STATE OF MICHIGAN

COURT OF APPEALS

PRISCILLA SCHWARZE, as Conservator of CARL SCHWARZE, and PRISCILLA SCHWARZE, Individually,

Plaintiff-Appellant/Cross-Appellee,

and

THOMAS M. SCHWARZE, as Personal Representative of the ESTATE OF THOMAS SCHWARZE,

Intervening Plaintiff,

v

MARY DILWORTH and AUTO-OWNERS INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

and

DAVID MICHAEL FOWLER and HUGH EDWARD DILWORTH

Defendants.

UNPUBLISHED
July 27, 2006

No. 257467
Wayne Circuit Court
LC No. 01-134972-CK

PRISCILLA SCHWARZE,

Plaintiff-Appellee,

and

THOMAS M. SCHWARZE, as Personal Representative of the ESTATE OF THOMAS SCHWARZE,

Intervening Plaintiff-Appellant/ Cross-Appellee,

v

No. 257511
Wayne Circuit Court
LC No. 01-134972-CK

MARY DILWORTH and AUTO-OWNERS INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

and

HUGH EDWARD DILWORTH and DAVID MICHAEL FOWLER,

Defendants.

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In Docket No. 257467, plaintiff Priscilla Schwarze appeals as of right, in her individual capacity and as conservator of the estate of Carl Schwarze, her husband, the trial court's order entering judgment in favor of defendants Mary Dilworth and Auto-Owners Insurance Company in this declaratory judgment action. In Docket No. 257511, intervening plaintiff Estate of Thomas M. Schwarze appeals as of right the same order. Defendants cross-appeal in both Docket Nos. 257467 and 257511. This Court consolidated the appeals. In Docket Nos. 257467 and 257511, we reverse and remand for entry of judgment in accordance with the jury's verdict. Defendants' challenges on cross-appeal are denied.

Plaintiffs and the individually named defendants were parties to underlying motor vehicle negligence actions from which the insurance coverage issues in the instant declaratory judgment action arose. The motor vehicle accident at issue occurred on November 29, 1998, as Thomas Schwarze was driving a Ford Expedition in Hillsdale County. Schwarze ran a stop sign, and a Dodge Ram driven by David Fowler, and allegedly owned by Mary and Hugh Dillworth, collided with the Expedition. Thomas Schwarze died at the scene. Carl Schwarze, Thomas' nephew (aged thirty-four), a rear-seat passenger, suffered severe brain injury.

Mary and Hugh Dilworth were divorced at the time of the accident (11-29-98). They had married in 1984 and had lived on Mary's 240-acre farm in Clayton, Michigan. Hugh purchased the Dodge Ram in 1995, with Mary's financial help, while Hugh and Mary were married. Hugh moved off the farm in or around 1996, and he and Mary divorced in 1997. Mary continued paying many of Hugh's bills after the divorce and they continued to see each other (and eventually remarried). At all times, Mary paid the insurance premiums on the Dodge Ram.

Fowler had been driving the Dodge Ram for several months before the accident. Fowler had done building and handy work for both Mary Dilworth on the farm and for Hugh Dilworth. Fowler and Hugh Dilworth agreed that in exchange for Fowler's work, the Dodge Ram would become Fowler's.[1] In addition, part of the deal was that Hugh Dilworth would get a 1989 Dodge pickup from Fowler, and take $6,000 off the "price" of the Dodge Ram. Hugh and Fowler had agreed the week before the accident that Hugh would transfer the title to the Dodge Ram to Fowler the following week.[2] In the interim, the accident occurred.

The Policy

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[1] Fowler testified at deposition:

> *Q*. And, so most of the purchase price of that vehicle [Dodge Ram], as I understand it, and you can correct me if I'm wrong, was paid off by you by service you performed for Hugh or Mary Dilworth, correct?
>
> *A*. Correct.
>
> *Q*. And had you like kept a running total of the amount of money that they owed you for the services that you were performing?
>
> *A*. Correct.
>
> *Q*. And, when you reached a certain point, then that truck was going to become your truck?
>
> *A*. Correct.
>
> *Q*. Was any additional money going to have to be paid?
>
> *A*. No.
>
> *Q*. So, you worked the whole thing off in services?
>
> *A*. I was working it off, yes.

[2] Hugh Dilworth signed a police statement on December 1, 1998, two days after the accident, stating:

> I, Hugh Dilworth, made a deal with David Michael Fowler on Wednesday, November 25, 1998 to purchase my 1995 Dodge Truck. We were to going to [sic] settle up on Monday, November 30, 1998, although I said it was all right to use my plates and insurance until we finished the deal on that Monday. I have known Mike for some time and he has borrowed the truck in the past.

