

STATE OF MICHIGAN
IN THE SUPREME COURT

AUTOMOBILE CLUB INSURANCE
ASSOCIATION,

Plaintiff/Appellee/
Cross-Appellant,

Docket No: 143808

Court of Appeals No: 294324

Ingham Circuit Court Case No: 08-1249-NF

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois
Insurance Company.

Defendant-Appellant/
Cross-Appellee,

and

ALLSTATE INSURANCE COMPANY,
Defendant.

THOMAS C. LEFLER, JR. (P33735)
SCHOOLMASTER, HOM, KILLEEN, SIEFER,
ARENE & HOEHN
Attorneys for Plaintiff-Appellant
40900 Woodward Ave., Ste. 200
Bloomfield Hills, MI 48304-2255
(517) 622-2425

DALE L. ARNDT (P42139)
BENSINGER, COTANT & MENKES, PC
Attorneys for Defendant-Appellee State Farm
3152 Peregrine Dr., NE, Ste. 210
Grand Rapids, MI 49525
(616) 365-9600

JOHN A. LYDICK (P23330)
Attorney of Counsel for Plaintiff-Appellant
30700 Telegraph Road, Ste. 3475
Bingham Farms, MI 48025-4571
(248) 646-5255

143808 **DEFENDANT-APPELLANT/CROSS-APPELLEE'S SUPPLEMENTAL
BRIEF PURSUANT TO MARCH 23, 2012 ORDER**

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

Submitted by:
Dale L. Arndt (P42139)
Attorney for Defendants-Appellant
BENSINGER, COTANT & MENKES, P.C.
3152 Peregrine Dr., N.E., Ste. 210
Grand Rapids, MI 49525
(616) 365-9600

FILED

MAY 4 2012

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF FACTUAL BACKGROUND.....	1
ARGUMENT.....	3
DISCUSSION.....	3
RELIEF REQUESTED.....	17

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brausch v Brausch</i> , 283 Mich App 339, 348; 770 NW2d 77 (2009)	6
<i>Dairyland Ins. Co. v Auto-Owners</i> , 123 Mich App 675; 333 NW2d 322 (1983).....	14,15
<i>Delamielleure v Belote</i> , 267 Mich App 337, 341; 704 NW2d 746 (2005).....	6
<i>Farm Bureau v Allstate Ins Co</i> , 233 Mich App 38; 592 NW2d 395 (1998).....	15
<i>Fontana v Maryland Casualty Ins</i> , unpublished [Docket Nos. 264127 and 264128; rel'd 1/24/06].....	6
<i>Frowner v Smith</i> , ___ Mich App ___; ___ NW2d ___ (2002).....	9
<i>Grange Ins Co of Michigan v Lawrence</i> , ___ Mich App ___; ___ NW2d ___ (2012) [Rel'd 4/24/12]	7
<i>McKimmy v Melling</i> , 291 Mich App 577, 582; 805 NW2d 615 (2011).....	13
<i>Workman v DAIIE</i> , 404 Mich 477; 274 NW2d 373 (1979).....	15,16
<i>Williams v State Farm</i> , 202 Mich 491; 509 NW2d 821 (1993).....	15
 <u>Statutes</u>	
MCL 3.211(C)(1)(3)	5
MCL 3.211(C)(3).....	7,15
MCL 500.3114	10
MCL 500.3114(1)	13,16
MCL 500.3163	9
MCL 722.23	13
MCL 722.31	5
MCL 722.31(2)	6,7,15
MCL 722.31(4)	13,14

Court Rules

MCR 3.211(C)5

MCR 3.211(C)(1).....5

MCR 3.211(C)(3).....6,7

STATEMENT OF FACTUAL BACKGROUND

[Reference to Exhibits, unless stated otherwise, refer
to Exhibits attached to Defendant-Appellant State Farm's
Application for Leave to Appeal.]

This Application for Leave to Appeal involves a question concerning priority for payment of personal protection insurance benefits stemming from accidental bodily injuries sustained by Sarah Campanelli, a minor, in an automobile accident that occurred on November 27, 2007. As a result of injuries and complications stemming from her involvement in the motor vehicle accident, Ms. Campanelli eventually passed away, approximately a month after the motor vehicle accident, during her hospitalization. The central issue presented by the proceedings to date has concerned the determination as to where Sarah Campanelli would be considered domiciled as of the time of the accident in November of 2007. The Ingham County Circuit Court with Judge Joyce Draganchuk presiding, granted summary disposition to Defendant-Appellant State Farm Mutual Automobile Insurance Company concluding that Sarah Campanelli was domiciled with her natural mother, Tina Taylor, and Sarah's uncle, Terry Gravelle, in Howell, Michigan. At the time of the accident, Plaintiff-Appellee, Auto Club, insured Terry Gravelle under a Michigan no-fault automobile insurance policy at that same address.

