2012 IL App (3d) 100339-U

Order filed March 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2012

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff/Counter-Defendant-Appellee, v. REGINALD HUTCHINS, by his mother and next friend, LATONYA JOHNSON, ARTIS WILLIAMS and ROSE WILLIAMS, Defendants/Counter-Plaintiffs-Appellants.	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois Appeal No. 3-10-0339 Circuit No. 04-MR-201 Honorable Bobbi N. Petrungaro, James E. Garrison Judges Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice McDade specially concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held:* The appellate court reverses the trial court's orders allowing plaintiff's cross motion for summary judgment and denying defendants' motion for summary judgment in the declaratory action. The cause is remanded to the trial court with directions since the issue of coverage cannot be determined based on the outcome of the cross motions for summary judgment.

¶ 2 Plaintiff filed a first amended complaint for declaratory judgment requesting the court to

declare that plaintiff "[did] not owe Underinsured Motorist Coverage or indemnity to the minor Defendant, REGINALD HUTCHINS, under the policy of insurance" issued by plaintiff to Williams. Plaintiff also asked the court to declare Hutchins "was not, at all relevant times, prior to and up to the time of the occurrence, a resident of the home of the Defendants, ARTIS WILLIAMS and ROSE WILLIAMS." Both parties filed cross-motions for summary judgment on only this declaratory action.

¶ 3 By way of summary judgment, the trial court declared that plaintiff did not owe Underinsured Motorist Coverage to the minor. The trial court denied the defendants' motion to reconsider the rulings on the cross motions for summary judgment. Defendant appeals pursuant to Supreme Court Rule 304. Ill. S. Ct. R. 304 (eff. Feb. 1, 1994).

¶ 4 Justices Wright and McDade agree summary judgment should have been granted in defendants' favor on the narrow declaratory question and remand to the trial court for proceedings on defendants' counter-complaint. Justice Holdridge, dissenting, would affirm all rulings of the trial court regarding the cross-motions for summary judgment on the grounds that the documents and testimony overwhelmingly established that Hutchins primarily resided with his mother, not his grandparents, and, therefore, there was no genuine issue of material fact on the ultimate question of coverage. In her special concurring decision, Justice McDade concludes the trial court should have found in favor of defendant on the issue of coverage. The panel agrees that defendants waived any issue related to the sufficiency of the amended complaint for purpose of review. The court also agrees the trial court's discovery rulings were not included in the trial court's Rule 304 language and should not be considered on appeal.

¶ 5 FACTS

¶ 6 On August 30, 2004, plaintiff filed its first amended complaint for declaratory relief. First, paragraph (i) of the amended complaint's prayer for relief requested the court to declare that Hutchins:

> "[W]as not, at all relevant times, prior to and up to the time of the occurrence, a *resident* of the home of the Defendants, ARTIS WILLIAMS and ROSE WILLIAMS." (Emphasis added.)

Second, paragraph (ii) of the amended complaint's prayer for relief requested the trial court to declare that:

> "STATE FARM CASUALTY INSURANCE COMPANY does not owe Underinsured Motorist Coverage or indemnity to the minor Defendant, REGINALD HUTCHINS, under the policy of insurance."

¶ 7 On September 22, 2004, defendants filed a timely answer to the amended complaint. Much later, on April 6, 2005, defendants filed a motion to compel plaintiff to answer certain interrogatories and produce various documents. The trial court denied defendants' motion to compel answers to certain interrogatories and took other discovery matters under advisement. On May 10, 2005, the court ordered plaintiff to produce some documents and found all other documents were properly withheld or redacted by plaintiff.

¶ 8 Shortly after the initial complaint for declaratory relief was filed in 2004, defendants filed a counter-complaint at law for statutory damages on May 4, 2004. The counter-complaint is not at issue in this appeal, but alleged Hutchins primarily resided with his grandparents and qualified as an "insured." Since plaintiff refused to pay defendants' claim or arbitrate the disputed issue of coverage, defendants undecided counter-complaint requests the trial court to order plaintiff to

pay defendants the sum of $60,000, plus attorney fees.

