STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1267

Progressive Insurance,
Respondent,

vs.

Justin Abel, et al.,
Appellants.

Filed June 13, 2022
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Clay County District Court
File No. 14-CV-19-4575

Kenneth H. Bayliss, Jessie L. Sogge, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent)

Jordan B. Weir, Vogel Law Firm, Fargo, North Dakota (for appellants)

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.[*]

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

This is an underinsured-motorist-benefits action arising from injuries to an insured's 20-year-old stepdaughter. Appellants challenge the district court's grant of summary

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

judgment for respondent-insurer and its denial of summary judgment for appellants. Appellants argue, among other things, that the district court improperly weighed evidence and made credibility determinations and therefore erred by denying coverage under the resident-relative provision of the stepfather's automobile policy. Because genuine issues of material fact preclude summary judgment, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

On December 9, 2015, appellant Aubrie Abel was injured while a passenger in a car accident in Harvey, North Dakota. Aubrie was a 20-year-old student at Minot State University. Aubrie settled for the $100,000 limit of the driver's insurance policy and pursued underinsured-motorist (UIM) benefits.

At the time of the accident, appellant Justin Abel, Aubrie's stepfather,[1] had UIM coverage through an automobile policy with respondent-insurer Progressive Preferred Insurance Company (Progressive). Progressive denied Aubrie's UIM claim after concluding that "Aubrie was no longer a resident of Justin's household." Progressive filed a complaint seeking a declaratory judgment that Aubrie was not covered by Justin's automobile insurance policy. Appellants counterclaimed for UIM benefits. Both parties moved for summary judgment.

The summary-judgment record established many undisputed facts. Aubrie lived with her mother and Justin (parents) in Sabin, Minnesota, until her high-school graduation

[1] This opinion refers to Aubrie and Justin individually by their first names to avoid confusion and refers to Aubrie and Justin collectively as appellants.

in 2014. After graduation, Aubrie lived in West Fargo, North Dakota, with her mother's grandparents to get a North Dakota driver's license, which she obtained. Aubrie testified that she "struggled" to pass the Minnesota driver's test and did not have a Minnesota driver's license. In March 2015, Aubrie moved to Harvey, North Dakota, to live with and help care for her great-grandparents.

While in Harvey, Aubrie became a certified nursing assistant (CNA). Aubrie's grandmother paid for the CNA coursework. In July 2015, Aubrie began working 36.5 hours per week as a CNA in Harvey. Aubrie's employer paid for her online classes at Minot State so she could be certified as a direct support professional. At the same time she started working as a CNA, Aubrie moved into an apartment in Harvey, where she lived by herself for four months until the accident. After the accident, Aubrie moved back to Sabin and lived with her parents.

After hearing arguments on the parties' summary-judgment motions, the district court issued a written decision determining there was no UIM coverage for Aubrie's injuries through Justin's automobile policy. The district court concluded that Aubrie was not a resident of Justin's household because "the undisputed facts show that Aubrie had established a separate residence in Harvey, North Dakota, at the time of the accident." In making this determination, the district court relied on Aubrie's employment in Harvey, her rent payments for the apartment, her North Dakota driver's license, and Aubrie's response during a deposition that she would move back to Sabin "eventually" and was not going to live in Harvey "forever." The district court also rejected an affidavit from Aubrie as "self-serving and not sufficient to create a genuine issue of material fact as it contradicts

testimony provided in a prior deposition, under oath." The district court therefore denied appellants' motion for summary judgment and granted Progressive's motion for summary judgment.

This appeal follows.

DECISION

Appellate courts "review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). In considering the record on summary judgment, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Summary judgment is proper if the moving party shows that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law" based on the record, which may include depositions, documents, affidavits, admissions, and interrogatory answers. Minn. R. Civ. P. 56.01, 56.03(a). A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

In this appeal, we consider whether summary judgment is appropriate given the record evidence and the terms of Justin's automobile policy, which provides UIM coverage for the named insured's resident relative. The interpretation of an insurance policy is a question of law that we review de novo. *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018). Appellate courts interpret unambiguous language in an insurance policy

"to ascertain and give effect to the intentions of the parties as reflected in the terms of the policy." *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310, 316 (Minn. 2021) (quotation omitted). This court previously held that a similar resident-relative provision is unambiguous. *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16, 19 (Minn. App. 1986), *rev. denied* (Minn. Mar. 27, 1986).[2] Here, neither party contends the resident-relative provision is ambiguous, and we agree that the language is unambiguous.

