STATE OF MICHIGAN

COURT OF APPEALS

GEORGE ZULAKIS, Personal Representative of the Estate of CHARLES M. DECKER, Deceased, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 20, 2001
V AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	No. 221948 Ingham Circuit Court LC No. 97-085667-NI

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order entering judgment for plaintiff. We affirm in part and reverse in part.

Plaintiff's decedent, Charles Decker, was killed on June 21, 1996, shortly after his eighteenth birthday,[1] in an automobile accident that claimed the lives of three other passengers and left a fifth severely injured. The automobile was driven by former defendant Russell Black, who had insurance in the amount of $20,000 per claim and $40,000 per occurrence. Plaintiff sued Black and later amended his complaint to add defendant, claiming underinsured motorist benefits under an insurance policy issued to decedent's grandparents. Because of the claims of the other four accident victims, plaintiff settled with Black for $8,000, one-fifth of Black's policy limits.

Defendant filed a motion for summary disposition, claiming that because decedent did not reside with his grandparents at the time of his death and because decedent owned two cars, he was excluded from benefits under the policy. The trial court granted partial summary disposition to plaintiff, finding that the term "automobile" in the policy was ambiguous as to operability. The court construed the term against defendant and determined, as a matter of law, that plaintiff's decedent's inoperable automobiles were not "automobiles" precluding coverage. A jury then determined that decedent "resided with" his grandparents when he died. The trial court entered

[1] Plaintiff's decedent's date of birth was June 13, 1978.

judgment for plaintiff, after assessing an $8,000 setoff for the amount received from the settlement with Black.

I

Defendant first argues that the trial court erred by instructing the jury that an adult could be a resident of two households.[2] Under the circumstances presented here, we disagree.

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[2] The challenged instruction is:

> In your deliberations you should take into consideration the law of this state which provides that it is possible for a person to be a resident of more than one household.
>
> On the day of his death, Charles Decker could be a resident of both his sister's household and his grandparents' household.
>
> The terms residence and resides with have no absolute meaning in the law. The legal meaning must be viewed flexibly within the context of the facts.
>
> Whether Charles Decker was a resident of his grandparents' household within the meaning of the Auto Owners Insurance policy is for you to decide after giving consideration to the following factors:
>
> 1: The subjective or declared intent of Charles Decker to remain permanently or indefinitely in the place intended to be his residence.
>
> 2: The existence of an informal relationship between Charles Decker and the members of the household contended to be his residence.
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> 3: The location of Charles Decker's living quarters in the same house that is contended to be his residence.
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> 4: The existence of an alternative place of lodging for Charles Decker other than the place contended to be his residence.
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> 5: Whether Charles Decker continued to use the mailing address of the place contended to be his residence.
>
> 6: Whether Charles maintained possessions at the place contended to be his residence.
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> 7: Whether he used the address of the place contended to be his residence on his driver's license and other documents.
>
> 8: Whether a room was maintained for Charles Decker at the place contended to be his residence.

(continued…)

We review claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). This Court examines the jury instructions as a whole to determine whether there is error requiring reversal. "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*., citing *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

Decedent's grandparents' insurance policy provided underinsured motorist benefits up to $100,000 for the named insureds and "a relative who does not own an automobile." The policy defines a "relative" as "a person who **resides with you** and who is related to you by blood, marriage, or adoption."

Defendant argues that it was error to instruct the jury that an adult may have dual residency. We conclude that although the instructions may have been less than perfect, reversal is not required.

The general rule is that, "unless the language of an insurance policy unambiguously so requires, a policy should not be construed to defeat coverage." *Vanguard Ins Co v Racine*, 224 Mich App 229, 232; 568 NW2d 156 (1997), citing *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259 (1985). The policy language at issue here is "resides with." In *Paprocki v Jackson Clerk*, 142 Mich App 785, 788; 371 NW2d 450 (1985), this Court noted that "resides" may have different meanings.:

> In *Kubiak v Steen*, 51 Mich App 408; 215 NW2d 195 (1974), this Court held that the word "resides" may have two different meanings. In its "popular" sense "resides" means no more than actual physical presence, the place where one eats and sleeps, regardless of whether one intends to make that place a permanent residence. In its "legal" or technical sense "resides"
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> > "' * * * means legal residence; legal domicile, or the home of a person in contemplation of law; the place where a person is deemed in law to live, which may not always be the place of his actual dwelling, and thus the term may mean something different from being bodily present, and does not necessarily refer to the place of actual abode.'" *Id.*, 413.

