

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

The Honorable Pat M. Donofrio, the Honorable Kirsten Frank Kelly and the Honorable Jane M. Beckering

LORI CALDERON, as Guardian of ARTHUR
KRUMM, a Legally Incapacitated Person,

Plaintiff/Counter-Defendant/Appellee,

and

FUNCTIONAL RECOVERY, INC.,
~~a Michigan corporation,~~

Intervening Plaintiff/Appellee,

-vs-

AUTO-OWNERS INSURANCE COMPANY,

138805 Defendant/Counter-Plaintiff/Appellant. *OK*

Supreme Court No. _____

Court of Appeals No. 283313

Lower Court No. 06 602100 NF

*Wayne
J. Murphy*

SECRET WARDLE

198
5/26
34987
PATRICK J. BAGLEY (P 51101)
Attorney for Plaintiff Calderon
4540 Highland Road
Waterford, MI 48328
(248) 673-7000

MICHAEL L. UPDIKE (P 28964)
STACEY L. HEINONEN (P 55635)
Attorneys for Auto-Owners Insurance Co.
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

L. PAGE GRAVES (P 51649)
Attorney for Intervening Plaintiff
603 Bay Street
P.O. Box 705
Traverse City, MI 49685-0705
(231) 946-0700

NOTICE OF APPEARANCE

APPEARANCE

FILED

MAY - 4 2009

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

NOTICE OF HEARING

DEFENDANT/COUNTER-PLAINTIFF/APPELLANT
AUTO-OWNERS INSURANCE COMPANY'S APPLICATION FOR
LEAVE TO APPEAL

COPY OF THE DECISION AND OPINION OF THE COURT OF APPEALS
FOR WHICH LEAVE TO APPEAL IS SOUGHT

PROOF OF SERVICE

SECRET WARDLE

BY: MICHAEL L. UPDIKE (P 28964)
STACEY L. HEINONEN (P 55635)
Attorneys for Auto Owners Ins. Co.
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

Dated: May 4, 2009

C:\NrPortbl\imanager\VERTELS\1232505_1.DOC

SECRET WARDLE

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

The Honorable Pat M. Donofrio, the Honorable Kirsten Frank Kelly and the Honorable Jane M. Beckering

LORI CALDERON, as Guardian of ARTHUR
KRUMM, a Legally Incapacitated Person,

Plaintiff/Counter-Defendant/Appellee,

and

FUNCTIONAL RECOVERY, INC.,
a Michigan corporation,

Intervening Plaintiff/Appellee,

-vs-

AUTO-OWNERS INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Appellant.

Supreme Court No. _____

Court of Appeals No. 283313

Lower Court No. 06 602100 NF

PATRICK J. BAGLEY (P 51101)
Attorney for Plaintiff/Counter-Defendant/
Appellee Calderon
4540 Highland Road
Waterford, MI 48328
(248) 673-7000

MICHAEL L. UPDIKE (P 28964)
STACEY L. HEINONEN (P 55635)
Attorneys for Auto-Owners Insurance Co.
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

L. PAGE GRAVES (P 51649)
Attorney for Intervening Plaintiff/Appellee
603 Bay Street
P.O. Box 705
Traverse City, MI 49685-0705
(231) 946-0700

**DEFENDANT/COUNTER-PLAINTIFF/APPELLANT AUTO-OWNERS
INSURANCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL**

Dated: May 4, 2009

TABLE OF CONTENTS

Index of Authorities	iii
Statement of the Basis of Jurisdiction of the Supreme Court	1
Statement of the Question Presented	3
Statement of Facts	4
Standard of Review	23
Argument	25-45

The Supreme Court should grant leave and review a decision of the Court of Appeals that reversed summary disposition for a defendant on the grounds there were questions of fact over whether a person resided with his grandmother in Michigan at the time of a motor vehicle accident when it was undisputed that:

- the person had lived at a number of different addresses in Michigan, only occasionally staying with his grandmother;
- the person was married and had moved to Arkansas with his wife and stepchildren;
- the person had gone to North Carolina to see a friend and inquire about a job, and was involved in a motor vehicle accident on the way back to the place he was staying at in North Carolina;
- the only testimony that the person intended to return to Michigan and reside with his grandmother was based on guess, conjecture and speculation by those who had no direct knowledge of the person's intentions; and
- where resolution of the issue of what minimum evidence must be presented on the issue of a person's residency for Michigan no-fault benefits is a matter of continuing and

substantial public interest and of major significance to the
jurisprudence of the State of Michigan.

Conclusion and Request for Relief

46

Index to the Appendix

Proof of Service

INDEX OF AUTHORITIES

Cases:

<i>Anderson v Liberty Lobby, Inc.</i> , 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986)	37
<i>Bryant v Safeco Insurance Company</i> , 143 Mich App 743; 372 NW2d 655 (1985)	22
<i>Citizens Insurance Company v Bloomfield Township</i> , 209 Mich App 484; 532 NW2d 183 (1985)	24
<i>Dairyland Insurance Company v Auto-Owners Insurance Company</i> , 123 Mich App 675; 333 NW2d 322 (1983)	27,28,30 31,35,43
<i>Fowler v Airborne Freight Corporation</i> , 254 Mich App 362; 656 NW2d 856 (2002)	28,31 32,41
<i>Fuller v Ann Arbor Railroad Company</i> , 141 Mich 66; 104 NW 414 (1905)	38
<i>Fundunburks v Capital Area Transportation Authority</i> , 481 Mich 873; 748 NW2d 804 (2008)	30,31, 34,40
<i>Harris v Rahman</i> , 474 Mich 1001; 708 NW2d 100 (2006)	31,34, 40-42
<i>Hayes v State Farm Mutual Automobile Insurance Company</i> , Michigan Court of Appeals No. 264445, <i>rel'd</i> 2/23/2006 (unpublished)	32,33
<i>Ingram v Hartford Insurance Company of the Midwest</i> , 06-CV-14085-DT, <i>rel'd</i> 2/23/07 (unpublished)	37
<i>Jackson v Saginaw Company</i> , 458 Mich 141; 580 NW2d 870 (1998)	43
<i>King v Nicholson Transit Company</i> , 329 Mich 586; 46 NW2d 389, <i>cert den</i> 342 US 886; 72 S Ct 176; 96 L Ed 665 (1951)	38
<i>Leader v Leader</i> , 73 Mich App 276; 251 NW2d 288 (1977)	30

<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999)	22
<i>Nguyen v Professional Code Inspections of Michigan, Inc.</i> , 472 Mich 885; 695 NW2d 66 (2005)	31,34, 40,42,43
<i>Rednour v Hastings Mutual Insurance Company</i> , 468 Mich 241; 661 NW2d 562 (2003)	26
<i>Rohlman v Hawkeye-Security Insurance Company</i> , 442 Mich 520; 502 NW2d 310 (1993)	26
<i>Scott v Boyne City, Gaylord & Alpena Railroad Company</i> , 169 Mich 265; 135 NW 110 (1912)	38
<i>Skinner v Square D Company</i> , 445 Mich 153; 516 NW2d 475 (1994), <i>reh den</i> 445 Mich 1233 (1994)	34,35,38
<i>Stanton v City of Battle Creek</i> 466 Mich 611; 647 NW2d 508 (2002)	43
<i>West v General Motors Corporation</i> , 469 Mich 177; 665 NW2d 468 (2003), <i>reh den</i> 668 NW2d 911 (2003)	43
<i>Williams v State Farm Mutual Automobile Insurance Company</i> , 202 Mich App 491; 509 NW2d 821 (1993)	21,27,30 35,36
<i>Workman v Detroit Automobile Inter-Insurance Exchange</i> , 404 Mich 477; 274 NW2d 554 (1979)	27,30, 35,43,45

Statutes:

MCL 500.3101(1)	25
MCL 500.3103(2)	26
MCL 500.3113(a)	45
MCL 500.3113(c)	45
MCL 500.3114(1)	25-27,33, 39,42,43, 45

MCL 500.3114(2)	25
MCL 500.3114(3)	25

Court Rules:

MCR 2.116(C)(10)	1,18,24, 40,41
MCR 2.116(G)(5)	22
MCR 7.203(A) <i>et seq.</i>	20
MCR 7.205 <i>et seq.</i>	1
MCR 7.215(J) <i>et seq.</i>	31,32
MCR 7.215(J)(1)	31
MCR 7.302 <i>et seq.</i>	2,23
MCR 7.302(B)	23
MCR 7.302(B) <i>et seq.</i>	2,23,46
MCR 7.302(B)(1)	23
MCR 7.302(B)(2)	23
MCR 7.302(B)(3)	2,23
MCR 7.302(B)(5)	2,23

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This matter arises from a single-vehicle accident in North Carolina in 2003 wherein an Arkansas resident, with decidedly tenuous ties to Michigan, was seriously injured. The Michigan guardian, Plaintiff/Counter-Defendant/Appellee Lori Calderon (hereinafter referred to as Plaintiff), of the Arkansas resident sought and for a time received Michigan no-fault insurance benefits from the Defendant/Counter-Plaintiff/Appellant Auto-Owners Insurance Company (Auto-Owners) for the care of the Arkansas resident. After Auto-Owners determined the Arkansas resident did not qualify for Michigan no-fault benefits, it stopped providing them. Plaintiff, later joined by Intervening Plaintiff-Appellee Functional Recovery, Inc. (Functional; Functional and Plaintiff will be collectively referred to as Plaintiffs), sued Auto-Owners. Auto-Owners counterclaimed against Plaintiff for the no-fault benefits that had been improperly paid on behalf of Plaintiff's ward.

In due course, Auto-Owners sought and received summary disposition from the trial court, the Honorable John A. Murphy of the Wayne County Circuit Court (Judge Murphy), on the basis of MCR 2.116(C)(10), no material issue of fact in dispute between the parties, the court may determine the rights of the parties as a matter of law. Judge Murphy concluded that no reasonable juror could find that Plaintiff's ward resided with a Michigan resident at the time of the North Carolina accident. Please see Exhibits A and B in the Appendix to this Application.

Plaintiffs sought interlocutory review of Judge Murphy's decision pursuant to the provisions of MCR 7.205 *et seq.* The Court of Appeals declined to consider the matter, however. Please see Exhibit C in the Appendix.

