STATE OF MICHIGAN

COURT OF APPEALS

ANIYA CORBIN, Minor, by Next Friend ANTHONY CORBIN,

Plaintiff-Appellee,

v

MEEMIC INSURANCE COMPANY,

Defendant-Appellee,

and

FARM BUREAU GENERAL INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION
January 13, 2022
9:20 a.m.

No. 354672
Washtenaw Circuit Court
LC No. 19-001384-NI

Before: GADOLA, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

In this first-party no-fault action, defendant, Farm Burau General Insurance Company, appeals by leave granted[1] the trial court's order denying Farm Bureau's motion for summary disposition and granting summary disposition to defendant, Meemic Insurance Company. Farm Bureau contends on appeal that the trial court erred when it held that plaintiff, a minor, was domiciled with her mother at the time of her automobile accident, and that the court erred in dismissing Meemic on that basis. We reverse and remand for the trial court to reassess its domicile determination.

I. FACTUAL BACKGROUND

[1] *Corbin v Meemic Ins Co*, unpublished order of the Court of Appeals, entered December 23, 2020 (Docket No. 354672).

This case arises out an automobile accident that left plaintiff permanently and severely injured. Plaintiff's parents share joint legal and physical custody of plaintiff on the basis of a consent order of filiation entered in 2010. At the time of the accident, plaintiff was with her mother, who lacked automobile insurance. On that basis, plaintiff's mother filed an application for no-fault benefits on plaintiff's behalf with the Michigan Assigned Claims Plan (MACP). The MACP then assigned Farm Bureau to the case.

Later, however, plaintiff, with her father as next friend, filed the present suit against Farm Bureau and Meemic. Plaintiff contended that she was the resident relative of someone insured by Meemic, plaintiff sought no-fault benefits from Meemic on that basis, and alternatively argued that Farm Bureau was liable for her benefits after having been assigned by the MACP. Farm Bureau moved for summary disposition, arguing that the resident relative insured by Meemic was plaintiff's paternal great-grandmother, with whom both plaintiff and her father resided at the time of the accident. Meemic filed a countermotion, contending that, under *Grange Ins Co of Mich v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013), because a custody order was in place that granted joint physical and legal custody of plaintiff to her parents, her domicile for no-fault purposes was with whichever parent had actual custody at the time of the accident. The trial court agreed and dismissed Meemic from the case. This appeal followed.

II. STANDARD OF REVIEW

The trial court indicated that it granted summary disposition to Meemic pursuant to MCR 2.116(C)(8), however, we note that the trial court looked beyond the pleadings in reaching its conclusion. MCR 2.116(C)(8) considers the pleadings and not documentary evidence, *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), whereas MCR 2.116(C)(10) considers both, *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). See also *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019). Thus, even where a decision on a motion for summary disposition is premised on MCR 2.116(C)(8), when a court looks beyond the pleadings in granting the motion, we treat the motion as though it were granted under MCR 2.116(C)(10). *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Here, central to the trial court's decision was the consent order of filiation that was first made part of the record when Farm Bureau filed its motion for summary disposition, and the details of which were not incorporated into plaintiff's complaint. Accordingly, because the trial court looked beyond the pleadings in rendering its decision, we treat the motion as though it were granted under MCR 2.116(C)(10).

This Court reviews decisions to grant or deny summary disposition de novo. *El-Khalil*, 504 Mich at 159. Summary disposition pursuant to MCR 2.116(C)(10) is appropriate where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted). In reviewing the motion, "this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion." *Sanders*, 303 Mich App at 4 (quotation marks and citation omitted).

Generally, a domicile determination is a question of fact, "and this Court will not reverse the trial court's determination unless the evidence clearly preponderates in the opposite direction." *Goldstein v Progressive Cas Ins Co*, 218 Mich App 105, 112; 553 NW2d 353 (1996). Where the underlying facts are not in dispute, however, the determination of domicile is a question of law this Court reviews de novo. *Grange*, 494 Mich at 490. Issues of statutory interpretation are likewise questions of law that this Court reviews de novo. *Id*.

