COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

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. 97-0255

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

HELEN M. ROGERS,

PLAINTIFF-APPELLANT,

MEDICARE PART B.,

INVOLUNTARY-PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

ESTELLA POSTON, MUTUAL SERVICE CASUALTY INSURANCE COMPANY, MARY H. JOHNSON AND ALLSTATE INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Helen M. Rogers appeals the trial court's grant of summary judgment in favor of American Family Mutual Insurance Company and dismissal of Rogers's negligence claim and her claim for underinsured motorists coverage. Rogers argues that the trial court erred in granting summary judgment because: (1) the driver of the car in which she was a passenger had a duty to avoid the accident in which Rogers was injured and there are allegedly issues of material fact as to whether the driver breached that duty; and (2) American Family allegedly failed to give proper notice of a change in the driver's underinsured motorists coverage and, therefore, the terms of the previous coverage apply to Rogers's claim.

I. BACKGROUND

On June 25, 1995, Mary Nichy, Rogers's daughter, was driving eastbound on Good Hope Road in Milwaukee County. Rogers was a passenger in Nichy's car. As Nichy drove in the far right lane of the three eastbound lanes, she saw a disabled vehicle parked in the lane ahead of her. Nichy braked and stopped without hitting the disabled vehicle. Ann Miller had been driving the vehicle traveling directly behind Nichy's car. Miller saw the disabled vehicle and pulled into the center lane before Nichy stopped her car. Estella Poston had been driving the vehicle traveling directly behind Miller's vehicle. After Miller pulled into the center lane, Poston saw Nichy brake and stop her car. Poston was unable to stop her own vehicle and hit Nichy's car, pushing it into the disabled vehicle. Rogers was injured as a result of the accident.

American Family is Nichy's automobile liability insurance carrier. Rogers sued American Family claiming that Nichy negligently caused the accident

that resulted in Rogers's injuries. Rogers also made a claim under Nichy's underinsured motorists coverage. As noted, the trial court granted summary judgment in favor of American Family on both claims.

II. DISCUSSION

We review the trial court's grant of summary judgment *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., 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 judgment as a matter of law." Summary judgment should be granted only where the moving party shows the right to judgment "with such clarity as to leave no room for controversy." ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. ***Id.***, 97 Wis.2d at 338–339, 294 N.W.2d at 477.

Rogers argues that the trial court erred in granting summary judgment as to Nichy's negligence because there are material issues of fact as to whether Nichy maintained a proper lookout for road hazards and as to whether she stopped suddenly on the roadway. Rogers identifies evidence that Miller, the driver behind Nichy, was able to see the disabled vehicle and avoid it by changing lanes, and conflicting evidence as to whether the hazard lights of the disabled vehicle were engaged; Rogers asserts that the jury could conclude from this evidence that Nichy was negligent in failing to maintain a proper lookout. Rogers also identifies a conflict between Poston's deposition, in which Poston said that

Nichy stopped her car suddenly, and the depositions of Nichy and Rogers, in which Nichy and Rogers said that Nichy did not stop her car suddenly.

American Family does not dispute that these facts are in conflict, but rather argues, in essence, that they are not material issues of fact either because Nichy had no duty to prevent Poston from rear-ending her car, or alternatively, because Nichy signaled her intent to stop with her brake lights and thus did not breach any duty.[1] We disagree.

A driver has a duty to exercise ordinary care to keep a careful lookout ahead and about for other vehicles that may be within or approaching the driver's course of travel. *See* ***Cavanaugh v. Andrade***, 202 Wis.2d 290, 321, 550 N.W.2d 103, 116 (1996); WIS J I—CIVIL 1055. A driver also has a duty to use ordinary care to lookout for the condition of the highway ahead for traffic signs, markers, obstructions to vision, and other things that might warn the driver of possible danger. WIS J I—CIVIL 1055.

> To satisfy this duty of lookout, the driver must use ordinary care to make his observations from a point where such observations would be effective to avoid the accident.

[1] In support of these arguments, American Family cites cases in which a driver was faced with a sudden emergency or potential hazard, and therefore braked suddenly or stopped in the roadway to avoid the sudden circumstance; the driver's lookout ahead was not in issue in these cases. *See, e.g.,* ***Tesch v. Wisconsin Public Serv. Corp.***, 2 Wis.2d 131, 85 N.W.2d 762 (1957) (truck braked suddenly to avoid hitting car that began pulling toward roadway); ***Mack v. Decker***, 24 Wis.2d 219, 128 N.W.2d 455 (1964) (car stopped to avoid hitting children entering or near road). The courts in such cases have held that the stopping driver had no duty to a following driver other than to properly signal the stop with brake lights. *See* ***Tesch***, 2 Wis.2d at 136–138, 85 N.W.2d at 755–756; ***Decker***, 24 Wis.2d at 231, 128 N.W.2d at 462. Because Nichy was not faced with a sudden emergency, but, rather, the stalled car was stationary on the road as Nichy approached, and thus her lookout ahead is in issue, the cases American Family cites are inapposite. American Family also cites ***Bentzler v. Braun***, 34 Wis.2d 362, 371, 149 N.W.2d 626, 631 (1967), for the proposition that a driver does not have a duty to maintain a lookout to the rear if the driver properly signals a stop with brake lights. ***Bentzler*** did not involve a sudden stop, nor was the driver's lookout ahead in issue, and therefore it, too, is inapposite.

> Additionally, having made his observation, the driver must then exercise reasonable judgment in calculating the position or movement of persons, vehicles, or other objects…. When hazards exist because of highway conditions, volume of traffic, obstructions to view, weather, visibility, or other conditions, care must be exercised consistent with the hazards.

Id. A driver may not claim an existing emergency to avoid liability when the alleged negligence is negligent lookout. *See* ***Leckwee v. Gibson***, 90 Wis.2d 275, 288, 280 N.W.2d 186, 191 (1979); ***Schmiedeck v. Gerard***, 42 Wis.2d 135, 140, 166 N.W.2d 136, 138 (1969).

Nichy had a duty to observe the parked vehicle in the lane ahead of her, and to use reasonable judgment in avoiding the vehicle. If Nichy failed to properly observe the parked vehicle in time to take reasonable action to avoid it, but instead came to a sudden stop in the roadway, thereby causing Poston to rear-end her car, then a jury could find that Nichy was negligent. Because there are genuine issues of material fact as to whether Nichy maintained a proper lookout and as to whether she came to a sudden stop, the trial court erred in granting summary judgment to American Family on Rogers's negligence claim. We therefore reverse the trial court's grant of summary judgment on Rogers's negligence claim and remand the negligence claim to the trial court to proceed to trial.

Rogers also asserts that the trial court erred in granting summary judgment as to her underinsured motorists claim. Rogers asserts that, as a passenger in Nichy's car, she was covered by Nichy's underinsured motorists insurance, and that the court erred in applying the definition of underinsured motor vehicle that appears in Nichy's current policy because American Family failed to properly notify Nichy of a change in the definition of that term.

In 1991, American Family changed the definition of underinsured motor vehicle in Nichy's policy. Prior to the change, the definition read as follows: "**Underinsured motor vehicle** means a **motor vehicle** which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the damages an **insured person** is legally entitled to recover." After the change the definition stated: "**Underinsured motor vehicle** means a **motor vehicle** which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the limits of liability of this Underinsured Motorists coverage." The underinsured motorists coverage for Nichy's car was $100,000.

All three of the vehicles involved in the crash had bodily injury liability limits of $100,000. Thus, under the most recent definition of underinsured motor vehicle, there was not an underinsured vehicle in the accident and Nichy's underinsured motor vehicle coverage was unavailable to Rogers. Rogers asserts, however, that the previous definition of underinsured motor vehicle applies because American Family did not give Nichy proper notice of the less favorable term, as required by § 631.36(5), STATS. She asserts that the notice that American Family gave was insufficient because it was misleading as to the effect of the change in the definition of the term "underinsured motor vehicle," and that the trial court erred in finding that the notice complied with the statute.

The meaning of a statute presents a question of law that we review *de novo*. *See* ***Jungbluth v. Hometown, Inc.***, 201 Wis.2d 320, 327, 548 N.W.2d 519, 522 (1996). We must first examine the plain language of the statute, and if the meaning is plain, we may not look further than the language itself to determine the meaning of the statute. ***Id.***

Section 631.36(5), STATS., provides:

> RENEWAL WITH ALTERED TERMS. (a) *General.* Subject to pars. (b) and (d) , if the insurer offers or purports to renew the policy but on less favorable terms or at higher premiums, the new terms or premiums take effect on the renewal date if the insurer sent by 1st class mail or delivered to the policyholder notice of the new terms or premiums at least 60 days prior to the renewal date…. If the insurer does not notify the policyholder of the new premiums or terms as required by this subsection prior to the renewal date, the insurer shall continue the policy for an additional period of time equivalent to the expiring term and at the same premiums and terms of the expiring policy ....

Under the plain language of the statute, American Family was required to send notice of new, less favorable terms at least 60 days prior to the renewal date in order for those terms to take effect on the renewal date. Nichy does not challenge the timing of the notice, but rather asserts that its content was insufficient.

The notice provided to Nichy stated in relevant part:

> The Wisconsin Family Car Policy Change Endorsement (which begins below) contains eleven separately numbered changes. Those changes are summarized as follows regarding their effect on your policy:
>
> A. Changes 1, 5, 7, 8, 9, 10, and 11 are wording changes made in an attempt to more clearly state the original intent of the policy.
>
> ….
>
> This endorsement becomes a part of the auto policy identified on the enclosed form and is effective on the renewal date shown.
>
> Please read this endorsement carefully and be sure to keep it with your policy.
>
> If you have any questions, please contact your agent who is aware of these changes and ready to serve your insurance needs. Thank you for placing your business with us.

> ….
>
> 10. Under the Underinsured Motorists (IUM) Coverage Endorsement, the first sentence of definition 3 "underinsured motor vehicle" is changed to read:
>
> > 3. **Underinsured motor vehicle** means a **motor vehicle** which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the limits of liability of this Underinsured Motorists coverage.

This notice of the changed term was sufficient under § 631.36(5), STATS. It provided Nichy with notice that her policy was being renewed on new terms, and provided the exact text of the new term at issue here. This notice provided all that § 631.36(5) requires, and it was not misleading. We therefore affirm the trial court's grant of summary judgment on Rogers's underinsured motorists claim.[2]

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

[2] Rogers also argues that the contract should be reformed to reflect the previous definition of underinsured motor vehicle because the notice was misleading. Because the notice was not misleading, we reject this argument as well.