STATE OF MICHIGAN

COURT OF APPEALS

HAROLD PALKA,

Plaintiff-Appellee,

v

AAA OF MICHIGAN, d/b/a AUTO CLUB GROUP INSURANCE,

Defendant/Third-Party Plaintiff-Appellee,

and

HOME-OWNERS INSURANCE COMPANY,

Defendant/Third-Party Defendant-Appellant.

UNPUBLISHED
September 10, 2020

No. 350204
Livingston Circuit Court
LC No. 16-029031-NF

UNIVERSITY OF MICHIGAN REGENTS,

Plaintiff-Appellee,

v

HOME-OWNERS INSURANCE COMPANY,

Defendant-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

and

No. 350207
Livingston Circuit Court
LC No. 16-029193-NF

MICHIGAN ASSIGNED CLAIMS PLAN,

Defendant.

Before: JANSEN, P.J., and K. F. KELLY and CAMERON, JJ.

PER CURIAM.

In Docket No. 350204 and in Docket No. 350207, defendant Home-Owners Insurance Company (HOI) appeals as of right final orders that granted summary disposition and awarded money judgments to plaintiffs Harold Palka and University of Michigan Regents (UMR).[1] The orders at issue in this appeal are earlier orders in which the circuit court denied HOI's motions for summary disposition and granted summary disposition to defendant Auto Club Insurance Association (ACIA).[2] In both cases, we affirm.

I. RELEVANT BACKGROUND

Palka was operating a Honda two-wheeled motocross bike on November 7, 2015 when he collided with an automobile owned and operated by Geraldine Przeslawski. Przeslawski's no-fault insurer was ACIA. Palka, at the time of the accident, had no vehicle insurance and was living with his mother, Alice Palka (Alice), at a home in Pinckney, Michigan. Alice's no-fault insurer was HOI. Palka sustained serious injuries and was treated at facilities operated by UMR, which sought reimbursement for medical expenditures.

At issue in these appeals are (1) whether Palka was "domiciled" with his mother at the time of the accident and (2) whether the Honda was an off-road vehicle (ORV) under the no-fault act, MCL 500.3101 *et seq*. The answers to these questions were crucial for determining whether HOI was responsible for paying Palka's no-fault benefits. The trial court concluded that Palka was domiciled with Alice at the time of the accident and that the Honda was an ORV under the no-fault act, not a motorcycle. Accordingly, the trial court determined that HOI was the priority no-fault insurer. The trial court's final orders reflected that HOI was to pay UMR for services rendered and that HOI owed additional no-fault benefits to Palka. These appeals followed.

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[1] Although these two plaintiffs filed two separate actions in the lower court, the actions were consolidated below. Because there were two separate docket numbers below, two separate appeals were filed in this Court by HOI. However, the appellate briefs filed in both appeals are identical.

[2] ACIA is referred to by various names, such as "AAA of Michigan," in the lower court record and on appeal. For ease of reference, we use the sole acronym "ACIA" in referring to this insurer.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012). HOI requested summary disposition under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

III. ANALYSIS

A. PARTY ADMISSIONS

HOI first argues that the trial court should have granted summary disposition in its favor on the basis of admissions made by Palka and ACIA during discovery. We disagree.

MCL 500.3114(1) states that, except in situations not applicable here, "a personal protection insurance policy . . . 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." Thus, HOI is responsible for plaintiff's no-fault benefits if, at the time of the accident, plaintiff was domiciled with his mother at the Pinckney home. "A domicile determination is generally a question of fact; however, where the underlying material facts are not in dispute, the determination of domicile is a question of law for the circuit court." *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 490; 835 NW2d 363 (2013).

Michigan courts use the *Workman-Dairyland* framework to analyze the facts material to domicile. See *Workman v Detroit Auto Inter-Ins Exchange*, 404 Mich 477, 496-497; 274 NW2d 373 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983). The framework encompasses several factors for the domicile analysis. The factors include:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his domicile or household; (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[;] and (4) the existence of another place of lodging. [*Workman*, 404 Mich 496-497 (quotation marks and citations omitted).]

In a case that involves determining whether an adult child is domiciled with a parent, "[o]ther relevant indicia of domicile include such factors as whether the claimant continues to use his

parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support." *Dairyland*, 123 Mich App at 682. Our Supreme Court has made it clear that a person has only one domicile, and that an adult's existing domicile remains in effect until the adult establishes a new domicile. *Grange*, 494 Mich at 493-494.

