COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1948 **Cir. Ct. No. 2005CV39**

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

RANDY L. SCHMUCK,

PLAINTIFF-APPELLANT,

V.

BITUMINOUS FIRE AND MARINE INSURANCE COMPANY, A/K/A BITUMINOUS CASUALTY CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Randy Schmuck appeals an order granting Bituminous Casualty Corporation's motion for summary judgment. The circuit court concluded worker's compensation was Schmuck's exclusive remedy and

dismissed Schmuck's complaint, in which he sought uninsured motorist (UM) benefits under his employer's auto policy. We affirm.

BACKGROUND

¶2 Schmuck and coworker Ryan Oja, both employees of Push, Inc., were working in Park Falls, Wisconsin, in 2002. After work one night, they ate dinner at a bar and grill. Both were drinking. They stayed at the bar for a few hours, then left in a truck owned by Push. Oja offered to drive. Oja drove the truck through a ditch and onto the highway, where it was struck by a semi truck. Schmuck sustained significant injuries.

¶3 Schmuck received nearly $442,000 in benefits through Push's worker's compensation insurer. Schmuck then brought suit against Push's auto insurer, Bituminous, seeking UM benefits.[1] The matter was referred to the Department of Workforce Development to determine whether Schmuck's injuries were sustained in the scope of his employment. An administrative law judge concluded they were. That decision was affirmed by the Labor and Industry Review Commission and the circuit court.

¶4 Bituminous then filed a motion for summary judgment, asserting that worker's compensation provided the exclusive remedy for Schmuck's

[1] Oja was originally named as a defendant in Schmuck's complaint, but filed for bankruptcy and was dismissed from the action.

injuries. *See* WIS. STAT. § 102.03(2).[2] The circuit court agreed and dismissed Schmuck's complaint.

DISCUSSION

¶5 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. That methodology is well-established and need not be recited here. *See* ***id.***, ¶41. "Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***, ¶42; *see also* WIS. STAT. § 802.08(2).

¶6 Schmuck seeks UM benefits, and we therefore begin with the pertinent insurance policy language. Push's UM endorsement states that Bituminous will pay "all sums the 'Insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.'" There is no dispute that Schmuck was an insured passenger in an uninsured motor vehicle. Thus, the success of Schmuck's claim turns on whether Schmuck was "legally entitled to recover" compensatory damages from Oja.

¶7 Insurance contract interpretation is a question of law that we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. The same rules of construction that govern contracts are applicable to

[2] WISCONSIN STAT. § 102.03(2) states that "the right to recovery of [worker's] compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier."

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

insurance policies. ***Id.*** The goal of contract interpretation is to give effect to the intent of the parties as expressed in the language of the policies. ***Id.***

¶8 Schmuck contends that the phrase "legally entitled to recover" is ambiguous and should be construed in favor of coverage. *See* ***id.***, ¶13. He argues that the phrase refers only to the twin concepts of fault and damages, without consideration of any affirmative defenses available to the alleged tortfeasor. Thus, Schmuck contends the circuit court wrongly barred coverage based on WIS. STAT. § 102.03(2)'s exclusivity provision.

¶9 The principal case Schmuck relies on is not on point. In ***Sahloff v. Western Casualty & Surety Co.***, 45 Wis. 2d 60, 171 N.W.2d 914 (1969), our supreme court considered whether "a suit brought on the uninsured motorist coverage is governed by the three-year tort statute of limitations … or by the six-year statute of limitations prescribed for contracts …." ***Id.*** at 64. The insurer asserted that the tort limitations period applied and had passed, and therefore the plaintiff had no claim against the insurer because the plaintiff was not "legally entitled to recover" from the alleged tortfeasor. ***Id.*** at 64-65. Our supreme court rejected that argument. It construed the phrase "legally entitled to recover" as intended only to "keep the fault principle as a basis for recovery against the insurer[,]" and determined that an insured "need only have had a cause of action against the uninsured motorist." ***Id.*** at 69. An action on a UM policy to recover benefits "sounds in contract although in order to recover the insured must prove the negligence of an uninsured motorist." ***Id.*** at 70.

¶10 Any ambiguity left in ***Sahloff***'s discussion of the phrase "legally entitled to recover" was clarified in ***State Farm Mutual Automobile Insurance Co. v. Gillette***, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662. There, our

supreme court distilled from ***Sahloff*** the essential holding that "the insured's cause of action against the tortfeasor must exist *at the time of the accident* and need not also be enforceable against the tortfeasor at the time the insured sues the insurance company." ***Gillette***, 251 Wis. 2d 561, ¶39. Indeed, the court flatly rejected the notion that proof of fault and damages alone entitles an injured party to collect under tort law for purposes of underinsured motorist coverage.[3] ***Id.***, ¶43. Instead, the phrase "legally entitled to collect" "embraces the limitations imposed by law on the amount or type of damages recoverable from the driver of the underinsured motor vehicle." ***Id.***, ¶42. Under Wisconsin law, then, "legally entitled to recover" has a defined meaning and is not ambiguous.

¶11 Here, the circuit court properly concluded that the exclusivity provision of the Worker's Compensation Act bars Schmuck's claim for UM coverage. WISCONSIN STAT. § 102.03(1) provides that an employer is liable for worker's compensation purposes when certain conditions are met. "Where such conditions exist the right to the recovery of compensation under this chapter *shall be the exclusive remedy against the employer, any other employee of the same employer* and the worker's compensation insurance carrier."[4] WIS. STAT. § 102.03(2) (emphasis added). Schmuck concedes these conditions of liability have been met; indeed, he has claimed worker's compensation benefits for his injuries. We agree with the circuit court; any claim Schmuck might have had

[3] Wisconsin courts treat underinsured and uninsured cases interchangeably for purposes of interpreting the phrase "legally entitled to recover." ***State Farm Mut. Auto Ins. Co. v. Gillette***, 2002 WI 31, ¶29 n.19, 251 Wis. 2d 561, 641 N.W.2d 662. In addition, courts do not differentiate between the phrases "legally entitled to recover" and "legally entitled to collect." ***Id.***

[4] The exclusivity provision contains three exceptions not at issue in this case.

against Oja was extinguished by the exclusivity provision as soon as the claim arose.

¶12 Schmuck's attempt to argue around the exclusivity provision is unpersuasive. He notes that the exclusivity provision uses the term "employee," which is defined by WIS. STAT. § 102.07. Under § 102.07(4)(a), an employee is someone "in the service of another under any contract of hire, express or implied, … if employed with the knowledge, actual or constructive, of the employer …." However, § 102.07(4)(a)2. excludes "[a]ny person whose employment is not in the course of a trade, business, profession or occupation of the employer …." Schmuck argues that Oja was not an employee because the accident occurred while Schmuck was off-duty and intoxicated.

¶13 Schmuck's argument is premised on a misconstruction of WIS. STAT. § 102.07. The statute is primarily concerned with identifying an employer-employee relationship in the first instance. *See* ***County of Barron v. Labor & Indus. Review Comm'n***, 2010 WI App 149, ¶11, 330 Wis. 2d 203, 792 N.W.2d 584. Contrary to Schmuck's contention, § 102.07(4)(a)2. does not require that an alleged tortfeasor be acting in the course and scope of his or her employment at the time of the wrongful conduct.

¶14 In fact, we have repeatedly rejected similar arguments in other cases. In ***Rivera v. Safford***, 126 Wis. 2d 462, 467, 377 N.W.2d 187 (Ct. App. 1985), the plaintiff argued that "worker's compensation precludes relief against a coemployee *only* where the coemployee was acting within the scope of his employment." Interpreting WIS. STAT. § 102.03, we concluded that "only the injured employee, and not the injuring coemployee, need have been acting within the scope of his or her employment at the time of the injury." ***Id.*** at 467-68. We

confirmed this conclusion in ***Mudrovich v. Soto***, 2000 WI App 174, ¶10, 238 Wis. 2d 162, 617 N.W.2d 242, when we rejected the plaintiff's "mistaken" argument that alleged tortfeasors must be performing services incidental to their employment.

¶15 Schmuck's argument is also contrary to our supreme court's precedent. The argument that a wrongdoer must be acting in the course of employment is based on a clear misreading of WIS. STAT. § 102.03. *See* ***Jenson v. Employers Mut. Cas. Co.***, 161 Wis. 2d 253, 270, 468 N.W.2d 1 (1991). In ***Jenson***, the supreme court explicitly adopted our conclusion in ***Rivera*** and held that exclusivity barred a plaintiff's claim even though the wrongful conduct occurred on the streets outside the course of the parties' employment.[5] ***Id.***

¶16 Schmuck's brief includes a number of arguments that do not merit individual attention. For example, he claims Wisconsin's omnibus statute, WIS. STAT. § 632.32(6)(b)2.a., mandates coverage in this case. He also claims that Bituminous has waived the exclusivity defense by virtue of a provision in its insurance contract. For one thing, Schmuck does not adequately explain or develop these arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). For another, he fails to respond to Bituminous's arguments to the contrary. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[5] Schmuck asserts that none of the three cases interpreted the exclusivity provision found in WIS. STAT. § 102.03(2). To the contrary, the plaintiffs' attempts to get out from under the exclusivity provision were at the heart of each case.

In the alternative, Schmuck requests that we certify this case to the state supreme court because the three cited decisions "ignore the … definition for 'employee'" and are "clearly erroneous." We think our prior decisions are well-reasoned and decline Schmuck's invitation.

By the Court.—Order affirmed.

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