STATE OF MICHIGAN

COURT OF APPEALS

QAISER WUTWUT, as next friend of TABARAK WUTWUT,

Plaintiff,

v

FARM BUREAU GENERAL INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

BRISTOL WEST INSURANCE GROUP,

Defendant/Cross-Defendant-Appellee,

and

CITIZENS INSURANCE COMPANY OF AMERICA, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, NEW HAMPSHIRE INDEMNITY COMPANY, INC., d/b/a AMERICAN INSURANCE GROUP, and MICHIGAN ASSIGNED CLAIMS FACILITY,

Defendants.

UNPUBLISHED
April 16, 2013

No. 305562
Wayne Circuit Court
LC No. 06-626705-NF

DETROIT MEDICAL CENTER, d/b/a CHILDREN'S HOSPITAL OF MICHIGAN,

Plaintiff,

v

FARM BUREAU GENERAL INSURANCE

No. 305636
Wayne Circuit Court
LC No. 06-624685-NF

COMPANY,

Defendant/Cross-Plaintiff-
Appellant,

and

BRISTOL WEST INSURANCE GROUP,

Defendant/Cross-Defendant-
Appellee,

and

CITIZENS INSURANCE COMPANY OF AMERICA, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, NEW HAMPSHIRE INDEMNITY COMPANY, INC., and MICHIGAN ASSIGNED CLAIMS FACILITY,

Defendants.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

This matter involves two consolidated appeals[1] from two consolidated lower court files. In Docket No. 305562, defendant/cross-plaintiff, Farm Bureau General Insurance Company (Farm Bureau), appeals by right an order acknowledging resolution of the uninsured motorist claim of plaintiff, Qaiser Wutwut, next friend of Tabarak Wutwut, prohibiting reference to this settlement in the no-fault claims, preserving the parties' rights to appeal the trial court's no-fault rulings, and dismissing Tabarak's claims. In Docket No. 305636, Farm Bureau appeals by right an order severing the consolidated cases and dismissing the claims of plaintiff, Detroit Medical Center, d/b/a Children's Hospital of Michigan (DMC). In both appeals, Farm Bureau challenges the grant of summary disposition against it on the no-fault claims and the dismissal of Farm Bureau's cross-claim against defendant/cross-defendant, Bristol West Insurance Group (Bristol West), regarding no-fault benefits that Farm Bureau contends it paid contrary to the rules governing priority. We reverse the grant of summary disposition against Farm Bureau and the

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[1] The appeals were consolidated "to advance the efficient administration of the appellate process." *Wutwut v Farm Bureau Gen Ins Co*, unpublished order of the Court of Appeals, entered August 31, 2011 (Docket Nos. 305562, 305636).

dismissal of Farm Bureau's cross-claim against Bristol West, and remand for further proceedings consistent with this opinion.[2]

Farm Bureau argues that the trial court erred in ruling on summary disposition that Farm Bureau shares liability with Bristol West for payment of Tabarak's no-fault benefits, and in dismissing Farm Bureau's cross-claim against Bristol West, because this Court already held in a prior appeal that the issue whether Tabarak was domiciled in the same household as her father, Qaiser, was a question of fact for the jury, and that a genuine issue of material fact continued to exist on that issue despite the taking of Qaiser's deposition after this Court's prior opinion. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307253, issued February 12, 2013) (slip op at 3). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "This Court also reviews de novo the question of law whether the trial court followed this Court's ruling on remand." *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

When an appellate court remands a case to a lower court, the lower court on remand must "comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). "A trial court on remand possesses the authority to take any action that is consistent with the opinion of the appellate court." *Driver v Hanley (After Remand)*, 226 Mich App 558, 564; 575 NW2d 31 (1997). An appellate court's determination that summary disposition is premature does not preclude a grant of summary disposition on remand where the parties supply evidence that was not before the appellate court when it ruled. *Allstate Ins Co v Miller (After Remand)*, 226 Mich App 574, 580-581; 575 NW2d 11 (1997).[3]

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[2] Although the trial court erred in granting summary disposition in favor of Tabarak on the no-fault claim, the error affects only Farm Bureau's cross-claim against Bristol West. Tabarak is no longer involved in this case in light of the settlement of her uninsured motorist claim against Farm Bureau and Farm Bureau's payment of the outstanding no-fault benefits. The only dispute at this point is between Farm Bureau and Bristol West in the context of Farm Bureau's cross-claim for no-fault benefits that Farm Bureau claims to have paid out of priority.

[3] In its appellate brief responding to Farm Bureau's arguments on appeal, Bristol West addresses the law of the case doctrine. However, Farm Bureau does not argue that the law of the case

Here, the underlying factual issue is whether Tabarak and her father, Qaiser, were domiciled in the same household at the time of Tabarak's accident on September 1, 2005, such that Qaiser's no-fault insurer, Farm Bureau, is responsible under MCL 500.3114(1)[4] for one-half of the no-fault PIP benefits incurred by Tabarak. As explained in this Court's prior opinion in these cases, *Detroit Med Ctr v Farm Bureau Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2010 (Docket Nos. 287775, 287776), if Tabarak and Qaiser were not domiciled in the same household on the date of the accident, then Bristol West, the no-fault insurer for Tabarak's mother, Ashwak Hammed, would be responsible for the entire amount. If, on the other hand, Tabarak and Qaiser were domiciled together, then Farm Bureau and Bristol West would each be responsible for one-half of the no-fault benefits.

This Court's prior opinion quoted from *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364-365; 656 NW2d 856 (2002), regarding the factors relevant to determining domicile. In *Fowler*, this Court explained:

> The relevant factors in deciding whether a person is domiciled in the same household as the insured include: (1) the subjective or declared intent of the claimant to remain indefinitely in the insured's household, (2) the formality of the relationship between the claimant and the members of the household, (3) whether the place where the claimant lives is in the same house, within the same curtilage, or upon the same premises as the insured, and (4) the existence of another place of lodging for the person alleging domicile. *Workman v DAIIE*, 404 Mich 477, 496-497; 274 NW2d 373 (1979).
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> When considering whether a child is domiciled with the child's parents, other relevant indicia include: (1) whether the child continues to use the parents' home as the child's mailing address, (2) whether the child maintains some possessions with the parents, (3) whether the child uses the parents' address on the child's driver's license or other documents, (4) whether a room is maintained for the child at the parents' home, and (5) whether the child is dependent upon the parents for support. *Goldstein* [*v Progressive Cas Ins Co*, 218 Mich App 105, 111-112; 553 NW2d 353 (1996)], citing *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983). [*Fowler*, 254 Mich App at 364-365.]

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doctrine applies. Instead, Farm Bureau contends that the trial court failed to comply with this Court's remand directive and that a genuine issue of material fact exists. In any event, it appears that the law of the case doctrine does not apply in the circumstances of this case. See *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995) ("When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits.").

[4] MCL 500.3114(1), a subsection of the Michigan no-fault act, MCL 500.3101 *et seq*., provides, in part: "[A] personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household. . . ."

After reviewing the above case law regarding the factors for determining a person's domicile, this Court's prior opinion concluded that a genuine issue of material fact existed regarding whether the Dearborn Heights, Michigan, home in which Tabarak was domiciled was also Qaiser's household:

> Applying these factors to the facts of this case, material questions of fact exist regarding Qaiser's membership in his family's Michigan household, or stated differently, whether the Michigan home Qaiser owned and in which Tabarak was domiciled was also Qaiser's household at the time of the accident. It is undisputed that Qaiser returned to Iraq in the fall of 2003, approximately two years before the accident, and that the rest of the family remained in their Michigan home. According to Hammed, Qaiser left Michigan with the stated intention of establishing a home for his family in Iraq. Several facts support Hammed's statement that Qaiser then "settled" in Iraq. He ran for public office, took a job at his friend's company, and sold his share of his Michigan carpentry business, although it is unclear in the record whether he sold his share of the business before or after the accident.
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> Other facts suggest that although Qaiser was living in Iraq, he remained a member of his family's Michigan household. At the time of the accident, the title to the house, the mortgage, and some of the utilities were in his name. He continued to receive some mail, such as junk mail and utility bills, at the house. He left some clothes, shoes, and books there. The vehicle Qaiser insured with Farm Bureau continued to be stored there. He sent money to Hammed for living expenses, filed at least one income tax return in the United States, renewed his Michigan driver's license, and maintained a joint bank account with Hammed in Michigan. Qaiser also changed living arrangements multiple times after moving to Iraq, i.e., living first in a condominium, then in a room in his sister's house, and then an apartment.
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> It is undisputed that Qaiser traveled to Michigan periodically to visit his family, typically staying for about one month at a time. But neither Hammed nor Tabarak could recall with certainty how often Qaiser visited prior to the accident. Tabarak testified that Qaiser returned to Michigan whenever his work allowed. Hammed testified that at the time of the accident, Qaiser still intended to have his family move to Iraq if he could create a suitable and safe home for them and that he had settled there, but Tabarak testified that whether Qaiser would return permanently to Michigan was undecided.
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> Given that a number of factors weigh against a finding that Qaiser was a member of the household where Tabarak was domiciled at the time of the accident, while a number of other factors support such a finding, and that several material facts presented by the parties require clarification, this issue must be resolved by the trier of fact. [*Detroit Med Ctr*, unpub op at 11-12 (footnote omitted).]

