COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 1996

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(1), 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. 95-2149

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

DAVID J. BARKOW, BY HIS GUARDIAN AD LITEM, JOHN D. MURRAY, GORDON O. BARKOW AND NADINE S. BARKOW,

Plaintiffs-Respondents,

v.

MATTHEW J. CIESIELCZYK, GENERAL CASUALTY COMPANY OF WISCONSIN, EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, AND STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF HEALTH,

Defendants,

THRESHERMEN'S MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Threshermen's Mutual Insurance Company appeals a judgment requiring liability coverage for both automobiles listed on a policy be stacked, resulting in Threshermen's liability to pay $250,000 damages.[1] Threshermen's raises one issue: Whether § 631.43(1), STATS., allows the liability limits of Threshermen's policy to be stacked. Because ***Schult v. Rural Mut. Ins. Co.,*** 195 Wis.2d 231, 536 N.W.2d 135 (Ct. App. 1995), governs, we conclude stacking is permitted and affirm the judgment.

The facts are undisputed. On July 29, 1993, David Barkow sustained injuries as a passenger in his father's car, driven with permission by Matthew Ciesielczyk, when it went out of control and overturned. At the time of the accident, Ciesielczyk's father, Jerome, had in effect auto insurance policies issued by Threshermen's. One policy covered a Chevrolet owned by Jerome with a bodily injury liability limit of $50,000. Threshermen's does not dispute this coverage and has paid the $50,000.

Threshermen's also issued another insurance policy to cover Jerome's Ford sedan and Ford van, with liability limits of $100,000 per person. The declarations page showed that a separate premium for each vehicle was charged; the liability premium for the 1990 Ford sedan was $73 and $60 for the 1988 Ford van. The policy states: "We will pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident."

Threshermen's has paid $100,000 on this policy and disputes payment of a second $100,000. Threshermen's does not dispute that Matthew

[1] "Stacking is defined as an insured attempting to collect reimbursement for the same loss under several policies." ***Schult v. Rural Mut. Ins. Co.,*** 195 Wis.2d 231, 237, 536 N.W.2d 135, 138 (Ct. App. 1995).

was insured under the policy. The issue is whether the $100,000 liability limits apply with respect to each automobile insured and each premium paid under the policy.

Threshermen's relies on the following policy language:

> A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident. This is the most we will pay regardless of the number of:
> 1. "Insureds;"
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident.[2]

Summary judgment methodology is well known and we need not repeat it here. ***Schult,*** 195 Wis.2d at 236, 536 N.W.2d at 137. In construing an insurance policy, we interpret its plain language the way a reasonable person in the position of the insured would have understood the words to mean. ***Id.*** at 237, 536 N.W.2d at 137. Absent any ambiguity, we give the terms of a statute their ordinary meaning. ***Id.*** "These are questions of law that we review *de novo*." ***Id.***

Under analogous facts,[3] ***Schult*** examined the same "limit of liability" policy language as in Threshermen's policy and concluded that the

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[2] In its brief, Threshermen's record cite is to the Chevrolet policy that has the following paragraph in its limit of liability section: "B. We will apply the limit of liability to provide any separate limits required by law for bodily injury and property damage liability. However, this provision (B.) will not change our total limit of liability." The Chevrolet policy is not at issue. Paragraph B in the insurance contract covering the Ford sedan and van is different and states: "Any amounts otherwise payable for expenses under this coverage shall be reduced by any amounts paid or payable for the same expenses under Part A or Part C." For the purposes of our discussion, this difference is not material.

[3] In ***Schult v. Rural Mut. Ins. Co.,*** 195 Wis.2d 231, 235, 536 N.W.2d 135, 137 (Ct. App. 1995), the plaintiff was injured as a passenger in a rental van driven by the insured.

"limit of liability clause is an 'other insurance' provision which violates § 631.43(1), STATS., and is void." ***Id.*** at 240, 536 N.W.2d at 139. ***Schult*** explains:

> Section 631.43(1), STATS., voids clauses which limit liability when more than one premium has been paid for coverage in which the insurer promises to indemnify an insured against the same loss. ... [A]bsent an express statement that a single premium covers all vehicles, an insured may reasonably expect that coverage is stackable.