III. ANALYSIS

Farm Bureau contends that the trial court's application of *Grange* was inapt, and that it was not appropriate under the circumstances for the trial court to treat the consent order of filiation as conclusive evidence of plaintiff's domicile.

A. *GRANGE*

Resolution of this issue centers on the interaction between MCL 500.3114(1) and MCL 500.3172(1)(a), and of course, on application of *Grange*. MCL 500.3114(1) provides, in relevant part,

> [A] personal protection insurance policy described in [MCL 500.3101] 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.

The parties do not dispute that the insurance policy provided by Meemic to plaintiff's great-grandmother was one such insurance policy, and that to the extent plaintiff was domiciled with her father at the time of the accident, Meemic's policy applies. MCL 500.3172(1)(a) provides:

> (1) A person entitled to a claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may claim personal protection insurance benefits through the assigned claims plan if any of the following apply:
>
> (a) No personal protection insurance is applicable to the injury.

The parties likewise do not dispute that, if plaintiff was not domiciled with her father and great-grandmother at the time of the accident, then Meemic's policy is not applicable to plaintiff's injuries and the MACP properly assigned an insurer—Farm Bureau—to the case. The trial court determined that the issue of plaintiff's domicile was resolved by application of *Grange*.

Grange was a consolidated case involving two similar factual scenarios. *Grange*, 494 Mich at 482-489. In the first, the custody of a minor child was governed by a judgment of divorce that granted joint legal custody to both parents but primary physical custody to the mother. *Id*. at 482. After the child was killed in an automobile accident, both of her parents submitted claims for PIP benefits with their respective insurers—Farm Bureau and Grange. *Id*. at 483. Farm Bureau, the mother's insurer, appeared before the trial court and argued that the two insurers were equal in the order of priority for the payment of PIP benefits because the minor child was domiciled in both of her parents homes, and thus sought a partial reimbursement from Grange, the father's insurer, for

benefits paid. *Id.*[2] Grange argued that it was not liable for any PIP benefits because the child was solely domiciled with her mother, and not her father. *Id*. The trial court determined that the child was domiciled with both parents and thus both insurers were equally liable for her PIP benefits. *Id*. at 484. This Court affirmed. *Id*. at 484.

In the second case, two parents were awarded joint legal custody of their minor child, but the father was awarded physical custody. *Id*. at 486. The most recent custody order in that case permitted the father to change the child's domicile to the state of Tennessee, and awarded the mother six weeks of summer visitation in Michigan. *Id*. When the child was 16 years old, she determined that she wanted to get to know her mother better, and both the mother and father agreed that the child could remain in Michigan after summer visitation and attend high school while living with her mother and uncle. *Id*. at 487. That fall, the child was killed in an automobile accident. *Id*. Thereafter, the uncle's automobile insurer, Automobile Club Insurance Association, began to pay no-fault benefits on the basis that the child was a resident relative. *Id*. Ultimately, however, ACIA instituted an action wherein it argued that it was not liable for no-fault benefits because the child was not actually domiciled in Michigan. *Id*. at 487-488. On that basis, ACIA argued that the insurer of highest priority was the insurer that insured the vehicle in which the child had been a passenger. *Id*. at 488. The trial court disagreed, and concluded that the child "had residency in Michigan with her mother and her uncle at the time of the motor vehicle accident." *Id*. This Court reversed, concluding that the child's actual domicile was a question of fact for the jury. *Id*. at 488-489.

The Court reasoned that both cases turned "on the interpretation of 'domiciled' as it is used in MCL 500.3114(1)." *Id*. at 492. The Court noted more specifically that the first case turned on "whether a child of divorced parents injured in a motor vehicle accident can be 'domiciled' in more than one household for purposes of the no-fault act," and that the second case turned on "whether a family court order pertaining to a child's custody conclusively establishes a child's domicile under the no-fault act." *Id*.

As to the first issue, the Court noted that, with respect to MCL 500.3114(1), "had the Legislature intended to make insurers liable for PIP benefits for dual coexisting 'domiciles,' then it would have used the term 'resided,' and not 'domiciled,' " in the statute. *Id*. at 495-496. This is because, although a person may have more than one residence at a time, a person may only have one domicile. *Id*.