Despite this Court's conclusion that material questions of fact exist regarding the domicile issue, the trial court on remand again granted summary disposition against Farm Bureau on the residency issue, this time relying on Qaiser's deposition testimony provided on June 7, 2010, after this Court issued its April 1, 2010, opinion. However, we conclude that Qaiser's testimony does not alter the determination in this Court's prior opinion that summary disposition is inappropriate. This Court's prior opinion explicated fully the conflicting evidence regarding the factors relevant to establishing domicile, and Qaiser's deposition testimony did not definitively resolve or eliminate this genuine factual dispute. Qaiser testified that he intends to retire in Michigan, that he views Michigan as his home, and that he never intended to leave Michigan for Iraq permanently. This testimony may lend support to the contention that he was domiciled in Michigan. However, other evidence outlined in this Court's prior opinion continues to exist to support a contrary conclusion. In particular, Hammed testified that Qaiser left Michigan with the stated intention of establishing a home for his family in Iraq, and that Qaiser then "settled" in Iraq, which was supported by the fact that he ran for public office in Iraq, took a job at a friend's company in Iraq, and sold his share of his Michigan carpentry business. *Detroit Med Ctr*, unpub op at 11. In addition, Qaiser's own testimony reinforces the extent of his connections to Iraq. While in Iraq, Qaiser has engaged in political activities, worked for the Iraqi government, worked for or operated businesses, and lived in a rental apartment that he furnished. Accordingly, Qaiser's deposition testimony does not alter the conclusion that a genuine issue of material fact exists regarding whether Qaiser and Tabarak were domiciled in the same household on the date of the accident.

Finally, Bristol West argues that it should not be held responsible for any penalty interest or attorney fees incurred by Farm Bureau for its refusal to pay no-fault benefits under MCL 500.3148(1).[5] Bristol West has not filed a cross-appeal raising this issue, but assuming that the issue is properly before this Court, we conclude that Bristol West's argument lacks merit. This Court's prior opinion already addressed the issue. This Court held that "because material questions of fact exist as to whether Farm Bureau is required to pay PIP benefits, the trial court was premature in ordering Farm Bureau to pay penalty attorney fees." *Detroit Med Ctr*, unpub op at 13. This Court further stated:

> Bristol West remains responsible for one-half of the no-fault benefits as well as the penalty interest and attorney fees as ordered by the trial court, with responsibility for the other half to be determined *after* Farm Bureau's coverage obligations are ascertained. In the event Farm Bureau's policy is deemed not to apply in this case, the trial court shall enter an order holding Bristol West

[5] MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

> responsible for the full amount of no-fault benefits as well as any applicable penalty interest and attorney fees. [*Id*. at 13 n 9 (emphasis added).]

It remains to be determined whether Farm Bureau's policy applies because the domicile issue has not yet been decided by a trier of fact in accordance with this Court's prior opinion. It therefore continues to be premature at this point to decide whether Farm Bureau is responsible for one-half of the penalty interest and attorney fees or whether Bristol West is responsible for the full amount. The trial court is directed to comply on remand with the instructions in this Court's prior opinion regarding no-fault penalty interest and attorney fees.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood