COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1490 **Cir. Ct. No. 2010CV3**

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

STEPHEN P. MEINEL, JODENE MEINEL AND SPECIAL ADMINISTRATOR STEPHEN P. MEINEL FOR THE ESTATE OF LACEY MEINEL,

PLAINTIFFS-APPELLANTS,

V.

DANIEL D. SCHAEFER,

DEFENDANT,

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. This appeal concerns a dispute over automobile liability insurance coverage, and, in particular, a dispute concerning the application of the policy's "drive other car" exclusion. The circuit court granted summary judgment in favor of the insurer on the ground that this exclusion applied and therefore the policy did not cover liability for the insureds' son, who was driving an automobile not identified in the insurance policy. We agree with the circuit court that the "drive other car" exclusion applies because we conclude the insureds' son was the owner of the automobile he was driving. Accordingly, we affirm the summary judgment in favor of the insurer.

BACKGROUND

¶2 In January 2009 Daniel Schaefer was driving a 2005 Cadillac when it collided with a vehicle occupied by Jodene Meinel and her daughter, Lacey. Lacey died as a result of the car accident. Lacey's parents, the Meinels, filed a wrongful death suit against Schaefer and Auto-Owners Insurance Company, Schaefer's parents' insurer. The Meinels contended that Schaefer was insured under his parents' Auto-Owners insurance policy.

¶3 The insurance policy provides liability coverage to Schaefer's parents, as well as "any relative" using the automobiles identified in the policy. The Cadillac is not identified in the policy. The policy defines "relative" as "a person who resides with [the named insureds] and who is related to [any of the named insureds] by blood, marriage or adoption." In Section IV.1.b.(2) of the policy, liability coverage is extended for the named insured and for "relatives who do not own an automobile" to automobiles not identified in the policy. However, this extension does not apply if the automobile is "owned by or furnished or

available for regular use to [the named insureds] or [the relative]." Section IV.1.a.(1). We will call this provision the "drive other car" exclusion.

¶4 Auto-Owners moved for summary judgment, contending there is no coverage for Schaefer's liability under his parents' policy because (1) he was not a resident of his parents' household at the time of the accident; (2) he owned the Cadillac; and (3) the Cadillac was available for his regular use.

¶5 The parties' submissions show the following undisputed facts about the Cadillac. Schaefer purchased this vehicle in September 2008. At that time, he did not own any automobile because the automobile he had owned was "totaled" in an accident that occurred in August 2008. Schaefer took out a loan to pay for the Cadillac and the title to the Cadillac was in Schaefer's name. Schaefer purchased the Cadillac with the intent that it would be used by his girlfriend, Kelly Wildenberg, to drive to work. Schaefer did not need the Cadillac to drive to work because he had other transportation.

¶6 The submissions also showed that, after Schaefer purchased the Cadillac and until the time of the accident, Wildenberg regularly used it to drive to work. She began work at various times in the morning and worked as late as 10:00 p.m. during the week, and occasionally worked on weekends. The Cadillac was available for Schaefer's use when Wildenberg was not working. Schaefer made all the monthly payments for the Cadillac and performed routine maintenance on the vehicle. Wildenberg purchased insurance on the Cadillac, listing herself as the primary driver, and Schaefer was not listed on the policy.

¶7 The circuit court granted Auto-Owner's motion for summary judgment. The court concluded that material issues of fact existed on whether Schaefer resided with his parents. However, the court concluded that the "drive

other car" exclusion applied because the terms of the policy were unambiguous and the undisputed facts showed that Schaefer owned the Cadillac and it was available for his regular use.