Plaintiff-Appellee Auto Club subsequently appealed, and by way of an unpublished Opinion dated June 21, 2011, a panel of the Michigan Court of Appeals [Judges Markey, Wilder and Stephens] reversed the trial court's grant of summary disposition, finding that there was a question of fact as to Sarah's intent to remain in Michigan, finding, in pertinent part:

The trial court, while acknowledging that Sarah had in the past maintained her domicile in Tennessee, determined that, as a matter of law, the circumstances of the summer and fall of 2007 changed her domicile to Michigan. We disagree. It is undisputed that Sarah expressed her intention to return to Tennessee with both her sister and her father. Had she been of majority age, the evidence is sufficient

to infer that she would in fact have acted on her intentions. However, as the trial court recognized, Sarah was a minor child, and her legal custodian, her father, told her that she had to finish the school semester in Michigan and was not permitted to return to Tennessee until the Christmas break at the earliest. These circumstances raise genuine issues of material fact related to Sarah's intentions. Rather than the facts simply reflecting a hope to return to Tennessee, the facts could just as easily be interpreted as showing a firm intention to return that was stifled only by the fact that Sarah was not legally permitted, because of her age, to act on her intention at that time."

* * *

"It is clear that the trial court based its decision to grant summary disposition in favor of defendant on its finding that there was "no real evidence that Sarah intended to return to Tennessee to live." However, as noted earlier, while it is true that Sarah's mother stated that Sarah planned to stay with her in Michigan for a year, there was contradictory testimony from her sister and father indicating that Sarah intended to return to Tennessee. Accordingly, because a trial court is not permitted to determine facts or assess credibility on a motion for summary disposition, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), there was a genuine issue of material fact, and summary disposition was improper." (See Exhibit V, p. 4.)

Defendant-Appellant State Farm filed a Motion for Reconsideration with the Court of Appeals, which it denied by way of an Order dated August 11, 2011, with Judge Markey voting to grant reconsideration. (Exhibit W.)

Defendant-Appellant State Farm then subsequently filed an Application for Leave to Appeal with the Court. On March 23, 2012, the Court issued an Order directing the following:

On order of the Court, the application for leave to appeal the June 21, 2011 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. We direct the Clerk to schedule oral argument on whether to grant the applications or take other action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether legal residence and domicile of the insured minor were conclusively established in Tennessee pursuant to the judgment of divorce entered by the Wayne Circuit Court, as amended, or whether the minor had the capacity to acquire a different legal residence or domicile of choice. See, e.g., *Vanguard Ins Co v Racine*, 224 Mich App 229, 233 (1997); MCR 3.211(C)(1) and (3); 8 Mich Civ Jur, Domicile §7; Restatement (Second), Conflict of Laws, §§15 and 22(1) comments a and d. The parties should not submit mere restatements of their application papers.

In response thereto, Defendant-Appellant State Farm submits the following:

ARGUMENT

- I. IN RESPONSE TO THE COURT'S QUESTIONS RAISED BY ITS MARCH 23, 2012 ORDER, DEFENDANT-APPELLANT STATE FARM AFFIRMATIVELY STATES THAT DOMICILE WAS NOT CONCLUSIVELY ESTABLISHED IN TENNESSEE AS OF THE TIME OF THE ACCIDENT BY WAY OF THE WAYNE COUNTY CIRCUIT COURT'S ORDERS, AND, THE ORDERS PERMITTED SARAH'S RETURN TO MICHIGAN IN THE MANNER ALLOWED FOR AT LAW. FURTHER, SARAH'S RESIDENCY WAS MOVED TO MICHIGAN IN ACCORDANCE WITH HER PARENTS' JOINT DECISION, AS PERMITTED UNDER MCR 3.211(C)(3) AND MCL 722.31(2), WHICH WAS NOT AND COULD NOT BE PRECLUDED UNDER THE TERMS OF THE WAYNE COUNTY CIRCUIT COURT'S ORDERS. ADDITIONALLY, SARAH'S LEGAL CAPACITY TO ACQUIRE DOMICILE OF CHOICE, INCLUDING SARAH'S POSSIBLE INTENTIONS TO RETURN TO TENNESSEE AFTER THE ACCIDENT, WOULD HAVE NO BEARING UPON THE PROPER ANALYSIS TO BE CONDUCTED AS THE DECISION TO MOVE HER TO MICHIGAN WAS UNDERTAKEN BY HER PARENTS WHO JOINTLY POSSESSED THE SOLE LEGAL CAPACITY TO MOVE HER RESIDENCY TO MICHIGAN AND NO SIMILAR DECISION OR ACTIVITY WAS EVER MADE OR UNDERTAKEN TO REMOVE HER RESIDENCY FROM MICHIGAN AT ANY TIME PRIOR TO THE ACCIDENT.

DISCUSSION

At the time of the accident, Sarah Campanelli was 16 years old, born February 7, 1991 to Tina Marie Campanelli a/k/a Tina Taylor and Francis Michael Campanelli, who were divorced prior to the motor vehicle accident. (Exhibits B and C.) The January 12, 1995 Judgment of Divorce granted joint legal custody to both parents and physical custody to Mr. Campanelli. (Exhibit C.) Subsequent to the Judgment of Divorce, in February of 1996, as a result of a job promotion which Frank Campanelli received, he was permitted to remove Sarah to the State of Tennessee to live with him, and a visitation schedule was established for Tina Taylor. (Exhibit D.) The February 5, 1996 Order, however, did not modify joint legal custody previously awarded. *Id.*

The Judgment of Divorce entered by the Wayne County Circuit Court, as amended, cannot be perceived as establishing Sarah Campanelli's conclusive residency or domicile at the

time of the involved motor vehicle accident. As noted above, the Judgment of Divorce entered January 12, 1995 awarded joint legal custody to Sarah's parents, Tina and Frank. The initial Order of Divorce provided that domicile and residence of the involved children, including Sarah "shall not be removed from the State of Michigan without the prior approval of the Court." (See Exhibit C, p. 5.) Thereafter, on February 5, 1996, an Order was entered specifically allowing Sarah's father, Frank, "to move the minor children of the parties to reside with him at 4719 Lynngate, Memphis, TN 38141." (See Exhibit D, p. 2.)

It is noted that the February 5, 1996 Order did not establish that Sarah's residence could not be changed from Tennessee, nor did it prohibit or preclude residency from being returned to Michigan. In fact, reading the two Orders together, under the original January 12, 1995 Judgment of Divorce, domicile or residency was not only expressly permitted within but exclusively required and preferred in Michigan, with the only exception being created by the February 1996 Order which permitted Sarah's move with her father to Tennessee. The February 1996 Order, however, did not modify the original Judgment of Divorce Order. Therefore, the original January 12, 1995 Judgment of Divorce remained in effect establishing that domicile or residency was to be within the State of Michigan with the only exception permitted by prior approval of the Wayne County Circuit Court. The February 5, 1996 Order did not mandate prior Court approval before Sarah's residency could be changed or removed from the State of Tennessee, as it did in its original Order prohibiting residence other than in the State of Michigan. Therefore, by operation of these two Orders, residency and domicile could only exist, if not in the State of Michigan, then only by way of the Court's prior approval, within Tennessee. The express terms of these two Orders clearly establish that residency and domicile were not intended to be conclusively or exclusively established to or only within the State of Tennessee,

but, rather, residency and domicile were always permitted within Michigan and to the exclusion of any and all other locations by way of the Court's initial Judgment of Divorce unless express prior approval of the Court was obtained.

The technical requirements for judgments and orders regarding child custody as set forth in MCL 3.211(C)(1)(3) in fact supports such a conclusion. Specifically, MCR 3.211(C) provides:

- (C) A judgment or order awarding custody of a minor must provide that
- (1) the domicile or residence of the minor *may not be moved from Michigan* without the approval of the judge who awarded custody or the judge's successor.

* * *

- (3) a parent whose custody or parenting time of a child is governed by the order *shall not change the legal residence of the child except in compliance with* section 11 of the Child Custody Act, *MCL 722.31*. (Emphasis added.)

