COURT OF APPEALS DECISION DATED AND FILED

October 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2156

Cir. Ct. No. 2004CV1489

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

J. L. D.,

PLAINTIFF-APPELLANT,

V.

BRETT C. HAY AND PROGRESSIVE HALCYON INSURANCE COMPANY,

DEFENDANTS,

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 DYKMAN, J. This is an appeal by J.L.D. from a summary judgment order dismissing Allstate from J.L.D.'s wrongful death action against it and Brett Hay. J.L.D. contends that Allstate provided excess liability coverage to Hay under Hay's parents' Allstate policy because Hay was driving his mother's Mitsubishi. Allstate contends that it did not provide any liability coverage to Hay because the Mitsubishi was excluded from liability coverage under the Hays' policy. We conclude that the Hays' Allstate policy unambiguously excludes liability coverage for Hay while driving the Mitsubishi. Accordingly, we affirm.

Background

¶2 The following facts are undisputed. On May 31, 2003, Jesse Kessenich was killed in an automobile accident in which he was a passenger and Brett Hay was the driver. The vehicle Hay was driving was a Mitsubishi owned by Hay's mother, Constance Hay. Progressive Halcyon Insurance Company insured the Mitsubishi, with Brett Hay the named insured. Kessenich's minor daughter, J.L.D., sued Hay and Progressive for wrongful death. Progressive settled with J.L.D. for its policy limits and was dismissed from this lawsuit.

¶3 J.L.D. then filed an amended complaint including Allstate as a defendant. J.L.D. alleged Allstate provided excess liability coverage to Hay while Hay was driving the Mitsubishi because Hay's parents had an insurance policy through Allstate covering all three of their automobiles, including the Mitsubishi. J.L.D. moved for summary judgment declaring that Allstate provided Hay with excess liability coverage, and Allstate moved for summary judgment declaring that it did not provide any coverage to Hay. The trial court granted summary judgment to Allstate. J.L.D. appeals from that order.

Standard of Review

¶4 We review an order granting summary judgment de novo, employing the same methodology as the trial court. ***Fazio v. Department of Employee Trust Funds***, 2005 WI App 87, ¶8, 280 Wis. 2d 837, 696 N.W.2d 563 (citation omitted). Summary judgment is appropriate if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id***. Here, the facts are undisputed and we thus conduct an independent review of the record. *See* ***id***.

¶5 This case requires us to interpret an insurance policy. The interpretation of an insurance policy is a question of law we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857 (citation omitted). We construe an insurance policy as we do contracts generally. ***Id***. Thus, "[a]n insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." ***Id***. If the policy is unambiguous, we strictly apply its terms "without resort to rules of construction or applicable principles of case law."[1] ***Id***., ¶13.

Discussion

¶6 J.L.D. contends that Hay had excess liability coverage as an insured person driving a non-owned vehicle under the Hays' Allstate policy. Allstate concedes that Hay was an insured person under the Hays' policy and that the

[1] In accord with ***Folkman v. Quamme***, 2003 WI 116, ¶¶36-44, 264 Wis.2d 617, 665 N.W.2d 857, we turn to established principles of insurance law to aid our understanding of the provisions at issue. Because we conclude the policy is unambiguous, we strictly apply its terms without resorting to construction or further case law.

Mitsubishi was a "non-owned" vehicle because it was owned by Hay's mother,[2] but asserts that the unambiguous language of the Hays' policy does not provide liability coverage to Hay while driving the Mitsubishi. We agree with Allstate.

¶7 The Hays' insurance policy states: "The coverages of this policy apply only when a specific premium is indicated for them on the declarations page. If more than one **auto** is insured, a coverage premium will be shown for each **auto**." Thus, by the unambiguous language of the policy, a vehicle insured under the policy only receives the type of coverage for which a premium is listed on the declarations page. The only premium listed for the Mitsubishi on the policy's declaration page is for "Auto Comprehensive Insurance." All other premiums, including "Automobile Liability Insurance," are listed as "suspended." ***Id***.