Id. at 241, 536 N.W.2d at 139.[4] *Cf.* ***Mills v. Wisconsin Mut. Ins. Co.,*** 145 Wis.2d 472, 483, 427 N.W.2d 397, 402 (Ct. App. 1988), *overruled on other grounds by* ***West Bend Mut. Ins. Co. v. Playman,*** 171 Wis.2d 37, 489 N.W.2d 915 (1992) ("When the insured pays two premiums, he or she obtains two protections regardless of whether the coverage is provided in one policy or two policies."). *Also cf.* ***West Bend,*** 171 Wis.2d at 41, 489 N.W.2d at 917 ("Where an insured pays separate premiums, he or she receives separate and stackable uninsured motorist protections whether the coverage is provided in one or more than one policy.") (quoting ***Carrington v. St. Paul Fire & Marine Ins. Co.,*** 169 Wis.2d 211, 224, 485 N.W.2d 267, 272 (1992)).

Schult observed that the insured was driving a nonowned vehicle at the time of the accident. "Consequently, the liability insurance in the instant case does not follow the vehicle, but follows the insured." ***Id.*** at 242, 536 N.W.2d at 139. When the insured is driving a nonowned vehicle, liability insurance is personal to him and may be stacked. ***Id.***

Schult concluded that (1) the insurer agreed to pay damages for bodily injury which the insured became legally responsible; (2) the insurer made three separate agreements to pay by accepting three liability insurance premiums; (3) the insurer's duty to provide liability insurance turns on the fact that the insured was driving a nonowned vehicle, not a covered vehicle; and, therefore, the limit of liability clause was void and stacking was permissible. ***Id.*** at 243, 536 N.W.2d at 140.

Similarly in the present case, (1) Threshermen's agreed to pay damages for bodily injury which the insured became legally responsible; (2) Threshermen's made three separate agreements to pay by accepting three separate premiums (one each for the Chevrolet, Ford sedan and Ford van); and (3) Threshermen's duty to provide liability insurance turns on the fact that the

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[4] Section 631.43, STATS., provides in part:

> **Other insurance provisions. (1) General**. When 2 or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions.

insured was driving a nonowned vehicle, not a covered vehicle. The three agreements cover the same loss and therefore the limit of liability clause is void.

Threshermen's argues that because ***Schult*** conflicts with ***Agnew v. American Family Mut. Ins. Co.,*** 150 Wis.2d 341, 441 N.W.2d 222 (1989), and ***Mills***, we should revisit this issue. We disagree that there is a conflict. We distinguish ***Agnew*** and ***Mills*** on their facts: both involved passengers injured in vehicles covered in the insured's policies, not nonowned cars as here. In ***Agnew***, the plaintiff was injured while a passenger in a Ford pickup driven by Scott Sailor and owned by Scott's father. Scott was insured under his father's three auto insurance policies, one of which covered the pickup in the accident. ***Id.*** at 343, 441 N.W.2d at 223.

As ***Agnew*** explained: "[Section] 631.43(1) does not govern the policies involved in this case, because the three policies do not insure the insured in this case against the same loss." ***Id.*** at 349, 441 N.W.2d at 226. Each policy insured against a different loss and only one policy insured against liability arising from the operation of the vehicle specified in the policy owned by the policyholder. ***Id.*** at 349, 441 N.W.2d at 226. Only the policy covering the Ford pickup covered liability incurred by reason of operation of the Ford pickup. ***Id.***

In ***Mills,*** the plaintiff was injured while a passenger in his father's car, driven by a friend with permission. The car was insured by one of two Wisconsin Mutual Insurance Company policies issued to Mill's father. The driver was an insured under his parent's policy issued by Economy Fire and Casualty Company, that covered three vehicles, none of which were involved in the accident. ***Id.*** at 474, 427 N.W.2d at 398.