> For over 165 years, Michigan courts have defined "domicile" to mean the place where a person has his true, fixed permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. Similarly, a person's domicile has been defined to be that place where a person has voluntarily fixed his abode and not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time. In this regard, the Court has recognized that it may be laid down as a settled maxim that every man must have

[2] At the time, MCL 500.3115(2) allowed insurers to recoup benefits from other insurers of equal priority. *Grange*, 494 Mich at 491. That provision is now codified as MCL 500.3114(8).

> such a national domicile somewhere. It is equally well settled *that no person can have more than one such domicile, at one and the same time*. [*Id*. at 493-494 (quotation marks and citations omitted).]

The Court continued: "consistent with the traditional common-law principle that a person may only have one domicile at a given point in time, we hold that a child, whose parents are divorced and who has more than one legal residence, may have only a single domicile at any point in time that continues until the child acquires a different one." *Id*. at 496.

With respect to the next issue, how courts may determine the domicile of a minor, the Court noted that "common law recognizes three means of acquiring a domicile, which are generally applicable to all persons depending on the factual circumstances, including: (1) domicile of origin or nativity; (2) domicile of choice; and (3) domicile by operation of law." *Id*. at 501. "[A] child's domicile, upon the divorce or separation of the child's parents, is the same as that of the parent to whose custody *he has been legally given* pursuant to a custody order." *Id*. at 504. That is, "a child's domicile, upon . . . entry of a custody order is established by operation of law consistent with the terms of the custody order." *Id*. at 505. Although parents might ordinarily be permitted to alter a child's domicile to be consistent with their own, "parents are legally bound by the terms of the custody order." *Id*. at 508. "[T]he order therefore negates the parents' legal capacity, which is necessary to establish a domicile of choice for the minor child that is different from that established in the custody order." *Id*. at 508-509. "Therefore, courts presiding over an insurance coverage dispute involving the minor child of divorced parents must treat a custody order as *conclusive* evidence of a child's domicile." *Id*. at 511 (emphasis added). In such cases, "the factual circumstances or the parents' or child's intention are irrelevant to the domicile determination." *Id*.

With all of the above in mind, the *Grange* Court concluded that the child in the first factual scenario was domiciled with her mother because the relevant custody order granted the mother primary physical custody, and the child in the second factual scenario was domiciled with her father for the same reason and because the custody order in that case expressly established domicile in the state of Tennessee. *Id*. at 513-515. In reaching this conclusion, the Court noted that, in some rare instances, custody orders may grant joint physical custody *and* equal parenting time, and instructed lower courts on how to deal with those cases:

> Although not presently before this Court, we recognize that determining domicile by reference to a custody order may appear to lead to a perplexing result where the order grants each parent joint physical custody under MCL 722.26a(7) *and* creates an equal 50/50 division of physical custody. To begin with, we emphasize that an award of joint physical custody alone does not automatically create this potentially perplexing situation because although an order may award joint physical custody, it may also establish that one parent has *primary* physical custody. Alternatively, the details of the physical custody division may reveal that one parent has physical custody of the child more often than the other parent despite the joint physical custody arrangement. Thus, it is only in the very rare event that a custody order awards joint physical custody *and* grants both parents an equal amount of time to exercise physical custody that this issue arises. Indeed, MCL 722.26(a)(7) does not require that parents share *equal* physical custodial time for a court to award joint physical custody; rather, MCL 722.26a(7)(a) merely defines

joint physical custody as an order "[t]hat the child shall reside *alternatively for specific periods* with each of the parents." (Emphasis added.) The statute does not, however, require that the child reside with each parent for an *equal* amount of time to constitute joint physical custody.

In the unusual event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time. Restatement [Conflict of Laws 2d], § 22 (1971). Thus, the child's domicile is with the parent who has physical custody as established by the custody order at the specific time of the incident at issue. This approach is constituent with the terms of the custody order and avoids a finding that the child has dual coexisting domiciles. [*Id*. at 512 n 78 (first alteration in original).]

B. APPLICATION OF *GRANGE*

Returning to the facts of the case at bar, the consent order of filiation governing plaintiff's custody provided as follows:

CUSTODY

The parties shall have joint legal and physical custody of said minor child(ren) until further order of the Court.

The parents shall cooperate with respect to the child(ren) so as, in a maximum degree, to advance the child(ren)'s health, emotional and physical well-being, and to give and afford the child(ren) the affection of both parents and a sense of security. Neither parent will directly or indirectly influence the child(ren) so as to prejudice the child(ren) against the affectionate relationship between the child(ren) and the father and the child(ren) and the mother. Neither party will do anything which may estrange the other from the child(ren) or injure the opinion of the child(ren) to the other party, or which will hamper the free and natural development of the child(ren) for the other party.

DOMICILE

The domicile or residence of the child(ren) may not be moved from Michigan without the approval of this Court and the custodian shall promptly notify the Court when the child is moved to another address.

A party whose custody or parenting time of a child is governed by this Order shall not change the legal residence of the child, except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

A parent of a child whose custody is governed by Court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which

the order is issued, except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

PARENTING TIME

The non-custodial parent shall have reasonable parenting time until further order of the Court.

As the trial court recognized, the order of filiation did not establish a primary custodial parent or otherwise fix a parenting time schedule. That is, plaintiff's schedule was left to her parents so long as they continued to cooperate and work together. The trial court nonetheless concluded that the order of filiation was dispositive, and that, pursuant to the instructions contained in footnote 78 of *Grange*, plaintiff's domicile was with whichever parent had actual custody at the time of the automobile accident.

The conclusions set forth in footnote 78 do not apply to the above arrangement.[3] The dispositive fact in *Grange* was that both of the custody orders awarded primary physical custody to one parent. *Grange*, 494 Mich at 513-515. And footnote 78 does not apply by its own terms. The *Grange* Court referred in that footnote to the unusual situation in which a custody order awards *both* joint physical custody and equal parenting time. *Id*. at 512 n 78. "In the unusual event that a custody order *does* grant an equal division of physical custody, *and only in this instance*, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living." *Id*. (second emphasis added). This is not such a case, as the order of filiation left parenting time to the discretion of the parents.

Meemic contends that the above application of *Grange* is inapt because *Grange* specifically held that, where custody of a minor is governed by a court order, parents are bound by the order and lose the legal capacity to establish a domicile of choice for that minor. Again, this rule does not cleanly apply here because the order of filiation did exactly what the custody orders in *Grange* did not: it reserved to the parents their right to determine both residence and domicile, with some limitations. The order did not set forth a parenting time schedule, let alone one that required equal parenting time. This alone takes this order outside what was addressed in footnote 78.

With that in mind, we hold that the trial court needed to look beyond the order of filiation to determine plaintiff's actual domicile, as the order of filiation was not dispositive. To do so, the trial court should have reverted to the traditional multifactored analyses from *Workman v Detroit*

[3] Farm Bureau suggests that the relevant portion of *Grange* is dictum. It is not. "[D]ictum is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive." *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (quotation marks and citation omitted). However, "when a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Id*. at 384 (quotation marks, citation, and alterations omitted).

Auto Inter-Insurance Exch, 404 Mich 477; 274 NW2d 373 (1979), and *Dairyland Ins Co v Auto Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983), to determine plaintiff's domicile. See *Grange*, 494 Mich at 497 n 41 ("The *Workman-Dairyland* multifactored framework comprises the one now commonly employed by Michigan courts when a question of fact exists as to where a person is domiciled.").

Here, there was a substantial amount of testimony to suggest that plaintiff's father had always operated as plaintiff's primary custodian, and that both parents intended to continue that arrangement before and after the subject-automobile accident. Rather than stand in the position of the finder-of-fact, we think it more appropriate that the trial court be afforded an opportunity to weigh the above evidence. See *Grange*, 494 Mich at 490 (noting that the issue of domicile is ordinarily a question of fact). Suffice it to say, however, in light of the fact that the order of filiation did not conclusively determine plaintiff's domicile, the trial court erred in not weighing the additional relevant evidence when it made its initial domicile determination.

Reversed and remanded for the trial court to reassess its determination regarding plaintiff's domicile. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Jane E. Markey
/s/ Christopher M. Murray