COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1999

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. 98-3685-FT

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

FEDERATED MUTUAL INSURANCE CO.,

PLAINTIFF-APPELLANT,

V.

ROSEMARY KUBOKAWA

DEFENDANT,

GENERAL CASUALTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

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

PER CURIAM. Federated Mutual Insurance Co. has appealed from an order entered in the trial court on November 18, 1998, granting a motion by

General Casualty to vacate an order entered in the trial court on June 2, 1998, granting Federated's motion for summary judgment and awarding Federated damages of $7550. In the November 18, 1998 order, the trial court limited Federated's recovery from General Casualty to $500. Pursuant to this court's order of January 29, 1999, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

This action arises from a subrogation claim brought by Federated against General Casualty, seeking to recover for damage to a Ford Escort provided as a "loaner" vehicle to Diane Kubokawa when she brought her own automobile to a car dealership for repairs and servicing. Federated provided a commercial package insurance policy to the car dealership and paid the dealership's claim for the damaged Escort. Federated then filed suit against General Casualty, which provided a personal automobile policy to Diane's mother, Rosemary Kubokawa.[1] Federated and General Casualty filed cross-motions for summary judgment based on stipulated facts. Federated's motion was initially granted by the trial court. However, after the filing of a motion for reconsideration by General Casualty, the trial court determined that the coverage provided by the General Casualty policy for the loss of the Escort was excess rather than primary and reduced Federated's recovery from $7550 to $500.[2]

[1] Rosemary Kubokawa was named as a defendant in the complaint, but the action against her was dismissed by stipulation of the parties in an order entered in the trial court on September 26, 1997.

[2] The trial court stated in its decision on reconsideration that the $500 was the value of the deductible "lost" by the car dealership, Federated's insured.

Federated's first argument on appeal is that General Casualty's motion for reconsideration must be deemed denied because it was not decided by the trial court within ninety days of its filing. In support of this argument, Federated relies on § 805.17(3), STATS. However, its reliance is misplaced. Section 805.17(3) applies to bench trials and other situations where a trial court engages in fact-finding at an evidentiary hearing. *See* ***Schmeling v. Phelps***, 212 Wis.2d 898, 905, 569 N.W.2d 784, 787 (Ct. App. 1997); ***Schessler v. Schessler***, 179 Wis.2d 781, 784-85, 508 N.W.2d 65, 66-67 (Ct. App. 1993). It does not apply to cases involving summary judgment. *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis.2d 527, 533-34, 499 N.W.2d 282, 284-85 (Ct. App. 1993). Regardless of whether Federated's motion for summary judgment was based upon stipulated facts, it remained a motion for summary judgment which required the trial court to make a legal conclusion rather than findings of fact. *See* ***Millen v. Thomas***, 201 Wis.2d 675, 682-83 and n.2, 550 N.W.2d 134, 137 (Ct. App. 1996). Consequently, § 805.17(3) was inapplicable to the motion for reconsideration, *see* ***Continental Casualty***, 175 Wis.2d at 533-34, 499 N.W.2d at 284-85, and did not limit the time for deciding it.

Federated next argues that the trial court erroneously exercised its discretion by granting relief under § 806.07(1)(h), STATS. However, General Casualty's motion did not indicate that relief was sought under § 806.07, and nothing in the trial court's decision and order granting reconsideration indicates that § 806.07 was the basis for its decision.[3] In fact, in a decision and order

[3] According to the record, the first time the parties made any mention of § 806.07, STATS., was after the trial court issued its decision and order granting reconsideration. Federated then objected that the trial court lacked jurisdiction to reconsider under § 805.17(3), STATS., and that it had no basis to reconsider under § 806.07. General Casualty responded that reconsideration was appropriate under § 806.07(1)(h).

entered on December 15, 1998, responding to Federated's objections to its decision on reconsideration, the trial court determined that it did not lose jurisdiction to address the motion for reconsideration because § 805.17(3), STATS., did not apply to reconsideration of a summary judgment. It stated that "[a]s a result, there is no need to analyze or refer to Section 806.07."

The trial court thus did not reconsider the original decision and order under § 806.07, STATS., nor was it limited to reconsidering under that statute. *See* ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (Ct. App. 1992). Motions for reconsideration have become part of the common law and permit a circuit court to review what it concludes was an erroneous ruling in a pending case. *See* ***id.*** at 294, 491 N.W.2d at 124.[4] Moreover, while the court in ***Continental Casualty*** held that the time limits in § 805.17(3), STATS., do not apply to motions for reconsideration of a summary judgment, it did not preclude parties from bringing motions for reconsideration under the summary judgment statute, § 802.08, STATS. *See* ***Continental Cas.***, 175 Wis.2d at 535 n.2, 499 N.W.2d at 285.

On reconsideration, the trial court granted summary judgment to General Casualty, concluding that it had erred in interpreting the General Casualty policy. This court reviews the trial court's decision granting summary judgment de novo, applying the same standards as those employed by the trial court. *See*

[4] In ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (Ct. App. 1992), the court stated that "[w]e see no reason why a trial court, having concluded that a prior nonfinal ruling in a pending case is wrong, cannot correct that error by reconsideration. We conclude that Iowa's motion is not governed by sec. 806.07." Regardless of whether the holding of ***Fritsche*** is limited to reconsiderations of nonfinal orders, it applies here because the June 2, 1998 order granting summary judgment to Federated ordered "that judgment be entered" and was thus nonfinal under ***Radoff v. Red Owl Stores, Inc.***, 109 Wis.2d 490, 493-94, 326 N.W.2d 240, 241-42 (1982).

