COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP58 **Cir. Ct. No. 2013CV153**

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

JAMES R. HARTWIG,

PLAINTIFF-RESPONDENT,

STATE OF WISCONSIN - DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. American Family Mutual Insurance Company appeals a judgment entered in this insurance coverage dispute arising from a single-car automobile accident in which James Hartwig was injured while a passenger in the vehicle. The vehicle was owned by Derek Elliott, was being driven by Andrew Juza, and was insured by American Family. There were two claims at issue, both of which were resolved by summary judgment: (1) liability coverage; and (2) underinsured motorist (UIM) coverage. In addition, the circuit court also made evidentiary rulings in anticipation of a trial that was ultimately not held.

¶2 We conclude the circuit court erred by granting summary judgment on Hartwig's claim for liability coverage because there is a genuine issue of material fact regarding whether the vehicle's owner placed a restriction on the driver's use of the vehicle, which restriction was being violated at the time of the accident. We also conclude the circuit court erred by placing the burden upon American Family to prove that Juza was not using the vehicle for a permitted purpose at the time of the accident. Next, we conclude the circuit court erred by *sua sponte* granting summary judgment in Hartwig's favor on his claim for UIM benefits without sufficient notice to American Family or opportunity for discovery on that claim. Finally, we affirm the circuit court's evidentiary ruling excluding evidence of Juza's and Hartwig's respective levels of intoxication at the time of the accident.

BACKGROUND

¶3 Hartwig was injured in a one-vehicle accident on December 3, 2012. He was a passenger in Elliott's vehicle, which Juza was operating. At the time of

the accident, American Family had issued an insurance policy to Elliott containing liability and UIM coverage. It is undisputed that the amount required to compensate Hartwig for his injuries exceeded the policy limits.

¶4 Hartwig filed this direct action against American Family seeking compensation for his injuries. The primary issue was whether Juza was a permissive user of Elliott's vehicle, such that American Family must provide liability coverage related to the accident. The insurance policy defined "insured persons" as including "[a]ny person using your insured car."[1] However, the policy stated an "insured person" did not include any person using the insured car without permission, nor any person who, although using the insured car with permission, "exceeds the scope of that permission."

¶5 Following some discovery, American Family sought to submit the question of permissive use to a jury. Three days before the jury trial was set to begin, the circuit court determined that Elliott had undisputedly given Juza express permission to use his vehicle prior to the accident. The court reserved for further consideration the issue of whether Juza was exceeding the scope of that permission at the time of the accident. The following day, the court concluded American Family would bear the burden of proving "that Andrew Juza's operation of the motor vehicle at the time of the accident" fell outside the scope of permissive use Elliott had granted.

¶6 On the morning the trial was set to begin, the circuit court concluded Hartwig was entitled to summary judgment on the issue of permissive use. The

[1] For purposes of UIM coverage, an "insured person" is "[a]ny one else occupying your insured car."

court's assessment of the deposition transcripts and other evidence in the record led it to conclude that there was no genuine issue of fact that Elliott granted Juza permission to use his vehicle without any restrictions. The court acknowledged the existence of conflicting evidence in this regard, but it concluded that Elliot's "now self-serving testimony about limitations" on the scope of permitted use, made following the accident, came too late.

¶7 The jury trial was cancelled. The parties then stipulated to a final judgment regarding damages in order to permit American Family to appeal the circuit court's permissive use determination.

