2011 IL App (2d) 100837-U
No. 2-10-0837
Order filed September 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STATE FARM FIRE AND CASUALTY COMPANY,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 07-MR-1271
KATHERINE KIMBERLY,	)	Honorable Kenneth L. Popejoy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court erred in granting the defendant's motion for summary judgment because there was a genuine issue of material fact as to whether she was entitled to coverage under the insurance contract at issue.

¶ 1 The plaintiff, State Farm Fire and Casualty Company, appeals from an order of the circuit court of Du Page County granting summary judgment in favor of the defendant, Katherine Kimberly. The plaintiff argues that the trial court erred in ruling that the defendant was entitled to underinsured motorist (UIM) coverage under an insurance contract between the plaintiff and the defendant's parents. We reverse and remand for additional proceedings.

¶ 2 I. BACKGROUND

¶ 3 On September 6, 2007, the plaintiff filed a complaint for declaratory judgment seeking to establish that the defendant was not entitled to underinsured motorist benefits under an insurance policy issued to her parents. The complaint alleged that on March 22, 2005, the defendant was involved in a single-vehicle car accident in Colorado while riding as a passenger. On July 13, 2006, the defendant submitted a claim for underinsured motorist benefits under a personal liability umbrella policy (PLUP) issued by the plaintiff to the defendant's parents, Dan and Margaret Kimberly.

¶ 4 The PLUP, effective from September 4, 2004, until September 4, 2005, provided as follows:

> "[The plaintiff] will pay, up to the Coverage W limit, the amount which you and your passengers are legally entitled to recover as bodily injury damages from the owner or driver of an underinsured motor vehicle."

The PLUP further provided that "you" and "your" refer to the "insured." The PLUP defined "insured" as follows:

> "5. '*insured*' means:
>
> a. the *named insured*;
>
> b. the following residents of the *named insured's* household:
>
> (1) the *named insured's relatives*;
>
> ***
>
> 13. '*relative*' means any person related by blood, adoption, or marriage to the *named insured*." (Emphasis in original.)

The declarations page of the PLUP listed the "named insured" as Dan and Margaret Kimberly. Based on the policy language, the plaintiff asked the trial court to declare that the defendant was not

entitled to UIM coverage under the PLUP because she was not a resident of her parents' household on the date of the accident.

¶ 5 On December 23, 2009, the defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)), arguing that there was no genuine issue of material fact and that she was entitled to judgment as a matter of law. The defendant argued that she was entitled to UIM coverage under the PLUP because she was a "named insured." Alternatively, she argued that the PLUP was ambiguous as to the terms "resident" and "household" and that the ambiguity should be construed against the plaintiff.

¶ 6 On January 6, 2010, the plaintiff filed a cross-motion for summary judgment pursuant to section 2-1005 of the Code and a response to the defendant's motion for summary judgment. In its cross-motion, the plaintiff argued that the defendant had to be a resident of her parents' house at the time of the accident to qualify as an insured under the PLUP. Although the policy did not define "resident," the plaintiff argued that Illinois courts have consistently found that the phrase was not ambiguous and that whether a party was a resident was evidenced primarily by the acts of that party. The plaintiff argued that based on the defendant's acts, she was clearly not a resident of her parents' household. The plaintiff pointed out that the defendant moved to Colorado in 2004, renewed her lease one month prior to the accident, started and incorporated a foundation in Colorado, and was still living in Colorado four years after the accident. The plaintiff argued that there was no evidence to indicate that the defendant ever had any plans to return to Illinois.

¶ 7 In response to the defendant's motion for summary judgment, the plaintiff argued that the only "named insureds" under the policy were the defendant's parents, Dan and Margaret Kimberly. As such, the defendant would only be entitled to coverage under the policy if she was a resident of her parents' household. The plaintiff argued that the defendant was not a resident of her parents'

household at the time of the accident and that she was not entitled to summary judgment. Thereafter, the defendant filed a combined response to the plaintiff's cross-motion for summary judgment and a reply in support of her motion for summary judgment. The plaintiff filed a reply in further support of its cross-motion for summary judgment.

¶ 8 The record on summary judgment included the depositions of the defendant and Dan Kimberly, and two of the plaintiff's employees: Robert Hager and Robert Meding. The record also included the defendant's Colorado apartment lease, indicating that she had renewed her apartment lease for six months just prior to the car accident, and a printout of the Kate Kimberly Foundation's website.

