COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2009

David R. Schanker
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. 2008AP979 **Cir. Ct. No. 2007CV1065**

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

ESTATE OF JU HER BY SPECIAL ADMINISTRATOR CHUE HER,
ESTATE OF PELG HER BY SPECIAL ADMINISTRATOR CHUE HER,
TOU HER, SIA HER AND CHUE HER,

PLAINTIFFS-RESPONDENTS,

MILWAUKEE COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

JOSHUA SCOLMAN,

DEFENDANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

ESURANCE INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

DONTE L. SIMS, TOU FUE HERRPATCHENG AND CHAONG WIANG A/K/A CHONG YANG HER,

THIRD-PARTY DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Reversed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 DYKMAN, J. American Family appeals from an order granting the Hers' motion for a declaratory judgment and establishing that Ju and Pelg Her are entitled to underinsured motorist (UIM) coverage under separate policies American Family issued to the Hers. American Family contends that the "Limits of Liability" (LOL) exclusion in the policies limits American Family's total exposure for all injured persons in this case to $500,000. American Family also argues that the "Drive Other Car" (DOC) exclusion in each of the policies limits all of the injured persons to recovery under one policy, with a per occurrence maximum of $500,000. The Hers respond that the LOL and DOC clauses violate statutory requirements, and are thus impermissible and unenforceable. We conclude that the DOC clause in each of the American Family policies limits all of the injured persons to recovery under one policy, and thus American Family's total liability to the Hers is $500,000.[1] Accordingly, we reverse.

[1] Because we conclude that American Family's liability to the Hers is limited to $500,000 based on the DOC provision in each policy, we need not address the parties' dispute over whether American Family properly relied on the LOL or "Own Other Car" clauses in each of the policies to reach the same maximum payments in this case.

Background

¶2 The following facts are undisputed. This case arises out of a car accident between the Hers and Joshua Scolman that occurred in October 2006. At the time of the accident, Tou Her was driving his Honda Accord. Tou's bothers Ju and Pelg Her and their cousin Anthony Her were his passengers.[2] Scolman, who was highly intoxicated, ran a red light and struck the Hers. Tou was seriously injured and the rest of the occupants of the Accord were killed.

¶3 Because Scolman was underinsured,[3] the Hers sought coverage of $250,000 per person under the UIM provisions of policies American Family had issued to the Hers.[4] American Family claimed that its total exposure to the Hers was $500,000, the per occurrence maximum under the Accord policy. American Family relied on its policies' LOL clause to argue that the injured parties could not "stack" coverage, and thus it would pay $500,000 in total to the parties. Alternatively, American Family argued its DOC or "Own Other Car" exclusions in the policies limited coverage for all the injured parties to the Accord policy only. The Hers argued that the LOL clauses are impermissible reducing clauses, not

[2] For clarity, we will refer to the Hers by their first names.

[3] Scolman was insured by Esurance Insurance Company, with a policy limit of $50,000. Esurance paid its policy limit to the Hers and is not a party to this appeal. The parties agree that any UIM payment by American Family is reduced by the amount the Hers have recovered from Esurance.

[4] American Family had issued five separate policies to the Hers, all containing UIM provisions: two policies to Tou, for his Accord and another vehicle; two policies to Chue Her (Tou, Ju and Pelg's father) on two vehicles he owns; and one policy to Ju, for his Toyota Rav4.

anti-stacking clauses. Also, they claimed the DOC exclusions are impermissible under the statutes based on their use of the term "resident" rather than "relative."[5]

¶4 The trial court granted the Hers' motion for a declaratory judgment, finding that the LOL clause in each of the American Family policies was an impermissible reducing clause and that the DOC and "Own Other Car" exclusions were impermissible. The court ordered American Family to pay the maximum UIM limits to Tou and Anthony under the Accord policy. It ordered American Family to pay Ju the maximum UIM limits under Ju's policy on his Toyota Rav4, and to pay Pelg the UIM maximum under one of the policies issued to Pelg's father, Chue Her. American Family appeals.

Standard of Review

¶5 This case requires that we interpret provisions of an insurance contract and a statute and apply them to undisputed facts. Interpretation of an insurance contract is a question of law, which we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. Statutory interpretation and application are also questions of law, subject to our independent review. *See* ***Town of Madison v. County of Dane***, 2008 WI 83, ¶51, 311 Wis. 2d 402, 752 N.W.2d 260.

Discussion

¶6 American Family argues that the DOC exclusion in Ju's Rav4 policy excludes him from receiving UIM coverage under that policy, and that the same

[5] The Hers make no claim to coverage implicating the "Own Other Car" exclusion.

provision in Chue's policies exclude Pelg from any UIM coverage under either of Chue's policies.[6] We agree.

¶7 American Family's DOC provision states: "This coverage does not apply for bodily injury to a person … [w]hile occupying … a motor vehicle that is not insured under this policy, if it is owned by you or any resident of your household." The Hers argue that this provision is invalid because it does not meet the requirements of WIS. STAT. § 632.32(5)(j) (2007-08),[7] which states:

> A policy may provide that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:
>
> 1. Is owned by the named insured, or is owned by the named insured's spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.
>
> 2. Is not described in the policy under which the claim is made.
>
> 3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

The Hers contend that American Family's DOC provision violates the statute because it excludes coverage if the policyholder was in the car of a "resident," rather than a "relative" who "resides in the same household" as required by § 632.32(5)(j)1. The Hers argue that "resident" encompasses a broader group than

[6] On appeal, American Family agrees that Anthony and Tou are entitled to coverage under the Accord policy, reaching the policy's maximum. They raise and dispute any other possible claim to coverage under any of the policies they issued to the Hers. The Hers argue only that in addition to American Family's coverage for Tou and Anthony, (1) Pelg is entitled to coverage under one of his father's policies, and (2) Ju is entitled to coverage under his Rav4 policy. We therefore limit this opinion to the dispositive issues in dispute between the parties.

[7] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

a "relative" who "resides in the same household" and thus the DOC clause is impermissible. Also, the Hers point out that "resident" is not defined in the policies, but that "relative" is defined under the policies as a relative who lives in the same household but who does not own a car. Thus, the Hers argue, even substituting "relative" for "resident" in the DOC provision to mirror the statute, the DOC exclusion does not apply based on American Family's definition of "relative," because Tou owned a car and is therefore not Pelg or Ju's "relative."[8]

¶8 American Family replies that the Hers' argument is inapplicable because it is undisputed that Tou is a relative of Ju and Pelg (under the common definition of that term) who lived in their household, thus falling squarely under both the statute and the DOC provision. Thus, even if the DOC provision could extend to impermissible parties under different facts, that is not the case here. *See* ***Remiszewski v. American Family Ins. Co.***, 2004 WI App 175, ¶17, 276 Wis. 2d 167, 687 N.W.2d 809 (limiting construction of insurance policy to language that was in dispute and applied to facts).

¶9 We recently addressed this issue in ***Nischke v. Aetna Health Plans***, 2008 WI App 190, No. 2008AP807. There, Nischke was injured while driving a car owned by her mother-in-law, who resided in her household. ***Id.***, ¶2. Nischke's insurance policy had UIM coverage with a DOC provision using

[8] The argument advanced by the Hers—that Tou is not a relative of Pelg or Ju based on the fact that Tou owned a car, despite the fact that the three were brothers living in the same household—is counterintuitive. We recognize that the basis for the Hers' argument is that American Family's policy defines "relative" in terms of whether or not an individual owns a car. However, in the real world, whether or not one is another's relative has nothing to do with whether or not that person owns a car. Regardless, American Family's DOC provision uses the word "resident," not "relative," and therefore American Family's unusual definition of relative is not at issue in this case.

"resident" rather than "relative," as here, and Nischke, like the Hers, argued that the provision was overbroad and invalid. *See* ***id.***, ¶¶3, 5, 15. We disagreed, because "applying the exclusion to [the] facts, the exclusion [was] consistent with the statute." ***Id.***, ¶16. We declined to consider hypothetical facts to determine whether the provision would be overbroad in a different context. ***Id.***

¶10 The Hers argue that ***Nischke*** is distinguishable because here American Family has defined "relative" under their policies to exclude anyone who owns a car, a fact not present in ***Nischke***. The Hers contend that American Family's policy definition of "relative" must be read into their UIM clause in place of the word "resident," because WIS. STAT. § 632.32(5)(j)1. allows only exclusions for occupying a car owned by a "relative" who "resides in the same household" as the policyholder. Thus, the Hers argue, American Family's DOC exclusion does not exclude coverage for Ju and Pelg because Tou cannot be their "relative" as defined under the policy, because he owned a car.

¶11 The problem with the Hers' argument is that American Family's DOC exclusion does *not* use the word "relative," it uses the word "resident." We do not agree with the Hers that we must import American Family's defined term "relative" into its DOC provision based on the fact that WIS. STAT. § 632.32(5)(j)1. uses the word "relative." In ***Nischke***, we applied a similar DOC provision that used the word "resident" to similar facts and determined that the provision was valid. We explained that Nischke's injuries "arose from Nischke's occupation—her use—of a motor vehicle (1) owned by a relative of [the] named insured, living in the named insured's household; (2) not described in the policy; and (3) not covered as a newly acquired or replacement car." ***Nischke***, 2008 WI App 190, ¶16. We did not go beyond the facts of the case to determine whether "resident" would ever be overbroad and thus prohibited by statute. ***Id.***

¶12 We discern no reason to distinguish ***Nischke*** from this case, and we therefore may not reach a contrary conclusion. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Thus, following ***Nischke*** and limited to the facts of this case, American Family's DOC clauses apply to exclude Ju and Pelg from coverage because Tou is their relative who resides in their household, and they were in his car when injured.[9]

¶13 Finally, the Hers contend that American Family's DOC provision is ambiguous because "resident" is not defined under the policies. They posit various hypothetical scenarios in which parties may or may not be "residents" of the same household, based on how "resident" is defined. However, the Hers do not explain how the use of the term "resident" is ambiguous as applied to this case. It is undisputed that Tou—who owned the Accord he was driving at the time of the accident—lived in the same household as Ju and Pelg. The Hers do not posit a theory as to why Tou is not a "resident" of Ju and Pelg's household, under any reasonable definition of that term. We therefore have no basis to conclude that American Family's DOC provision is impermissible or inapplicable to the facts of this case.[10] Accordingly, we reverse.

[9] American Family also argues that the policies' elasticity clause and WIS. STAT. § 631.15 conform the DOC clause to the statute and exclude coverage. The Hers respond that this argument misstates the law because we may not conform insurance clauses in favor of insurance companies. We need not reach this dispute. We have concluded that no statutory violation has been presented by the facts of this case.

[10] The Hers also contend that the DOC exclusion in this case is contrary to public policy because it prevents the Hers, who purchased separate insurance policies, from utilizing the coverage they paid for. While we sympathize with the Hers' position, we cannot overcome the binding precedent of ***Nischke v. Aetna Health Plans***, 2008 WI App 190, No. 2008AP807, to avoid the decision we reach today.

By the Court.—Order reversed.

Not recommended for publication in the official reports.