(…continued)

9: Whether Charles was dependent on members of the household contended to be his residence for his financial support.

This list is not exhaustive. These are merely among the relevant factors. No one of these factors is determinative. Each must be weighed and balanced with the others.

> At common law, any place of abode or dwelling, however temporary it might have been, was said to constitute a residence. *Gluc v Klein*, 226 Mich 175; 197 NW 691 (1924). . . . [*Paprocki, supra* at 788-789.]

The jury instructions challenged were taken largely from *Workman v Detroit Automobile Inter-Ins Exchange*, 404 Mich 477; 274 NW2d 373 (1979), and *Dairyland Ins v Auto-Owners*, 123 Mich App 675; 333 NW2d 322 (1983), cases that interpreted the term "domicile" for purposes of the no-fault act. The policies at issue in both *Workman,* and *Dairyland, supra,* provided in pertinent part that the personal protection insurance policy applied "to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household." 404 Mich at 493; 123 Mich App at 678. The *Dairyland* Court discussed *Workman,* noting:

> Domicile and residence in Michigan are generally synonymous terms and, for purposes not involving insurance law, have been defined as "the place where a person has his home, with no present intention of removing, and to which he intends to return after going elsewhere for a longer or shorter time." *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933). See, also, *Leader v Leader*, 73 Mich App 276; 251 NW2d 288 (1977).
>
> *Workman* [*supra*], is the only Michigan Supreme Court case interpreting the term "domicile" for the purposes of the no-fault act. That decision began its analysis by pointing out that for insurance purposes the term "domiciled in the same household" **has no absolute or fixed meaning, and must be viewed flexibly in the context of the numerous factual settings possible.** *Workman,* pp 495-496. The Court further stated that in determining whether a person is "domiciled in the same household" as an insured, the courts of this and other states have articulated a number of factors, no one of which is, by itself, determinative. Each factor is to be weighed and balanced with the other. The Court went on to say:
>
> > "Among the relevant factors are the following: (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his 'domicile' or 'household' * * *; (2) the formality or informality of the relationship between the person and the members of the household * * *; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises * * *; (4) the existence of another place of lodging by the person alleging 'residence' or 'domicile'." *Workman,* pp 496-497. (Citations and footnote omitted.)
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> Based upon these factors *Workman* upheld the trial court's finding that a daughter-in-law who lived with her husband in a trailer within the curtilage of the house of her father-in-law, the named insured, was "domiciled in the same household" with the named insured.

> In ascertaining domicile for purposes of the no-fault act, our Court has held that persons domiciled may include those who are not actually living in the same household as the insured. . . . However, this Court has not had the opportunity to consider the particular problems posed by young people departing from the parents' home and establishing new domiciles as part of the normal transition to adulthood and independence. This case, therefore, presents a question of first impression in this jurisdiction.
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> All relevant factors must be considered in ascertaining domicile. *Montgomery v Hawkeye Security Ins Co*, 52 Mich App 457; 217 NW2d 449 (1974). In *Workman, supra*, as previously noted, the Court stated that the four factors therein specified were merely "among the relevant factors" to be considered. See, also, *Davenport v Aetna Casualty & Surety Co of Illinois*, 144 Ga App 474; 241 SE2d 593 (1978) (domicile to be ascertained by evaluating the aggregate of details surrounding living arrangements). **Other relevant indicia of domicile include such factors as whether the claimant continues to use his parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support.**
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> * * *
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> Moreover, the determination of domicile is a question of fact . . . . [*Dairyland, supra* at 681-684. Emphasis added.]

Defendant's appellate brief cites *Vanguard, supra* at 233, for the proposition that "[a] party generally has only one legal residence or domicile." Although that proposition is stated in *Vanguard*, we do not believe that that decision supports the conclusion that the jury instruction challenged here inadequately stated the law.

