STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0690

Gage Cates, a minor, by his mother and natural guardian, Jackie Winter,
Appellant,

vs.

North Star Mutual Insurance Company,
Respondent.

Filed February 10, 2009
Affirmed
Larkin, Judge

Rice County District Court
File No. 66-CV-07-788

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Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this appeal from an award of summary judgment in favor of respondent, appellant claims that the district court erred by concluding that the insured's adult child was not a resident of the insured's household, and therefore not an insured under the policy issued by respondent. Because there are no genuine issues of material fact and because the district court properly applied the law, we affirm.

FACTS

In June 2003, Jane Kalow purchased a home at 204 First Avenue Southwest, in Fairbault (insured premises). Kalow lived at the insured premises for approximately six months. Kalow's adult child, Elizabeth Boudreau, and grandson (Boudreau's minor son) lived with Kalow at the insured premises. In January 2004, Kalow moved into the home of her fiancé, now husband. Boudreau and her minor son continued to live at the insured premises after Kalow moved out. Boudreau's boyfriend, Dustin Metcalf, moved into the insured premises in approximately January 2005. Metcalf owned a dog and kept the dog at the insured premises while he lived there. Appellant Jackie Winter, G.C.'s guardian, alleges, and respondent North Star Mutual Insurance Company denies, that Elizabeth Boudreau had an ownership interest in Metcalf's dog.

After Kalow moved out of the insured premises, she visited Boudreau there at least once a week. On occasion, Kalow would cook dinner for Boudreau. Kalow also stayed overnight a couple of times. Kalow never charged Boudreau rent and occasionally gave Boudreau money and food. Boudreau continued to live at the insured premises until

the property was foreclosed upon in October or November of 2005. Kalow kept personal property at the insured premises and received mail there after she moved out. Kalow also continued to pay the utilities associated with the insured premises.

Respondent issued a combined dwelling-owner's policy, #76D8012888, to Kalow for the policy period June 19, 2005 to June 18, 2006. Kalow is the named insured under the policy. The policy identifies the insured premises as Kalow's property at 204 First Avenue Southwest.

On July 22, 2005, Metcalf's dog bit G.C. at a location away from the insured premises. Appellant filed suit against Boudreau. Respondent denied coverage for Boudreau. The underlying liability case was settled pursuant to a *Miller v. Schugart* agreement. Appellant then commenced an action against respondent seeking a declaratory judgment that Boudreau is an insured under respondent's policy. The district court granted respondent's motion for summary judgment, concluding that Boudreau is not insured under the policy and that respondent had no duty to defend Boudreau or to indemnify her for any claims asserted against her. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal,

> the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citations omitted).

Whether a person resides in a household for the purposes of an insurance policy is generally a question of fact. *Frey v. United Servs. Auto. Ass'n*, 743 N.W.2d 337, 344 (Minn. App. 2008) (citing *Fruchtman v. State Farm Mut. Auto. Ins. Co.*, 274 Minn. 54, 55, 142 N.W.2d 299, 300 (1966)) (other citation omitted). But where there are no genuine issues of material fact, the question of residence can be resolved as a matter of law by reference to the insurance policy and the facts in the record. *See Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). "Interpretation of insurance policy language and application of the policy to the facts in a case are also questions of law that this court reviews de novo." *Frey*, 743 N.W.2d at 342. The parties in this case filed cross-motions for summary judgment, demonstrating that the material facts are not in dispute. *See id.* at 344.

General contract principles govern the construction of insurance policies, and insurance policies are interpreted to give effect to the intent of the parties. *See Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 199 N.W.2d 806, 811 (Minn. 1972). "Where the language is unambiguous, [courts] will not render a construction which is more favorable to finding coverage but will apply the phrase to the facts of the case in order to give effect to the plain meaning of the language." *Firemen's Ins. Co. of Newark, N.J. v. Viktora*, 318 N.W.2d 704, 706 (Minn. 1982). "[W]hen interpreting an insurance policy, we will avoid an interpretation that will forfeit the rights of the insured under the policy, unless such an

intent is manifest in 'clear and unambiguous' language." *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000) (quoting *Sterling State Bank v. Virginia Sur. Co.*, 285 Minn. 348, 353-54, 173 N.W.2d 342, 346 (1969) (other citation omitted). "'Whether the language of an insurance policy is ambiguous is a question of law to be decided initially by the trial court.'" *Lott v. State Farm Fire & Cas. Co.*, 541 N.W.2d 304, 307 (Minn. 1995) (quoting *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979)). The phrase "residents of your household" is unambiguous, and therefore, not subject to application of the rules of construction that favor finding coverage. *See id.* (discussing the phrase "residents of named insured's household").

Under the terms of the policy at issue here, the term "insured" refers to:

> you and residents of your household who are:
> a. your spouse;
> b. your relatives; or
> c. other persons under the age of 21 and in the care of any person named above.

