

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 16, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**MIDWESTERN NATIONAL
INSURANCE CORPORATION,**

Plaintiff-Respondent,

v.

**THRESHERMEN'S MUTUAL
INSURANCE COMPANY,**

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waushara County: JAMES W. KARCH, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Threshermen's Mutual Insurance Company appeals from a circuit court judgment requiring Threshermen's and Midwestern National Insurance Corporation to pay pro rata shares of a settlement. The court found that neither insurer's policy offered primary coverage on a car involved in a fatal crash. Threshermen's argues that because the car was listed

on Midwestern's policy, and because Midwestern received a premium for insuring the car, Midwestern's policy was primary and Midwestern should pay the entire settlement amount. We affirm the circuit court.

BACKGROUND

On May 1, 1990, Sandra McManis was the titled owner of a 1985 Renault Encore. Her grandparents, Virginia and Frederick Jeschke, had made some payments for the car, and from the summer of 1989 they kept it at their place of business and maintained it. In August 1989, the Jeschkes bought auto insurance from Midwestern for two cars, and in September 1989, they added the Renault Encore to the policy.

On May 1, 1990, McManis's stepsister, Gretel Zapf, obtained family¹ permission to use the Renault. Gretel was in a one-car accident which killed her passenger. Midwestern settled with the passenger's family for its policy limits, and then brought this action against Threshermen's for contribution. Midwestern argued that Gretel Zapf was insured under an excess coverage provision in her father's auto insurance with Threshermen's which reads:

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

¹ Apparently Gretel's sister, Kelly, (another of McManis's stepsisters) had day-to-day control of the car at that time, and Gretel got Kelly's permission to drive the car.

Midwestern argued that its policy on the Renault was also excess, and not primary, because its policy with the Jeschkes contains a nearly identical "Other Insurance" provision and the Jeschkes did not own the Renault.

Threshermen's argues that although McManis is the titled owner of the car, the de facto owner is Virginia Jeschke. Threshermen's points to McManis's lack of control over the car, Jeschke's control over the car, and to Jeschke's having insured the car with Midwestern, obtaining a policy from Midwestern which described the Renault as a covered automobile.

Specifically, Threshermen's points to Midwestern's policy with the Jeschkes which defines "your covered auto" as "any vehicle shown on the declarations" page, where the Renault is duly described. Threshermen's also points to Midwestern's "Insuring Agreement" which states that Midwestern will pay for bodily injury and property damage for which a "covered person" becomes liable, defining "covered person" as one who is using "your covered automobile." Threshermen's concludes that because the Renault is duly described as "your covered automobile," and because Gretel Zapf was the one using "your covered automobile, Gretel is a "covered person" under Midwestern's policy, making its policy primary. Threshermen's argument implies that while Midwestern's coverage under the "Insuring Agreement" may conflict with the coverage it offers under the "Other Insurance" provision, the "Insuring Agreement" should control because the Renault was specifically listed as a "covered auto" under the insuring agreement.²

Both insurers submitted summary judgment motions to the circuit court. The court denied both motions because it found that the factual question of "ownership" was dispositive. Thereafter, the parties agreed that the circuit court should act as the finder of fact. Without taking further testimony, the circuit court found that the Renault was a "temporary substitute vehicle," and

² Threshermen's also poses a hypothetical regarding the Omnibus Statute, § 632.32, STATS. Under this hypothetical, Threshermen's first posits that had one of the Jeschkes been driving, the policy must surely have been primary, because the Jeschkes were the named insureds. Next, Threshermen's notes that under the Omnibus Statute, Gretel Zapf is required to be treated in the same manner as would have been the Jeschkes. Therefore, Threshermen's concludes that Midwestern must be the primary insurer. However, because neither of the Jeschkes were driving, that issue is not before us, and we do not reach it.

not furnished for Gretel's regular use. The court found that McManis was the "owner," that the Jeschkes acquired no ownership interest in the car, and that Midwestern's policy was not primary. Because both insurers' "other insurance" policies were identical, the court therefore ordered both insurers to pay pro rata shares. See *Schoenecker v. Haines*, 88 Wis.2d 665, 671-73, 277 N.W.2d 782, 785 (1979).

ANALYSIS

The dispute is longer in its explication than in its resolution. Under *Duncan v. Ehrhard*, 158 Wis.2d 252, 260, 461 N.W.2d 822, 825-26 (Ct. App. 1990), "ownership" is given its common meaning and is often equated to "title ownership." Applying that meaning, the trial court correctly found that Sandra, the title owner, was the "owner" of the Renault Encore. Accordingly, the Jeschkes did not "own" the car, and the "other insurance" provision makes Midwestern's policy excess. Pro rata division was therefore the correct result under *Schoenecker*.

By the Court.— Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.