COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP190 **Cir. Ct. No. 2007CV1504**

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

UNITED HEALTH CARE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

MICHAEL CROPSEY AND WENDY CROPSEY,

PLAINTIFFS-CO-APPELLANTS,

V.

STATE AUTO INSURANCE COMPANY OF WISCONSIN,

DEFENDANT-APPELLANT,

ACE AMERICAN INSURANCE COMPANY AND SWEDISH MATCH NORTH AMERICA, INC.,

DEFENDANTS-RESPONDENTS,

DENIL WALL OLDSMOBILE - CADILLAC, LLC,

DEFENDANT,

SENTRY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-CO-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. State Auto Insurance Company of Wisconsin, Sentry Insurance, and Michael and Wendy Cropsey (collectively, State Auto) appeal from an order declaring that a commercial auto liability policy issued by Ace American Insurance Company to Swedish Match North America, Inc., does not cover personal injuries caused by a Swedish Match employee while driving a stranded motorist's vehicle. State Auto contends the policy's plain language requires coverage. In the alternative, it argues the phrase "in your business or your personal affairs" is ambiguous and must be construed in favor of coverage. We affirm.

BACKGROUND

¶2 While returning home from a day of sales calls on May 13, 2005, Adam Lemorande, a Swedish Match employee, discovered sixteen-year-old Ashley Nelson stranded next to her vehicle. Lemorande and Michael Cropsey, Nelson's neighbor, stopped to help. Nelson stated her car would operate only in reverse, and gave Lemorande permission to move it out of the road. As Lemorande maneuvered Nelson's vehicle, he struck Cropsey, fracturing Cropsey's right ankle.

¶3 At the time of the accident, Swedish Match was the named insured on a commercial auto liability policy with Ace. The policy provided up to $1 million in liability coverage for "all sums an 'insured' legally must pay as damages because of 'bodily injury' … to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'"

¶4 State Auto's appeal turns on the meaning of the word "insured". Section II.A.1. of the Ace policy defines an insured as:

> **a.** You for any covered "auto".
>
> **b.** Anyone else while using with your permission a covered "auto" you own, hire or borrow ….[1]

Endorsement 14 supplements this definition:

> Any "employee" of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

¶5 Cropsey initially commenced this action against State Auto Insurance Company of Wisconsin, which issued an auto liability policy to Lemorande's father, and Sentry Insurance, which issued an auto liability policy to Cropsey that included underinsured motorist benefits. Cropsey later added claims against Swedish Match and Ace.

¶6 State Auto and Ace both sought declaratory judgment. At a hearing on the motions, the circuit court interpreted the policy as requiring a nexus between the employee's actions and the employer. It found no facts supported

[1] "You" and "Your" in the policy refer to Swedish Match. Coverage for permissive use of a covered auto is limited by a list of exceptions not pertinent to this appeal.

State Auto's assertion that Lemorande was acting in the scope of his employment when he operated Nelson's vehicle: "[W]hen [Lemorande] left the [Swedish Match] vehicle … [he] took on the role of essentially a good [s]amaritan or a volunteer …." Accordingly, the court granted Ace's motion and dismissed all claims and cross-claims against it.[2]

DISCUSSION

¶7 State Auto claims the Ace policy covered Lemorande while operating Nelson's auto. Interpretation of an insurance policy is a question of law subject to de novo review. ***Danbeck v. American Fam. Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. We construe insurance policies to give effect to the intent of the parties, as expressed in the policy language itself. ***Id.*** We give the words of an insurance policy their common and ordinary meaning, and we interpret the policy as a reasonable person in the position of the insured would understand it. ***Id.***

¶8 State Auto claims Endorsement 14's plain language grants coverage because Lemorande did not "own, hire or borrow" Nelson's vehicle in Swedish Match's business or personal affairs. State Auto's construction has the absurd effect of transforming Swedish Match's commercial auto policy into a personal auto liability policy for all Swedish Match employees. "So far as reasonably practicable, a contract should be given a construction which will make it a rational business instrument and will effectuate what appears to have been the intention of the parties." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App.

[2] The circuit court used the same rationale to dismiss Cropsey's claims against Swedish Match. State Auto does not appeal that determination.

1990). State Auto fails to identify any legitimate business justification for its proposed construction. There is no evidence Swedish Match and Ace intended to secure personal auto liability coverage for each employee regardless of the purpose for the vehicle's use.

¶9 Instead, we conclude the phrase "in your business or personal affairs" modifies the phrase "using a covered 'auto,'" not the phrase "you don't own, hire or borrow." Consequently, Endorsement 14 expands the definition of an "insured" to cover employees acting on Swedish Match's behalf while using a non-Swedish Match automobile. Lemorande was undisputedly acting on his own initiative when aiding Nelson. Accordingly, the policy language does not provide coverage. *See* ***Pham v. Hartford Fire Ins. Co.***, 419 F.3d 286, 290 (4th Cir. 2005) (finding identical policy language "clear and unambiguous" and describing State Auto's proposed construction as "strained").

¶10 State Auto alternatively argues Endorsement 14 is ambiguous and must be construed in favor of coverage. State Auto contends the phrase "your business or your personal affairs" is broad enough to encompass Lemorande's conduct. This argument is based on ***Balz v. Heritage Mutual Insurance Co.***, 2006 WI App 131, ¶3, 294 Wis. 2d 700, 720 N.W.2d 704, in which we noted an insurance policy covering an employee while using a non-owned vehicle in the employer's business or personal affairs was arguably ambiguous because it could "include virtually any action taken by an employee, even those actions not taken in the scope of business." ***Id.***, ¶10. However, the issue in ***Balz*** was not policy coverage. Rather, the dispute in that case focused on the form of a special verdict

question—an issue on which the circuit court is afforded wide discretion.[3] *See* ***id.***, ¶8. We therefore do not regard ***Balz*** as controlling.[4]

By the Court.—Order affirmed.

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

[3] State Auto misconstrues ***Balz v. Heritage Mutual Insurance Co.***, 2006 WI App 131, 294 Wis. 2d 700, 720 N.W.2d 704, as holding that an employee is covered by the "in your business or your personal affairs" clause for any act regardless of its relation to his or her employment. Rather, we determined that a special verdict question asking whether the alleged tortfeasor was acting within the course and scope of his employment was consistent with the employer's liability policy. Consequently, our holding in that case cuts *against* State Auto's position here.

[4] ***Balz*** aside, we do not regard Lemorande's use of Nelson's vehicle to be in Swedish Match's "personal affairs." The circuit court correctly interpreted this language to require a nexus between the employee's conduct and the employer, as where the employer requests an employee to perform a personal errand on the employer's behalf.