COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1997

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. 96-2739-FT

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

KAYLA BOEBEL, by her parents and natural guardians Patricia Boebel and Thomas Boebel, and PATRICIA BOEBEL and THOMAS BOEBEL,

Plaintiff-Appellants,

GROUP HEALTH COOPERATIVE OF SOUTH CENTRAL WISCONSIN,

Involuntary-Plaintiff,

v.

KELLY McKINNEY,

Defendant,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Kayla Boebel and her parents, Patricia and Thomas Boebel, appeal from a judgment dismissing their complaint against American Family Mutual Insurance Company.[1] The issue concerns application of a homeowners' insurance child care services coverage option to the facts of this case. We affirm.

Kayla Boebel, a minor, was injured by an intentional act of Donald McKinney while she was being cared for in the McKinney home. The Boebels brought this action against Donald's wife, Kelly, and American Family, their insurer, alleging that Kelly was negligent in failing to properly supervise Kayla and by allowing Donald to have unsupervised contact with Kayla.

The McKinneys had purchased an additional coverage option for their homeowners' policy which covers "child care service regularly provided by an **insured** on the **insured premises** for which an **insured** receives monetary or other compensation." The policy excludes bodily injury which is expected or intended by any insured. American Family first moved for summary judgment on the ground that Donald's intentional act barred payment on behalf of either Donald or Kelly. However, the circuit court ruled that the exclusion for intentional acts could not be broader than the coverage itself, and therefore, if Donald was not covered under the child care option, the intentional act exclusion would not apply to his conduct.

The parties then conducted discovery and submitted depositions and affidavits to the circuit court for a ruling on whether Donald is covered. The court concluded that Donald was regularly providing child care services for compensation, and therefore was covered. Accordingly, the intentional act exclusion barred the Boebels' claim. The Boebels appeal.

It is not disputed that Kelly McKinney was regularly providing child care service for compensation. Nor is it disputed that Donald's act was

[1] This is an expedited appeal under RULE 809.17, STATS.

intentional. The parties agree that the only questions are whether Donald was (1) regularly providing child care services and (2) personally receiving compensation for such services. If both questions are answered affirmatively, American Family prevails. Therefore, the case is in a peculiar posture because the claimants, who might ordinarily be arguing for an expansive application of a coverage provision, are instead arguing for a narrow application, which the insurance company opposes.

The Boebels cite various cases for the notion that ambiguities in an insurance policy must be construed against the drafter. However, we see no ambiguity in the child care coverage policy before us. Rather, the difficulty is in applying that provision to the specific facts. The facts relating to Donald's involvement in child care are not disputed. The application of an insurance policy to undisputed facts is a question of law we decide without deference to the circuit court. ***Schaefer v. General Casualty Co. of Wis.***, 175 Wis.2d 80, 84, 498 N.W.2d 855, 856 (Ct. App. 1993).

We first consider whether Donald was regularly providing child care services. The record shows that Kelly provided the bulk of child care services and dealt with the logistical aspects of the business such as scheduling and collection of fees. However, there is no dispute that Donald would occasionally watch Kayla, along with his own children, when Kelly would run errands. This would usually occur once or twice a week for an hour or less. We conclude that being the only adult in the house with small children is sufficient to be described as "providing child care services." It is not necessary that Donald have performed other tasks such as washing, diapering or feeding. Donald's performance of this service, while not of extended duration, was regular.

We turn to whether Donald received compensation for his service. The record shows that Kelly handled the fee arrangements and that the checks were made out to her. However, the checks were then deposited in the McKinneys' joint checking account, from which household expenses for both of them were paid. The Boebels argue that the checks to Kelly did not become compensation to him anymore than checks from his full-time employment became compensation to Kelly when deposited in that account. However, the difference is that Donald was participating, albeit minimally, in the child care services for which compensation was being paid. It is not necessary that Kelly

have paid a specific amount directly to Donald for us to say that Donald derived some compensation, however minimal, from his participation.

Therefore, we conclude that Donald was covered under the child care provision and, as a result, American Family is properly dismissed from this action by application of the intentional acts exclusion.

By the Court.—Judgment affirmed.

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