Pursuant to the directives of MCR 3.211(C)(1), the original Judgment of Divorce remained in effect, and, pursuant to these directives, as well as the express terms of the divorce judgment, domicile or residence was always permitted within Michigan. No authority or approval is required to move a child "to" Michigan. Under both the express operation of MCR 3.211(C)(1) and the original Judgment of Divorce, domicile and residence could be reestablished within the State of Michigan at any time without the Wayne County Circuit Court's approval, permission and/or consent.

Moreover, pursuant to the provisions of subparagraph 3 of MCR 3.211(C), a minor child's residency can be specifically changed if undertaken in compliance with the provisions of MCL 722.31, which, expressly states:

"A parent's *change of a child's legal residence is not restricted* by subsection (1) *if the other parent consents to*, or if the court, after complying with subsection (4), permits, *the residence change*. This section does not apply if the order

governing the child's custody grants sole legal custody to 1 of the child's parents." MCL 722.31(2) (Emphasis added.)

Under the express directives of MCR 3.211(C)(3) and MCL 722.31(2), when joint legal custody exists, a child's legal residency can be changed with mere consent of the parents. It is only when a parent has sole *legal* custody must the parent obtain the trial court's approval, but parents with *joint* legal custody do not need permission or approval from the trial court to move a child more than 100 miles if parental consent exists. *Brausch v Brausch*, 283 Mich App 339, 348; 770 NW2d 77 (2009). Parental consent is permitted to effectuate a residency change where the consent is for a specific identifiable change of residence, and it is clear the parents have consented to the residence change. *Delamielleure v Belote*, 267 Mich App 337, 341; 704 NW2d 746 (2005). Here, the record is replete with evidence and documentation revealing that Mr. Campanelli did expressly consent and acted to effectuate Sarah's move, including the withdrawal from her high school in Tennessee and her enrollment in Howell, and specifically allowing Sarah to move in with her mother at her uncle's residence. (See Exhibits G, H, J, I and R, pg. 138.) With parental consent to Sarah's move clearly evidenced, under the express terms of MCR 3.211(C)(3) and MCL 722.31(2), Sarah's relocation back to the State of Michigan was permitted and effective, as a matter of law. Further, accordingly, the Judgment of Divorce or subsequent Order permitting Sarah to move with her father to Tennessee did not and could not in any way have prevented or precluded Sarah's residency from being reestablished within the State of Michigan, and, in fact, the terms of the original Order of Judgment establishes that residency was preferred within the State of Michigan.

Additionally, decisions by the appellate courts have clearly indicated for purposes of determining domicile and residency pursuant to the provisions of the Michigan No-Fault Statute, that the terms of the Judgment of Divorce are not controlling. (See *Fontana v Maryland*

Casualty Ins, Slip Op, p. 3, docket nos. 264127 and 264128 [rel'd 1/24/06, Exhibit S.] Most recently, a panel of the Michigan Court of Appeals [Judges Beckering, Owens and Krause] in *Grange Ins Co of Michigan v Lawrence*, ___ Mich. App. ___; ___ NW2d ___ (2012) [Docket No. 303031; Rel'd 4/24/12] again rejected the notions that any provisions contained within the Judgment of Divorce were binding upon the determinations of residency for purposes of the No-Fault Statute. In *Grange Ins Co, supra*, similar to the factual circumstances here, the Court of Appeals addressed the residency of a minor child where the parents had shared joint legal custody, but the minor child's mother had been awarded primary physical custody. The panel of the Court of Appeals rejected the notion that the Judgment of Divorce was conclusive or binding upon determinations of the minor child's residency at the time of the accident, noting that "although the judgment of divorce awarded Rosinski [the minor's mother] primary physical custody, that order does not change that the evidence shows Josalyn [minor] actually resided with both her parents, which is the relevant inquiry under the No-Fault Act." *Grange, supra*, Slip Op at p. 3. Similarly, irrespective of any provisions contained within the Wayne County Circuit Court's divorce or custody orders, the factual circumstances remain that, as of the time of the involved motor vehicle accident, Sarah was clearly residing with her mother in Michigan, and, in fact, was doing so with her father's express permission and consent. By clear operation of law, with the permission and consent of both parents, as of the time of the motor vehicle accident, Sarah's residency with her mother in Michigan was expressly permitted, MCR 3.211(C)(3) and MCL 722.31(2), and the Wayne County Circuit Court's divorce or custody orders did not and could not be interpreted to prevent or preclude Sarah's residency with her mother in Michigan. Thus, there is nothing upon which to conclude the terms of the Orders would conclusively, or exclusively, establish Sarah's domicile at the time of the accident.

