

No. 97-0009

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**R & R LOGGING AND CITIZENS INSURANCE COMPANY OF
AMERICA,**

PLAINTIFFS,

v.

**FLANNERY TRUCKING, INC., MELVIN G. FLANNERY,
AND RICHARD J. HERMAN,**

DEFENDANTS-RESPONDENTS,

HERITAGE MUTUAL INSURANCE COMPANY,

**INTERVENING DEFENDANT-
APPELLANT.**

ERRATA SHEET

Marilyn L. Graves
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
633 W. Wisconsin Ave., #1400
Milwaukee, WI 53203-1918

Jennifer Krapf
Administrative Assistant
119 Martin Luther King Blvd.
Madison, WI 53703

Peg Carlson
Chief Staff Attorney
119 Martin Luther King Blvd.
Madison, WI 53703

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District IV
119 Martin Luther King Blvd.
Madison, WI 53703

Hon. Robert E. Kinney
Oneida County Courthouse
P.O. Box 400
Rhineland, WI 54501

John F. O'Melia
P.O. Box 1047
Rhineland, WI 54501

Tom Kalkofen
Trial Court Clerk
Forest County Courthouse
Crandon, WI 54520
(L.C. #96-CV-60)

Steven C. Garbowicz
P.O. Box 639
Eagle River, WI 54521

Robert A. Kennedy
209 E. Madison
Crandon, WI 54520

Gregory J. Strasser
P.O. Box 8063
Wausau, WI 54402

PLEASE TAKE NOTICE that the attached pages 2 and 4 are to be substituted for pages 2 and 4 in the above-captioned opinion which was released on June 17, 1997.

Dated this 1st day of July, 1997.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, J.J.

LaROCQUE, J. Heritage Mutual Insurance Company appeals a summary judgment in favor of its insured, Flannery Trucking, Inc., declaring coverage under Heritage's commercial automobile insurance policy. We conclude that the policy unambiguously excludes coverage for the claim against Flannery. We therefore reverse and remand for entry of summary judgment in favor of Heritage.

Flannery arranged with R&R to transport a logging skidder. The skidder was damaged during transportation when it struck an overhead railroad viaduct. R&R sued Flannery for negligence, and Heritage intervened as a defendant seeking a coverage declaration. Heritage contended that its commercial automobile policy excluded from coverage claims for property damage to transported property in Flannery's care, custody or control. Heritage and Flannery each filed a motion for summary judgment. Concluding that the policy language was ambiguous, the trial court construed the policy in favor of coverage and granted Flannery's motion. Heritage now appeals.

We review a trial court's grant or denial of a motion for summary judgment de novo. *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Moreover, the interpretation of an insurance policy is also a question of law that we review de novo. *United States Fire Ins. Co. v. Ace Baking Co.*, 164 Wis.2d 499, 502, 476 N.W.2d 280, 282 (Ct. App. 1991). "Insurance policies, like other contracts, are construed to ascertain and effectuate

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered *autos* for Liability Coverage:

-
2. *Mobile equipment* while being carried or towed by a covered auto.¹

This section creates no ambiguity when read in conjunction with the care, custody and control exclusion. Under the plain language of Section I, paragraph C, mobile equipment is defined as a covered auto "If Liability Coverage is provided by this Coverage Form." Because coverage to damage to the skidder is excluded in this case, the provision purporting to define the skidder as a covered auto does not apply.

Flannery argues, however, that our reading of the policy renders illusory any liability coverage relating to the use of the skidder as a covered auto. In other words, because the skidder is a covered auto only when it is carried or towed, it is inconceivable that there will ever be coverage for an accident arising out of its use. We are not persuaded by this argument. First, whether the inclusion of mobile equipment being towed or carried as a covered auto is likely to arise under a different set of circumstances from that presented by this case is not the test we apply to ascertain coverage. We must determine only whether the reference to mobile equipment as a covered auto creates an ambiguity so as to compel a construction favorable to Flannery under the facts presented. We perceive no ambiguity in that respect.

¹ The policy defines "*mobile equipment*," in relevant part, as "any of the following types of land vehicles, including any attached machinery or equipment: 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads"