¶ 9 I. Defendants' Motion for Summary Judgment on the Declaratory Question

¶ 10 On August 21, 2008, defendants filed a request for summary judgment in the declaratory action only, alleging "that there is no triable question of fact as to whether the minor Defendant was a 'resident' of his grandparent's household and that 'resident' is a term which also has 'no fixed or exact meaning' and 'thus must be construed most strongly against the insurer and liberally in favor of the insured.' " [1]

¶ 11 In addition, defendants asked the court to make the following three additional findings beyond those identified by plaintiff in the amended complaint: (1) enter an order finding that the phrase "resides primarily" in plaintiff's insurance policy is ambiguous; (2) enter an order finding that Hutchins was "at all times pertinent hereto, a 'resident['] of the named insured's household;" and (3) enter a finding that Hutchins resided primarily with his grandparents because their home was his "first, chief, and principal residence throughout his life." Based on these three additional questions, defendants requested the trial court to grant defendants' motion for summary judgment in their favor, dissolve the stay of arbitration, and award costs, arbitration fees and other relief.

¶ 12 The pleadings and attached exhibits in the declaratory action establish the following undisputed facts. Artis and Rose Williams (Williams) are the parents of Latonya Johnson (Johnson). Johnson is the mother of Reginald Hutchins (Hutchins), born on October 12, 1988. Thus, Hutchins is the grandson of Artis and Rose Williams. On November 28, 2001, plaintiff prepared an automobile insurance policy on behalf of Artis and Rose Williams who resided in

[1]Defendants' motion for summary judgment asserted that "[o]nly Plaintiff's declaratory action is implicated by this motion."

Bolingbrook, Illinois. The insurance policy defined the term "*Relative*" as "a ***person*** related to ***you*** or ***your spouse*** by blood, marriage or adoption who resides primarily with ***you***. It includes ***your*** unmarried and unemancipated child away at school." (Emphasis in original.) The insurance policy began in 2001 and remained in effect on the date of the occurrence, June 14, 2003.

¶ 13 It is undisputed that Hutchins was crossing a street on foot in Chicago and was struck by an underinsured motor vehicle driven by Walter Martin. Martin's insurance company, Universal Casualty Company, settled the claim for Hutchins' extensive injuries resulting from the collision. Thereafter, Williams submitted a separate claim to plaintiff, based on Williams' underinsured motorist coverage, alleging Hutchins qualified as a relative and was entitled to coverage.

¶ 14 In her deposition taken on January 8, 2007, Rose Williams testified she was the mother of Latonya Johnson who gave birth to Hutchins in 1988. At the time of Hutchins' birth, Johnson lived with Williams in Broadview, Illinois. According to Rose, Johnson, Hutchins, and her husband Artis eventually moved from Broadview to a home in Bolingbrook, where they all lived together until Johnson moved to an apartment in Chicago.

¶ 15 Rose testified that after moving to Chicago, Johnson eventually arranged for Hutchins to attend school in the city. However, according to Rose, Hutchins continued to live with Rose and Artis in their Bolingbrook home. Artis drove Hutchins to school in Chicago each day and would bring Hutchins back to Bolingbrook during the week nights, but not on the weekends. Rose stated that, after her daughter moved to Chicago, Hutchins visited with Johnson in Chicago on

the weekends.[2] Rose said that this arrangement continued for the two or three years preceding the accident in 2003. Rose remained in this Bolingbrook home until 2004. According to Rose, her husband, Artis, died on April 18, 2004.

¶ 16 Rose testified that Hutchins did not go with his mother to Chicago because Hutchins wanted to stay with her in Bolingbrook. Rose testified as follows:

> "I mean, I was right there when he was born, *** You know, he practically lived with us all – most of the time. All the time, really, he lived with us, and sometimes he would go and stay with his mother. But he always wanted to live with us. He always wanted to stay with us."

¶ 17 Latonya Johnson testified during her deposition taken on January 8, 2007, that she lived with Hutchins in her parents' residence in Broadview, Illinois. Later, she and her son moved with her parents to Bolingbrook, Illinois, and lived there together for the next three years. Johnson testified that Hutchins attended fifth, sixth, and seventh grade in Bolingbrook, but attended Nash Elementary School in Chicago during his eighth grade year. When Hutchins attended Nash Elementary School, Johnson listed Hutchins' address as 607 Lavergne in Chicago even though Hutchins lived with her only two or three days per week because of her late night work schedule. When Hutchins was not staying at Johnson's apartment, Artis Williams drove Hutchins to school in Chicago from Bolingbrook. Johnson explained that this arrangement lasted until the end of eighth grade. When asked if Hutchins moved with her to the Lavergne Street address, Johnson

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[2]In contrast, Hutchins', in his deposition, testified that when attending school in Chicago, he regularly visited his grandparents on the weekends.

testified, "Yes. He did for a short period of time." At the time of the accident, Johnson believed that public aid would cover Hutchins' medical bills. Johnson said that no one else had been granted legal custody of Hutchins.