To the extent that the Court's Order for supplemental briefing addresses questions concerning an unemancipated minor's capacity or freedom to choose a particular residency or domicile, as the foregoing discussion indicates, Sarah's capacity, intentions and/or desires are of little significance and/or consequence with respect to the circumstances which existed in 2007 and all times prior to the involved motor vehicle accident since the change in her residency and domicile was appropriately effectuated and carried out through the efforts and actions of her parents, who having joint legal custody, were permitted and appropriate. There existed no provision either by way of the Wayne County Circuit Court's orders or by statute which prohibited or precluded her parents' decisions and/or determinations in moving Sarah to Michigan to live with her mother, and there is and can be no dispute that Sarah was in fact residing with her mother at the time of the accident in accordance with these determinations. To the extent that it would be asserted that Sarah lacked the legal capacity to change her domicile, this proposition would in fact support a finding in favor of State Farm, as it was clear that those individuals charged with the ability to make or effectuate the change in residency prior to the accident, being her parents, expressly and voluntarily acted to do so, in a manner which was expressly permitted by law. Any issues concerning whether Sarah, herself, individually, had the legally recognized capacity to voluntarily choose her domicile undercuts the reasoning and rationale expressed by the Court of Appeals in reversing the trial court's grant of summary disposition to State Farm, based upon its interpretation that there were "genuine issues of material facts related to Sarah's intentions," which are of no relevance. (Exhibit A, p. 4.)

Additionally, any analysis to suggest that Sarah's lack of legal capacity to choose her place of residency is controlling, or detrimental to a determination of residency with Auto Club's insured is unsupported, as both parents possessed joint legal custody over Sarah, and both

consented to her residency in Michigan, and such an analysis would not only improperly ignore the actual circumstances of her residency with her mother at the time of the accident, but, it would also negate the fundamental interests and constitutionally guaranteed rights of her parents to be able to participate in and make determinations with respect to Sarah's custody, care and management. This is particularly true given the fact that there is and can be no disagreement that the parents clearly consented to the move. The courts have noted that "a natural parent possesses a fundamental interest in the companionship, custody, care and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and Article 1, §17, of the Michigan Constitution." *Frowner v Smith*, ___ Mich App ___; ___ NW2d ___ (2002) [Docket No. 305704; Rel'd 4/26/2012] citing *In Re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009). To the extent that it is recognized that Tina Taylor and Frank Campanelli together possessed the fundamental and inherent rights to be involved in such decisions as Sarah's residency, which was exercised with the consent of each, it would be legally inconsistent to determine that these considerations and/or determinations made by Sarah's parents prior to the accident would have no bearing upon evaluating Sarah's residency at the time of the accident because of Sarah's lack of mental capacity to choose her residency or under a predetermined rule for domicile. The point of the matter is that Sarah's mother and father had and possessed, at the time the decision was made to have Sarah move in with her mother in Michigan, the legally recognized fundamental rights and interests to make such determinations and decisions and those determinations and/or decisions were made in advance to the motor vehicle accident with the documented consent and permission by Sarah's father. Therefore, Sarah's capacity or incapacity to acquire domicile of choice cannot be viewed

as controlling or deficient as the parents, who both possessed this fundamental right, consented and agreed to change Sarah's residence.

With respect to those general citations within the Court's Order, as noted above, legal capacity is possessed and was exercised by Sarah's parents, and 8 Mich Civ Jur, Domicile §7 similarly notes that to the extent minors are "presumed in law to be lacking the capacity to form the intention required . . . These persons *depend upon others who are considered by the law as capable of forming the intention to change their domicile* of choice." *Id.* Sarah's parents exercise of that legal capacity in moving Sarah to Michigan to live with her mother, confirms that domicile of choice was permitted and obtained since those persons having the "legal capacity to do so" exercised that choice. Once legal capacity to choose is satisfied, domicile is established by the person's "physical presence," which Sarah clearly had with her mother in Michigan and a "attitude" to make that place her home for "the time at least." Restatement (Second), Conflict of Laws, §§ 15, 16 and 18. The commentators have noted that "physical presence" is "essential" and physical presence for a specified duration is not necessary so long as the person "has been present there for a time at least." Restatement (Second), Conflict of Laws, §16, comments a and b. The commentators have also noted that "It is possible, however, to have the proper attitude of mind [to make the place his or her home] even though he [or she] does intend to move at a definite time." Restatement (Second), Conflict of Laws, §18, comment b. Stated alternatively, there is a sufficient "attitude" if one can say "this is now my home," *Id.* Irrespective of any claims to the contrary, at the time of the accident and all times leading up to the accident in cannot be disputed that Sarah was physically residing with her mother, officially enrolled in school and active in the community, clear evidence of her attitude, and more importantly her parents, to make that her home "for the time at least." There was, and can be, no

