COURT OF APPEALS DECISION DATED AND RELEASED

OCTOBER 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0803

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

AMERICAN WEST
INSURANCE COMPANY,

Plaintiff-Appellant,

v.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed*.

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

PER CURIAM. American West Insurance Company appeals a summary judgment dismissing its action against American Family Mutual Insurance Company in which it sought a declaration that American Family must contribute toward the damages and settlement costs arising out of an automobile accident. American West contends that its policy's "other

insurance" clause limited coverage to excess insurance and that American Family, another excess insurer, must share in the cost of the settlement. The trial court ruled that American West's policy was ambiguous on the question of primary versus excess coverage and that a reasonable insured would have believed the policy provided primary coverage. We affirm the trial court's decision.

American West insured three vehicles under a policy issued to Carol Demoulin. One of the vehicles, a Cavalier, was owned by her daughter. The Cavalier was involved in an accident while it was driven by the daughter's boyfriend who was insured by American Family. The accident victim sued American West and American West now seeks contribution on the theory that both its policy and American Family's policy provided excess coverage and they should share the loss *pro rata*.

The "other insurance" clause in American West's policy states:

> If there is other applicable liability insurance we will only pay our share of the loss. Our share is the portion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Because Carol Demoulin is the named insured and she did not own the Cavalier, American West contends that this policy unambiguously provides only excess coverage.

American West's interpretation of the other insurance clause does not conform to the traditional purposes of these clauses. Other insurance clauses generally provide liability coverage when the named insured borrows a car or uses an employer's car. Ordinarily, the insurance on the accident vehicle is primary while the personal insurance of the driver is excess. Here, the Cavalier is listed as an insured vehicle. The policy does not differentiate between the coverage for the Cavalier and that provided for the other vehicles listed on the policy. While American West can draft an insurance policy to

depart from the traditional practices and definitions, it must ensure that any deviations are written in plain and unambiguous language.

When an insurance policy is ambiguous, the language may be construed in favor of coverage. ***Just v. Land Reclamation Ltd.***, 155 Wis.2d 737, 746, 456 N.W.2d 570, 573 (1990). An insurance policy is ambiguous if it allows more than one construction. ***Smith v. Atlantic Mutual Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 598-99 (1990). The policy must be considered as a whole to give each of its provisions the meaning the parties intended. ***Schaefer v. General Casualty Co.***, 175 Wis.2d 80, 84, 498 N.W.2d 855, 856 (Ct. App. 1993). This court must construe the policy as it is understood by a reasonable person in the position of the insured. ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 264, 371 N.W.2d 393, 393 (Ct. App. 1985).

Although the other insurance clause appears to limit the policy to provide only excess coverage, other parts of the policy create an ambiguity regarding coverage. The other insurance clause limits liability to excess coverage for a "vehicle you do not own." Another part of the policy defines a "non-owned auto" as "any private passenger auto ... not owned by ... you or any family member...." Construing the policy as a whole, we conclude that a reasonable insured would have thought that "a vehicle you do not own" and a "non-owned auto" would have the same meaning. A reasonable insured would believe that the Cavalier is not a "vehicle you do not own" because it is owned by a family member living in the same household. Because the policy contains confusing definitions, the Cavalier was listed as a covered vehicle and because Demoulin paid the premium for primary coverage, we conclude that a reasonable insured would have believed that the policy provided primary coverage in the absence of a specific statement to the contrary. The policy is not sufficiently explicit to deny the traditional primary coverage afforded to vehicles named in the policy.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.