¶ 9 In her deposition, the defendant testified that she was born July 13, 1979, and graduated from Colgate University in New York in May 2001. After graduating, she moved back to her parents' house in Hinsdale and lived there until October 2001, when she moved to Jackson Hole, Wyoming, with a friend. She moved because she thought it would be her only chance to have fun and be a "ski bum." In Jackson Hole, she worked at a ski shop, delivered pizzas, and managed/waitressed at a restaurant. She returned to live with her parents for a couple of months in the spring of 2002 because no work was available in Jackson Hole during the off-season.

¶ 10 In March 2003, she was injured in a ski accident when she fell 240 feet off a cliff. She pulverized her L1 vertebrae and severed her spinal cord at L1. (The record indicates that the accident rendered the defendant a paraplegic). After the accident, she was hospitalized for a few months in Idaho and Atlanta. On June 13, 2003, she returned to her parents' house and participated in rehabilitation in Chicago until September 2003. In September 2003, she moved to New York City and lived with two friends. She moved because she wanted to learn how to be independent again. While in New York, she continued her rehabilitation and took classes at New York University. She

lived there for nine months. She did not have a plan when she left New York, she was "still figuring life out."

¶ 11 After leaving New York, she stayed at home in Hinsdale for a week and then drove to Colorado with her boyfriend of four-and-a-half years, Adam Shapiro. She did not have a long-term plan when she moved to Colorado. She went to Colorado because it had the best spinal cord injury hospital in the country. Adam went to Colorado to attend graduate school. She and Adam towed a U-Haul to Colorado and rented an apartment with a nine-month lease. Adam purchased most of the furniture. She received mail at the apartment. She did not have a phone in the apartment, she relied on her cell phone. She left a "good deal" of her belongings at her family home in Hinsdale. She was traveling light because she did not have a plan. She brought some clothes, toiletries, books, and a computer to Colorado. She had a vehicle in Colorado and a Wyoming driver's license.

¶ 12 In the summer of 2004, she created the Kate Kimberly Foundation and incorporated the foundation in Colorado. The purpose of the foundation was to help other people with spinal cord injuries by getting them involved in sports and teaching them to maintain an active lifestyle. The foundation held fundraising triathlons in 2004, 2005, and 2006. The defendant returned home for Christmas in 2004.

¶ 13 The defendant further testified that in March 2005, she was involved in a single-car accident in Colorado. Adam was driving. While exiting the highway the car spun, hit a guardrail and flipped three times. (An essay on her foundation's website indicated that she shattered her pelvis; snapped both femurs, tibias, and fibulas; crushed her right ankle; and severed the right calf muscle.) She was in the hospital for three weeks and then returned to live with Adam. Adam had rented a new apartment because the previous apartment was not handicap accessible and she was in a big wheelchair. She resumed rehabilitation. Her parents came to Colorado after the accident. In the

summer of 2005, she went home to visit her family. She and Adam lived in a house in Boulder from January 2006 until the end of October 2006. Thereafter, she moved to another apartment in Superior, Colorado and lived alone. At the time of the deposition, she still lived in Superior. Although she had attempted to register to vote in Colorado, and had voted in the 2004 election, she was later told that her registration was improper and her vote did not count.

¶ 14 At the time before the car accident, she did not have a future plan, she was still recovering from her spinal cord injury and was concerned only with the next day. She did not have career aspirations at that time. She was focused on rehabilitation and getting her life back. At the time before the car accident, she had not intended to make Colorado her home. When asked whether, just prior to the car accident, she planned to return to Illinois and live with her parents, the defendant replied "no." However, she later explained that she only answered "no" because she was pressed for a "yes" or "no" answer and, at that time, she did not have a specific plan. However, she testified that, just prior to the car accident, she was planning to "eventually" move back to her parents' house, find a job, and live at home to save some money.

¶ 15 When questioned by her own attorney, the defendant testified that she incorporated her foundation in Colorado because she thought she was required to do so. She had been registered to vote in Illinois since she was 18. After her ski accident in 2003, her parents made modifications to the family home to make it wheelchair accessible. They installed two stair climber lifts and modified two bathrooms. Her parents had spent a considerable amount of money for these modifications because they had discussed her living in the family home. Most of her possessions were left in Hinsdale when she moved to Colorado. When she went to Colorado, she did not intend to stay in Colorado for more than nine months. She did not have a long term plan.

¶ 16 When she lived in Wyoming and Colorado, all her bank statements were sent to her family home in Hinsdale. The only reason she changed her driver's license from Illinois to Wyoming was because she had to have a Wyoming license to deliver pizzas there. Her financial advisor was in Oakbrook. She was always a member of Grace Episcopal Church in Hinsdale and had not joined another church in Colorado. She filed tax returns in Illinois in 2003, 2004, and 2005. Just before the car accident, she was able to walk with a brace on her left leg and a walker and she was progressing to learn to walk on crutches. After the car accident, she could no longer stand and walk due to intense pain in her pelvis and femurs.