Auto-Owners issued the farm umbrella excess insurance policy to named insured Mary Dilworth, which provided $5,000,000 excess coverage for designated risks of loss insured by four primary policies, enumerated in Schedule A of the policy's declarations pages. The primary policy on the 1995 Dodge Ram was issued by AAA, identified Mary Dilworth as the "principal named insured," and Hugh Dilworth as an "other named insured" and the "principal driver" of the vehicle.

The Auto-Owners policy provided that coverage is afforded to the policy's "insured" and to permissive driver(s) of vehicles owned by her.

> "Insured" means you and also:
>
> * * * *
>
> (b) Any person using an automobile or watercraft you own, hire or borrow and any person or firm liable for the use of such vehicle or craft . . . . Actual use must be with the reasonable belief that such use is with and within the scope of, your permission.

Maintenance of the primary AAA policy was a stated condition for triggering the excess coverage under the Auto-Owners' policy.

After the accident, Mary filed a claim for coverage under both the AAA and Auto-Owners' policies. AAA issued a $16,000 check to both Mary and Hugh for the salvage value of the Dodge Ram. They gave most of the money to Fowler to pay for his services and split the remainder.

The instant action

In the instant declaratory action, plaintiff Priscilla Schwarze and intervening plaintiff estate of Thomas Schwarze sought a declaration that the umbrella excess insurance policy Auto-Owners issued to Mary Dilworth provided coverage for damages arising out of the underlying accident, on the ground that defendant Mary Dilworth was an "owner" of the Dodge Ram.

Defendants filed several pre-trial motions for summary disposition asserting that there was no genuine issue of fact that Mary Dilworth was not an "owner" as defined in MCL 257.37, and that the Auto-Owners umbrella policy provided no coverage for liability under the owner liability statute, MCL 257.401. The circuit court's denial of these pre-trial motions is the focus of defendants' cross-appeal.

The circuit court granted defendants' pretrial motion, over plaintiff's objection, to strike plaintiff's jury demand, agreeing with defendants that the declaratory action involved strictly equitable claims and relief and plaintiffs were thus not entitled to a jury trial. However, the court empanelled an "advisory" jury, anticipating an appeal to this Court.

The trial court instructed the jury at the outset of trial:

> THE COURT: Ladies and gentlemen, either because of stipulation of the attorneys or because of rulings of the Court, you are to assume the following

things to be true, that Ms. Mary Dilworth was the named insured on a policy of farm umbrella insurance issued by Auto Owners on July 21st, 1998 providing excess coverage for any automobile that she owned in the amount of $5 million.

That the umbrella policy issued by Auto Owners provided coverage for the named insured, Mary Dilworth, her spouse, and any permissive user of a vehicle she owned. That the Dodge Ram pick up truck involved in the accident was purchased by Mr. Hugh Dilworth and titled in his name. That Ms. Mary and Mr. Hugh Dilworth were divorced in 1996. That the divorce judgment provided that any vehicles titled in Hugh's name were his property. That Mr. David Fowler was not a relative to Ms. Mary Dilworth. That the 1995 Dodge Ram was covered by a AAA policy which named Ms. Mary Dilworth as the primary insured and Mr. Hugh Dilworth as the other insured.

That the AAA policy is incorporated by reference in the farm umbrella policy, and that Mr. Fowler was the driver of the vehicle at the time of the accident.

The trial court's final jury instructions were:

The plaintiff must prove—well, actually she only has to prove one thing. Initially we told you it was two.

She must prove that Ms. Dilworth was an owner of the motor vehicle in question.

For the purposes of the owner's liability statute the term owner has been statutorily defined as, owner means any one [of] the following, any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof under a lease or otherwise for a period that is greater than thirty days. [MCL 257.37(a).]

Or, except as other wise provided in section 401.

A person that holds the legal title on the vehicle, or, the person who has the immediate right of possession of the vehicle under an installment sales contract.

Mr. Fowler was a permissive user of the vehicle.

The plaintiffs claim that Ms. Dillworth [sic] was an owner of the vehicle involved in the accident because she had the right to the exclusive use of the truck at the time of the incident.

The right to use – exclusive use means the right to use the vehicle without the permission of an owner in a manner consistent with ownership.

It does not matter if the right to use of the vehicle was exercised.

It is the law of Michigan that there is no requirement that an individual actually own a vehicle in order to insure it. However, you may consider the fact that an

> individual insures a vehicle when deciding if that individual is an owner of a vehicle.

The jury verdict form asked one question: "Was Ms. Mary Dilworth an owner of the vehicle involved in the accident?" The jury unanimously answered "Yes."

The trial judge disagreed, concluding that Mary was not an owner of the vehicle and that coverage under the Auto-Owners policy was not triggered by the accident. The trial court's order of judgment in defendants' favor, entered July 29, 2004, stated the following findings of fact:

> a. Mary Dilworth was not an owner of the 1995 Dodge Ram pick-up truck involved in the subject motor vehicle accident.
>
> b. Since defendant Mary Dilworth has no legal obligation to the plaintiffs or intervening plaintiff, there is no coverage under the subject farm umbrella insurance policy provided to her by defendant Auto-Owners Insurance Company for any damages recovered or recoverable by either plaintiffs or intervening plaintiff.
>
> c. That this Court's ruling is entered notwithstanding the fact that the "advisory" jury subsequently returned an unanimous verdict in favor of plaintiffs finding that defendant Mary Dilworth was an owner of the 1995 Dodge Ram pick-up truck involved in the subject vehicle accident.

These appeals ensued.

I

Plaintiff and intervening plaintiff (plaintiffs) assert that they had a right to have a jury decide the question whether Mary Dilworth was an "owner" as defined in MCL 257.37, and that the trial court thus erred in granting defendants' motion to strike plaintiff's jury demand. Plaintiffs assert that both before and after the adoption of the 1963 Constitution, controlling precedent upheld and enforced the right to a jury trial to resolve issues of fact arising in declaratory actions regarding insurance coverage disputes because such actions were commonly considered actions at law for legal, as opposed to equitable, remedies. We agree.

Whether a party is entitled to a jury trial is a question of law that is reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998). Const 1963, Art 1, § 14, provides:

> The right of trial by jury shall remain, but shall be waived in all cases unless demanded by one of the parties in the manner prescribed by law.

MCR 2.508 provides:

> (A) Right Preserved. The right of trial by jury as declared by the constitution must be preserved to the parties inviolate.
>
> (B) Demand for Jury.

(1) A party may demand a trial by jury of an issue as to which there is a right to trial by jury by filing a written demand for a jury trial within 28 days after the filing of the answer or a timely reply. . . .

* * *

(D) Waiver; Withdrawal

* * *

(3) A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys.

MCR 2.605(B) provides:

> (B) Procedure. The procedure for obtaining declaratory relief is in accordance with these rules, and *the right to trial by jury may be demanded under the circumstances and in the manner provided in the constitution, statutes, and court rules of the state of Michigan*. [Emphasis added.]

Dean & Longhofer, Michigan Court Rules Practice, Authors' Commentary on Rule 2.605 states:

> A declaratory judgment may be granted in a case of actual controversy, whether or not other relief is or could be sought or granted, and whether or not another adequate remedy exists. The court has jurisdiction to grant a declaratory judgment if it would have jurisdiction to grant other relief on the same claim.
>
> The normal procedures under the MCR apply in a declaratory judgment action, *including the right to a jury trial.* . . . [Dean & Longhofer, Michigan Court Rules Practice, Rule 2.605, Authors' Commentary, p 357. Emphasis added.]

Regarding the determination whether a right to jury trial exists, Dean & Longhofer state:

> § 2605.5 **Fact Questions**
>
> As noted above, a number of decisions interpreting the former declaratory judgment statute said that declaratory relief would not be given when fact questions were involved. In most cases where this language occurred, there were other reasons for denying declaratory relief, and so it may be doubted that this was ever intended as a categorical restriction upon declaratory judgment procedure.
>
> Moreover, the language invariably occurred in cases filed on the equity side of the docket under former practice. The courts appear to have been concerned over whether the issue was truly equitable or legal in nature, and whether granting declaratory relief on the equity side of the docket might have deprived the other party of the right to trial by jury. The former statute authorized the action for declaratory judgment to be filed either on the law or equity side of the court, and if these very same claims for declaratory relief had been filed on the law side of

the court, the concern over trying factual issues might have been obviated and declaratory relief granted.

These difficulties have been overcome by the merger of law and equity, and by the provisions of MCR 2.605(B). Under that subrule, the right to trial by jury may be demanded under the circumstances and in the same manner provided in the constitution, statutes and court rules for other cases. *This obviously contemplates the trial of factual issues, if necessary, in declaratory judgment actions.*

Whether there will be a right to trial by jury should be determined by reference to the way in which the issues would have arisen in the absence of the declaratory judgment procedure. If they would have traditionally arisen in a law action, the right to trial by jury is not impaired simply because the position of the parties has been reversed under the procedure for declaratory relief. Where, however, in the absence of the declaratory judgment procedure, the issues would have come up in an equitable proceeding in which there was historically no right to a jury, there is no right to a jury in the declaratory judgment action. [Emphasis added.]

As plaintiffs assert, had a declaratory action not been available, this action would have been brought against Auto-Owners by Mary Dilworth as a breach of contract action, or by plaintiffs in a garnishment action. These are legal remedies to which the right to a jury trial exists. See MCR 3.101(M)(4)[3] as to garnishment actions.

Further, the cases plaintiffs cite support that issues of fact in declaratory actions may be tried to a jury. Plaintiffs rely on *Wolverine Mutual Motor Ins Co v Clark*, 277 Mich 633; 270 NW 167 (1936), and other cases including *Travelers Indemnity Co v Duffin*, 28 Mich App 142; 184 NW2d 229 (1970), rev'd 384 Mich 812; 184 NW2d 739 (1971), *Manley v Detroit Auto Inter-Insurance Exchange*, 425 Mich 140; 388 NW2d 216 (1986), and *Fire Ins Exchange v Diehl*, 450 Mich 678; 545 NW2d 602 (1996).

Wolverine Mutual Motor Ins Co, *supra*, 277 Mich 633, was decided before 1963, in 1936. In that case, Schaffner claimed personal injury following a motor vehicle accident involving a vehicle of the defendant Clark's. The plaintiff insurance company insured Clark

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[3] MCR 3.101(M)(4) addresses garnishment after judgment, and provides:

(M) Determination of Garnishee's Liability.

* * *

(4) The issues between the plaintiff and the garnishee will be tried by the court unless a party files a demand for a jury trial . . . The defendant or a third party waives any right to a jury trial unless a demand for a jury is filed with the pleading stating the claim.

under a policy that provided there was no coverage when the car was driven by Clark's son. The plaintiff insurer filed a petition in chancery for a declaratory judgment that it had no liability to Clark or Schaffner because Clark's son had been driving the vehicle at the time of the accident. Schaffner moved to dismiss the proceedings against him, asserting, inter alia, that a chancery/equity court was the wrong forum. The Supreme Court agreed, noting in pertinent part:

> The statute provides for declaration of rights (1) at the instance of an "interested" person, (2) in case of "actual controversy," 3 Comp. Laws 1929, §§ 13903-13909; *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673 (68 A. L. R. 105), (3) "by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require," (4) with trial by jury when the declaration or relief "shall involve the determination of issues of fact triable by a jury," . . .
>
> * * *
>
> Is plaintiff in the proper forum? It is plain from the whole statute that the remedy must be sought in the appropriate court and "the nature of the case," not the pleasure of the petitioner, is the test of the forum. It would require clear language to support a holding that the legislature intended so unjust a proceeding as that a party, having a purely legal right of action or defense, may bring a proceeding for declaratory judgment in chancery, at his will, serve process anywhere in the State, and deprive a defendant of his right of trial in his own locality by a jury of his vicinage. If any doubt exists as to the construction of the statute (and I have none), such practice should be condemned or at least vigorously discouraged under the discretionary power of the court. *Washington-Detroit Theatre Co. v. Moore, supra;* 87 A. L. R. 1212.
>
> *As presented by the petition, the question of plaintiff's liability on the policy depends upon a single issue of fact, whether Clark's son was driving or in control of the car which hurt Schaffner*. Its liability to pay cannot accrue until Schaffner has judgment against Clark. Then, if Clark pays the judgment his remedy against plaintiff will be an original action on the policy. If Clark does not pay, Schaffner's remedy against plaintiff will be in garnishment. *Both remedies are at law with right to trial by jury. Plaintiff's defense is legal, has no equitable features, and may be made in either law action as completely as it could be made in the present proceeding.*
>
> Consequently, this proceeding is not well laid in chancery because "the nature of the case requires" that it be on the law side of the court and also because it "involves the determination of issues of fact triable by a jury." An advisory

> finding of a jury in equity does not substitute or compensate for the binding verdict of a jury at law. [277 Mich at 636-638. Emphasis added.[4]]

In *Travelers Indemnity Co v Duffin, supra,* 28 Mich App 142, rev'd 384 Mich 812 (1971), the plaintiff insurer brought a declaratory judgment seeking a declaration that the plaintiff's insurance policy issued to Louise Laming did not cover Louise Laming's son, William, on the date William was involved in the subject accident. On the date of the accident William was driving a Rambler owned by Kenneth Stone. Louise Laming's policy provided that any relative of the insured was covered if use of the vehicle was with permission of the owner, and defined "relative" as one who is a resident of the same household, provided he does not own a private passenger automobile. The policy did not exclude or include nonoperable cars within its definition of "private passenger automobile." William had bought an Oldsmobile the year before the accident, but had never registered it in his name. The car had remained in the front yard, inoperable and unlicensed until about three months before the accident. William had then given the vehicle to one Kenneth Stone, who towed it from the Laming house and sold it to a junk dealer.

