COURT OF APPEALS
DECISION
DATED AND RELEASED

June 4, 1997

NOTICE

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.

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

No. 96-2565

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

GELBERT MARTINEZ AND HORTENCI MARTINEZ,

PLAINTIFFS,

EMPLOYEE BENEFIT PLAN OF MAPLE LEAF FARMS,

INVOLUNTARY-PLAINTIFF,

V.

JEFFERSON INSURANCE,

DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT,

BARRY W. ARRIES,

DEFENDANT-APPELLANT,

V.

CNA INSURANCE COMPANY -- CONTINENTAL CASUALTY COMPANY,

THIRD PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. This is a dispute between two insurance companies, Jefferson Insurance and CNA Insurance Company—Continental Casualty Company (CNA), about which insurer provides primary liability coverage for the alleged negligence of Barry W. Arries. The critical question is in what capacity was Arries operating the truck at the time of the accident. We conclude that the circuit court improperly resolved a disputed issue of fact on summary judgment. Therefore, we reverse the judgment and remand the action for trial.

Arries was driving a Mack truck owned by Arries Trucking Inc. when there was an accident with a vehicle driven by Gelbert Martinez. Jefferson provides liability coverage to Arries Trucking. Prior to the accident, the Mack truck was leased to Three T's Trucking, d/b/a Jung Brothers Trucking (Jung), by a lease agreement with Joan Arries. CNA issued a liability policy to Jung.

The "Trucker's Coverage" sections of the Jefferson and CNA policies are identical. The policies provide that coverage is

> primary for any covered "auto" while hired or borrowed by you and used exclusively in your business as a "trucker" and pursuant to operating rights granted to you by a public authority. This Coverage Form's Liability Coverage is excess over any other collectible insurance for any covered "auto" while hired or borrowed from you by another "trucker."

The circuit court determined that Jefferson provides primary coverage and CNA is the excess insurer. Barry Arries and Jefferson appeal.

We do not review the circuit court's decision granting summary judgment; we independently apply the methodology set forth in § 802.08(2), STATS., to the record de novo. *See* ***Wegner v. Heritage Mut. Ins. Co.***, 173 Wis.2d 118, 123, 496 N.W.2d 140, 142 (Ct. App. 1992). The methodology we apply in summary judgment analysis has been stated often and we need not repeat it. *See* ***id.*** Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.***

Both parties moved for summary judgment. It cannot be assumed that just because both parties move for summary judgment that there is no dispute as to any material fact. *See* ***Millen v. Thomas***, 201 Wis.2d 675, 689, 550 N.W.2d 134, 140 (Ct. App. 1996) (Brown, J., concurring). "Summary judgment does not authorize a trial by affidavit." ***State Bank of Independence v. Equity Livestock Auction Market***, 141 Wis.2d 776, 781, 417 N.W.2d 32, 34 (Ct. App. 1987). The court must independently verify that no material issue of fact remains to be resolved. *See* ***Millen***, 201 Wis.2d at 689-90, 550 N.W.2d at 140 (Brown, J., concurring).

To determine which insurer provides primary coverage, it must be determined whether Barry was operating the truck for purposes of Jung's or Arries' trucking business. Barry's affidavit states that on the morning of the accident, "I was dispatched by [Jung] to pick up a load" and that "[o]n my way to pick up a load for Jung, I was involved in an accident with Gelbert Martinez." The affidavit of Thomas Jung directly disputes Barry's assertion. Jung indicates that on the morning of the accident, "Arries was not conducting any business at the dispatch or direction of [Jung], nor was he en route to do so." Jung's affidavit goes on to explain that the day before the accident he told Barry that there was no assignment for the next day but that Barry could, at his discretion, stop by and see if there was an assignment.

There is a dispute as to the purpose of Barry's operation of the truck.[1] That dispute must be resolved by the trier of fact at trial.[2] *See* ***Gouger v. Hardtke****,* 167 Wis.2d 504, 517, 482 N.W.2d 84, 90 (1992).

Both parties argue that it does not matter whether Barry was operating the truck for Jung or not. Jefferson contends that as a matter of law under the lease agreement and Interstate Commerce Commission regulations the truck was always in Jung's exclusive control and thereby covered by CNA's policy. CNA argues that under the lease agreement, Arries Trucking agreed to indemnify and hold Jung harmless for any liability arising out of the use of the truck,[3] and therefore, Jefferson provides primary coverage.

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[1] Because Jefferson's counsel argued that CNA provides coverage even if Barry was not under the specific dispatch of Jung, the circuit court found that Barry's affidavit was "directly impeached." It also found that in light of Jung's affidavit, Barry's assertion that he was going to pick up a load for Jung "simply is not true." The court believed Barry's affidavit was stating a "falsehood." The court should not have made such a credibility determination on summary judgment. *See* ***Gouger v. Hardtke****,* 167 Wis.2d 504, 517, 482 N.W.2d 84, 90 (1992) (when the party opposing summary judgment shows facts which cast doubt upon the affiant's credibility, the trier of fact must be allowed to evaluate the individual's testimony); ***State Bank of Independence v. Equity Livestock Auction Market***, 141 Wis.2d 776, 784, 417 N.W.2d 32, 35 (Ct. App. 1987) (on summary judgment the trial court is not entitled to weigh conflicting evidence as it would at a trial).

[2] The circuit court recognized that a genuine issue of material fact was disputed as to Jefferson's motion for summary judgment and properly denied that motion. When the circuit court addressed CNA's motion for summary judgment, it found that there was no genuine issue of material fact because there was no counteraffidavit submitted by Arries in response to Jung's affidavit. The affidavits of the parties should not be considered as separately applying to each party's motion for summary judgment. The motions should not have been considered in a vacuum.

[3] The lease provides: "CONTRACTOR [Joan Arries] further expressly agrees to indemnify and hold JUNG BROS. harmless for any loss, damage or expense, including attorney's fees, incurred by JUNG BROS., resulting from any acts or omissions by CONTRACTOR, its employees or agents, that may arise while CONTRACTOR is operating the leased equipment, whether or not under the specific dispatch of JUNG BROS."

This is a dispute between two insurance companies.[4] The insurance contracts and not the lease agreement control here. Under both insurance contracts the truck is a "covered 'auto,'" and Barry is an insured when using the truck with permission.[5] The provision of the other insurance clause defines which insurer is excess and which is primary. To satisfy that clause it must be determined whether the truck was being operated for Jung's business.

We remand the case and therefore we need not address Jefferson's claim that both companies provide excess coverage and coverage should be prorated. We summarily reject Jefferson's contention that CNA lost its right to contest coverage by improperly breaching the duty to defend. Although CNA was brought into the action by the third-party complaint filed by Jefferson and Jefferson first moved for summary judgment, a judicial determination of coverage was sought by the parties. CNA has participated in the proceedings necessary to resolve the coverage question and has not breached its duty to defend. Jefferson's claim that CNA must reimburse it for the defense provided thus far must await a determination of which company provides primary coverage.[6]

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[4] Jung, Joan Arries and Arries Trucking are not parties to this action. A contract cannot be enforced by a person not a party to it. *See* ***Abramowski v. Wm. Kilps Sons Realty, Inc.***, 80 Wis.2d 468, 472, 259 N.W.2d 306, 308 (1977). Also, because Jung has not paid any loss or incurred any out-of-pocket expenses, the indemnification provision in the lease is not activated.

[5] As a licensed carrier, Jung is responsible even when the lessor is performing duties for another entity or only engaged in intrastate operation. *See* ***Williamson v. Steco Sales, Inc.***, 191 Wis.2d 608, 616-17, 530 N.W.2d 412, 416-17 (Ct. App. 1995). That Jung is also responsible serves to further establish coverage under the CNA policy, but it does not answer the question under the other insurance clause as to which of the two competing truckers Barry was working for at the time of the accident.

[6] We note that if it is determined that Barry was not operating the truck as part of Jung's business, the indemnification provision in the lease is moot because Jung has no liability. CNA would not be entitled to reimbursement of attorney's fees expended to determine the coverage issue since it is not a party to the lease.

By the Court.—Judgment reversed and cause remanded.

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