COURT OF APPEALS
DECISION
DATED AND RELEASED

November 4, 1997

NOTICE

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.

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

No. 97-1937-FT

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

DOROTHY COELLO, ALYCE AND ARLEIGH KUSCHEWSKI,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

VALERIE LYNK, NORTHLAND INSURANCE COMPANY, ABC INSURANCE COMPANY, MUTUAL SERVICE INSURANCE COMPANY, WISCONSIN PHYSICIANS SERVICE-MEDICARE PART B, AND STATE OF WISCONSIN HEALTH INSURANCE RISK SHARING PLAN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Washburn County: WARREN WINTON, Judge. *Affirmed.*

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

PER CURIAM. Dorothy Coello and Alyce and Arleigh Kuschewski appeal a summary judgment dismissing their action against Allstate Insurance.[1] They contend that Allstate insured Valerie Lynk, the driver of a car that caused them injury, through a policy issued on another vehicle. The trial court concluded that the Allstate policy, issued to Lynk's father, did not provide coverage because Lynk was not a "resident" of her parents' household at the time of the accident and because the car Lynk was using at the time of the accident was available for her regular use. Coello and the Kuschewskis argue that summary judgment was inappropriate because there are outstanding issues of material fact as to each of the trial court's rulings. We conclude that the trial court properly granted summary judgment on the basis of the car being regularly available for Lynk's use, we need not review the other issue and we affirm the judgment.

We review summary judgments de novo and will affirm if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* ***St. John's Home v. Continental Cas. Co.***, 147 Wis.2d 764, 781-82, 434 N.W.2d 112, 119 (Ct. App. 1988). The construction of an insurance policy presents a question of law which we review independently of the trial court. *See* ***American States Ins. Co. v. Skrobis Painting & Decor., Inc.***, 182 Wis.2d 445, 450, 513 N.W.2d 695, 697 (Ct. App. 1994).

The Allstate policy insured Lynk when she was driving a vehicle that was not "available or furnished for regular use …." The purpose of the "non-owned automobile" exclusion is to provide coverage to the insured while she has only infrequent or merely casual use of a vehicle other than the one described in

[1] This is an expedited appeal under RULE 809.17, STATS.

the policy, but not to cover her when she is using a vehicle that she frequently uses or has the opportunity to use because the insurance company has not received a higher premium for the added risk associated with the opportunity to frequently use an additional car. *See* ***Hochgurtel v. San Felippo***, 78 Wis.2d 70, 81, 253 N.W.2d 526, 530 (1977). The uncontradicted evidence establishes that Lynk's live-in boyfriend bought the car involved in the accident and that it was available for her unrestricted use for approximately three weeks, thus defeating coverage under this policy. *See* ***Moutry v. American Mut. Liab. Ins. Co.***, 35 Wis.2d 652, 658-59, 151 N.W.2d 630, 633 (1967).

Coello and the Kuschewskis argue that Lynk's deposition establishes that her use was restricted or, at a minimum, creates an issue of fact on that question. In her deposition, Lynk testified:

> Q. And was it available for you to use whenever you wanted to?
>
> A. Not whenever I wanted to.
>
> Q. But it was available for you to use when it was there?
>
> A. When it was—when I needed a car.

Lynk's statement that she could not use the car whenever she wanted to does not state or imply that she needed permission to use the car. Rather, in the context of her other answers, it establishes that she could use the car when she needed it and when no one else was using it. To state that the car was not available whenever she wanted to use it does not imply that her use was restricted. Coello and the Kuschewskis cite ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis.2d 183, 260 N.W.2d 241 (1977), to support their argument that an issue of fact remains on the issue of restricted use. In ***Lecus,*** the driver was "allowed" to use a car whenever

he wished and his "requests" were always granted. ***Id***. at 190, 260 N.W.2d at 244. Lynk's deposition does not indicate that she was required to request permission to use the car or that her use depended on anyone "allowing" her to drive the car.

By the Court.—Judgment affirmed.

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