Justin's automobile policy provides that an "insured person" includes a "relative" if related to the named insured by "blood, marriage, or adoption." The policy also states that a relative includes "unmarried dependent children temporarily away from home . . . if they intend to continue to reside in [the named insured's] household." We note that the resident-relative provision in Justin's policy both expands and limits coverage. *See id*. at 18 (stating resident-relative language "is widely used in insurance policies to both exclude and extend coverage"). The resident-relative provision first defines coverage as including a relative who is "a person residing in the same household" as the named insured. But the resident-relative provision also limits or excludes coverage by providing that an unmarried dependent child who is "temporarily away from home" will "qualify as a relative *if* they intend to continue to reside in [the insured's] household." (Emphasis added.)

[2] In *Skarsten*, we considered the resident-relative provision found in Minnesota Statutes section 65B.43, subdivision 5, which defined "'[i]nsured'" to include a relative of the named insured who 'resides' in the same household with the named insured." 381 N.W.2d at 18 (quoting Minn. Stat. § 65B.43, subd. 5 (1982)). We noted the same statute also provided that "[a] person resides in the same household with the named insured if that person usually makes his home in the same family unit, even though he temporarily lives elsewhere." *Id*.

Appellants argue the district court erred by granting summary judgment for Progressive based on evidence that Aubrie established a separate residence in Harvey and its conclusion that Aubrie was not Justin's resident relative at the time of the accident. Progressive contends the district court's summary-judgment decision rests on undisputed evidence that Aubrie lived in Harvey and did not intend to continue to reside with her parents in Sabin.

Generally, whether a relative resides in the named insured's household is a question of fact. *Id.* (stating that whether an individual is a resident of an insured's household is a "fact question"); *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 344 (Minn. App. 2008) ("Whether an individual is a resident relative of an insured is normally a factual question."); *State Farm Fire & Cas. Co. v. Lawson*, 406 N.W.2d 20, 22 (Minn. App. 1987) ("Whether a relative resides in the insured's household at the time of an accident is a question of fact."), *rev. denied* (Minn. June 30, 1987). "[S]ummary judgment may be entered" on a question of fact, however, "where the material facts are undisputed and as a matter of law compel only one conclusion." *Sauter v. Sauter*, 70 N.W.2d 351, 354 (Minn. 1955).

Minnesota courts have used three factors to determine whether a relative is a resident of the insured's household: (1) living under the same roof as the named insured; (2) living in a close, intimate, and informal relationship with the named insured; and (3) due to that intentionally substantial, informal relationship, considering the relationship "in contracting about such matters as insurance or in their conduct in reliance thereon."

Firemen's Ins. Co. of Newark v. Viktora, 318 N.W.2d 704, 706 (Minn. 1982) (quotation omitted); *accord Skarsten*, 381 N.W.2d at 19.

When considering the residence of a relative who is "temporarily away from home," Minnesota courts expand the analysis of the first *Viktora* factor to incorporate a separate five-factor analysis: (1) age of the relative; (2) whether a separate residence is established; (3) self-sufficiency of the relative; (4) frequency and duration of the relative's stay in the named insured's home; and (5) the relative's intent to return to the named insured's household. *Wood v. Mut. Serv. Cas. Ins. Co.*, 415 N.W.2d 748, 750 (Minn. App. 1987), *rev. denied* (Minn. Feb. 12, 1988).

We consider the district court's analysis of the undisputed facts about Aubrie under each *Wood* factor. First, Aubrie was 20 years old at the time of the accident. Second, Aubrie established a separate residence in Harvey at the time of the accident, while her parents lived in Sabin. Third, Aubrie was employed full time, paid her own rent, and cooked and cleaned for herself. She attended online college classes paid for by her Harvey employer. (Below, we discuss additional facts about Aubrie's self-sufficiency that were not included in the district court's analysis.) Fourth, Aubrie testified she returned to Sabin "every weekend" and could not remember any extended stays in her parents' home during the time she lived in Harvey.

The parties hotly contest the record evidence on the fifth *Wood* factor—Aubrie's intent to return to Justin's household in Sabin. We briefly summarize the record evidence on the fifth factor. Aubrie's 2018 affidavit stated Aubrie's "permanent residence" is in

Sabin, she used the Sabin address on her tax returns, and she considered herself a member of her parents' household.

