COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP2294 **Cir. Ct. No. 2005CV58**

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

THERESA L. LECHNER,

PLAINTIFF,

V.

ERIC EHMANN,

DEFENDANT-RESPONDENT,

MARY A. MORAN,

DEFENDANT,

ONEBEACON MIDWEST INSURANCE CO.,

DEFENDANT-APPELLANT,

ALLIED INSURANCE COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEAL from an order 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. This case involves a dispute over insurance coverage. Theresa Lechner's vehicle was hit by a vehicle owned by Mary Morin. Eric Ehmann allegedly operated Morin's vehicle at the time of the accident. Allied Insurance Company provided an automobile insurance policy to Ehmann. Allied's policy had an exclusion for any person "using a vehicle without a reasonable belief that a person is entitled to do so." The trial court granted summary judgment to Allied, concluding the exclusion applied to the undisputed facts.

¶2 OneBeacon Midwest Insurance Company, which insured Lechner, appeals. It argues the circuit court misinterpreted the insurance policy by analyzing whether Ehmann had permission to use the vehicle rather than whether Ehmann reasonably believed he was entitled to use the vehicle. It also argues summary judgment was inappropriate because disputed material facts existed regarding whether Ehmann reasonably believed he was entitled to use the vehicle.[1] Because the circuit court properly interpreted the insurance policy and the undisputed facts showed that Ehmann could not have reasonably believed he was entitled to use the vehicle, we affirm.

[1] OneBeacon also argues "the trial court erred by deciding the issue of fact as opposed to deciding whether there is a genuine issue." Because we do not give deference to the circuit court on appeal for a summary judgment, we need not decide whether the court erred in this respect. Whether the circuit court improperly sat as a finder of fact does not affect our analysis of the record.

BACKGROUND

¶3 On February 21, 2002, Lechner was driving on County Highway G in Oneida County when another vehicle struck her and fled the scene of the accident. A police investigation later determined that Mary Morin owned the vehicle that struck Lechner, and Ehmann was driving Morin's vehicle at the time of the accident. Ehmann pled no contest to the hit and run on July 23, 2002.

¶4 Lechner filed a claim against Ehmann and his liability insurance company, Allied, for the injuries she sustained in the hit-and-run accident. She also filed a claim against Morin, alleging negligent entrustment of her vehicle to Ehmann. Additionally, Lechner filed an underinsured motorist claim against her automobile insurance company, OneBeacon. Allied moved for summary judgment, arguing its policy did not provide coverage to Ehmann because of an exclusion for any person "[u]sing a vehicle without a reasonable belief that that person is entitled to do so." After bifurcating the claims, the court determined on summary judgment that Allied's policy did not provide coverage to Ehmann and granted summary judgment dismissing the claim against Allied.

¶5 Prior to the accident, Ehmann and Morin were in a dating relationship. They had broken up and gotten back together a number of times. Morin stated that her relationship with Ehmann terminated prior to February 2002. Morin lived in Florida from December 2001 until March 2002. When Ehmann attempted to visit Morin in January at her Florida residence, she enlisted the help of police to prevent him from contacting her. Morin stated that she did not "give Eric Ehmann any suggestion that he had authority to operate my car."

¶6 In his deposition testimony, Ehmann stated he had permission to drive every vehicle he drove in February 2002. However, Ehmann also said he

had never operated Morin's Lumina, the vehicle involved in the hit-and-run. He further stated that he did not know where the keys to the Lumina were and had not asked Morin for permission to use the vehicle in February 2002.

¶7 Ehmann also stated that when he and Morin were dating, they had equal access to each other's possessions. Ehmann stated he believed he and Morin were still dating in February 2002. However, he admitted that when he attempted to visit her in Florida, the police showed up. According to Ehmann, "The police officer came up to me and he goes, 'What's this all about?' I go, 'I don't know.' He goes, 'Well, she said you know what this is all about.' And I said, 'Well, I'll just leave her alone.'"

¶8 The circuit court stated there was no question that Ehmann did not have express consent to operate the vehicle on the day in question. However, the court further examined whether Ehmann had implied consent, stating, "if the relationship was still continuing, then I assume that he did have implied consent to do so." The trial court stated:

> [I]n this case I believe that the great bulk of the circumstantial evidence suggests–and I think it suggests it rather unequivocally–that the relationship between the parties had ended before this incident in February of 2002. The most telling reason is that … Ehmann attempted to visit Ms. Morin at her condo in Florida. It wasn't just that he was rebuffed by her. She enlisted the police to see to it that he was discouraged.
>
> Now the policy requires that for there to be permission there's a reasonableness requirement, and I don't think it was reasonable at least after that time in December of '01 for Mr. Ehmann to have thought that he was still involved in any relationship with Ms. Morin.
>
> ….
>
> I find that no reasonable person could have believed–reasonable person in the position of Mr. Ehmann could

> have believed that he had permission to–to drive the 1990 Lumina in February of 2002.

DISCUSSION

¶9 We review a grant of summary judgment without deference to the circuit court. ***Phillips v. Behnke***, 192 Wis. 2d 552, 558, 531 N.W.2d 619 (Ct. App. 1995). Summary judgment is appropriate where no disputed issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Phillips***, 192 Wis. 2d at 558. "If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance," summary judgment is not appropriate. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). Interpretation of an insurance policy is also a question of law we review without deference. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶13, 275 Wis. 2d 35, 683 N.W.2d 75.

¶10 Allied's insurance policy excluded coverage to a person "using a vehicle without a reasonable belief that a person is entitled to do so." Therefore, it is necessary to determine whether the undisputed facts presented could lead reasonable people to differ as to whether Ehmann had a reasonable belief that he was entitled to use the car in February 2002.[2]

[2] We note that although the trial court used the term "permission," this is merely a matter of semantics. The circuit court framed the issue as to whether Ehmann had express or implied permission to use the car. It is clear from the record that the circuit court correctly analyzed whether Ehmann had a reasonable belief that he was entitled to use the car.

¶11 Ehmann did not contend that he had explicit permission to use the vehicle.[3] In order for him to have held a reasonable belief that he was entitled to use the car, he would have had to reasonably believe that his relationship with Morin entitled him to the use of the vehicle. Ehmann stated that when he and Morin were going together, they had equal access to each other's possessions.

¶12 While Ehmann contends he and Morin still had a relationship in February 2002, this belief is not reasonable. Morin lived in Florida from December 2001 until March 2002. When Ehmann attempted to visit Morin in January at her Florida residence, she enlisted the help of police to prevent him from contacting her, and Ehmann told the police "I'll just leave her alone." Ehmann could not have reasonably believed he and Morin had a relationship after that point. Therefore, Ehmann could not have had a reasonable belief that he was entitled to use Morin's vehicle in February 2002.[4]

By the Court.—Order affirmed.

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

[3] OneBeacon attempts to skirt the issue of express permission by claiming, "Mr. Ehmann testified that every time he drove a car in February of 2002 he had permission to drive it or owned the vehicle himself." OneBeacon states this creates a dispute as to material facts. OneBeacon's contention completely ignores Ehmann's express statement that he did not drive the car on the day in question and did not ask for permission to use the car. There is simply no dispute that Ehmann did not have Morin's express permission to use her car on the date of the accident.

[4] We note that there is a factual dispute as to whether Ehmann was driving Morin's vehicle at the time of the accident. However, this dispute is not material to this appeal. Because Ehmann did not have a reasonable belief he was entitled to use the vehicle, Allied's policy does not provide coverage. Likewise, if he was not driving the vehicle, Allied's policy would not provide coverage.