Auto-Owners eventually dropped (that is, dismissed with prejudice) its counterclaim against Plaintiff, thus allowing the case to be closed in the trial court. Immediately thereafter,

Plaintiffs pursued an appeal as of right of Judge Murphy's July 30, 2007 Order (Exhibit B in the Appendix) granting Auto-Owners summary disposition as to Plaintiffs' claims against it.

Plaintiffs' appeal was duly briefed and argued before the Court of Appeals. On March 24, 2004, the Court of Appeals, the Honorable Pat M. Donofrio (Judge Donofrio), the Honorable Kirsten Frank Kelly (Judge Frank Kelly), and the Honorable Jane M. Beckering (Judge Beckering), reversed Judge Murphy and remanded the case to him for trial on the issue of Plaintiff's ward's domicile at the time of the North Carolina accident. Please see Exhibit D in the Appendix. The Court of Appeals believed there was a fact question on the matter, despite the ward's several different residences in Michigan, his lengthy stay in Arkansas, and the fact that he was returning to the place he was staying at in North Carolina at the time of the accident.

MCR 7.302 *et seq.* allows parties to apply for leave to appeal a decision of the Court of Appeals to this Honorable Supreme Court, provided that: (1) the Application for Leave to Appeal is filed within 42 days of the date of the decision and opinion of the Court of Appeals; and (2) meets one or more of six enumerated criteria listed in MCR 7.302(B) *et seq.*

It is anticipated that the instant Application for Leave to Appeal will be filed with the Clerk of the Supreme Court on or before May 5, 2009, May 5, 2009 being the 42nd day after the date of the March 24, 2009 decision and opinion of the Court of Appeals. As will be explained more fully *infra*, Auto-Owners' Application meets both the criteria spelled out MCR 7.302(B)(3) and MCR 7.302(B)(5) for the granting of applications for leave to appeal. Accordingly, the Application is properly within the jurisdiction of this Supreme Court.

STATEMENT OF THE QUESTION PRESENTED

Should the Supreme Court grant leave and review a decision of the Court of Appeals that reversed summary disposition for a defendant on the grounds there were questions of fact over whether a person resided with his grandmother in Michigan at the time of a motor vehicle accident when it was undisputed that:

- *the person had lived at a number of different addresses in Michigan, only occasionally staying with his grandmother;*
- *the person was married and had moved to Arkansas with his wife and stepchildren;*
- *the person had gone to North Carolina to see a friend and inquire about a job, and was involved in a motor vehicle accident on the way back to the place he was staying at in North Carolina;*
- *the only testimony that the person intended to return to Michigan and reside with his grandmother was based on guess, conjecture and speculation by those who had no direct knowledge of the person's intentions; and*
- *where resolution of the issue of what minimum evidence must be presented on the issue of a person's residency for no-fault benefits is a matter of continuing and substantial public interest and of major significance to the jurisprudence of the State of Michigan?*

Plaintiff would presumably contend that the answer to the question should be "No."

Auto-Owners respectfully suggests to this Honorable Supreme Court that the answer to the question should be "Yes."

The trial court, Judge Murphy, was not asked the question.

The Court of Appeals, Judges Donofrio, Frank Kelly and Beckering, was not asked the question.

STATEMENT OF FACTS

Plaintiff's ward, Arthur Krumm (Mr. Krumm), was one of three passengers in a car driven by Krystal Tyner (Ms. Tyner) in North Carolina early in the morning of May 16, 2003. The vehicle was involved in a single vehicle automobile accident. Mr. Krumm allegedly sustained a closed head injury in the accident. Mr. Krumm did not have automobile insurance at the time of this incident, and Ms. Tyner's insurance policy, issued outside Michigan, was not a no-fault policy.

Mr. Krumm had not lived in Michigan for many months prior to the 2003 accident. However, both Plaintiff, Mr. Krumm's sister, and his grandmother, Beverly Krumm (Mrs. Krumm) resided in Michigan at the time of the accident. Mrs. Krumm was insured for Michigan no-fault benefits by Auto-Owners at the time of Mr. Krumm's accident in North Carolina.

In due course, Mr. Krumm was moved to Michigan and Plaintiff was appointed his legal guardian. Plaintiff demanded that Auto-Owners provide Mr. Krumm with the full panoply of Michigan no-fault benefits for the injuries he received in North Carolina, including substantial attendant care payments to Plaintiff.

Under the terms of Mrs. Krumm's Auto-Owners policy, as well as MCL 500.3114 *et seq.*, Mr. Krumm was covered for Michigan no-fault benefits if and only if he was a relative of Mrs. Krumm domiciled in the same household as Mrs. Krumm at the time of an injury-causing motor vehicle accident. Auto-Owners initially accepted Plaintiff's representations that Mr. Krumm was a relative residing with Mrs. Krumm at the time of the North Carolina accident. Auto-Owners later concluded that Plaintiff had misrepresented Mr. Krumm's residence at the time of the accident.

Shortly after Auto-Owners determined that Plaintiff had misrepresented Mr. Krumm's residence, Plaintiff filed the above-entitled cause of action against Auto-Owners. Auto-Owners countersued for the no-fault payments it paid out before it discovered that, contrary to Plaintiff's assertions, Mr. Krumm had not been a resident of Mrs. Krumm's household at the time of the accident. Functional joined the lawsuit as Intervening Plaintiff, maintaining that it was entitled to payments for certain therapy and care it had allegedly provided Mr. Krumm.

There was extensive discovery in the case, including many depositions. While Mr. Krumm did, from time to time, stay at Mrs. Krumm's home in Michigan, it was clear he was most definitely not living there at the time of the accident in North Carolina and had not lived there for at least 13 months. Please see Exhibit E in the Appendix to this Brief, the transcript of Mrs. Krumm's deposition, pages 16 and 17.

Occasionally, Mr. Krumm would return to his grandmother's home looking for a place to stay, but for the most part, he was an independent man. Mr. Krumm's numerous police reports indicate where Mr. Krumm was living and when, and all show that he was not residing with Mrs. Krumm for a very long period of time before the accident.

- 2/4/1999: Mr. Krumm was involved in a domestic incident at 1723 Birby Road in Fife Lake, Michigan (Mr. Krumm did **not** give his residence as Mrs. Krumm's house) (please see Exhibit F in the Appendix)
- 1/4/2001: Mr. Krumm filed a complaint against a Tonya Barber (Ms. Barber) and did **not** give Mrs. Krumm's address as his address (Exhibit F)
- 4/26/2001: Mr. Krumm was involved in a civil dispute with Ms. Barber at a Kalkaska, Michigan bar and did not give Mrs. Krumm's address as his address (Exhibit F)
- 11/21/2001: Mr. Krumm was apprehended by the authorities after a foot chase near Grand Kal and Lund Roads near Fife Lake, Michigan and did **not** give Mrs. Krumm's address as his address (Exhibit F)

- 1/23/2002: Mr. Krumm was cited for open intoxication at Puffer Road and West Sharon Road near Fife Lake, Michigan and did **not** give Mrs. Krumm's address as his address (Exhibit F)
- 1/31/2002: Mr. Krumm was a witness to an incident that occurred at 10676 Grand Kal Road in Fife Lake, Michigan and did **not** give Mrs. Krumm's address as his address (Exhibit F)
- 2/22/2002: Mr. Krumm was involved in a fight at the Taffletown Bar in Kalkaska, Michigan and did **not** give Mrs. Krumm's address as his address (Exhibit F)
- 4/22/2002: Mr. Krumm was arrested for assault at 10676 Grand Kal Road in Fife Lake, Michigan and did **not** give Mrs. Krumm's address as his address (Exhibit F)

Mr. Krumm began a relationship with Ms. Barber in 1993.

- Q. And you met [Mr. Krumm] where?
- A. In Kalkaska County.
- Q. Would this be, you say, after that. Do you actually mean after 1993 or would it have been in –
- A. It was '93....

Please see Exhibit G in the Appendix to this Brief, the transcript of the deposition of Ms. Barber, page 12.

Mr. Krumm and Ms. Barber moved in with one another. Their first home together was a trailer on Thomas Road in Fife Lake, Michigan. They lived there together as boyfriend and girlfriend for about three months before they ran out of money for rent.

- Q. How long did you and [Mr. Krumm] stay, reside, occupy the Thomas Road trailer?
- A. About three months.

Exhibit G in the Appendix, page 30.

Mr. Krumm was wanted by the police, who were searching for him based upon a drunk driving arrest warrant. The couple (that is, Mr. Krumm and Ms. Barber) moved to North Carolina together.

Q. When you left Thomas Road, why did you leave?

A. Because [Mr. Krumm] was running from the police.

Q. What was he running for at the time? What did they want him for, perhaps would be a better way to ask.

A. Drunk driving.

Q. Anything else?

A. He was wanted for breaking and entering. They hadn't arrested him for it but he kind of thought they were looking for him for it, and so, once again, we had left and went to – I mean, whenever he thought he was in trouble, he wanted to run so we left and went to North Carolina.

Exhibit G in the Appendix, page 35.

After moving to North Carolina, Mr. Krumm took a job with Ms. Barber's ex-husband, Scott Barber (Mr. Barber), as a roofer. Mr. Krumm and Ms. Barber¹ married after they moved to North Carolina, on April 25, 1997. Please see Exhibit H in the Appendix to this Brief, a photocopy² of a certified copy of a North Carolina marriage license establishing both Mr. Krumm's marriage to Ms. Barber in 1997 and Mr. Krumm's residence at that time as being

¹ To avoid confusion with Mrs. Krumm, Mr. Krumm's grandmother, Ms. Barber will continue to be referred to as Ms. Barber throughout this Brief despite her marriage to Mr. Krumm in North Carolina in 1997.

² Auto-Owners will file the certified copy of the marriage license with the Supreme Court immediately upon that forum's request.

in Walkertown, North Carolina. Plaintiffs never came forward with any testimony or other evidence that Exhibit H was false, fraudulent or incorrect.

Mr. Krumm was pulled over for speeding and driving without a license by the North Carolina public safety authorities. The authorities discovered the outstanding arrest warrant against Mr. Krumm in Michigan and took him into custody.

Q. So, indeed, the police were looking for him?

A. Yeah. That was why we left Michigan.

Q. They found him in the Carolinas or North Carolina.

A. Uh huh.

Q. What did he get arrested for down there?

A. He was driving a car and got pulled over.

Q. And they got him without a lawful license or without any license or drunk or what? Why was he –

A. He was driving – he was speeding.

Please see Exhibit G in the Appendix, page 39.

After spending 90 days in a Winston-Salem, North Carolina jail, Mr. Krumm was extradited to Michigan. Ms. Barber (now Mr. Krumm's wife) followed him back to Fife Lake, Michigan, getting an apartment near the jail in Kalkaska, Michigan where Mr. Krumm was being held. Later, after Mr. Krumm was released from jail, he and Ms. Barber moved in with Mrs. Krumm.

Q. You come back, he's in jail for about a year or he's in a halfway house or he's in some sort of rehab and by the time he gets out, a year has gone by –

A. Right.

Q. -- from his return? And now you and he are residing with [Mrs.] Krumm?

A. • Right.

Q. How long after -- how long do you and he stay at his grandmother's house?

A. We're there for a year or so...

Please see Exhibit G, page 44.

Mr. Krumm and his wife, Ms. Barber, stayed at various apartments, rental houses, and cottages for three and four months at a time after leaving Mrs. Krumm. The primary reason for the frequent change of residence was a continuing inability to pay the rent.

Q. Is there a reason why you stayed at these places for such a short time?

A. Because Artie is the one that brought the money in and -- I was in an accident myself and, you know, I didn't work. He brought the money in and I got what was leftover out of the paychecks, you know, and so, what bills got paid was what bills go [*sic*] paid, you know.

Q. Are you saying that you'd leave because you're not paying your rent and you'd have to leave because you were being evicted or made to leave?

A. Pretty much.

Please see Exhibit G, pages 47 and 48.

Mr. Krumm and Ms. Barber did sporadically go back to Mrs. Krumm's house, but never stayed very long because Ms. Barber and Mrs. Krumm did not get along.

Q. After Birgy? When you lost that, you moved back to his grandma's?

- A. We went back to his grandma's house and his grandma and I had got into a little, kind of a little spat, which happened frequently. Archie and Karen, which is his brother –

Exhibit G, pages 60 and 61.

Mr. Krumm allegedly had an affair with a Tiffany Darling (Ms. Darling) for a short while. After the affair, Mr. Krumm and Ms. Barber rented and moved into a house on Grand Kal Road in Kalkaska County, Michigan. Exhibit G, pages 50 and 64. The numerous police reports during this period also identify Mr. Krumm's residence at being in Kalkaska County at the house on Grand Kal.

The relationship and residences of Mr. Krumm and Ms. Barber were further substantiated by the testimony of Crystal Silva (Ms. Silva), Ms. Barber's daughter.

- Q. Okay. So you're living in South Boardman [*i.e.*, **not** Mrs. Krumm's home], you return from your father's home, and at that point in time Artie [Mr. Krumm] and your mom and the children, your brothers and sisters, are a family unit, so to speak, in this home; correct?

- A. Correct.

Please see Exhibit I in the Appendix to this Brief, the transcript of the deposition of Ms. Silva, page 47.

Mr. Krumm and Ms. Barber decided to move to Arkansas in April, 2002 because Mr. Krumm was again hiding from the police. When they initially moved to Arkansas, Mr. Krumm made the move alone because the couple was not able to afford their own place in Arkansas right away. Ms. Barber later followed Mr. Krumm to Arkansas after Mr. Krumm obtained enough money to allow both of them to live in Arkansas.

- Q. Okay. And you moved into a hotel?

A. Yeah.

Q. With your husband?

A. Yeah.

Q. For what length of time?

A. We were there for, I don't know, two or three weeks.

Q. Do you remember where?

A. At the Chief Hotel.

Q. Chief?

A. I think that's how you spell it.

Q. C-H-I-E-F Hotel?

A. Yeah.

Q. Did they have efficiency apartments there? I mean, were these the kind of accommodations you could afford? Was it like an apartment? Just a room?

A. Just a room.

Q. A place to sleep?

A. A place to sleep.

Q. He's working. Is he working daily?

A. Yeah.

Q. So he's now been down here, when you move out of that hotel, for something on the order of six or seven weeks altogether; correct?

A. Yeah, I think about five or six weeks.

Q. And during the time that he was here and you were in Michigan, did he ever come back to visit you?

A. No, I was waiting to come here.

- Q. What were you waiting for, incidentally?
- A. Why I was waiting to come here?
- Q. Yeah. What were you waiting for? Why didn't you go with him?
- A. Because he was in trouble.
- Q. Explain to me how that would stop you from traveling with him to Arkansas.
- A. Because I didn't want to come down and stay at Ron's house.
- Q. Ron?
- A. Ron Dake [Mr. Dake or Mr. Drake], yeah. I was waiting to get money to come and stay at a hotel or do, you know.

Please see Exhibit G in the Appendix, pages 66 and 67.

After Mr. Krumm moved to Arkansas in April of 2002, he opened a bank account with Arvest Bank using Mr. Dake's [Drake's] address, 109 North School Street, Apartment 7, Fayetteville, Arkansas as his residence address. Please see Exhibit J in the Appendix, Mr. Krumm's deposit agreement with the Bank. Mr. Krumm's Forest Area Credit Union account in Michigan was declared dormant in July of 2002, and the Credit Union began assessing penalty fees against the \$10.00 balance he had with the Credit Union. Please see Exhibit K in the Appendix, the third quarter of 2002 statement of Mr. Krumm's account with the Credit Union.

Ms. Barber joined Mr. Krumm in Arkansas in August of 2002.

- Q. And this is in September of '02, August of '02, something like that? I'm not putting words in your mouth. I don't want to.
- A. Right.
- Q. When do you recall coming, leaving your sister's and coming to Arkansas?

A. In like in August. It was about August.

Q. Okay. We're talking '02?

A. Right.

Please see Exhibit G in the Appendix, pages 64 to 65.

Initially, the couple stayed in motels or hotels. Later, however, they were able to move to a house at 2123 North Pump Station Road in Fayetteville, Arkansas.

Mr. Krumm had been working regularly, so the couple had money to stay in hotels on a weekly basis.

Q. Okay. Where do you take up residence down here when you come down here?

A. In a hotel.

Q. Do you move in with Arthur or do you not?

A. We were in a hotel.

* * *

Q. So you and he are now living down here, in any case?

A. Right.

Q. When you move out of the hotel, where do you go?

A. We rented a place.

Q. Where?

A. Over on Pump Station Road.

Q. Yeah. Right. I do have records indicating you stayed on Pump Station and I gather that you didn't stay at more than one address on Pump Station. Am I safe in – what was your address on Pump Station?

A. 2123.

Q. 2123 North Pump Station? Is that correct? Yes?

A. Yes.

Please see Exhibit G in the Appendix, pages 65 and 77.

In September, Mr. Krumm filed a change of address form at Arvest Bank identifying the Pump Station Road address as his new address. Please see Exhibit L in the Appendix. This is consistent with Mr. Krumm's numerous police and court records, which show him using Mr. Dake's [Drake's] address in Arkansas as his place of residence during the summer of 2002 and later changing over to the Pump Station address.

Mr. Krumm was arrested and booked by the Fayetteville Police Department on October 5 and December 18, 2002 and again on April 26, 2003. Please see Exhibit M in the Appendix, Mr. Krumm's Adult Profile Sheet. He was cited by the local public safety authorities for reckless driving on October 27, 2002 and gave as his address 2123 North Pump Station Road. He was present at 2123 North Pump Station Road when a fire occurred there on December 3, 2002. Please see Exhibit N in the Appendix, a Fire Investigation Report by the Springdale Fire Department.

Mr. Krumm was also present at 2123 Pump Station Road when his friend, Larry Corbitt (Mr. Corbitt), was accused of fondling one of Mr. Krumm's stepdaughters and the local police were called to the Pump Station Road address. Please see Exhibit O in the Appendix, an Offense Report on the incident.

Mr. Krumm wrote a series of bad checks on his Arkansas bank account during December of 2002. That led to a warrant for his arrest. He voluntarily turned himself in on March 14, 2003. Please see Exhibit P in the Appendix, an Arrest Report for Mr. Krumm.

In each of his many encounters with Arkansas public safety authorities, Mr. Krumm identified himself as an **Arkansas resident** with an **Arkansas address**. He **always** provided a **local Arkansas address**. Mr. Krumm represented himself to be a **resident of Arkansas** and living with Ms. Barber, his lawfully wedded wife, and his stepchildren **in Arkansas**. He even went so far in terms of domestication in **Arkansas** as contracting with Waste Management to collect garbage at his Pump Station Road home. Please see Exhibit Q in the Appendix, Waste Management records.

Mr. Krumm consistently represented to everyone that he was an **Arkansas** resident. When the police were called to the house in Springdale (that is, the Pump Station Road house) to investigate a domestic violence complaint, the accounts given by the police officers leave no doubt as to Mr. Krumm's residence in Arkansas and his intent to remain in that state.

...I then asked Arthur [Mr. Krumm] what had happened. Arthur became very belligerent, and stated, "She was being a bitch." I then asked Arthur what had caused the argument, and how she was being a "bitch." Arthur stated, "Because she's Tonya [Ms. Barber]." I continued to try to find out from Arthur what had happened, when Arthur told me that this was his house, and he paid the bills here. I informed Arthur that I knew that. At this time Ofc. Coggin #353, and Ofc. Hudson #316 had arrived on the scene. Arthur then told me that I had no right to be at his house.

Please see Exhibit R in the Appendix, the statement of Officer Chatfield.

The following excerpt of Officer Chatfield's statement transcript contains a vulgar word, repeated several times, and this writer apologizes to the Supreme Court, the Justices and staff, for its presentation here. Unfortunately, it is part of the record.

...I walked outside with Officer Chatfield and advised him that we did have probable cause to arrest Arthur [Mr. Krumm] for Domestic Assault. Arthur was telling Officer Chatfield that we had no right coming into his house like this. Arthur also stated, "I pay the fucking bills, I make the fucking money in this

house, and I haven't done a fucking thing wrong!" Arthur was being very belligerent and disrespectful to Officer Chatfield. Officer Chatfield then went into the house to speak with Tonya about the situation again. When Officer Chatfield went into the house Arthur started in on me stating, "you mother fuckers are wrong, this is my fucking house and she is being a fucking bitch, I have not layed [sic] a fucking hand on her!" I advised Arthur that I [sic] he needed to calm down right then and not become belligerent anymore. Arthur replied to my request by stating, "this is my fucking house!" Arthur seemed to have a control problem because we were at his house investigating a disturbance. I could tell that Arthur was a controlling person because of his continuance statements about everything being "his." I advised Arthur he needed to calm down again, once again he only replied with foul language remarks. At this point in time Arthur was getting very disorderly with myself. I then told Arthur that we were investigating a disturbance and he was interfering and becoming disorderly. Arthur stated, "oh fuck you, this is my house!"