The district court limited its analysis of the fifth factor to Aubrie's 2020 deposition, where she testified that she did not know when asked if she could "say for certain that [she] would have moved back to Sabin" before the accident. She also stated that her plan at the time of the accident was "to get a degree and move back [to Sabin]" and that she "most definitely" would have moved in with her parents if she got a job in Sabin. When asked if it was "[f]air to say there was no set or definite plan to move back to Sabin prior to this accident," Aubrie replied, "No, I was going to move back eventually. I wasn't going to live in Harvey forever."

In Aubrie's 2021 affidavit, she stated that she "never established a permanent home in Harvey" and that her "intent all along was to leave Harvey as soon as [she] completed [her] education." She also stated that her "permanent intent was to return to Sabin" and that "[a]t all times [she] had an apartment in Harvey, Sabin was [her] home."

The district court erred in its analysis of the record evidence under the five *Wood* factors for three reasons.

First, the district court failed to address evidence favorable to appellants' claim for UIM coverage. For example, the district court failed to mention Aubrie's 2018 affidavit even though the affidavit stated that Aubrie considered herself a member of her parents' household and that her permanent residence was in Sabin. The district court also understated Aubrie's deposition testimony by stating Aubrie "periodically" returned to Sabin while living in Harvey. Aubrie testified that she returned to Sabin "[l]ike every

weekend." The district court also ignored evidence that Aubrie used her Sabin address on her tax returns and that her Harvey employer paid for her college classes.

Second, the district court drew an inference unfavorable to appellants based on evidence that Aubrie had a North Dakota driver's license. Appellants do not contest that a driver's license is relevant evidence of a driver's residence. *See Lundquist v. Leonard*, 652 N.W.2d 33, 36 (Minn. 2002) (noting evidence of a driver's-license address when determining a political candidate's residence). Here, however, the district court relied on Aubrie's address on her North Dakota license without considering Aubrie's testimony that she got a North Dakota driver's license because she "struggled" to pass the Minnesota driver's-license exam. Rather, the district court characterized this evidence favorably to Progressive by stating that "Aubrie had no intention of obtaining a Minnesota driver's license." Thus, the district court failed to analyze the driver's-license evidence in a light favorable to appellants. *See STAR Ctrs.*, 644 N.W.2d at 76 (stating that on a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party).

Third, the district court erred by rejecting Aubrie's 2021 affidavit as self-serving. The district court relied on *Banbury v. Omnitrition Int'l, Inc.*, where this court held "a self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact." 533 N.W.2d 876, 881 (Minn. App. 1995). *Banbury* also stated, however, that "a subsequent affidavit" may "raise a factual issue where the deposition itself reveals confusion or mistake; such an affidavit is not inherently inconsistent with the deposition, but rather seeks to explain it." *Id*.

Aubrie's 2021 affidavit was submitted after her deposition. The affidavit stated Aubrie's "only permanent intent was to return to Sabin once [she] completed [her] education." The district court determined Aubrie's 2021 affidavit contradicted her deposition testimony about her intent to return to Sabin. The district court described Aubrie's deposition testimony as follows: "When asked whether Aubrie had a set or definitive plan to move back to Sabin prior to the accident, she replied that she was going to move back eventually and wasn't going to live in Harvey forever." The district court's description, however, omits Aubrie's full testimony.

In her deposition, Aubrie was asked if it is "fair to say that there was no set or definite plan to move back to Sabin prior to this accident." Aubrie replied, "No," before continuing to say she "was going to move back eventually" and "wasn't going to live in Harvey forever." Thus, Aubrie's deposition testimony denied that she had "no set or definite plan to move back to Sabin." Reading Aubrie's answer to the "definite plan" question along with her other deposition testimony in the light most favorable to Aubrie, her testimony is, at the very least, confusing about her intent to return to Sabin. Thus, Aubrie's 2021 affidavit clarifies confusion on a central factual issue, and the district court erred by rejecting the affidavit as self-serving. *See id.*

The district court also erred by rejecting Aubrie's 2021 affidavit because it clarified her deposition testimony on who paid utilities for her Harvey apartment. The district court stated that Aubrie paid for utilities in her apartment. In her deposition, Aubrie testified she did not remember whether any utilities payments were "associated" with her Harvey apartment. Aubrie agreed that, if any utilities were paid, then she would have been

