COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2009AP2345 **Cir. Ct. No. 2008CV5175**

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

ALLISON M. OTTMANN, EDIE OTTMANN AND MICHAEL OTTMANN,

PLAINTIFFS-CO-APPELLANTS,

V.

THE CINCINNATI INSURANCE COMPANY AND RITA KULINSKI,

DEFENDANTS-APPELLANTS,

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT-RESPONDENT,

EVERBRITE LLC HEALTH & WELFARE PLAN, JEREMY R. FLINK, RENEE FLINK, MANAGED HEALTH SERVICES INSURANCE CORP., MILWAUKEE COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES AND DELTA DENTAL OF WISCONSIN, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed and cause remanded with directions.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. At issue in this appeal is whether the trial court erred when it concluded that a watercraft exclusion in an American Family Mutual Insurance Co. homeowner's insurance policy barred coverage for its insureds, Renee Flink and her son Jeremy R. Flink, two of the alleged tortfeasors in this personal injury case.[1] The trial court granted summary judgment to American Family, concluding that as a matter of law the watercraft exclusion barred coverage. Plaintiff Allison Ottmann, who was injured in a collision with Jeremy (who was operating the watercraft rented from Avid Rentals by Rita Kulinski), and her parents appeal. Rita allowed Jeremy to operate the watercraft. Rita and her insurer appeal. Renee and Jeremy are not parties to the appeal. All appellants argue, based on the undisputed facts, that the watercraft exclusion does not apply because the watercraft was not rented to either Renee or Jeremy. American Family responds that the undisputed facts support the trial court's interpretation of the watercraft exclusion in this case. Rita argues, in the alternative, that if we do not find as a matter of law that the undisputed facts provide coverage for Renee, then there are disputed facts that require remand for trial. We conclude that the watercraft exclusion is not applicable because the watercraft was not rented to

[1] This case involves two mothers and two sons. To avoid confusion because of duplicate last names, we will refer to the mothers and their sons by their first names.

either Renee or Jeremy, the insureds.[2] Therefore, we reverse the judgment dismissing American Family and remand for further proceedings.

BACKGROUND

¶2 Rita and Renee are sisters. They vacationed with their families in the area of Adler Lake in Manitowish, Wisconsin. Rita rented a watercraft[3] (hereafter, "jet-ski") from Avid Rentals. The rental agreement listed only Rita as the lessee. She signed the document and initialed each of the agreement provisions. Rita paid the entire rental fee of $195.18 to Avid Rentals. The rental agreement listed two authorized operators of the jet-ski: Rita and her son Justin Kulinski.[4]

¶3 Later that day, Rita asked Jeremy if he would like to try the jet-ski; he said he would. Rita permitted Jeremy to use the jet-ski. While Jeremy was operating it, the jet-ski collided with another jet-ski operated by Ottmann, resulting in injuries to Ottmann.

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[2] American Family does not argue that the watercraft was rented to Jeremy, who was sixteen years old at the time of the accident and who American Family has acknowledged is an insured under his mother's homeowner's policy. At issue in this appeal is whether the watercraft was rented to Renee.

[3] The rental agreement consistently refers to the rental of a "watercraft." In the parties' briefs, they refer to the particular watercraft rented as a "WaveRunner," a "jet-ski" and a "personal watercraft." For consistency, we will refer to the rented machine as a jet-ski, which no one disputes was a watercraft under the rental agreement and under the insurance policy.

[4] Rita also wrote her nephew Jeremy's name down as an authorized user, but then scribbled his name out. According to Rita's deposition, she wrote down his name because she thought he would ride the jet-ski. However, the owner of Avid Rentals told Rita that she "really should only be putting people on there who can sign it. That they should be here." Therefore, Rita crossed off Jeremy's name.

