STATE OF MICHIGAN

COURT OF APPEALS

TITAN INSURANCE COMPANY,

Plaintiff-Appellee,

v

BROTHERHOOD MUTUAL INSURANCE COMPANY,

Defendant-Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 23, 2010

No. 283050
Oakland Circuit Court
LC No. 2007-082161-NF

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), appeals as of right the trial court's declaratory judgment declaring State Farm liable to plaintiff, Titan Insurance Company ("Titan") for no-fault benefits paid to Orlin Bestrom.[1] On appeal, State Farm, an out-of-state insurer, argues that Bestrom was not eligible for no-fault benefits because he was an uninsured resident of Michigan and not using a motor vehicle as a motor vehicle at the time of his injury. In the alternative, State Farm claims that defendant, Brotherhood Mutual Insurance Company ("Brotherhood"), is liable to Titan for benefits paid to Bestrom because Bestrom was a resident of Michigan and, therefore, Brotherhood was the priority insurer as the insurer of the owner of the motor vehicle that caused Bestrom's injuries. We disagree and affirm.

Bestrom, who was 85 years old at the time of the accident, lives in Michigan between June and October of every year. He lives the remainder of the year in Florida. He maintains an

[1] Titan is Bestrom's assigned subrogee in this case. See MCL 500.3171.

auto insurance policy in Florida with State Farm. While in Michigan, Bestrom works as a volunteer at Pine Ridge Bible Camp ("Pine Ridge"). On August 22, 2006, he was working at Pine Ridge when he drove a Pine Ridge-owned pickup truck to an equipment shed to retrieve some equipment. Bestrom parked the truck on a slight incline and started placing items into the back of the truck. However, the truck's gearshift was in neutral, and as he turned away from the truck he noticed out of the corner of his eye that the truck had started to roll backward down the incline. He attempted to get into the cab of the truck in order to stop it, grabbing the steering wheel and stepping on the running board of the truck. As he tried to pull himself into the truck, his foot slipped and went under the truck. He lost his grip on the steering wheel and fell to the ground; the truck ran over the right side of his body and his head. Bestrom was left with a broken jaw and a "mangled" shoulder blade; he had four surgeries, his mouth wired shut, and received 42 staples in his shoulder blade.

Titan was assigned Bestrom's no-fault claim under MCL 500.3171 (Michigan Assigned Claims Facility). Titan sued for declaratory relief, asserting that either State Farm or Brotherhood was liable to reimburse Titan for no-fault benefits paid to Bestrom. The trial court held that State Farm, as Bestrom's personal insurer, was liable to Titan pursuant to MCL 500.3163, which mandates that a certified out-of-state insurer is liable for its insured's no-fault benefits incurred as a result of a motor vehicle accident in Michigan. See *Jones v State Farm Ins Co*, 202 Mich App 393, 407; 509 NW2d 829 (1993).

On appeal, State Farm first argues that the trial court erred in concluding that Bestrom is a nonresident and, therefore, has access to coverage by his out-of-state insurer, State Farm. A trial court's ruling in a declaratory judgment action is reviewed de novo. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). The trial court's findings of fact are reviewed for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000); MCR 2.613(C). A trial court's finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *Christiansen, supra*, 239 Mich App at 387.

The trial court held:

> [I]f [Bestrom's] ties to Michigan are substantial enough to render him a resident of this state then he must also be considered a resident of Florida since his ties to that state are even stronger than his ties to Michigan, particularly with respect to the use and operation of his motor vehicles. Thus, he can be considered an out-of-state resident for the purpose of MCL 500.3163.

This Court has concluded multiple times, however, that a resident of Michigan *cannot* be a nonresident under the no-fault act. *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 40; 592 NW2d 395 (1998); *Wilson v League General Ins*, 195 Mich App 705, 710; 491 NW2d 642 (1992). Thus, the critical question is whether Bestrom is a Michigan resident; if he is, he is not a nonresident for these purposes, regardless of his connections to Florida.

"'Residence' and 'domicile' are legally synonymous." *Cervantes v Farm Bureau Ins Co*, 272 Mich App 410, 414; 726 NW2d 73 (2006) (considering the insured's domicile). Many factors have been considered with respect to the question of residency; the determination varies according to the factual circumstances. *Id*. at 414-415. The factors include, but are not limited

to: the person's intent, mailing address, the address listed on the person's driver's license, tax returns and other documents, the location of bank accounts, maintenance of a telephone number, and property ownership. *Id*.; *Witt v American Family Ins Co*, 219 Mich App 602, 605-606; 557 NW2d 163 (1996). "A party generally has only one legal residence or domicile." *Vanguard Ins Co v Racine*, 224 Mich App 229, 233; 568 NW2d 156 (1997) (concerning homeowners insurance).

