COURT OF APPEALS DECISION DATED AND RELEASED

May 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 95-1561

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

DAVID KADLAC, d/b/a DAVE'S MOBILE GAS STATION and ROBIN BARONSKY,

Plaintiffs-Respondents,

v.

THERON A. NAIR, AUBREY M. NAIR and RAHNOD C. WEAVER,

Defendants-Respondents,

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervening Defendant-Appellant.

ADALBERT MENZER and HANNAH MENZER,

Plaintiffs-Respondents,

v.

THERON A. NAIR, AUBREY M. NAIR and RAHNOD C. WEAVER,

Defendants-Respondents,

DAVE'S INTERSTATE TOWING, INC., GENERAL CASUALTY COMPANY OF WISCONSIN and STATE OF WISCONSIN DEPARTMENT OF JUSTICE,

Defendants,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervening Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Reversed and cause remanded*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. We granted State Farm Mutual Automobile Insurance Company leave to appeal from a circuit court order which denied its motion for summary judgment and required it to provide liability coverage for the perpetrators of a drive-by shooting. We reverse the circuit court on the grounds that under a conflict of laws analysis, Michigan law governs interpretation of the insurance contract and the coverage question in this case. Applying Michigan law, we conclude that State Farm does not owe coverage to the perpetrators of the drive-by shooting.

The following facts are not disputed by the parties. On July 16, 1993, Theron A. Nair, his brother, Aubrey, and Rahnod C. Weaver stopped for food at Dave's Mobile Station in Kenosha, Wisconsin, on their way to Chicago by car from Michigan. The parties were traveling in Weaver's vehicle. The vehicle was insured by State Farm under a policy issued to Weaver, who was a

resident of the K.I. Sawyer Air Force Base in Michigan. The State Farm policy was in effect on the date of the shooting. Weaver's vehicle was garaged in Michigan, the lien holder was a Michigan bank and the State Farm policy was applied for, issued and delivered in Michigan by a Michigan agent. Apparently, the parties do not dispute that Weaver held a valid Wisconsin driver's license.[1]

For reasons not relevant to this appeal, either Theron or Aubrey fired a weapon numerous times from Weaver's vehicle as it drove through the gas station parking lot,[2] injuring bystanders Adalbert Menzer and Robin Baronsky. Menzer and Baronsky (among others) sued the perpetrators and others. State Farm intervened as Weaver's insurer and sought a ruling that it did not provide liability coverage for the injury and property damage claims. The circuit court declined to grant summary judgment to State Farm.[3] We granted State Farm leave to appeal the trial court's refusal to grant summary judgment.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Belland v. Allstate Ins. Co.,*** 140 Wis.2d 391, 395, 410 N.W.2d 611, 612 (Ct. App. 1987). We will reverse a trial court's refusal to grant summary judgment if it has incorrectly decided a legal issue. ***Id.*** at 395, 410 N.W.2d at 613.

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[1] The record is not entirely clear on this point, however. The driver's license number provided by Weaver in the application for the State Farm policy matches the license number appearing on the Michigan registration for his vehicle. However, a driving record abstract provided by the State of Wisconsin Department of Transportation for an individual named "Rahnod Weaver" contains a different license number. Notwithstanding this conflict in the record, we will accept the parties' apparent agreement that Weaver held a Wisconsin driver's license. We note that the record does not explain why Weaver held a Wisconsin license.

[2] At various points, both Theron and Aubrey have claimed responsibility for the shooting. Their reasons for doing so are not relevant here. However, it is undisputed that the shots were fired from Weaver's vehicle.

[3] The parties agree that the court did not explicitly decide whether Wisconsin or Michigan law would apply. Apparently the circuit court did not find a basis for summary judgment under either state's law.

Interpretation of State Farm's insurance contract depends on whether Wisconsin or Michigan law applies. The contract provides:

> We will pay damages which an *insured* becomes legally liable to pay because of:
>
> 1.*bodily injury* to others, and
>
> 2.damage to or destruction of property including loss of its use, caused by accident resulting from the ownership, maintenance or use of *your car.*

In deciding which state's law governs interpretation of this provision, we apply the analysis used in ***Belland***.

> Contract rights are to be determined by the local law of the state with which the contract has its most significant relationship. The factors measuring this relationship are: (1) place of contracting; (2) place of performance; (3) place of the subject matter of the contract; (4) domicile, nationality, place of incorporation and place of business of the parties; (5) law under which the contract will be most effective; and (6) other contracts presented in the given case. A mere counting of the contacts is not determinative of the law to be applied. Rather, a qualitative analysis of the contacts should be made in light of the policies of the competing jurisdictions.

Id. at 397-98, 410 N.W.2d at 613-14 (citations omitted).

Here, assessing the contacts qualitatively, we conclude that they favor the application of Michigan law. It is undisputed that the policy was applied for, issued and delivered in Michigan by a Michigan agent to a Michigan resident on a vehicle garaged in Michigan (the factors relating to the contract itself). In contrast, the contacts with Wisconsin are minimal and, in

some respects, fortuitous: Weaver's vehicle was passing through Wisconsin on its way to Chicago when the shooting occurred, Weaver held a Wisconsin driver's license and Baronsky is domiciled in Wisconsin.

Although the incident occurred in Wisconsin and the owner of the vehicle was a licensed Wisconsin driver, these factors do not control the conflicts question presented. *See* ***id.*** at 398, 410 N.W.2d at 614. The Wisconsin contacts are neither sufficient in quantity nor quality to override the quality and quantity of contacts with Michigan. We conclude that Michigan law governs whether State Farm owes coverage for the drive-by shooting.

Applying Michigan law, we conclude that the holding in ***Auto Owners Ins. Co. v. Rucker,*** 469 N.W.2d 1 (Mich. Ct. App. 1991), disposes of the coverage question in this case. Under its policy, State Farm agreed to pay damages for which an insured is legally liable because of bodily injury or property damage "caused by accident resulting from the ownership, maintenance or use of *your car*." In ***Rucker,*** the policy also provided coverage for damage incurred by the insured "arising out of the use of an automobile." The issue before the ***Rucker*** court was whether the death of a bystander in a drive-by shooting arose out of use of the motor vehicle. The ***Rucker*** court held that "[f]or that clause to apply, a causal connection between the use of the vehicle and the injury must be shown. The connection must be more than incidental or fortuitous." ***Id.*** at 1. The court stated that "[t]he injury must be foreseeably identifiable with the normal use of the vehicle." ***Id.*** at 2.

The ***Rucker*** court held that the death arose from the firing of a shotgun and while use of the vehicle made it easier for the perpetrators to approach the scene and escape, use of the vehicle "was nonetheless incidental to the injury." ***Id.*** The court stated that drive-by shootings "are not identified with the normal use of a motor vehicle." ***Id.*** Therefore, the death did not arise out of use of an automobile as contemplated by the insurance policy and there was no coverage for the claim.

In light of the holding in ***Rucker,*** which we are bound to apply to State Farm's insurance contract in this case, we conclude that State Farm did not owe coverage for the drive-by shooting. The circuit court erred in denying

summary judgment to State Farm on this issue. Accordingly, we reverse and remand for the entry of a judgment dismissing State Farm from the action.

By the Court.—Order reversed and cause remanded.

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