

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 98-3248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

RONALD J. TAYLOR AND CATHY TAYLOR,

PLAINTIFFS,

v.

**WEST AMERICAN INSURANCE COMPANY,
T&K HELGESEN, INC. AND MICHAEL J. COLLINS,**

DEFENDANTS-PETITIONERS-APPELLANTS,

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. West American Insurance Company, T&K Helgesen, Incorporated, and Michael J. Collins appeal from the trial court’s order granting partial summary judgment to St. Paul Fire & Marine Insurance Company.¹ West American argues that the trial court erred in concluding that the personal injury that Ronald J. Taylor allegedly sustained as a result of Collins’s negligence was not covered by an insurance policy that had been issued by St. Paul. West American also argues that Wisconsin’s omnibus statute requires the policy to provide coverage. We conclude that the trial court correctly determined that St. Paul’s policy did not provide coverage, and that the omnibus statute does not require the policy to provide coverage.² We therefore affirm.

I. BACKGROUND.

¶2 Taylor coordinated the construction of new homes for Sterling Building Systems, a division of Wausau Homes, Incorporated. Taylor was injured at the construction site for one of those new homes, when Collins, a crane operator employed by T&K Helgesen, dropped a beam, which he was unloading by hand from a semi-tractor/trailer, onto Taylor’s head.

¶3 Taylor filed a complaint against Collins, T&K Helgesen, and their liability insurer, West American. He also named St. Paul as a defendant because St. Paul had issued to Wausau Homes an insurance policy covering the semi-tractor/trailer that was involved in the accident. Additionally, St. Paul, as the

¹ Throughout this opinion, West American Insurance Company, T&K Helgesen, Incorporated, and Michael J. Collins will be referred to collectively as West American.

² West American raises additional issues that we do not reach because our conclusion that the policy does not provide coverage is dispositive. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (appellate court need only address dispositive issues).

worker's compensation insurer for Wausau Homes, had provided worker's compensation benefits to Taylor and, thus, had a subrogation interest in any recovery Taylor received for his injuries.

¶4 St. Paul filed a motion for partial summary judgment declaring that the insurance policy it had issued to Wausau Homes did not provide coverage for Taylor's injuries. The trial court granted the motion, concluding that an exclusion in the policy precluded coverage. West American now appeals.

II. ANALYSIS.

¶5 We review *de novo* the trial court's grant of summary judgment. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). WISCONSIN STAT. § 802.08(2) (1997-98), sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

¶6 "The construction of words and phrases in insurance policies is generally a matter of law and is controlled by the same rules of construction as are applied to contracts generally." *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). "Where no ambiguity exists in the terms of the policy, we will not engage in construction, but will merely apply the policy terms." *Id.* at 736.

¶7 The insurance policy that St. Paul issued to Wausau Homes provided, in relevant part:

What This Agreement Covers

Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:

- results from the ownership, maintenance, use, loading or unloading of a covered auto; and
- is caused by an accident that happens while this agreement is in effect.

It is undisputed that Collins was a protected person under St. Paul's policy and that Taylor's injuries were caused as a result of the unloading of a covered auto. The dispute centers on whether coverage is precluded by the following exclusion in the policy: "Employer's Liability. We won't cover bodily injury to an employee arising out of his or her employment by a protected person."

¶8 West American does not dispute that Sterling was a protected person under the policy or that Taylor's injuries arose out of his employment with Sterling. West American argues, however, that the exclusion does not preclude coverage here because Collins, as the allegedly negligent party, is the protected person under the policy, and Taylor was not employed by Collins. West American asserts that the phrase "a protected person" in the exclusion refers only to the alleged tortfeasor, and not to other protected persons under the policy.

¶9 In support of this argument, West American relies on *United States Fidelity & Guaranty Company v. PBC Productions, Inc.*, 153 Wis. 2d 638, 451 N.W.2d 778 (Ct. App. 1989). There, the plaintiff, Philip J. Wittliff, was a passenger in an automobile driven by Howard Larson, and was injured when the automobile collided with a logging truck. *See id.* at 640. Both Larson and Wittliff were employees of PBC Productions, and were acting in the scope of their employment at the time of the accident. *See id.* Larson was an "insured" under the terms of a business automobile insurance policy that USF&G had issued to

PBC because Larson was driving a covered automobile with PBC's permission. *See id.* Wittliff, therefore, notified USF&G that he intended to assert claims against the policy based on Larson's alleged negligence. *See id.*

¶10 USF&G argued that Larson's alleged negligence was not covered by the policy, based upon the following two exclusions:

WE WILL NOT COVER—EXCLUSIONS

This insurance does not apply to:

....

Any obligation for which the insured or his or her insurer may be held liable under any workers' compensation or disability benefits law or under any similar law.

....

Bodily injury to any employee of the insured arising out of and in the course of his or her employment by the insured.

