**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 26, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**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* § 808.10 and RULE 809.62, STATS.**

**No. 98-1372**

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

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**LISA M. LAPOINTE, CHARLIE A. CIEZKI AND JORY A. LAPOINTE, BY THEIR GUARDIAN AD LITEM, DAVID H. HUTCHINSON,**

**PLAINTIFFS-APPELLANTS,**

**HUMANA INSURANCE COMPANY, F/K/A WISCONSIN HEALTH ORGANIZATION INSURANCE COMPANY, AND ITT CEBSCO,**

**INVOLUNTARY-PLAINTIFFS,**

**V.**

**JAMES E. SERCOMBE III, JAMES SERCOMBE, JR., SHIRLEY M. SERCOMBE, AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANTS,**

**AMERICAN AND FOREIGN INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Wilk,[1] JJ.

PER CURIAM. Lisa M. LaPointe and her minor children have appealed from a summary judgment dismissing their complaint against American and Foreign Insurance Company (A & F). In the judgment, the trial court determined that an insurance policy issued by A & F to Sales Force Companies, Inc., provided no coverage for injuries suffered by LaPointe when her automobile was struck by a car driven by James E. Sercombe III (Jamie), the minor son of James Sercombe, Jr. (Sercombe), an employee of Sales Force. We affirm the judgment.

When, as here, material facts are undisputed and the sole issue involves the interpretation of an insurance policy, a question of law is presented which is appropriate for summary judgment. *See* ***Greene v. General Cas. Co.***, 216 Wis.2d 152, 157, 576 N.W.2d 56, 59 (Ct. App. 1997), *review denied*, 216 Wis.2d 612, 579 N.W.2d 44 (1998). This court reviews the trial court's decision granting summary judgment de novo, applying the same standards as those employed by the trial court. *See* ***id.*** The interpretation of an insurance contract also presents a question of law for this court's independent review. *See* ***id.***

Insurance policies are controlled by the same rules of construction that govern other contracts. *See* ***Meyer v. City of Amery***, 185 Wis.2d 537, 543, 518 N.W.2d 296, 298 (Ct. App. 1994). The goal is to ascertain the intentions of

[1] Circuit Judge S. Michael Wilk is sitting by special assignment pursuant to the Judicial Exchange Program.

the contracting parties. *See* ***Rohloff v. Heritage Mut. Ins. Co.***, 179 Wis.2d 165, 170, 507 N.W.2d 112, 114 (Ct. App. 1993). Insurance policies are to be construed to give their language the common and ordinary meaning as that language would be understood by a reasonable person in the position of the insured. *See* ***C.L. v. School Dist. of Menomonee Falls***, 221 Wis.2d 692, 697, 585 N.W.2d 826, 828 (Ct. App. 1998). Ambiguities in coverage must be construed in favor of coverage, while exclusions must be narrowly construed against the insurer. *See* ***Meyer***, 185 Wis.2d at 543, 518 N.W.2d at 298. However, words or phrases are ambiguous only when they are reasonably susceptible of more than one reasonable construction, and when a policy's terms are plain they cannot be rewritten by construction. *See* ***id.***

It is undisputed that A & F issued a commercial fleet policy to Sales Force. It is also undisputed that at the time of the injuries to LaPointe, Sales Force provided a Mercury Topaz automobile to Sercombe which he used for both business and personal matters. However, at the time of the accident involved here, Jamie was not driving the Mercury Topaz, but was instead driving a Buick Century which was owned by Sercombe personally and insured by him with another insurer.

LaPointe argues that Sercombe is an insured under the commercial fleet policy issued by A & F to Sales Force and that the policy provides coverage for this accident even though the vehicle involved in the accident was not the vehicle provided to Sercombe by Sales Force. We disagree.

Section II-Liability Coverage of the policy issued by A & F to Sales Force provides:

> A. COVERAGE
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

The policy further provides:

> 1. WHO IS AN INSURED
>
> The following are "insureds":
>
> a. You for any covered "auto."
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.

The policy provides that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." The "Named Insured" listed in the declarations page is "The Sales Force Companies Inc." The declarations page and Section I definition of "covered autos" further provide that a covered auto for liability purposes is "any 'auto.'"

LaPointe contends that Sercombe was an insured at the time of this accident because the accident occurred "while [he was] using with … permission" the Mercury Topaz, an auto owned by Sales Force. She asserts that Sercombe was an insured under the terms of the policy issued by A & F throughout the time Sales Force permitted him to use an auto owned by it, regardless of whether the auto owned by Sales Force was the auto involved in the accident for which liability coverage was sought and regardless of whether Sercombe was involved in the accident. Because a "covered auto" is defined as "any auto," she asserts that coverage exists under the policy provision indicating that A & F will pay all sums

an "insured" must pay as damages caused by an accident resulting from use of a covered auto.

LaPointe's construction of the policy issued by A & F would extend benefits under that policy to a degree never contemplated by the insured or insurer. The policy purchased by Sales Force was a commercial fleet policy. It covered vehicles owned by the named insured, Sales Force. It provided additional coverage to anyone who used a covered vehicle with Sales Force's permission.

Because Sales Force is the named insured, the policy provides it with coverage for "any auto." However, because Sales Force is the only named insured, it is the only insured encompassed within the definition of an insured as "[y]ou for any covered 'auto.'" Sales Force's employees are not "insureds" under that provision. *See* ***Meyer***, 185 Wis.2d at 544, 518 N.W.2d at 298.

Sercombe is an insured under the policy, but only under limited conditions—namely, *while using* a vehicle owned, hired or borrowed by Sales Force with Sales Force's permission. This accident did not occur while Sercombe was using the Mercury Topaz owned by Sales Force, nor did it involve the Topaz in any manner. It occurred while Sercombe's son was using a Buick Century owned solely by Sercombe, not by Sales Force.

LaPointe attempts to construe "while using" in the "WHO IS AN INSURED" provision to mean that coverage is provided to Sales Force employees for all motor vehicle accidents which occur during the time period they possess a vehicle owned by Sales Force with Sales Force's permission. Such a construction of the words "while using" would result in an oversimplification of the policy, inconsistent with the intent and purpose of a commercial fleet policy and the

unambiguous meaning of the words.[2] The policy simply does not extend to other vehicles personally owned by Sercombe, particularly when the other vehicle is operated by someone other than Sercombe. To construe it in such a manner would extend the benefits granted and broaden the risks imposed to a degree not contemplated by the seller or purchaser of a commercial fleet policy. *Cf.* ***id.*** at 546-47, 518 N.W.2d at 299-300.

LaPointe relies upon ***Greene***, 216 Wis.2d at 160, 576 N.W.2d at 60, for the proposition that coverage is provided under the A & F policy even for Sercombe's personally owned vehicle because the A & F policy defined a "covered auto" as "any auto." However, LaPointe's reliance upon ***Greene*** is misplaced. In that case, the employee for whom coverage was claimed was specifically included as an insured under an additional interest endorsement section of the policy which provided insurance to the employee for any auto that he drove. *See* ***id.*** at 159-60, 576 N.W.2d at 60. In contrast, only Sales Force is a named insured under the A & F policy, and Sercombe is an insured only "while using" a Sales Force vehicle with the permission of Sales Force. Nothing in ***Greene*** supports LaPointe's argument that an employee is insured for accidents involving all vehicles, including those not owned, hired or borrowed by Sales Force, simply because the employee permissibly has possession of a Sales Force vehicle.

[2] LaPointe contends that the words "while using" are ambiguous and compel the construction advocated by her. We reject this argument because we conclude that no reasonable insured would construe that language to mean that insurance provided to him or her by the employer while driving a company-owned car with the permission of the employer would also provide coverage for a privately-owned vehicle being driven by the employee's child.

Because we conclude that Sercombe is not an insured under the A & F policy for purposes of this accident, we need not address any liability and coverage issues related to Sercombe's sponsorship of Jamie's driver's license under § 343.15, STATS.

*By the Court.*—Judgment affirmed.

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