Greene v. General Cas. Co., 216 Wis.2d 152, 157, 576 N.W.2d 56, 59 (Ct. App. 1997), *review denied*, 216 Wis.2d 612, 579 N.W.2d 44 (1998). When, as here, material facts are undisputed and the sole issue involves the interpretation of an insurance policy, a question of law is presented which is appropriate for summary judgment. *See* ***id.***

Insurance policies are controlled by the same rules of construction that govern other contracts. *See* ***Meyer v. City of Amery***, 185 Wis.2d 537, 543, 518 N.W.2d 296, 298 (Ct. App. 1994). The goal is to ascertain the intentions of the contracting parties. *See* ***Rohloff v. Heritage Mut. Ins. Co.***, 179 Wis.2d 165, 170, 507 N.W.2d 112, 114 (Ct. App. 1993). Insurance policies are to be construed to give their language the common and ordinary meaning as that language would be understood by a reasonable person in the position of the insured. *See* ***C.L. v. School Dist.***, 221 Wis.2d 692, 697, 585 N.W.2d 826, 828 (Ct. App. 1998). Ambiguities in coverage must be construed in favor of coverage, while exclusions must be narrowly construed against the insurer. *See* ***Meyer***, 185 Wis.2d at 543, 518 N.W.2d at 298. However, words or phrases are ambiguous only when they are reasonably susceptible of more than one reasonable construction, and when a policy's terms are plain they cannot be rewritten by construction. *See* ***id.***

The policy issued by General Casualty to Rosemary Kubokawa provided:

> COVERAGE FOR DAMAGE TO YOUR AUTO
>
> A. We will pay for direct and accidental loss to "your covered auto" or any "non-owned auto," including its equipment …
>
> ....
>
> If there is a loss to a "non-owned auto," we will provide the broadest coverage applicable to any "your covered auto" shown in the Declarations.

Federated contends that the broadest possible coverage would be primary coverage with a $100 deductible to the insured. General Casualty, in contrast, relies on the section of its policy which provides:

> OTHER SOURCES OF RECOVERY
>
> If other sources of recovery also cover the loss we will pay only our share of the loss.… However, any insurance we provide with respect to a "non-owned auto" shall be excess over any other collectible source of recovery including, but not limited to:
>
> 1. Any coverage provided by the owner of the "non-owned auto."

General Casualty also relies on the portion of the policy issued by Federated to its insured which provides:

> 5. OTHER INSURANCE
>
> a. For any covered "auto" you own, this Coverage Form provides primary insurance.

Because the Ford Escort was owned by Federated's insured and because Federated's policy provided coverage for the loss of the Escort, General Casualty contends that the Federated policy provided primary coverage for the damage to the vehicle, while its policy provided only excess coverage. In contrast, Federated contends that the provisions in the General Casualty policy regarding "broadest possible coverage" and excess coverage create an ambiguity in the policy which must be construed against General Casualty.

We conclude that the policy terms are unambiguous and clearly establish that the coverage provided by General Casualty is merely excess. The Federated policy expressly states that it provides primary insurance for any covered auto owned by its insured, which in this case was the Ford Escort owned by the car dealership. Under its subrogation rights, Federated stood in the place of

the car dealership in seeking to recover the insurance proceeds paid for the Escort. However, because the Federated policy stated that it provided primary insurance for the Escort, and because any insurance that the General Casualty policy provided for the Escort was expressly made excess over any coverage provided by the owner, the only conclusion that can reasonably be drawn from the language of the two policies is that Federated could not recover from General Casualty the insurance proceeds paid by it to the car dealership.[5]

Federated also contends that the provision limiting coverage when coverage is provided by the owner of a "non-owned auto" renders the coverage for a non-owned auto illusory under the General Casualty policy. It contends that the limitation therefore should be struck from the policy.

Coverage is illusory if a premium is paid for coverage which would not pay benefits under any reasonably expected set of circumstances. *See* ***Link v. General Cas. Co.***, 185 Wis.2d 394, 400, 518 N.W.2d 261, 263 (Ct. App. 1994). Under the General Casualty policy, coverage would be provided for a non-owned vehicle if the owner of the non-owned vehicle did not obtain collision insurance for it or, in some instances, where damages exceeded the owner's coverage.

[5] In its reply brief, Federated argues that although General Casualty's coverage may be excess coverage as to the damages suffered by the car dealership, it is primary coverage for General Casualty's insured, Diane Kubokawa, who may ultimately be liable to Federated for the loss. Federated contends that the trial court failed to recognize that the exclusionary language did not apply in this case because Federated's policy provides no coverage for Diane, and there was no other insurance protecting her from financial liability to Federated.

Diane is not a party to this lawsuit or appeal, and the issue of whether she is insured under the policy issued by Federated to the car dealership or liable to Federated is not before this court. The only "loss" suffered has been damages for the loss of the Escort, and because that loss was covered by Federated, any insurance provided by General Casualty for the loss of the Escort was excess to that provided by Federated.

Consequently, coverage is not illusory under the General Casualty policy and no portion of it can be struck by this court.

By the Court.—Order affirmed.

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