

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2001

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1493

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JEAN M. FLEISHMAN, N/K/A GALASINSKI,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. BREM,

DEFENDANT,

AMERICAN FAMILY MUTUAL INS. CO.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 DYKMAN, P.J. American Family Mutual Insurance Company (American Family) appeals from an order and a judgment declaring American Family liable to Jean Fleishman for \$33,000 pursuant to the uninsured motorist coverage in her automobile policy with American Family. The trial court determined that she was entitled to \$33,000 because that was the amount of damages she could have recovered from Michael Brem, the uninsured motorist who injured her, had she sued him. The issue is whether Fleishman is entitled to \$33,000 or that sum reduced by the amount of worker's compensation benefits paid to Fleishman, who was in the course and scope of her employment when she was injured by Brem.

BACKGROUND

¶2 Fleishman and American Family agree that Brem was negligent and caused Fleishman \$33,000 in damages. They disagree on the meaning of an uninsured motorist clause in the automobile policy American Family sold to Fleishman. The policy provides in pertinent part: "We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle."

¶3 Fleishman's employer's worker's compensation carrier paid Fleishman \$13,346.70. Fleishman's total compensatory damages were \$33,000. American Family argues that it owes Fleishman only \$19,653.30 because that is the amount she is "legally entitled" to recover from Brem. The trial court

concluded that Fleishman was entitled to \$33,000 compensation from American Family.¹ American Family appeals.

DISCUSSION

¶4 This appeal involves uninsured motorist coverage contained in an insurance contract. The grant or denial of relief in a declaratory judgment action is a matter within the discretion of the trial court. *United Fire & Cas. Co. v. Kleppe*, 174 Wis. 2d 637, 640, 498 N.W.2d 226 (1993). A trial court acts outside the ambit of that discretion when it bases its discretionary decision upon an error of law. *Id.* Resolution of this case turns on the interpretation of a clause in the underlying insurance policy. Interpretation of an insurance contract is a question of law that we review de novo. *Smith v. Katz*, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999).

¶5 The issue is whether American Family is entitled to reduce the damages it must pay to Fleishman by the amount she received in worker's compensation benefits. This dispute is over a clause in Fleishman's insurance policy, the operative words of which are "legally entitled to recover."

¶6 American Family asserts that Fleishman is not "legally entitled to recover" \$33,000 in compensatory damages because, pursuant to WIS. STAT. § 102.29(1) (1995-96),² she would not have received that amount of damages had

¹ The actual sum was agreed to between Fleishman and American Family after the trial court's decision. The trial court's opinion determined only that Fleishman was entitled to the full amount of her compensatory damages without specifying the amount.

² All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted. WISCONSIN STAT. § 102.29(1) states in part:

The making of a claim for compensation against an employer or compensation insurer for the injury or death of an

(continued)

she brought this action directly against Brem. Rather, part of the recovery from such an action would reimburse Fleishman's employer's worker's compensation carrier under the subrogation requirement in § 102.29. In other words, because the worker's compensation reimbursement would not be paid to Fleishman in an action against Brem, she would not be entitled, in American Family's view, to receive \$33,000 from American Family.

¶7 The rules for interpreting insurance contracts are well established: Insurance contracts are controlled by the same rules of construction as are applied

employe shall not affect the right of the employe, the employe's personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death..... If notice is given as provided in this subsection, the liability of the tortfeasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim, the proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employe or the employe's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future Any balance remaining shall be paid to the employe or the employe's personal representative or other person entitled to bring action.

American Family asserts that, applying the facts of this case, the distribution formula in § 102.29(1) yields the following results:

Total recovery amount	\$33,000
-1/3 to plaintiff	\$11,000
-1/3 reasonable costs of collection (lawyer fees)	\$11,000
-Amount repaid to worker's compensation	
carrier	\$13,346.70
-Balance remaining	\$0

to other contracts. *Ehlers v. Colonial Penn Ins. Co.*, 81 Wis. 2d 64, 74, 259 N.W.2d 718 (1977). When the language of a contract is unambiguous, we apply the literal meaning of the policy. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998). The language in Fleishman's policy is not ambiguous—it has already been interpreted by the supreme court. In *Sahloff v. Western Cas. & Sur. Co.*, 45 Wis. 2d 60, 68-69, 171 N.W.2d 914 (1969), the court said:

But in answer to the merits of this argument, the phrase "legally entitled to recover" raises the question of whether the insured needs to have only a cause of action against the uninsured motorist or whether his claim must also be enforceable at the time of his suit against his insurer. We think the phrase was used only to keep the fault principle as a basis for recovery against the insurer and deals with the question of whether the negligence of the uninsured motorist and the absence of contributory negligence is such as to allow the insured to recover.

¶8 The issue in *Sahloff* was whether the tort or contract statute of limitations applied in a policyholder's suit to recover under the uninsured motorist provisions of his auto policy. *Id.* at 64. The court noted that the phrase "legally entitled to recover" appeared first in WIS. STAT. § 204.30(5)(a) (1967), and then in the uniform uninsured motorist coverage in auto policies. *Id.* at 63, 69. The court found no basis in the history of the statute or the endorsement that coverage should be restricted to situations in which the insurer can stand in the shoes of the uninsured motorist. *Id.* at 69.

¶9 Following *Sahloff*, we conclude that the phrase "legally entitled to recover" found in Fleishman's auto policy with American Family deals only with the question of whether the negligence of Brem and the negligence of Fleishman is such that Fleishman could recover from Brem. Fleishman and American Family

have stipulated that Fleishman can recover from Brem because Brem was entirely at fault for the accident. Therefore, the phrase “legally entitled to recover” does not have the meaning ascribed to it by American Family. We therefore affirm the trial court’s judgment and order declaring that American Family is liable to Fleishman in the amount of \$33,000.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

