# STATE OF MICHIGAN

# COURT OF APPEALS

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THE DETROIT MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee/Cross-Appellee,

and

BRISTOL WEST INSURANCE GROUP,

Defendant-Appellee/Cross-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, NEW HAMPSHIRE INDEMNITY COMPANY, and MICHIGAN ASSIGNED CLAIMS FACILITY,

Defendants.

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QAISER WUTWUT, as next friend of TABARAK WUTWUT,

UNPUBLISHED
April 1, 2010

No. 287775
Wayne Circuit Court
LC No. 06-624685-NF

Plaintiff-Appellee/Cross-Appellee,

v

No. 287776
Wayne Circuit Court
LC No. 06-626705-NF

FARM BUREAU GENERAL INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee/Cross-Appellee,

and

BRISTOL WEST INSURANCE GROUP,

Defendant-Appellee/Cross-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, NEW HAMPSHIRE INDEMNITY COMPANY, d/b/a AMERICAN INSURANCE GROUP, and MICHIGAN ASSIGNED CLAIMS FACILITY,

Defendants.

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Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In these consolidated cases pertaining to an insurance coverage dispute, defendant Farm Bureau General Insurance Company ("Farm Bureau") appeals as of right the trial court's August 22, 2008, order holding that Farm Bureau and defendant Bristol West Insurance Group ("Bristol West") are in the same order of priority to pay the no-fault benefits applicable to injuries sustained by plaintiff Tabarak Wutwut and must pay the allowable expenses incurred in equal proportions, along with interest and penalty attorney fees. We vacate in part and remand.

## I. FACTUAL BACKGROUND

In September 2005, Tabarak, who was then 14-years-old and walking home from a driver's training class, was struck and injured by a motor vehicle driven by an uninsured motorist. The vehicle "jumped" the curb and knocked Tabarak against a building. She suffered several fractured bones and internal injuries, and received treatment at plaintiff Detroit Medical Center ("DMC"). There were two potential sources of insurance coverage available to Tabarak. Farm Bureau had issued a business auto no-fault policy to Tabarak's father Qaiser Wutwut, and Bristol West had issued an auto no-fault policy to Tabarak's mother Ashwak Hammed. At the time of the accident, both policies were in effect and Tabarak lived with Hammed in Dearborn Heights, Michigan, in a home owned by Qaiser. Qaiser was in Iraq. Both Farm Bureau and Bristol West declined to provide coverage. Bristol West questioned the familial relationship between Tabarak and her mother Hammed.[1] Farm Bureau disputed whether Tabarak was domiciled in Qaiser's household at the time of the accident. Thereafter, Tabarak sought benefits through defendant Michigan assigned claims facility, see MCL 500.3171 *et seq*., which assigned her claim to defendant Citizens Insurance Company of America ("Citizens"). Citizens, however, also initially denied payment of the claim.

### A. FACTS RELEVANT TO TABARAK'S AND QAISER'S LIVING ARRANGEMENTS

The Wutwuts are originally from Iraq. Qaiser was forced to flee Iraq in the 1990s because he had been active in a group that opposed Saddam Hussein's regime. Qaiser moved to the United States in 1994. In 1996, he purchased a house in Michigan. The rest of Qaiser's family, including his wife Hammed and daughter Tabarak, moved from Iraq to Michigan in 1997. Qaiser established a carpentry business with his brother near Detroit.

Two to three months before Hussein's capture in December 2003, Qaiser returned to Iraq. Hammed testified that when Qaiser left for Iraq, he said, "I'm going to find a home and I'll find me a job since Saddam was toppled. I mean, we going to all go back to Iraq and we going to live there." Hammed indicated that Qaiser intended to create a place in Iraq for their family to live. Qaiser first moved into a small condominium next to his sister's house in Baghdad, then into his sister's house, and then into a nearby rental apartment. It appears from the record that at the time of the accident, he was living with his sister. He ran for public office, took a job at his friend's company, and sold his share of his Michigan carpentry business to his brother or his brother's wife.