The policy provides that medical expenses will be paid to "persons away from the insured premises if the bodily injury . . . (c) is caused by an animal owned by or in the care of an insured." Kalow is the named insured under the policy, and therefore "you" and "your" refer to her.

Neither party disputes that Boudreau is Kalow's relative. The narrow issue here is whether Boudreau is a resident of Kalow's household within the meaning of this insurance policy. The district court concluded that Boudreau was not a resident of Kalow's household at the time of the dog bite. The district court noted that Kalow lived

exclusively with her new husband and that she did not reside at the insured premises at the time of the dog bite. The district court further noted that Kalow did not reside at the insured premises after January 2004 and that she never intended to move back. While the district court agreed that it is possible for a person to have more than one household, it stated that such a person must live at more than one residence in order to do so.

Appellant argues that the district court failed to recognize that an insured may maintain households at two separate properties, despite only residing at one of the properties. Appellant contends that Kalow maintained the insured premises as a second household and that Boudreau was a resident of that household. Alternatively, appellant argues that Kalow was a resident of the insured premises and the district court's determination to the contrary is clearly erroneous.

Respondent's policy does not define the term "household." Accordingly, we use the definition established in case law. The supreme court has defined "'household' in its common and ordinary meaning 'for insurance purposes as generally synonymous with 'family' and as including those who dwell together as a family under the same roof.'" *Viktora*, 318 N.W.2d at 707 (quoting *Van Overbeke v. State Farm Mut. Auto. Ins. Co.*, 303 Minn. 387, 392, 227 N.W.2d 807, 810 (1975)) (other citation omitted). The term "'household' refers to a social unit which is something more than a group of individuals who occasionally spend time together in the same place." *Lott*, 541 N.W.2d at 307.

In order to determine whether an individual is a resident of an insured's household, we examine: (1) whether the individual and the insured are living together under the same roof; (2) whether the individual and the insured are in a close, intimate,

and informal relationship; and (3) whether the intended duration is likely to be substantial. *Id.* at 307-08 (citing *Viktora*, 318 N.W.2d at 706). Our application of these factors to the undisputed facts of this case leads us to conclude that Boudreau was not a member of Kalow's household at any time relevant to the underlying claim.

First, Boudreau and Kalow did not live together under the same roof in a close, intimate and informal relationship at the time of the dog bite. In fact Boudreau and Kalow had not dwelled together as a family under one roof since January 2004, when Kalow moved out of the insured premises, more than 18 months before the dog bite. Kalow regularly visited Boudreau at the insured premises and occasionally spent the night there, but Kalow did not live there. Kalow lived with her husband at another location. Boudreau, on the other hand, lived with her minor son and boyfriend at the insured premises. Because Kalow and Boudreau did not live together under the same roof in a close, intimate, and informal relationship, there is no need to analyze the third factor, which presumes that the insured and proposed insured are living together under the same roof.

Appellant urges us to find that an insured can maintain more than one household even though the insured resides at only one location. Appellant's position represents a sharp departure from the case law defining household and household residency. The household residency factors that were adopted in *Viktora*, and the definition of household that is based on those factors, all focus on whether the proposed insured and the named insured live together "under the same roof." *Viktora*, 318 N.W.2d at 706-07.

Granted, there are cases in which a proposed insured who was a young adult was found to be a resident of the insured's household even though the proposed insured was not living with the named insured at the time of the incident that gave rise to the claim. In those cases, however, the courts determined that the proposed insured's residence away from the insured's home was temporary and that the proposed insured intended to return to the insured's home. *See, e.g.*, *Wood v. Mut. Serv. Cas. Ins. Co.*, 415 N.W.2d 748, 751 (Minn. App. 1987) (named insured's son was resident of insured's household where son's stay in the Army was temporary, and son clearly intended to return to insured's home), *review denied* (Minn. Feb. 12, 1988); *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16, 19 (Minn. App. 1986) (named insured resided in the same household as her father, the proposed insured, where named insured temporarily resided away from the family farm while she attended college but returned home as often as possible and considered the family farm her permanent residence), *review denied* (Minn. Mar. 27, 1986).