¶4 Rita acknowledged that she wrote a letter stating, "I'm the one who rented the stupid Wave Runner," but maintained that it was agreed before the jet-ski was rented that Renee would contribute towards the rental. In contrast, Renee testified that she was not sure if Avid Rentals would allow Jeremy to operate the jet-ski and, therefore, "it wasn't agreed upon before [it was rented] that I [would] give her money." Renee said that she "probably" told Rita that if Jeremy was allowed to operate it, Renee "would contribute to it." When Renee learned that Rita had let Jeremy ride the watercraft, Renee "gave her money to help pay for the [jet-ski]," which Rita "grudgingly accepted," according to Renee. It is undisputed that Renee gave Rita money towards the rental of the jet-ski. Rita said the amount was about $50.

¶5 Allison Ottmann and her parents (collectively, "Ottmann") sued, as material to this appeal, the following: Rita; Rita's insurance carrier, Cincinnati Insurance Company; Jeremy; Renee; and Renee's homeowner's insurance carrier, American Family. Ottmann alleged that Jeremy had negligently operated the jet-ski and that Rita and Renee had negligently entrusted, trained and supervised Jeremy.

¶6 American Family moved for Declaratory Judgment/Summary Judgment that there was no insurance coverage for Renee's and Jeremy's alleged negligent acts because of a watercraft exclusion in the homeowner's policy. Ottmann filed a cross-motion for declaratory judgment confirming insurance coverage by the American Family policy.

¶7 The watercraft exclusion at issue at the motion hearing provided:

> 19. **Watercraft.**

> a. **We** will not cover **bodily injury** or **property damage** arising out of the ownership, supervision, entrustment, maintenance, operation, use, loading or unloading of a watercraft:
>
> (1) with inboard or inboard-outboard motor power owned by any **insured**;
>
> (2) with inboard or inboard-outdrive motor power of more than 50 horsepower *rented to any **insured***;
>
> (3) that is a sailing vessel, with or without auxiliary power, 26 feet or more in length owned by or rented to any **insured**;
>
> (4) that is an iceboat, airboat, air cushion or similar type of craft; or
>
> (5) powered by one or more outboard motors with more than 50 total horsepower, owned by any **insured**.

(Italics added for emphasis.) The term "rented to," which appears in provisions (2) and (3), is not defined in the policy.

¶8 American Family argued that the exclusion applied based on provision (2) of the exclusion. First, it asserted that the jet-ski operated by Jeremy was propelled by an inboard motor of greater than fifty horsepower; this was not disputed. Second, American Family argued that the jet-ski was "rented to" a group of people that included their insured Renee, as evidenced by the fact that Renee contributed to the cost of the rental. American Family asserted that the reason Jeremy's name was originally written on the contract as an authorized user and the reason Renee gave Rita money "was because it was intended that Jeremy Flink would be one of the users of the [jet-ski]." At oral argument, American Family's counsel summarized the insurer's position as follows: "So I think under all the facts presented and interpreting the policy in a reasonable manner that this should be viewed as a rental situation and a situation where the personal watercraft was rented to an insured."

¶9 The trial court granted American Family's motion and dismissed American Family from the case, based on the trial court's interpretation of the language of the policy and its conclusion that the watercraft exclusion applied. The trial court opined that the watercraft exclusion, read as a whole, "says we're covering nothing, we want nothing to do with watercraft." The trial court explained that, in the context of the entire watercraft exclusion:

> I think a common sense reading is that that's an exclusion. There's no coverage. I think that extra 1 or 2 [referring to provisions (1) and (2) of the exclusion] is inartfully drawn, but it's quite clear, the whole reading of the whole thing excludes coverage for personal watercraft. So I'm going to grant the motion. I think American Family's out of it.