The circuit court denied the insurer's motion for declaratory judgment. This Court affirmed, with one judge dissenting. The Supreme Court reversed, 384 Mich 812, for the reasons stated by the dissenting Court of Appeals judge, which included:

> A jury trial was timely demanded by the plaintiff. Within 20 days after defendant Donald E. Duffin filed his answer, the plaintiff moved to strike a part of the answer, and within 30 days after the motion to strike was denied the plaintiff filed its reply and jury demand.
>
> Moreover, plaintiff's jury demand has been treated as timely; the pretrial statement provides: "A jury trial has been demanded by plaintiff which is

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[4] Plaintiffs correctly state that *Wolverine Mutual Motor Ins, supra,* was cited with approval in *United States Fidelity and Guaranty Co v Kenosha Investment Co,* 369 Mich 481; 120 NW2d 190 (1963). In *United States Fidelity,* the Michigan Supreme Court affirmed the dismissal of the plaintiff's complaint for declaratory judgment involving a fire insurance policy, based in part on the fact that an action at law was pending. The insurer had denied liability for $30,000 as claimed by the defendant, and tendered $5,000 to the defendant. The defendant refused and the plaintiff filed the declaratory judgment action. The defendant moved to dismiss, asserting that whether it owed the insured $30,000 or $5,000 was a question of fact to be determined by the court or a jury in the law action it had filed in circuit court. The Supreme Court agreed:

> In view of the fact that plaintiff's claim is legal, and in view of the fact that declaratory judgment proceedings are discretionary, and since plaintiff will have its opportunity to present the question of its liability in the law action, we conclude the court did not err in holding that plaintiff was not entitled to maintain the equitable declaratory judgment action. [369 Mich at 486.]

> granted". And even if it is thought that a jury was not timely demanded, once it is granted a trial judge may not, as the trial is about to begin, without cause, retract the grant.
>
> The judge's action in taking this case from the jury before the witnesses were heard and hearing the testimony himself as if a jury had not been demanded or granted deprived the plaintiff of its right to a jury verdict on the disputed issue of fact.
>
> In *Drysdale v. State Farm Mutual Insurance Company* (1968), 13 Mich App 13, we held that whether an inoperable automobile was *in fact* an automobile within the meaning of an automobile liability insurance policy could not be resolved on a motion for summary judgment. Similarly *here, the trial judge erred when he ruled, just before the impaneling of the jury, that whether Laming's inoperable 1955 Oldsmobile was an automobile did not present a question of fact necessitating consideration by a jury, and that, although it was necessary to hear the testimony of witnesses, he foresaw that the question presented was purely one of law.*
>
> Although it developed at the trial that the testimony of the witnesses, relied on by the judge when he decided for the defendant, was not contradicted, issues of credibility are always to be decided by the trier of fact; and the trier of fact that the plaintiff was entitled to have decide the credibility issue was a jury. The testimony relied on by the judge was largely that of defendant William J. Laming, an interested witness. [28 Mich App 148-149. Emphasis added.]

In *Manley, supra,* another case plaintiffs cite, the issue was not entitlement to a jury trial, but implicit in the decision is that factual issues in a declaratory judgment are for a jury:

> The disputed factual issues that were tried [to a jury] were the amount payable to the Manleys for "room and board" and whether private duty nurse's aides were additionally necessary for John's care and, if so, the amount payable therefore.

In *Fire Ins Exchange v Diehl, supra,* 450 Mich 678, the plaintiff insurer sought a declaratory judgment that it was under no duty to defend or indemnify the defendants in an action arising from sexual assaults, on the basis that the policy only covered injury that was neither expected nor intended by the insured and excluded intentional acts. The Supreme Court concluded that the defense to coverage, i.e., foreseeability, was a question of fact for the jury: "Whether a result is reasonably foreseeable to a child should be 'a question of fact for the jury, which is to determine it on the basis of whether . . . a child of [like] age' . . . ." *Id.* at 688.

These cases support that where there are disputed issues of fact in declaratory actions where a jury demand is properly made, they are properly tried to a jury. In contrast, the cases defendants cite in support of their assertion that the circuit court properly struck plaintiffs' jury

demand[5] because the relief plaintiffs requested in this declaratory action was purely equitable, and plaintiffs did not and could not make any direct legal claims for money damages in law from either defendant, are not on point--they merely support the propositions that a suit for a declaratory judgment is an action that is equitable in nature, see *Coffee-Rich, Inc v Michigan Dep't of Agriculture*, 1 Mich App 225; 135 NW2d 594 (1965)[6], and that where a declaratory action seeks only equitable relief there is no right to a jury trial, see *Commissioner of Ins v Advisory Bd of the Michigan State Accident Fund*, 173 Mich App 566; 434 NW2d 433 (1988), and *Gelman Sciences, Inc v Fireman's Fund Ins Cos*, 183 Mich App 445, 449-450; 455 NW2d 328 (1990).[7] Defendants cases do not involve declaratory actions where there are disputed issues of fact.