HOI argues that the trial court erred by failing to give conclusive effect to Palka's response to its request for admission that he was domiciled in California, not Michigan. To be conclusive on the domicile issue, the admissions would have to have demonstrated that Palka had terminated his domicile in Michigan and established a domicile in California. Indeed, ACIA admitted that Palka "has testified at various times that, at some unspecified time in the future[,] . . . he intended to move to California to live with his wife." Comparatively, in its response to the requests for admission, ACIA stated that at the time of the accident, Palka was domiciled with Alice in Michigan.

We agree with the trial court, and conclude that in no way did ACIA's admissions conclusively establish that Palka was domiciled in California at the time of the accident. At most, they showed that ACIA was acknowledging Palka's intent to move to California in the future. HOI contends that Palka's admissions definitively resolved the issue of domicile. And HOI emphasizes Palka's admission that ACIA was "the insurer in the highest priority to pay" Palka's no-fault benefits. While it is true that admissions can encompass "the application of law to fact," MCR 2.312(A), in *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 67; 475 NW2d 418 (1991), this Court stated that "under MCR 2.312(B)(1) it is only against the party to whom a request for admission has been served that a matter may be deemed admitted." Accordingly, Palka's answers are not attributable to ACIA. ACIA denied as untrue the assertion that ACIA was the highest-priority insurer for paying Palka's no-fault benefits and also denied that Palka was domiciled in California at the time of the accident.

HOI goes on to argue that ACIA must be deemed to have admitted all of HOI's requests for admissions—which encompassed the question about the highest-priority insurer—because ACIA did not respond to the requests. But this is patently untrue. Not only did ACIA file responses, although untimely, but HOI *relied* on those responses in making its arguments below and even *attached* the responses to its June 23, 2017 motion for summary disposition. Given that HOI attached ACIA's responses to its own summary disposition motion and relied on the responses in making its arguments, HOI has affirmatively waived the argument ACIA admitted all of HOI's requests for admission.[3]

[3] While the responses were filed more than 28 days after issuance of the requests to admit, and MCR 2.312(B)(1) states that requests for admission are deemed admitted if a reply is not received within 28 days, the fact remains that ACIA chose to rely upon the "tardy" responses and even attached them in support of its summary disposition motion. This was an affirmative waiver of any argument that the responses were unacceptably tardy. See, generally, *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003) (stating that waiver is

On the basis of the foregoing, we conclude that the trial court did not err by declining to rule that the admissions by the parties definitely established that Palka was domiciled in California at the time of the accident and that ACIA was the highest-priority insurer for the payment of no-fault benefits.

B. DOMICILE

Next, HOI argues that the trial court erred by finding that Palka was domiciled with Alice at the time of the accident. We disagree.

HOI argues that Palka's true domicile was California. However, at the time of the accident, it is undisputed that Palka was living with Alice and had been for months: Palka paid rent, had a room in the home, and was receiving mail there. Both Palka and Alice agreed that Palka would be staying at Alice's home at least until the end of the lease. Although Palka had intended to move to California to be with his wife before the accident, he admitted that he had set no specific date for the move, and actually needed to get his finances together before moving. He said that his plan was to move to California "eventually." Further, Palka admitted that although he was "going to move to California," he had not actually been a resident of California and had never lived with his wife. He did not have a California driver's license, and had not purchased any tickets to travel to California as of the date of the accident. Palka stated that between the marriage and the accident, he had gone to California approximately three times, for short trips of a week or so. He testified that just before the accident, he had some possessions, such as clothes and "shaving stuff," in California, and had things like "dish sets" and "DVDs" in Michigan.

On the basis of the foregoing, we conclude that the trial court did not err by finding that Palka was domiciled in Michigan at the time of the accident. The evidence showed that Palka had an intention to move to California at some point but he had not yet done so, or set a date to do so. We find no basis for reversal.

C. VEHICLE STATUS AS AN ORV UNDER THE NO-FAULT ACT

Finally, HOI argues that the trial court erred by finding that the vehicle Palka was driving at the time of the accident was an ORV and not a motorcycle. Again, we disagree.