Rita, her insurance company and Ottmann all appeal from the judgment dismissing American Family.[5]

LEGAL STANDARDS

¶10 In this case, the trial court granted what it termed American Family's "Motion for Declaratory Judgment/Summary Judgment." We review a grant of summary judgment *de novo*, and "[a] party is entitled to summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶34, 309 Wis. 2d 365, 749 N.W.2d 211. Conversely, "'[a] decision to grant or deny declaratory relief falls within the discretion of the [trial] court.'" ***Id.***, ¶35 (citation

[5] On appeal, Ottmann asks this court to overturn the Declaratory Judgment/Summary Judgment *and* to declare that American Family must defend and indemnify Jeremy and Renee. We decline Ottmann's invitation to determine American Family's duty to defend and indemnify the Flinks because the trial court did not fully consider Ottmann's cross-motion for declaratory judgment, having concluded that the watercraft exclusion applied. On remand, the trial court is directed to consider Ottmann's motion for declaratory judgment, bearing in mind our legal conclusion that the watercraft exclusion is inapplicable.

and emphasis omitted). Appellate courts "'will uphold a discretionary act if the [trial] court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (citations, emphasis and one set of quotation marks omitted).

¶11 Here, both the declaratory judgment and the summary judgment in American Family's favor were based on the trial court's interpretation of an insurance contract, which is an issue we review *de novo*.[6] *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. Insurance policies are construed as they would be understood by a reasonable person in the position of the insured. ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). "Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain," ***American Girl***, 268 Wis. 2d 16, ¶24, and an insurer has the burden of proving an exception to coverage or that the insured comes within an exclusion, *see* ***Estate of Ermenc v. American Family Mut. Ins. Co.***, 221 Wis. 2d 478, 481, 585 N.W.2d 679 (Ct. App. 1998). Any doubts about the meaning of policy language must be resolved in favor of the insured. ***Elliott v. Donahue***, 169 Wis. 2d 310, 321, 485 N.W.2d 403 (1992).

[6] Based on this standard of review, we will not discuss at length the trial court's interpretation of the exclusion. However, we note that it appears that the trial court read the watercraft exclusion as applying to the use of all watercraft, which we believe was too broad an interpretation. The enumerated provisions of the exclusion limit its application to five specific situations.

DISCUSSION

¶12 The sole issue presented on appeal is whether the watercraft exclusion applies. American Family, Ottmann and Rita assert that the relevant facts in this case are undisputed.[7] We agree that there are no disputed material facts. To the extent there is conflicting deposition testimony concerning when Renee actually gave Rita money towards the jet-ski rental, when she decided to do so and when it was decided that Jeremy would ride the jet-ski, we agree that those facts are not material to our analysis of the watercraft exclusion clause.

¶13 Based on the undisputed material facts, American Family argues that the exclusion applies by virtue of provision (2), which states that the policy does not cover operation of a watercraft "with inboard or inboard-outdrive motor power of more than 50 horsepower *rented to any* ***insured***." (Italics added for emphasis.) American Family asserts that Renee, an insured under the insurance policy, rented the jet-ski from Avid Rentals. American Family also offers an alternative legal theory that was not advanced at the trial court: that Renee rented the jet-ski from Rita. We conclude that the exclusion does not apply because Renee did not rent the jet-ski from either Avid Rentals or Rita. Therefore, the trial court erred when it granted declaratory judgment and summary judgment in American Family's favor.

[7] Rita and her insurer assert that if, contrary to the parties' agreement, this court concludes that details concerning the payment by Rita and the timing of the decision that Jeremy would use the jet-ski are relevant to whether Renee rented the jet-ski, then because of conflicting deposition testimony on those details, summary judgment was improper.

I. Renee did not rent the jet-ski from Avid Rentals.

¶14 American Family acknowledges that Renee did not sign the rental contract with Avid Rentals. However, American Family nonetheless argues that because Renee contributed money towards the rental fee, she was part of a group of people who rented the jet-ski.

¶15 American Family suggests that our analysis of whether Renee rented the jet-ski should be guided by the case of ***Herwig v. Enerson & Eggen***, 98 Wis. 2d 38, 295 N.W.2d 201 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 170, 303 N.W.2d 669 (1981) (per curiam),[8] which all of the parties cite on appeal. In that case, Herwig was trying out a piece of farm equipment that he was considering buying from Enerson & Eggen. ***Id.*** at 41. Before Herwig took the machine, the parties agreed that if Herwig decided to buy the machine, he would owe Enerson & Eggen nothing for the day of use; however, if he decided not to buy it, he would owe Enerson & Eggen an agreed-upon amount to cover their cost of cleaning the machine. ***Id.*** While Herwig was trying out the machine, his son was injured by it. ***Id.*** Herwig decided not to buy the machine, paid Enerson & Eggen the agreed-upon price for cleaning the machine and purchased another machine. ***Id.***

¶16 Herwig's injured son sought damages under Enerson & Eggen's insurance policy. *See* ***id.*** at 39. The insurer "denied coverage[,] claiming that ...