¶ 18 Reginald Hutchins testified during his deposition, taken on March 27, 2007, that after his mother moved from Bolingbrook to Chicago, he continued to attend B.J. Ward Elementary School in Bolingbrook, and split his time between his mother's house and his grandmother's house. When asked why he stopped attending B.J. Ward and began attending Nash Elementary School, he stated, "I just wanted to move because my grandma was getting on my nerves." In contrast to his grandmother's deposition, Hutchins explained he spent his time visiting his grandmother almost every weekend while attending Nash in Chicago.

¶ 19 At the end of eighth grade, Hutchins said that he was sending out applications to high schools in Chicago. He stated he did not finish the application process because of the accident. Hutchins said his grandfather brought him to Chicago the day before the accident, in 2003, to get a haircut for his eighth grade graduation from Nash Elementary School. Hutchins said he left the barber shop on the day of the accident and "decided to walk home." When asked if he was living with his mother at that time, he stated, "Yeah. Oh, no. I was going back and forth, *** I was going back and forth, back and forth to my grandma [*sic.*] house and my house." When asked why he lived with his grandmother "in the first place," he stated, "Go to school. I still go back and forth now."

¶ 20 Prior to the accident, he decided he did not want to attend Bolingbrook High School for ninth grade because he did not "want to go out there," and all of the high schools to which he applied were located in Chicago. Hutchins testified he was now 18 years old, a senior at

Downers Grove South High School, and currently lived in Chicago on Monroe Avenue with his mother and stepfather. Then, he stated he was "living back and forth like I was when I was going to Nash Elementary."

¶ 21 II. Plaintiff's Cross-Motion for Summary Judgment

¶ 22 On October 7, 2008, plaintiff filed a cross-motion for summary judgment in plaintiff's favor with the following, undisputed, attached exhibits: (1) Johnson's 2003 tax return transcript, which revealed that Johnson claimed Hutchins as her dependent; (2) Williams' tax return transcript for the same year, 2003, documenting that Williams' did not claim Hutchins as a dependent that same year; (3) Johnson's 2001 application for the section 8 housing assistance payment program, reporting her address as 1909 W. Washburne in Chicago, Illinois and describing her "Family Household Composition," to include herself and Hutchins; (4) family reports from the U.S. Department of Housing and Urban Development dated August 20, 2002, which listed Johnson's address as 607 N. Lavergne in Chicago, Illinois and listed her household to include only herself and Hutchins; (5) a printout dated January 18, 2008, which listed insurance benefits paid on behalf of Hutchins for the time period of January 1, 2000, until December 31, 2003, reporting Hutchins' address at 607 N. Lavergne in Chicago. This form also identified previous benefits paid for Hutchins' examinations relating to the Chicago school district, dental appointments, appointments at the Austin Family Health Center during the years 2001, 2002, and 2003, in addition to medical treatment relating to the accident on June 14, 2003.

¶ 23 Court's Ruling on Defendants' Motion for Summary Judgment on the Declaratory Action

¶ 24 On September 18, 2009, the court took the cross-motions for summary judgment under

advisement. On November 5, 2009, as requested by defendants' in the original motion for summary judgment, the trial court considered and concluded the phrase " 'resides primarily with you' " was not ambiguous. The court concluded although a person may have more than one residence, a person cannot have more than one primary residence.

¶ 25 Without announcing whether all material facts were undisputed, the court found the evidence of the minor's intent was controlling and established his primary residence was in Chicago with his mother. Therefore, the trial court declared plaintiff was not obligated to provide insurance coverage. The court granted plaintiff's cross-motion for summary judgment on the declaratory action and denied defendants' motion for summary judgment in the same action.

¶ 26 Defendants filed a motion to reconsider the rulings on summary judgment, arguing the court had not specifically addressed defendants' claim that plaintiff's amended complaint failed to state a cause of action. Following a hearing, the court entered a written order on March 31, 2010, denying defendants' motion to reconsider and included language indicating "Rule 304 language for purposes of defendants' rights to review the instant order. No just reason exists to delay enforcement or appeal of this order." On April 27, 2010, defendants filed a timely notice of appeal.

