STATE OF MICHIGAN

COURT OF APPEALS

BRIAN STAMM,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 19, 2005

No. 261225
Monroe Circuit Court
LC No. 04-017489-NF

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this declaratory action, defendant appeals as of right from an order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Defendant first argues that the trial court erroneously determined that plaintiff was domiciled with his parents and, therefore, was entitled to benefits under his father's personal injury protection (PIP) insurance policy. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 523; 687 NW2d 143 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ensink, supra* at 523.

Under MCL 500.3114(1), a PIP policy is required to provide coverage to the person named in the policy, the named person's spouse, and "a relative of either domiciled in the same household. . . ." The determination of domicile is generally a question of fact. However, where, as here, the underlying facts are not in dispute,[1] domicile is a question of law for the court.

[1] Defendant argues that, based on the facts presented, there is a question of fact regarding whether plaintiff was domiciled with his parents and, therefore, summary disposition was (continued…)

Fowler v Auto Club Ins Ass'n, 254 Mich App 362, 364; 656 NW2d 856 (2002), citing *Goldstein v Progressive Cas Ins Co*, 218 Mich App 105, 11-112; 553 NW2d 353 (1996).

> The relevant factors in deciding whether a person is domiciled in the same household as the insured include: (1) the subjective or declared intent of the claimant to remain indefinitely in the insured's household, (2) the formality of the relationship between the claimant and the members of the household, (3) whether the place where the claimant lives is in the same house, within the same curtilage, or upon the same premises as the insured, and (4) the existence of another place of lodging for the person alleging domicile. *Workman v DAIIE*, 404 Mich 477, 496-497; 274 NW2d 373 (1979).
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> When considering whether a child is domiciled with the child's parents, other relevant indicia include: (1) whether the child continues to use the parents' home as the child's mailing address, (2) whether the child maintains some possessions with the parents, (3) whether the child uses the parents' address on the child's driver's license or other documents, (4) whether a room is maintained for the child at the parents' home, and (5) whether the child is dependent upon the parents for support. *Goldstein*, *supra* at 112, citing *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983). [*Fowler*, *supra* at 364-365.]

"In considering these factors, no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others." *Workman*, *supra* at 496.

Plaintiff was 24 years of age at the time of the accident. Plaintiff maintained and still maintains an apartment in Toledo, Ohio where he works and attends the University of Toledo part-time.[2] He admitted that he had no plans to move back to his parents' home, but also stated that he considered his parents' home to be his main residence. His parents maintain a fully furnished bedroom for him at their home, whereas he only has modest furnishings and personal belongings at his apartment. Plaintiff also stores clothing and "all kinds of other things" at his parents' home. Furthermore, plaintiff was permitted to come and go freely at his parents' home and returned to his parents' home for weekends, holidays, and for a period of months after his injury. While plaintiff did receive credit card bills and utility bills at his apartment, he had a Michigan driver's license with his parents' address on it and used that address for his employment records, college registration, tax records, and bank statements. In addition,

(…continued)

inappropriate. Defendant erroneously conflates a dispute regarding the legal import of the facts with a dispute about the facts themselves. Had there been a dispute as to whether plaintiff lived in an apartment or attended the University of Toledo, those disputes would have had to be resolved by a fact-finder. However, where the facts are undisputed (i.e. no one disputes that plaintiff lived in an apartment and attended the University of Toledo), the legal import of those facts is a matter of law to be decided by the trial court.

[2] Plaintiff attended Grand Valley State University full-time for two years before transferring to the University of Toledo. After attending the University of Toledo full-time for three years, plaintiff took one year off and then returned part-time.

although plaintiff works full time and pays for his own food and rent, his father pays his tuition, car payments and insurance payments. Likewise, his mother is a joint holder on all three of his bank accounts and managed those accounts on his behalf. Finally, when plaintiff was injured, his parents retired his credit card debts, which were approximately $15,000.

While plaintiff has taken longer than the traditional four-years to earn his degree and was not able to state with certainty whether he intended to return to his parents' home upon graduation, the fact that he was attending school and was largely dependent upon his parents for financial support is indicative of the fact that he had not yet fully moved out on his own. Furthermore, his deposition testimony and his use of his parents' address for his most important documents and mail clearly evince a belief that his permanent residence was with his parents. Therefore, taken as a whole, these factors strongly favor the determination that plaintiff was still domiciled at his parents' home at the time of the accident. The trial court did not err when it granted summary disposition to plaintiff on that basis.

Defendant next argues that the trial court erred by awarding attorney fees to plaintiff. We disagree.

A trial court's finding that an insurer unreasonably refused to pay benefits is reviewed for clear error. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 38-39; 651 NW2d 188 (2002). Clear error exists if the reviewing court obtains a definite and firm conviction that a mistake occurred. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

MCL 500.3148(1) states that the claimant's attorney's fee "shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." Hence, the trial court did not have discretion to refuse to award plaintiff his attorney's fees, if the trial court determined that defendant's refusal to pay PIP benefits was unreasonable. "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and the amount of loss sustained." MCL 500.3142(2). "Where benefits are not paid within the statutory period, a rebuttable presumption of unreasonable refusal or undue delay arises such that the insurer has the burden to justify the refusal or delay." *Bloemsma v Auto Club Ins Ass'n*, 174 Mich App 692, 696-697; 436 NW2d 442 (1989). However, a delay in payment is not unreasonable "where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987).

While the trial court did not expressly state that defendant had unreasonably refused to pay the claim or unreasonably delayed in making proper payment, defendant presented no

evidence to rebut the presumption that the refusal or delay was unreasonable.[3] Consequently, we are not left with the definite and firm conviction that the trial court committed clear error.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[3] Defendant also argues that the trial court erred by granting fees without considering that defendant was owed a set-off for insurance benefits paid to plaintiff by the driver of the other vehicle. However, an insured's claim of set-off is not a reasonable legal excuse for non-payment or delayed payment of owed benefits. *Cole ex rel Robinson v DAIIE,* 137 Mich App 603, 613; 357 NW2d 898 (1984).