

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2002

Cornelia G. Clark
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. 02-0257-FT

Cir. Ct. No. 01-CV-48

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SUSAN A. RIEMER AND MICHAEL RIEMER,

PLAINTIFFS-RESPONDENTS,

v.

**UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND
BURNSVILLE AUTOMOBILE D/B/A BURNSVILLE TOYOTA,**

DEFENDANTS-APPELLANTS,

**NORTH CENTRAL HEALTH PROTECTION PLAN-A
COOPERATIVE AND WEATHER SHIELD MANUFACTURING,
INC. HEALTH PLAN,**

DEFENDANTS.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND THUMS, Judge. *Reversed.*

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

¶1 CANE, C.J.¹ Universal Underwriters Insurance Company appeals an order² denying its summary judgment motion and granting Susan and Michael Riemers' request for declaratory relief. The court granted the Riemers' motion construing a Universal umbrella policy held by Burnsville Automobile to provide coverage for an automobile accident involving one of Burnsville's employees. The court determined the umbrella policy covered all excess liability beyond that covered in the underlying garage policy. Consequently, the court denied Universal's summary judgment motion in which it argued the employee was covered only under the underlying policy and not the umbrella policy because he was not within the scope of his employment at the time of the accident. Because the umbrella policy covers only Burnsville, its two owners and its employee retirement plan, and because the driver was not within the scope of his employment at the time of the accident, we reverse the trial court's order.

BACKGROUND

¶2 On December 15, 1998, an automobile driven by Neng Nathan Lee collided with an automobile driven by Susan Riemer on Highway 29 near Abbottsford. Lee, Susan, and her husband Michael were injured, although Susan's injuries were the most severe. Lee had been visiting his fiancée in Appleton and was driving to the Minneapolis area, where he worked as a salesperson for Burnsville. The car Lee was driving was owned by Burnsville, which allowed its employees to use its vehicles for personal reasons.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version.

² We granted this interlocutory appeal on February 19, 2002.

¶3 The Riemers brought suit against Lee, Burnsville, and Universal. Their complaint alleged negligence against Lee and sought recovery from Universal as Burnsville's insurer. Universal paid the Riemers the \$500,000 limit under Burnsville's garage policy and the Riemers dismissed Lee as a defendant. Alleging Susan's damages were in excess of the garage policy limit, the Riemers asked the court for a declaration of additional coverage under Burnsville's umbrella policy, also issued by Universal. The Riemers argued the umbrella policy provided coverage for all liability beyond that covered by the underlying policy. Universal moved for summary judgment, arguing that although the underlying policy covered Lee by his status as an employee, he was not covered under the more limited umbrella policy because he was not acting within the scope of his employment at the time of the accident. The court granted the Riemers' motion and denied Universal's, saying the umbrella policy's language covered all liability beyond that of the underlying policy. Universal appeals.

STANDARD OF REVIEW

¶4 Resolution of this case turns on the interpretation of an insurance contract, a question of law that we review independently, although benefiting from the trial court's analysis. *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). When the terms of an insurance policy are unambiguous, we will not rewrite the policy by construction. *Taylor v. Greatway Ins. Co.*, 2001 WI 93, ¶10, 245 Wis. 2d 134, 628 N.W.2d 916. In construing an insurance contract, a construction that gives reasonable meaning to every provision is preferable to one leaving part of the language useless or meaningless. *Stanhope v. Brown County*, 90 Wis. 2d 823, 848-49, 280 N.W.2d 711 (1979).

¶5 Here, the circuit court's interpretation of the insurance policy was partially decided on a motion for summary judgment. Our review of the trial court's denial of summary judgment is also de novo, and we apply the same standards and methods as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Insurance coverage issues can be resolved on summary judgment motions. *Meyer v. City of Amery*, 185 Wis. 2d 537, 542, 518 N.W.2d 296 (Ct. App. 1994).

DISCUSSION

¶6 Universal argues the trial court erred by finding coverage under the umbrella policy for all damages in excess of those incurred under the underlying policy. The umbrella policy, Universal contends, does not have coverage as broad as the underlying policy. Although Lee was covered under the underlying policy, he is excluded from the umbrella, which Universal claims only covers Burnsville, its two owners and its employee retirement fund. Universal admits Burnsville would be vicariously liable had Lee been acting within the scope of his employment at the time of the accident. Because there was no evidence Lee was within the scope of his employment, Universal contends, the court should have granted its motion for summary judgment. In addition, Universal contends Minnesota law must govern the interpretation of the contract.

¶7 The Riemers respond that the court properly interpreted the umbrella policy by finding it covers all liability in excess of the underlying policy. They argue because the underlying policy covered Lee, the umbrella policy also provides coverage for him. In addition, they claim the trial court found Lee was

acting within the scope of his employment, so the umbrella policy, by Universal's own admission, provides coverage.

¶8 Before examining the contract language, we must first resolve Universal's claim Minnesota law governs resolution of this dispute. Universal argues because the contract's most significant relationships are with Minnesota, that state's law must apply. *See State Farm Mut. Ins. Co. v. Gillette*, 2002 WI 31, ¶25, 251 Wis. 2d 561, 641 N.W.2d 662. While this is most likely the case, Universal does not explain the consequences of applying Minnesota's law as opposed to Wisconsin's. In fact, Universal admits Wisconsin's and Minnesota's insurance laws are substantially the same. We will assume they are and resolve this case under Wisconsin law.

I. Umbrella policy interpretation

¶9 The relevant parts of the umbrella policy are:

INSURING AGREEMENT – WE will pay for LOSS, subject to the terms and conditions of this Coverage Part, in excess of:

(a) coverage provided in any UNDERLYING INSURANCE;

....

DEFINITIONS – When used in this Coverage Part:

....

“LOSS” means all sums the INSURED legally must pay as DAMAGES because of INJURY to which this insurance applies caused by an OCCURRENCE.

....

WHO IS AN INSURED — ...

....

With respect to any AUTO or watercraft:

(a) YOU;

With respect to (1) any AUTO or watercraft used in YOUR business or (2) personal use of any AUTO owned or hired by YOU:

(a) any person or organization shown in the declarations for this Coverage Part as a “Designated Person”.

The policy’s general conditions define “YOU” as “the person or organization shown in the declarations as the Named Insured.” The Named Insureds are Burnsville, its owners Dick and Gail Sjoquist, and Burnsville’s employee retirement plan. In the umbrella’s declarations, the Designated Persons are the Sjoquists.

¶10 In the event of automobile accidents, the umbrella provides coverage to the Named Insureds and Designated Persons. Only Burnsville, its employee retirement plan and the Sjoquists fall into these categories. The umbrella policy does not cover Lee. It appears the trial court relied primarily on the umbrella’s insuring agreement in determining the umbrella provided coverage for all liability under the underlying policy. This interpretation, however, ignores the umbrella’s limitations on what it insures. When interpreting an insurance contract, we must try to give a reasonable meaning to each clause. *Stanhope*, 90 Wis. 2d at 848-49. The reasonable meaning of the “Who Is An Insured” clause of the umbrella policy is that it limits coverage to Burnsville, its owners and its employee retirement plan. Simply put, the umbrella policy limits its coverage to a smaller number of insureds than does the broader underlying policy.

II. Universal's summary judgment motion

¶11 Although Universal admits Burnsville would be vicariously liable had Lee been within the scope of his employment at the time of the accident, it argues there was no evidence Lee actually was, and therefore, the circuit court should have granted Universal's summary judgment motion. In response, the Riemers contend the trial court found Lee was within the scope of his employment at the time of his accident. In addition, they argue Universal cannot contest this ruling because it did not raise the issue in its appeal. The Riemers' arguments are not persuasive and we determine Universal is entitled to summary judgment.

¶12 Pursuant to WIS. STAT. § 802.08(2), summary judgment must be entered "if 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." If the pleadings state a claim for relief and the responsive pleadings join the issue, we must examine the summary judgment submissions to determine whether they set forth specific evidentiary facts to demonstrate a genuine issue for trial. *See* WIS. STAT. § 802.08(3); *Transportation Ins. Co. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993). Here, we must determine whether the record shows a genuine issue of fact regarding whether Lee was within the scope of his employment at the time of his accident. We conclude it does not.

¶13 Except for the Riemers' arguments on appeal, there is nothing indicating they ever claimed Lee was within his employment at the time of the accident. In their complaint, the Riemers merely assert Lee was "permissively" operating the vehicle and do not even allege he was a Burnsville employee.

Further, in the affidavit supporting their declaratory judgment motion, the Riemers attached an adjuster's report that specifically says Lee was not in the scope of his employment. In addition, the Riemers repeatedly admitted in their trial court briefs that Lee was not within the scope of his employment. Nothing in the record suggests the Riemers contested the issue. If the party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial in response to the movant's submissions, then summary judgment shall be entered against the party. *Larson v. Kleist Builders, Ltd.*, 203 Wis. 2d 341, 345, 553 N.W.2d 281 (Ct. App. 1996).

¶14 Contrary to the Riemers' assertions, the trial court did not find Lee was acting within the scope of his employment. Although the trial court addressed some scope of employment issues in its oral ruling, it never explicitly held Lee was within the scope of employment at the time of the accident. Nor does the court's written order mention scope of employment. Although Universal's summary judgment motion was based on an argument Lee was not within the scope of his employment, the denial of that motion is not a finding Lee was acting within the scope of his employment. Instead, it appears the court based the denial on its determination the umbrella policy's coverage was coextensive with the underlying policy.

¶15 We also reject the Riemers' claim that Universal failed to address the scope of employment issue in its appeal and therefore abandoned the issue. Whether Lee was within the scope of his employment was the focus of Universal's summary judgment motion, which it is now appealing, along with the granting of the Riemers' declaratory judgment motion. Although Universal did not address the issue in its initial brief, we note the trial court's decision and order denying

Universal's motion focused on the interpretation of the umbrella policy, not scope of employment.

CONCLUSION

¶16 The umbrella policy only covers Burnsville, its two owners and its employee retirement fund. It would cover Lee's negligence under a theory of vicarious liability had he been acting within the scope of his employment at the time of the accident. The circuit court record, however, does not disclose that a genuine dispute exists between the parties on this issue and, therefore, Universal is entitled to summary judgment.

By the Court.—Order reversed.

Not recommended for publication in the official reports.