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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-784

American Family Mutual Insurance Company,
Respondent,

vs.

Reid Douglas Larson,
Defendant,

Jessica Maria Henke,
Appellant.

Filed April 13, 2010
Reversed and remanded
Ross, Judge

Anoka County District Court
File No. 02-CV-08-4186

John M. Bjorkman, Paula Duggan Vraa, Larson King, St. Paul, Minnesota (for respondent)

John T. Buchman, Adriel B. Villarreal, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Kalitowski, Judge; and Stauber, Judge.

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

ROSS, Judge

In this insurance coverage dispute, injured apartment guest Jessica Henke appeals from the district court's summary judgment concluding that apartment tenant Reid Larson was not insured under his mother's homeowner's insurance policy. Henke sued Larson for negligently shooting her in the eye with a BB gun. She partially settled the suit for the policy limits of Larson's renter's insurance policy. Henke sought additional damages under Larson's mother's homeowner's policy. Because there is a genuine issue of material fact as to whether Larson was "insured" as a "resident" of his mother's home under the contract language of his mother's policy, we reverse the district court's grant of summary judgment and remand for further proceedings.

FACTS

Reid Larson shot appellant Jessica Henke with a BB gun, seriously injuring her eye. Henke sued Larson for negligence. The incident occurred in August 2006 at Larson's Brooklyn Park apartment, for which Larson had acquired renter's insurance through American Family Mutual Insurance Company. Larson tendered the defense to American Family, and the parties reached a partial settlement on the basis of *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994). In *Ryan*, the supreme court approved an insurance settlement in which the plaintiff released a motorist and his primary insurer from liability up to the limits of the primary policy but reserved her claims against the motorist up to the limits of his excess liability coverage under a secondary policy. *Id.* at 790.

Henke sought additional damages on the theory that Larson had personal liability coverage under his mother's homeowner's insurance policy, also issued by American Family. The homeowner's policy provides that American Family "will pay . . . compensatory damages for which any insured is legally liable because of bodily injury . . . caused by an occurrence covered by this policy." It defines "insured" as "you and, if residents of your household[,] your relatives." So for Larson to be covered under his mother's policy, he must have been a "resident" of her household at the time of the BB gun incident.

American Family sought a declaratory judgment that it had no duty to defend or indemnify Larson under his mother's policy. It asserted that Larson was not an "insured" under the policy because he had not been a resident of his mother's household at the time of the incident and that, even if he had been a resident, any personal injury occurring at his apartment was excluded from coverage because the apartment was not an "insured premises."

The parties filed cross motions for summary judgment and offered various facts bearing on residency in support of their competing motions. Before moving to the Brooklyn Park apartment, Larson had been living off and on with his mother at her Andover home. He left her home in the fall of 1999 to attend college but moved back after only a few semesters. He left her home in 2004 to live with his girlfriend and again in 2005 to live with another, returning each time within several months because the relationship soured.

The then 26-year-old Larson moved to the Brooklyn Park apartment in the summer of 2006 to assume a friend's lease, which had about three months remaining. He continued to visit his mother, stopping by to do laundry, eat meals, and occasionally spend the night. Larson stated that while he hoped he would not have to move back in with his mother after his friend's lease ended, he would move back if "nothing else came up." Nothing else came up, so when the lease terminated in September, he returned to his mother's home.

The district court granted American Family's summary judgment motion. It concluded as a matter of law that Larson had not been a member of his mother's household and so was not an insured under her homeowner's policy. The district court acknowledged that there was "some dispute" as to whether Larson intended to move back in with his mother after the lease ended but reasoned that his purchasing renter's insurance "weigh[ed] heavily" in favor of concluding that he intended to permanently leave home.

Because its determination of residency compelled summary judgment for American Family, the district court did not reach the issue of whether Larson's apartment was an "insured premises" under his mother's policy. Henke appeals.

D E C I S I O N

Henke challenges the district court's summary judgment order declaring that Larson was not an insured under his mother's homeowner's insurance policy. She takes issue with the district court's determination that Larson was not a resident of his mother's home at the time of the incident. American Family both defends the district court's

conclusion that Larson did not reside with his mother and continues to assert that summary judgment is justified alternatively because the Brooklyn Park apartment was not an insured premises under the mother's policy.

On appeal from summary judgment, this court determines whether genuine issues of material fact exist and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We view the evidence in the light most favorable to the party resisting summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). We conclude that conflicting evidence as to whether Larson intended to return to live with his mother after his lease expired creates a genuine issue regarding a material fact in this case—Larson's place of residence. The district court therefore erred by granting summary judgment based on Larson's residence.