DISCUSSION

¶8 On appeal, the Meinels contend that the circuit court erred in deciding that the "drive other car" exclusion applied. They assert that the undisputed facts show that Schaefer was not the owner of the Cadillac and that it was not available for his regular use, or, in the alternative, there are factual disputes that entitle them to a trial on both issues. Auto-Owners responds that the circuit court correctly concluded that there are no factual disputes with respect to either issue, and the circuit court correctly decided summary judgment in its favor. Auto-Owners does not argue that the circuit court erred in concluding there were disputed issues of fact regarding whether Schaefer was a "relative" as defined in the policy. Therefore, in this opinion we assume that Schaefer is a "relative" and focus on the "drive other car" exclusion. Because we conclude that, based on the undisputed facts, Schaefer is the owner of the Cadillac, we do not address whether the Cadillac is available for his regular use.[1]

¶9 We review a grant of summary judgment by applying the same methodology as the circuit court, and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled

[1] As we noted in paragraph 3, the extended coverage applies only to "relatives who do not own an automobile." Thus, Schaefer's ownership of the Cadillac precludes coverage for his liability under this provision as well as under the "drive other car" exclusion. However, neither party suggests that we need to separately address ownership under the "relatives who do not own an automobile" provision.

to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).[2] This case also requires us to interpret an insurance policy, which presents a question of law for our de novo review. *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶7, 314 Wis. 2d 246, 758 N.W.2d 196 (citation omitted). We construe policy language as it would be understood by a reasonable person in the position of the insured. ***Id.***, ¶8 (citation omitted).

¶10 The Meinels contend that the phrases "owned by" and "own," as used in Section IV of the Auto-Owners policy, are susceptible to more than one reasonable construction and, therefore, are ambiguous. They contend "owner" may mean the person whose name is on the title or, instead, the person who insures the vehicle and uses it on a daily basis. Because we are to construe ambiguous provisions in favor of coverage, *see* ***Thompson v. Threshermen's Mutual Insurance Co.***, 172 Wis. 2d 275, 282, 493 N.W.2d 734 (Ct. App. 1992), the Meinels argue that we must construe "ownership" more broadly than title ownership. A broad construction of "ownership," they assert, properly results in either summary judgment concluding that Wildenberg is the owner or a trial on the issue of ownership.

¶11 We begin with a discussion of two cases that have recently addressed the meaning of "owned by" or "own" in the context of a "drive other

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

car" exclusion.[3] The first is ***Westphal v. Farmers Insurance Exchange***, 2003 WI App 170, ¶¶5-6, 266 Wis. 2d 569, 669 N.W.2d 166, in which an accident occurred after an agreement to sell the automobile had been made but before title was transferred. In ***Westphal*** we considered whether the buyer or seller owned the vehicle at the time of the accident. We began by noting that the supreme court had concluded that "the term 'owner' had no fixed meaning and it must be interpreted based on the circumstances presented." ***Id.***, ¶12 (citing ***Continental Cas. Co. v. Transport Indem. Co.***, 16 Wis. 2d 189, 193, 114 N.W.2d 137 (1962)). We also noted that, although motor vehicle title is prima facie evidence of ownership, citing to WIS. STAT. § 342.10(5),[4] it is not necessarily dispositive. ***Id.***, ¶14. We concluded that there were factual disputes, including competing reasonable inferences from the facts, as to which party owned the vehicle on the date of the accident, and that this issue was properly resolved by a jury. ***Id.***

¶12 The second case that arises in the context of a "drive other car" exclusion is ***Young***, 314 Wis. 2d 246. In ***Young*** there was evidence that the titleholder of the vehicle involved in the accident and the person who drove it exclusively both intended that title would be transferred to the latter once his divorce was final. ***Id.***, ¶2. The insurer argued that we should follow ***Duncan v. Ehrhard***, 158 Wis. 2d 252, 260, 461 N.W.2d 822 (Ct. App. 1990), in which we stated that "[i]n common usage, 'owner' is often equated to title-ownership" and

[3] In both ***Westphal v. Farmers Insurance Exchange***, 2003 WI App 170, 266 Wis. 2d 569, 669 N.W.2d 166, and ***Young v. West Bend Mutual Insurance Company***, 2008 WI App 147, 314 Wis. 2d 246, 758 N.W.2d 196, the issue was whether the insured, not a relative, owned the automobile for purposes of the "drive other car" exclusion. Neither party has suggested that this distinction affects our analysis, and we therefore assume it does not.

[4] WISCONSIN STAT. § 342.10(5) provides that "[a] certificate of title issued by the department is prima facie evidence of the facts appearing on it."

concluded that, according to the ordinary meaning, the titleholder owned the vehicle. ***Young***, 314 Wis. 2d 246, ¶10. In contrast, the insured in ***Young*** argued that we should adopt a more expansive view of the meaning of "own," under which title was not conclusive as to ownership of a vehicle. ***Id.***, ¶¶11, 12. In ***Young*** we arrived at the interpretation of "owned by" by first considering the purpose of the "drive other car" exclusion. ***Id.***, ¶13. The purpose is to "exclude coverage of a vehicle that the insured owns or frequently uses for which no premium has been paid."[5] ***Id.*** (citation omitted). We also considered the principle that we are to construe exclusions narrowly and resolve ambiguities in favor of coverage. ***Id.***, ¶15. We concluded that this principle requires that we adopt an "an interpretation of 'owned by' that takes into account factors beyond title-ownership …." ***Id.*** Accordingly, we held that the intent and conduct of the parties was relevant in deciding who owns the vehicle in question for purposes of the "drive other car" exclusion. ***Id.***, ¶16.

¶13 Reading ***Westphal*** and ***Young*** together, we conclude that, in interpreting the meaning of "owned by" and "own" in this case, we are to treat the title as prima facie evidence of ownership, ***Westphal***, 266 Wis. 2d 569, ¶14, and also consider "the intent and conduct of the parties." ***Young***, 314 Wis. 2d 246, ¶16.

¶14 With this background, we return to an examination of the Meinels' argument that the terms "owned by" and "own" are ambiguous. They assert the meaning is ambiguous because these terms could be understood to mean either the

[5] In the Auto-Owners policy at issue here, as we have already noted, the extension of liability coverage applies to both the named insured and to "relatives who do not own an automobile."

titleholder or the "true owner," which they define as the person who uses the vehicle on a daily basis and insures it. According to the Meinels, this ambiguity means that we must construe the policy terms to mean "the true owner" and in this case that is Wildenberg. However, this argument is based on an incorrect reading of ***Young***.

¶15 In ***Young*** we took into account the variation in the interpretation of "own" or "owner" in prior cases by adopting the broader interpretation, that is, the interpretation that did not rely on title alone. In other words, we resolved the ambiguity in favor of the insured by adopting the broader interpretation. We did not hold, as the Meinels appear to believe, that any time there is evidence that a non-titleholder does things that might arguably be considered the conduct of a titleholder, the non-titleholder "owns" the vehicle as a matter of law. Nor did we hold in ***Young*** that, whenever there is evidence of words or conduct that purport to show ownership in a non-titleholder, the issue of ownership must go to a jury. Rather, in ***Young*** there were facts in dispute as to the reason for the titleholder retaining title, which, we stated, "may be material to the matter of ownership." ***Id.***, ¶18.

¶16 When we examine the undisputed facts here, we conclude that Schaefer "owns" the Cadillac within the meaning of the "drive other car" exclusion. Schaefer is the only person on the title and that is prima facie evidence that he is the owner of the Cadillac. *See* ***Westphal***, 266 Wis. 2d 569, ¶14. Other undisputed evidence is consistent with Schaefer being the owner of the Cadillac: he purchased it after the automobile he previously held title to was "totaled"; he took out a loan to pay for the Cadillac; he alone made the monthly payments; and he maintained the Cadillac.

¶17 The evidence that the Meinels focus on to support their argument that Schaefer is not the owner is (1) that Wildenberg was the primary driver, driving it to and from work; and (2) that she paid for the insurance. However, we conclude that this evidence does not make her the owner or create a factual dispute on this point. Allowing Wildenberg to use the Cadillac daily to drive to and from work is not inconsistent with Schaefer being the owner of the vehicle. The undisputed testimony is that, when Wildenberg was not using the Cadillac for work, Schaefer could use it when he wanted, without her permission. In fact, Schaefer agreed that he did not need Wildenberg's permission to drive the Cadillac because he was listed as the owner of the vehicle.

¶18 As for Wildenberg's obtaining and paying for insurance, Schaefer testified that "[p]robably both of us came to an agreement on it, since she would be using it also"; and Wildenberg testified that she paid the insurance "[b]ecause [she] was [going] to be the primary driver." There is no evidence or reasonable inference from the evidence that Wildenberg was paying for the insurance because either she or Schaefer considered her to be the owner of the Cadillac. The only reasonable inference from the record is that Wildenberg was paying for the insurance because she was the primary driver.

¶19 We do not agree with the Meinels that ***Westphal*** and ***Young*** are factually similar to this case. In each case there was evidence that both parties intended to transfer title. ***Westphal***, 266 Wis. 2d 569, ¶¶4-5; ***Young***, 314 Wis. 2d 246, ¶2. In contrast, there is no evidence here that either Schaefer or Wildenberg intended that title be transferred to Wildenberg. Nor do the cases cited in ***Westphal*** or ***Young*** for a "broad" interpretation of "ownership" support a conclusion of ownership by anyone other than Schaefer on the undisputed facts of this case. *See* ***Continental***, 16 Wis. 2d 189 (concluding that "owner" in a statute

governing liability of motor vehicles transporting people and property required a broad interpretation in light of the statute's purpose; and concluding that a lessee of the vehicle was an "owner," where the lease gave the lessee exclusive possession, control, and use of the vehicle, and imposed on the lessee liability for damages arising from use of the vehicle); ***Loewenhagen v. Integrity Mut. Ins. Co.***, 164 Wis. 2d 82, 473 N.W.2d 574 (Ct. App. 1991) (applying a conclusive presumption of transfer of ownership of a motor vehicle because title was endorsed and delivered, as required by statute, while noting that, if that had not been done, the intent of the parties would govern).

¶20 The Meinels also contend that the use of "*the* owner" (emphasis added) in another provision of Section IV means that Schaefer must be the *sole* owner of the Cadillac in order for the "drive other car" exclusion to apply.[6] According to the Meinels, even if Wildenberg is not the sole owner, she is a co-owner with Schaefer, or at least there are factual disputes on this point. Auto-Owners objects to our consideration of this issue because, it asserts, the Meinels failed to make this argument in the circuit court. The Meinels reply that they did make this argument in the circuit court, and they point out that the circuit court stated that "[e]ither [Schaefer] was a co-owner or he was the sole owner; no other scenario would be supported by the evidence."

¶21 We do not decide whether the Meinels properly preserved this argument because, even if they did not, we have the authority to address it. *See* ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 171-72, 288 N.W.2d 129

[6] The phrase "the owner," as used in Section IV, comes from a provision that follows those we have already referred to in paragraph 3 above. Section IV.1.c.(1) provides: "We do not cover: *the owner* of the automobile …." (Emphasis added.)

(1980). We choose to address this issue. The Meinels do not explain why the use of "the owner" in another provision of Section IV means that we should interpret "owned by" and "own" in the provisions directly relevant to this case as meaning "solely owned by" and "solely own." *See* ***supra***, n.6. However, even if the Meinels are correct that the "drive other car" exclusion applies only if the Cadillac is solely owned by Schaefer, we conclude that the undisputed facts show that he is the sole owner. The undisputed evidence that we have discussed in paragraphs 16-18 and the reasonable inferences from that evidence does not support a conclusion that Wildenberg is a co-owner of the vehicle. Specifically, there is no evidence or reasonable inference from the evidence that either Schaefer or Wildenberg intended Wildenberg to be a co-owner of the Cadillac.

¶22 In summary, we conclude that a reasonable person in the position of the insureds, that is, Schaefer's parents, would understand that the Cadillac is owned by Schaefer and therefore coverage under Section IV is excluded under the "drive other car" exclusion.

CONCLUSION

¶23 We affirm the circuit court's order granting summary judgment.

By the Court.—Order affirmed.

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