COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2260 **Cir. Ct. No. 2005CV142**

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

JENNIFER J. CARLSON,

PLAINTIFF-APPELLANT,

V.

SOUTHERN-OWNERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, ADAM J. LEVAN, WESLEY J. LEVAN AND AUTO-OWNERS INSURANCE COMPANY,

DEFENDANTS,

STATE OF WISCONSIN HEALTH INSURANCE RISK SHARING PLAN AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

NOMINAL-DEFENDANTS.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jennifer Carlson appeals a summary judgment concluding Southern-Owners Insurance Company does not provide underinsured motorist (UIM) coverage for her injuries. She contends the circuit court erred when it concluded she did not "reside with" her parents for purposes of the Southern-Owners policy. We disagree and affirm the judgment.

BACKGROUND

¶2 Carlson was seriously injured in a vehicle-pedestrian accident on October 29, 2004. At the time of the accident, Carlson was thirty-four years old and was employed as a substitute teacher in two Oneida County school districts. She was living in a home near Rhinelander owned by her parents, Arthur and Alice Carlson.

¶3 Carlson's parents are retired and own homes in both Rhinelander and Haines City, Florida. They lived full time in Rhinelander until March 2003. From March 2003 through October 2004 they spent eight months in Florida and ten months at their home in Wisconsin, generally switching homes every three to four months. According to the summary judgment submissions, both of Carlson's parents were living in Florida when the accident occurred.[1] Carlson's parents declared Florida their home state for income tax purposes in 2004. They were registered voters in Florida and held Florida driver's licenses during all of 2003

[1] At the summary judgment hearing, Carlson stated this was incorrect, and after the hearing moved to add an affidavit to the record in which Alice Carlson stated she had been attending a retreat in Wisconsin at the time of the accident. The court refused to allow Carlson to supplement the summary judgment record, and Carlson has not appealed that decision.

and 2004. Carlson lived full time at her parents' Rhinelander home during all of 2003 and 2004.

¶4 Carlson filed suit seeking, among other things, coverage under a Southern-Owners UIM policy issued to her parents. She moved for partial summary judgment on the issue of coverage, claiming that under Florida law Carlson "resided with" her parents as was required for coverage under the Southern-Owners policy. Southern-Owners disputed Carlson's interpretation of Florida law.[2] The circuit court, applying Florida law, concluded Carlson did not "reside with" her parents. The court therefore concluded there was no coverage and dismissed Carlson's claim against Southern-Owners.

DISCUSSION

¶5 Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[3] We

[2] As an alternative argument, Southern-Owners argued Wisconsin law applies. Carlson concedes that if Wisconsin law applies, there is no coverage. The court concluded it did not need to reach the choice of law question because there was also no coverage under Florida law. *See* ***Henderson v. State Farm Mut. Auto. Ins. Co.***, 59 Wis. 2d 451, 454, 208 N.W.2d 423 (1973) (choice of law need not be addressed unless it is outcome determinative). Like the circuit court, we need not reach the choice of law issue. *See* ***id.***

The choice of law issue exists because the policy excludes coverage for family members who own their own car. Wisconsin permits these so-called "drive other car" exclusions. *See* ***Vieau v. American Family Mut. Ins. Co.***, 2006 WI 31, ¶40, 289 Wis. 2d 552, 712 N.W.2d 661. Florida, however, does not. ***Auto-Owners Ins. Co. v. Queen***, 468 So. 2d 498, 499 (Fla. App. 1985). This means that if Florida law applies, Carlson is entitled to coverage if she "resided" with her parents at the time of the accident despite the "drive other car" exclusion.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

review summary judgments without deference to the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Interpretation of an insurance contract also presents a question of law reviewed without deference to the circuit court. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857.

¶6 The Southern-Owners policy provides:

> **We** will pay damages **you** are legally entitled to recover from the owner or operator of any **uninsured automobile**[4] because of **bodily injury you** sustain … when **you** are a pedestrian…. (Emphasis in original.)

The term "you" refers to Carlson's parents. However, the same coverage also extends to a relative[5] "who resides with **you**…. The parties dispute whether, applying Florida law, Carlson was a person "who resides with" her parents at the time of the accident.

¶7 Under Florida law, insurance provisions dealing with residency are generally viewed in their "most inclusive sense." ***General Guar. Ins. Co. v. Broxsie***, 239 So.2d 595, 597 (Fla. App. 1970). This rule is derived from the principle that ambiguities in insurance contracts are generally construed against the drafter and in favor of coverage. ***Id.*** Carlson argues Florida's broad construction rule applies here and requires a finding of coverage.

[4] The Southern-Owners' definition of "uninsured automobile" includes underinsured vehicles as well.

[5] The policy defines "relative" as follows: "**Relative** means a person who resides with **you** and who is related to **you** by blood, marriage, or adoption. **Relative** includes a ward or foster child who resides with **you**." (Emphasis in original.)

¶8 Southern-Owners disagrees, arguing a person cannot "reside with" someone living in a different dwelling. Southern-Owners relies primarily on ***Allstate Ins. Co. v. Gordon***, 364 So.2d 44 (Fla. App. 1978), a homeowner's insurance case. The policyholder spent three or four consecutive days each week caring for her mother at her mother's residence. On the days she cared for her mother, she stayed at her mother's apartment overnight. On days she did not, she stayed at her own apartment some distance away. ***Id.*** at 45-46.

¶9 The mother's residence was burglarized and some of the policyholder's jewelry was taken. The insurer argued there was no coverage because the policy covered property losses at a location other than the policyholder's apartment only if the policyholder was "temporarily residing" at the location where the loss occurred. ***Id.*** at 45. The insurer argued that because the policyholder had stayed at her own apartment the day and night prior to the burglary, she was not "temporarily residing" at her mother's residence at the time of the theft.

¶10 The court agreed, reasoning that "it could not be said that on the date of the loss, the policyholder was temporarily residing at [her mother's] address." The court, citing a similar Louisiana case,[6] stated that "when time is split between two residences, the policyholder is only residing in the one in which he is occupying at the time of the theft." ***Id.*** at 46.

[6] Carlson argues ***Gordon*** "has very little to say" about the question at hand because the ***Gordon*** court was setting out a proposition of Louisiana law. ***Allstate Ins. Co. v. Gordon***, 364 So.2d 44 (Fla. App. 1978). However, the ***Gordon*** court was applying Florida law, not Louisiana law, and the opinion cites the Louisiana court's rationale with approval in its analysis.

¶11 Carlson argues ***Gordon*** is inconsistent with ***Broxsie***, where the court noted that "a person may have a residence in more than one place." ***Broxsie***, 239 So.2d at 597. However, the rule in ***Gordon*** applied when "time is split between two residences." ***Gordon***, 364 So.2d at 46. This statement explicitly recognized that a person may have more than one residence. The court was instead drawing a distinction between having a residence and "temporarily residing" in a place.

¶12 We draw a similar distinction here. There is a distinction between "having a residence" in a place and "residing with" a person. Even though an individual may have more than one residence, the individual only "resides with" individuals who occupy the same dwelling at a given point in time.

¶13 Carlson's final argument illustrates this distinction. Carlson argues that if someone asked Carlson "are you a resident of your parents' household?" she could reasonably answer "yes." The correct question under the policy, however, is "do you reside with your parents?" Carlson could reasonably answer "sometimes" or "for part of the year," but an unequivocal "yes" simply would not be accurate. Carlson was injured during a time of year when she did not "reside with" her parents.

By the Court.—Judgment affirmed.

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