

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AUTO CLUB INSURANCE ASSN,

Plaintiff,

v

Case No. 13-136315-NF
Hon. Wendy Potts

AUTO-OWNERS INSURANCE CO,

Defendants.

OPINION AND ORDER RE: DEFENDANT AUTO-OWNERS INSURANCE
COMPANY'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On

JUL 31 2014

On October 2, 2012, Basha Wright was injured in an accident while driving her father Dwayne Wright's vehicle that was insured by Plaintiff Auto Club Insurance Association. After the accident Basha Wright made a claim for personal injury protection benefits with Auto Club. According to Auto Club, Basha Wright told its claims representative that she lived with her mother Tamara Kirby. When Auto Club learned that Kirby had vehicle insurance, it told Basha Wright that she had to file her PIP claim with her mother's insurer, Defendant Auto-Owners Insurance Company. Auto Club asserts that its claims representative called Auto-Owners and orally reported information about Basha Wright's claim. During a May 31, 2013 recorded interview, Basha Wright told an Auto-Owners's claims representative that she lived with her father at the time of the accident. Auto Owners then denied the claim and told Basha Wright that she had to file a claim with her father's insurance. On September 18, 2013, Auto Club's counsel

sent a letter to Auto-Owners demanding that it pay for Basha Wright's PIP benefits. When it refused to do so, Auto Club filed this action seeking a declaratory judgment that Auto-Owners is the higher priority no-fault insurer because Basha Wright was domiciled with her mother at the time of the October 2012 accident.

Auto-Owners now moves for summary disposition under MCR 2.116(C)(7), which tests whether the claims are barred as matter of law, and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Auto-Owners argues that there is no question of fact that Basha Wright was living with her father at the time of the accident and Auto Club is the higher priority insurer. Under the no-fault act, if Basha Wright was domiciled with her mother at the time of the accident, her mother's insurer, Auto-Owners, would be responsible for paying her PIP benefits. MCL 500.3114(1). However, if she was not domiciled with her mother, the insurer of her father's vehicle, Auto Club, would be the highest priority insurer. MCL 500.3114(4)(a). Thus, the key issue to deciding this dispute is determining Basha Wright's domicile on the date of the accident.

To determine domicile, the Court considers several factors including (1) the person's subjective or declared intent to remain at the home, either permanently or for an indefinite or unlimited length of time; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage, or upon the same premises; (4) the existence of another place of lodging for the person. *Workman v Detroit Auto Inter-Insurance Exchange*, 404 Mich 477, 496-497; 274 NW2d 373 (1979). Additional factors applicable to determining if a child is domiciled with her parents include whether: (1) the child continues to use the parents' home as a mailing address, (2) the child maintains some possessions with the parents, (3) the child uses the parents'

address on the child's driver's license or other documents, (4) a room is maintained for the child at the parents' home, and (5) the child is dependent upon the parents for support. *Fowler v Airborne Freight Corp*, 254 Mich App 362, 364-365; 656 NW2d 856 (2002). No one factor is determinative and each factor must be balanced and weighed with the others. *Workman, supra* at 496. Determining domicile is a question of fact unless the underlying facts are not in dispute. *Fowler, supra* at 364.

Auto Club asserts that there are factual disputes that preclude the Court from deciding this issue as a matter of law. Specifically, Auto Club asserts that Basha Wright claimed to be living with her mother at the time she filed her claim with Auto Club in October 2012 and she changed her story when she realized that her mother's insurance rates would go up. As evidence of this dispute, Auto Club presents entries from its claim file noting that Basha Wright and Kirby claimed Basha Wright lived with Kirby. Auto-Owners contends that the statements in the claim file are inadmissible hearsay, however, the claim file appears to be admissible under the business record exception. MRE 803(6).

Regardless whether the claim file or the statements in the file are admissible, other evidence still presents an apparent question of fact regarding where Basha Wright was living at the time of the accident. As Auto-Owners's notes, Basha Wright and Kirby both testified that Basha Wright was not living with her mother on October 2, 2012. Dwayne Wright testified that he did not know where Basha Wright was staying on October 2, 2012 because he moved out of his girlfriend's home in Detroit where he had lived with Basha. However, Dwayne Wright testified that in September 2012 she was staying both at his girlfriend's house and at Kirby's home. Thus, there appears to be a question of fact where Basha was living on October 2, 2012.