¶ 27 ANALYSIS

¶ 28 I. Motion to Dismiss for Failure to State a Cause of Action

¶ 29 On appeal, defendants request this court to consider whether the first amended complaint for declaratory relief was insufficient on its face. Plaintiff responds by pointing out to this court that defendants concede the sufficiency of the plaintiff's first amended complaint in their appellate brief. Furthermore, plaintiff alternatively contends defendants waived this issue by

answering the amended complaint without objection in the trial court.

¶ 30 We agree that defendants have conceded the legal sufficiency of the amended complaint at page 15 in their appellate brief. In addition, the case law provides that where "a complaint substantially although imperfectly alleges a cause of action, defendant waives any defect by answering it without objection." *Burks Drywall, Inc. v. Washington Bank & Trust Co.*, 110 Ill. App. 3d 569, 572 (1982). The record reveals defendants filed a timely answer to the first amended complaint on September 22, 2004 without contesting the sufficiency of this amended complaint. Consequently, we unanimously agree that the sufficiency of the amended complaint has been conceded, as well as waived, by defendants for purposes of this appeal.

¶ 31 II. Cross Motions for Summary Judgment

¶ 32 When a trial court grants or denies summary judgment, we review *de novo*. *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 801 (citing *Courson ex rel. Courson v. Danville School District No. 118,* 301 Ill. App. 3d 752 (1998)). Since our review is *de novo*, this court must now carefully focus on the precise, narrow question set out in plaintiff's amended complaint for declaratory relief which asked the trial court to declare Hutchins "did not reside" with his grandparents and deny coverage on this basis.

¶ 33 As recognized by Justice Holdridge in his separate decision, I agree that whether Hutchins resided "primarily" with his grandparents would be a dispositive issue with regard to coverage in this case. However, plaintiff's amended complaint for declaratory action did not ask the trial court to address this dispositive question regarding the minor's "primary" residence. Instead, for some inexplicable reason, the plaintiff asked the trial court to declare whether Hutchins "did not" reside with his grandparents at all relevant times before and on the date of the

accident.

¶ 34 The difficulty with the language of this precise declaratory question, selected by plaintiff for the focus of the amended complaint, is not imaginary. In fact, the language of the amended complaint has been the source of extensive debate in this court as we considered the best approach to address the issues raised in defendants' appeal which is now before us. As pointed out by Justice McDade in her separate concurring decision in this case, the prayer for reversal of the trial court's denial of defendant's motion for summary judgment argues that Hutchins did not "primarily" reside with his grandparents and the parties have extensively argued this very issue on appeal. Thus, the separate decisions of my respected colleagues address whether the undisputed facts set out in the cross motions support a finding that Hutchins did not primarily reside with his grandparents for purposes of coverage. Both of my respected colleagues make very valid points and draw logical conclusions from the pleadings regarding the best method for determining the location of minor's primary residence in light of the language set forth in this policy. The fact that both of my colleagues have reviewed the same pleadings and reached opposite views regarding the location of Hutchin's primary residence, leads me to the conclusion that the material facts are disputed and should not be decided by summary judgment even in the event that the amended complaint had placed the issue of primary residence before the trial court, which I contend, the parties did not do.

¶ 35 Consequently, due to the problematic language of the amended complaint, plaintiff now requests *this court* to further amend the language of the amended complaint in order to conform to the court’s broader, and more favorable, finding that Hutchins did not “primarily” reside with his grandparents. In support of this unusual request, plaintiff claims that " this court may consider

an amendment to the complaint as having been made [on appeal] based on the *evidence* in the record that Reginald Hutchins did not primarily reside with his grandparents on the date of the accident."

¶ 36 Yet, I conclude that plaintiff's specific and narrow prayer for declaratory relief should not be modified by this court in hindsight. Plaintiff presumably was familiar with any difficulties arising from the language of their policy and drafted their prayer for relief seeking a declaration that Hutchins “did not” reside with his grandparents, without inviting the trial court to consider whether Hutchins "primarily" resided with his grandparents. Obviously, if Hutchins “did not” reside with his grandparents, their home could not qualify as his "primary" residence. Thus, an ambiguity surrounding the term "primarily" could be avoided by drafting the declaratory issue this way.