DISCUSSION

¶8 American Family first argues the circuit court erred by granting summary judgment to Hartwig on the issue of permissive use for purposes of liability coverage. We review a grant of summary judgment de novo. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. We use the same methodology employed by the circuit court. *See* ***id.*** Summary judgment is appropriate 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 a judgment as a matter of law." WIS. STAT. § 802.08(2) (2015-16).[2]

¶9 American Family faults the circuit court for applying the "initial permission" rule, which provides that if a person "was given initial permission to

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

use a vehicle, subsequent use was also within that permission, regardless of whether the use was within the insured's contemplation when he gave initial permission." *See* ***Employers Ins. of Wausau v. Pelczynski***, 153 Wis. 2d 303, 308, 451 N.W.2d 300 (Ct. App. 1989) (citing ***Drewek v. Milwaukee Auto. Ins. Co.***, 207 Wis. 445, 448, 240 N.W. 881 (1932)). Wisconsin courts have rejected the "initial permission" rule in favor of the "mere deviation" rule, which gives rise to coverage only in instances of a driver's minor deviations from the scope of permission. ***Id.*** (citing ***Boehringer v. Continental Cas. Co.***, 7 Wis. 2d 201, 205, 96 N.W.2d 353 (1959), and ***Kitchenmaster v. Mutual Auto. Ins. Co. of Herman***, 248 Wis. 554, 558, 22 N.W.2d 479 (1946)). The "minor deviation" rule requires that the scope of permission be determined in each case. ***Id.***

¶10 The circuit court here recognized, and we agree, that the undisputed facts showed Elliott had given Juza permission to use the vehicle. However, there was conflicting evidence about whether Elliott placed restrictions upon that use. Elliott testified at his deposition that Juza asked to borrow Elliott's vehicle because the taillights on Juza's vehicle were not working and he had no way of getting to and from work. Elliott testified as follows:

> Q Once you got back to your residence, did you have any conversation with Mr. Juza as to the use of the Suzuki Samurai [Elliott's vehicle]?
>
> A Yes. It was to get to and from work because he had to be there early in the morning and he had no other options for a vehicle.
>
> Q Did you tell Mr. Juza that?
>
> A Yes.
>
> ….
>
> Q Did you set any parameters or limitations on his use of the vehicle?

> A To get to and from work was the basis of the negotiation.

Elliott testified he had not rescinded that limitation after granting Juza permission to use the vehicle. Juza testified that Elliott did not tell him he could not use the vehicle for personal purposes or, contrary to Elliott's testimony, restrict his use to only going to and from work.

¶11 Hartwig's arguments generally center around perceived inconsistencies or ambiguities in Elliott's deposition testimony. Hartwig asserts Elliott, during his deposition, subsequently disclaimed having put any limitations upon Juza's use of the vehicle. Indeed, Hartwig's various arguments largely flow from the basic premise that Elliott did not place any express restrictions upon Juza's use of his vehicle. However, the portions of the deposition transcript Hartwig cites are not necessarily inconsistent with Elliott's initial testimony, or reasonable inferences therefrom, that he told Juza he could use the vehicle only to get to and from work.[3] As such, Hartwig proceeds from a flawed premise, and he

[3] For example, in one instance Elliott testified that he did not impose any limitations on Juza's use of the vehicle during his initial phone call, but rather they discussed that issue later in person. In another instance, Elliott expressed confusion about the following question posed by Hartwig's counsel, eventually answering in the negative: "Did you ever tell Mr. Juza he could not use your vehicle for anything other than going to and from work?" In neither specific instance was Elliott's testimony inconsistent with his general testimony, or reasonable inferences therefrom, that he *affirmatively* told Juza he could use the vehicle only going to and from work.

Elliott also testified he did not "go through a bunch of lists of things [Juza] could and could not do with the vehicle, but the negotiation was … he had to get to work." However, it is well settled that a person granting permission to use his or her vehicle need not expressly state all the limitations. ***Harper v. Hartford Acc. & Indem. Co.***, 14 Wis. 2d 500, 509, 111 N.W.2d 480 (1961).