In *Vanguard,* one of the defendants, Marcell Racine, had a homeoner's insurance policy issued by the plaintiff, Vanguard. Mr. Racine and his wife were divorced, and shared legal custody of their three year old son, Vance, with physical custody being with Mrs. Racine. Mr. Racine had visitation every other weekend and approximately one night a week; maintained a separate bedroom for Vance, with toys, clothes and toiletries at his prior home; and had just moved into another home where he intended to do the same at the time of the accident. Vance Racine was killed while riding a lawn mower with his father. Mrs. Racine brought a negligence suit against Mr. Racine, who in turn asked Vanguard to undertake his defense and indemnify him. Vanguard filed a declaratory action, and the Racines filed a motion for summary disposition. The circuit court granted the defendants' motion, and this Court affirmed:

> The dispute regarding the policy primarily concerns the definition of "insured":
>
> > "Insured" means you and residents of your household who are: (a) your relatives; or (b) other persons under the age of 21 in the care of any person named above.

The liability coverage provisions of the policy do not apply to bodily injury sustained by any "insured." Coverage for medical payments is similarly excluded for bodily injury to any person **"regularly residing"** at the insured location.

There are a number of Michigan precedents addressing similar insurance policy language. E.,g., *Williams v State Farm Mutual Automobile Ins Co,* 202 Mich App 491; 509 NW2d 821 (1993); *Dobson v Maki*, 184 Mich App 244; 457 NW2d 132 (1990); *Dairyland Ins Co v Auto-Owners Ins Co,* 123 Mich App 675; 333 NW2d 322 (1983). However, all these precedents concern situations in which, if the person in question was held to be a "resident" of the household of the insured, or "domiciled" there, insurance coverage was afforded. Here, the opposite result obtains; if decedent was a resident of his father's household, there is no coverage.

We find these decisions inapposite, considering the general rule that, unless the language of an insurance policy unambiguously so requires, a policy should not be construed to defeat coverage. *Shumake v Travelers Ins Co,* 147 Mich App 600, 608; 383 NW2d 259 (1985). Previous holdings regarding the "resident" question are not helpful, because **in each case the Court properly strove to find that the individual in question was a resident and thus eligible for insurance benefits**.

There are general rules applicable to the interpretation of insurance policies that do provide guidance for this case. An insurance policy is a contract, and the court must determine what the parties agreed to in the policy in order to determine if a policy covers a particular accident. Where policy language is clear, courts are bound by the specific language set forth in the policy. We must interpret the terms of the policy in accordance with their commonly used meaning if the terms are not defined in the policy or the meaning of the terms are [sic] not obvious from the policy language. The fact that the term in controversy is not defined in the policy does not alone establish that an ambiguity exists. A provision is considered ambiguous when its words can reasonably be understood in different ways. Whether the terms of an insurance policy are ambiguous is a question for the court. Any ambiguity in an insurance policy is construed against the insurer and in favor of coverage. [Citations omitted.]

Applying these principles, we conclude that the policy in this case **presents an ambiguous use of the terms "residents" and "regularly resides" under the facts of this case.** See *Mongtomery v Hawkeye Security Ins Co*, 52 Mich App 457; 217 NW2d 449 (1974). The policy does not define these terms, and they are **susceptible to two different meanings**. They could be interpreted as being synonymous with the term "domicile" or primary residence. See *Workman v DAIIE,* 404 Mich 477, 495; 274 NW2d 373 (1979) (usually, the terms "residence" and "domicile" are legally synonymous). A party generally has only one legal residence or domicile. In this case, the one domicile would be defendant Jeri Racine's home, which was where Vance spent the majority of his time and where Jeri Racine had physical custody of Vance under the divorce judgment. **Conversely,** it is possible to interpret the policy in the manner that plaintiff

> contends is correct. Vance was physically present at his father's home on the day of the accident, and Vance intended to stay the weekend. Moreover, Vance intended to establish his own room in the new house in the near future. Vance also had his own room in his father's previous home. It is possible to interpret the term "residents" to include relatives who periodically stay in a home indefinitely, but maintain a legal domicile at some other location during the same period.
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> Because the policy terms are susceptible to two different meanings under the facts of this case, they must be construed against plaintiff as the drafter of the insurance contract and in favor of coverage for defendants. [*Vanguard*, *supra* at 231-234.]

See also cases discussed in Anno: *Who is "member" or "resident" of same "family" or "household" within no-fault or uninsured motorist provisions of motor vehicle insurance policy*, 66 ALR 5th 269.