¶ 37 Now that the trial court resolved the broader declaratory question, as propounded first in defendant's motion for summary judgment, in plaintiff’s favor, plaintiff asks this court to further amend their first amended complaint on appeal. I steadfastly maintain that the prayer for relief in a declaratory action defines the issues for the court's consideration and should not be expanded by this court after one party prevails on issues beyond the scope of the declaratory action, no matter how fascinating that broadened issue would be. In fact, we all agree the issue of whether the trial court properly considered a minor's intent as the controlling factor when determining Hutchins' primary residence is very intriguing.

¶ 38 Hoping that this court will expand the scope of the declaratory question to now determine the location of the minor's "primary" residence based on the pleadings and the facts, plaintiff directs this court to the decision in *Kijowski v. Kijowski*, 36 Ill. App. 2d 94, 96-97 (1962).

Plaintiff submits this case provides persuasive authority allowing this reviewing court to amend the plaintiff's first amended complaint, even though such a request was not presented by plaintiff in the trial court.

¶ 39 *Kijowski* does not provide persuasive authority because even the court in *Kijowski* recognized the preferred practice would have been for plaintiff to file a motion to amend the allegations of the complaint in the trial court. *Kijowski* Ill. App. 2d at 96-97. Furthermore, *Kijowski* did not involve a declaratory action subject to a jury demand or the resolution of pending cross motions for summary judgment. In *Kijowski*, the appellate court simply modified the allegations of the complaint to retrospectively include those facts which were necessary to give rise to the trial court's jurisdiction to conduct the trial on the merits concerning a petition for dissolution. It is well established that jurisdictional issues may be addressed at any time.

¶ 40 Absent an agreement from both parties to this appeal, we decline to amend the prayer for declaratory relief to conform to the question actually decided by the trial court. We point out that by taking this approach, either party may file another declaratory action requesting the court to declare whether Hutchins primarily resided with his grandparents.

¶ 41 Thus, for the reasons set forth above, it must be emphasized that the narrow issue presented for our *de novo* review is whether the undisputed facts set out in the pleadings and attached exhibits support plaintiff's contention that Hutchins "did not" reside with his grandparents at all relevant times, prior to and up to the time of the occurrence, and therefore, coverage was not required. With this significant clarification in mind, we turn to the merits of

defendants' motion for summary judgment. [3]

¶ 42 Section 2-1005 of the Illinois Code of Civil Procedure provides that summary judgment should be granted if the pleadings, depositions, admissions, and affidavits on file "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(c) (West 2008). The movant's right to summary judgment must be "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). If an examination of the record reveals that "it can be fairly stated that a triable issue of fact exists, the motion should be denied." *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 801 (2007) (citing *Bellmer by Bellmer v. Charter Security Life Insurance Co.*, 140 Ill. App. 3d 752 (1986)).

¶ 43 In this case, defendants' motion for summary judgment on the declaratory action, which is the focus of this appeal, alleges "that there is no triable question of fact as to whether the minor Defendant was a 'resident' of his grandparent's household and that 'resident' is a term which also has 'no fixed or exact meaning' and 'thus must be construed most strongly against the insurer and liberally in favor of the insured.' " Since the policy does not define the ordinary term "resident," we turn to Webster's Third New International Dictionary, which defines a "resident" as follows:

¶ 44 "One who resides in a place: one who dwells in a place for some duration - often distinguished from inhabitant" Webster's Third New International Dictionary

[3]In the introductory paragraph of defendants' motion for summary judgment, defendants clearly stated that "[o]nly Plaintiff's declaratory action is implicated by this motion." Similarly, plaintiff specifically entitled their cross-motion for summary judgment as "PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AS TO ITS FIRST AMENDED COMPLAINT AT LAW."

(1993).

¶ 45 The difficulty with the language of the amended complaint in the case at bar, is not the failure of the policy to define ordinary terms such as “resident,” “primarily,” or “resides.” Rather, the confusion arises in this case because the policy does not define a relevant time frame for a determination of the location of a relative's primary residence. Struggling with the absence of a defined, specific, and relevant time frame, plaintiff's amended complaint deals with this circumstance by directing the trial court to consider "all relevant times, prior to and up to the time of the occurrence" when declaring whether Hutchins "did not" reside with his grandparents.

¶ 46 We have been charged with the task of reviewing *de novo* whether Hutchins "did not" reside with his grandparents at "all relevant times, prior to and up to the time of the occurrence" for purposes of the cross motions for summary judgment. Thus, I respectfully submit that we need not decide whether an ambiguity exists for purposes of the declaratory action because plaintiff did not request the court to consider this issue.

¶ 47 Here, the undisputed facts set out in the pleadings and exhibits reveal that Hutchins resided together with his grandparents and his mother in 2001 and continuously spent a considerable amount of time in his grandparents’ home, with undisputed regularity, while attending Bolingbrook schools and, thereafter, while attending school in Chicago during his eighth grade year. At a minimum, no one disputes that Hutchins stayed with his grandparents on multiple school nights during each week while attending school in Chicago, just before the accident, due to his mother's late night schedule at her Bolingbrook workplace.

¶ 48 Based on these undisputed facts set out in the pleadings, we conclude that Hutchins "did" reside with his grandparents at all relevant times, prior to and up to the time of the occurrence but

this does not resolve whether his grandparent's home remained his primary residence, at all relevant times, after his mother moved to Chicago.[4] Hence, the answer to the narrow declaratory question resolves nothing with regard to the ultimate issue of coverage and does not resolve the pending litigation between these parties.

¶ 49. Therefore, we reverse the trial court's decision denying defendant's motion for summary judgment, allowing plaintiff's cross motion for summary judgment, and declaring plaintiff was not obligated to provide coverage in this case. Further, we direct the trial court to enter a finding that the minor "did" reside with his grandparents without declaring whether coverage is applied for the reasons set forth, at length, above. The cause is remanded to the trial court to allow the court to decide the merits of defendants' pending counter-complaint at law for statutory damages.

¶ 50 Finally, defendants claim that the trial court erroneously failed to compel plaintiff to answer certain interrogatories and produce various documents requested by defendants during discovery. In this case, we have jurisdiction to consider defendants' appeal pursuant to Supreme Court Rule 304 (Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010)). The rulings on the discovery motions which defendant challenges in this appeal are not included in the Rule 304 language triggering this court's jurisdiction.

¶ 51 CONCLUSION

¶ 52 We reverse the decision of the trial court granting summary judgment in favor of plaintiff. We also reverse the decision of the trial court denying defendants' motion for summary judgment

[4]In fact, since Hutchins testified that he visited his grandparents on weekends while attending school in Chicago which conflicts with his grandmother's deposition testimony that he visited his mother on weekends during this same time period, it appears there are disputed material facts related to his primary residence shortly before the accident.

with directions. We decline to address the discovery issues as they are not properly before this court. The cause is remanded to the trial court for further proceedings on defendants' counter-complaint.

¶ 53 Reversed and remanded.

¶ 54 JUSTICE McDADE, specially concurring:

¶ 55 I concur in the decision to affirm the trial court's denial of defendants' motion to dismiss plaintiff's complaint for failure to state a cause of action for the reasons stated in the decision.

¶ 56 I concur in the decision to reverse the trial court's award of summary judgment in favor of plaintiff for the reason that there remain material issues of disputed fact as stated in the decision.

¶ 57 I concur in the decision to reverse the trial court's denial of summary judgment in favor of defendants, Reginald Hutchins, et al. in part for the reasons stated in the decision.

¶ 58 While I can go along with remand, I write separately to express my conviction that this matter can and should be fully resolved in this court and that the case requires remand only to resolve the statutory claim. I believe the defendants' motion for summary judgment should be granted.

¶ 59 That motion focuses entirely on the issues of where Reginald "resided" and "primarily resided" at arguably relevant times. There was no motion in the trial court to strike defendants' motion for introducing an issue not specifically raised in plaintiff's complaint for declaratory judgment. Rather, plaintiff responded with a cross motion for summary judgment that focused on the issue of where Reginald "primarily resided" that had been raised by the defendants – the issue that is, in fact, the determinant for coverage as expressed in the policy. In sum, the question of where Reginald "primarily resided" was central to the arguments in the trial court, to the

decision of the trial judge, and to the arguments presented in the briefs and oral presentations to this court on appeal. In my opinion, that issue is squarely before us in this appeal.

¶ 60 The defendants assert that Reginald's grandparents' home was his primary residence – an assertion that State Farm, of course, disputes. It is not necessary to actually resolve that dispute to find that defendants are entitled to judgment as a matter of law. The answer is not material to the issue of coverage raised in their motion.

