COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2412 **Cir. Ct. No. 00-CV-38**

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

LUKAS METNIK, A MINOR, BY HIS GUARDIAN AD LITEM, NEELAM K. DAVISON, TIM METNIK, AND KAY METNIK,

PLAINTIFFS-RESPONDENTS,

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

STEVEN WIRTZ,

DEFENDANT.

APPEAL from an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. American Family Mutual Insurance Company appeals an order denying its motion for a declaration that it did not provide liability coverage to its insured, Steven Wirtz, for injuries sustained by Lukas Metnik while attending day care at Wirtz's home. American Family argues that the circuit court erred by concluding that Metnik's claim falls within the "non-business exception" to the "business pursuits exclusion" of Wirtz's homeowners' insurance policy. We reject American Family's argument and affirm the order.

BACKGROUND

¶2 In 1996, Wirtz's wife began operating a day care center out of their home. In September of 1999, Metnik, who was attending the day care center, was injured after being bitten by Wirtz's dog. Metnik brought suit against Wirtz and his homeowners' liability insurer, American Family, to recover damages for the injuries suffered. Metnik's complaint alleged strict liability and negligence on the part of Wirtz and also alleged that American Family's insurance policy provided coverage to Wirtz as the owner of the dog that caused Metnik's injuries.

¶3 American Family filed a motion for declaratory judgment disputing insurance coverage under the policy. The circuit court denied the motion and this court granted American Family's petition for leave to appeal.

ANALYSIS

¶4 The grant or denial of relief in a declaratory judgment action is a matter within the discretion of the circuit court. ***United Fire & Cas. Co. v. Kleppe***, 174 Wis. 2d 637, 640, 498 N.W.2d 226 (1993). A circuit 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 an insurance contract, a question of law that we review independently, although benefiting from the circuit court's analysis. ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). A court gives insurance policy language its common and ordinary meaning, construing the insurance policy as would a reasonable person in the position of the insured. *See* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 221 Wis. 2d 800, 806, 586 N.W.2d 29 (1998). When an insurance policy read in context is reasonably susceptible to more than one construction, it is ambiguous. ***Id.*** at 806. Any ambiguity in an insurance policy is resolved in favor of the insured. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997). Further, "policy provisions tending to limit liability are narrowly construed against the insurer." ***Id.***

¶5 American Family argues that the circuit court erred by determining that there was coverage for Metnik's claims pursuant to the "non-business exception" to the "business pursuits exclusion" in Wirtz's homeowners liability insurance policy.[1] The policy provided, in relevant part:

> COVERAGE D – PERSONAL LIABILITY COVERAGE
>
> We will pay, up to our limit, compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence covered by this policy.

[1] After granting American Family's petition for leave to appeal, this court certified the appeal to our supreme court to determine whether a daycare provider's homeowner's policy with a standard "business pursuits" exclusion provides liability coverage when the homeowner's dog injures a child for whom daycare is being provided. The certification was held in abeyance pending our supreme court's decision in ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, 224 Wis. 2d 802, 628 N.W.2d 876. Following the decision in ***Vandenberg***, this court's certification was refused. ***Vandenberg*** controls the present case.

> Coverage D – Personal Liability and Coverage E – Medical Expense do not apply to:
>
> ….
>
> 4. Business. We will not cover bodily injury or property damage arising out of business pursuits or the rental or holding for rental of any part of any premises except:
>
> a. activities which are normally considered non-business ….

In turn, "business," under the policy's terms is defined as:

> Any profit motivated full or part-time employment, trade, profession or occupation and including the use of any part of any premises for such purposes. The providing of home day care services to other than insureds, for which an insured receives monetary or other compensation for such services is also a business.

¶6 The circuit court concluded that operation of the home day care center was a business pursuit. However, in denying American Family's motion for declaratory judgment, the court determined that the acts of controlling and supervising Metnik, the dog and the two in relation to one another during the operation of the day care center amounted to "activity ordinarily incident to non-business pursuits."

¶7 In ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, 244 Wis. 2d 802, 628 N.W.2d 876, an infant attending a home day care center was suffocated by the day care provider's five-year-old son. There, the circuit court determined that the day care provider's allegedly negligent supervision of her own child while providing day care services for other children did not fall within the "usual to non-business pursuits exception" to the "business pursuits exclusion" of the subject insurance policy. On certification from this court, our supreme court studied the numerous cases involving "usual to non-business pursuits" exceptions and noted

that it was "unable to find any readily identifiable meaning in the [exception's] language." ***Id.*** at ¶42. The court therefore concluded that the language of the exception was ambiguous and should be construed in favor of the insured. ***Id.*** The court determined that reasonable persons could reasonably believe that "they had coverage under this exception for the supervision and control of their own child." ***Id.***

¶8 Applying ***Vandenberg*** to the present case, where the language of the "non-business exception" is ambiguous, we construe the policy in favor of the insured. Because Wirtz reasonably could have believed that he had coverage under the "non-business exception" to the "business pursuits exclusion" for the supervision and control of his dog, we conclude that the insurance policy provides coverage to Wirtz for the claim that he was negligent in the supervision and control of that dog.

By the Court.—Order affirmed.

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