On the other hand, we recently held that a college student was not a resident of her parents' household where the student had been away at college in another state for three years, lived with her fiancé, and had no intent to return to reside in her family's home. *Frey*, 743 N.W.2d at 346. In addition, we noted in *Frey* that although all other members of the Frey family were listed in the relevant insurance policy, the college student was not. *Id.* at 345. Instead, the student's parents had contracted with an insurance company for a separate automobile insurance policy, listing the student as the sole operator of the vehicle. *Id.* This suggests that the Freys did not consider the college student a member

of the household for insurance purposes. *Id.* This court noted that although the student had a close, intimate, and informal relationship with her family, "there is a difference between being 'close' and living together" and that "there is nothing to indicate that [the student] was *living* in that close relationship at the time of the accident." *Id.* at 345. We concluded that the student was not a resident of her parents' household despite the facts that the student was financially dependent on her parents and regularly stayed with her parents during school breaks. *Id.* at 344-46 (applying the factors established in *Viktora*, 318 N.W.2d at 706, as well as considering the five factors established in *Wood*, 415 N.W.2d at 750, to determine residency and noting that "[t]he remaining [*Wood*] factors are a mixture of presence, living arrangements, and apparent intent"). This precedent indicates the importance, for residency purposes, of a child's intent to return to reside with the insured family when the child is not currently living under the same roof as the insured family. Such intent is lacking here.

At the time of the dog bite, Boudreau and Kalow had not resided together under the same roof for over 18 months. While Kalow kept some of her belongings at the insured premises and received mail there, the record does not indicate that Kalow's residence with her husband was temporary or that Kalow intended to return to live with Boudreau at the insured premises. To the contrary, the fact that Kalow allowed the insured premises to be foreclosed upon indicates that Kalow did not intend to return to reside at the insured premises. Nor is there any indication that Boudreau intended to return to living with Kalow.

With regard to the possibility of dual-household residency, while case law provides that minor children may be residents of more than one household, there is no precedent in Minnesota for the proposition that an adult may maintain two households even though the adult resides in only one household.[1] *See Thiem*, 503 N.W.2d at 790-91 (holding that minor son was a resident of his father's household as well as his mother's household even though son lived primarily with mother who had custody noting that "one can only conclude that father's continual maintenance of a relationship with his [son] and the provision in whatever home he occupied for the child's inclusion is dispositive of the residency criterion"); *Mut. Serv. Cas. Ins. Co. v. Olson*, 402 N.W.2d 621, 624-25 (Minn. App. 1987) (holding that the district court's finding of fact that the minor son was a resident of his mother's household was not clearly erroneous even though son lived primarily with father, who had custody, when son spent most weekends, some weekdays and the prior three summers living at his mother's house as a family under the same roof and the living arrangement with mother was not temporary), *review denied* (Minn. May 20, 1987); *Krause v. Mut. Serv. Cas. Co.*, 399 N.W.2d 597, 602 (Minn. App. 1987) (holding that child's absence from father's home did not deprive child of his status as part of family unit in his father's home where minor child temporarily resided with mother pending dissolution decree awarding legal custody). And in these cases, the finding of

[1] The Minnesota Supreme Court recently declined to reach the question of whether an adult can be a resident of two households for purposes of insurance. *McGlothlin v. Steinmetz*, 751 N.W.2d 75, 84 (Minn. 2008) ("Because we hold that McGlothlin demonstrated probable cause that she might not be a resident of the Steinmetz home, we need not reach the question of whether an adult can be a resident of two households for purposes of insurance.").

dual-household residency was based on the fact that the children spent significant periods of time in each residence and were integrated in the family unit at each residence, which equates with living together as a family under the same roof. Conversely, the Minnesota Supreme Court has held that an adult child was not a resident of his insured parents' household where the adult child and parent did not live under the same roof. *Lott*, 541 N.W.2d at 308.

Finally, appellant cites a case from the Eighth Circuit and cases from other states to support the proposition that a named insured and proposed insured need not live together under the same roof in order for the proposed insured to be a member of the named insured's household. *See, e.g.*, *State Farm Fire and Cas. Co. v. Ewing*, 269 F.3d 888 (8th Cir. 2001) (relying on *Lott*, 541 N.W.2d at 304, to conclude "[i]t is logical to assume that persons can *maintain* two households"); *Schaut v. Firemen's Ins. Co. of Newark, N.J.*, 515 N.Y.S.2d 60, 60-61 (N.Y. App. Div. 1987) (holding that an insurance policy taken out by a father for a home in which members lived afforded liability coverage to his family living on the insured premises even though the father did not live there because "his participation in and contribution to the maintenance and care of his children and home were nevertheless extensive"). Not only are these cases non-binding precedent and distinguishable, they also represent a significant departure from Minnesota's well-established precedent that defines household and household residency in terms of "dwell[ing] together as a family under the same roof." *Viktora*, 318 N.W.2d at 707. We will not depart from this precedent. "[T]he task of extending existing law falls to the supreme court or the legislature, not to this court." *Lake Superior Ctr. Auth. v.*

Hammel, Green & Abrahamson, Inc., 715 N.W.2d 458, 472 n.1 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

The district court did not err by concluding, as a matter of law, that Boudreau was not a resident of Kalow's household at the time of the dog bite, and therefore not an insured under respondent's policy. Accordingly, we affirm.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals