COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 17, 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. 96-3651-FT

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

TAMMY L. SLETTO,

PLAINTIFF-CO-APPELLANT,

V.

CLAUDINE K. KENYON, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, PRIMECARE HEALTH PLAN, INC.,

DEFENDANTS,

SENTRY INSURANCE, A MUTUAL COMPANY, AND CHRIS A. WILLIAMS,

DEFENDANTS-
THIRD PARTY PLAINTIFFS-APPELLANTS,

ALLSTATE INSURANCE COMPANY,

THIRD PARTY DEFENDANT-
RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Tammy L. Sletto, Chris A. Williams, and Sentry Insurance Mutual Company appeal from an order granting summary judgment and dismissing Allstate Insurance Company from this personal injury action. Allstate insured two cars owned by Williams, who was driving a car owned by Sletto at the time of the underlying accident. On cross-motions for summary judgment, the trial court ruled that Allstate's policy did not provide coverage because its definition of "insured auto" excluded cars "available or furnished for the regular use" of Williams. By order dated February 4, 1997, this appeal was submitted on the court's expedited appeal calendar. *See* RULE 809.17, STATS. Because the material facts are undisputed, and because they establish that Sletto's car was "available or furnished for [Williams's] regular use," we affirm.

The pertinent facts, taken from the parties' deposition testimony, are undisputed. Sletto and Williams lived together. Williams had originally owned Sletto's car, but he sold it to Sletto when they had broken up. They subsequently reconciled, but Sletto kept the car title in her name and maintained her own car insurance with Sentry. While living together, Sletto and Williams shared some living expenses, but they were responsible for the expenses of their individually-owned cars.

Williams had a set of keys for Sletto's car, but Williams testified that he could not use Sletto's car without her permission. Williams drove Sletto's car approximately once a week when the couple went grocery shopping. Williams also testified that he could use Sletto's car when his vehicles were broken, but he

could not recall how often that had happened. Williams also testified that he had driven the car when the couple had visited relatives "up north." Sletto testified that while Williams had to ask permission to drive her car, she had never refused permission. Sletto and Williams testified that they were always in the car together when Williams drove it, except possibly when Williams drove alone when his cars were broken.

The sole issue on appeal is whether Sletto's car was "available or furnished for" Williams's "regular use." The interpretation and application of the "regular use" provision depends upon the particular facts and circumstances of each case. *See* ***LeMense v. Thiel,*** 25 Wis.2d 364, 367, 130 N.W.2d 875, 876 (1964). When the material facts are not in dispute, the question of whether a vehicle was furnished or available for "regular use" is properly determined on summary judgment. *See* ***Moutry v. American Mut. Liab. Ins. Co.,*** 35 Wis.2d 652, 656, 151 N.W.2d 630, 632 (1967).

The "signposts" of "regular use" are summarized in ***Hochgurtel v. San Felippo,*** 78 Wis.2d 70, 82, 253 N.W.2d 526, 531 (1977): (1) continuous use rather than sporadic use; (2) frequent use rather than infrequent or merely casual use; (3) unqualified use rather than restricted use; (4) use for an indefinite period rather than for a definite period; and (5) usual use rather than unusual use. These "signposts" must be examined in light of the purpose of the "regular use" exclusion which is "to give coverage to the insured while engaged in the *only infrequent or merely casual use* of an automobile … but not to cover him … with respect to his use of another automobile which he *frequently uses or has the opportunity to do so."* ***Moutry,*** 35 Wis.2d at 657, 151 N.W.2d at 632 (quoting ***Aetna Cas. & Sur. Co.,*** 211 F.2d 732, 736 (4th Cir. 1954) (first emphasis added)). The exclusion exists because frequent use of a non-owned vehicle "increases the

risk to an insurance company without a corresponding increase in premium." ***Hochgurtel,*** 78 Wis.2d at 81, 253 N.W.2d at 530.

We agree with the trial court's conclusion that Williams regularly used Sletto's car. Williams drove the car at least once a week. Such use cannot be described as "infrequent." The fact that Sletto accompanied Williams when he drove does not affect the frequency of the use. Additionally, while Sletto's permission was required, Williams had an open-ended "opportunity" to use the car, and Sletto had never refused a request.

The appellants argue that the trial court improperly rejected as "incredible" the deposition testimony of Williams and Sletto that Williams could not use Sletto's car without first asking Sletto for permission. We do not read the trial court's comments in that fashion. The trial court's ruling, like ours, takes the necessity of permission as a given. However, in light of the frequency and regularity of Williams's use, permission becomes a less compelling consideration.

Williams's weekly use of Sletto's car represents the kind of "increased risk" that the "regular use" exclusion is designed to cover. Therefore, Allstate's policy did not provide coverage, and summary judgment in its favor was proper.

By the Court.—Order affirmed.

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