dispute as to these facts and circumstances as they existed as of the time of Sarah's accident. Even with respect to Frank Campanelli's indications that his daughter wanted to return home, by his own testimony, it is undisputed that there were no definitive plans or arrangements made for Sarah moving out of her mother's home or even reenrolling back in school in Tennessee. Rather, Mr. Campanelli's testimony establishes that no plans had been made for any immediate or future transfer of either her belongings or her school enrollment back to Tennessee as of the time of the motor vehicle accident:

Q Okay. So you wanted her to finish up school?

A I didn't want her to come in the middle of a semester no.

Q Gotcha. Did she understand or was she upset?

A No she understood that. She knew that basically at her Christmas break from school up there would be the earliest she could come home.

Q Okay. And did you start making plans for Christmas with her?

A Well I mean Christmas was always Christmas with us. I mean it was basically just Christmas. We always had Christmas together with the exception of a few times she was with her mom. Yeah I mean there would've been plans. The same plans there always are. (Exhibit B, p. 98.)

By Mr. Campanelli's own testimony, he had not made any plans to reenroll her or to have her move back into his home, and, in fact, the most that had been planned was for Sarah to visit for the Christmas holiday. Therefore, regardless of whether Sarah wanted to eventually return to her father's home, as of the time of the motor vehicle accident in November of 2007, it is clear that she did remain, and was to remain, with her mother for at least the immediately indefinite period of time. This does not create a question of fact as to Sarah's domicile as of the time of the motor vehicle accident, and does not require a determination of any witnesses credibility. As of the time of the accident, even accepting that Sarah had hoped to return to her father's home, as of

the time of the accident, she was to remain with her mother. Of course, with respect to any decisions for Sarah's return to Tennessee, the capacity to effectuate any change rested with her parents, and as pointed out, as of the time of the accident, there were no objective indicators by the parents to undertake or effectuate any immediate change nor was there any indication of the parents' consent to remove her from her mother's home or return her to Tennessee. Thus, as of the time of the accident there was the decision for her to remain, by those with the legal capacity to do so, a physical presence at her mother's home, and an "attitude" to remain "for the time at least."

Additionally, 8 Mich Civ Jur, Domicile §21, references the balancing of factors, approach set forth in *Workman v DAHE*, 404 Mich 477; 274 NW2d 373 (1979), "When considering whether a child is domiciled with the child's parents." Also, since both parents were granted "joint legal custody," (Exhibit C, p. 2) Restatement (Second), Conflict of Laws, §22(1)(d) confirms that "if there has been no legal fixing of custody, his domicil [sic] is that of the parent with whom he lives," which there can be no question Sarah was living with her mother at the time of the accident.

Any suggestion that either the terms of the divorce judgment or the existence of Sarah's legal capacity to choose her legal residence or domicile of choice are controlling upon the determinations of residency under the Michigan No-Fault Statute would effectively revise the express and unambiguous provisions of MCL 500.3114(1) extending coverage to "resident relatives" to include and encompass differing determinations and/or factors for minors, and yet differing factors for minors depending upon whether they might be the product of a marital relationship which has been formerly dissolved, and, if formerly dissolved, by reference to terms, conditions or proceedings, the scope and substance of which, have no relation to the

administration of the Michigan No-Fault Statute. Reference to these types of determinations and/or proceedings which are made outside of the scope of the Michigan No-Fault Statute would create situations which go beyond simply viewing the context of an injured person's actual circumstances of residency, and, that, heretofore, have not been in any way implicated by prior decisions of this Court in addressing the factors which may bear upon determinations of residency under the Michigan No-Fault Statute. More importantly, if the Legislature had intended such determinations to effectuate and/or be determinant of coverage, it could have chosen simply to provide in MCL 500.3114(1), however, the Legislature simply directed that coverage is afforded and extended to "a relative of either domiciled in the same household." If intended only to apply to the place of "legal" domicile, the Legislature could have simply chosen to indicate by use of such terms. Nonetheless, imposition of such conditions by reference to only "legal" domicile or residency should not be imposed by reference to either the terms of the divorce judgment or the existence of Sarah's individual legal capacity to choose her legal residence. [The terms "domicile" and "residence" are legally synonymous. *Workman, supra*, 404 Mich at 495. The general provisions concerning the domicile of a minor and his or her capacity to choose a domicile or obtain domicile by choice, is more squarely related to issues involving domestic and/or child custody determinations rather than determinations of domicile as it might relate to the Michigan No-Fault Statute. In these type of proceedings, these guiding principles are consistent with the general overriding focus in reviewing and/or ordering the place of residence or a change in residency so as not to be dependent upon the child's own individual desires or wishes, but that consideration is to be made of the factors with the child's best interest as the "primary focus." MCL 722.23, MCL 722.31(4), *McKimmy v Melling*, 291 Mich App 577, 582; 805 NW2d 615 (2011). To reach this end, the express factors to be considered with regards

to domicile and/or determining domicile disputes and/or child custody determinations are expressly set forth by statute, and are clearly detailed and specified with respect to evaluations of the child's interest and the overall custodial environment, wherein MCL 722.31(4) provides:

Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. MCL 722.31(4).

Of course, outside of this scope in addressing issues of domestic disputes and/or child custody determinations, the focus is not relevant for determinations of issues regarding status as a resident relative under the Michigan No-Fault Statute. Clearly, these factors do not address the focus or scope of the analysis and/or determining factors, for residency under the No-Fault Statute, and which have been articulated by the Court's earlier directives in *Workman, supra*, or the subsequent decisions by the Michigan Court of Appeals in the context of the framework set forth in *Workman, supra*. See *Dairyland Ins. Co. v Auto-Owners*, 123 Mich App 675; 333

NW2d 322 (1983); *Williams v State Farm*, 202 Mich App 491; 509 NW2d 821 (1993); *Farm Bureau v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1998).

Any analysis that would conclusively determine issues of domicile, under these factual circumstances, by predefined rules stemming from the lack of legal capacity of a minor to choose domicile or any unrelated determinations in connection with any domestic or child custody proceedings as being conclusive, would run contrary to the directives stated by the Court in *Workman* wherein it noted that in considering any factors “no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others.” *Workman*, 404 Mich at 496. Simply by the sole consideration of a minor’s capacity to choose her domicile and/or any determinations in a domestic or child custody proceeding would essentially remove any balancing approach intended or the weighing of the involved relevant factors on a case-by-case basis, contrary to the directives of *Workman, supra*. Of course, in this case, the essential point that cannot be missed is the fact that irrespective of the orders by the Wayne County Circuit Court or Sarah’s capacity to choose her domicile, prior to the accident and at the time of the accident Sarah was residing with her mother and that decision was made, in accordance with the exercise of those fundamental rights to do so by both her natural parents, and were effectuated by a means and manner by which are expressly permitted under Michigan law. See MCR 3.211(C)(3) and MCL 722.31(2). Accordingly, and in accordance with the directives of *Workman, supra*, when the relevant factors are balanced, including the factual circumstances concerning the indicia of Sarah’s residency within the State of Michigan at the time of the accident; that she was residing with her mother in Michigan with consent of the parents; that the decision was made to move her to Michigan as permitted at law; that the decision to move Sarah to Michigan was made and carried out by those persons who possessed the legal right to move

her residency, and; that no formal or similar efforts were undertaken at anytime prior to the accident to properly effectuate any change in her residency from Michigan, further compel a finding of residency with Auto Club's insured. Pursuant to the provisions of MCL 500.3114(1) and the balancing analysis directed to be employed under *Workman, supra*, as of the time of the accident, Sarah clearly physically resided with her mother with the attitude to make it her home for at least that time.

For the foregoing reasons, as well as those advanced by State Farm in its initial Application for Leave to Appeal, Defendant-Appellant respectfully requests entry of an Order granting application for leave to appeal, and, upon hearing, reversing the Opinion and Order of the Michigan Court of Appeals and reinstating the Ingham County Circuit Court's grant of summary disposition to State Farm.

RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellant State Farm respectfully requests entry of an Order reversing the Opinion and Order of the Michigan Court of Appeals and reinstating the trial court's grant of summary disposition.

Respectfully submitted,

BENSINGER, COTANT & MENKES, P.C.

DATED: May 3, 2012



DALE L. ARNDT (P42139)

Attorney for Defendant-Appellant State Farm