COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2719

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

JEROME J. HEIN AND JUDITH HEIN,

PLAINTIFFS-APPELLANTS,

PHYSICIANS PLUS INSURANCE CORPORATION,

SUBROGATED-PLAINTIFF,

V.

THOMAS N. FRIEBERG, BETH A. FRIEBERG AND PEKIN INSURANCE COMPANY,

DEFENDANTS,

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

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

¶1 VERGERONT, P.J. Jerome and Judith Hein appeal from a judgment declaring that a homeowners insurance policy issued to Thomas Frieberg did not provide coverage for Jerome's injuries resulting from an automobile accident allegedly caused by Frieberg's minor daughter. They contend the trial court erred in determining that the coverage in the policy for "liability … assumed by contract" did not include Frieberg's liability under WIS. STAT. § 343.15 (1999-2000),[1] the sponsorship statute. We conclude the trial court was correct and therefore affirm.

BACKGROUND

¶2 The relevant facts are not disputed. At the time of the accident, Frieberg's minor daughter was operating Frieberg's vehicle. She had received her Wisconsin Operator's License pursuant to WIS. STAT. § 343.15, which provides in part:

> **Application of persons under 18; liability of sponsors; release from liability; notification of juvenile violation.**
>
> (1) (a) Except as provided in sub. (4), the application of any person under 18 years of age for a license shall be signed and verified by either of the applicant's parents, or a stepparent of the applicant or other adult sponsor, as defined by the department by rule.
>
> ….
>
> (2) …. (b) Any negligence or wilful misconduct of a person under the age of 18 years when operating a motor vehicle upon the highways is imputed to the parents where both have custody and either parent signed as sponsor, otherwise, it is imputed to the adult sponsor who signed the application for such person's license. The parents or the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

> adult sponsor is jointly and severally liable with such operator for any damages caused by such negligent or wilful misconduct.

The vehicle was covered under Frieberg's automobile insurance policy, which had a policy limit of $50,000. The parties agree that Jerome's total claim for injuries and damages is $87,500, and the policy limits of the automobile insurance have been paid to him.

¶3 Frieberg also had insurance under a homeowners policy issued by Wisconsin Mutual Insurance Company. That policy provided:

> PRINCIPAL LIABILITY AND MEDICAL PAYMENTS COVERAGES
>
> *Coverage L – Personal Liability*
>
> We pay, up to our limit of liability, all sums for which any insured is legally liable because of bodily injury or property damage caused by an occurrence to which this coverage applies.
>
> ….
>
> INCIDENTAL LIABILITY AND MEDICAL PAYMENTS COVERAGES
>
> This policy provides the following Incidental Liability and Medical Payments Coverages. These incidental coverages are subject to the terms of the Principal Liability and Medical Payments to Others coverages. These incidental coverages do not increase the limit of liability stated for the principal coverages except: Claims Expense Coverage and First Aid Expense Coverage.
>
> ….
>
> 2. *Contracts and Agreements Coverage* – We pay for damages for bodily injury or property damage resulting from liability assumed by an insured under a contract, provided:
>
> a. the contract is in writing and made before the loss; and

> b. it is not in connection with business activities of any insured.

¶4 The exclusions in the policy with respect to motor vehicles provided:

> EXCLUSIONS
>
> 1. *Exclusions that Apply to Both Personal Liability and Medical Payments to Others*—This policy does not apply to liability:
>
> ….
>
> c. resulting from the ownership, maintenance, use, loading or unloading by an insured of motorized vehicles or watercraft, except as provided under Incidental Liability and Medical Payments Coverages; ….
>
> 2. *Exclusions that Apply only Personal Liability*—This coverage does not apply to liability:
>
> ….
>
> b. assumed under any contract or agreement, except as provided under Incidental Liability and Medical Payments Coverages.

¶5 Both the Heins and Wisconsin Mutual sought a declaratory judgment regarding coverage under the homeowners policy. Wisconsin Mutual claimed there was no coverage under the policy because of the motor vehicle exclusion. The Heins claimed there was coverage because the incidental liability section covers any liability Frieberg assumed by contract and that included the assumed liability as a sponsor of his daughter's driving privileges. The Heins asserted that the motor vehicle exclusion did not apply to the "Incidental Liability" coverage.