¶ 17 During the deposition, the defendant identified, as Exhibit 1, a printout of materials contained on her foundation's website. She testified that she wrote the essays contained on the website. In one essay, the defendant wrote that she had an obsession with the mountains of the west and that, after her college graduation, she "pursued [her] passion for the great outdoors and moved to Jackson Hole, Wyoming." She further wrote that "[f]or two years [she] realized [her] childhood dream to live, work, and play where the sky stretches for miles and the mountains touch the clouds." She further wrote that "[i]n two years Jackson became my home, and the lifelong friends I made became my family." In describing her life in Colorado after the March 2003 ski accident, she wrote that, after one year of rehabilitation, she was "living, working and playing in the Rockies."

¶ 18 Dan Kimberly testified that he was the defendant's father and had lived at the family's Hinsdale address with his wife for 25 years. After the defendant's ski accident, he spent between $10,000 and $15,000 making modifications to his house, including installing two chair lifts and making the master bathroom and the defendant's bathroom handicap accessible. Before the March 2005 car accident, he did not recall discussions with the defendant regarding her moving back home. They had occasionally discussed what she wanted to do with the rest of her life, but they never

formulated a specific plan or timeline. At some point, he had arranged for the defendant to have a job interview with one of his customers; however, the defendant never contacted the customer.

¶ 19 Dan further testified that while the defendant lived in Wyoming, she supported herself, but he continued to provide health and auto insurance. He did not provide for her financially when she moved to New York or Colorado. However, he did give her money occasionally as a parent would normally do for a child. The defendant's grandfather provided funds to pay for the defendant's continued rehabilitation in Colorado. When the defendant moved to Colorado he did not consider it "moving out," he simply viewed it as her going to Colorado for rehabilitation. Finally, Dan testified that he purchased auto insurance for the defendant when she started driving. When purchasing the PLUP, he had intended for it to cover the defendant.

¶ 20 Robert Hager testified that he was the plaintiff's team manager who supervised the claim representative, Laura McEnroe, who handled the defendant's claim for UIM coverage under the PLUP. To be covered under the PLUP, you have to be either the named insured or a resident relative of the named insured. The named insureds under the PLUP at issue were Dan and Margaret Kimberly. As such, the only question as to the defendant's claim under the PLUP was whether she was a resident of her parents' household at the time of the accident. That the defendant was a named insured under her own underlying auto policy would not have any bearing on the PLUP. The underlying auto policies and the PLUP had their own definitions of the term "insured."

¶ 21 Robert Meding testified that he had been an agent for the plaintiff since 1981. If a client wanted a PLUP, he or she would have to fill out an application, give him a check, and he would send it to the plaintiff's headquarters for underwriting. The application was to gather information such as name, address, underlying auto policies, number of cars, and number of drivers. If an insured wanted to make changes to a policy, such as change of address or the addition or removal of a child

from the policy, the insured would have to contact him to update the records. The PLUP was issued to Dan and Margaret Kimberly in 1984, before the defendant was of driving age.

¶ 22 On July 20, 2010, the trial court granted that defendant's motion for summary judgment and denied the plaintiff's cross-motion for summary judgment. The trial court found that the defendant "had not given up residing as a member *** of the named insured's household at the time of the accident." The trial court found that the defendant was still a resident of her parent's household because she could go to her parents' house at any time and her primary purpose in Colorado was rehabilitation. The trial court noted that the defendant did not have a long-term plan to leave Illinois; her home in Illinois had been modified to suit her needs; she filed taxes in Illinois; she was not registered to vote in Colorado; she never received a driver's license in Colorado; her financial statements were sent to her Hinsdale home; most of her belongings were in Hinsdale; her church was in Illinois; and she had not joined another church in Colorado. As such, the trial court ruled that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law.

¶ 23 II. ANALYSIS

¶ 24 Summary judgment is proper where the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005© (West 2008). We review summary judgment rulings *de novo*. *DesPain v. City of Collinsville*, 382 Ill. App. 3d 572, 577 (2008). By filing cross-motions for summary judgment, the parties "agree that only a question of law is involved and invite the court to decide the issues based on the record." *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). "An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact

exists or if the judgment was incorrect as a matter of law." *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 339 (2003).