¶8 J.L.D. contends, however, that Allstate provided Hay excess liability insurance because Hay was an insured person driving a non-owned vehicle under the "Other Insurance" provision of the Hays' policy. That provision states that "if a person insured is using a substitute private passenger **auto** or a non-owned **auto**, **our** liability insurance will be excess over other collectible insurance." J.L.D. argues that, pursuant to this provision, Hay had excess liability insurance as an insured person driving a non-owned vehicle. We disagree.

¶9 A traditional "Other Insurance" provision functions to prioritize coverage between insurance providers rather than create new coverage. Thus, in

[2] Because Allstate concedes that Hay was driving a "non-owned" vehicle, we will not address the parties' arguments over whether "non-owned" under the Allstate policy refers to non-owned as to the named insured or non-owned as to the insured person.

Jaderborg v. American Family Mut. Ins. Co., 2000 WI App 246, ¶¶9-10, 239 Wis. 2d 533, 620 N.W.2d 468, we explained that the "Other Insurance" provision in the Jaderborgs' policy merely prioritized coverage, and did not create underinsured motorist coverage that was not otherwise provided under the policy.[3] We therefore rejected the Jaderborgs' contention that the "Other Insurance" provision in their policy created excess underinsured motorist coverage over their underlying automobile insurance. ***Id.***

¶10 The supreme court used a similar analysis in ***Progressive Northern Ins. Co. v. Hall***, 2006 WI 13, 288 Wis. 2d 282, 709 N.W.2d 46. In ***Progressive***, the court rejected Progressive's attempt to characterize its "Other Insurance" provision as an "Exclusion" provision.[4] The court explained that, unlike an "Exclusion," "[t]he purpose of an 'other insurance' clause is to define which coverage is primary and which coverage is excess between policies." ***Id.***, ¶27 (citations omitted). Thus, "'Other Insurance' clauses govern the relationship between insurers, they do not affect the right of the insured to recover under each concurrent policy." ***Id***. (quoting 15 *Couch on Insurance*, § 219.1, at 219-8 (3d ed. 1999)). Because the clause at issue prioritized rather than created or excluded coverage, it is an "Other Insurance" clause and thus subject to statutory requirements. ***Id***., ¶¶26-30.

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[3] The language at issue was: "Other Insurance. The insurance afforded by this policy is excess over any other insurance available to an insured, except insurance written specifically as an umbrella or excess liability insurance policy." ***Jaderborg v. American Family Mut. Ins. Co.***, 2000 WI App 246, ¶10, 239 Wis. 2d 533, 620 N.W.2d 468.

[4] Progressive's "Other Insurance" provisions stated that "any insurance we provide shall be excess over any other uninsured or underinsured motorist coverage, except for bodily injury to you or a relative when occupying a covered vehicle." ***Progressive Northern Ins. Co. v. Hall***, 2006 WI 13, ¶5, 288 Wis. 2d 282, 709 N.W.2d 46.

¶11 "We recognize, of course, that the label given to a term in an insurance policy is not necessarily controlling." ***Id.***, ¶31. However, the "Other Insurance" clause in the Hays' policy unambiguously prioritizes, rather than creates, coverage. The Hays' policy states:

> **If There Is Other Insurance**
>
> If more than one policy applies to an accident involving **your** insured **auto**, **we** will bear **our** proportionate share with other collectible liability insurance. However, if a person insured is using a substitute private passenger **auto** or a non-owned **auto**, **our** liability insurance will be excess over other collectible insurance.

¶12 We ascertain no ambiguity in the "Other Insurance" provision of the Hays' policy. The language "our liability insurance" unambiguously refers to the insurance already established under the policy.[5] Read in conjunction with the phrase "will be excess over other collectible insurance," the entire sentence explains the relationship between the coverage under the Allstate policy and coverage under any other policy that applies. A reasonable insured would not read that clause to mean that it creates liability insurance. The clause is therefore not rendered ambiguous. ***Folkman***, 264 Wis. 2d 617, ¶32 ("[I]nconsistencies in the context of a policy must be material to the issue in dispute and be of such a nature that a reasonable insured would find an alternative meaning.").

