COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2004

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. 03-3258 **Cir. Ct. No. 00CV221**

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

DANIEL J.R. LACOUNT, BY HIS GENERAL GUARDIAN, DANIEL LACOUNT,

PLAINTIFF-RESPONDENT,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANT-APPELLANT,

JOSEPH W. LANGER AND COURTNEY J. LANGER,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

ERIN E. PENZA, BY HER NATURAL GUARDIANS, DON AND JANET PENZA, MOLLY J. SMITH, BY HER NATURAL GUARDIANS, MARVIN AND JULIE SMITH, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY AND XYZ INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS,

ESTATE OF JAMES M. WINGFIELD, BY ITS PERSONAL

REPRESENTATIVE, BRENDA K. WINGFIELD, BRENDA K. WINGFIELD, BRETT M. WINGFIELD, BY HIS NATURAL GUARDIAN, BRENDA K. WINGFIELD, ABBY L. WINGFIELD, BY HER NATURAL GUARDIAN, BRENDA K. WINGFIELD, VANESSA R. VAN LAANEN, BY HER NATURAL GUARDIANS, JODY G. AND VIRGINIA VAN LAANEN,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Reversed.*

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

¶1 PER CURIAM. General Casualty Company of Wisconsin appeals a declaratory judgment[1] that its policy provides Joseph Langer and his daughter Courtney with a cumulative $1 million in coverage even though the policy has a stated $500,000 per occurrence limit of liability. The trial court concluded that paragraph (a) of the omnibus insurance statute, WIS. STAT. § 632.32(3),[2] compels this result. We disagree with the trial court and reverse the judgment.

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[1] Leave to appeal the nonfinal ruling was granted on March 3, 2004. *See* WIS. STAT. RULE 809.50(3). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] WISCONSIN STAT. § 632.32(3) provides:

> Except as provided in sub. (5), every policy subject to this section issued to an owner shall provide that:

(continued)

¶2 On October 15, 1999, Courtney was driving a vehicle that collided with James Wingfield's van. Wingfield was killed and his passengers were injured. Courtney's passenger, Daniel LaCount, was also injured.[3] Courtney's vehicle was insured by Joseph's policy with General Casualty, with Joseph as the named insured. Courtney was covered because she was a family member using a covered vehicle with permission. Joseph was not involved in the accident but is vicariously liable under the sponsorship statute for damages caused by Courtney. *See* WIS. STAT. § 343.15(2)(b).

¶3 In 2001, the respondents moved for a declaratory judgment that the policy covered both Courtney and Joseph separately up to the $500,000 per occurrence limit, or up to $1 million total, on the basis that the omnibus insurance statute mandated such a result. The trial court denied that motion in November 2001. In April 2003, Wingfield's estate sought the same declaration. This time, the trial court granted the motion.

¶4 The insurance policy contained an unambiguous limit of liability:

> The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is our maximum limit of liability for all damages … arising out of "bodily injury" sustained by any one person in any one auto accident.

> (a) Coverage provided to the named insured applies in the same manner and under the same provisions to any person using any motor vehicle described in the policy when the use is for purposes and in the manner described in the policy.
>
> (b) Coverage extends to any person legally responsible for the use of the motor vehicle.

[3] LaCount is the plaintiff and the other injured parties became third-party defendants. Third-party defendant Van Laanen filed a response brief, as did the Wingfields. LaCount joins the Wingfield brief. We will refer collectively to the respondents unless it is necessary to identify them individually.

> Subject to this limit for "each person," the limit of liability shown in the Declarations for "each accident" for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident. …
>
> This is the most we will pay regardless of the number of "insureds," ….

The court concluded that WIS. STAT. § 632.32(3)(a) should be broadly construed and afford as much coverage as practical and therefore required General Casualty to insure both Courtney and Joseph separately for $500,000 each.

¶5 The omnibus insurance statute does not invalidate the limit of liability clause to create additional liability for vicarious sponsors. In ***Folkman v. Quamme***, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, the court rejected a similar argument based on WIS. STAT. § 632.32(3)(b). The court distinguished the sponsor's vicarious liability from cases where two individuals insured under the same policy were both negligent in causing the accident. ***Id.***, ¶64. The court noted that although the driver and the sponsor were both extended coverage under the policy, they merely shared the same liability subject to one limit of liability. *See* ***id.***, ¶74. Although ***Folkman*** involved review of § 632.32(3)(b), its analysis applies equally to paragraph (3)(a). Whether considering the owner's coverage or the driver's coverage, they share a single limit of liability when the owner's liability is not based on a separate negligent act.

¶6 Van Laanen argues that ***Folkman*** and the cases it relies upon should not control because they conflict with earlier decisions of the Wisconsin Supreme Court, particularly ***Smith v. National Indem. Co.***, 57 Wis. 2d 706, 712-13, 205 N.W.2d 365 (1973). ***Smith*** held that the omnibus insurance statute requires the limits of liability for a driver who rented the vehicle to be the same as the coverage afforded to the named insured. ***Id.*** Van Laanen contends that ***Smith*** compels

General Casualty to provide Courtney with the same coverage as it provides Joseph. That argument fails for two reasons. First, to the extent there is any inconsistency, the later decision (***Folkman***) by the supreme court controls and this court has no authority to overrule that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Second, we perceive no inconsistencies between ***Smith*** and ***Folkman***. The General Casualty policy provides identical coverage to Courtney and Joseph. They merely share a single limit of liability.[4]

By the Court.—Judgment reversed. No costs on appeal.

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

[4] The Wingfields identify two additional arguments in their brief. First, they argue the reducing clause violates the omnibus statute and therefore both the policy and General Casualty's defenses should be stricken. However, we need not consider arguments raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). A party raising an argument has an obligation to show that the argument was first made in the trial court. *See* WIS. STAT. RULE 809.19(1)(b). The Wingfields provide no record citation to so demonstrate and we will not search the record for them. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

Second, the Wingfields contend the policy fails to provide for the case of two actively negligent insureds. That is not the factual situation here, and we do not decide hypothetical issues. *See* ***State v. Armstead***, 220 Wis. 2d 626, 635, 583 N.W.2d 444 (Ct. App. 1998).