COURT OF APPEALS DECISION DATED AND FILED

May 5, 2011

A. John Voelker
Acting 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. 2010AP1079 **Cir. Ct. No. 2008CV3857**

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

ROBERT POORMAN AND LOIS POORMAN,

PLAINTIFFS-APPELLANTS,

V.

PROGRESSIVE UNIVERSAL INSURANCE COMPANY AND SPENCER D. BREITHAUPT,

DEFENDANTS,

SAMANTHA J. YOUNG,

DEFENDANT-CO-APPELLANT,

FARMERS AUTOMOBILE INSURANCE ASSOCIATION,

DEFENDANT-RESPONDENT,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed*.

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

¶1 PER CURIAM. This is an insurance policy coverage dispute arising out of a fatal car accident. Robert Poorman, Lois Poorman, and Samantha Young appeal the summary judgment granted to Farmers Automobile Insurance Association. The issue is whether a homeowner's insurance policy Farmers issued to another man, Laurence Rusniak, provides coverage for his son-in-law under the facts of this case. The circuit court determined that the policy did not provide coverage, and we agree.

¶2 The incident that gave rise to this dispute occurred when Young, who was under the influence of alcohol and drugs, rear-ended a car, killing the Poormans' daughter. The Poormans brought a wrongful death action against Young. Young testified at a deposition that she had been at Spencer Breithaupt's house right before the accident, and that he had given her alcohol and cocaine. Young was nineteen years old at the time. The Poormans then asserted a cause of action against Breithaupt.

¶3 Farmers became involved in the case because the house in which Breithaupt lived was owned by Breithaupt's father-in-law, Rusniak. Rusniak had purchased the house from his daughter, with the intent that she and Breithaupt would continue to live there. Rusniak also purchased homeowner's insurance for the house from Farmers. Young and the Poormans both argued in the circuit court that Breithaupt was covered by this insurance policy for this incident. Farmers moved for summary judgment arguing that Rusniak's policy did not cover

Breithaupt for this incident. The circuit court agreed, and both the Poormans and Young appeal.

¶4 The Poormans and Young raise a number of arguments to support their contention that the policy provides coverage for this incident. We conclude, however, that Breithaupt was not an insured under the terms of the insurance policy, and therefore, the policy does not cover him. Because we reach this conclusion, we need not address the other issues raised in the Poormans' brief. In addition, Young argues that the policy should be reformed to include coverage for Breithaupt because Rusniak intended the policy to cover the house and its contents. We are not, however, convinced that reformation is appropriate in this case. We affirm the circuit court's judgment.

¶5 We first address whether Breithaupt was a covered insured under Rusniak's policy with Farmers. The policy defines insureds, in relevant part, as "[y]ou and the residents of your household" who are relatives. No one disputes that Breithaupt and Rusniak are related. The issue presented here is whether Breithaupt is a "resident[] of [Rusniak's] household."

¶6 The Poormans argue that Breithaupt is a "resident of Rusniak's household" because he resided in the house Rusniak owned, and because Rusniak's deposition testimony established that Rusniak intended that the insurance he purchased cover Breithaupt. The Poormans do not dispute that Breithaupt and Rusniak never resided under the same roof. They argue, however, that resident relatives are not required to reside under the same roof.

¶7 The determination of residency is fact-specific to each case. ***Ross v. Martini***, 204 Wis. 2d 354, 358, 555 N.W.2d 381 (1996). The determination depends on three factors:

> (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship … in contracting about such matters as insurance or in their conduct in reliance thereon.

Pamperin v. Milwaukee Mut. Ins. Co., 55 Wis. 2d 27, 36-37, 197 N.W.2d 783 (1972) (citation omitted). "[L]iving together under one roof as a family is neither the sole nor the controlling test of whether a person is a resident or member of the household." ***Id.*** at 33-34. "[A]ll of the elements must combine to a greater or lesser degree in order to establish the relationship." ***Id.*** at 37.

¶8 The Poormans argue that the cases decided after ***Pamperin*** have held that the policy holder and the person claiming coverage need not reside under the same roof for coverage to be found. *See* ***Ross***, 204 Wis. 2d at 359. This is an accurate statement of the rule, but it is taken out of context.

¶9 None of the cases on which the Poormans rely involved a fact situation in which the policy holder and the person claiming coverage *never* resided under the same roof. The issues in those cases were whether the person claiming coverage was still a member or resident of the household even though they no longer lived under the same roof, or whether the person had lived under the same roof for a sufficient amount of time to be considered a resident or member of that household. *See eg.,* ***Ross***, 204 Wis. 2d at 360 (son of divorced parents who had lived with both parents was a resident of both households); ***Belling v. Harn***, 65 Wis. 2d 108, 116-17, 221 N.W.2d 888 (1974) (wife was resident of the same household as her husband under the terms of the insurance policy when they were divorcing and living separately); ***Londre v. Continental Western Ins. Co.***, 117 Wis. 2d 54, 60, 343 N.W.2d 128 (Ct. App. 1983) (son was

not a resident of his father's household when the father had irregular and infrequent visits with the son).

¶10 We are not convinced that the phrase "residents of your household" includes the situation presented by this case in which Breithaupt and Rusniak never actually lived together. Consequently, we conclude that Breihaupt was not a "resident of [Rusniak's] household," and therefore was not an "insured" under the policy. Because we have concluded that Breithaupt was not covered by the policy, we need not address the other arguments involving the terms of the policy.

¶11 In a separate brief, Young argues that the court should reform the policy to include coverage for Breithaupt. Young asserts that Rusniak's deposition testimony established that he intended and expected coverage for his daughter and son-in-law.

¶12 An insurance contract "may be reformed when the 'writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing.'" ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876 (citation omitted). When a party "states the facts to the agent and relies on [the agent] to write the policy, which will protect his interests, and the agent so understands, but fails by mistake to so write the contract, the mistake is considered mutual." ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 187, 148 N.W.2d 641 (1967) (citation omitted). A mistake because of an agent's negligence is also "'satisfactory ground for reformation, since the insured ordinarily relies upon the agent to set out properly the facts in the application.'" ***Vandenberg***, 244 Wis. 2d 802, ¶54 (citing ***Artmar, Inc.***, 34 Wis. 2d at 187). Therefore, reformation is allowed when there is a mistake by an agent

"even though the mistake is not technically mutual." ***Vandenberg***, 244 Wis. 2d 802, ¶54.

¶13 Young argues that the policy here should be reformed because Rusniak intended the policy to cover the Breithaupts. Neither the facts nor the law support this assertion. Rusniak never stated that he intended to purchase coverage for the Breithaupts, and he did not contend that the agent made a mistake regarding the policy. In his deposition testimony, Rusniak said his intent when purchasing the insurance policy was "[t]o make sure I was covered in case of fire or theft or whatever. So I – I had to satisfy the mortgage company to have insurance on the house." The policy he obtained from Farmers provided this coverage. When asked if he had told the agent that someone other than he would be living in the house, Rusniak replied: "I don't believe that was brought up in the conversation, to my knowledge."

¶14 Rusniak received the insurance coverage he requested. Rusniak did not request coverage for the Breithaupts when he purchased the insurance from Farmers, and he did not tell the agent that the Briethaupts were living in the insured home. Even if Rusniak had thought he was purchasing coverage for Breithaupt, there is no evidence to suggest that he conveyed this intention to the agent. In the absence of such evidence, we cannot conclude that the agent acted negligently by failing to provide this coverage. We see no basis under these circumstances for reforming the policy Rusniak received.

¶15 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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