Because there existed deposition testimony that raised a genuine issue of material fact, we need not separately address Hartwig's argument that certain of Elliott's other statements—made by affidavit and during recorded interviews with an insurance company representative—are insufficient to create an issue for trial.

cannot rest on the notion that Elliott later "clarified" his initial testimony upon further questioning by Hartwig's counsel. We therefore reverse the grant of summary judgment and remand for further proceedings on the issue of whether Juza was engaged in a permissive use of Elliott's vehicle at the time of the accident.[4]

¶12 American Family also asserts the circuit court erroneously shifted to it the burden of proving that Juza was using Elliott's vehicle outside the scope of permission. We agree. Given that a finding of permissive use is necessary to establish an initial grant of coverage—because it relates to who is "an insured" under the policy—and is not a policy exclusion, the burden of proving actual or implied permissive use rests with the party seeking to establish coverage. ***Derusha v. Iowa Nat'l Mut. Ins. Co.***, 49 Wis. 2d 220, 222, 181 N.W.2d 481 (1970); ***Oaks v. American Family Mut. Ins. Co.***, 195 Wis. 2d 42, 51, 535 N.W.2d 120 (Ct. App. 1995). We reject Hartwig's arguments to the contrary, which are either unsupported by or contrary to existing law.[5]

[4] We acknowledge the circuit court found incredible Elliott's testimony regarding the restrictions he imposed upon Juza's use of his vehicle. However, "[c]redibility of witnesses is not a determination to be made at the summary judgment stage." ***Pum v. Wisconsin Physicians Serv. Ins. Corp.***, 2007 WI App 10, ¶16, 298 Wis. 2d 497, 727 N.W.2d 346.

[5] Specifically, Hartwig argues ***Derusha v. Iowa National Mutual Insurance Co.***, 49 Wis. 2d 220, 181 N.W.2d 481 (1970), was based on a since-repealed version of the omnibus statute. However, ***Derusha***'s citation to authority regarding the allocation of the burden of proof was to a well-known insurance treatise, not to the omnibus statute. *See* ***id.*** at 222 & n.4. In any event, the current language of the omnibus statute is not inconsistent with the view that the definitional aspects of a permissive user are part of the policy language establishing an initial grant of coverage rather than an exclusion. *Compare* WIS. STAT. § 632.32(5)(a) *with* § 632.32(5)(e).

(continued)

¶13 American Family next argues the circuit court erred in granting partial summary judgment by concluding, as a matter of law, that Hartwig was a permissive passenger in the vehicle for purposes of UIM coverage. At the summary judgment hearing several days before trial, the court ruled "Hartwig had permission to be a passenger in the automobile, [and] that's not an issue at the trial." However, Hartwig's summary judgment motion had made clear that his presence in the vehicle as a permissive passenger—and thereby Hartwig's entitlement to UIM benefits—depended on whether Juza was a permissive user of the automobile for purposes of liability coverage.[6] Moreover, Hartwig had not

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Because ***Oaks v. American Family Mutual Insurance Co.***, 195 Wis. 2d 42, 51, 535 N.W.2d 120 (Ct. App. 1995), relies on ***Derusha*** as direct authority for the proposition that the party seeking to establish coverage bears the burden of proving permissive use, we cannot simply dismiss ***Oaks***' statement to that effect as dictum, as Hartwig urges us to do. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 (holding the court of appeals may not dismiss a statement from the supreme court as dictum).

Finally, Hartwig contends ***Heaton v. Mountin***, 2000 WI App 45, 233 Wis. 2d 154, 607 N.W.2d 322, abrogated both ***Derusha*** and ***Oaks*** by classifying the relevant permissive use policy language as an exclusion. ***Heaton***, however, appears merely to have adopted the parties' characterization of the permissive use provision as an exclusion; it did not hold as such. *See* ***Heaton***, 233 Wis. 2d 154, ¶7 n.1. Although Hartwig hints at a possible judicial estoppel argument given that American Family was the appellant in ***Heaton***, he never directly makes this argument, and we will not develop it for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. In any event, even if there is some tension between ***Heaton*** on the one hand, and ***Derusha*** and ***Oaks*** on the other, we are compelled to follow our supreme court's earlier pronouncement on this issue. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

[6] The summary judgment motion itself merely referenced the arguments set forth in Hartwig's "trial brief." Hartwig's trial brief stated:

> To avoid confusion of the issues, this coverage trial should address only permissive use for purpose of liability coverage. Moreover, underinsured motorist and uninsured motorist coverage is not triggered unless and until it is determined the [sic] there is liability coverage for Juza under the American Family policy ….

pled a UIM claim initially; only after granting partial summary judgment did the circuit court grant Hartwig's motion to amend his complaint to add a claim for UIM benefits under the American Family policy.

¶14 Under these circumstances, we agree with American Family that the circuit court's summary judgment ruling on Hartwig's UIM claim—granted prior to a time when any such claim had been allowed as an amendment to the pleading—was done *sua sponte* and without sufficient notice to American Family or the opportunity for it to respond. There was no motion for summary judgment on Hartwig's (then nonexistent) UIM claim before the circuit court at the time of the hearing. To raise and grant a summary judgment on its own motion, a circuit court must comply with the twenty-day notice provision contained in WIS. STAT. § 802.08(2). ***Larry v. Harris***, 2008 WI 81, ¶40, 311 Wis. 2d 326, 752 N.W.2d 279. "A court's *sua sponte* grant of summary judgment without complying with the statutory prior notice requirement deprives parties of an opportunity to bring forth all their evidence." ***Id.***, ¶43. This consideration is particularly important here, where no UIM claim had even been pled at the time discovery was conducted in this case.[7]

¶15 Hartwig argues American Family itself raised the issue of whether Hartwig was a permissive passenger at various points in the litigation. That American Family may have included segments of argument relating to a potential UIM claim does not change the fact that it was entitled to notice under WIS. STAT.

[7] Having concluded that the circuit court erred in granting summary judgment on Hartwig's UIM claim for procedural reasons, we need not also address American Family's alternative argument that the court erred in ruling as a matter of law that Hartwig was a permissive passenger.

§ 802.08(2) that the circuit court would be entertaining a motion for summary judgment on that issue. Hartwig also faults American Family for failing to request the ability to submit additional argument or evidence. But American Family did challenge the ruling in a motion for reconsideration, noting at the motion hearing that the circuit court had "technically [put] the cart before the horse … [because] it wasn't a UIM case" at the time summary judgment had been granted and there was at that time no pending summary judgment motion.

¶16 Finally, American Family challenges one of the circuit court's pretrial evidentiary rulings, which we elect to address in the interest of judicial economy. The circuit court granted Hartwig's motion in limine to exclude evidence regarding the extent of Juza's and Hartwig's respective intoxication at the time of the accident. The circuit court concluded such evidence was not relevant to a determination of insurance coverage. It also concluded that, under WIS. STAT. § 904.03, even if the evidence was relevant, its minimal probative value was substantially outweighed by the potential for unfair prejudice. Specifically, the court was concerned the jury would render a verdict based solely on the fact that Juza had consumed a large quantity of alcohol prior to the accident.

¶17 We review evidentiary rulings for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Here, an issue for trial was whether Juza and Hartwig were using Elliott's vehicle outside the scope of permission at the time of the accident. If the jury were to conclude that Elliott placed no restriction on Juza's use of the vehicle, then the use of the vehicle was with permission regardless of Juza's and Hartwig's intoxicated states. If the jury were to conclude that there was a work-travel

restriction, then the degree of intoxication is also irrelevant because the parties had stipulated that Juza was not on his way to or from work at the time of the accident.

¶18 Although American Family argues the intoxication evidence was necessary for the jury to consider the "totality of the circumstances," it has not presented any argument that alters the foregoing analysis. Indeed, American Family concedes in its reply brief: "Juza did not have permission to operate the vehicle as he did, regardless of whether he was drinking." The circuit court did not erroneously exercise its discretion in excluding the intoxication evidence.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).