

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2004

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. 04-0762-FT
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000050

**IN COURT OF APPEALS
DISTRICT III**

SUSAN M. SUHR AND GERALD L. SUHR,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Susan and Gerald Suhr appeal a summary judgment dismissing their personal injury action against Allstate Insurance Company. Susan Suhr was injured in a traffic accident with Benjamin Alstatt while he was operating a pickup truck owned by his father's business. Allstate insured the Alstatt's private automobile. The trial court concluded that Benjamin

was not insured under the Allstate policy because he was driving a vehicle available for his regular use that was not covered under the policy. The Suhrs argue that: (1) the Allstate policy insured Benjamin or, at a minimum, was ambiguous on that question; and (2) the pickup truck was not available for Benjamin's regular use. We reject these arguments and affirm the judgment.

¶2 Construction of an insurance contract is a question of law subject to *de novo* review. See *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. We construe an insurance policy to give effect to the parties' intent, expressed in the language of the policy itself, which we interpret as a reasonable person in the position of the insured would understand it. *Id.* An ambiguous policy is one that is susceptible to more than one reasonable construction when read in context. See *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990).

¶3 The Allstate policy is not susceptible to a reasonable construction that would insure Benjamin while he was driving the pickup truck. The policy extends liability coverage for bodily injury or property damage arising out of the use of an insured auto. The pickup truck was not an insured auto under the policy. An "insured person," such as Benjamin, is covered while using a "non-owned auto," which the policy defines as an auto not "available or furnished for the regular use of an insured person." Therefore, the policy unambiguously does not extend coverage to Benjamin while he was driving a vehicle not insured under the policy that was available for his regular use.

¶4 The Suhrs argue that the policy contains no "exclusion" for non-owned autos available for regular use. They cite numerous cases in which exclusions have been upheld. The law does not require that an insurance policy

deny coverage by use of an exclusion. The policy may simply fail to extend coverage in the first instance. Allstate's policy only purports to extend liability coverage to an insured person operating an insured auto. The definitions of those terms in the policy preclude coverage for Benjamin while he is operating another vehicle that is available for his regular use.

¶5 Undisputed evidence establishes that the pickup truck was available for Benjamin's regular use at the time of the accident. The Suhrs focus on the availability of the truck in the months and years before the accident. However, for more than two months before the accident, Benjamin had taken the truck to college and had no restrictions placed upon its use. Restrictions on Benjamin's use of the vehicle during the preceding summers is irrelevant.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