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[5] Defendants cite MCR 2.509(A)(2) in support. MCR 2.509(A) provides:

> (A) By Jury. If a jury has been demanded as provided in MCR 2.508, the action or appeal must be designated in the court records as a jury action. The trial of all issues so demanded must be by jury unless
>
> (1) The parties agree otherwise by stipulation in writing or on the record, or
>
> (2) the court on motion or on its own initiative finds that there is no right to trial by jury of some or all of those issues.

[6] In *Coffee-Rich*, the plaintiff manufacturer of "Coffee Rich" sought a declaration to enjoin the defendant Michigan Department of Agriculture from enforcing a statute regarding imitation cream to its product. Following a bench trial, the circuit court ruled in the plaintiff's favor. This Court affirmed, concluding that the circuit court had properly found that Coffee Rich was an all vegetable coffee whitener and not made as an imitation of cream. The Court noted that this being a suit for injunctive relief and a declaratory judgment, formerly, it "would have been an equity action, and is still an action equitable in nature." 1 Mich App at 228.

[7] In *Commissioner of Ins, supra*, the Insurance Commissioner filed suit against the Michigan State Accident Fund requesting the court declare as a matter of law that the commissioner had supervisory and administrative control of the Accident Fund. The defendants counter-complained. The circuit court granted declaratory and injunctive relief to the plaintiff and enjoined the defendants from collecting a rate increase. This Court affirmed, its decision having only a short discussion of the matter in issue in the instant declaratory action:

> We now turn to defendants' argument that the trial court erred in denying their demand for a jury trial. We disagree. The court rule relied upon by defendants, MCR 2.605(B), does not grant the right to jury trial in declaratory judgment actions, but merely provides that a party may demand a trial by jury where a jury trial is otherwise provided for by statute.

(continued…)

We conclude that, assuming there was a genuine issue of material fact whether Mary Dilworth was an "owner" as defined in MCL 257.37, plaintiffs had a right to have a jury decide the factual question.

B

Defendants assert that should plaintiffs prevail on the question whether they were entitled to a jury, the proper remedy is not to remand for entry of judgment in keeping with the "advisory" jury's verdict, but to remand for a new trial before a "real jury." We disagree.

Defendants correctly note that advisory jury verdicts are not binding, see e.g., *Kar v Hogan*, 54 Mich App 664; 221 NW2d 417 (1974) (noting "an advisory jury's opinion does not bind a chancellor in equity). MCR 2.517(A)(1) provides that in actions tried with an advisory jury, it remains the trial court's obligation to find the facts, make conclusions of law, and enter an appropriate judgment. MCR 2.509[8] provides that in actions involving issues "*not triable of*

(…continued)

> An action for declaratory and injunctive relief is equitable in nature. *Coffee-Rich, Inc v Dep't of Agriculture*, 1 Mich App 225, 228; 135 NW2d 594 (1965). There is no right to a jury trial where the relief sought is equitable in nature, as in the case at bar. *McDonald Ford Sales, Inc v Ford Motor Co*, 165 Mich App 321, 324; 418 NW2d 716 (1987). Accordingly, defendants had no right to jury trial in the case at bar. [173 Mich App at 586-587.]

In *Gelman Sciences, supra,* this Court noted:

> Normally, an action for declaratory relief is equitable in nature. There is no right to a jury trial where the relief sought is equitable in nature. *Comm'r of Ins v Advisory Bd of the Michigan State Accident Fund*, 173 Mich App 566, 586; 434 NW2d 433 (1988). . .
>
> Gelman's complaint requests equitable relief by way of specific performance of the duties to defend and indemnify based on the insurance contract. Hence, it is within the province of the judge to decide whether Fireman's owes Gelman a duty to indemnify it under the terms of the contract. However, Gelman has also requested damages for breach of contract and bad faith. These are legal issues requiring factual resolutions, and Fireman's is entitled to have them submitted to a jury. *Ecco, Ltd v Balimoy Mfg Co, Inc*, 179 Mich App 748, 749-751; 446 NW2d 546 (1989). The trial judge erred in denying a jury trial on Gelman's allegations of breach of contract and bad faith. [183 Mich App at 449-450.]

In *Gelman*, the coverage issues were legal ones, and no factual issue was identified as affecting the coverage question.

[8] MCR 2.509(D) provides:

> (D) Advisory Jury and Trial by Consent.

(continued…)

right by a jury because of the basic nature of the issue," the court may try the issues with an advisory jury or "with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." MCR 2.509(D) (emphasis added). These provisions are inapplicable because they apply to advisory juries in cases involving issues not triable of right by a jury. Here, plaintiffs were entitled to a jury trial.