[8] The six Wisconsin Supreme Court justices who reviewed the court of appeals decision were "equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed," and, therefore, the supreme court affirmed the court of appeals without addressing the merits of the case. *See* ***Herwig v. Enerson & Eggen***, 101 Wis. 2d 170, 171, 303 N.W.2d 669 (1981) (per curiam).

Herwig had rented the machine ... and that the policy excluded machines that were rented." ***Id.*** The trial court agreed and we reversed. ***Id.***

¶17 First, we concluded "that the term 'rental' is unambiguous and requires no construction." ***Id.*** at 41. Next, we identified the key issue as "whether the transaction between Enerson & Eggen and ... Herwig was a rental agreement excluded from insurance coverage under the terms of the policy." ***Id.*** We held:

> To resolve this issue, we must look ... to the intent of the rental exclusion, the meaning an ordinary person would give to the term rental, and the reasonable expectations of coverage of Enerson & Eggen. In examining these questions, we will avoid an interpretation that leads to an absurd result and will, consistent with public policy, favor coverage.

Id. at 41-42. We ultimately concluded that "[t]he intent of a rental exclusion is to limit the risk the insurer has undertaken" and that "a reasonable person of ordinary intelligence would … understand a rental to mean a commercial transaction entered into for profit." ***Id.*** at 42. Concluding that "[t]he essence of this transaction was an attempted sale, not a rental," we held that the exclusion did not apply. ***Id.*** at 43.

¶18 American Family argues that although ***Herwig*** held there had been no rental under the terms of the insurance policy at issue, ***Herwig***'s "reasoning is applicable as it discusses the factors relevant in determining whether there is a rental so as to exclude insurance coverage." American Family explains:

> In the present case, it is undisputed that the [jet-ski] operated by Jeremy Flink was rented from Avid Rentals. There is a rental agreement and the payment of the rental fee was "a commercial transaction entered into for profit." ***Herwig***, 98 Wis. 2d at 42. It is also undisputed that Renee Flink provided monetary payment towards the rental fee for the [jet-ski] operated by her son, Jeremy Flink. Moreover, it is undisputed that Renee Flink contributed money toward

> the rental fee as payment for her son's use of the [jet-ski]. Based on all of these facts, a reasonable insured would understand that the rented [jet-ski] operated by Jeremy Flink, and paid for in part by Jeremy Flink's mother, Renee Flink, was rented to them and others for use by a group of people.

(Record citations omitted.)

¶19 There can be no doubt that the jet-ski was rented from Avid Rentals, and that that rental was "a commercial transaction entered into for profit." *See* ***Herwig***, 98 Wis. 2d at 42. The issue presented here, however, is whether *Renee*—the insured under the homeowner's policy—rented it. We are unconvinced that she did.

¶20 American Family has provided us with no other legal authority to support its assertion that Renee's contribution of funds to the rental means that she "rented" the jet-ski as that term is used in American Family's policy. We are not convinced that a reasonable insured would understand that by contributing to the cost of a jet-ski that was rented to another person, via a written contract executed between the rental company and that person, the insured could be said to have "rented" the jet-ski herself. *See* ***Kremers-Urban***, 119 Wis. 2d at 735 (policies must be construed as they would be understood by a reasonable person).

¶21 Further, we do not find compelling American Family's argument that a reasonable insured would understand the phrase "rented *to* any insured"—as opposed to rented *by* any insured—to mean that "the former clearly allows for multiple renters simultaneously." Not only does the policy not define the term "rented to," it does not suggest that the terms "to" and "by" would have different meanings in its policy.