In this case, Bestrom considers Florida to be his state of residence and has no intent of moving back to Michigan. He files his federal tax return from his Florida address. His driver's license is from Florida, and his car is registered and insured in Florida. He does not own property in Michigan, but his wife does.[2] He has bank accounts in both Michigan and Florida—for depositing his social security checks. He has spent up to five months of each year for the past 27 years in Michigan. He spends the remaining months in Florida. Bestrom's intent and the bulk of his permanent connections indicate that Florida is his residence. Thus, although the trial court's analysis was incomplete, the court did not clearly err in holding that Bestrom is a nonresident for purposes of the no-fault act.

State Farm next argues that because Bestrom failed to register and insure his personal vehicle, pursuant to the requirements of MCL 500.3102, he is ineligible for no-fault benefits. Statutory interpretation is a question of law that this Court reviews de novo. *Toll Northville, supra*, 480 Mich at 10. This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008). If the statutory language is unambiguous, no judicial construction is required and the plain meaning of the language must be applied. *Id*. A provision is ambiguous if it irreconcilably conflicts with another provision or if it is equally susceptible to more than one meaning. *Id*. at 39-40. Every word or phrase should be ascribed its plain and ordinary meaning. *Id*. at 40; MCL 8.3a. Finally, it is important to '"avoid an interpretation that would render any part of the statute surplusage or nugatory."' *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

MCL 500.3102(1) mandates that a nonresident who operates a motor vehicle in Michigan for more than 30 days in a year must also insure the vehicle in Michigan, in accordance with MCL 500.3101:

> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to [the no-fault act]. [MCL 500.3702(1).]

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[2] They maintain this arrangement for tax reasons. The couple had been married for only three years.

Bestrom was living in Michigan for over two months at the time of the accident and there is no dispute that he did not register his vehicle here in Michigan. However, Bestrom was not operating his vehicle at the time of the accident. Rather, he was operating the Pine Ridge truck at the time he was injured. Nevertheless, State Farm asserts that because Bestrom did not register his personal vehicle, he is precluded from recovering no-fault benefits. We disagree.

We first note that there is no language in MCL 500.3102 that precludes the collection of no-fault benefits for failure to adhere to its requirements. In addition, our Supreme Court has recognized that the "penalty for failing to obtain appropriate insurance" is provided in MCL 500.3113. *Nelson v Transamerica Ins Services*, 441 Mich 508, 512 n 10; 495 NW2d 370 (1992). MCL 500.3113 expressly identifies the three situations in which a person is not entitled to no-fault benefits:

> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.
>
> (c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in compliance with section 3163.

There is no dispute that none of these subsections apply to the instant case because Bestrom was not the owner or registrant of the truck and he was personally insured by his out-of-state insurer, State Farm.[3] As State Farm has provided no support for its assertion that Bestrom may not recover benefits, and we are unable to find any support for this contention, we conclude that Bestrom's failure to adhere to MCL 500.3102 does not preclude eligibility for no-fault benefits.

State Farm next argues that Bestrom was not eligible for benefits from State Farm because MCL 500.3163 requires the motor vehicle involved in the accident to be registered out-of-state. In order to preserve an issue on appeal, it must be raised before and addressed by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Although State Farm raised this issue in its motion for summary disposition, the trial court did not address it. Thus, this Court need not review this issue. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007), we are not precluded from considering the issue if a miscarriage of justice would result from a failure to consider it, or the issue presents a question of law for which all of the necessary facts have been presented, or where resolution of the issue is necessary for a proper determination of the case. *Id*. As this issue presents a question of law for which all the facts necessary to its resolution have been presented, we will review this issue.

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[3] It is not clear whether the truck was properly registered in Michigan, but it is undisputed that it was owned by Pine Ridge.

We reject State Farm's argument. Nothing in MCL 500.3163 requires the motor vehicle involved in the accident to be registered out-of-state. Rather the injury must *arise* "from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle *by an out-of-state resident* . . ." MCL 500.3163(1)(emphasis added). The only requirement is that the injured party *be* an out-of-state resident, not that the vehicle involved in the accident be registered out-of-state.

State Farm next argues that Bestrom was not an occupant of the truck at the time of the accident and, therefore, MCL 500.3115 dictates that Brotherhood is the proper insurer to reimburse Titan. As above, this issue was raised in the trial court but not addressed below. Because there is no dispute about the facts, this issue presents a question of law for which all the facts necessary to its resolution have been presented and it is appropriate for this Court to review it. *Heydon, supra,* 275 Mich App at 278.