Please see Exhibit S in the Appendix, the statement of Officer Coggin.

Mr. Krumm and Ms. Barber, husband and wife, were evicted from the Pump Station Road house in April of 2003. However, shortly before the actual eviction, Mr. Krumm moved out and began living with a Janice Stunkel (Ms. Stunkel) elsewhere in Arkansas. He was living with her when he announced plans to move to North Carolina.

Q: And when Artie [Mr. Krumm] was having some difficulties [with his wife, Ms. Barber], was it unusual for him to call you?

A: Oh, no. Not at all.

Q: Did there come a time when you knew that Artie was going **to be moving to North Carolina**? [Emphasis added.]

A: Yes.

Q: Was Artie living with you at that time when you learned this?

A: Yes. Yes, he was.

Please see Exhibit T in the Appendix, the transcript of the deposition of Ms. Stunkel, page 5.

Mr. Krumm planned to work for Ms. Barber's former husband when he got to North Carolina. A friend, Krystal Tyner (Ms. Tyner), drove Mr. Krumm and one of his stepdaughters from Fayetteville, Arkansas to Winston-Salem, North Carolina. Please see Exhibit U, the transcript of Ms. Tyner's deposition, pages 16 through 20.

A few days before the accident that gave rise to this litigation, Mr. Krumm telephoned from North Carolina to Ms. Stunkel in Arkansas to tell her that things had not worked out in North Carolina and that he was returning to Arkansas.

Q: And he called your house and you answered the phone?

A: Uh-huh.

Q: And can you tell me how that conversation went?

A: He said that...he had been drinking...and he said that he was coming home. And I'm assuming Arkansas because he wouldn't call me to tell me he was going to Michigan.

Please see Exhibit T in the Appendix, page 8.

A few days later, Mr. Krumm was injured while riding in Ms. Tyner's vehicle in North Carolina. Ms. Tyner, Mr. Krumm and two others had gone out to dinner and drinking and were returning to the Tyner home when the accident happened. Mr. Krumm was **not** on his way to Michigan at the time of the accident. Specifically, he was on his way from one location in North Carolina to another location where he was staying—residing—while in North Carolina. Exhibit U in the Appendix, pages 22 through 25.

Discovery turned up nothing that suggested that Mr. Krumm lived at Mrs. Krumm's house in either 2002 or 2003. At most, he may have made a visit to Mrs. Krumm's home at some point in 2003, but then returned to Arkansas. Some witnesses opined that they thought

Mr. Krumm might return to Michigan at some point, but at the time of the accident he was in North Carolina and was returning to a friend's North Carolina home. *Id.*

After discovery was completed, Auto-Owners moved for summary disposition in its favor on the basis of MCR 2.116(C)(10). The Motion was limited to Plaintiffs' claims against Auto-Owners, and did not address Auto-Owners' counterclaim against Plaintiff for no-fault payments made on the basis of Plaintiff's false information. As explained *supra*, that portion of the above-entitled cause of action was subsequently dismissed with prejudice by agreement of the parties.

The Auto-Owners Motion was supported by the exhibits in the Appendix to this Application. Plaintiff opposed the Motion, and presented the following exhibits³.

- A statement by Mr. Barber that he "took it" that Mr. Krumm was coming to North Carolina from Arkansas to go "home" to Michigan.
- A statement by Mrs. Krumm that at one point she had told Mr. Krumm, Ms. Barber and her children (that is, Ms. Barber's children) to "get out" of her (Mrs. Krumm's) home. How this was consistent with Mr. Krumm being domiciled with Mrs. Krumm, the putative Auto-Owners insured, was never explained by Plaintiffs.
- A statement by William Duhaime (Mr. Duhaime) that he thought Mr. Krumm had made one trip back to Michigan while living in Arkansas.
- A statement by Lawrence Albert Corbitt (Mr. Corbitt) that he thought Mr. Krumm might have gone back to Michigan once or twice while he was living in Arkansas. It was his "understanding" that Mr. Krumm planned on returning to Michigan at some point.
- A statement by Ms. Tyner that Mr. Krumm wanted to visit her in North Carolina before "he went back home to Michigan."
- Medical records on Mr. Krumm. Plaintiffs never explained how these records were at all relevant to whether Mr. Krumm resided with his

³ The exhibits listed here should be part of the file transmitted to the Court of Appeals by the Wayne County Circuit Court and therefore part of the file transmitted to this Supreme Court by the Court of Appeals.

grandmother at the time of the North Carolina accident for the purpose of receiving Michigan no-fault benefits.

- An Affidavit from Plaintiff that it was her belief that Mr. Krumm was “domiciled with and living with” Mrs. Krumm at the time of the 2003 accident. Plaintiff did not explain how this could be the case when Mr. Krumm and Ms. Barber were lawful husband and wife, had lived together at two or more addresses in Arkansas for several months, and Mrs. Krumm had made it very clear that Ms. Barber, Mr. Krumm’s wife, was **not** welcome in Mrs. Krumm’s home.
- A statement by Superior Investigating Services to the effect that Plaintiff had said that as far as she knew Mr. Krumm was residing with Mrs. Krumm at the time of the 2003 accident.
- The transcript of Plaintiff’s deposition, in which she said it was her “understanding” that Mr. Krumm lived in Michigan, had gone to North Carolina for a vacation, and planned on returning to Michigan. There was unrefuted testimony that Mr. Krumm had lived continuously in Arkansas for several months prior to his trip to North Carolina.
- An extract of Ms. Barber’s deposition, where she confirmed that she and Mr. Krumm were married in Winston-Salem, North Carolina in 1997. It was her understanding that Mr. Krumm planned to return to Michigan at some point.
- A set of eight different letters or envelopes addressed to Mr. Krumm at Mrs. Krumm’s house, only three of which are dated and their dates are all **well after** the 2003 accident.
- What appeared to be a State of Michigan Identification Card for Mr. Krumm expiring in 2005 and listing Mrs. Krumm’s address. It is not known when the card was issued. Mr. Krumm’s accident occurred in 2003.
- An unidentified document apparently pulled from the internet listing various addresses for Mr. Krumm and in two instances showing multiple addresses at the same time.
- A series of police reports involving Mr. Krumm directly or indirectly. The most recent one, dated 4/22/02, listed Mr. Krumm’s address as being on Grand Kal Road in Fife Lake, Michigan. A 2/4/02 report used Mrs. Krumm’s address, as did a 1/31/2002 report. Mr. Krumm’s North Carolina accident was on May 16, 2003 (that is 5/16/03).

- Paperwork related to the eviction of Ms. Barber (identified as “Tonya Lynn Krumm”) from property in Arkansas.
- An assortment of documents pertaining to Mr. Krumm’s account with the Arvest Bank in Fayetteville, Arkansas. **Not one** of the documents gave or referred to Mrs. Krumm’s address in Michigan. •
- An extract of Krystal Silva’s (Ms. Silva) deposition where she stated that she did not know where Mr. Krumm lived.

Functional joined with Plaintiff in opposing the Auto-Owners Motion, adopting Plaintiff’s Answer and Brief in Support of Answer as its own Answer and Brief.

The Auto-Owners Motion for Summary Disposition was argued before Judge Murphy on July 20, 2007. Judge Murphy concluded that no reasonable finder of fact could conclude that Mr. Krumm had been a resident relative of Mrs. Krumm at the time of the accident. He noted there was testimony that Mr. Krumm may have been briefly seen in Michigan between the time he left for Arkansas and the time of the accident in North Carolina, but that “presence” did not amount to “residence.” Please see Exhibit A in the Appendix.

An Order implementing Judge Murphy’s decision was entered on July 30, 2007. Please see Exhibit B in the Appendix. It was not a final order within the meaning of MCR 7.203(A) *et seq.* because Auto-Owners’ counter-complaint against Plaintiff for past no-fault benefits paid on the basis of Plaintiff’s either false or incorrect assertions that Mr. Krumm was a resident relative of Mrs. Krumm at the time of 2003 accident remained outstanding.

Plaintiffs filed an Application for Leave to Appeal Judge Murphy’s July 30, 2007 Order granting Auto-Owners Motion for Summary Disposition with this Honorable Court of Appeals on August 16, 2007, along with a Motion for Immediate Consideration of the Application. While the Motion was granted, Plaintiffs’ Application was denied by the Judge Frank Kelly, the

Honorable Brian Zahra (Judge Zahra) and the Honorable Christopher Murray (Judge Murray) on September 24, 2007. Please see Exhibit C in the Appendix.

Auto-Owners subsequently dismissed its counter-claim against Plaintiff without prejudice. Plaintiffs sought to appeal Judge Murphy's July 30, 2007 Order to the Court of Appeals by right. The Court of Appeals rejected Plaintiffs' claim of appeal on November 21, 2007, holding that the dismissal of the Auto-Owners counter-claim without prejudice was not a final order for the purposes of an appeal as of right.

Plaintiff and Auto-Owners subsequently agreed to a dismissal of the Auto-Owners counter-claim with prejudice. Plaintiffs' appeal as of right to the Court of Appeals followed, with appellate briefing being completed by all parties in 2008 and oral argument being heard by Judges Donofrio, Frank Kelly and Beckering on March 11, 2009.

On March 24, 2009, the Court of Appeals issued an unpublished, *per curiam* decision and opinion which reversed Judge Murphy's Order granting Auto-Owners' Motion for Summary Disposition and remanded the case to Judge Murphy for a trial on the issue of Mr. Krumm's residency at the time of the accident in North Carolina. Please see Exhibit D in the Appendix. What Auto-Owners respectfully suggests is the *ratio decidendi* of the decision and opinion of the Court of Appeals is presented below for the convenience of this Supreme Court.