¶ 25 On appeal, the plaintiff argues that the trial court erred in finding that the defendant was a resident of her parent's household at the time of the March 2005 car accident. At the outset, we note that the filing of cross-motions for summary judgment does not establish the absence of issues of material fact. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769-71 (1993). This court, reviewing the grant of summary judgment *de novo*, may determine that, despite the summary judgment filings, a material issue of fact remains which precludes the entry of summary judgment for either party. *Id.*

¶ 26 As previously stated by this court:

> "The phrase 'resident of the household' has no fixed meaning. [Citation.] The reasonable interpretation of the phrase requires a case-specific analysis of intent, physical presence, and permanency of abode. [Citation.] However, the controlling factor is the intent, as evinced primarily by the acts, of the person whose residence is questioned. [Citation]. If an absence from a residence is intended to be temporary, it does not constitute an abandonment or forfeiture of the residence. [Citation.]
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> Because a determination of residency depends on intent, it typically should not be made on a motion for summary judgment. Indeed, 'summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.' [Citation.] Although summary judgment may still be granted if the record is sufficiently clear (see [citation]), it must be denied if the facts 'are susceptible to different inferences by fair-minded persons.' [Citation.]" *Farmers Automobile Insurance Association v. Williams*, 321 Ill. App. 3d 310, 314 (2001).

¶ 27 The reasoning in *Williams* is instructive in the present case. In *Williams*, the issue was whether an adult son, Matthew Williams, living with his father and attending college in Florida, was a resident of his mother's Illinois household. *Williams*, 321 Ill. App. 3d at 311. The trial court found that he was a resident of his mother's household and granted summary judgment for the insured and Williams. *Id.* at 313. On appeal, this court reversed and found that summary judgment was improper because "Williams' intent, the controlling issue in the case, [was] completely unclear." This court noted that several of Williams' statements and actions suggested that he intended to maintain residence at his mother's household. *Id.* at 314-15. Williams testified that he was just going away to school and intended to return to live with his mother during the summer. Williams' mother testified that Williams told her that he intended to move back home. *Id.*

¶ 28 This court found the following actions suggested an intent to retain residence at his mother's house: most of his belongings were there; he had his own room in her house; he had a key to the house; he had an Illinois driver's license; his car was registered in Illinois; he received mail at his mother's; he belonged to a church in Illinois; and he saw the dentist in Illinois. *Id.* at 315. However, this court also found that other facts suggested that Williams intended to abandon his mother's residence, such as: when he applied for a job in Florida, he indicated that he was permanently residing in Florida; he moved to Florida three months before classes started; his girlfriend and ultimate fiancée lived in Florida; Williams closed his bank account in Illinois; and he made no concrete plans to return to Illinois during school breaks. *Id.* Accordingly, this court held that reasonable persons could draw different inferences from these facts, reversed the order of summary judgment, and remanded the case for trial. *Id.* at 317.

¶ 29 In the present case, as in *Williams*, certain statements and actions suggest that the defendant intended to abandon her parents' household. The defendant moved to Jackson Hole shortly after

college graduation and wrote on her foundation's website that Jackson "became [her] home." After her ski accident, she only went home for three months and then moved to New York. After leaving New York, she stopped at home for one week and then left for Colorado. After her car accident in Colorado, the defendant remained in Colorado. Even after she was well enough to travel, she only went home for a short visit and then returned to Colorado. Although the defendant was still registered to vote in Illinois, the evidence showed that she had attempted to register in Colorado and had voted there on one occasion. In her deposition testimony, the defendant was unable to articulate any definite plans to return to live at her parents' residence. The defendant's father testified that he and the defendant never had discussions about her moving back home.

¶ 30 Nonetheless, other factors show an intent to maintain residency at her parents' household. At the time of the car accident, the majority of the defendant's belongings were in Hinsdale. She only moved some clothes, books, toiletries and a computer to Colorado. In Hinsdale, the defendant still had her own bedroom and a handicap accessible bathroom. The defendant received all her bank statements and financial documents at the Hinsdale address and she filed her tax returns in Illinois. The defendant belonged to a church in Hinsdale. Although the defendant had obtained a Wyoming driver's license, she testified that she only did so because of her job delivering pizzas. The defendant also testified that she only went to Colorado to continue rehabilitation and that, although she had no specific plans, she had envisioned moving back into her parents' house and finding a job at some point in the future.

¶ 31 In sum, there is a genuine issue of material fact as to whether the defendant was a resident of her parents' household on the date of the accident. The defendant's "'right to judgment is not free from doubt, and *** any motion for summary judgment should have been denied notwithstanding the desire of the parties to use this procedure.'" *Id.*, quoting *Giannetti v. Angiuli*, 263 Ill. App. 3d

305, 314-15 (1994). Accordingly, we reverse the trial court's order and remand the cause for additional proceedings.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed, and the cause is remanded for further proceedings.

¶ 34 Reversed and remanded.