At the time of the accident, Tabarak was living with Hammed, as well as two brothers, a sister-in-law, and two sisters, in their Michigan home. The title to the house and the mortgage were in Qaiser's name. Some of the utility bills for the house were also in his name. Qaiser continued to receive some mail, such as credit card advertisements and utility bills, at the house and left some clothes, shoes, and books there. The vehicle Qaiser insured with Farm Bureau

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[1] After plaintiffs filed suit and discovery was conducted, Bristol West essentially conceded the existence of coverage under its policy, which the trial court confirmed in its August 22, 2008, order.

continued to be stored there. While in Iraq, Qaiser sent money to Hammed, filed at least one income tax return in the United States, renewed his Michigan driver's license, and maintained a joint bank account with Hammed in Michigan. Qaiser traveled to Michigan periodically to visit, typically staying for about one month at a time. He stayed at the family's home in Michigan on three separate occasions during Tabarak's recovery from the accident. Neither Hammed nor Tabarak could recall with certainty how often Qaiser visited prior to the accident.

When asked whether Qaiser intended to stay in Iraq or return to the United States permanently, Tabarak testified:

> *Q.* When you said earlier your – he comes back and visits, though, regularly; correct, even before this accident?
>
> *A.* Well, whenever he can. Not regularly, but whenever he can.
>
> *Q.* Did he ever express to you any intention as to when he – whether or not he's going to stay in Iraq, whether or not he's going to come back to the United States and live consistently?
>
> *A.* You mean whether he's going to come back and just, you know, not go back anymore?
>
> *Q.* Yeah. Well, at least when is he going to come back to Iraq or the United States; do you know?
>
> *A.* Like come back and stay?
>
> *Q.* Yeah, to come back and stay.
>
> *A.* Actually, it's undecided. I don't know.
>
> * * *
>
> *Q.* Okay. Has your dad ever expressed to you what his intent is in terms of returning to the United States? In other words, has he expressed that he's going to come back and live in the United States on a permanent basis consistently?
>
> *A.* That's – he hasn't decided that yet, no.

When asked similar questions, Hammed testified:

> *Q.* Is it still your husband's plan that he will make a home for your family to come to Iraq?
>
> *A.* Yes, that's what's in his mind.
>
> * * *

*A.* Of course he would like us to go back there. But because of the changing situation there, I'm sacrificing and staying with them here.

*Q.* In your husband's mind as he has stated it to you, he intends to stay in Iraq?

*A.* He settled there.

## B. PROCEDURAL HISTORY

In August 2006, the DMC filed suit against defendants. Tabarak did likewise in September 2006. Both the DMC and Tabarak requested that the trial court adjudicate defendants' liability for no-fault benefits. The two cases were then consolidated. Farm Bureau moved for summary disposition in June 2007. At a hearing on the motion, Farm Bureau argued that Tabarak was not entitled to coverage under MCL 500.3114(1)[2] because she was not domiciled in the same household as Qaiser, who had been living in Iraq for approximately two years prior to the accident. Tabarak and Bristol West argued that, at the very least, material questions of fact existed regarding Qaiser's domicile. The trial court denied Farm Bureau's motion for summary disposition, stating that under the statute it is only necessary to determine the injured relative's domicile, not the domicile of the named insured. The court declined to order summary disposition against Farm Bureau, and ordered that reasonable efforts be made to depose Qaiser. But Qaiser was never deposed. In November 2007, Farm Bureau renewed its motion for summary disposition, arguing that whether Tabarak was a "resident relative" under MCL 500.3114(1) was still in dispute, and adding an additional ground for summary disposition, which is not at issue on appeal.

In December 2007, Tabarak filed an amended complaint seeking uninsured motorist benefits. Farm Bureau then filed another motion for summary disposition, arguing that Tabarak was not covered under the uninsured motorist section of Qaiser's policy. Thereafter, Tabarak filed cross motions for summary disposition on the issues of PIP benefits, uninsured motorist coverage, and serious impairment of body function. The DMC filed a renewed motion for no-fault penalties, and Citizens moved for summary disposition on its claim for reimbursement.

At the March 2008, hearing on the parties' motions, the trial court again rejected Farm Bureau's argument that Tabarak was not a "resident relative" of Qaiser's under MCL 500.3114(1), stating:

> I think your focus is opposite what the statute says. I think you're asking me to create an exception in a statute where the language is pretty clear. And that is under 3.114(1), the policy covers an insured of relative [sic] domiciled in the

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[2] MCL 500.3114(1), a subsection of the Michigan no-fault act, MCL 500.3101 *et seq*., provides, in part: "[A] personal protection insurance policy described in section 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."

> same household. As I've stated there are no cases standing for the proposition that the Court should look to the named insured['s] status. The fact – in fact, I check[ed] every other state.
>
> I think the statute is clear both the mother and father are named insured on [the] policy and the daughter lives in the household. There's no requirement in the statute that the named insured or case law for that matter be domiciled in the same household. And I'm not going to interpret this statute to the point where it would deny coverage to someone who's entitled to it.

The court held that Tabarak was entitled to PIP coverage and uninsured motorist coverage under Farm Bureau's policy, that Farm Bureau and Bristol West were in the same order of priority to pay no-fault benefits, and that Tabarak suffered a serious impairment of body function. The court took the motions filed by the DMC and Citizens under advisement. It subsequently entered an order granting plaintiff's motions for summary disposition as to PIP coverage and serious impairment of body function, and partial summary disposition as to uninsured motorist coverage, and denying Farm Bureau's motions for summary disposition.

Thereafter, the trial court heard oral arguments regarding Citizens' entitlement to reimbursement and the DMC's motion for no-fault penalty attorney fees and interest under MCL 500.3142 and 500.3148(1).[3] With regard to the no-fault penalties, the court concluded that Farm Bureau and Bristol West unreasonably refused to pay plaintiffs' claims. Specifically the court found that the insurers' positions of non-coverage were "not a product of [a] legitimate question of statutory construction[,] constitutional law nor bona fide factual uncertainty" and imposed no-fault penalties on both. The court issued an order in August 2008 rendering judgment against Farm Bureau and Bristol West according to its prior ruling, and ordering them to reimburse Citizens $354,123.05 in equal parts and pay plaintiffs penalty attorney fees and interest of varying amounts depending on each insurer's length of time in the case.

Farm Bureau now appeals as of right the trial court's decision in regard to both lower court cases. The cases have been consolidated for appeal.[4]

## II. PIP COVERAGE UNDER MCL 500.3114(1)

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[3] MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

[4] *Detroit Medical Ctr v Farm Bureau Gen Ins Co*, unpublished order of the Court of Appeals, entered October 2, 2008 (Docket Nos. 287775, 287776).

Farm Bureau argues that the trial court erred in granting Tabarak's motion for summary disposition of her claim for PIP coverage under MCL 500.3114(1) and rendering judgment against Farm Bureau. We agree. Under MCL 500.3114(1), a relative of the named insured must be domiciled in the named insured's household to trigger no-fault coverage. Whether Tabarak was domiciled in Qaiser's household at the time of the accident involves material questions of fact for the finder of fact.

## A. STANDARDS OF REVIEW AND STATUTORY INTERPRETATION

We review a trial court's decision on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Here, Farm Bureau moved for summary disposition under MCR 2.116(C)(10). It is not clear from the record under which subrule Tabarak filed her cross motion for summary disposition, and the trial court did not state under which subrule it decided the motions. We must assume that the court decided the motions under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. The court must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); MCR 2.116(G)(6). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

The interpretation and application of a statute involve questions of law that we also review de novo on appeal. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). As this Court stated in *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> Statutory interpretation is a question of law subject to review de novo on appeal. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. [Citations omitted.]

Every word or phrase of a statute should be accorded its plain and ordinary meaning, but if the Legislature's intent cannot be determined from the statute itself, this Court may consult dictionary definitions. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The no-fault act is a remedial statute that is "to be construed liberally in favor of the persons intended to be benefited by the statute." *Bierbusse v Farmers Ins Group*, 84 Mich App 34, 37; 269 NW2d 297 (1978).

In regard to interpreting the no-fault act in conjunction with the terms of an insurance policy, our Supreme Court explained:

> PIP benefits are mandated by statute under the no-fault act, MCL 500.3105 . . . , and, therefore, the statute is the "rule book" for deciding the issues involved in

questions regarding awarding those benefits.[3] On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute.

> [3] The policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.
>
> A policy of insurance must be construed to satisfy the provisions of the law by which it was required, particularly when the policy specifies that it was issued to conform to the statutory requirement . . . . [*Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525 and n 3; 502 NW2d 310 (1993).]

B. INTERPRETATION AND APPLICATION OF MCL 500.3114(1)

In this case, Farm Bureau issued a business auto no-fault policy to Qaiser. There is no dispute that the policy was in effect at the time of the accident or that Tabarak is Qaiser's daughter. The section of the policy entitled "Michigan Personal Injury Protection" states that the benefits described therein "are subject to the provisions of Chapter 31 of Michigan's Insurance Code of 1956, as amended." That section of the policy further states, in part:

> B. WHO IS AN INSURED
>
> 1. You or any "family member".
>
> * * *
>
> F. ADDITIONAL DEFINITIONS
>
> As used in this endorsement:
>
> * * *
>
> 2. 'Family member" means a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child.

As indicated, MCL 500.3114(1), a subsection of the no-fault act (chapter 31 of the Insurance Code), provides, in part:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 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.

At issue in this case is the proper interpretation and application of the phrase "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household," in MCL 500.3114(1). This case presents a unique set of facts in that Tabarak's (the relative's) domicile is undisputed; instead, the focus is on Qaiser's (the named insured's) household or domicile. Previous cases interpreting and applying MCL 500.3114(1) involved a determination of the relative's domicile. See, e.g., *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477; 274 NW2d 373 (1979); *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983).

This Court has held that "while MCL 500.3114(1) does not require that an insured's spouse be domiciled with the insured, any relative or child of the insured or the insured's spouse must be domiciled in the named insured's household to trigger no-fault coverage." *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 165; 561 NW2d 445 (1997), citing *Citizens Mut Ins Co v Community Services Ins*, 65 Mich App 731, 732-733; 238 NW2d 182 (1975). In *Workman*, our Supreme Court stated:

> [I]n this state, the terms "domicile" and "residence" are legally synonymous (except in special circumstances).
>
> Our review of both Michigan opinions and opinions of our sister state courts first reveals the general principle that the terms "resident" of an insured's "household" or, to the same effect, "domiciled in the same household" as an insured, have "no absolute meaning", and that their meaning "may vary according to the circumstances". The "legal meaning" of these terms must be viewed flexibly, "only within the context of the numerous factual settings possible".
>
> Accordingly, both our courts and our sister state courts, in determining whether a person is a "resident" of an insured's "household" or, to the same analytical effect, "domiciled in the same household" as an insured, have articulated a number of factors relevant to this determination. [*Workman*, 404 Mich at 495-496 (citations omitted); see also *Dairyland*, 123 Mich App at 680-682.]

While courts of this state have determined that a relative of the named insured or the insured's spouse must be domiciled in the same household as the named insured under MCL 500.3114(1), *Auto Club Ins Ass'n*, 221 Mich App at 165, our courts have not yet considered whether the named insured must be domiciled with the relative. MCL 500.3114(1) states that coverage applies to "the person named in the policy, the person's spouse, and a relative of either *domiciled in the same household*" (emphasis added). Reading the statute on its face, it is not unreasonable to conclude that it requires a determination as to the named insured's domicile where it is in dispute. It is difficult to imagine a situation where the relative is domiciled in the *same* household as the named insured, yet the named insured is domiciled elsewhere. On the other hand, the term "domiciled" only modifies the term "relative" in the statute, and the statute does not specifically reference the insured's domicile. Furthermore, our Supreme Court has held that the phrase "domiciled in the same household" has the same analytic effect as the phrase "resident of the insured's household." *Workman*, 404 Mich at 495-496. The latter phrase mirrors the policy language in this case, which states that a "family member" is a person related to the insured by blood, marriage, or adoption "who is a resident of your [the insured's] household." Considering the phrase "resident of the insured's household," we conclude that the

proper inquiry under MCL 500.3114(1) is whether the relative and the named insured are members of the same household.

