

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 7, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 01-2784-FT

Cir. Ct. No. 01-CV-33

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STEVE MEYER AND JANE MEYER,

PLAINTIFFS-APPELLANTS,

v.

**MELVIN SCHMITZ D/B/A MEL'S TRUCKING AND RURAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

GORDON SEAMONS AND ABC INSURANCE COMPANY,

**THIRD-PARTY DEFENDANTS-
(IN T. CT.),**

v.

**MELVIN SCHMITZ D/B/A MEL'S TRUCKING AND RURAL
INSURANCE COMPANY,**

**THIRD-PARTY PLAINTIFFS-
(IN T. CT.).**

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Steve and Jane Meyer appeal an order dismissing Rural Insurance Company from this action.¹ The issues are whether: (1) the insurer established on summary judgment that its policy did not provide coverage, and (2) there is a dispute of material fact that precludes summary judgment. We reverse.

¶2 The circuit court dismissed Rural based on its motion for summary judgment. Summary judgment methodology is well-established, and need not be repeated here. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court applied. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶3 The Meyers began this action by filing a complaint against Melvin Schmitz. They alleged that Schmitz was engaged in the trucking business, that in November 2000 he undertook to move a building for the Meyers, and that as a result of his negligence the building was destroyed. The Meyers also named Rural as a defendant and alleged that it was the insurer of Schmitz for acts of negligence. The complaint states a claim against both Schmitz and Rural. In its answer, Rural denied that Schmitz was negligent and asserted that the insurance policy issued to

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Schmitz was “subject to all its terms, conditions, limitations and exclusions.” The answer raises issues of fact and law.

¶4 Rural then moved for summary judgment on the ground that its policy does not provide coverage for the loss complained of by the Meyers. When a party moves for summary judgment, the initial burden is on the movant to demonstrate a *prima facie* case for summary judgment. *Grams*, 97 Wis. 2d at 338; *Leske v. Leske*, 197 Wis. 2d 92, 97-98, 539 N.W.2d 719 (Ct. App. 1995). Therefore, we next review Rural’s affidavits. Rural argues that its policy did not cover the Meyers’ loss because Schmitz did not obtain motor truck cargo coverage for the trailer he was using to haul the Meyers’ building. Rural’s affidavits included excerpts from the motor truck portion of the policy and the declarations pages.

¶5 The Meyers do not dispute that these materials show the trailer was not included in the motor truck coverage at the time of the accident. However, they argue that even if the trailer was not covered by motor truck coverage, there would still be coverage for Schmitz’s negligent operation of the motor vehicle that was pulling the trailer. Rural responds that there is nothing in the record pertaining to liability coverage, but that the liability coverage contains its own definitions and exclusions which would exclude coverage for property of others being transported in a commercial endeavor.

¶6 On summary judgment, the burden is on Rural to demonstrate that its policy, which listed several vehicles, did not provide coverage for this occurrence. Other portions of the policy may well contain the exclusion that Rural describes, but we cannot determine that when the record does not include the relevant portions of the policy. Therefore, because Rural’s submissions in support

of its motion for summary judgment have not established that its policy provides no coverage for this occurrence, Rural has not shown a *prima facie* defense.

¶7 Furthermore, even if Rural had made a *prima facie* defense based on the terms of the policy, the Meyers' response to Rural's motion raises a question of material fact that precludes summary judgment. The Meyers rely on the affidavit of Schmitz. He averred that at the time of the accident he was covered by a Rural policy that he purchased through insurance agent Gordon Seamons. Schmitz further averred that on October 31, 2000, he telephoned the Rural agency in Sparta, Wisconsin, which had been his carrier for approximately fifteen years. He advised the agency that he had purchased the trailer and asked for appropriate insurance, including cargo insurance. During that conversation "he was assured that the coverage would be placed in effect immediately [and] would be added to his present policy."

¶8 Rural argues that these averments may lead to a claim by Schmitz against the insurance agent for the agent's errors or omissions in failing to procure insurance, but that the consequences flowing from the agent's acts do not fall on Rural. We disagree. The insurance policy can be reformed to provide the requested coverage if the mistake was made by an authorized agent of the insurer. *See Scheideler v. Smith & Assocs., Inc.*, 206 Wis. 2d 480, 486, 557 N.W.2d 445 (Ct. App. 1996). The record includes an affidavit from Gordon Seamons, who identified himself as "an insurance agent for Rural," with a business address in Sparta. If the factfinder were to believe Schmitz's account of the telephone conversation, that would support reformation of the policy to provide the requested coverage. Therefore, summary judgment cannot be granted.

By the Court.—Order reversed and cause remanded.

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