Thus, the only question is whether defendants are entitled to a new trial because the jury's verdict was in some way inadequate. The trial court impaneled a jury to safeguard against the need to have a retrial should this Court disagree with its determination that no jury was required. The court made clear on the record that it was impaneling a jury "so whatever . . . happens, this case is over." The court stated that it would rule and that the jury would decide the case as well, "You will then have both rulings. If they happen to be the same, God bless it, we'll just be done. If they're different and you didn't like mine, I'm pretty sure you'll be appealing. If they're different and he doesn't like mine, but this case is going to be appealed anyway." Clearly, the court made clear that it contemplated that the jury verdict would be binding in the event this Court disagreed with its determination that plaintiffs did not have the right to have a jury decide whether Mary Dilworth was an "owner" under the owner's liability statute. Counsel voiced no objection, and all proceeded with the understanding that two rulings would be obtained, and if they differed, the question which one controlled would be determined by this Court's decision on the issue whether plaintiffs had a right to a jury. Under these circumstances, there is no justification for a second jury trial.

II

On cross-appeal, defendants assert that the trial court erred in failing to grant their pretrial motions for summary disposition brought under MCR 2.116(C)(10), because the policy at issue provides coverage only when Mary Dilworth "becomes legally obligated to pay damages," and in this case, in light of the undisputed facts and the applicable law, Mary Dilworth cannot be held legally obligated to pay damages to plaintiffs as an "owner" of the vehicle involved in the accident under the owner's liability statute, MCL 257.401(1), because the vehicle was titled solely in the name of her ex-husband, Hugh Dilworth, and she does not fit within any of the three legislatively defined definitions of owner in MCL 257.37(a)-(c).

A

This Court reviews the trial court's denial of summary disposition de novo. *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155

(…continued)

> In . . . actions involving issues not triable of right by a jury because of the basic nature of the issue, the court on motion or on its own initiative may
>
> (1) try the issues with an advisory jury; or
>
> (2) with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(2001). Statutory interpretation presents a question of law that is reviewed de novo. *Consumers Power Co v Dep't of Treasury,* 235 Mich App 380, 384; 597 NW2d 274 (1999).

B

The owner's liability statute in the Motor Vehicle Code provides in pertinent part that "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." MCL 257.401(1). "The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge." *Id.* Hence, to impose liability on a defendant, it is necessary to show (1) that the defendant is an "owner" and (2) that the defendant consented to the operation of the vehicle by another. *Peters v Dep't of State Highways,* 66 Mich App 560, 565; 239 NW2d 662 (1976).

There may be several owners under the Motor Vehicle Code, *Ringewold v Bos,* 200 Mich App 131, 135; 503 NW2d 716 (1993), with no one owner possessing all the normal incidents of ownership, *Goins v Greenfield Jeep Eagle, Inc,* 449 Mich 1, 5; 534 NW2d 467 (1995). A person need not even hold legal title to an automobile in order to be an "owner" of it under the code. *Ringewold, supra.* See, e.g., *John v John,* 47 Mich App 413; 209 NW2d 536 (1973) (holding that injured sister who contributed, along with two other sisters, to purchase of automobile and expense of operation thereof was a co-owner of automobile, even though title to the automobile was taken in the name of only one of the sisters). The purpose of the statute is to place the risk of damage or injury on both the person who has ultimate control of the motor vehicle and the person in immediate control of the vehicle. *DeHart v Joe Lunghamer Chevrolet, Inc,* 239 Mich App 181, 185; 607 NW2d 417 (1999).

The Motor Vehicle Code defines "owner" as "any" of the following:

> (a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (b) Except as otherwise provided in section 401a, person who holds the legal title of a vehicle.
>
> (c) A person who has the immediate right of possession of a vehicle under an installment sale contract. [MCL 257.37.]

The first definition of "owner", MCL 257.37(a), is at issue here. Our Supreme Court has given the "exclusive use" language of this section a broad interpretation. In *Ketola v Frost,* 375 Mich 266; 134 NW2d 183 (1965), also a wrongful death action, a truck was struck from behind by a truck-tractor leased by defendant Allied Van Lines to the driver, defendant Frost. At issue was whether Allied Van Lines was legally liable for the acts and conduct of defendant Frost where the lease agreement provided Frost with the right to use the truck-tractor independently for the purposes of any separate business of his own at such times as Allied Van Lines might not require the unit to be used in its business. *Id.* at 278-279. Specifically, Allied Van Lines argued that it did not ever have exclusive use or possession of the leased equipment. Our Supreme Court held that because Allied Van Lines could use the vehicle whenever it needed it, Allied Van Lines had

a right to exclusively use the vehicle in question; therefore, it was an owner under MCL 257.37(a), despite the fact that the truck-tractor was used by others when Allied Van Lines did not need to use the vehicle. *Id*. at 279.

In *Security Ins Co of Hartford v Daniels*, 70 Mich App 100, 106-107; 245 NW2d 418 (1976), a declaratory judgment action to determine who owned a vehicle driven by a repair shop owner at the time of a collision, the repair shop owner argued that he never had "exclusive use" of the vehicle because he merely possessed but did not actually use it. This Court found that argument to be without merit. Relying on *Ketola*, this Court read "exclusive use" as meaning "right to exclusive use." This Court held that the repair shop owner had a right to exclusively use the vehicle and found it irrelevant that he chose never to use the vehicle. *Id.* at 106.

This Court also construed the "exclusive use" language of MCL 257.37(a) in *Ringewold, supra*, 200 Mich App 131, a 1993 decision arising from the plaintiff's injuries from a car accident with a Volkswagen. The Volkswagen had been purchased by the defendant's former husband for their daughter, fifteen days before the accident occurred. However, he failed to make arrangements to record the transfer of title. The defendant claimed that she was not the "owner" of the Volkswagen for purposes of the owner's liability statute because she did not hold legal title to the vehicle and did not have possession of it for more than thirty days before the accident. *Id.* at 133-134. However, during discovery, the defendant admitted that she was the owner of the vehicle and that her former husband had purchased the vehicle in the defendant's name for their daughter's use. *Id.* at 136. There was also evidence that the defendant insured the vehicle under her automobile insurance policy and switched the license plates from a previously owned car to the Volkswagen. *Id.*

Citing *Daniels* and *Ketola*, this Court broadly construed the "exclusive use" language in MCL 257.37(a) and determined that the defendant was an "owner" of the Volkswagen. *Ringewold, supra* at 135-137. This Court found that, under the circumstances of the case, where the defendant had transferred license plates, insured the vehicle, and admitted that it was purchased in her name for her daughter's use, and "in view of the Legislature's intention to place liability on the person who is ultimately in control of the vehicle under the owner's liability section," the definition of ownership in the Michigan Vehicle Code imposed liability on any person who had a "right to exclusive use" for a period exceeding thirty days, "regardless of whether that person has, in fact, controlled the vehicle for that period." *Id.* at 137-138.

The general rule of law from *Ringewold* and its predecessors, *Ketola* and *Daniels*, is that the definition of "owner" in MCL 257.37(a) is not restricted to those who have actually exercised exclusive control over the vehicle for a thirty-day period; rather, an "owner" may be any person who has a "right to exclusive use" of the vehicle for a period exceeding thirty days, regardless of whether the person has, in fact, controlled the vehicle for that period.

C

Defendants' challenge on cross-appeal fails. The trial court correctly concluded that there was an issue of fact shown at the time of defendants' pretrial motions for summary disposition with respect to whether Mary Dilworth could be found to be an "owner" of the Dodge Ram under MCL 257.37(a).

Documentary evidence submitted below in connection with defendants' summary disposition motions included deposition testimony[9] that at the time of the accident, Mary could have used the Dodge Ram at any time, that she paid at least in part for the vehicle, that she at all times insured the vehicle, even after the divorce, that Fowler obtained the vehicle from Hugh Dilworth in exchange for work he performed for Hugh *and* Mary, and not only was the check for the damaged vehicle made out to Hugh and Mary jointly, but Mary actually shared in the proceeds. A reasonable jury could have concluded under these circumstances that after their divorce in 1997, in which Hugh was awarded the Dodge Ram, Hugh and Mary nevertheless treated the vehicle as jointly owned, and Mary retained a joint ownership interest. Thus, there was an issue of fact whether Mary Dilworth had a right to exclusively use the pickup truck just as Allied Van Lines in *Ketola, supra,* had the "right to exclusive use" of the truck-tractor whenever it needed the vehicle from defendant Frost, the repair shop owner in *Daniels, supra,* had the right to exclusive use of the vehicle, and the mother in *Ringewold, supra,* had the right to exclusive use of the Volkswagen purchased in her name for her daughter's use.

In light of our disposition, we need not address plaintiff and intervening-plaintiff's second argument on appeal--that Auto-Owners should be estopped from denying Mary Dilworth's ownership of the Dodge Ram because such a denial, if enforced, would result in illusory insurance coverage.

In Docket Nos. 257467 and 257511, we vacate the trial court's findings of fact and judgment in defendants' favor, and remand for entry of judgment in accordance with the jury's verdict. Defendants' cross-appeal is denied. We do not retain jurisdiction.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[9] Depositions of Mary Dilworth, Hugh Dilworth and David Fowler in the various underlying actions (each was deposed more than once) were submitted below.