STATE OF MICHIGAN

COURT OF APPEALS

DEBRA SANDERS,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE CO.,

Defendant/Cross-Plaintiff-Appellee,

and

ALLSTATE INSURANCE CO.,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
March 23, 1999

No. 207006
Kent Circuit Court
LC No. 96-03018 NF

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

The trial court entered an order of summary disposition in favor of State Farm Mutual Automobile Insurance Company ("State Farm") which declared Allstate Insurance Company ("Allstate") as the insurer of first priority, liable to plaintiff for no-fault personal injury protection benefits arising out of a motor vehicle accident. Allstate appeals of right. We reverse the trial court's order and remand this matter for trial.

This appeal arises out of a dispute between insurance carriers. Both carriers argue that the other is the insurer of the first priority required to pay first-party personal injury protection benefits owed to plaintiff Debra Sanders under Michigan's no-fault law. State Farm paid plaintiff's past claims and filed a cross-complaint against Allstate.

Both parties concede the occurrence of the accident, the injury to plaintiff, and that one of the defendant insurance companies is liable to plaintiff for first-party no-fault benefits. The sole question before the trial court was the location of plaintiff's domicile at the time of the accident. If plaintiff was domiciled with her mother at the time of the accident, as was found by the trial court, then plaintiff would

be a resident relative, covered under her mother's policy. MCL 500.3114(1); MSA 24.13114(1). If this were the case, Allstate would be responsible to reimburse State Farm for amounts paid by State Farm to plaintiff and for other first-party benefits as they may become due to plaintiff. If plaintiff was domiciled elsewhere, then State Farm, as insurer of the motor vehicle in which plaintiff was a passenger at the time of the accident, would be responsible for all of plaintiff's first-party no-fault benefits, both those paid and those which come due in the future. MCL 500.3114(4)(a); MSA 24.13114(4)(a).

Allstate's first issue on appeal is whether the trial court erred when it undertook a balancing of factors to determine domicile of plaintiff. Allstate argues that any such balancing is to be done by the trier of fact and that at summary disposition inferences are to be drawn in favor of the nonmovant. We agree.

A trial court's grant of a motion for summary disposition is reviewed de novo by this Court. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996); *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994).

When reviewing the grant of a motion for summary disposition based on MCR 2.116(C)(10), any reasonable inferences drawn from the evidence are to be drawn in favor of the nonmovant. *Gamet v Jenks*, 38 Mich App 719; 197 NW2d 160 (1972). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A movant is entitled to a grant of its motion only where there appears that, except as to the amount of damages, there is no genuine issue of material fact. MCR 2.116(C)(10) The courts are to be liberal in finding an issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). From a review of the pleadings, affidavits, depositions, admissions and other available documentary evidence, *Spiek, supra*, 456 Mich 337, the court must be convinced that no record might be developed that will leave open an issue upon which reasonable minds might differ. *Singerman v Municipal Services Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997).

In *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933), our Supreme Court stated that "when the place of domicile is disputed, as it was in this case, the court might properly submit the question of fact to a jury." The court in the present case settled the dispute over the domicile of plaintiff, without submission of the question to a jury. In doing so, the court itself weighed the factors presented in the cases, which have interpreted domicile as it is used in Michigan's no-fault act. Two cases provide the factors the trial court used in its analysis, *Workman v DAIIE*, 404 Mich 477, 496-497; 274 NW2d 373 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983). The four *Workman* and five *Dairyland* factors were accumulated and summarized by this Court in *Williams v State Farm Mutual Ins*, 202 Mich App 491, 494-495; 509 NW2d 821 (1993).

The trial court considered each of the *Williams* factors in its analysis. However, the trial court failed to consider the standard under which it was to review these factors. At no time in its analysis did the trial court indicate that inferences were being drawn in favor of Allstate, the nonmovant. See *Andrews, supra*. Our review of the record shows that on several factors, the trial court drew a balance

in favor of State Farm. For example, in considering plaintiff's intent to remain indefinitely in the insured's household, the trial court stated:

> Apparently her stated intent a couple of weeks prior to the accident in question was to move to Tennessee with the Geers and perhaps take up residence with them there. So it's a little hard to determine where the intent of Debra Sanders might have been as of the exact date of the accident. Indeed, it seems as though her life was literally and figuratively in a state of flux and she was at a transition point in her life.
>
> It would seem, to the extent that we can determine her subjective and/or declared intent, based on her testimony and the other factors, that she was considering herself to have been primarily domiciled in the home of her mother, but with the intent to remove therefrom in the very near future.

The trial court went on to hold that the evidence "militate[d] in favor of a conclusion that the main base of operations is the home of Debra Bliss, the mother in this case." As stated above, "militating in favor of" is not the proper standard for a grant of a motion for summary disposition. MCR 2.116(C)(10). We find that a factual question was raised regarding plaintiff's domicile which precludes summary judgment. Accordingly, this case must be reversed and remanded for trial. *Bryant v Safeco Ins Co*, 143 Mich App 743, 748, 372 NW2d 655 (1985).

Allstate also alleges that the trial court erred when it based its decision on a finding that Allstate had failed to overcome the burden the court felt was on Allstate: to prove plaintiff was domiciled somewhere other than with plaintiff's mother. The following discussion between the court and Allstate's attorney took place at the hearing on the motion for summary disposition:

> THE COURT: The points you raise are solid ones, and I agree that they raise questions. The main question that I have, though, is one that Mr. Murphy suggested; and that is, if the Debra Bliss residence is no longer the domicile of Debra Sanders, then what is? Don't we have to nominate some other choice?
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> MR. ENSLEN: Well, I don't think we do; but I will.
>
> THE COURT: I mean, there has to be a - - I think the law presumes everyone has a domicile. And to say, well, it's not with mom, is not of and by itself satisfactory. It seems to me if it isn't with mom, it has to be somewhere else…If it isn't with mom, where the heck is it?
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> MR. ENSLEN: Well, I truly do not believe I have to distinguish - - or I have to pick a domicile other than her mother's and say that's where she lived to meet my burden. But I suspect the facts support at least two theories; one, Carol Fisher, and the other is the Geers.

It was appropriate to put the burden on Allstate, the nonmovant, at a motion for summary disposition. *Gamet*, *supra*. Moreover, the court explicitly recognized that Allstate has produced

enough evidence to "raise questions" of fact regarding the domicile with either plaintiff's aunt or the Geer family. The court stated:

> [A]pparently, a lot of people feel obligated to take the Plaintiff in, and she's able to go to two or three different locations for that purpose.
>
> I have to say that the facts in this case tend to indicate that there are various places where the Plaintiff stays from time to time.

Here, the trial court indicated that the facts support "various places" that a reasonable trier of fact might find plaintiff to reside. Once again, a factual question has been raised regarding plaintiff's domicile which precludes summary judgment. Accordingly, we reverse and remand for trial. *Bryant, supra*, 143 Mich App 748.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald