COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 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. 98-2243

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

EDWARD T. MAJEWSKI AND MARCI E. MAJEWSKI, INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF MICHAEL MAJEWSKI,

PLAINTIFFS-RESPONDENTS,

V.

TODD GREMLER AND ROSE GREMLER,

DEFENDANTS,

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Wisconsin Mutual Insurance Company appeals a declaratory judgment that held its homeowners' policy gave Todd and Rose Gremler liability coverage for a wrongful death lawsuit concerning a four-month-old child who died at their home and in their care. The child's parents, Edward and Marcie Majewski, sued the Gremlers. Rose baby-sat neighbors' children, including the Majewskies' child, at her home for a fee; she charged the Majewskies $1.25 per hour. Wisconsin Mutual denied liability coverage under its business-pursuit exclusion, charging that Rose's childcare operations constituted a business, fell outside the premiums levied for homeowners' coverage, and needed a businesswoman's liability package. The trial court ruled on Wisconsin Mutual's motion for a declaratory judgment based on affidavits and depositions and, therefore, in effect granted summary judgment. It ruled that Rose's modest profits from her childcare operations disqualified those operations as a business. On appeal, Wisconsin Mutual argues that the trial court misapplied the policy to the facts. We agree with Wisconsin Mutual, reverse the judgment, and remand the matter for the issuance of a new judgment dismissing Wisconsin Mutual.

The trial court correctly granted summary judgment if there was no dispute of material fact and the Gremlers deserved judgment as a matter of law. *See* ***Powalka v. State Life Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We must give words in an insurance policy their ordinary meaning and owe no deference to the trial court's ruling. *See* ***Monfils v. Charles***, 216 Wis.2d 323, 332, 575 N.W.2d 728, 732 (Ct. App. 1998). Here, the Wisconsin Mutual homeowners' policy contains two relevant provisions. The policy (1) denies coverage for "liability resulting from activities in connection with an insured's business," and (2) defines business as including "services regularly provided by an insured for the care of others for which an insured is compensated." Not all

income-producing activities, however, qualify as business pursuits. As an aid in applying similar business-pursuit exclusions, courts have used a two-pronged test to judge whether particular income-producing activities constitute business pursuits: (1) continuity in operations; and (2) profit motive by the owner. *See* ***Monfils***, 216 Wis.2d at 334, 575 N.W.2d at 733. These tests require examination of all the relevant facts.

Here, the undisputed facts show that the Gremlers' childcare operations trigger the Wisconsin Mutual business-pursuit exclusion and childcare-provider definition. From 1992 through 1996, the Gremlers had annual revenues of $1,239, $4,001, $3,214, $2,671, and $951. While the Gremlers' profits were modest, it is undisputed that they also took tax advantages of the operations, deducting a share of utility expenses and property taxes from their income taxes, and they thereby benefited economically beyond the modest profits themselves. Rose's operations also went beyond the Majewskies' child; she cared for other children and was caring for two of them for pay at the time of the victim's death. This was not a case of isolated baby-sitting undertaken solely for the convenience of the children's parents. Rather, it was part of a larger, long-term enterprise with economic benefits to the caregiver herself. Viewed in this light, the Gremlers' childcare operations had the two prime characteristics of a business pursuit, continuity and profit motive, and the Gremlers therefore came within the terms of the business-pursuit liability exclusion.

The Gremlers also may not rely on the policy's exception to the business-pursuit exclusion. This exception gives coverage for "activities in conjunction with business pursuits which are ordinarily considered non-business in nature." Wisconsin courts have applied similar exceptions in other contexts. *See* ***Rufener v. State Farm Fire & Cas. Co.***, 221 Wis.2d 500, 585 N.W.2d 696

(Ct. App. 1998). In ***Rufener***, an adult was injured while helping a friend install a hoist in his garage; the friend used the hoist to dismantle equipment employed in his part-time snowplowing business. The ***Rufener*** court held such hoistwork "non-business" in nature, finding it tangential to the basic snowplowing operations. *See* ***id***. at 512, 585 N.W.2d at 701. Here, however, childcare was not tangential; it was the essence of Rose's service. Parents entrusted their children's safety to her, and Rose cannot reasonably argue that harm to those children was an activity that should be "considered non-business in nature." As a result, Rose could not rely on her homeowners' policy for liability coverage. Rather, Rose needed to purchase separate liability coverage for childcare business. On remand, the trial court shall dismiss Wisconsin Mutual from the lawsuit.

By the Court.—Judgment reversed and cause remanded for proceedings consistent with this opinion.

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