STATE OF MICHIGAN

COURT OF APPEALS

JENIFER R. FONTANA, GENE P. FONTANA, and K. PAUL ZOSEL,

Plaintiffs-Appellees,

v

MARYLAND CASUALTY COMPANY/ZURICH,

Defendant-Appellant.

UNPUBLISHED
January 24, 2006

No. 264127
Wayne Circuit Court
LC No. 04-408487-NI

AUTO OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

MARYLAND CASUALTY,

Defendant-Appellant.

No. 264128
Wayne Circuit Court
LC No. 04-422145-NF

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant Maryland Casualty Company ("Maryland Casualty") appeals as of right from a trial court order granting summary disposition in favor of plaintiffs Auto Owners Insurance Company ("Auto Owners") and Jenifer Fontana, in this case involving priority for purposes of first party no-fault benefits.[1] We reverse and remand.

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[1] Gene Fontana and K. Paul Zosel were added as co-guardians and co-conservators of Jenifer. An order was entered by the trial court consolidating lower court nos. 04-408487-NI and 04-422145-NF.

On March 31, 2003, Jenifer was involved in a motor vehicle accident, which resulted in significant injuries. At the time of the accident, Auto Owners insured a vehicle owned by Stella Fontana, Jenifer's mother, and Maryland Casualty insured a vehicle owned by Gene Fontana, Jenifer's father. Gene and Stella were divorced at the time of the accident and shared legal custody of Jenifer. On April 9, 2003, Jenifer filed an application for no-fault benefits with Auto Owners, in which she represented that she resided with Stella. Auto Owners paid Jenifer's no-fault benefits. Subsequent to the action, Auto Owners claims that it determined that Jenifer resided with Gene and that Gene had been assigned physical custody of Jenifer. Subsequently, Jenifer filed a complaint against Maryland Casualty, and alleged breach of contract for its failure to pay no-fault benefits and requested declaratory relief regarding the rights and responsibilities of Maryland Casualty. Thereafter, Auto Owners filed a complaint against Maryland Casualty, and alleged that it should be indemnified and reimbursed because Maryland Casualty was the insurance carrier of first priority for payment of Jenifer's no-fault benefits.

Maryland Casualty filed motions for summary disposition with regard to the complaints filed by Jenifer and Auto Owners. Specifically, Maryland Casualty argued that it was entitled to summary disposition because Jenifer was not domiciled with Gene at the time of the accident.

Jenifer filed a response and counter motion for summary disposition, and contended that she was entitled to a declaratory judgment resolving which first party carrier (or carriers) was liable to pay her no-fault benefits. Jenifer also requested reasonable attorney fees from Maryland Casualty pursuant to MCL 500.3148, for the delays it caused in refusing to pay the benefits. A hearing was conducted on Maryland Casualty's motion. At the hearing, the trial court stated that it firmly believed that Jenifer's domicile was with her father, thus, Maryland Casualty was liable for Jenifer's no-fault benefits, and that Jenifer should receive attorney fees for Maryland Casualty's refusal to pay the benefits. Subsequently, the trial court entered an order denying Maryland Casualty's motion for summary disposition; granting summary disposition in favor of Auto Owners and Jenifer; finding that Maryland Casualty was the insurance carrier of first priority for payment of Jenifer's no-fault benefits for the motor vehicle accident; requiring Maryland Casualty to reimburse Auto Owners for the benefits paid to Jenifer; finding Maryland Casualty liable for the personal injury protection (PIP) benefits paid to plaintiff; and requiring Maryland Casualty to pay Jenifer costs and attorney fees incurred in the case.

On appeal, Maryland Casualty argues that Auto Owners is responsible for Jenifer's no-fault benefits because Jenifer was domiciled with her mother Stella at the time of the accident, thus, making Auto Owners the provider with first priority. We agree.

When two or more no-fault insurance policies cover a claim, the respective liabilities of the insurers are determined by each insurer's priority status and the existence of a coordination of benefits clause in any policy. The priority of each insurer is generally governed by MCL 500.3114 and MCL 500.3115, but a no-fault insurer which would not normally be the primary insurer can contract to provide primary coverage. *Doss v Citizens Ins Co*, 146 Mich App 510, 513; 381 NW2d 409 (1985). MCL 500.3114(1) provides in relevant part:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies 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, if the injury arises from a motor vehicle accident.

Accordingly, in determining whether an insurer is liable for PIP benefits, under MCL 500.3114(1), there must be a determination of (1) whether a party is a relative of the insured and (2) whether the party is domiciled in the same household as the insured. Because Jenifer was a relative of both Gene and Stella, a question remains with regard to who she was domiciled with.