¶6 The trial court concluded that the "Incidental Liability" coverage did not apply because liability imposed on Frieberg by WIS. STAT. § 343.15 was not a contract within the meaning of the policy. The court based its decision on ***Klatt v. Zera,*** 11 Wis. 2d 415, 105 N.W.2d 776 (1960).

DISCUSSION

¶7 The interpretation and application of a statute to a set of undisputed facts is a question of law, which we review de novo. ***Ynocencio v. Fesko,*** 114 Wis. 2d 391, 396, 338 N.W.2d 461 (1983). The interpretation of an insurance contract is also a question of law. ***Rayburn v. MSI Ins. Co.***, 2000 WI App 9, ¶7, 240 Wis. 2d 745, 624 N.W.2d 878.

¶8 As they did before the trial court, the Heins contend on appeal that Frieberg's assumption of liability under WIS. STAT. § 343.15 constitutes a contract and is therefore covered under the "Incidental Liability" portion of his homeowners policy. They assert the court erred in relying on ***Klatt***, because, in their view, ***Klatt*** erroneously relied on dictum in ***Behringer v. State Farm Mut. Auto. Ins. Co.,*** 275 Wis. 586, 595, 82 N.W.2d 915 (1957). However, we do not agree with their analysis of either ***Behringer*** or ***Klatt***.

¶9 In ***Behringer***, the insurer filed a form with the Commissioner of Motor Vehicles, pursuant to the Safety Responsibility Law, which certified that its policy covered the owner and the driver, who was a minor at the time of the accident. ***Behringer***, 275 Wis. at 588-89. The insurer later claimed the certification was not binding because it had completed the form based on misinformation that the sixteen-year-old driver held a valid driver's license at the time of the accident. ***Id.*** at 590. The supreme court held the insurer could not assert an exclusion clause in its policy as a defense to coverage when the facts upon which the insurer relied could have been discovered prior to filing the form. ***Id.*** at 594. The court went on to discuss the insurer's claim that it had a valid defense against coverage because the insurance policy did not apply "to liability assumed by the insured under any contract or agreement …." ***Id.*** at 594-95. The

court stated "[i]t would seem that such liability of [the parent under the sponsorship statute] ... for the acts of operation of his son ... is one imposed by statute rather than the result of a contract or agreement." ***Id.*** at 595 (footnote omitted).

¶10 The Heins assert that the ***Behringer*** court's determination that liability under the sponsorship statute is one imposed by law was not necessary to the court's decision that the certification was binding. However, "when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." ***State v. Kruse***, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981) (citation omitted).

¶11 Significantly, in the later ***Klatt*** decision, the supreme court did not treat its statement in ***Behringer*** on the sponsorship statute as dictum but instead referred to it as a "holding" and relied on it.[2] ***Klatt***, 11 Wis. 2d at 423. In ***Klatt***, a father signed as a sponsor on his son's driver's license application. ***Id.*** at 417. The insurer claimed the son was not covered under the father's policy because the policy excluded from coverage any liability assumed by contract, which occurred when the father signed his son's driver's license application. ***Id.*** at 423. The supreme court stated:

> This same argument was advanced and rejected by this court in ***Behringer v. State Farm Mut. Automobile Ins.***

[2] *See also* ***Groth v. Farmers Mut. Auto. Ins. Co.***, 21 Wis. 2d 655, 659, 124 N.W.2d 606 (1963) ("The liability imposed by sec. 343.15(2), Stats., has been held by this court to be a direct statutory one and not the result of contract" (citing ***Behringer v. State Farm Mut. Auto. Ins. Co.***, 275 Wis. 586, 595, 82 N.W.2d 915 (1957))).

> ***Co.***, (1957), 275 Wis. 586, 594, 82 N. W. (2d) 915, wherein we declared:
>
> ….
>
> "It would seem that such liability of [the parent] … for the acts of operation of his son … is one imposed by statute rather than the result of a contract or agreement."
>
> The case of ***Buckeye Union Casualty Co. v. Bell*** (7th Cir. 1957), 249 Fed. (2d) 211, has been cited in the brief in behalf of [the insurer] as reaching the opposite result. There is nothing in the opinion in that case which convinces us that our holding in the ***Behringer*** *Case* is wrong. The ***Buckeye*** *Case* is distinguishable on the basis of the difference between wording of sec. 47-2706, Burns, Indiana Stats. 1952, and sec. 343.15, Wis. Stats. 1957. Such Indiana statute provides that a parent, who signs the application of a minor child under the age of eighteen for a driver's license, "*agrees* to be responsible, jointly and severally" with such minor for any injury or damage which the latter may cause by reason of the operation of a motor vehicle. On the other hand, the liability imposed by sec. 343.15, Wis. Stats. 1957, is couched in terms of imputing the negligence of the minor operator to the sponsoring parent, and contains no provision to the effect that the latter agrees to assume any liability for the acts of the former.
>
> We adhere to our holding in the ***Behringer*** *Case* that an exclusion clause, which [excludes coverage for liability assumed by contract or agreement] … does not exclude coverage with respect to a liability imposed by statute upon the named insured as a result of his signing of the application of his minor child for a driver's license.

Id. at 423-24 (citations omitted).

¶12 The Heins criticize the reasoning of ***Behringer*** and ***Klatt*** and argue that we should follow the Seventh Circuit ***Buckeye*** case and Indiana law. However, only the supreme court has the power to overrule, modify, or withdraw language from a previous supreme court case, ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and this court is bound by the decisions of the

supreme court. ***State v. Olsen,*** 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980).

¶13 The Heins attempt to distinguish ***Klatt***, asserting that the court there found no contractual obligation because it determined "there was no language whereby the parent expressly agreed to be responsible." In contrast, the Heins contend, in the application signed by Frieberg, he expressly agreed to accept liability.[3] However, the statement in ***Klatt*** on which the Heins rely concerned a comparison of the Indiana and Wisconsin statutes; the ***Klatt*** court did not address the language of the application the parent signed. Rather, the court distinguished the Indiana statute from the Wisconsin statute because the former, unlike the later, explicitly stated the parent agreed to assume liability. Since the relevant language of the Wisconsin sponsorship statute has not changed since ***Klatt***, we see no basis for distinguishing ***Klatt*** as the Heins propose.

¶14 The Heins offer another distinction between ***Klatt*** (and ***Behringer***) and this case. They point out that in this case, the contract language at issue describes coverage whereas in those cases it described an exclusion. The Heins argue that we must follow the accepted rule of construction of insurance policies that exclusions are to be narrowly construed and grants of coverage are to be broadly construed. ***Mooren v. Economy Fire & Casualty Co.***, 230 Wis. 2d 624, 632, 601 N.W.2d 853 (Ct. App. 1999), *review denied*, 231 Wis. 2d 375, 607 N.W.2d 291 (1999). However, the interpretation of the contract language in this case, in the supreme court's view, turns on the statutory language of WIS. STAT.

[3] The application signed by Frieberg stated: "Sponsor Certification: As the adult sponsor, I accept responsibility and verify that minor is not a habitual truant and meets the educational requirements under s. 343.15 Wis. Stats."

§ 343.15, and that has not changed. We see no reasoned basis for deciding that a parent's liability under § 343.15 is "liability assumed by an insured under a contract" when that phrase is in the coverage portion of a policy but not when the same phrase is contained in an exclusion.

¶15 Finally, the Heins assert that the public policy of WIS. STAT. § 343.15 will be circumvented if the sponsor's liability is considered statutorily imposed. Once again, we are not free to disregard supreme court decisions. The Heins must address their policy arguments either to the supreme court or to the legislature.

¶16 Because we are persuaded that ***Klatt*** controls the outcome of this case, we conclude that Frieberg did not assume liability by contract when he signed his daughter's driver's license application. The Heins do not argue that, if there is no coverage under this provision of the incidental liability section, the motor vehicle exclusion does not apply. Accordingly, the trial court correctly declared there was no coverage under Frieberg's homeowners policy.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.