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. 97-0009

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

R&R LOGGING AND CITIZENS INSURANCE COMPANY OF AMERICA,

PLAINTIFFS,

V.

FLANNERY TRUCKING, INC., MELVIN G. FLANNERY AND RICHARD J. HERMAN,

DEFENDANTS-RESPONDENTS,

HERITAGE MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded with directions.*

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

LaROCQUE, J. Heritage Mutual Insurance Company appeals a summary judgment in favor of its insured, Flannery Trucking, Inc., declaring coverage under Heritage's commercial automobile insurance policy. We conclude that the policy unambiguously excludes coverage for the claim against Flannery. We therefore reverse and remand for entry of summary judgment in favor of Heritage.

Flannery arranged with R&R to transport a logging skidder. The skidder was damaged during transportation when it struck an overhead railroad viaduct. R&R sued Flannery for negligence, and Heritage intervened as a defendant seeking a coverage declaration. Heritage contended that its commercial automobile policy excluded from coverage claims for property damage to transported property in Flannery's care, custody or control. Heritage and Flannery each filed a motion for summary judgment. Concluding that the policy language was ambiguous, the trial court construed the policy in favor of coverage and granted Flannery's motion. Heritage now appeals.

We review a trial court's grant or denial of a motion for summary judgment de novo. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Moreover, the interpretation of an insurance policy is also a question of law that we review de novo. ***United States Fire Ins. Co. v. Ace Baking Co.***, 164 Wis.2d 499, 502, 476 N.W.2d 280, 282 (Ct. App. 1991). "Insurance policies, like other contracts, are construed to ascertain and effectuate

the parties' intent. Thus, a clear contractual provision must be construed as it stands. Ambiguities, however, are construed against the party who drafted the contract." ***Id.*** at 502-03, 476 N.W.2d at 282.

The general liability coverage provision of the policy is set forth in Section II A. and provides that Heritage "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 … use of a covered auto." (Underlining added.)

Section II B. then provides the exclusions to which the insurance does not apply. The relevant language provides as follows:

> B. EXCLUSIONS
> This insurance does not apply to any of the following:
> ….
> 6. Care, Custody or Control.
> *Property damage* to … property owned or transported by the *insured* or in the *insured's* care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement. (Underlining added.)

Although everyone was in accord that the preceding terms would exclude the damage to the skidder if the policy went no further, the trial court agreed with Flannery's contention that an ambiguity was created by other provisions in the policy. We disagree.

The language Flannery says creates an ambiguity is in Section I of the policy describing "covered *autos*." Paragraph C of Section I is entitled "Certain Trailers, Mobile Equipment and Temporary Substitute Autos" and provides in part as follows:

> If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered *autos* for Liability Coverage:
>
> ….
>
> 2. *Mobile equipment* while being carried or towed by a covered auto.[1]

This section creates no ambiguity when read in conjunction with the care, custody and control exclusion. Under the plain language of Section I, paragraph C, mobile equipment is defined as a covered auto "If Liability Coverage is provided by this Coverage Form." Because coverage to damage to the skidder is excluded in this case, the provision purporting to define the skidder as a covered auto does not apply.

Flannery argues, however, that our reading of the policy renders illusory any liability coverage relating to the use of the skidder as a covered auto. In other words, because the skidder is a covered auto only when it is carried or towed, it is inconceivable that there will ever be coverage for an accident arising out of its use. We are not persuaded by this argument. First, whether the inclusion of mobile equipment being towed or carried as a covered auto is likely to arise under a different set of circumstances from that presented by this case is not the test we apply to ascertain coverage. We must determine only whether the reference to mobile equipment as a covered auto creates an ambiguity so as to compel a construction favorable to Flannery under the facts presented. We perceive no ambiguity in that respect.

We do note that the exclusion for damage to property being transported only excludes claims for *property damage* to the property being

[1] The policy defines "*mobile equipment*," in relevant part, as "any of the following types of land vehicles, including any attached machinery or equipment: 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads …."

transported. It does not exclude liability claims for *bodily injury* involving the property being transported. The fact that a skidder may be a covered auto does not change the fact that it was property "transported by the *insured* or in the *insured's* care, custody or control." Flannery's argument would require us to judicially rewrite the exclusion to exclude coverage for "property damage to property owned or transported by the *insured* or in the *insured's* care, custody or control *unless the property is a covered auto*." This we cannot do. When the relevant terms of a policy are plain on their face, the policy should not be rewritten to bind the insurer to a risk it did not agree to take. ***Garriguenc v. Love***, 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975).

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.