Palka was driving a two-wheeled Honda bike designed for motocross racing at the time of the accident. Thus, the relevant question becomes whether the vehicle was an ORV or a motorcycle under the no-fault act. The no-fault act has specific priority provisions applicable to

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a voluntary abandonment of a known right). HOI, upon receiving the responses, did not thereafter argue that all its requests must be deemed admitted by ACIA because of the tardiness of the responses but instead chose to rely on and cite to some of ACIA's responses. This Court cannot permit HOI to "pick and choose" and decide for itself which written responses by ACIA were acceptably "valid" and which requests should be merely deemed admitted because of tardiness. ACIA has abandoned its tardiness argument.

motorcycle accidents. MCL 500.3114(5). If a motorcyclist is injured in a collision with a car, the car owner's no-fault insurance carrier is the first in priority to provide benefits to the injured motorcyclist. MCL 500.3114(5)(a). The no-fault act defines "motorcycle" as a vehicle that is designed to travel with no more than three wheels in contact with the ground, that has a saddle or seat for the rider, and that has a motor that exceeds 50 cubic centimeters of piston displacement. MCL 500.3101(3)(g). The definition of a motorcycle specifically excludes ORVs: "Motorcycle does not include a moped or an ORV." MCL 500.3101(3)(g).

Comparatively, the act defines ORV, in pertinent part, as follows:

> "ORV" means a motor-driven recreation vehicle designed for off-road use and capable of cross-country travel without benefit of road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. ORV includes, but is not limited to . . . a motorcycle or related 2-wheel, 3-wheel, or 4-wheel vehicle . . . . ORV does not include a vehicle described in this subdivision that is registered for use on a public highway and has the security required under subsection (1) or section 3103 in effect. [MCL 500.3101(3)(k)][4]

In the trial court, the parties focused a considerable amount on whether the Honda was capable of riding on off-road trails. But the definition of ORV focuses on whether the vehicle was designed specifically "for off-road use" and whether it is "capable of cross-country travel without benefit of road or trail[.]" MCL 500.3101(3)(k). HOI's own evidence showed that the Honda was, in fact, designed for off-road use, specifically in closed-course racing.[5] Indeed, the owner's manual states, "Careful pre-ride inspections and good maintenance are especially important because your [vehicle] is *designed* to be ridden in *off-road* competition." (Emphasis added.)

In concluding that the Honda was an ORV, the trial court relied in part on *Nelson v Transamerica Ins Servs*, 441 Mich 508; 495 NW2d 370 (1992). In *Nelson*, the Court stated:

> [I]t appears the motorcycle insurance requirement was intended only for on-road motorcycles.
>
> Furthermore, inherent in the definition of ORV is the intention that only off-road vehicles be included. It logically follows that in including the term "motorcycle" in the ORV definition, the Legislature intended to include only motorcycles that were specifically designed for off-road use. Thus, the no-fault act states which vehicles must be insured, and the ORV exemption states which vehicles are exempt from the no-fault act insurance requirement. [*Id*. at 516.]

[4] In 2016, the Legislature slightly revised the grammar and internal references in the ORV definition. 2016 PA 346. The revisions are not pertinent in this case.

[5] Palka was not a professional racer. Rather, he raced as a hobby and therefore was using the Honda as a "recreation vehicle." MCL 500.3101(3)(k).

The *Nelson* Court found that the vehicle at issue in that case was an ORV, reasoning that it "could not legally be operated as a street bike on public highways because it did not have necessary safety features. It was designed without a headlight, turn signals, or brake lights. Its knobby tires and higher suspension would be useful only in negotiating extremely difficult terrain." *Id*. at 520. Similarly, the vehicle at issue here was not designed for public-highway use, but rather off-road use: unlike a motorcycle, this vehicle did not have necessary safety features such as headlights or turn signals. Moreover, the evidence the vehicle was "capable of cross-country travel without benefit of road or trail[.]" MCL 500.3101(3)(k).

We conclude that the trial court did not err by finding that the Honda was an ORV and did not fall within the definition of a motorcycle under the no-fault act. MCL 500.3101(3)(g). [6]

In Docket No. 350204, we affirm.

In Docket No. 350207, we affirm.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Thomas C. Cameron

[6] HOI contends that the Honda was a motorcycle and that ACIA, therefore, was first in priority to pay Palka's no-fault benefits. ACIA argues that even if the Honda was a motorcycle, it would owe no benefits because the vehicle was not insured. We need not reach this argument by ACIA because the Honda was clearly an ORV and not a motorcycle under the no-fault act.