

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2937
STATE OF WISCONSIN**

Cir. Ct. No. 01CV000121

**IN COURT OF APPEALS
DISTRICT IV**

JEFFREY A. LIBRANDE,

PLAINTIFF-APPELLANT,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Reversed and cause remanded.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Jeffrey Librande appeals a summary judgment order dismissing his action to recover damages under his father's homeowner's policy from Allstate Insurance Company for injuries Librande suffered in a chainsaw accident while helping his father cut down a tree in the fall of 1998. The trial court held, as a matter of law, that the policy did not provide coverage

because Librande was a resident of his father's household at the time of the accident, and granted Allstate's motion for summary judgment. We conclude that there were material facts in dispute as to Librande's residency at the time of the accident, and therefore reverse and remand for further proceedings.

¶2 This court reviews summary judgment decisions *de novo*, applying the same method employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law.... [Next,] we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

Frost v. Whitbeck, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted).

¶3 Here, the parties do not dispute that the complaint stated a claim and that the answer joined issue. They also agree that the policy at issue excludes coverage for related members of the insured's household. They disagree over whether the summary judgment materials were sufficient to create a genuine issue of material fact for trial on the issue of Librande's residency at the time of the accident.

¶4 Librande listed his parents' address as his home address when he went to the hospital following the accident. He also gave a deposition in the fall of 2002, in which he stated that he currently lived at his parents' house and had lived there "[o]n and off my life.... I moved out for a time, but I always end up going back," and subsequently agreed with counsel's statements that he was living

with his parents from about 1994 on, including during the summer of the accident. In response to the summary judgment motion, however, Librande filed an affidavit stating that he had forgotten at the time of his deposition that he had actually been living with his aunt, Rose Archer, from October of 1997 until April of 2001.

¶5 Librande also filed affidavits from his aunt, Verla Thompson, his aunt-by-marriage, Anne Librande, and his cousin, Connie Spence. Thompson stated that she was in close touch with the Librande family, had visited Rose Archer on various occasions, and knew that Librande had lived with Archer from October of 1997 until April of 2001. Anne Librande stated that she lived next door to Archer and had personally observed that Librande was living with Archer and using Archer's house as his permanent residence from October of 1997 through April of 2001. This occurred after Anne had declined a request from Jeffrey Librande to live with Anne. Spence stated that she was Archer's primary caretaker and had frequent contact with her; that Librande had helped her refurbish Archer's home in the fall of 1997 and had moved in shortly thereafter; and that he had stayed until early 2001, when Archer passed away.

¶6 Allstate first contends that the statements submitted by Librande and his relatives were "sham affidavits." See *Yahnke v. Carson*, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 (an affidavit which contradicts deposition testimony without explanation for the discrepancy is generally insufficient to create a genuine issue of fact). Even assuming that Librande's own affidavit was a sham, however, we are not persuaded that the other three affidavits also should have been disregarded merely because they conflicted with deposition testimony given by Librande. The affidavits of Thompson, Anne Librande, and Spence were based on personal knowledge and were sufficiently specific to create a factual

dispute as to whether Librande may have been living at Archer's house at the time of the accident.

¶7 Allstate next contends that, even if Librande may have been living with Archer at the time of the accident, that fact is not material because there was other evidence to show that Librande was also a member of his father's household. It is true, as Allstate claims, that a person in Wisconsin may be a resident of more than one household for insurance purposes and that household members do not necessarily need to live under the same roof. *Seichter v. McDonald*, 228 Wis. 2d 838, 846, 599 N.W.2d 71 (Ct. App. 1999). The person's intent must still be established, however, and actual residency may be relevant to the determination of intent. Therefore, if it is true that Librande was living with his aunt for a period of three years, there is still a material factual dispute over whether he intended at that time to ever return to his parents' house or was still also a member of his parents' household. In sum, we are persuaded that the issue of Librande's residency at the time of the accident, whether singular or dual, presents a material factual dispute for trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