Our Supreme Court has summarized the "general rule of priority" for payment of no-fault benefits as follows: "A no-fault insurance policy . . . covers all injuries arising from the use of motor vehicles suffered by persons named in the policy. In other words, the general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions . . . applies." *Parks, v DAIIE*, 426 Mich 191, 202-203; 393 NW2d 833 (1986); MCL 500.3114(1). State Farm argues that instead of applying this general rule here, MCL 500.3115(1) mandates that the insurer of the owner or registrant of the motor vehicle in the accident—here, Brotherhood—is liable for no-fault benefits where the injured party was not an occupant of the vehicle. State Farm overlooks the fact that MCL 500.3115 is only applicable "[e]xcept as provided in MCL 500.3114(1), i.e. where the injured party does not have personal insurance. Because Bestrom does not have personal insurance—through State Farm, pursuant to MCL 500.3163—there is no need to consult the priority of insurers found in MCL 500.3115.

Lastly, State Farm argues on appeal that Bestrom is not eligible for no-fault benefits because his injuries did not arise out of the use of a motor vehicle *as a* motor vehicle. A trial court's ruling in a declaratory judgment action is reviewed de novo. *Toll Northville, supra,* 480 Mich at 10. Likewise, statutory interpretation is a question of law that this Court reviews de novo. *Id*. The trial court's findings of fact are reviewed for clear error. *Christiansen, supra,* 239 Mich App at 387; MCR 2.613(C). A court's finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Christiansen, supra,* 239 Mich App at 387.

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle *as a motor vehicle* . . . ." MCL 500.3105(1). This Court's primary goal when considering statutory language is to give effect to the intent of the Legislature. *Alvan Motor, supra* at 39. If the statutory language is unambiguous, no judicial construction is required and the plain meaning of the language must be applied. *Id*.

Our Supreme Court has concluded, "[T]he clear meaning of [MCL 500.3105(1)] is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 220; 580 NW2d 424 (1998). Examples of circumstances where a motor vehicle is not being used as a motor vehicle are when the vehicle is

used as a housing facility, an advertising display, a construction equipment base, or merely the backdrop of an assault by another instrumentality. *Id.*; *Univ Rehab v Farm Bureau*, 279 Mich App 691, 696-697; 760 NW2d 574 (2008). The vehicle should be more than "merely the location" of the injuries, but "a direct, active cause of" the injuries. *Univ Rehab, supra*, 279 Mich App at 697.

In this case, just prior to the accident that caused his injuries, Bestrom was using the truck to drive to an equipment shed for the purposes of transporting equipment from the shed to a work site. At the time that the truck started moving, Bestrom had just placed some equipment into the back of the truck. The truck was moving because it was on an incline and Bestrom had left it in neutral. At the exact time that Bestrom was injured, he was not driving the truck; he was attempting to regain control of the truck and, when he failed, the truck ran over him and caused his injuries.

State Farm's argument is that at the very moment Bestrom was injured by the truck, the truck was rolling without an operator and, therefore, not currently engaged in any transportational purposes. Titan and Brotherhood take a longer view of whether the truck was presently being used for its transportational function, noting that the Bestrom was using the truck to drive and haul equipment at the moment that the accident—the truck rolling without an operator—began. Titan and Brotherhood have the correct perspective.

Clearly, the truck was more than a mere backdrop to the accident. *Univ Rehab* at 697. The truck itself caused Bestrom's injuries when it ran over him. Further, the truck was not being used for any non-transportational purpose; it was either still being used as a motor vehicle, or not being used at all. *McKenzie, supra,* 458 Mich at 220. As an illustration, this Court has previously held that injuries caused by the motorized delivery mechanism of a stopped delivery truck arose out of the use of the truck as a motor vehicle. *Drake v Citizens Ins Co*, 270 Mich App 22, 24-26; 715 NW2d 387 (2006). The Court in that case concluded that because the truck was, generally, being used to deliver animal feed, it was engaged in a transportational purpose even if at the moment of the accident the truck was merely depositing animal feed. *Id*. at 26. Similarly, in this case, Bestrom was using the truck to transport equipment, an essential component of which is loading the truck with the equipment to be transported. During this use, the truck started moving and, as a result of trying to stop the vehicle, Bestrom was injured. Finally, at the very moment he was injured, Bestrom was attempting to enter the truck for purposes of operating the truck—i.e., to stop the truck from rolling into a nearby building. "[I]njuries incurred while entering a vehicle with the intent to travel . . . [arise] out of the use of a motor vehicle as a motor vehicle." *McKenzie, supra,* 458 Mich at 221. For all of the foregoing reasons, we hold that the truck that injured Bestrom was being used as a motor vehicle at the time he was injured.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood