COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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. 96-3172

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

ELLEN C. (HAWES) GRENDAHL,

PLAINTIFF-APPELLANT,

v.

UNITED FIRE & CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY, AND DONNA J. DEFOSSE,

DEFENDANTS,

GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Ellen Grendahl appeals from an order granting General Casualty Company of Wisconsin's motion for summary judgment. The judgment confirmed the circuit court's conclusion that Grendahl was not entitled to underinsured motorist benefits under her policy with General Casualty. The court concluded that Grendahl was not entitled to those benefits because the motorist with whom she collided, Donna DeFosse, was driving a vehicle with insurance coverage in excess of the $50,000 limits of Grendahl's General Casualty policy at the time of the accident.

Grendahl argues that the circuit court's decision on Fireman's Fund Insurance Company's previous motion for summary judgment precludes an inconsistent decision on General Casualty's motion. She also asserts that regardless of whether issue preclusion required that the circuit court find no coverage, the motorist with whom she collided was an underinsured motorist under the terms of her insurance policy with General Casualty.

We conclude that the doctrine of issue preclusion is inapplicable because the decision on Fireman's Fund's motion did not conclude that DeFosse's vehicle was not a "covered auto" under the Fireman's Fund policy. We further conclude that DeFosse's vehicle was insured by Fireman's Fund at the time of the accident. We therefore affirm the trial court's order.

On September 16, 1991, while driving her automobile, Ellen Grendahl collided with an automobile driven by Donna DeFosse. On August 22, 1994, Grendahl sued DeFosse and DeFosse's automobile liability insurer to recover for her injuries. Grendahl also joined her own automobile insurer because of its subrogation interest under her medical payment coverage. For the same reason, she joined her health insurance carrier, Aetna Life Insurance Company.

Aetna and Grendahl soon settled Aetna's subrogation claim, and Aetna was dismissed from this action.

On June 20, 1995, Grendahl amended her summons and complaint to add Fireman's Fund as a defendant. She did so because she discovered that DeFosse was employed by Renewal Unlimited and had been driving her automobile on an errand for Renewal when the accident occurred. Fireman's Fund was Renewal's automobile liability carrier. Grendahl did not add Renewal as a defendant. On December 20, 1995, Grendahl obtained permission to amend her complaint again and did so, alleging that she was entitled to recover underinsured motorist benefits under her policy with General Casualty.

Fireman's Fund answered and raised several affirmative defenses. After amended pleadings and procedural matters not relevant here, Fireman's Fund moved for summary judgment. The trial court granted Fireman's Fund's motion and dismissed Grendahl's claim against it.

Here is where the trouble starts. Apparently the trial court directed Fireman's Fund's attorney to prepare an order reflecting the court's oral order dismissing Grendahl's claim against Fireman's Fund. The attorney did so and sent the order to the court, with copies to the other parties. The order drafted and sent by the attorney reads in pertinent part:

> [T]he court makes the following findings:
>
> ….
>
> 2. The named insured under the subject Fireman's Fund insurance policy is Renewal Unlimited;
>
> 3. Donna DeFosse is not an "insured" under the Fireman's Fund insurance policy;

> 4. The vehicle being operated by Donna DeFosse at the time of the subject accident was not a "covered auto" as defined by the Fireman's Fund insurance policy;
>
> 5. The statute of limitations period for any personal injury claims by Plaintiff against Renewal Unlimited arising from the subject motor vehicle accident has expired.

After the attorney sent the original order to the court and copies to the other parties, General Casualty's attorney wrote to the trial court on March 13, 1996. The letter reads in pertinent part:

> While we have no objection to the entry of an order dismissing the complaint and cross-claim against Fireman's Fund Insurance, we do object to finding 4. contained within the proposed order. We request that either the provision be deleted from the order, or alternatively that the entry of the order be deferred until a motion for summary judgment to be filed by General Casualty can be considered by the court.
>
> ….
>
> Without going into to much detail, it is necessary to note that the General Casualty policy provides UIM coverage for an underinsured motor vehicle….
>
> Our concern is that the court may now inadvertently have made a finding unnecessary to the Fireman's Fund motion, and imprecise as to when in time the specific ruling was directed….

Grendahl and General Casualty apparently assume that the trial court did not respond to the March 13 letter. Grendahl notes in her brief: "In reaching its decision, the court made the specific factual findings that … 'the vehicle operated by DeFosse at the time of the accident was not a ''covered auto" as defined by the Fireman's Fund insurance policy.'" General Casualty notes in its brief: "[T]he court did not revise the Order…."

But the circuit court did respond to the March 13 letter. We append a copy of the court's March 29, 1996 order to show how the order differs from the copy of the order found in Grendahl's appendix. The trial court excised the disputed paragraph from the order it signed, while the unsigned copy of the order contained in Grendahl's appendix shows the disputed paragraph unaltered.

There are two problems with the circuit court's alleged "factual finding" that DeFosse's vehicle was not a "covered auto" at the time of the accident.[1] First, "[s]ummary judgment procedure prohibits a court, trial or appellate, from deciding an issue of fact." ***State Bank v. Elsen,*** 128 Wis.2d 508, 511, 383 N.W.2d 916, 917 (Ct. App. 1986). Second, the circuit court did not make that "finding."

No one appealed the March 29, 1996 summary judgment dismissing Fireman's Fund, and the time to appeal passed. *See* § 808.04(1), STATS. At about the same time, Grendahl settled with DeFosse and her insurer, and they were dismissed from this action. Grendahl and General Casualty both moved for summary judgment to determine whether Grendahl could recover under General Casualty's underinsured motorist coverage. The circuit court granted General Casualty's motion, again making "findings of fact." Though findings of fact are incompatible with summary judgment, we need not consider the effect of this label because we review the trial court's summary judgment *de novo*.

[1] We question whether a determination that the DeFosse vehicle was not a covered vehicle can be a finding of fact. The trial court was interpreting the meaning of a contract, ordinarily a question of law. ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993).

Though both parties moved for summary judgment, neither addresses on appeal the methodology to be used when deciding a motion for summary judgment. Because this methodology often determines the outcome of a case, we repeat what we said in ***In re Cherokee Park Plat***, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983):

> Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint … states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.
>
> Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment.

(Citations omitted.)

Cherokee Park requires that we first examine the pleadings. Grendahl's second amended complaint alleges that General Casualty Company issued her an automobile liability policy with an underinsured motorist coverage policy limit of $100,000. She alleges that she was injured when DeFosse negligently operated her automobile and collided with Grendahl's automobile. She alleges that her damages exceed the $50,000 policy limit of DeFosse's insurance policy, which, under the terms of her policy, entitles her to a recovery

under her policy with General Casualty. In the absence of General Casualty's objection to the conclusory nature of some of these allegations, we conclude that Grendahl's complaint states a claim.

Next, ***Cherokee Park*** requires that we examine General Casualty's answer. The answer contains the affirmative defense that the underinsured motorist provisions of Grendahl's policy are inapplicable because the vehicle operated by DeFosse was not an underinsured motor vehicle as that term is defined in Grendahl's policy. Grendahl does not complain that this allegation is conclusory, and we therefore conclude that General Casualty's answer shows the existence of disputed factual issues.

The third step in summary judgment methodology is to examine the moving party's affidavits. The only sworn allegations are found in two affidavits of Grendahl's attorney and an attached copy of Grendahl's insurance policy, which describes Grendahl's underinsured motorist coverage. General Casualty does not object that Grendahl's affidavits fail to show whether DeFosse's vehicle was an underinsured motor vehicle. At this stage of summary judgment analysis, we do not take the pleadings into account. ***Cherokee Park***, 113 Wis.2d at 119, 334 N.W.2d at 584. But with no objection to them, we conclude that Grendahl's affidavits are sufficient to make a prima facie case for summary judgment. We therefore move to step four, an examination of General Casualty's affidavits.

General Casualty submitted an affidavit consisting of a copy of an insurance policy issued to Renewal Unlimited/Head Start and a portion of a deposition of DeFosse, which shows that at the time of the accident, she was working for Head Start. The deposition and policy show that at least as to the question of whether Grendahl can recover underinsured motorist benefits from

General Casualty, the material facts are all undisputed and only a question of law remains. Summary judgment disposition is therefore appropriate, though we might first examine the materials submitted in support of and in opposition to General Casualty's motion for summary judgment. However, reciprocal summary judgment motions that rely on the same facts not only waive the right to a jury trial, but are an explicit assertion that both movants are satisfied that the material facts are undisputed and that each contends that he or she is entitled to judgment as a matter of law. ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis.2d 437, 446-47, 492 N.W.2d 131, 134 (1992).

The trial court's findings of fact on General Casualty's motion for summary judgment provide: "Because plaintiff had the option of joining Renewal there was insurance coverage available at the time of the accident." Grendahl asserts that this finding is contrary to the trial court's finding in its first order, which provides: "The vehicle being operated by Donna DeFosse at the time of the subject accident was not a 'covered auto' as defined by the Fireman's Fund insurance policy." She then concludes that the doctrine of issue preclusion made the second finding erroneous.

Grendahl acknowledges that one element necessary for issue preclusion is that the issue of material fact or law was actually litigated and determined by a final judgment. *See* ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis.2d 381, 396, 497 N.W.2d 756, 762 (Ct. App. 1993). However, as we have previously noted, the issue of whether the vehicle operated by DeFosse was a covered auto under the Fireman's Fund policy was not decided in the circuit court's first summary judgment. Thus, the doctrine of issue preclusion is not applicable here.

However, Grendahl asserts that we may review *de novo* the trial court's conclusion that she is not entitled to underinsured motorist coverage. We agree. The interpretation of an insurance policy is a question of law that we review without deference to the trial court. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990). Grendahl's initial argument for a *de novo* interpretation is still based upon her assertion that there is no genuine issue of material fact because the trial court's first decision, that the DeFosse vehicle was not a covered vehicle, was not appealed, and the time for appeal has passed. But that interpretation was foreclosed when the trial court excised the disputed paragraph from its opinion. We will continue with our *de novo* review of the issue.

Grendahl's policy with General Casualty sets out its underinsured motorist coverage in pertinent part:

> We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of bodily injury:
>
> 1. Sustained by an "insured;" and
>
> 2. Caused by an accident.
>
> ….
>
> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less that the limit of liability for this coverage.

DeFosse's vehicle had a liability limit of $50,000, Grendahl's vehicle had an underinsured motorist liability limit of $100,000, and the Fireman's Fund policy had a liability limit of $500,000. Therefore, if the Fireman's Fund policy was inapplicable or unavailable at the time of the accident, DeFosse's

liability limits were less than Grendahl's, and Grendahl was entitled to recover under the underinsured motorist coverage of her policy with General Casualty.

Renewal's policy with Fireman's Fund provides: "We will pay all sums an insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto."

Section one of the Fireman's Fund policy defines "covered autos": "ITEM TWO of the Declarations shows the autos that are covered autos for each of your coverages. The following numerical symbols describe the autos that may be covered autos." The symbols entered next to a coverage on the Declarations designate the only autos that are covered autos.

Item two of the declarations shows a numerical symbol of "7" after the description "Liability Insurance." The numerical symbol "7" describes: "SPECIFICALLY DESCRIBED AUTOS. Only those autos described in ITEM THREE of the Declarations…."

Item three of the declarations is a schedule of covered autos. There are thirteen vehicles listed in item three. The only description pertinent to this case is the second entry on item three, where the description is "employees non-owned."

This dispute boils down to the meaning of the term "employees non-owned." Grendahl asserts that this term refers to vehicles not owned by employees of Renewal, but used by the employees in the operation of Renewal's business. Thus, if an employee were running an errand for Renewal in a borrowed or rented automobile, the Fireman's Fund policy would cover that vehicle.

However, an automobile owned by an employee and used for the benefit of Renewal would not be covered by the Fireman's Fund policy. General Casualty disagrees. It interprets the term "employees non-owned" as referring to automobiles not owned by Renewal but owned and operated by Renewal's employees.

A very important factor in our conclusion is that the Fireman's Fund policy is a contract between Fireman's Fund and Renewal Unlimited. We should interpret the term "employees non-owned" in light of that fact. Renewal purchased the policy for its protection. Presumably, Renewal's officers and the Fireman's Fund representative who sold the policy were concerned with situations in which Renewal would be subjected to liability. Presumably, they knew of the doctrine of *respondeat superior*, which makes an employer liable for the negligence of its employees if the employees are acting for the employer's benefit. It is far more likely that an employee would use his or her own automobile when driving it for Renewal's benefit than borrow or rent a car for the same purpose. It is improbable that Renewal and Fireman's Fund intended to cover the unusual situation of a Renewal employee using a borrowed automobile for Renewal's benefit, leaving Renewal unprotected in the more probable situation of an employee using his or her own car for Renewal's benefit. It is thus probable that when Renewal and Fireman's Fund used the disputed term, they were referring to the meaning that General Casualty now asserts.

Grendahl asserts that it is unreasonable to expect coverage for twenty-five employees, each using their own automobiles, for the premium charged, $44.00. We are not actuaries. The risk would seem to depend upon the likelihood of a Renewal employee using his or her automobile for the benefit of Renewal. With twelve other vehicles at its command, it might well have been

Renewal's expectation that it would almost never be necessary to have an employee use his or her automobile for Renewal's benefit. We have no way of knowing what a $44.00 premium would be expected to cover. Had either Grendahl or General Casualty felt that this would be a valuable item of evidence, they could have obtained an affidavit from an actuary. Neither did, and under the unique facts of this case, Grendahl could have benefited from an actuary's opinion no matter what the conclusion. Were the amount of the premium dispositive, someone could have obtained an opinion about it. No one brought that information to the attention of the trial court.

We conclude that the term "employees non-owned" refers to automobiles owned by Renewal's employees and not owned by Renewal Unlimited. Accordingly, at the time of the accident, the Fireman's Fund policy covered the DeFosse vehicle when she was running an errand for Renewal and collided with Grendahl. Fireman's Fund's limit for bodily injury liability was not less than Grendahl's limit of liability for underinsured motorist coverage. Therefore, Grendahl's underinsured motorist coverage was not applicable to her accident of September 16, 1991.

By the Court.–Order affirmed.

Not recommended for publication in the official reports.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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