Ambiguous language and exclusionary clauses in insurance contracts are construed strictly against the insurer. *State Farm Auto Ins Co v Burbank*, 190 Mich App 93, 100; 475 NW2d 399 (1991). In this case, because the term "resides with" could be interpreted in more than one manner, the term is ambiguous and must be construed against defendant. Therefore, it was possible for decedent to "reside with" both his sister and his grandparents. We conclude that although the jury instructions were imperfect, on balance, they adequately and fairly presented the theories of the parties and the applicable law to the jury. *Case*, *supra* at 6.

II

Defendant next argues that the court erred by granting partial summary disposition to plaintiff on the basis that decedent's inoperable vehicles did not constitute "automobiles" under the terms of the policy. Defendant argues that the term automobile in the insurance provision extending underinsured motorist benefits to "a relative who does not own an automobile," is clear and unambiguous and there is no need to determine whether the auto is operable or inoperable. Alternatively, defendant argues that the question whether an inoperable automobile is an automobile under the policy is a question of fact for the jury and not appropriately resolved on summary disposition.

Decedent was the titled owner of two vehicles at the time of his death. Neither vehicle was operable on the date of his death. The registration and insurance on both vehicles had lapsed before his death. Although defendant argued the term "automobile" was unambiguous, the trial court disagreed, finding the term ambiguous concerning operability, and construed the ambiguity against defendant. The court then granted summary disposition to plaintiff on the issue, finding as a matter of law that decedent's cars were not "automobiles" under the policy.

Travelers Indemnity Co v Duffin, 28 Mich App 142; 184 NW2d 229 (1970), rev'd in part on other grounds, 384 Mich 812; 184 NW2d 739 (1971),[3] held that an automobile can reach such

[3] The Supreme Court reversed, adopting the dissent in *Travelers Indemnity Co v Duffin*, 28 Mich App 142; 184 NW2d 229 (1970).

a level of disrepair that it is no longer an "automobile," the ownership of which precludes insurance coverage. It appears that other jurisdictions have also largely concluded that the term "automobile" is ambiguous concerning operability. See, e.g., *Farmers Ins Co of Washington v Miller*, 87 Wash 2d 70; 549 P2d 9 (1976); *Erie Ins Co v Adams*, 674 NE2d 1039 (Ind App, 1997); *McKee v American Family Mut Ins Co*, 932 SW2d 801, 803-804 (Mo App, 1996); and *Santana v Auto-Owners Ins Co*, 91 Ohio App 3d 490, 498; 632 NE2d 1308 (1993); but see *Stewart v Middlesex Ins Co*, 38 Conn App 194, 198; 659 A2d 210 (1995).

The Court of Appeals majority in *Duffin* concluded that there was no material fact regarding whether the inoperable Oldsmobile in that case was an "automobile" within the meaning of the policy. The dissent, relying on *Drysdale v State Farm Mutual*, 13 Mich App 13, 163 NW2d 654 (1968), asserted that the question whether an inoperable automobile was in fact an automobile within the meaning of the policy could not be decided on summary disposition and was for the jury. *Duffin*, *supra* at 148-149 (Levin, P.J., dissenting). The Supreme Court reversed, adopting the dissent. The same credibility issues present in *Duffin* are present here. Under *Duffin*, we must reverse, and remand for a jury determination whether the vehicles were "automobiles" under the policy.

III

Finally, defendant argues that the trial court erred by assessing a setoff of the $8,000 actually received from Black's insurer instead of the $20,000 policy limit defendant claims was "available" to Black. The policy states that the limit of liability for underinsured coverage shall not exceed: "the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceeds the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile . . . ."[4]

During the pendency of this appeal, this Court evaluated the same policy language in *Wilkie v Auto-Owners Ins Co*, 245 Mich App 521; 629 NW2d 86 (2001), and found that the term "available" was ambiguous. *Id*. at 527. Ambiguous terms in an insurance policy must be construed against the drafter and in favor of the insured. *Id*. at 524. In cases involving multiple claimants, the pro-rata amount actually received by each plaintiff and not the entire policy limits is the proper amount set off against the amount available to the plaintiff under the underinsured motorist coverage provision. *Id*. at 530. In this case, the proper setoff was $8,000 rather than $20,000.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael R. Smolenski

[4] Plaintiff filed a supplemental authority brief citing this decision.