

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1070

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**AMBER L. ENGLISH, A MINOR, BY HER GUARDIAN AD
LITEM, ATTORNEY THOMAS H. STRAKELJAHN,**

PLAINTIFFS-APPELLANTS,

v.

**VIRGIL WOODWORTH AND ABC INSURANCE COMPANY, A
FICTIONALLY NAMED DEFENDANT INSURANCE COMPANY,**

DEFENDANTS,

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND
RURAL MUTUAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Amber L. English, by her guardian ad litem, appeals the judgment of the circuit court granting the motions of American Family Mutual Insurance Company and Rural Mutual Insurance Company for summary judgment. The issue on appeal is whether English raised genuine issues of disputed facts so as to defeat the motions for summary judgment. We conclude that the circuit court properly granted the motions and therefore affirm.

¶2 The action underlying this appeal arose from a car accident which occurred in December 1994. Virgil Woodworth was driving, and English and her mother, Brenda English, were passengers. Brenda English, who owned the car, was killed in the accident. Woodworth did not have a driver's license, and neither Woodworth nor Brenda English carried his or her own insurance.

¶3 English sued Woodworth and an unknown insurance company. Eventually, English alleged that at the time of the accident Woodworth lived with his mother and her husband, Bonnie and James Criplean, and was covered by the insurance American Family provided to James. In the alternative, English alleged that Woodworth was living with his former stepfather, Kenneth Nolte, and was covered by the insurance Nolte had from Rural Mutual. The Cripleans lived on Britton Road and Nolte lived in the Garden Grove Trailer Park, both in Union Grove, Wisconsin.

¶4 The circuit court bifurcated the issues of coverage and liability and stayed the liability phase of the trial pending the coverage determination. Both insurance companies moved for summary judgment arguing that Woodworth was not covered under the policies they provided. American Family argued that Woodworth was not covered under the policy it provided to James Criplean because he did not live with the Cripleans at the time of the accident. Rural

Mutual argued that Woodworth was not named in the policy and was not a family member as defined by the policy and therefore was not covered. We consider American Family's argument first.

¶5 English argues that the circuit court should not have granted American Family's motion for summary judgment because there were facts presented which arguably showed that Woodworth lived with his mother at the Britton Road address. Specifically, English argues that there are nine facts which support her contention that Woodworth lived with the Cipleans at the time of the accident. These facts are: (1) the Wisconsin Motor Vehicle Accident report from the accident lists Woodworth's address as his mother's address; (2) the police report from the accident lists his mother's address as his address; (3) a letter from the officer investigating the accident which says that Woodworth gave the Britton Road address as his own address at the time of the accident; (4) and (5) in a related criminal proceeding, Woodworth's attorney stated more than once that Woodworth lived with his mother; (6) in his deposition testimony, Woodworth did not deny that his lawyer had made these statements; (7) in his deposition testimony, Woodworth admitted that he never contacted the court to "say that the information provided to the court about him living with his mother was untrue"; (8) Woodworth's employment records state that his address was his mother's; and (9) Woodworth's hospital records state that his address was his mother's.

¶6 In their deposition testimony, Woodworth, his mother, his brother and his mother's husband all denied that Woodworth lived with the Cipleans at the time of or in the year prior to the accident. Their testimony established that Woodworth was living with Brenda English in various locations, and with his former stepfather, Kenneth Nolte, but not with the Cipleans. The circuit court granted American Family's motion for summary judgment, concluding that "[t]he

testimony of Woodworth's family establishes that Woodworth was, at best, a person that located in more than several houses in the year prior to the accident; and, for the period of time at least 30 days prior to the accident he clearly did not live with Criplean." The court concluded that Woodworth was using his mother's address as a "point of contact" and not as his residence.

