NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1846

RAGAN PRUITT ON BEHALF OF HER MINOR CHILDREN, ALEXIS LEDET, RENE LEDET, AND OLIVIA LEDET

VERSUS

MICHAEL MOORE, STATE FARM FIRE & CASUALTY CO., ALLSTATE INSURANCE COMPANY, AND HARTFORD INSURANCE CO. OF THE MIDWEST

On Appeal from the 18th Judicial District Court
Parish of Iberville, Louisiana
Docket No. 55,924, Division "B"
Honorable J. Robin Free, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered September 20, 2006

PARRO, J.

In this wrongful death and survivorship action arising out of an automobile accident, Allstate Insurance Company (Allstate) and Farmers Insurance Exchange (Farmers) appeal a judgment finding that at the time of the accident, Michael Moore was covered by automobile liability insurance policies issued to his aunt and grandparents, and ordering the insurers to pay their policy limits, plus interest and court costs, to the children of the accident victim. For the reasons that follow, we reverse.

BACKGROUND

On March 18, 2001, Moore was involved in an automobile accident while driving a vehicle belonging to a friend; the accident caused Bradford R. Ledet's death. A lawsuit was filed against Moore and various insurers on behalf of Ledet's minor children, Alexis, Rene, and Olivia Ledet, by their mother, Ragan Pruitt. Claims against several insurers were compromised and dismissed, leaving only those against Allstate, who insured Moore's aunt, Terri L. Williams, and against Farmers, who had two policies insuring Moore's grandparents, Joshua and Janie Holiday.[1] Moore's aunt and grandparents were domiciled at 2313 Edgewood Drive, Baton Rouge, Louisiana, on the date of the accident. Although different policy language was used, the Allstate and Farmers policies provided that any relative or family member living with the named insured(s) or residing in the same household as the named insured(s) was also an insured for claims based on the relative's negligent operation of a non-owned vehicle. By the time of trial, the only remaining issue in the lawsuit was whether Moore resided at 2313 Edgewood Drive, where his grandparents and aunt lived, such that he would be an insured under their automobile liability policies. Moore claimed he did not live there, but lived next door at 2337 Edgewood Drive with his mother, his two younger sisters, and their children.

[1] Although the Farmers policies show the named insured as "Joush" Holiday, Moore's grandfather said at trial that his name was "Joshua."

Following a bench trial on this issue, the court found that Moore was a resident of 2313 Edgewood Drive and was covered as an insured under all of the policies. Based on a joint stipulation of the parties concerning fault, policy limits, and extent of damages, a judgment was signed on March 23, 2005, against Allstate in the amount of $10,000 and against Farmers in the amount of $20,000, plus interest and costs. Farmers and Allstate appeal the coverage issue only.

LEGAL PRINCIPLES

An insurance policy is a contract; like all other contracts, it constitutes the law between the parties. See LSA-C.C. art. 1983. If the policy wording is clear and expresses the intent of the parties, the agreement must be enforced as written. See LSA-C.C. art. 2046. If there is any ambiguity in a policy, then that ambiguity should be construed in favor of the insured and against the insurer. See LSA-C.C. art. 2056. However, courts have no authority to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language. Pareti v. Sentry Indem. Co., 536 So.2d 417, 420 (La. 1988). Courts should not strain to find an ambiguity where none exists. Whether a contract is ambiguous or not is a question of law. Strickland v. State Farm Ins. Companies, 607 So.2d 769, 772 (La. App. 1st Cir. 1992). However, whether a relative lives with an insured is a question of fact to be determined on a case-by-case basis. Haydel v. State Farm Ins. Co., 05-0701 (La. App. 1st Cir. 3/24/06), 934 So.2d 726, 729. This determination must be based on the evidence as a whole, not on isolated facts that support a particular conclusion. Chapman v. Poirrier, 96-977 (La. App. 3rd Cir. 2/5/97), 689 So.2d 623, 625, writ denied, 97-1164 (La. 6/20/97), 695 So.2d 1358.