In *Thomas v Vigilant Ins Co*, 156 Mich App 280, 281; 401 NW2d 351 (1986), this Court considered whether the plaintiff was entitled to PIP coverage under a homeowner's policy issued to his parents. The policy extended coverage to the named insureds and to "residents of the named insureds' household." *Id*. The *Thomas* Court held that the "commonly understood meaning of the word 'household' is a family unit living together under the same roof." *Id*. at 283. In so holding, the Court considered numerous dictionary definitions:

> Black's Law Dictionary (rev 4th ed), p 873, defines "household" as: "a family living together . . . [those] who dwell under the same roof and compose a family."[5] Webster's Third New International Dictionary (1971) defines "household" as: "[those] who dwell under the same roof and compose a family; a domestic establishment; specifically, a social unit comprised of those living together in the same dwelling place." The American Heritage Dictionary of the English Language (1976) defines "household" as: "[a] domestic establishment including the members of a family and others living under the same roof." [*Id*. at 282-283.]

Considering the commonly understood meaning of the term "household" and the particular facts of the case, the *Thomas* Court concluded that the plaintiff and his parents maintained separate and distinct households. *Id*. at 283. The Court stated:

> In the instant case, although Madge and Victor Taylor owned both the home on Porter Street in which Elvictor [the plaintiff] lived and their own residence on Cobb Street, they established only one household on Cobb Street. Elvictor Taylor and his family comprised a separate and distinct household in a separate dwelling on Porter Street. Elvictor Taylor paid his own utilities and purchased his own groceries. Rent was paid to Madge and Victor in the form of keeping the house in good repair. We conclude, therefore, that Elvictor was not a resident of the insureds' household since the insureds' household was at a different address under a separate roof. [*Id*. at 283-284.]

In determining whether the plaintiff in *Thomas* resided in his parents' household, this Court considered a number of factors in addition to whether he and his parents slept under the same roof. Courts of this state have articulated non-exhaustive lists of factors to be considered in determining domicile for insurance purposes, and we find that those factors may be used as a

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[5] Interestingly, Black's Law Dictionary (5th ed), p 666, includes in the definition of "household": "[a] man's family living together constitutes his household, *though he may have gone to another state*," and that for insurance purposes, the term is "generally synonymous with 'family'" (emphasis added). Black's Law Dictionary (8th ed), p 756, defines "household" as "[a] family living together" and "a group of people who dwell under the same roof."

guide in determining membership in a household.[6, 7] In *Fowler v Airborne Freight Corp*, 254 Mich App 362, 364; 656 NW2d 856 (2002), this Court stated that the "factors should be weighed or balanced with each other because no one factor is determinative."

> The relevant factors in deciding whether a person is domiciled in the same household as the insured include: (1) the subjective or declared intent of the claimant to remain indefinitely in the insured's household, (2) the formality of the relationship between the claimant and the members of the household, (3) whether the place where the claimant lives is in the same house, within the same curtilage, or upon the same premises as the insured, and (4) the existence of another place of lodging for the person alleging domicile. *Workman*[, 404 Mich at 496-497].
>
> When considering whether a child is domiciled with the child's parents, other relevant indicia include: (1) whether the child continues to use the parents' home as the child's mailing address, (2) whether the child maintains some possessions with the parents, (3) whether the child uses the parents' address on the child's driver's license or other documents, (4) whether a room is maintained for the child at the parents' home, and (5) whether the child is dependent upon the parents for support. *Goldstein* [*v Progressive Casualty Ins Co*, 218 Mich App 105, 112; 553 NW2d 353 (1996)], citing *Dairyland*[, 123 Mich App at 682]. [*Fowler*, 254 Mich App at 364-365.]

Applying these factors to the facts of this case, material questions of fact exist regarding Qaiser's membership in his family's Michigan household, or stated differently, whether the Michigan home Qaiser owned and in which Tabarak was domiciled was also Qaiser's household at the time of the accident. It is undisputed that Qaiser returned to Iraq in the fall of 2003, approximately two years before the accident, and that the rest of the family remained in their Michigan home. According to Hammed, Qaiser left Michigan with the stated intention of establishing a home for his family in Iraq. Several facts support Hammed's statement that Qaiser then "settled" in Iraq. He ran for public office, took a job at his friend's company, and sold his share of his Michigan carpentry business, although it is unclear in the record whether he sold his share of the business before or after the accident.

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[6] Although unpublished opinions are not binding on us, it is worth noting that in at least two unpublished cases, this Court has considered the factors listed in *Workman* in determining membership in a household for purposes of homeowner's insurance coverage. *Farm Bureau Gen Ins Co v Palmateer*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket No. 253290); *Michigan Basic Prop Ins Ass'n v Moore*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 1996 (Docket No. 182095).

[7] We acknowledge that there may be special circumstances in which the terms "domicile" and "household" should not be treated synonymously, and the factors for determining domicile would be inadequate to determine membership in a household. We do not find that such special circumstances exist in this case.

Other facts suggest that although Qaiser was living in Iraq, he remained a member of his family's Michigan household. At the time of the accident, the title to the house, the mortgage, and some of the utilities were in his name. He continued to receive some mail, such as junk mail and utility bills, at the house. He left some clothes, shoes, and books there. The vehicle Qaiser insured with Farm Bureau continued to be stored there. He sent money to Hammed for living expenses, filed at least one income tax return in the United States, renewed his Michigan driver's license, and maintained a joint bank account with Hammed in Michigan. Qaiser also changed living arrangements multiple times after moving to Iraq, i.e., living first in a condominium, then in a room in his sister's house, and then an apartment.

It is undisputed that Qaiser traveled to Michigan periodically to visit his family, typically staying for about one month at a time. But neither Hammed nor Tabarak could recall with certainty how often Qaiser visited prior to the accident. Tabarak testified that Qaiser returned to Michigan whenever his work allowed. Hammed testified that at the time of the accident, Qaiser still intended to have his family move to Iraq if he could create a suitable and safe home for them and that he had settled there, but Tabarak testified that whether Qaiser would return permanently to Michigan was undecided.[8]

Given that a number of factors weigh against a finding that Qaiser was a member of the household where Tabarak was domiciled at the time of the accident, while a number of other factors support such a finding, and that several material facts presented by the parties require clarification, this issue must be resolved by the trier of fact.

## III. NO-FAULT PENALTY ATTORNEY FEES UNDER MCL 500.3148(1)

Farm Bureau argues that the trial court erred in ordering it to pay penalty attorney fees under MCL 500.3148(1). The no-fault act provides for an award of reasonable attorney fees on overdue benefits if the insurer has unreasonably refused to pay the benefits. MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

Our Supreme Court recently stated that "an insurer's initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to

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[8] Although Qaiser signed an affidavit stating that he considered himself to be a Michigan resident and considered his home to be the family's Michigan home, we will not consider the affidavit at this stage of the proceedings. The trial court did not consider the affidavit when deciding the parties' summary disposition motions because it had not yet been created, and it is inappropriate for a party to expand the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

pay those benefits." *Moore v Secura Ins*, 482 Mich 507, 526; 759 NW2d 833 (2008), citing *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008), and *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994). But the Court rejected the inverse proposition, stating: "Nothing in our jurisprudence suggests that an insurer's initial refusal to pay no-fault insurance benefits can be deemed unreasonable, even though it is later determined that the insurer did not owe those benefits." *Id*. Such a "proposition effectively penalizes an insurer for refusing to pay benefits that the insurer had no obligation to pay. In contrast, we conclude that if an insurer does not owe benefits, then benefits cannot be overdue. Therefore, before a court may award attorney fees, benefits must be overdue, and an insurer must have unreasonably refused to pay the claim or delayed in payment." *Id*.

In this case, because material questions of fact exist as to whether Farm Bureau is required to pay PIP benefits, the trial court was premature in ordering Farm Bureau to pay penalty attorney fees.

We vacate the portion of the trial court's August 22, 2008, order holding Farm Bureau responsible for one-half of the no-fault benefits applicable to Tabarak's injuries as well as no-fault penalty interest and no-fault penalty attorney fees.[9] This case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[9] Bristol West remains responsible for one-half of the no-fault benefits as well as the penalty interest and attorney fees as ordered by the trial court, with responsibility for the other half to be determined after Farm Bureau's coverage obligations are ascertained. In the event Farm Bureau's policy is deemed not to apply in this case, the trial court shall enter an order holding Bristol West responsible for the full amount of no-fault benefits as well as any applicable penalty interest and attorney fees.