Id. at 641-42. This court rejected USF&G's argument, concluding that the word "insured" in the exclusions referred to Larson, rather than PBC. We explained:

It is settled law in this state that when an employee seeks to recover for damages sustained as the result of a co-employee's negligence, and the co-employee is an insured under the employer's policy, the word "insured" in the exclusions at issue here refers to the co-employee tortfeasor, and *not* to the employer.

Id. at 642. Therefore, because Wittliff was not an employee of the insured, Larson, the exclusions did not preclude coverage.

¶11 Unlike the exclusions at issue in *PBC Productions*, the exclusion here is not limited to bodily injury to an employee arising out of employment by "the insured." Rather, the exclusion is broadly worded to preclude coverage for bodily injury to an employee arising out of employment by "a protected person."

Because the exclusion uses the indefinite article “a” rather than the definite article “the” before the term “protected person,” it is not limited to “the” protected person who was alleged to have been negligent. The exclusion precludes coverage for bodily injury to an employee arising out of his or her employment by anyone who is “a protected person” under the policy.³

¶12 As noted, it is undisputed that Sterling is a protected person under the policy, and that Taylor’s injury arose out of his employment with Sterling. We therefore conclude that the trial court correctly determined that St. Paul’s policy did not provide coverage for Taylor’s injuries.⁴

¶13 West American further argues that if the exclusion precludes coverage, it violates Wisconsin’s omnibus statute, which provides, in relevant part:

³ Many of the additional authorities upon which West American relies in support of its argument involve exclusions similar to the exclusions at issue in *United States Fidelity & Guaranty Co. v. PBC Productions, Inc.*, 153 Wis.2d 638, 451 N.W.2d 778 (Ct. App. 1989). We find those cases similarly inapposite. West American also cites, although without argument, cases from foreign jurisdictions that reject the distinction we make here. We decline to follow the reasoning of those cases. The exclusion at issue here unambiguously excludes coverage for Taylor’s injuries.

⁴ In its appellate brief, West American makes a passing reference to a severability clause in the St. Paul policy, and notes that in *Bituminous Casualty Corp. v. Aetna Life and Casualty Co.*, 599 S.W.2d 516 (Mo. Ct. App. 1980), the court concluded that a similar severability clause limited the application of an exclusion similar to the one at issue here. West American did not raise this issue in the trial court. We therefore decline to address it. *See Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 790, 501 N.W.2d 788 (1993) (appellate court will not address issues that were not raised before the trial court). We note, however, that the courts are divided as to the effect of a severability clause on exclusions like the one before us. *Compare Bituminous Cas. Corp.*, 599 S.W.2d at 520-21 (holding that the severability clause provides separate coverage to each insured as if each were insured by a separate policy), *with St. Paul Fire and Marine Ins. Co. v. Schilling*, 520 N.W.2d 884, 888-90 (S.D. 1994) (holding that the severability clause does not “operate to extend protection to an additional insured where such claims were explicitly denied coverage under an employee exclusion”). *See also St. Paul Fire and Marine Ins. Co.*, 520 N.W.2d at 890 (noting the split of authority and enumerating cases).

[E]very policy subject to this section issued to an owner shall provide that:

(a) Coverage provided to the named insured applies in the same manner and under the same provisions to any person using any motor vehicle described in the policy when the use is for purposes and in the manner described in the policy.

WIS. STAT. § 632.32(3). In other words, any coverage that the policy provides to the named insured “must be extended to those to whom the coverage of the policy was intended to be extended by the omnibus statute.” *Lukaszewicz v. Concrete Research, Inc.*, 43 Wis. 2d 335, 341, 168 N.W.2d 581 (1969). However, “when the named insured and all additional insureds are excluded in reference to some risk of coverage not required by the statute, such exclusion is valid.” *Id.*

¶14 West American argues that the omnibus statute requires the policy to provide coverage for Collins’s alleged negligence in unloading the covered auto and injuring Taylor because it would provide coverage to employees of Wausau Homes under the same circumstances. We disagree.

¶15 An employee of Wausau Homes would not be entitled to coverage under the policy if the employee’s negligence resulted in an injury to Taylor during the course of Taylor’s employment with Wausau Homes. Indeed, under the clear terms of the exclusion, all bodily injury to an employee that arises out of his or her employment by a protected person is excluded from coverage, regardless of who caused the bodily injury. Neither Collins nor any other protected person is afforded coverage for Taylor’s injuries, which concededly arose out of his employment with a protected person. The exclusion, therefore, does not violate the omnibus statute. *See id.* (exclusion that precludes coverage of named insured

and all other insureds does not violate omnibus statute); accord *Pyykola v. Woody*, 52 Wis. 2d 342, 346, 190 N.W.2d 534 (1971).⁵

By the Court.—Order affirmed.

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

⁵ The exclusion at issue in *Lukaszewicz v. Concrete Research, Inc.*, 43 Wis. 2d 335, 168 N.W.2d 581 (1969), was held to be in violation of the omnibus statute because, by its terms, it did not apply to the named insured. See *id.* at 339-40. Unlike the exclusion in *Lukaszewicz*, St. Paul's exclusion applies equally to the named insured and all other protected persons.