A person may have several residences. Gedward v. Sonnier, 98-1688 (La. 3/2/99), 728 So.2d 1265, 1270. The actual facts supporting the physical aspect of where a person lives are necessary to make a determination regarding whether coverage exists under an insurance policy. See Alpaugh v. Continental Ins. Co., 01-0101 (La. 6/29/01), 791 So.2d 71, 73-74. Some of the factors that determine whether a person lives with the named insured include, but are not limited to: (1) where he

spends his time when not employed or at school; (2) where he keeps his clothing or other personal belongings; (3) where he receives his mail, including official notices and mail from friends; and (4) whether he has a bedroom in the insured's house. Haydel, 934 So.2d at 729. Other factors may include: (1) whether the person was living in the house immediately prior to the accident; (2) whether the person was visiting; and (3) whether the person was entitled to return without having to request permission. Prudhomme v. Imperial Fire & Cas. Ins. Co., 95-1502 (La. App. 3rd Cir. 4/3/96), 671 So.2d 1116, 1119, writ granted in part on other grounds, 96-1030 (La. 6/7/96), 674 So.2d 987. Generally, the cases hold that children, even though majors, remain residents of their parents' household if they maintain temporary residences elsewhere. Martin v. Willis, 584 So.2d 1192, 1194 (La. App. 2nd Cir. 1991), writ denied, 590 So.2d 589 (1992).

REVIEW OF THE EVIDENCE

Moore stated that at the time of the accident, he lived with his mother at 2337 Edgewood, a house that they began renting some years earlier. When he was fifteen, his mother became disabled as the result of a stroke and eventually could not keep up the payments on their former, much nicer residence on Gayosa Street. So they moved to a more affordable house next door to his grandparents. Moore said that at the time of the accident, he was paying the rent for the house at 2337 Edgewood and lived there with his mother, two younger sisters, and their six children. He kept all of his clothing and personal belongings there, ate most of his meals there, bathed there, brushed his teeth there, had a bedroom there, and slept there most nights, unless he stayed at his girlfriend's house. If friends came to pick him up, they would go to his mother's house, and at the end of the evening, they would drop him back off at his mother's house, which was where he slept. Moore said he lived with his mother at 2337 Edgewood until sometime after the accident, when she moved in with an aunt, and he got married and bought a house with his wife.

Moore said he never had any clothes or personal belongings at his grandparents' house next door, nor did he have a bed or a bedroom there. However, he said that

because his grandparents had lived at 2313 Edgewood for many years, theirs was "the only solid home in our family." Consequently, "[e]verybody's mail goes to that house. ... about 80% of our family." Like the majority of his family, Moore had always used 2313 Edgewood as his mailing address. Therefore, he received his mail there, including his grades from Southern University. He also used that address on his driver's license and, when asked his address, always stated it was 2313 Edgewood. Because it was his grandparents' home, he was welcome there and was in and out at will; he occasionally ate there, watched TV there, or took a nap in a chair there. When he was a child, his mother would sometimes drop him off to spend the night with his grandparents. During his teen years, he moved around some, but did not ever live with his grandparents. Moore said that as an adult, he did not spend the night at their house, but occasionally had "dozed off and I wake up that morning and I'm there ... ."[2] Most holidays, the entire family would gather at his grandparents' house.

Moore's first answers to the plaintiffs' interrogatories gave 2313 Edgewood as his address, but those answers were amended to show he resided with his mother at 2337 Edgewood. Neither set of answers was verified. One of the original answers stated, "At the time of the accident at issue, Respondent lived at 2313 Edgewood, Baton Rouge, LA 70802 ... ." Another stated, "At the time of the accident, Respondent lived with his grandparents, Janie and Josh Holiday." Moore said he did not recall telling his attorney this information, other than providing the mailing address. The amended answers to those interrogatories stated, in pertinent part, "At the time of the accident at issue, Respondent lived at 2337 Edgewood, ... " and " ... lived with his mother, Jerice Moore, and Kiana Moore, his sister." Moore explained that, "The second time I answered the question, I told him I misunderstood what he was saying. Anytime I fill out my address, I use 2313 Edgewood Drive." He realized he had misunderstood the question during his deposition, "When he asked me did I realize what's the difference

[2] He later clarified this by saying that he had occasionally stayed overnight with his grandparents as a child, but had not spent the night in their house as an adult.

between living somewhere or just using the address. ... that's when the answer changed."

Williams, Moore's aunt, testified that at the time of the accident, she lived at 2313 Edgewood with her parents, Janie and Joshua Holiday. Her daughter and her sister also lived there at that time, but Moore "was living next door with his mother." She said Moore "was taking and paying the rent" on the house at 2337 Edgewood. She saw him every now and then when he picked up his mail, but Moore had never stayed at 2313 Edgewood for any extended period of time during all the years she had lived there with her parents. Years earlier, Williams had married someone in the military and moved away, but had returned to her parents' home after only three or four months. She said Moore did not have a permanent residence there as a child, stating, "his mama was probably in and out of there ... when he was a little baby, but she had her own residence." She confirmed her deposition testimony that as a teenager, "his address was at his mother's house, but you know how teenagers are, they live wherever." Williams said she rarely saw Moore, just when "he'll be coming in and out getting his mail." She said that around the time of the accident, "he never stayed" at his grandparents' house.

Williams acknowledged that she was "not happy at all" about having her insurance policy involved in the lawsuit. As a single parent, she worked hard and struggled to keep up with her bills, so she did not want to pay an increased insurance premium. However, despite this concern, she insisted she was telling the truth to the court.

Moore's grandfather also testified, stating that he and his wife, Janie, had lived at 2313 Edgewood for thirty years. At the time of the accident, two of their daughters also lived with them, but Moore did not and never had lived there. Holiday acknowledged that Moore received his mail at their address, adding, "Well, I didn't have a problem with it because all the rest and the other people's too ... their mail be delivered there." He was referring to other family members--he and his wife had twelve children and many grandchildren, all of whom were welcome to visit and to use

their address for mail. Like any of their grandchildren, Moore could visit any time he wanted and could stop in for a meal. Holiday said he did not raise Michael; he was too busy holding down two jobs to provide for his large family. Holiday said he had been retired since 1989, but was not always around the house in 2001, when Moore's accident occurred. He said he did not see Moore often; in fact, sometimes months would go by without his seeing Moore at all. He was not sure who picked up Moore's mail. Holiday said that except for one daughter whose children had lived with them many years earlier, none of his grandchildren had ever lived with them.[3]

Moore's grandmother reiterated that she and her husband had lived at 2313 Edgewood for about thirty years. She said they had twelve children and about twenty-four grandchildren; Moore was one of their grandchildren. She said that "[w]hen he was first born [his mother] came home with him, and she stayed a couple of nights and then she went to her own house." At the time of Moore's accident, his mother lived next door. She could not recall whether Moore still lived with his mother at that time, but said he definitely was not living at their house at 2313 Edgewood. His grandmother confirmed that Moore did not keep any clothing at their house or have a room there. The only people living with her and her husband in 2001 were her two daughters and one granddaughter. She knew Moore used their address as his mailing address, as did many of their other children and grandchildren, none of whom spent the night or kept anything at their house. She was not active in raising Moore, and said he had not stayed with them as a child or as a teenager. Even when he lived next door with his mother, he did not come over to their house very often, and she did not recall ever seeing him take a nap or stay overnight.

THE ALLSTATE POLICY

Allstate's policy, which insured Williams, provided that while using a non-owned auto, insured persons included the policyholder named on the declarations page and "any resident relative using a four wheel private passenger auto or utility auto." There

[3] This statement was inconsistent with his wife's and daughter's testimony that Williams' child did live with them at the time of the accident.

was no dispute that Moore was a relative of Williams and was using a non-owned four wheel private passenger auto when the accident occurred.[4] "Resident" was defined, in pertinent part, as "the physical presence in your household with the intention to continue living there."

In Carbon v. Allstate Ins. Co., 97-3085 (La. 10/20/98), 719 So.2d 437, 440, the supreme court concluded that the meaning of the Allstate definition of "resident" is clear and unambiguous. "A relative will be considered a 'resident' only if he has a physical presence in the household plus the intent to continue living in that household at the time of the accident." Id. Therefore, under this policy provision, in order to establish that Moore was a "resident" of his aunt's home, the plaintiffs had to establish that he met the "physical presence" requirement contained in the definition to such a degree that he was considered to be "living there." Id. They also had to prove his intent to remain in that household as a predicate to insurance coverage. Id. at 442.

After reviewing the record as a whole, we conclude that, based on the evidence presented in this case, the trial court manifestly erred in finding that Moore was a resident of his aunt's household, as that term is defined in the Allstate policy. Moore's "physical presence" at 2313 Edgewood was sporadic and impermanent. He was a welcome visitor, not a resident. Until he married, Moore's permanent residence was always where his mother lived. Whenever his mother moved from one house to another while he was growing up, Moore moved with her and lived with her in those abodes. His reference to the house at 2313 Edgewood as "the only solid home in our family," was given in the context of explaining why he and 80% of his relatives used that as a mailing address, even though he and those other relatives did not actually live there. All of the witnesses agreed that at the time of the accident, Moore did not live in the same household as his aunt at 2313 Edgewood, but lived next door with his mother at 2337 Edgewood. The facts establish that Moore did not have sufficient "physical presence" in his aunt's home to be considered a resident there, nor did he demonstrate

[4] Moore said that the car he was driving when the accident occurred belonged to a friend, and that he and his friend had just "swapped cars" temporarily.

any intent to live there. The trial court's conclusion to the contrary is clearly wrong--Moore was not a "resident" relative, and thus was not an insured under Allstate's policy.

THE FARMERS POLICIES

Farmers issued two policies to Moore's grandparents covering two different vehicles. Both policies defined "you" and "your" as the named insured shown on the declarations page and the spouse, if a resident of the same household. Liability coverage was provided for an "insured," which included "[y]ou or any 'family member' for the ownership, maintenance or use of any auto ... ." The term "family member" was defined, in pertinent part, as "a person related to you by blood, marriage or adoption who is a resident of your household." The policy had an exclusion for any vehicle other than "your covered auto" that was owned by or furnished or available for the regular use of the named insured or a family member. There was no dispute concerning the facts that Moore was a person related by blood to the named insured, his grandfather, and that he was using an automobile that neither he nor the named insured owned or had available for regular use. Therefore, Moore could be covered as an insured "family member" under the Farmers policies if the plaintiffs could establish that he was a resident of his grandparents' household.

Unlike the Allstate policy, the Farmers policies did not define "resident" or "household." The supreme court has held that the term "resident of the same household" has no absolute or precise meaning, so any doubt as to the extent or fact of coverage under this term must be understood in its most inclusive sense. Bond v. Commercial Union Assurance Co., 407 So.2d 401, 407-08 (La. 1981) (on rehearing); O'Neal v. Blackwell, 00-2014 (La. App. 1st Cir. 11/14/01), 818 So.2d 118, 121-22. In Bearden v. Rucker, 437 So.2d 1116, 1121 (La. 1983), the supreme court noted that residence is a matter of intention and choice, rather than location. The court further stated that the controlling test of whether persons are residents of the same household at a particular time is not solely whether they are then residing together under one roof. The real test is whether the absence of the party of interest from the household of the named insured is intended to be permanent or only temporary, i.e., whether

there is physical absence coupled with the intent not to return. Id.[5] In normal speech, one's household is the familial or residential group with whom one lives. Leteff v. Maryland Cas. Co., 91 So.2d 123, 143 (La. App. 1st Cir. 1956).

Our review of the jurisprudence reveals that ultimately, although the test may be stated differently depending on the wording of the policy, the test used by the courts to determine whether a relative is a "resident of the same household" as the named insured is whether that relative has physical presence with the intent to continue living in that household.[6] Evaluating the factors established by the jurisprudence and applying them to the terminology used in the Farmers policies, we again conclude that the trial court's factual finding on this issue constituted manifest error. Viewing the evidence as a whole, it is clear that at the time of the accident, Moore was not a resident of the same household as his grandparents, nor had he ever been. His use of their address as his mailing address is not dispositive of this issue, nor is his occasional, temporary presence in their home to pick up mail or to visit his aunt or grandparents. Based on the overwhelming preponderance of the evidence, Moore resided with his mother in the house next door to his grandparents. Therefore, he was not a "family member" of the named insureds' household, as that term is defined in the Farmers policies, and was not an insured under those policies.

CONCLUSION

Based on the foregoing, the judgment of March 23, 2005, is reversed. Each party is to bear its own costs for this appeal.

REVERSED.

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[5] In Bearden, the issue was whether a spouse who had physically separated from her husband some months prior to being involved in an automobile accident could still be considered a named insured, as the "spouse, if a resident of the same household" as her husband. Therefore, the test was phrased in terms of her absence from the household. For our purposes, this test could be re-phrased in positive terms without altering its meaning, such that the test is whether the **presence** of the party in the household of the named insured is intended to be permanent or only temporary, i.e., whether there is **physical presence** coupled with the **intent to remain**. Putting this test in terms of presence, rather than absence, results in a test that is the same as the definition of "resident" in the Allstate policy.

[6] In some instances, the situation might involve a relative who had physical presence in the past and maintains an intent to return to the named insured's household. Cases involving children who are away at school or otherwise temporarily away from the parent's or parents' residence may fall into this category. See, e.g., Martin, 584 So.2d 1192, and cases cited therein.