

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-2471

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**NEW HAMPSHIRE INSURANCE COMPANY, INC.,
D/B/A GRANITE STATE INSURANCE COMPANY,**

PLAINTIFF-RESPONDENT,

v.

**CAROLE TIMBLIN, INDIVIDUALLY AND
D/B/A HENRY TIMBLIN TRUCKING,**

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Carole Timblin, individually and d/b/a Henry Timblin Trucking, has appealed from a judgment awarding damages and costs in the amount of \$17,850 to New Hampshire Insurance Company, Inc. The trial

court awarded judgment based upon its determination that Timblin owed New Hampshire additional premiums for a commercial automobile liability insurance policy issued by New Hampshire to Timblin for the period between November 23, 1994, and November 23, 1995. The trial court found that Timblin hired independent truckers during the policy period, and that New Hampshire was therefore entitled to additional premiums under a “cost of hire” theory. It further found that Timblin had changed her “zones of operation” with respect to seventeen vehicles, entitling New Hampshire to additional premiums. We affirm the judgment.

¶2 The record indicates that since 1987, Timblin, doing business as Henry Timblin Trucking, has obtained commercial automobile liability insurance through a risk-sharing insurance plan established by the State of Wisconsin under WIS. STAT. ch. 619 (1997-98), known as the Wisconsin Auto Insurance Plan (WAIP). In 1992, New Hampshire was assigned as the servicing carrier to administer Timblin’s policy. New Hampshire insured Timblin for several policy terms. This action arises from a renewal of the policy effective November 23, 1994, to November 23, 1995. Timblin paid a premium deposit of \$46,822 at the beginning of the renewal period. At the end of the policy term New Hampshire hired Alan Fishbein of A&S Audit Services to perform an audit of Timblin’s operations. Based upon the audit, New Hampshire issued a Statement of Premium Adjustment to Timblin notifying Timblin that she owed an additional premium of \$16,689.

¶3 Neither party disputes that New Hampshire was entitled to conduct an audit when the policy period ended and to charge additional premiums if warranted. However, Timblin contends that the award under New Hampshire’s “zones of operation” claim must be reversed because New Hampshire’s 1995 audit

revealed more instances where Timblin's trucks were operating in areas of less risk than increased risk. She contends that the award under New Hampshire's "cost of hire" claim must also be reversed because there was no evidence that, doing business as Henry Timblin Trucking, she contracted with third parties. She contends that the payments upon which the "cost of hire" award was premised were, in fact, payments made by a separate brokerage company operated by her, known as CHT Brokers, which has brokerage authority from the Interstate Commerce Commission (ICC). She contends that the payments were made to companies which had their own liability insurance and operating authority from the ICC. Timblin contends that absent evidence that any of the payees operated under the ICC contract carrier authority of Henry Timblin Trucking, there was no increased exposure for New Hampshire and no basis for additional premiums.

¶4 The trial court rejected Timblin's arguments following a bench trial. It found that Timblin hired independent truck operators to haul loads under Henry Timblin Trucking's ICC carrier authority, resulting in an increased risk to New Hampshire. It also found changes in the zones of operation for seventeen Timblin vehicles during the policy period, and that additional premiums were therefore warranted.

¶5 Insurance policies are controlled by the same rules of construction that govern other contracts. See *Meyer v. City of Amery*, 185 Wis. 2d 537, 543, 518 N.W.2d 296 (Ct. App. 1994). The interpretation of an insurance contract presents a question of law. See *Rohloff v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 165, 169, 507 N.W.2d 112 (Ct. App. 1993). The goal of the courts is to ascertain the intentions of the contracting parties. See *id.* at 170. The terms of an insurance policy are to be construed to give the language its plain and ordinary meaning as that language would be understood by a reasonable person in the position of the

insured. *See C.L. v. School Dist. of Menomonee Falls*, 221 Wis. 2d 692, 697, 585 N.W.2d 826 (Ct. App. 1998). Words or phrases in a policy are ambiguous only when they are reasonably susceptible to more than one reasonable construction. *See Meyer*, 185 Wis. 2d at 543. When a policy's terms are plain, they cannot be rewritten by construction. *See id.*

¶6 Although the interpretation of the parties' insurance contract presents a question of law, a different standard of review is applied to the trial court's findings of fact. When, as here, a trial is held to the court, the trial court's factual findings will not be reversed unless they are clearly erroneous. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The trial court is the ultimate arbiter of the credibility of the witnesses. *See id.* at 644. Where more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. *See id.*

¶7 The trial court's findings of fact and conclusions of law are supported by the policy, the WAIP provisions, and the evidence in the record. The policy issued by New Hampshire provided:

a. The policy is a premium audit policy pursuant to the following term:

The estimated premium for this Coverage Form is based on the exposures you told us you have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the Named Insured will be billed for the balance, if any.

¶8 The policy gave New Hampshire the right to examine and audit Timblin's books and records, and to make inspections and surveys at any time. The terms of the WAIP were also incorporated into the policy. Under the terms of the WAIP, in computing an additional premium under the policy, New Hampshire

was to “charge the amount applicable on the effective date of the change.” Wisconsin Automobile Insurance Plan Commercial Automobile Manual-General Rules, Rule 9.1.b.(revised May 1, 1991). The rates applicable when determining premiums based upon zones of operation are also set forth in the WAIP, as are the methods for calculating premiums.

¶9 When Timblin’s policy with New Hampshire was renewed in November 1994, Timblin was not required to complete a new application, and the declarations were based upon previous declarations setting forth the vehicles owned or operated by Timblin and their zones of operation. In the 1995 audit, Fishbein discovered that seventeen vehicles hauled to areas other than the 42/48 zone of operation set forth in the declarations. Some were newly added vehicles, while others were vehicles whose zones of operation changed over the course of the policy period. The premium applicable to each of those seventeen vehicles was then determined based upon the zone of operation in which it operated during the policy period, with the amount prorated based upon when the vehicle was added to Timblin’s fleet or when the change in the zone of operation occurred. Using the rates applicable at the time each change occurred, New Hampshire determined that Timblin owed additional premiums.

¶10 New Hampshire’s actions were permitted under the policy. The policy expressly provided that the premium paid by Timblin in 1994 was an estimated premium, and that if changes occurred in the zones of operation for any vehicle in Timblin’s fleet, the premiums applicable to the changed or added vehicle would be determined using the rate applicable to the zone at the time of the change.

¶11 Timblin contends that the changes in the zones of operation did not increase the risk to New Hampshire, and that most of the changes resulted in vehicles operating in areas of lower risk under the base rates set forth in the WAIP. She contends that overall the actual exposure faced by New Hampshire was less at the time of the audit than when the premium was estimated in 1994, and that additional premiums were therefore unwarranted under the language providing that the final premium would be determined based on actual exposure.

¶12 Timblin's argument in effect asks this court to disregard the provisions of the policy which provide that in determining the premium applicable to a vehicle whose zone of operation changed, or which was added to Timblin's fleet, New Hampshire was to charge the amount and use the rate applicable on the date of the change. No one disputes that New Hampshire did so here, nor does Timblin dispute that the method of calculation used by New Hampshire in 1995 complied with the WAIP manual.

¶13 Underlying Timblin's argument is a claim that New Hampshire made a mistake in calculating the premiums applicable to each vehicle when it estimated the premium in 1994. Timblin contends that this mistake was not mutual, and therefore cannot be used as a basis for reformation of the contract. She also contends that she relied on the amount of the estimated premium and, absent an increase in the risk associated with the zones in which she operates, New Hampshire is estopped from increasing her premium.

¶14 These arguments fail based upon the clear policy language. For equitable estoppel to arise, there must be action or inaction by the party against whom estoppel is asserted, and detrimental reliance on the action or inaction by the party asserting estoppel. See *Gonzalez v. Teskey*, 160 Wis. 2d 1, 12, 465

N.W.2d 525 (Ct. App. 1990). In addition, a party's reliance on the conduct of another must be reasonable. *See id.* at 14.

¶15 Timblin cannot be held to have reasonably relied to her detriment on the 1994 premium. Regardless of whether New Hampshire correctly calculated the premium in November 1994, the policy clearly provided that the premium was estimated and that Timblin's operation was subject to audit. New Hampshire charged additional premiums only for vehicles whose zones of operation changed or which were added during the course of the policy period. It did not adjust premiums for any vehicles whose zones of operation did not change. For those vehicles whose zones of operation changed, or which were added, it applied the rate applicable at the time of the change. Because Timblin accepted a policy which clearly and unambiguously permitted New Hampshire to apply the rate applicable at the time of a change, she cannot object when the procedure resulted in a higher than estimated premium. The charging of the additional premium for the vehicles whose zones of operations changed or which were added to the fleet was fully consistent with the policy and did not constitute reformation of the insurance contract.

¶16 Timblin's challenge to the award based on "cost of hire" also fails. The policy issued by New Hampshire provided coverage for vehicles which were hired or borrowed and which operated under Henry Timblin Trucking's carrier authority. The record indicates that during his 1995 audit, Fishbein concluded that Timblin had hired independent truckers to transport goods for Timblin's customers under the ICC carrier authority held by Timblin for Henry Timblin Trucking. Fishbein reached this conclusion after examining the general ledger kept by Timblin for Henry Timblin Trucking, which contained a column labeled "DR 520," identifying cash payments made to independent truckers during the policy

period. In addition, he reviewed bills of lading, which corresponded to entries made in the cash payment journal. The majority of those bills identified “Timblin” or “Henry Timblin Trucking” as the carrier or party to be billed, or were on office forms bearing the heading “Henry Timblin Trucking.”

¶17 At trial, Timblin testified that the cash payments identified in column DR 520 of the general ledger were payments made to companies which had their own liability insurance and operating authority from the ICC. She contended that these payments were arranged by her through CHT Brokers’ brokerage authority rather than Henry Timblin Trucking’s contract carrier authority, and that there was therefore no increased exposure for New Hampshire, which was not obligated to provide insurance for brokered loads. She submitted exhibit 37 consisting of certificates of insurance from trucking companies to which cash payments were made, along with copies of the ICC carrier authority under which those companies operated, and copies of documents labeled “rate confirmation.” The latter were on letterhead labeled “CHT Brokers, a Division of Henry Timblin Trucking.” Each rate confirmation form listed the shipper and consignee for a particular load, was signed by Carole Timblin on behalf of CHT Brokers, and listed an independent trucker as the “delivering carrier.” In contending that Henry Timblin Trucking did not hire or borrow vehicles from independent truckers, Timblin also relied on the lack of evidence that drivers’ logs and driver qualification certifications were filed with Henry Timblin Trucking.

¶18 Fishbein testified that during the audit Timblin did not provide him with information showing her brokerage authority. He also testified that he observed no other entity doing business at Timblin’s place of business, and that he did not see separate books, records, accounting, bank statements or financial statements for any entity other than Henry Timblin Trucking. He also did not see

any freight bills or bills of lading indicating that CHT Brokers arranged any loads referred to in the cash payment section of the general ledger.

¶19 Contrary to Timblin's implicit contention, the trial court was not required to find that her testimony on this subject was credible or to conclude that exhibit 37 conclusively established that the payments identified in DR 520 of the general ledger represented payments to independent truckers operating under CHT Brokers' brokerage authority rather than Henry Timblin Trucking's carrier authority. The issue of whether Timblin contracted with independent truckers under the brokerage authority of CHT Brokers or the carrier authority of Henry Timblin Trucking presented a question of fact. The trial court's finding that Timblin hired the truckers under Henry Timblin Trucking's carrier authority is not clearly erroneous.

¶20 The trial court's finding is supported by the cash payments entries in the general ledger, which did not on its face identify the payments as being made by a brokerage company. It was supported by numerous bills of lading which were on office forms for Henry Timblin Trucking or which otherwise identified "Timblin" or "Henry Timblin Trucking" as the carrier or party to be billed, rather than an independent trucker. The trial court could reasonably conclude that "Timblin" referred to Henry Timblin Trucking, not some other unidentified entity. Although Timblin testified that the bills were prepared by the companies that contacted her to carry the loads, and that at the time of the contact she often did not know if the load would be carried by a Timblin truck or an independent trucker, the trial court was entitled to rely on this information to conclude that any independent trucker who was subsequently contacted by Timblin to handle the load was in fact operating under Henry Timblin Trucking's carrier authority.

¶21 The fact that an independent trucking company also insures its own vehicles is irrelevant to a carrier's obligations to meet the financial responsibility requirements of ICC regulations. See *Hartford Ins. Co. v. Occidental Fire & Cas. Co.*, 908 F.2d 235, 238 (7th Cir. 1990). Consequently, the fact that independent truckers who hauled loads for Timblin had their own insurance does not compel a finding that Timblin arranged loads in her broker's capacity rather than through Henry Timblin Trucking's carrier authority. In addition, while Timblin correctly points out that the record contains no written trip leases between Henry Timblin Trucking and the independent truckers to whom payments were made, the absence of a written lease is not controlling and does not prevent a finding that the independent truckers operated under Henry Timblin Trucking's carrier authority. See *Williamson v. Steco Sales, Inc.*, 191 Wis. 2d 608, 616, 530 N.W.2d 412 (Ct. App. 1995); *Fuller v. Riedel*, 159 Wis. 2d 323, 333, 464 N.W.2d 97 (Ct. App. 1990). Similarly, although the failure of the independent truckers to display placards, logos or other identifying information naming Henry Timblin Trucking as the carrier is evidence on the issue, it does not preclude a finding that they acted under Timblin's carrier authority. Cf. *Williamson*, 191 Wis. 2d at 623-24 (indicating that a carrier's identification on a truck was evidence on the issue of whether a lease was in effect on the date of an accident, but was not, standing alone, controlling on the issue).

¶22 Timblin produced no checks or bank records showing that the payments reflected in column DR 520 of the general ledger were made from a separate account maintained by CHT Brokers. She testified that CHT Brokers had no separate telephone line, dispatch book, financial statements or ledger. She produced no bills or invoices reflecting payments made or received by CHT Brokers, and testified that invoicing for brokered loads was done on Henry

Timblin Trucking invoices. She testified that CHT Brokers received no income separate from Henry Timblin Trucking, and that it did not get billed for shipments that it arranged. Although she testified that receipts from brokered loads went into a CHT Brokers account, she produced no bank records or other documentation verifying this claim.

¶23 Based on the commingling of records by Timblin and the remaining evidence in the record, the trial court could reasonably find that New Hampshire properly concluded that the general ledger reflected cash payments to independent truckers who acted under Henry Timblin Trucking's carrier authority. Because all truckers operating under Henry Timblin Trucking's carrier authority were covered under the policy, New Hampshire properly demanded and was awarded an additional premium.

By the Court.—Judgment affirmed.

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