To be covered by his mother's insurance policy, Larson must have been a resident of her household on the date of the incident. The supreme court has identified three factors to consider when determining a person's residence for insurance purposes:

> (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship "in contracting about such matters as insurance or in their conduct in reliance thereon."

Firemen's Ins. Co. of Newark, N.J. v. Viktora, 318 N.W.2d 704, 706 (Minn. 1982) (quotation omitted).

Henke argues that the so-called *Viktora* factors compel the conclusion that Larson was a resident of his mother's household at the time of the incident. But *Viktora* suggests

the opposite conclusion because Larson was not living under the same roof as his mother, the named insured. *See id.* at 707 (holding that an adult son was a resident of his parents' household when he had been living with them during a union strike). *Viktora* contemplates that a resident is one who "liv[es] under the same roof" as the policyholder. *Id.* at 706; *see also Auto-Owners Ins. Co. v. Harris by Harris*, 374 N.W.2d 795, 797 (Minn. App. 1985) (citing cases, including *Viktora*, where adult children had been found residents of their parents' households and noting that in each case the child had "maintained a continuous, significant presence in the parents' home before the date of the incident litigated" and dwelled under the same roof). *Viktora* provides Henke with little help.

But we agree with Henke that the facial severity of the *Viktora* factors does not reflect the nuances of Minnesota caselaw. *See McGlothlin v. Steinmetz*, 751 N.W.2d 75, 83 (Minn. 2008) ("Our cases reflect that we utilize the [*Viktora*] factors to inform the analysis of the residency question, but we do not apply them rigidly. Rather, we interpret the factors broadly so that all aspects of the relationship are examined.").

Applying policy language similar to American Family's, this court in several insurance-coverage cases has found persons who were not living under same roof as the named insured to be residents of the named insured's household. *See, e.g.*, *Wood v. Mut. Serv. Cas. Ins. Co.*, 415 N.W.2d 748, 751 (Minn. App. 1987) (affirming trial court's determination that 17-year-old child who left home for the Army, returned home whenever he could, and intended to return to the family home after his time in the Army was a resident), *review denied* (Minn. Feb. 12, 1988); *Morgan v. Ill. Farmers Ins. Co.*,

392 N.W.2d 37, 40 (Minn. App. 1986) (reversing trial court's determination that adult child was not a resident when she lived in a separate apartment while attending college but was supported financially by her parents, was claimed by them as a dependent for tax purposes, maintained a bedroom and some possessions at their house, and spent weekends and holidays there), *review denied* (Minn. Oct. 22, 1986); *Skarsten v. Dairyland Ins. Co.*, 381 N.W.2d 16, 19 (Minn. App. 1986) (reversing trial court's determination that adult child was not a resident when she lived in a separate apartment while attending college but was supported by her parents, was claimed as a dependent, visited home occasionally, and intended to return), *review denied* (Minn. Mar. 27, 1986).

In cases such as these, we have identified additional factors relevant to the residence issue. They are (1) the proposed insured child's age, (2) whether the child has established a separate residence, (3) the child's level of self-sufficiency, (4) the frequency and duration of the child's stays in the family home, and (5) the child's intent to return. *Wood*, 415 N.W.2d at 750. "The fact that belongings remain in the home and the home continues to be the mailing address may be considered, but are not dispositive." *Id.* at 751.

Henke argues that a material fact issue existed as to whether Larson intended to return to his mother's house after finishing his friend's lease. American Family emphasizes that both parties moved for summary judgment and suggests that in that procedural posture Henke implicitly acknowledged that no material facts exist. American Family relies on *Frey v. United Services Automobile Association* for support. 743 N.W.2d 337, 344 (Minn. App. 2008). *Frey* quotes the supreme court opinion of

American Family Mutual Insurance Company v. Thiem for the proposition that "by submitting cross-motions for summary judgment, [the] parties tacitly agreed that there exist no genuine issues of material fact." *Id.* (citing 503 N.W.2d 789, 790–91 (Minn. 1993)) (quotation omitted). This proposition of logic was dicta and is not persuasive. Of course, a motion for summary judgment generally includes an argument that the undisputed facts allow *the movant* to prevail; but this argument by no means implies that the opponent necessarily prevails as a matter of law if the motion fails. A party can argue logically that the undisputed facts support one outcome without conceding that the material facts that tend to support judgment in her opponent's favor are similarly without dispute. This logic applies whether or not there are cross motions. In other words, arguing that the undisputed facts lead to only one legal conclusion does not compel the opposite legal conclusion if the argument fails. The contrary proposition restated in *Frey* was unnecessary to the holdings in *Frey* and *Thiem*, and American Family's reliance on it is misplaced. We do not deem Henke to have waived the right to argue that factual disputes prevent the district court from resolving the issue of Larson's intent as it did.

