

RENDERED: June 19, 1998; 10:00 a.m.

ORDERED NOT TO BE PUBLISHED BY THE KENTUCKY SUPREME COURT:
JUNE 9, 1999 (98-SC-000798)

NO. 96-CA-003515-MR

MATTHEW HALL, a Minor by his
Guardian EUGENIA (HALL) BOOTH

APPELLANT

APPEAL FROM LAWRENCE CIRCUIT COURT
V. HONORABLE STEPHEN FRAZIER, JUDGE
CIVIL ACTION NO. 95-CI-000001

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, JUDGE. Matthew Hall, through his mother and guardian Eugenia (Hall) Booth, appeals from a declaratory judgment¹ that denied him uninsured motorist (UM) coverage

¹ Ky. Rev. Stat. (KRS) 418.040 provides that "[i]n any action in a court of record of this commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff [in this case, Kentucky Farm Bureau Mutual Insurance

benefits under a policy which listed his grandmother and his great-aunt and great-uncle as named insureds. The judgment was based on a finding by the trial court that Matthew was not a resident of his great-aunt and great-uncle's house when he was injured in an automobile accident involving an uninsured motorist.

In February 1993, Matthew, then five years of age, was injured while riding in an automobile operated by his grandmother, Pearl Booth, and owned by his great-grandmother, Cora Booth. The driver of the other vehicle was uninsured. A claim was asserted against Kentucky Farm Bureau Mutual Insurance Company (KFB) which had an automobile insurance policy listing John and Georgia Quisenberry of Louisa, Kentucky, and Pearl Booth as named insureds. The policy also provided coverage to the related residents of the insureds' household. KFB's liability turns on whether Matthew was a "resident" entitled to coverage under the uninsured motorist clause of the KFB policy.² While it is undisputed that Matthew is related to the Quisenberrys by blood and that he was living in the Quisenberry household at the time of the accident, KFB insists that Matthew was not a covered "relative" because he was not a "resident" of

Company] may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked."

² Uninsured motorist coverage under the policy is provided to "family members," that is, persons related to the insured "by blood, marriage or adoption, who [are residents] of [the insureds'] household. This includes a ward or foster child."

the household.

"The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings. Sometimes, in statutes, residence means domicile; sometimes . . . , it clearly does not. When these words, 'domicile' and 'residence', are technically used by persons skilled in legal semantics, their meanings are quite different." Commissioner of Internal Revenue v. Swent, 155 F.2d 513, 515 (4th Cir. 1946).

In Southeastern Greyhound Lines v. Conklin, 303 Ky. 87, 196 S.W.2d 961 (1946), Kentucky's highest Court drew a distinction between "domicile" and "residence":

Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation. It does not include as much as domicile which requires an intention combined with residence. One may seek a place for purpose of pleasure, of business, or of health. If his intent be to remain it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence.

Id. at 962.

Other courts have explained that "'residence' means . . . a personal presence at some place of abode with no present

intention of definite and early removal and with a purpose to remain for an undetermined period, not infrequently but not necessarily combined with a design to stay permanently." T. P. Laboratories, Inc. v. Huger, 197 F.Supp 860, 865 (D. Md. 1961). Similarly, in Fielding v. Casualty Reciprocal Exch., 331 So. 2d 186, 190 (La. Ct. App. 1976), the court said that "[t]o be considered a resident of a particular place, it is only necessary that a person 'maintain such a relation with the place or premises so selected as will entitle him at his will and without making new arrangements therefor upon each return, to occupy such place whenever his necessities or pleasure require, this without having to ask permission of someone else.'" (Citation omitted.)

"A person may have more than one place of residence at any given time and maintain a permanent place of residence even though he or she may live elsewhere temporarily." Perry v. Motorists Mut. Ins. Co., Ky., 860 S.W.2d 762, 765 (1993). For example, the child of divorced parents can be a resident of two separate households for insurance purposes. Walbro v. Amerisure Cos., 133 F.3d 961, 969 (6th Cir. 1997), and the cases cited therein. An individual may have both a "permanent residence" and a "temporary residence."

One who comes to [a place] for a definite purpose which in its nature may be promptly accomplished is a

transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end [he] makes his home temporarily in [this place], he becomes a resident, though it may be his intention at all times to return to his domicile . . . when the purpose for which he came has been consummated or abandoned.

Fuller v. Hofferbert, 204 F.2d 592, 597 (6th Cir. 1953).

If KFB had intended for the uninsured motorist clause to cover only "legal residents" or "domiciliaries" of the Quisenberry household, it could have included such a definition in its policy. Since the policy does not define "resident," the ambiguous term must be construed in such a manner as to favor insurance coverage rather than to restrict it. Perry, 860 S.W.2d at 765.