Even if the Court were to accept as an undisputed fact that Basha Wright was living with her father on October 2, 2012, the Court cannot conclude that the *Workman* and *Fowler* factors weigh in favor of priority for Auto Club. Basha's driver's license and voting records listed her mother's home as her residence, and there is other evidence that she used her mother's home as her mailing address. Although there is no evidence that Basha Wright had a bedroom at her mother's home or that she kept her possessions there, there is evidence that Basha Wright stayed at both her parents' homes and did not have a fixed, continuous residence. Thus, the factors appear to weigh in favor of a finding that Basha Wright was domiciled at her mother's home, regardless where she was staying at the time of the accident.

In sum, the Court concludes that there is a factual dispute where Basha Wright was staying at the time of the accident that precludes the Court from determining domicile as a matter of law.

Auto-Owners further asserts that Auto Club failed to timely give it written notice of its intent to seek reimbursement from Auto-Owners. Under MCL 500.3145(1), an action to recover PIP benefits must be filed within one year of the date of the accident unless the claimant gives written notice of injury to the insurer within the one-year limitation period. The notice must give the name and address of the claimant and state "in ordinary the name of the person injured and the time, place and nature of his injury." MCL 400.3145(1). Because Auto Club's right to bring this action is based on a subrogation to the rights of its insured, the one-year limitation period applies to this claim. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343; 715 NW2d 324 (2006).

Auto-Owners asserts that this case is time-barred because Auto Club did not present it with adequate written notice of its claim within one year of the date of the accident. However,

this argument ignores the fact that Auto Club filed this complaint on September 19, 2013, less than one year after the October 2, 2012 accident. Thus, the claim was filed within the one-year limitation period and is not time-barred. Auto-Owners notes that it was not served until October 15, 2013, however, it cites no authority holding that MCL 500.3145(1) requires that a complaint be served within one year of the accident. Moreover, even if Auto Club's September 18, 2013 letter to Auto-Owners failed to meet the requirements of written notice under the statute, this fact would be relevant only if Auto Club filed this action after October 2, 2013. The requirement to give the insurer written notice of injury within one year of the accident applies only if an action is not filed within the one-year limitation period. Because Auto-Club's complaint was timely filed, the written notice provision is inapplicable.

In its final argument, Auto-Owners asserts that Auto Club is not entitled to pursue penalty interest under MCL 500.3142 or attorney fees under MCL 500.3148. Indeed, our courts have long held that the interest a no-fault claimant is entitled to seek for overdue payments does not apply to a priority dispute between insurers. *Allstate Ins Co v Citizens Ins Co*, 118 Mich App 594, 607; 325 NW2d 505 (1982). Because Auto Club cites no authority supporting its claim to penalty interest, Auto-Owners is entitled to summary disposition of that claim.

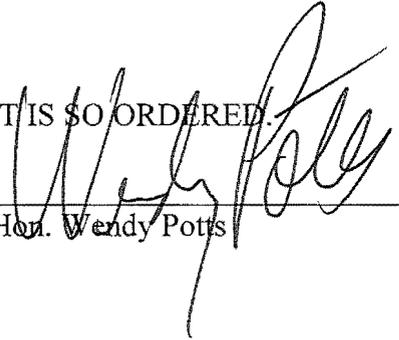
As for Auto Club's claim for its attorney fees for Auto-Owners's alleged unreasonable delay in payment, neither the statute nor the case law is clear on whether this provision is also inapplicable to a dispute between insurers. The *Allstate* decision addressed only penalty interest under MCL 500.3142. The Court of Appeals in *Karmol v Encompass Property & Casualty Co*, 293 Mich App 382, 392; 809 NW2d 631 (2011) appears to hold that an insurer cannot seek attorney fees under MCL 500.3148, however, it did not squarely address this issue. However, even if Auto Club is entitled to pursue attorney fees, it must demonstrate that Auto-Owners

unreasonably refused to pay. MCL 500.3148(1). Auto-Owners's refusal cannot be considered unreasonable under the statute if it is "the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987). Because this case involves questions of statutory construction and factual disputes, Auto-Owners did not unreasonably refuse to pay Basha Wright's PIP benefits and it is entitled to summary disposition of Auto Club's claim for attorney fees.

For all of these reasons, the Court grants Auto-Owners summary disposition of Auto Club's claims for attorney fees and penalty interest. In all other respects, summary disposition is denied.

Dated: **JUL 31 2014**

IT IS SO ORDERED.



Hon. Wendy Potts