

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20389  
Summary Calendar

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STANDARD FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

versus

JENNIFER SMITH YATES, ET AL.,

Defendants,

TODD ALAN HAUSER,  
Individually and a/n/f/ of Jordan Alan Hauser, a Minor,

Defendant-Appellant.

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Appeal from the United States District Court  
from the Southern District of Texas  
(CA-H-93-3114)

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(December 21, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

By EDITH H. JONES, Circuit Judge:\*

Todd Hauser filed a civil action in state court on behalf of his minor son Jordan to recover for bodily injuries allegedly suffered due to the negligence and gross negligence of Janie

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Clinton Smith and Jennifer Smith Yates.<sup>1</sup> Pursuant to the Federal Declaratory Judgment Act, Standard Fire Insurance Company, issuer of a Texas Homeowners' Policy to Janie Smith, sought a declaratory judgment that this policy neither afforded coverage to Smith or Yates for the injuries alleged nor obligated Standard Fire to defend them. Todd Hauser on behalf of his minor son appeals the entry of summary judgment in favor of the insurance company.

The only material issue before the district court was whether Jordan was a "resident" of Janie Smith's household; her Homeowners' Policy expressly excluded coverage for any injury to Janie and all "residents" of her household. Because this court reviews the grant of summary judgment de novo, we independently examine the district court's determination that Jordan resided in Janie Smith's household to ensure that Standard Fire is entitled to judgment as a matter of law.

All of the underlying facts are undisputed. Nevertheless, the ultimate problem of determining Jordan's "residence" is also a factual question. See, e.g., Travelers Indemnity Company v. Maddox, 345 S.W.2d 290 (Tex. Civ. App. -- Texarkana 1961, writ ref'd), Boon v. Premier Insurance Company, 519 S.W.2d 703 (Tex. Civ. App. -- Texarkana 1975, no writ); Southern Farm Bureau Casualty Insurance Company v. Kimball, 552 S.W.2d 207 (Tex. Civ. App. -- Waco 1977, writ ref'd n.r.e.). Accordingly, summary judgment could be entered only if the record would compel

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<sup>1</sup> Jennifer Smith Yates is Jordan's biological mother. Janie Clinton Smith is the mother of Jennifer Smith Yates.

a rational jury to resolve this dispute exclusively in favor of Standard Fire. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). We affirm the judgment of the district court, because under the controlling definition of "residence" the record permits no contrary result.

For most of the previous decade, determining the residence of Jordan Hauser has been exceedingly straightforward. The residence of the child of unmarried parents tracks the residence of the custodial parents. See Everson v. Boydston, 377 S.W.2d 117, 119 (Tex. Civ. App.--El Paso 1964, no writ) ("Our courts have held . . . that the domicile of children of divorced parents follows the domicile of the parent to whom their custody was awarded.")(citations omitted).<sup>2</sup> Jennifer Smith testified in 1993 that she had lived the previous 11 years at the house of Janie Clinton Smith, her mother. The only exception to this continuous residence was from the period of February to May 1992 when she and her husband, Mr. Yates, moved into an apartment.<sup>3</sup>

At the time of Jordan's injuries, on or about August 29, 1992, however, Jennifer Smith Yates was staying at her grandmother's house. Consequently, appellant argues that this address became the child's residence and thus the insurance exclusion would not be applicable. Standard Fire retorts that this

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<sup>2</sup> Under Texas law, "residence" is a lesser included element of the broader term "domicile." Travelers Indemn. Co. v. Mattox, 345 S.W.2d 290, 292 (Tex. Civ. App.--Texarkana 1961, writ ref'd n.r.e.).

<sup>3</sup> In May 1992, Jennifer and Mr. Yates moved back into Janie Smith's house.

was merely a temporary place of rest while she recovered from the birth of her second child.

Unfortunately, "residence" is not defined by the policy. Confronted with undefined terms of an insurance policy, the "plain, ordinary and generally accepted meaning" governs. Ramsay v. Maryland American Gen. Ins. Co., 533 S.W.2d 344, 346 (Tex. 1976). Hence, "resident" suggests a requirement of "living in a place for some length of time," WEBSTER'S NEW COLLEGIATE DICTIONARY 985 (1977), in contradistinction to a location where one stays for a short and temporary period of time. More specifically, to divine whether persons are "residents of the same household":

The controlling test . . . 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 alleged insured is intended to be permanent or only temporary -- i.e., whether there is physical absence coupled with an intent to return.

Southern Farm Bureau Casualty Ins. Co. v. Kimball, 552 S.W.2d 207, 208 (Tex.Civ. App. --Waco 1988, writ ref'd n.r.e.)(emphasis in original).

Jennifer Smith's own testimony refutes the possibility that she ever abandoned an intent to return to Janie Clinton Smith's home. In particular, the following deposition testimony is unequivocal:

Q: When did you move into your grandmother's house?  
A: We never did.

. . .  
Q. Why did you move over to your grandmother's house then?

A. We didn't move. . . [A]fter I had Jay, we went directly to my grandmother's house. . . .And we planned on staying there only until my stitches healed and I was able to get in and out of my own bed.

. . .  
Q. Was this a temporary situation?

A. Yes . . .

. . .  
Q. While you were staying at [your grandmother's] house was it your intent to return to [Janie Smith's home]?

A. Yes.

Q. Was it your intent to take Jordan with you to [Janie Smith's home]?

A. Yes, sir.

Indeed, she never moved her furniture or other substantial belongings, including most of her clothing, and Janie Smith's deposition reflected a similar understanding.

Todd Hauser, on behalf of Jordan, locates only disputed testimony as to whether Jennifer Smith completed a change of address form. At this stage of proceeding, this court must accept the Hauser's version of the conflicting evidence on the change of address form. Nevertheless, no reasonable jury would be entitled find more than a temporary departure from Janie Clinton Smith's home. As a matter of law, therefore, Jordan remained a "resident."

For this reason, the district court's order is **AFFIRMED**.