The record below is replete with evidence that Matthew was a resident of the Quisenberry household. Georgia Quisenberry testified that in late 1992 and early 1993 her sister and Matthew's grandmother, Pearl Booth, "was with me constantly." With regard to Matthew, Georgia stated that, "I know that Matthew for sure came to stay in November [1992] and never left. I mean never -- he would -- him and Pearl went places, but when Pearl was there Matthew was there." Georgia also discussed Pearl's involvement with the KFB policy Georgia

had obtained:

A. [By Georgia] - When Pearl came to stay with me I've always been concerned about insurance and I had her put on our insurance policy.

Q. (By Attorney Schmitt) - On whose policy?

A. - Me and my husband.

Q. - You had her put on your auto policy?

A. - Yes.

Q. - Are you sure about that?

A. - Oh, I'm positive. She was listed as a driver because I did not want -- I didn't want any problems with insurance. I mean I just have a thing about having things covered.

Linda Bradley, Georgia's sister, gave similar testimony regarding Pearl and Matthew's residence:

Q. - [By Attorney Webb] - Had Ms. Booth moved into [Georgia's house] --

A. - [By Linda Bradley] - Yeah, she'd moved down. Yes, sir.

Q. - And during that time period, what was the situation concerning Matthew Hall?

A. - Well, Matthew was with his grandmother. Left staying with her, you know, she kind of -- well,

she was like a mother too, you know, just like his real mother, but she was having to take care of Matthew.

Tommy Vicars, a friend of Georgia Quisenberry's, confirmed what other witnesses had said:

Q. [By Attorney Webb] - Now, after Ms. Quisenberry had her bone marrow transplant what if anything do you know -- are you aware of that Pearl Booth did in response to that?

A. [By Tommy Vicars] - Stayed with her constantly

* * *

Q. - And during the time period that Pearl was staying with her, do you have any information or any knowledge as to where Matthew Hall --

A. - I believe he stayed with his grandmother, Pearl.

Q. - So when you stated awhile ago that you believed that the people that was present with Georgia Quisenberry would be her son and --

A. - Pearl and Matthew. Matthew stayed with Pearl all the time. He wouldn't go nowhere or be nowhere without her.

* * *

Q. - But from the -- if we assume that [Georgia's] bone marrow transplant took place in October of 1992 and the car accident took place in February of 1993, during that time period from October of '92 until February of '93 --

A - They all lived [at] Georgia's. They stayed with Georgia.

Q. - When you're saying they, you're speaking of Pearl Booth and Matthew Hall?

A. - Matt and Pearl. Yeah.

Q. - And that was on a day in and day out basis?

A. - Day, night, day, night, seven days a week.

Annie Doherty, Georgia Quisenberry's sister-in-law, testified that Pearl and Matthew were living with Georgia "most of the time." Jonathan Quisenberry, Georgia's son, testified that Matthew and Pearl lived with Georgia, John and Jonathan for over a year. Matthew's mother, Eugenia (Hall) Booth, testified that "Matthew went to stay with [Georgia Quisenberry] in October of '92."

In the face of this testimony, the trial court found that Matthew was not a resident of the Quisenberry household, but resided instead with his mother Eugenia (Hall) Booth in Olive Hill, Kentucky. The court apparently relied on the fact

that Eugenia had set aside a room for her son at her place of residence and had advised the hospital where Matthew was treated following his injury that her son's address was "General Delivery, Olive Hill, Kentucky." The court also appears to have relied on the testimony of KFB's District Claims Manager Donald Lamb who said that he had taken an unsworn statement from Georgia Quisenberry's deceased husband, John. According to Lamb, John Quisenberry told him that Pearl and Matthew were never residents of his household. This hearsay evidence was inadmissible and should not have been relied on by the court.

Kentucky Rule of Evidence (KRE) 802 provides that hearsay, that is, an oral or written assertion, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted, is not admissible except as provided by the Rules of Evidence or other rules adopted by the Supreme Court of Kentucky. Clearly, the assertion by Lamb of the statement allegedly made by John Quisenberry goes to the truth of the matter asserted -- that Matthew was not a resident of the Quisenberry house. While KRE 804 provides an exception to the hearsay exclusion rule when the declarant is unavailable as a witness, as is the case when the declarant is deceased, Quisenberry's statement does not fit within any of the hearsay exceptions listed in KRE 804(b).³

³ The Kentucky Rule of Evidence (KRE) 804(b) exceptions relate to former testimony, statements under belief of impending death, statements against interest and statements of

Ky. R. Civ. Proc. (CR) 52.01 mandates that findings of fact made by the trial court are not to be set aside by an appellate court unless clearly erroneous. In this case, the finding that Matthew was not a resident of the Quisenberry household at the time he was injured is clearly erroneous and must, therefore, be set aside. The judgment is reversed and this case is remanded to Lawrence Circuit Court with directions to enter judgment holding KFB liable to Matthew for UM benefits under the automobile insurance policy issued to the Quisenberrys and granting such further relief as is warranted by the pleadings and proof.

ALL CONCUR.

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personal or family history.