Conflicting evidence in the record as to Larson's intent creates a genuine factual issue as to whether he was a resident of his mother's household. Whether a person resides in a household is a question of fact. *Wood*, 415 N.W.2d at 750. A genuine issue of fact may be established only by substantial evidence. *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976) (quotation omitted). Evidence is substantial when it "sustains, with equal justification, two or more inconsistent inferences." *E.H. Renner & Sons, Inc. v. Primus*, 295 Minn. 240, 243, 203 N.W.2d 832,

835 (1973). But "metaphysical doubt" about a material fact does not create a genuine issue. *Fin Ag, Inc. v. Hufnagle, Inc.*, 700 N.W.2d 510, 517−18 (Minn. App. 2005), *aff'd*, 720 N.W.2d 579 (Minn. 2006).

American Family argues that Henke's "claimed factual dispute" is the result of a self-serving affidavit that conflicts with earlier deposition testimony. "A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact." *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). "A subsequent affidavit may, however, 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.* Larson's deposition includes an incongruence. Larson testified that he *intended* to return to his mother's home after finishing the lease but also that he *hoped* he would not have to move back in with his mother. Larson's subsequent affidavit clarifies that his hope not to have to move back with his mother was merely that—a hope—by stating that he knew when he agreed to assume the lease it would be a temporary arrangement and that he intended to stay only until September and then return to his mother's home.

The factual dispute arises from more than the mere assertion that Larson intended to move home. Larson testified that he made no attempt to find another place to live before the lease expired; that his friend approached him about the lease, a fact that suggests that the move was a spontaneous, temporary sojourn to help an acquaintance; that he continued to visit his mother for laundry and meals and, occasionally, to stay overnight; that he left some things at the house and still had a bedroom there; that nearly

all of his mail was still going to his mother's house; and that he did in fact move back after only three months as soon as the lease ended. Although the district court, in determining that Larson intended to permanently leave home, placed great weight on the fact that he obtained renter's insurance, we do not construe this one fact to overcome all others, nor do we interpret the acquisition of renter's insurance to conclusively prove permanency. Larson testified that he obtained the insurance because his apartment was in a rough neighborhood and he feared a break-in. We are not persuaded that his obtaining an insurance policy to protect his interest in personal property requires a finding that he planned not to return to his mother's home.

American Family argues that Larson's intent to return home was not a material fact because he had established his own separate residence. The argument relies substantially on inferences drawn from Larson's decision to purchase renter's insurance. As stated, we do not believe that obtaining renter's insurance disposes of the question of intent to establish residency at the insured location. And even if Larson established a separate residence by purchasing renter's insurance, we are not prepared to hold that a person cannot establish multiple residences. *See McGlothlin*, 751 N.W.2d at 82 (observing that Minnesota caselaw does not address whether an adult can be a resident of two households for insurance purposes); *Thiem*, 503 N.W.2d at 790−91 (holding that a minor child was the resident of both his mother's and father's households for insurance purposes).

We see Larson's intent as material. *See Highland Chateau, Inc. v. Minn. Dept. of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984) ("A material fact is one whose

resolution will affect the result or outcome of the case."), *review denied* (Minn. Feb. 6, 1985). If Larson intended to leave home permanently, not much distinguishes this case from *Lott v. State Farm Fire & Casualty Company*, in which the supreme court found that the insured's son, "a self-supporting 30-year-old" who lived in his own apartment, was not a resident of the insured's household. 541 N.W.2d 304, 306, 308 (Minn. 1995). But if Larson was merely helping a friend by completing the lease, then he could be expected to return to his mother's house for a substantial period, as he had done after breaking up with his two girlfriends and in fact did upon the lease's expiration in September.

There is a genuine issue of material fact whether Larson qualified as a resident of his mother's household under her homeowner's insurance policy. There is more than a metaphysical doubt about Larson's intent to return to his mother's house; enough evidence suggests that he intended to return, requiring a factfinder's assessment.

American Family urges us to affirm on its alternative ground that Larson's apartment was not an insured premises under the homeowner's policy. But because the district court did not reach this issue, we decline to address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court should not consider an issue not decided by the district court). On remand, the district court will have the opportunity to answer this unresolved question.

Reversed and remanded.