¶ 61 In support of their prayer for reversal of the trial court's denial of their motion for summary judgment, defendants have argued to this court that "the phrase 'resides primarily' as utilized in [plaintiff's] policy is ambiguous as a matter of law and is so unclear, indefinite, and unspecific as to have no fixed or enforceable meaning." They contend the term is ambiguous because there are "a variety of reasonable interpretations of the phrase." We have agreed with that contention and have found the phrase to be ambiguous, although Judge Wright and I have reached that conclusion for different reasons. She limits her conclusion to the absence of a defined time frame. *Supra,* ¶45. Mine is more broadly-based, finding ambiguity in the absence of both definitions for critical words and for any relevant time frame.

¶ 62 With regard to the words, nowhere within its four corners does the policy define the phrase "resides primarily." Published decisions tell us how to address that circumstance.

> "Because the policy does not define the term ***, we must give it its plain, ordinary and popular meaning. [Citation.] ' " 'Usual and ordinary meaning' has been stated variously to be that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to

> a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." '[Citations.]" *Maxum Indemnity Co. v. Gillette*, 405 Ill. App. 3d 881, 885 (2010).

¶ 63 The problem we currently face is that while the phrase itself has plain import, its *actual* meaning in the context of this case is subject to conjecture and debate. Resolution of the issue before us requires more than a construction of the meaning of "resides primarily," but rather the application of that phrase to our particular facts. The question is never whether the words alone are unambiguous, for all words have a commonly understood meaning. Words, standing alone, are defined and, standing alone, are unambiguous. The question is whether there is ambiguity in the application of a particular word or phrase in a particular context. *American Family Mutual Insurance Co. v. Hinde*, 302 Ill. App. 3d 227, 232 (1999) ("In determining whether there is an ambiguity, the provision in question cannot be read in isolation but must be read with reference to the facts of the case at hand").

¶ 64 Defendants do not dispute that one can have only one primary residence. Nor do I. But State Farm has failed to define that term in its policy, to plead how that location is properly determined or how plaintiff allegedly made that determination *vis-a-vis* Reginald in this case, or any facts that definitively support its conclusion that the Williams' home was not his primary residence. As used in the policy and applied to our facts, the term "resides primarily" is vague because it is susceptible of more than one meaning, just as residence, in a given context, is similarly susceptible.

¶ 65 Adding to the ambiguity caused by State Farm's failure to define the term "resides

primarily" is its failure to define the time frame ("all relevant times") within which to assess where a relative primarily resides. State Farm's complaint alleges:

> "10. Upon information and belief, REGINALD HUTCHINS did not primarily reside with ARTIS and ROSE WILLIAMS *at all relevant times."* (Emphasis added.)

Yet, nowhere in the policy does State Farm indicate what any relevant time is. Is it the whole of Reginald's life? the length of time the policy has been in effect? the last five years? the most recent twelve months? The most recent school year? It cannot simply mean on the actual day of the accident, as the dissent suggests, because that would render the word "primarily" superfluous and violate a fundamental rule of construction. In addition to complicating the coverage determination, this omission from the policy leaves State Farm free to choose any time frame in which it would be best able to sustain an argument that Reginald's residence was not primarily with his grandparents. Thus State Farm has not only heightened the policy's ambiguity regarding the meaning of "primarily resides," it has, in its failure to define "relevant times," created a tool it can manipulate to defeat coverage altogether.

¶ 66 Defendants further assert that because the policy is ambiguous and the facts demonstrate competing reasonable inferences as to coverage, this court must find coverage as a matter of law and enter summary judgment in their favor. *State Farm Mutual Insurance Co. v. Williams*, 181 Ill. 2d 436, 441 (1998) ("Provisions that limit or exclude coverage are to be construed liberally in favor of the insured and against the insurer"). In my opinion, decisions of the supreme and appellate courts of Illinois clearly show that defendants are correct.

¶ 67 In light of the clear showing of ambiguity, this court must construe the pertinent language

in the insurance policy against plaintiff and in favor of coverage. *Progressive Premier Insurance Co. v. Cannon*, 382 Ill. App. 3d 526, 529 (2008) ("If the clause is ambiguous, it should be construed in the insured's favor"). Considering the wealth of evidence that Reginald has resided at times solely with his grandparents, at times simultaneously with his mother and his grandparents, but clearly never exclusively with his mother, and construing the policy against plaintiff and in favor of coverage; this court should find that at a relevant time Reginald resided primarily with his grandparents. Therefore, this court should find that Reginald has established a right to coverage under their policy.

> "As our supreme court recently reiterated in *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009), once an insured establishes a right to coverage, it is an insurer's duty to establish that a limitation in the policy applies." *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill. App. 3d 512, 528 (2010).

¶ 68 In summary, this court should find that, because State Farm has failed to define any of the terms that are essential to prove its exclusion and because defendants have produced evidence that at times Reginald resided exclusively and at times primarily in his grandparents' home, plaintiff has not, and indeed cannot, establish that the limitation in the policy (to only those relatives who reside primarily with the insured) applies in this case. For these reasons, this court should not only reverse the trial court's order denying defendants' motion for summary judgment (as we have done), but also enter judgment in defendants' favor on that motion on the grounds Reginald is entitled to coverage under the Williams's policy. See, *e.g.*, *Gonzalez v. State Farm*

Mutual Automobile Insurance Co., 242 Ill. App. 3d 758, 764 (1993)[5].

¶ 69 JUSTICE HOLDRIDGE, dissenting:

¶ 70 I would find that the trial court properly granted State Farm's cross-motion for summary judgment. I would affirm the trial court's judgment in total, and I, therefore, respectfully dissent from the judgment of the court reversing and remanding the matter to the circuit court.

¶ 71 The dispositive issue in State Farm's complaint for declaratory judgment is whether Reginald was a covered insured under the underinsured motorist coverage provided by the automobile insurance policy issued to Artis and Rose Williams by State Farm. Under the terms of the policy, Reginald was a covered injured if, at the time he sustained bodily injuries arising out of the use of an underinsured vehicle, he "reside[d] primarily with [Artis and Rose Williams]." Reginald sustained bodily injuries arising out of the use of an underinsured vehicle on June 14, 2003. The question is, therefore, limited to what his *primary* residence was on that date.

¶ 72 In this case, there can be no serious doubt and, thus, no genuine issue of material fact that, at the time of the accident, 14-year-old Reginald resided primarily with his mother in Chicago and not with his grandparents in Bolingbrook. The evidence that Reginald resided primarily with his mother in Chicago is overwhelming. In response to a direct question regarding his residence at the time of the accident, Reginald testified in his deposition that, at the time of the accident, he

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[5] Held: Clause excluding uninsured motor vehicle coverage for vehicles designed for use mainly off public roads and not "able to be licensed" for public road use was "ambiguous" as to whether it covered dirt bike designed primarily for off-road use, which bike could have been driven on public roads only with certain equipment modifications, and thus, construing policy against insured, dirt bike on which passenger was riding when injured was covered by uninsured motor vehicle clause of automobile policy issued to passenger's parents.

resided with his mother in Chicago, and he was attending Nash Elementary School in Chicago, two blocks away from his home. He further testified that he was supposed to graduate from eighth grade at Nash a few days after the accident and his plans at the time were to attend high school the following year in Chicago. He testified that he had no plans at that time to attend high school in Bolingbrook. In addition, the record also established that his mother had sole legal custody of him and, at the time of the accident, she had no plans for Reginald to live primarily with his grandparents. Likewise, the documentary evidence overwhelmingly established that Reginald's primary residence was with his mother in Chicago and not with his grandparents in Bolingbrook. Latonya Johnson's tax returns for 2003 indicated that she was a head of household and that Reginald was her dependent living in her household. Conversely, the Williams's tax returns showed that Reginald was not a member of their household. Similarly, Johnson's federal assistance housing application indicated that Reginald would be living with her and that he was a registered member of her household on the date of the accident. Records from the Chicago public school system also established that, on the date of the accident, Reginald was a resident of the school district. Given these undisputed facts, the fact that Reginald spent some weekends at his grandparents' house prior to the accident is insufficient to create a genuine issue of material fact as to his primary residence on the date of the accident. Likewise, the fact that Reginald was discharged from rehabilitation to his grandparents' house in Bolingbrook *after* the accident, that he withdrew from the Chicago public school and enrolled in Bolingbrook in February of 2004, eight months *after* the accident, or that he ultimately did not attend high school in Chicago *after* the accident are not relevant to a determination of his primary residence at the time of the accident.

¶ 73 Because I would find no genuine issue of material fact on the question of coverage, I would grant summary judgment to State Farm.