"Generally, the determination of domicile is a question of fact. However, where, as here, the underlying facts are not in dispute, domicile is a question of law for the court." *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364; 656 NW2d 856 (2002), citing *Goldstein v Progressive Casualty Ins Co*, 218 Mich App 105, 111-112, 553 NW2d 353 (1996); *Williams v State Farm Mut Auto Ins Co*, 202 Mich App 491, 494-495; 509 NW2d 821 (1993). Questions of law are reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Our Supreme Court in *Workman* v *DAIIE*, 404 Mich 477, 495; 274 NW2d 373 (1979), examined the term "domiciled in the same household," and stated that in Michigan "the terms 'domicile' and 'residence' are legally synonymous (except in special circumstances)." The Court further provided:

> Our review of both Michigan opinions and opinions of our sister state courts first reveals the general principle that the terms "resident" of an insured's "household" or, to the same effect, "domiciled in the same household" as an insured, have "no absolute meaning", and that their meaning "may vary according to the circumstances". *Cal-Farm Ins Co v Boisseranc*, 151 Cal App 2d 775, 781; 312 P2d 401, 404 (1957). The "legal meaning" of these terms must be viewed flexibly, "only within the context of the numerous factual settings possible". *Montgomery v Hawkeye Security Ins Co*, 52 Mich App 457, 461; 217 NW2d 449 (1974).
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> Accordingly, both our courts and our sister state courts, in determining whether a person is a "resident" of an insured's "household" or, to the same analytical effect, "domiciled in the same household" as an insured, have articulated a number of factors relevant to this determination. 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 495-496.]

The relevant factors to consider when determining domicile for purposes of first party no-fault benefits are as follows :

> 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.

> 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. [*Fowler, supra* at 364-365 (citations omitted).]

We disagree with the trial court and find that the undisputed facts, presented to the trial court, support that Jenifer was domiciled with her mother Stella and did not reside with her father Gene. With regard to the first factor, Gene indicated in his deposition that when Jenifer moved out in November 2002, it was permanent. There was nothing presented to dispute this fact. With regard to the formality of the relationships, there is no dispute that Jenifer had a formal relationship with both Gene and Stella. With regard to where the person lives, it was undisputed that Jenifer was living with Stella at the time of the accident. At the time of the accident, Jenifer lived with Stella in Melvindale, Michigan, and did not maintain a living quarters in Gene's home. There is no support for Jenifer having lodging anywhere, but with Stella at the time of the accident. Jenifer did not have a room kept for her at Gene's house. A review of the first four factors support that Jenifer was domiciled with Stella.

With regard to other relevant factors, the undisputed facts support that Jenifer did not receive mail at Gene's house and that Jenifer did not have any possessions at Gene's house. Jenifer received her mail at Stella's Melvindale address. The undisputed facts also support that the only financial support Gene provided during the pertinent time period was health insurance. The only factor supporting domicile with Gene is that Jenifer's driver license included her father's former address.[2] However, we do not believe this is enough to support that Jenifer was domiciled with Gene.

In addition, we recognize that, pursuant to a 1993 court order, Gene had physical custody of Jenifer and that Jenifer moved back in with Gene after the accident. Initially, upon divorce, physical custody had been awarded to Stella, but in 1993 the judgment of divorce was modified and Gene was awarded physical custody. And, subsequent to the accident, Jenifer returned to live with her father, which he indicated, in his deposition, was because he was in a better position to care for her after she had sustained the brain injury. Plaintiff Auto-Owners relies on these factors, but has presented nothing to support that this mandates a finding that Jenifer was domiciled with Gene. This Court need not search for authority to support defendants' position. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999). Nonetheless, we find that case law supports that domicile or residence is where one is residing

[2] At the time of the accident, Gene had not lived at the address listed on Jenifer's driver's license for approximately two years.

with no present intent of leaving at the time of the accident, thus, based on the individual's subjective intent and physical presence, rather than what is provided in a court order.[3]

Next, Maryland Casualty argues that the trial court erred in awarding Jenifer costs and attorney fees for its unreasonable refusal to pay benefits. We agree. Because Maryland Casualty was not the provider with first priority the trial court erred in finding that it unreasonably refused to pay Jenifer no-fault benefits.

Reversed and remanded for further proceeding consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

[3] We note that under Michigan law the domicile or residence of a minor child is not necessarily limited to one household. See *Walbro Corp v Amerisure Co*, 133 F3d 961 (CA 6 1998). However, in order for a minor child to be domiciled with both divorced parents, the child must actually reside with both parents at the time of the accident. In *Walbro*, at the time of the accident, the minor child would spend alternating weekends, allowing flexibility for activities, with the divorced parents who had joint legal and physical custody. *Id*. at 970. In the present case, the undisputed evidence supports that, at the time of the accident, Jenifer only resided with Stella and had no intent to reside with Gene.