¶7 The first issue raised in this appeal is whether English presented sufficient evidence to create a question of disputed fact about whether Woodworth lived with the Cripleans. When reviewing a grant or denial of summary judgment, this court applies the same methodology as the trial court. *See Universal Die & Stampings, Inc. v. Justus*, 174 Wis. 2d 556, 560, 497 N.W.2d 797 (Ct. App. 1993).

We first examine the complaint to determine whether a claim has been stated and then the answer to ascertain whether it presents a material issue of fact. If they do, we then examine the moving party's affidavits to determine whether a *prima facie* case for summary judgment has been made If it has, we look to the opposing party's affidavits [or other proof] to determine whether any material facts are in dispute which would entitle the opposing party to a trial.

Id. (citation omitted). The summary judgment statute, WIS. STAT. § 802.08(3) (1997-98),¹ states in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence."

¶8 We conclude that much of the evidence offered by English to establish that Woodworth lived with his mother was not admissible. The first two

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

facts which English contends support her position are the Wisconsin Motor Vehicle Report and the police report written at the time of the accident. Neither one of these documents is admissible as evidence at trial. *See WIS. STAT. § 346.73.* The circuit court, therefore, could not properly consider these documents as evidence.

¶9 The third fact which English argues supports her position is a letter written by the investigating officer. This letter was submitted to the court as an exhibit to the affidavit of English's counsel. The summary judgment statute requires that affidavits be made on "personal knowledge" and are to include only evidentiary facts. *See WIS. STAT. § 802.08(3).* "Affidavits, or portions thereof, that do not comply with § 802.08(3) are to be disregarded by the court in determining whether summary judgment should be granted." *L.L.N. v. Clauder*, 203 Wis. 2d 570, 596, 552 N.W.2d 879 (Ct. App. 1996), *rev'd on other grounds*, 209 Wis. 2d 674, 563 N.W.2d 434 (1997). English's counsel can swear to the fact that he received the letter, but he cannot, on personal knowledge, attest to the facts contained in the letter. The court cannot consider the letter as proof that Woodworth lived at his mother's address at the time of the accident.

¶10 The investigating officer also signed two affidavits. The first affidavit stated that he did not recall who told him that Woodworth lived at the Britton Road address. The second affidavit states that Woodworth gave him the Britton Road address. In either case, this evidence does not refute, but rather confirms, Woodworth's testimony that he used his mother's address as a point of contact, as the circuit court called it.² Woodworth testified that he would give

² In his deposition testimony, Woodworth stated that he did not remember giving his mother's address at the time of the accident, but he believes he did so because "that's the only people that I could get ahold of at that time – that I know I could get ahold of."

employers and other people his mother's address during this period of time.³ This evidence does not establish that he was actually living at his mother's house.

¶11 The fourth and fifth facts English claims support her arguments concern statements made in court by Woodworth's criminal defense attorney in a related proceeding. Apparently Woodworth's criminal counsel stated in court on more than one occasion that Woodworth lived with his mother. The first statement made by the attorney was at a bail hearing, presumably to support the position he was taking on Woodworth's bail.⁴ The attorney argued to the court that Woodworth had substantial ties to the area and that he had lived with his mother for the past year and one-half. In the second instance, Woodworth's attorney stated at Woodworth's arraignment that Woodworth lived with his mother and stepfather.

¶12 The second statement is clearly irrelevant. The statement was made at Woodworth's arraignment hearing which took place after the accident. The deposition testimony established that Woodworth lived with his mother and stepfather after the accident. The issue before the court on summary judgment is where Woodworth was living at the time of the accident.

¶13 As to the first statement, we agree with the circuit court's conclusion that the statement has little probative value given the circumstances in which it was uttered. Further, English is attempting to admit the statement to prove that Woodworth was actually living with his mother prior to the accident. As such, the

³ Woodworth testified that his mother's address was just one of the addresses he would use during this period.