¶13 Under "Part 1: Automobile Liability Insurance," the Hays' policy states: "Under these coverages, **your** policy protects a person insured from claims

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[5] We read the insurance policy as a whole to determine ambiguity. ***Folkman***, 264 Wis. 2d 617, ¶19 ("Occasionally a clear and unambiguous provision may be found ambiguous in the context of the entire policy."). Here, the Hays' policy states that it provides only coverage that has a premium listed on the declarations page. A. App. 131. Thus, the term "our liability coverage" refers to the coverage as listed on the declarations page.

for accidents arising out of the ownership, maintenance or use, loading or unloading of the **auto we** insure." A. App. 132. Because the parties concede Hay was a "person insured," we turn to whether the Mitsubishi was an "insured auto."[6]

¶14 "Insured Autos" are defined as: "(1) Any **auto** described on the declarations page and the four wheel private passenger **auto** or **utility auto you** replace it with.… (4) A non-owned **auto** used with the permission of the owner. This **auto** must not be available or furnished for the regular use of a person insured." The parties agree the Mitsubishi was not an insured auto under clause (4) because it was available or furnished for Hay's regular use. J.L.D. argues, instead, that the Mitsubishi was an insured auto under clause (1) because it is listed on the declarations page. Thus, the insurance coverage, if any, derives from the Mitsubishi's status as a car listed on the declarations page of the policy, not from its status as a non-owned vehicle under clause (4).

¶15 We reject J.L.D.'s argument that the liability insurance for the other two vehicles under the Hays' policy followed Hay while he was driving the Mitsubishi, a non-owned vehicle. J.L.D. relies on ***Schult v. Rural Mut. Ins. Co.***, 195 Wis. 2d 231, 242, 536 N.W.2d 135 (Ct. App. 1995), for the assertion that

[6] We reject J.L.D.'s contention that Allstate provides excess liability insurance whether or not the Mitsubishi is an "insured auto" simply because Hay is an "insured person." J.L.D. relies on the following provision of the Hays' policy: "**Allstate** will pay for all damages a person insured is legally obligated to pay—because of bodily injury or property damage meaning: (1) bodily injury, sickness, disease or death to any person, including loss of services; and (2) damage to or destruction of property, including loss of use." A. App. 132. J.L.D. argues that because this provision does not specifically state that the insured person must be driving an insured auto, Allstate provides coverage to insured persons regardless of the status of the auto. We disagree. J.L.D.'s reading isolates the provision and reaches an illogical result. We conclude that a reasonable insured would not understand this provision to mean that Allstate will pay any damages regardless of their source, when read in the context of a policy that delineates when its coverages will and will not apply. *See **Folkman***, 264 Wis. 2d 617, ¶¶16-21.

liability insurance follows the person, not the vehicle. In ***Schult***, we concluded that the liability coverages Rural Insurance issued to Keith Schult could be stacked because there were three separate premiums for liability insurance under his policy. ***Id***. at 240-42. Because Keith was driving a non-owned, non-covered vehicle, the three liability premiums could be stacked to cover damages for which he was legally responsible. ***Id***. We explained that:

> Rural agreed to pay [the injured party] $100,000 for her damages pursuant to the liability insurance provision because Keith was driving a nonowned vehicle and became responsible for bodily injuries and not because [she] was injured while Keith was driving one of his covered vehicles. Consequently, the liability insurance in the instant case does not follow the vehicle, but follows the insured. In other words, under Keith's policy, when he is driving a nonowned vehicle, liability insurance is personal to him and may be stacked.

Id. at 241-42.

¶16 ***Schult***, however, is inapposite. Here, unlike in ***Schult***, J.L.D. asserts that Hay had liability coverage because Hay was driving a covered vehicle insured under the policy at issue. Thus, any coverage for Hay is derived from the fact that the Mitsubishi was listed on the declarations page of the Hays' policy, not from the fact that the car was non-owned as to Hay.

¶17 Our inquiry therefore focuses exclusively on the coverage of the Mitsubishi listed on the declarations page. As noted, the only coverage listed for the Mitsubishi on the policy's declarations page is "Comprehensive Auto Insurance." Because the Hays' policy unambiguously excludes any coverage without a premium listed on the declarations page, we conclude that Allstate did not provide liability coverage to Hay when he was driving the Mitsubishi. We therefore affirm.

By the Court.—Order affirmed.

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