While it certainly appears that the trial court considered the *Williams* [v *State Farm Mutual Automobile Insurance Company*, 202 Mich App 491; 509 NW2d 821 (1993)] factors in deciding whether Krumm was domiciled with his grandmother at the time of this incident, it does not appear that it applied the correct standard in doing so. This is because, when weighing the evidence of intent [there was no "evidence" of intent, unless guess, conjecture and speculation constitutes "evidence"] provided together with evidence presented regarding other *Williams* factors (*i.e.*, the formality of the relationship between [Mr.] Krumm and his grandmother who was actually his adoptive mother [true], that [Mr. Krumm] had designated living space in his grandmother's house [true to some extent], he kept possessions at her home [childhood toys], [Mr.] Krumm had no other place

of lodging [incorrect], and that his mailing address and Michigan ID addresses were his grandmother's address [it was not clear when the ID was issued and what letters there were that were dated were dated **after** the May 16, 2003 accident in North Carolina]), when viewed in the light most favorable to plaintiff clearly created a genuine issue of material fact for the jury regarding whether [Mr.] Krumm was domiciled with his grandmother in Michigan. Again, the trial court was duty bound to review the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion, plaintiff. MCR 2.116(G)(5); *Maiden [v Rozwood]*, 461 Mich 109; 597 NW2d 817 (1999), *supra* at 120. The trial court did not do so, and instead, impermissibly usurped the role of the jury when it decided this factual question and issues of witness credibility as a matter of law.

Based on the record evidence, we conclude that a factual question was raised regarding [Mr.] Krumm's domicile at the time of the accident that precludes summary judgment [*sic*]. Thus, the trial court erred when it concluded that plaintiff had not shown there was a question of fact regarding whether [Mr.] Krumm was domiciled at his grandmother's house at the time of the accident. Accordingly, this case must be reversed and remanded for trial. *Bryant v Safeco Insurance Company*, 143 Mich App 743, 748; 372 NW2d 655 (1985).

After receiving the decision and opinion of the Court of Appeals, Auto-Owners prepared and filed the instant Application for Leave to Appeal the decision and opinion to this Honorable Supreme Court.

STANDARD OF REVIEW

Applications for leave to appeal filed with the Supreme Court are governed by, and implicitly reviewed in accordance with, MCR 7.302 *et seq.* MCR 7.302 *et seq.* lists four criteria for obtaining leave to appeal a decision of the Court of Appeals⁴. Only one of the four must be met in order to have leave granted.⁵

MCR 7.302(B)(3) provides that leave may be granted where the issue presented in the application involves legal principles of major significance to the state's jurisprudence. Auto-Owners respectfully suggests that the issue of domicile for the purposes of determining an individual's eligibility for Michigan no-fault benefits is, indeed, a legal principle not only of major significance to the state's jurisprudence, but one of continuing controversy. The case at bar provides a perfect vehicle for resolving conflicts, eliminating (or at least significantly reducing) confusion, and providing clear guidance on when an individual will and will not qualify for no-fault benefits to bench and bar alike.

MCR 7.302(B)(5) allows leave to be granted where the decision of the Court of Appeals is clearly erroneous, will cause material injustice, or the decision conflicts with other decisions of the Court of Appeals or with decisions of this Supreme Court. The use of the word "or" suggests that only one of the three—clear error, material injustice, or conflict with precedent—need be

⁴ Technically, only two of the six criteria listed under MCR 7.302(B) *et seq.* specifically mention the Court of Appeals, MCR 7.302(B)(3) and MCR 7.302(B)(5), but arguably MCR 7.302(B)(1) and MCR 7.302(B)(2) have application to the Court of Appeals in many instances, albeit not in the case at bar.

⁵ Auto-Owners understands that the Supreme Court is solely responsible for deciding whether any of the four criteria listed in MCR 7.302(B) pertaining to a decision of the Court of Appeals have been met by an applicant. Auto Owners further understands, and fully respects, that even if an application meets one or more of the criteria listed under MCR 7.302(B), the Supreme Court retains the right to exercise its discretion and not grant leave to appeal.

met, not all three, for leave to be granted. Auto-Owners will demonstrate *infra* that all three criteria are met with respect to its Application for Leave to Appeal.

The decision of the Court of Appeals that is the subject of the Auto-Owners Application for Leave to Appeal now before this Supreme Court reversed a decision of the trial court to grant Auto-Owners summary disposition on the basis of MCR 2.116(C)(10), no material issues of fact in dispute between the parties, the court may determine the rights of the parties as a matter of law. Decisions to grant or deny motions for summary disposition brought pursuant to MCR 2.116(C)(10) are reviewed on appeal *de novo*. *Citizens Insurance Company v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1985); see also *United Auto Workers v Civil Service Commission*, 223 Mich App 403, 405; 566 NW2d 57 (1997).

SECRET WARDLE

ARGUMENT

The Supreme Court should grant leave and review a decision of the Court of Appeals that reversed summary disposition for a defendant on the grounds there were questions of fact over whether a person resided with his grandmother in Michigan at the time of a motor vehicle accident when it was undisputed that:

- *the person had lived at a number of different addresses in Michigan, only occasionally staying with his grandmother;*
- *the person was married and had moved to Arkansas with his wife and stepchildren;*
- *the person had gone to North Carolina to see a friend and inquire about a job, and was involved in a motor vehicle accident on the way back to the place he was staying at in North Carolina;*
- *the only testimony that the person intended to return to Michigan and reside with his grandmother was based on guess, conjecture and speculation by those who had no direct knowledge of the person's intentions; and*
- *where resolution of the issue of what minimum evidence must be presented on the issue of a person's residency for no-fault benefits is a matter of continuing and substantial public interest and of major significance to the jurisprudence of the State of Michigan.*

I. MCL 500.3114(1) strictly limits those who may claim Michigan no-fault benefits.

Michigan was the first state in the Union to adopt a comprehensive no-fault law in 1972, which went into effect on October, 1, 1973. One provision of Michigan's no-fault law is that a relative of a person who has a Michigan no-fault insurance policy and is "domiciled" with that person is automatically covered for Michigan no-fault benefits. MCL 500.3114(1) provides:

Except as provided in subsections (2), (3), and (5) [MCL 500.3114(2), (3) and (5)], a personal protection insurance policy described in section MCL 500.3101(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. A personal injury insurance policy described in section 3103(2) [MCL 500.3103(2)] 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 motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer. [Emphasis added.]

The statute entitles a person to collect personal injury protection (commonly referred to as "PIP") or no-fault benefits from the insurance carrier of a relative **if and only if** the injured person is "domiciled" in the same household **at the time of the accident**.

A person's entitlement to PIP benefits is controlled by the language of the statute rather than the express provisions of the policy. *Rohlman v Hawkeye-Security Insurance Company*, 442 Mich 520, 533; 502 NW2d 310 (1993). The rules that normally govern the construction and interpretation of insurance policies, one of which requires that an insurance policy be construed against the policy drafter/insurer and another that any doubt as to coverage for a claim is to be resolved in favor of coverage, do not apply. *Rednour v Hastings Mutual Insurance Company*, 468 Mich 241, 251; 661 NW2d 562 (2003). Instead, courts are to concern themselves with giving full effect to the statutory language that controls the content of insurance policies. *Id.* The issue is not the language used in the Auto-Owners policy, but rather the language used in MCL 500.3114(1). If Mr. Krumm was not domiciled with his grandmother in Michigan at the time of the accident in North Carolina, Plaintiffs have no claim on Auto-Owners and that is all there is to it.

II. Factors used to determine domicile approved by Michigan appellate courts support Judge Murphy's holding that no reasonable juror could have concluded Mr. Krumm resided with his grandmother at the time of the accident.

The inquiry to be made regarding residency ("domicile") under MCL 500.3114(1) was first articulated by this Supreme Court in *Workman v Detroit Automobile Inter-Insurance Exchange*, 404 Mich 477, 496-497; 274 NW2d 554 (1979). The issue was further clarified by the Court of Appeals in *Dairyland Insurance Company v Auto-Owners Insurance Company*, 123 Mich App 675, 680-681; 333 NW2d 322 (1983) and a decade later in *Williams v State Farm Mutual Automobile Insurance Company*, 202 Mich App 491, 494-495; 509 NW2d 821 (1993).

Those factors are:

- (1) Subjective or declared intent of the person to remain at the contended residence permanently or for an undetermined amount of time;
- (2) Closeness of the person's relationship to other members of the household;
- (3) Place of residence is undivided as between the person seeking coverage and other household members;
- (4) Existence of other places of lodging or domicile;
- (5) The person's mailing address;
- (6) Location of personal possessions;
- (7) Use of the contended residence address for other purposes such as driver's license or tax documents;
- (8) Maintenance of a personal space for the person at the contended residence such as a bedroom; and
- (9) Whether the person is dependent upon the named insured for financial support.

These factors are to be applied to the point in time **when the accident occurred**—here, May 16, 2003. No one factor controls over the others. Additional factors may be applied when

determining the domicile of a child. *Fowler v Airborne Freight Corporation*, 254 Mich App 362, 364; 656 NW2d 856 (2002). This last point is not a consideration in the case at bar, as Mr. Krumm was chronologically an adult at the time of the 2003 accident.

In articulating the test for domicile for the purposes of entitlement to Michigan no-fault benefits, the *Dairyland* Court concluded as a matter of law that an adult child was no longer domiciled in his mother's house by relying upon the following facts:

At the time of the accident [the son] had not lived with his mother for six months and was not dependent upon her for support, he liked living in his grandfather's trailer and expected to continue to do so indefinitely, and he had no **precise** plans or expectations of returning to his mother's home. **Storage of some of his belongings at his mother's home, use of such home as a mailing address, and the knowledge that he could and would return to live with her if forced to do so by adverse circumstances, are insufficient to constitute him a member of his mother's household.**

Dairyland, at 684, emphasis added.

A nearly identical paragraph could be written to describe the paucity of Mr. Krumm's connections to Mrs. Krumm's household at the time of the accident—except that Mr. Krumm had been living out of state for **13 months**, or more than twice as long as the six months that was regarded as significant in *Dairyland*. Mr. Krumm was also living more than 750 miles from his grandmother's home in northern Michigan—the injured party in *Dairyland* was living less than 20 miles away from an address where domicile or residency was claimed for the purposes of Michigan PIP coverage. The injured party in *Dairyland* was also much younger than Mr. Krumm and not married.

Not to belabor the point, but the documentary evidence and witness testimony in the case at bar established that Mr. Krumm had not lived in Mrs. Krumm's house for more than a year prior to the 2003 accident. Mr. Krumm's absence of 13 months while living, working, and

socializing outside of Michigan does not permit a reasonable person to come to the conclusion that Mr. Krumm was domiciled at his grandmother's house in Michigan at the time of the accident in North Carolina. A disputed question of fact is not presented when the dispute must rely on evidence that is based on guess, conjecture and speculation and conclusions that require a suspension of logic.

Further, Mr. Krumm was supporting his own separate household, complete with a wife and young stepchildren, in Arkansas at the time of the accident. The father of Mr. Krumm's stepchildren, Mr. Barber, described Mr. Krumm as having taken very good care of his children. This speaks to the fact that Mr. Krumm had dependents he was maintaining **in Arkansas**—and **not** at Mrs. Krumm's house in Michigan, where Mr. Krumm's wife was, by the grandmother's own testimony, decidedly not welcome.

The day of the accident, Mr. Krumm called Arkansas from North Carolina to make arrangements to **return** to Arkansas and to stay at Ms. Stunkel's apartment when he returned to Arkansas from North Carolina. Irrespective of where Mr. Krumm *may* have been heading to at some point in the *indefinite future*, he had been living at Ms. Stunkel's apartment **before** traveling to North Carolina and he intended to go **back** to Ms. Stunkel's apartment when he returned to Arkansas. As explained *supra*, he was in transit from a dining and drinking emporium of some sort in North Carolina to where he was staying in North Carolina at the time of the accident. He was very definitely **not** heading toward Michigan at the time of the accident.

The fact that Mr. Krumm had possessions at Mrs. Krumm's house left over from his childhood and that he knew Mrs. Krumm would take him in again if he needed a place to stay (this is not an uncommon phenomenon among parents and grandparents) are insufficient to deem him a member of, and domiciled in, Mrs. Krumm's household. This is especially true when one

recalls that he had not lived at Mrs. Krumm's house for at least 13 months before the accident—and he had only stayed with her sporadically off and on for several years before that. Most everything Mr. Krumm had, except his childhood toys and other childhood possessions, fit into a duffle bag which, not surprisingly, traveled with him. *Id.*, at 684.

Further, during his 13 months in Arkansas, Mr. Krumm gave out his **Arkansas** address as **his** address—where he lived with his wife and his stepchildren—to the local public safety authorities, the bank where he established a checking account, and even the service that picked up garbage at his house. Mr. Krumm represented to police officers that he was a resident of Arkansas and “lord of the castle” at the Pump Station Road house in Arkansas in no uncertain terms as well. Given this, no reasonable person could conclude that Mr. Krumm was domiciled with Mrs. Krumm at the time of the accident, at least if the guidance in *Workman*, *Dairyland* and *Williams* is followed.

What is particularly significant is that the *Dairyland* Court acknowledged that “determination of domicile is a question of fact for trial court resolution,” citing *Leader v Leader*, 73 Mich App 276, 283; 251 NW2d 288 (1977). *Dairyland*, at 684. However, the Court of Appeals specifically held that the trial court had correctly ruled that the injured party was not domiciled with his mother. There is no reference to a trial *qua* trial in the *Dairyland* opinion, or of a jury. The opinion does not flatly state that the matter was resolved on a motion for summary judgment (the disposition occurred prior to the adoption of the Michigan Court Rules of 1985), but that is a reasonable inference given the other language in the opinion. As will be explained in more detail *infra*, there is no fact issue when no reasonable juror could accept the evidence on the matter. *Fundunburks v Capital Area Transportation Authority*, 481 Mich 873; 748 NW2d

804 (2008); see also *Harris v Rahman*, 474 Mich 1001; 708 NW2d 100 (2006) and *Nguyen v Professional Code Inspections of Michigan, Inc.*, 472 Mich 885; 695 NW2d 66 (2005).

Dairyland was decided in 1983 so is not controlling precedent on the Court of Appeals by operation of MCR 7.215(J)(1). However, *Fowler v Airborne Freight Corporation, supra*, was decided after October 31, 1990, in fact more than a decade after October 31, 1990, and so must be followed by all panels of the Court of Appeals. If a hearing panel of the Court of Appeals disagrees with the result and holding of *Fowler*, and would prefer not to follow it, the panel is obligated to following the procedure outlined in MCR 7.215(J) *et seq.* That was **not** done in the case at bar.

In *Fowler*, the plaintiff was seriously injured in a motor vehicle accident, but had no Michigan no-fault coverage of his own. He sought no-fault benefits from his parents' insurer. Discovery established that the plaintiff and his girlfriend lived in a carriage house on his parents' property, the carriage house being part of the curtilage. The parents had a key to the carriage house, and the plaintiff stored many of his possessions in his parents' house. The trial court ruled this was not enough, **as a matter of law**, to allow a finder of fact to reasonably conclude that the plaintiff was domiciled with his parents. The Court of Appeals, the Honorable Michael Smolenski (Judge Smolenski), joined by the Honorable Michael Talbot (Judge Talbot) and the Honorable Kurtis Wilder (Judge Wilder), **affirmed** the summary disposition granted the defendant insurer. Implicit in the ruling of the trial court and the affirmance of the ruling by the Court of Appeals was that no reasonable juror could have concluded that, under the circumstances established in discovery, the plaintiff was domiciled with his parents at the time of the accident.

SECRET WARDLE

In the case at bar, Plaintiff's ward had lived nearly continuously the better part of a thousand miles from Mrs. Krumm's Fife Lake, Michigan home for 13 months before his accident. Mrs. Krumm had no access at all to the various places he lived and/or stayed at in Arkansas and North Carolina. Regardless of whether the correct result was reached in *Fowler*, the Court of Appeals was obligated to follow it in deciding whether or not Judge Murphy erred in finding that no reasonable juror could conclude that Mr. Krumm was domiciled with his grandmother in northern Michigan after living with his wife and others in Arkansas for 13 continuous months at the time of the North Carolina accident.

Another particularly instructive case is *Hayes v State Farm Mutual Automobile Insurance Company*, Michigan Court of Appeals No. 264445, *rel'd* 2/23/2006 (unpublished), Exhibit V in the Appendix to this Application⁶. In *Hayes*, the Honorable Richard Bandstra (Judge Bandstra), the Honorable Helen White (Judge White) and the Honorable Karen Fort Hood (Judge Fort Hood), noted that the plaintiff was an adult who had no Michigan no-fault insurance of his own. His parents did have Michigan no-fault insurance. The plaintiff used his parents' residence as his mailing address, to store his possessions, and as a place to eat and stay at from time to time. The *Hayes* Court decided that summary judgment in favor of the defendant insurer was appropriate because, due to his rather nomadic lifestyle, the Plaintiff did **not** reside primarily with his parents.

Plaintiff would be a resident relative [of his parents] if he chiefly dwelled or lived with his parents, not if he used his parents' house as a storage locker and post office.

⁶ *Hayes* is cited for the persuasiveness of its reasoning, not as controlling precedent *per se*, in accordance with MCR 7.215 *et seq.* A copy of the decision and opinion in *Hayes* was included in the Appendix to Auto-Owners' Court of Appeals Appellee Brief.

The *Hayes* Court noted the plaintiff generally slept at a friend's house and was not often at his parents' home for any reason during the two months before the accident that triggered his need for Michigan no-fault benefits. The *Hayes* Court affirmed the decision of the trial court to grant the defendant insurer summary disposition on the basis that, as a matter of law, the plaintiff could not be considered to have been domiciled with his parents at the time of the motor vehicle accident that injured the plaintiff. In other words, no reasonable juror could have concluded that the plaintiff was domiciled with his parents at the time of the accident.

Auto-Owners' position in the case at bar is *far stronger* than was the position of the insurer in *Hayes*. Not only had Mr. Krumm been away from his grandmother's house for the 13 months before the 2003 accident (at most, he **may** have made a short trip back to Michigan where he might or might not have stayed for a night or two at his grandmother's), but he was living several states away from his grandmother's house, was married and had stepchildren in the state where he was living. If the trial court was correct in granting the *Hayes* defendant summary disposition (and Judges Bandstra, White and Fort Hood of the Court of Appeals all agreed that the trial court in *Hayes* was correct), it is very difficult to see how the decision of Judge Murphy to grant Auto-Owners' Motion for Summary Disposition based on Mr. Krumm's lack of domicile with his grandmother can be faulted.

All of the case law cited *supra* interpreting and applying MCL 500.3114(1) holds that domicile may be decided as a matter of law whenever the facts are such that no reasonable juror could conclude that, given the facts, a person was or was not domiciled with another at a particular point in time. These were the undisputed facts before Judge Murphy:

- A marriage certificate and direct, unrefuted testimony from Ms. Barber that she was married to Mr. Krumm for some years prior to, and at the time of, the 2003 accident. Plaintiff's testimony was **not** to the contrary—all Plaintiff really testified to was that she "thought" she would have been

notified when Mr. Krumm got married, and that as best she could recall she had not been so notified. So in order for a "reasonable juror" to believe that Ms. Barber and Mr. Krumm were not married, they would have to find that the certified marriage certificate from North Carolina was incorrect, forged, whatever, and that the only way Ms. Barber and Mr. Krumm could have been married is if Plaintiff had been advised of it and could not have forgotten about the notification.

- Unrefuted statements from neutral and disinterested public safety authorities that Mr. Krumm regarded the Pump Station Road house in Arkansas as his home.
- Unrefuted testimony that Mr. Krumm had resided continuously in Arkansas for more than a year prior to the accident, except possibly for one or two short visits to Michigan. He did take a trip of a week to two weeks to North Carolina at the end of his sojourn in Arkansas. However, he was **indisputably returning to Arkansas, not going to Michigan, from North Carolina** at the time of the accident.
- Unrefuted evidence that Mr. Krumm had an active bank account in Arkansas.
- Testimony from Plaintiff and others that it was their "understanding" that Mr. Krumm was planning on returning to Michigan and, despite being married to Ms. Barber and helping to care for her children (that is, Mr. Krumm's stepchildren), returning to live with his grandmother in Fife Lake at some point in the indefinite future.
- Mr. Krumm kept his childhood possessions at Mrs. Krumm's house in Fife Lake.
- Unrefuted police records which suggested that Mr. Krumm had what might charitably be called a nomadic lifestyle.

Judge Murphy came to the conclusion, as he was entitled to do under *Fundunburks v Capital Area Transportation Authority*, *supra*, *Harris v Rahman*, *supra*, and *Nguyen v Professional Code Inspections of Michigan, Inc.*, *supra*, that no reasonable juror could conclude that Mr. Krumm was domiciled in his grandmother's house in Fife Lake, Michigan at the time of the 2003 accident in North Carolina. There is no usurpation of the role of a jury when there is only one reasonable conclusion that can be drawn from the facts. See, generally, *Skinner v*

Square D Company, 445 Mich 153, 164-166; 516 NW2d 475 (1994), *reh den* 445 Mich 1233 (1994). Judge Murphy's determination meant that Auto-Owners had and has no duty to provide Mr. Krumm with any Michigan no-fault benefits, and summary disposition was properly granted to Auto-Owners.

III. *Williams v State Farm Mutual Automobile Insurance Company, supra, relied upon by the Court of Appeals in reversing Judge Murphy, actually supports affirmation of his decision.*

In its March 24, 2009 decision and opinion, the Court of Appeals placed primary reliance not on *Workman v Detroit Automobile Inter-Insurance Exchange, supra*, and *Dairyland Insurance Company v Auto-Owners Insurance Company, supra*, but on *Williams v State Farm Mutual Automobile Insurance Company, supra*. In *Williams*, the plaintiff grew up in Michigan. His parents were long-term Michigan residents. The Plaintiff had lived and worked in Nevada for approximately three years. However, on December 31, 1987, the plaintiff notified his parents that he was quitting his job in Nevada and moving back to Michigan to live with them. The plaintiff did, in fact, quit his job, close his Nevada bank account while opening a bank account in Michigan, gave up his Nevada apartment and loaded all of his possessions in a truck and headed back to Michigan, leaving Nevada on March 8, 1988. He was in a motor vehicle accident in Oklahoma on March 11, 1988. He was able to get back to Michigan, however, after the accident, and then lived with his parents for several months. *Id.*, at 492-493.

The Court of Appeals, speaking through former Judge Holbrook, joined by the late Judge Shepherd, the late Judge MacKenzie dissenting, affirmed the trial court's decision that the plaintiff was domiciled with his parents at the time of the accident and therefore entitled to Michigan no-fault benefits from his parents' no-fault insurer, the defendant in the case. As the trial court put it, "all [plaintiff's] bridges were burned in Nevada." *Id.*, at 493. The only real

criticism the majority had was that the trial court should not have given “special weight” to the plaintiff’s “intent” to return and live in Michigan.

In the case at bar, there is only hearsay evidence that Mr. Krumm intended to return to Michigan. If *Williams* applies, clearly that hearsay testimony should have no special weight, assuming *arguendo* it is even admissible in light of the egregious hearsay problems with the evidence. More importantly, there was not one shred of admissible evidence that Mr. Krumm had “burned his bridges” in Arkansas. Since Mr. Krumm was only sporadically employed at any time regardless of where he was, it is difficult to say he “quit” a job in Arkansas. He was, interestingly enough, definitely looking for a job in North Carolina (**not** Michigan), at least prior to the accident. Had he gotten a job, there seems little doubt he would have remained in North Carolina.

There was and is no evidence that Mr. Krumm closed any accounts, banking or otherwise, in Arkansas, and opened new ones in Michigan prior to the accident. He had not relinquished his domicile or residence in Arkansas—his wife and stepchildren maintained a place to live there, before his trip to North Carolina, during his time in North Carolina, and for a time after his accident in North Carolina. He had not forwarded his mail to his grandmother’s home in Fife Lake, Michigan. He had not loaded up his personal belongings, except what would fit in a duffle bag. Significantly, he was **not** on his way to Michigan at the time of the accident. He was actually on the way back to where he was staying **in North Carolina**. At some point after he had gotten back to where he was staying in North Carolina had the accident not happened, he would have returned to Arkansas. Perhaps after returning to Arkansas he would have gone to Michigan—but that is purely guess, conjecture and speculation.

Even if Mr. Krumm might have gone from Arkansas to Michigan at some point had the accident in North Carolina not happened, there is no evidence that he would have gone to live with his grandmother had he decided to return to Michigan after returning to Arkansas from North Carolina. It is true that, from time to time, Mr. Krumm had lived for limited periods of time with his grandmother, but the evidence is uncontroverted that for most of his adult life he did **not** live with his grandmother. For all that is known, after returning to Arkansas from North Carolina, Mr. Krumm could have moved to Louisiana or Florida, roofers often being in demand in those states. As the Honorable Robert H. Cleland (Judge Cleland) of the United States District Court for the Eastern District of Michigan observed in *Ingram v Hartford Insurance Company of the Midwest*, 06-CV-14085-DT, *rel'd* 2/23/07 (unpublished) (please see Exhibit W in the Appendix), deposition testimony can sometimes be insufficient to defeat a motion for summary judgment. There must be evidence in the record on which a jury can reasonably base a finding in favor of the plaintiff [citing *Anderson v Liberty Lobby, Inc.*, 477 US 242, 252; 106 S Ct 2505; 91 L Ed 2d 202 (1986)].

In its decision and opinion reversing Judge Murphy, the Court of Appeals cited the following.

- There was “evidence of intent” with respect to Mr. Krumm going to live with his grandmother.

It is not clear what “evidence of intent” the Court of Appeals meant. There is only hearsay testimony that Mr. Krumm even planned to return to Michigan at some point had the accident in North Carolina not happened, and none at all that he would have gone to live with his grandmother had he returned to Michigan. It is, at bottom, guess, conjecture and speculation on the part of the various deponents that Mr. Krumm would have returned to Michigan, and even

more of a flight of fancy that he intended to “domicile” himself at his grandmother’s home. Cases do not go to a jury when key issues must be resolved by resort to guess, conjecture and speculation. *King v Nicholson Transit Company*, 329 Mich 586, 592; 46 NW2d 389, cert den 342 US 886; 72 S Ct 176; 96 L Ed 665 (1951); see also *Fuller v Ann Arbor Railroad Company*, 141 Mich 66; 104 NW 414 (1905) and *Scott v Boyne City, Gaylord & Alpena Railroad Company*, 169 Mich 265; 135 NW 110 (1912). As this forum pointedly noted in the recent, landmark case of *Skinner v Square D Company, supra*, there is no role for a jury where the facts do not logically lead to a conclusion. The facts as established in the extensive discovery in this case do not logically lead to the conclusion that Mr. Krumm was domiciled with his grandmother at the time of the accident.

- Mrs. Krumm was not only Mr. Krumm’s grandmother, but she was actually his adoptive mother.

This is true. However, it was undisputed that Mrs. Krumm had absolutely no use for Ms. Barber, Mr. Krumm’s wife, and at one point had ordered Ms. Barber out of her house. While Mrs. Krumm may deserve some credit for stepping in once Mr. Krumm’s biological mother left, that is at most only an indication that Mr. Krumm, without his wife and stepchildren, might have been allowed to live with Mrs. Krumm had he gone to Michigan after returning to Arkansas from North Carolina.

- Mr. Krumm kept some of his possessions at Mrs. Krumm’s home.

This is true—in the sense that Mr. Krumm’s childhood toys and the like were at Mrs. Krumm’s house. Those who have had to clean out a family home after the death or institutionalization of a parent often find childhood possessions stored in attics, closets, crawl

spaces and the like. That seems a very questionable basis for establishing “domicile” within the meaning of MCL 500.3114(1), given the consequences that flow from the determination of domicile under the statute.

- Mr. Krumm’s mailing address was his grandmother’s house.

This is incorrect. Mr. Krumm did receive some mail at his grandmother’s house—but the **only** mail that could be documented as having been sent to Mr. Krumm at his grandmother’s house at a specific time were all sent to him **after** the accident in North Carolina. There was no evidence Mr. Krumm ever directed anyone—the IRS, an insurance company, public safety authorities and so on—to use his grandmother’s address in the event they needed to get in touch with him. Indeed, the last time Mr. Krumm gave any one in any sort of a business or official capacity his address was in Arkansas—and then he gave his Arkansas address.

- Mr. Krumm’s Michigan ID card gave his grandmother’s address.

That is true, but there was never any evidence introduced in the trial court as to **when** Mr. Krumm got his Michigan ID card. If it was issued **after** the accident in North Carolina, it would be meaningless in terms of establishing Mr. Krumm’s domicile at the **time** of the accident. Even if the ID card was issued before the accident, all at bottom it means was at the **time** Mr. Krumm **got** the ID, he had presented two documents to the Michigan Secretary of State (the Michigan Secretary of State issues ID cards) such as a credit card bill or a government document with his name and his grandmother’s address on them.

The Court of Appeals then concluded that Judge Murphy was obligated to review all admissible evidence presented in opposition to the Auto-Owners Motion for Summary

Disposition in a light most favorable to Plaintiffs. In the opinion of the Court of Appeals, however, Judge Murphy had not done so. In light of that, reversal was required.

Auto-Owners would certainly agree that in, for example, an intersection accident where one witness testifies a light was green and another witness testifies the light was red, a disputed question of material fact exists that cannot legitimately be resolved on a MCR 2.116(C)(10) motion. The finder of fact, the jury when one has been demanded, must listen and observe the testimony of the two witnesses, and decide which one of them is telling the truth. That does not mean one witness is committing perjury a la former Mayor Kwame Kilpatrick or former Governor Rod Blagojevich, but merely that the finder of fact concludes that one witness's perception and recollection of the color of the light at a particular point in time was better and more accurate than the other witness.

Where the Court of Appeal erred was in forgetting that the right of a finder of fact, a jury or individual juror, to make a finding of fact is not unbridled. Otherwise, the admonition concerning "no reasonable juror" in such cases as *Fundunburks v Capital Area Transportation Authority, supra*, *Harris v Rahman, supra*, and *Nguyen v Professional Code Inspections of Michigan, Inc., supra* is meaningless.