⁴ Only that portion of the transcript which includes his attorney's statement is included in the record.

statement is hearsay. *See* WIS. STAT. § 908.01(3). Affidavits in support of summary judgment must contain evidentiary facts, and hearsay evidence is not properly before the court on a motion for summary judgment. *See Fritz v. McGrath*, 146 Wis. 2d 681, 689, 431 N.W.2d 751 (Ct. App. 1988).

¶14 While there is some implicit support for the argument that an attorney's admission may be deemed to be an admission of the client and, hence, may be an exception to the rule against hearsay, *see State v. Cardenas-Hernandez*, 214 Wis. 2d 71, 90 n.3, 571 N.W.2d 406 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 516, 579 N.W.2d 678 (1998), the authority to make such evidentiary admissions must be established. *See id.* In this case, not only was there no attempt to establish the attorney's authority to make such an admission, it was not established that this was an evidentiary fact. The attorney's statement was merely part of his argument, presumably to support the position he was taking on bail. As such, the statement is not admissible to establish that Woodworth lived with his mother at the time of the accident.

¶15 The sixth fact English relies on is Woodworth's statements in his deposition testimony that he could not deny that his former counsel made the above statements. Woodworth actually testified that he did not remember if his counsel made the statements. He was then asked: "You don't deny that, based on that transcript, that he said that to the Court, do you?" Woodworth replied: "No, I don't deny that he said this, no." These statements are simply irrelevant. All Woodworth's testimony establishes is that his counsel probably made the statements. Woodworth's deposition testimony does not establish that he lived with his mother. In fact, to the contrary. He specifically testified that he did not live with his mother at the time of the accident.

¶16 The seventh fact English also contends supports her argument is the fact that neither Woodworth nor his counsel contacted the court at any point in the criminal proceeding to suggest that his counsel had misspoken about where Woodworth lived. This fact is also irrelevant. It does not prove where Woodworth actually was living at the time of the accident, especially in light of his testimony that he did not remember his counsel making any statement about where he lived.

¶17 The employment documents and hospital records were also not properly offered to the court by affidavit, and if they were considered by the trial court, they should not have been. *See L.L.N.*, 203 Wis. 2d at 596. English argues that Woodworth did not object to these documents at the time and so should not be heard to object to them now. This court, however, reviews the grant or denial of summary judgment de novo. *See Universal Dye & Stampings*, 174 Wis. 2d at 560. This court is required to apply the same methodology as the circuit court. *See id.* The summary judgment statute requires that the court consider only admissible evidence. *See WIS. STAT. § 802.08(3).* We will not consider evidence that was not properly before the court.

¶18 The evidence which was properly before the circuit court consisted of the deposition testimony of Woodworth, his mother, his brother and his stepfather. All of these people testified that Woodworth lived in a number of places in the year prior to the accident, primarily with Brenda English. All of these people also testified that Woodworth did not live with his mother during this time, but visited her often. We agree with the circuit court's conclusion that the undisputed facts establish that Woodworth did not live with his mother at the time of the accident.

¶19 English also argues that the circuit court erred as a matter of law when it granted summary judgment to Rural Mutual on the grounds that Woodworth was not a family member covered by his former stepfather's insurance policy. Rural Mutual provided insurance to Kenneth Nolte. The policy provided coverage to family members who were residents of the policyholder's household. The policy defined a family member as "a person related to you by blood, marriage or adoption."

¶20 We conclude that the policy requires a familial relationship. Under the common meaning of the word family, *see Henderson v. State Farm Mutual Automobile Ins. Co.*, 59 Wis. 2d 451, 457-59, 208 N.W.2d 423 (1973), as well as under the specific definition of the insurance policy, the family exclusion must be read to exclude Woodworth. The undisputed facts establish that Woodworth's mother and Kenneth Nolte were divorced prior to the accident. Moreover, at the time of the accident Woodworth's mother was married to another man, James Criplean. At the time of the accident, Woodworth was no longer related to Nolte by marriage and therefore was not covered by Nolte's Rural Mutual insurance policy. The judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

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