"responsible." In her 2021 affidavit, Aubrie stated her parents "paid" for the Harvey apartment's utilities. Viewed in the light most favorable to Aubrie, her 2021 affidavit "reveals confusion or mistake" in her deposition testimony about who paid for the apartment utilities and "seeks to explain it." *See id.*

Even if we were to accept the district court's conclusion that Aubrie's 2021 affidavit contradicted her deposition testimony about her intent to return to Sabin and the utility payments, then we would still conclude that the district court erred. The district court's decision failed to address new evidence in the 2021 affidavit about relevant facts that were not discussed in Aubrie's deposition. For example, the 2021 affidavit established that Aubrie's parents claimed her as a dependent on their tax returns and paid for her health insurance, car insurance, and cell phone. At the same time the district court ignored these facts about Aubrie's self-sufficiency (or lack thereof), the district court found Aubrie paid her own rent and utilities and did her own cooking and cleaning.

In *Skarsten*, we reversed summary judgment for the insurer based on the resident-relative provision and cautioned "a court must not rely on selected facts in order to justify a conclusion." 381 N.W.2d at 19. Here, the district court's summary-judgment decision rested on "selected facts" because it ignored relevant evidence favorable to appellants' position, drew inferences unfavorable to appellants, and failed to view the record evidence in a light favorable to appellants.

Aside from challenging the district court's analysis of the record evidence, appellants contend that adult children "temporarily away from home qualify as residents for purposes of insurance coverage under Minnesota law." Progressive responds that the

district court's decision denying UIM coverage "poses no threat to legal principles applicable to those who leave for college and maintain residence in their parent's homes."

Minnesota's caselaw supports appellants' position. In *Viktora*, the supreme court reversed a summary-judgment decision denying homeowner's coverage to a 23-year-old son who was injured after he returned to live with his parents during a strike at his workplace. 318 N.W.2d at 705, 707. In *Schoer v. W. Bend Mut. Ins. Co.*, this court affirmed a judgment granting UIM coverage to a 21-year-old college student living in Minnesota based on the jury's determination that the student was a member of his mother's Wisconsin household. 473 N.W.2d 73, 76-77 (Minn. App. 1991). In *Wood*, this court affirmed a summary judgment granting coverage under a parent's automobile policy for a 20-year-old son who had enlisted in the U.S. Army and was injured while on his way home for leave. 415 N.W.2d at 749-51.

Progressive argues we should distinguish each of these cases and instead be guided by the supreme court's decision in *Lott v. State Farm Fire & Casualty Co.*, 541 N.W.2d 304, 308 (Minn. 1995). In *Lott*, the supreme court reversed summary judgment declaring coverage for a 30-year-old son under a resident-relative provision in his parent's homeowner's policy. *Id.* The son had not lived with his parents for eight years and had a separate residence. *Id.* at 306. A guest at the parent's lake house sued the son after the guest was injured on the dock. *Id*. The supreme court's decision pointed out that the son visited the lake house every year for ten weekends plus one full week, the son had no clothing or belongings at the lake house, and the son had been self-supporting for eight years. *Id.* at 308.

Progressive's argument is unpersuasive. While the district court correctly noted that Aubrie returned to Sabin only for weekend visits, the frequency of Aubrie's visits was "[l]ike every weekend" compared to the son's ten weekend visits per year in *Lott*. Moreover, none of the other facts in *Lott* closely align with the evidence offered by Aubrie, a 20-year-old student who worked, attended college, and paid her own rent for four months while receiving some financial support from her parents. In contrast, the son in *Lott* had been self-supporting for eight years.

Because the record, when viewed in the light most favorable to appellants, raises genuine issues of material fact about whether Aubrie was a resident relative of Justin's household at the time of the accident, we conclude the district court erred by granting Progressive's motion for summary judgment, and therefore we reverse in part.

Appellants argue that we should enter summary judgment in favor of UIM coverage, either because the evidence does not allow for conflicting inferences on Aubrie's residence in Sabin or because Aubrie maintained two residences at the time of the accident. For the reasons stated, we conclude the record raises genuine issues of material fact about Aubrie's residence, and therefore we affirm in part the district court's decision to deny summary judgment to appellants.

Affirmed in part, reversed in part, and remanded.