¶22 For these reasons, we reject American Family's argument that Renee rented the jet-ski from Avid Rentals. As noted, we must strictly construe exclusions against the insurer, and the insurer bears the burden of proving that the insured comes within an exclusion. *See* ***American Girl***, 268 Wis. 2d 16, ¶24; ***Estate of Ermenc***, 221 Wis. 2d at 481. American Family has failed to prove that the exclusion applies.

II. Renee did not rent the jet-ski from Rita.

¶23 American Family argues that even if Renee did not rent the jet-ski from Avid Rentals, she rented it from Rita. Thus, American Family reasons, the jet-ski was "rented to" Renee and the exclusion applies. We reject this argument.

¶24 The essence of rental as a for-profit commercial transaction is a *quid pro quo*—an exchange of money for the use of goods or services. The Avid Rentals rental agreement typifies such an agreement. The agreement defines the amount and type of consideration to be paid, the goods to be used and the time for which they can be used. We do not suggest that rental of an item of personal property can only be established by a written document. However, the fundamental aspects of a rental agreement must be established by the evidence. There must be evidence of the exchange of consideration for the use of the personal property for a period of time. And, under ***Herwig***, making a profit must be at least one purpose of the transaction. *See* ***id.***, 98 Wis. 2d at 42.

¶25 Here, there is no evidence in the record before us that Rita rented the jet-ski from Avid with the intent of renting time on the jet-ski to other people to make a profit. There is no evidence that Rita subsequently decided to "rent" the jet-ski to other people, including her sister. Nothing about Rita's rental of the jet-ski, while the two families were vacationing together on a lake, suggests anything

like a commercial transaction between Rita and Renee. Once again, American Family has failed to convince us that its exclusion applies.

CONCLUSION

¶26 We conclude that the jet-ski was not "rented to" Renee by either Avid Rentals or her sister. We reject American Family's argument that the watercraft exclusion applies in this case. Therefore, we reverse the judgment granting declaratory judgment and summary judgment in American Family's favor. Because Ottmann's cross-motion for declaratory judgment that American Family has a duty to defend and indemnify Jeremy was denied based on the trial court's erroneous conclusion that the watercraft exclusion applied, we also reverse the denial of Ottmann's cross-motion. However, we decline Ottmann's invitation to determine American Family's duty to defend and indemnify Jeremy because the trial court did not fully consider those issues. On remand, the trial court is directed to consider Ottmann's motion for declaratory judgment, bearing in mind our legal conclusion that the watercraft exclusion is inapplicable.

By the Court.—Judgment reversed and cause remanded with directions.

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¶27 FINE, J. (*dissenting*). I do not understand why the Majority says there are no material facts in dispute. If Renee Flink and Rita Kulinski agreed that they would jointly pay to rent the jet-ski, then both Ms. Flink and Ms. Kulinski rented it. Indeed, a reasonable insured would understand that if he or she agreed with another person for that person to sign rental papers, but that the insured would not only pay for the rented item but also use it, that the item was "rented" by both the insured and the person who signed the paperwork. The summary-judgment submissions reveal that there is a dispute whether that was done here.

¶28 Moreover, a devious insured (and I do not suggest that Ms. Flink is one) could very well read the watercraft-exclusion clause in conjunction with the Majority opinion and use a "straw man" to sign the paperwork, while that devious insured was the renter in fact, although not the renter (under the Majority's rationale) *de jure*. Thus, the devious insured could use the Majority opinion to effectively erase the watercraft-exclusion clause (or any other exclusion that is triggered by a "rental") from his or her policy, and thereby get coverage for which he or she did not pay.

¶29 I also believe that there are genuine issues of material fact whether Ms. Flink rented the jet-ski from Ms. Kulinski. The "profit" to which the Majority refers in ¶25 is certainly here: a fifty-dollar reduction in the $195.18 Ms. Kulinski paid because she signed the rental papers.

¶30 I would remand for a trial on whether Ms. Flink "rented" the jet-ski, and, as a result, triggered the watercraft exclusion.

¶31 I respectfully dissent.