In *Fundunburks*, the plaintiff had to plead and prove gross negligence on the part of a bus driver in order to avoid the statutory bar of governmental immunity. In her deposition, the plaintiff testified that the bus doors closed on her foot, causing her to fall. Bystanders or passengers yelled at the driver to stop, and the driver did brake momentarily before speeding away. The plaintiff's testimony was not refuted by the bus driver. Although the Court of Appeals agreed with the trial court that there was a question of fact over the driver's gross negligence, thereby precluding summary disposition for the driver under MCR 2.116(C)(10), this

Supreme Court disagreed. It unequivocally held that no reasonable juror could conclude that the driver had been grossly negligent—had acted with reckless disregard as to whether harm occurred to the plaintiff. Applying the *ratio decidendi* of *Fundunburks* to the matter at bar, the Court of Appeals should have come to the same conclusion as it did in *Fowler v Airborne Freight Corporation, supra*—the injured party was not domiciled with his nominal parent at the time of the motor vehicle accident as a matter of law.

The issue in *Harris* was also whether the plaintiff had created a disputed question of material fact over whether the defendant had been grossly negligent in his actions. If the plaintiff could not create an issue of fact on the matter, his cause of action was statutorily barred by governmental immunity. In opposition to the defendant's MCR 2.116(C)(10) motion for summary disposition, the plaintiff presented the following:

- The defendant knew at the time of the mercury spill at the plaintiff's home that the amount of mercury involved in a spill was an important factor because the greater the spill the greater the danger of vaporization and, therefore, poisoning.
- The defendant believed that when one pound of elemental mercury was involved in a spill, immediate evacuation of the contaminated area was necessary.
- The defendant was informed during his first conversation with the plaintiff that one pound of mercury was involved and that the Poison Control Center (PCC) had advised the family to evacuate the home.
- Although the defendant's testing had revealed levels of mercury contamination within the legal limits for industrial sites, this legal limit was higher than was safe in a residential area because it was based on time of exposure.
- The defendant had recommended that the plaintiff keep her family pets away from the most heavily contaminated areas for the safety of the pets.

- The defendant did not advise the plaintiff to evacuate her home, but he directly contradicted the advice given the plaintiff by the PCC in telling the plaintiff that it was mere speculation that the levels of mercury in the home were dangerous.

This Supreme Court unequivocally held in *Harris* that, despite the evidence presented by the plaintiff in opposition to the defendant's motion for summary disposition, no reasonable juror could conclude that the defendant had been acting with an intent to harm the plaintiff or with reckless indifference as to whether the plaintiff was harmed.

It is patently obvious that the evidence presented by the *Harris* plaintiff is considerably more direct as to what the defendant did and did not do than what Mr. Krumm said and did with respect to his residence or domicile prior to the 2003 accident in North Carolina. Yet that was not enough to create a question of fact as to the *Harris* defendant's gross negligence, and gross negligence in Michigan's governmental immunity statutes is no more nebulous a subject or concept than is residency or domicile within the meaning of MCL 500.3114(1). If the Court of Appeals erred in finding a fact question in *Harris*, it surely erred in finding a fact question in the case at bar.

Finally, in *Nguyen*, the Court of Appeals reversed a trial court's grant of summary disposition to the defendant, a government worker, on the basis of governmental immunity. The defendant had allegedly wrongly used his authority to issue a stop work order on a construction project. The issue revolved around the issuance of a variance—specifically, whether a variance had been issued or not and whether the defendant knew about it at the time the stop work order had been issued. If the variance had been issued, and the defendant knew or should have known about it, there was no legal basis for the defendant to issue a stop work order. The Court of

Appeals noted the “record evidence on this point [was] subject to interpretation and proof” and was therefore not suitable for resolution on a motion for summary disposition.

The Supreme Court, in an unusual unanimous decision, **reversed** the Court of Appeals, specifically holding that “[n]o reasonable juror could conclude that defendant’s conduct amounted to reckless conduct showing a substantial lack of concern whether damage or injury would result,” citing *Stanton v City of Battle Creek*, 466 Mich 611, 620-621; 647 NW2d 508 (2002) and *Jackson v Saginaw Company*, 458 Mich 141, 146; 580 NW2d 870 (1998).

It is true *Nguyen* and the other cases of this Supreme Court cited and discussed *supra* involved governmental immunity. In *West v General Motors Corporation*, 469 Mich 177; 665 NW2d 468 (2003), *reh den* 668 NW2d 911 (2003), however, this Supreme Court overruled the Court of Appeals and found that the trial court had correctly dismissed the plaintiff’s “whistle blower” claim against the defendant for the failure of the plaintiff to make out a *prima facie* case against the defendant. The only way the finder of fact could link up the plaintiff’s purported “whistle blowing” activity and the acts the plaintiff claimed were retaliatory was by engaging in guess, conjecture and speculation about the relationship between the two.

In the case at bar, the only way the finder of fact could conclude that Mr. Krumm was domiciled, within the meaning of the statute, MCL 500.3114(1), as interpreted by *Workman, Dairyland* and the other cases cited *supra*, with his grandmother in Michigan at the time of the 2003 accident in North Carolina would be by engaging in unbridled guess, conjecture and speculation as to his intention to immediately return to his grandmother’s home in Fife Lake and take up permanent residence there. Accordingly, *West* supports what the trial court, Judge Murphy, did here, and what the Court of Appeals should have done—affirm, not reverse, Judge Murphy.

The essential point is that in each case discussed *supra*, this Supreme Court made its decision to reverse the Court of Appeals on the basis that, while there may have been a disputed question of fact, no reasonable juror could reach the conclusion that the plaintiff had a cause of action against the defendant (*i.e.*, the jurors would be *per se* unreasonable if they found for the plaintiffs). Therefore, each case against the various defendants should have been dismissed with prejudice as a matter of law. Here Plaintiffs have no cause of action against Auto-Owners unless they can prove Mr. Krumm was domiciled with his grandmother at the time of the accident. While there may have been a question of fact as to whether Mr. Krumm was **going** to return to Michigan had he not been in the accident in North Carolina, that is not a basis for overturning summary disposition if no reasonable juror could conclude that Mr. Krumm's domicile at the **time** of the accident was with his grandmother in Michigan.

IV. The public interest would be furthered by reviewing and reversing the decision of the Court of Appeals, as the resolution of the issue of what minimum evidence must be presented on the issue of a person's residency and subsequent eligibility for no-fault benefits is a matter of continuing major significance to the jurisprudence of the State of Michigan.

Auto-Owners is well aware of the large number of applications this forum receives, each claiming that the issue presented warrants plenary consideration. Most of the time the Supreme Court concludes that the issue does not merit consideration, at least at the time it is presented.

Auto-Owners respectfully suggests that the issue here is different. Michigan's provision of unlimited medical care to those residents injured in motor vehicle accidents is unique among the fifty states. The Supreme Court can take judicial notice that the cost of these unlimited benefits, a cost ultimately borne by insureds, is substantial, and there have been various proposals to put a "cap" on such coverage.

It is not clear if the Legislature, when it adopted no-fault in 1972, fully anticipated the burden unlimited medical benefits would become. It is, though, significant that the Legislature did, right from the very beginning, put limits on those who could qualify for such benefits. MCL 500.3113(a), for example, prohibits persons who knowingly and unlawfully take a motor vehicle and are injured from collecting benefits. MCL 500.3113(c) prohibits persons who are not Michigan residents from collecting benefits. Under MCL 500.3114(1), insurers do not have to provide benefits unless the claimant was domiciled with a resident relative in Michigan. And yet Auto-Owners finds itself potentially exposed to paying unlimited benefits, either directly or by contribution to the Michigan Catastrophic Claims Association (MCCA), for someone who had left Michigan, established residency in Arkansas, and whose only connection with a Michigan resident relative was boyhood toys stored in a room and the belief by some that he hoped to take up residence with his grandmother in Michigan at some point in the indefinite future despite the fact that his wife was most definitely not welcome at his grandmother's house.

This case provides the perfect vehicle for clarifying the guidance of *Workman v Detroit Automobile Inter-Insurance Exchange*, *supra*, and making it clear that domicile for the purposes of MCL 500.3114(1) is something more than a nebulous concept that can be manipulated to create fact questions (as in the instant matter) depending upon the particular whim or makeup of a court. Auto-Owners respectfully suggests that, at the very least, the rule of law should be that domicile for the purposes of MCL 500.3114(1) must be established solely by admissible evidence that is not based on guess, conjecture and speculation about what someone would have done at some point in the future had he or she not been injured in a motor vehicle accident 700 or more miles from Michigan's border.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Auto-Owners respectfully requests this Honorable Supreme Court to issue an Order:

A. Granting Auto-Owners leave to appeal the March 24, 2009 decision and opinion of the Court of Appeals to this forum pursuant to the provisions of MCR 7.302(B) *et seq.*; or, in the alternative,

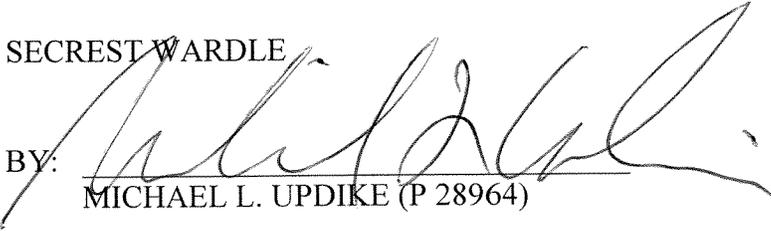
B. Scheduling oral argument on the Auto-Owners Application for Leave to Appeal at a date, time and place convenient to the Supreme Court; or, in the further alternative,

C. Issuing an Order peremptorily reversing, vacating and holding for naught the March 24, 2009 decision and opinion of the Court of Appeals in the above-entitled cause of action, and reinstating with full force and effect the July 30, 2007 Order of Judge Murphy granting Auto-Owners Motion for Summary Disposition.

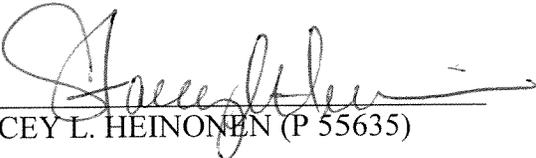
SECRET WARDLE

SECRET WARDLE

BY:


MICHAEL L. UPDIKE (P 28964)

and


STACEY L. HEINONEN (P 55635)

Attorneys for Defendant/Counter-Plaintiff/
Appellee Auto-Owners Insurance Co.
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

Dated: May 4, 2008