Mills states: "Mills contends that the liability coverage under *both* policies should be stacked for each vehicle covered and each premium paid." ***Id.*** at 482, 427 N.W.2d at 401 (emphasis added). ***Mills*** concluded that stacking was not required under § 631.43(1), STATS., "because there are not involved two or more policies promising to indemnify an insured against the same loss." ***Id.*** Mills states that "Liability coverage, however, follows the vehicle, not the person." ***Id.*** at 483, 427 N.W.2d at 402.

Unfortunately, ***Mills*** does not explicitly state that the plaintiff was seeking to stack his father's two Wisconsin Mutual policies, one of which covered the car involved in the accident. However, because the opinion uses the term "both" policies, that can be the only interpretation. If the driver's Economy Fire and Casualty policies were contemplated, there would have been at least three, if not five (including Mills'), policies at issue.

Consequently, we interpret ***Mills*** and ***Agnew*** to speak for the same proposition, that "In this case, each policy [under discussion] insures against a different loss and only one policy insures the insured against the loss incurred." ***Agnew,*** 150 Wis.2d at 349, 441 N.W.2d at 226. Because only one policy promised to indemnify the insured against the loss incurred, § 631.43(1), STATS., did not apply and stacking was not permitted. ***Agnew***, 150 Wis.2d at 351, 441 N.W.2d at 227. *Cf*. ***Mills,*** 145 Wis.2d at 482, 427 N.W.2d at 401 (This is not a stacking case under § 631.43(1) because there are not involved two or more policies promising to indemnify an insurer against the same loss.).

Threshermen's argues that its limit of liability clause is valid because it is not a reducing clause but is a definition of coverage. ***Schult*** explicitly rejects this argument. ***Id.*** at 237, 536 N.W.2d at 138.

Threshermen's also argues that the trial court failed to distinguish underinsured and uninsured motorist coverage, which is personal and portable, with liability insurance, which insures for liability to others. This argument was also addressed in ***Schult***: "[W]e have determined that there is no basis in the law for limiting stacking to uninsured motorist and underinsured motorist cases." ***Id.*** at 240, 536 N.W.2d at 139.

Because the insured was driving a nonowned vehicle and became responsible for bodily injuries while doing so,

> the liability insurance in the instant case does not follow the vehicle, but follows the insured. In other words, under Keith's policy, when he is driving a nonowned vehicle, liability insurance is personal to him and may be stacked. *See* ***State Farm*** [***Mut. Auto. Ins. Co. v. Continental Cas. Co.***], 174 Wis.2d [434,] 440, 498 N.W.2d [247,] 249 [Ct. App. 1993] (in an accident

> involving a nonowned vehicle, provisions covering nonowned vehicles apply, and not those relating to coverage for the vehicle specified in the policy.).

Schult, 195 Wis.2d at 242, 536 N.W.2d at 139.

Schult pointed out that had the insured been driving his own covered vehicle, there would be no stacking because each premium insured against liability arising from the operation of the vehicle specified in the policy, citing ***Agnew.*** *See* ***Schult,*** 195 Wis.2d at 242, 536 N.W.2d at 139.

Threshermen's further argues that stacking liability coverage is illogical because there is no reasonable basis to ignore the limit of liability provision just because the insured "happens to be driving a non-owned vehicle" at the time of the accident. Citing ***State Farm,*** 174 Wis.2d at 442, 498 N.W.2d at 250, ***Schult*** concluded that the resolution of any coverage dispute is necessarily governed by the terms of the policy as negotiated by the parties, and the insurer had consciously chosen to make separate promises in exchange for separate premiums. "'We see nothing unreasonable or illogical in our holding State Farm to its separate promises under such circumstances. The law of insurance coverage is not governed by the fortuity of events ....'" ***Schult***, 195 Wis.2d at 242-43, 536 N.W.2d at 139-40 (quoting ***State Farm,*** 174 Wis.2d at 442, 498 N.W.2d at 250).

Finally, Threshermen's cites several out of state cases in support of its argument. The court of appeals, however, is bound by the precedential effect of its own opinions. *See* ***In re Court of Appeals,*** 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978).

By the Court.—Judgment affirmed.

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