

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 01-2019-FT
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-126

**IN COURT OF APPEALS
DISTRICT III**

RON STRAND AND SANDRA STRAND,

PLAINTIFFS-APPELLANTS,

V.

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ron and Sandra Strand appeal a summary judgment dismissing their claims against their insurer, Auto-Owners Insurance

Company.¹ The Strands argue that they did not need to replace personal property in order to obtain the benefit of replacement cost coverage under the terms of their insurance policy. They also argue that the policy covered land motorized vehicle accessories. We reject their arguments and affirm the judgment.

I. BACKGROUND

¶2 The Strands purchased an insurance policy from Auto-Owners effective from December 31, 1998, to December 31, 1999. The policy provided fire insurance protection and replacement cost coverage for their personal property. On May 8, 1999, a fire destroyed a shed on their property and its contents. The Strands submitted a sworn statement and proof of claim on April 3, 2000, which Auto-Owners rejected, claiming it was inaccurate and incomplete. The proof of claim also was to have been filed within 180 days of the loss, and thus was late.

¶3 The Strands filed suit against Auto-Owners claiming that it refused to pay for covered losses. They asserted that they were entitled to replacement costs for property not in fact repaired or replaced, and payment for other items that Auto-Owners refused to pay based upon various exclusions contained in its policy terms.

¶4 Auto-Owners filed a motion for summary judgment. It asserted that the policy does not provide replacement cost payment for household personal property that has not in fact been repaired or replaced, and that certain other

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

property was not covered property under the policy. The trial court granted partial summary judgment in favor of Auto-Owners. It ruled that under the policy, the Strands were required to actually replace personal property before being reimbursed at replacement cost value. The court also ruled that certain items were excluded under the policy because they were either land motorized vehicles or business property and that several other items were covered under the policy as personal property. The court also entered judgment in favor of the Strands for the amount payable for several covered items. The Strands now appeal the portion of the judgment granting partial summary judgment in favor of Auto-Owners.

II. SUMMARY JUDGMENT

¶5 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

III. INTERPRETATION OF INSURANCE POLICY LANGUAGE

¶6 An insurance agreement functions as a contract between the insured and the insurer. *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 764, 517 N.W.2d 463 (1994). Therefore, the interpretation of insurance policies is governed by the same rules of construction that apply to other contracts. *Smith v. Katz*, 226 Wis. 2d 798, 806, 595 N.W.2d 345 (1999). Interpretation of an insurance contract is a question of law which this court reviews de novo. *Id.* at 805.

¶7 Insurance policies must be reviewed as a whole to ensure that pertinent provisions are given a reasonable meaning. *Ledman v. State Farm Mut. Auto Ins. Co.*, 230 Wis. 2d 56, 66, 601 N.W.2d 312 (Ct. App. 1999). In interpreting a contract, “[a] court may not depart from the plain meaning of a contract where it is free from ambiguity.” *Hortman v. Otis Erecting Co.*, 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct. App. 1982) (citation omitted). Where interpretation is required, words of the policy should be given the meaning that a reasonable person in the position of the insured would understand. *Wisconsin Label Corp. v. Northbrook Prop. & Cas. Co.*, 2000 WI 26, ¶25, 233 Wis. 2d 314, 607 N.W.2d 276.

IV. WAIVER

¶8 Auto-Owners argues that the Strands waived their right to appeal the judgment because they consented or stipulated to the entry of judgment. *See Cascade Mtn., Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997). We disagree. In *Cascade*, the trial court granted partial summary judgment dismissing most of the plaintiff’s claims and the parties stipulated to the entry of a conditional judgment. *Id.* at 266-67. The plaintiff then attempted to appeal the court’s decision partially granting the defendant’s motion for summary judgment. *Id.* at 267. Pursuant to the stipulation: “If the dismissal of those claims was affirmed, Cascade could docket the \$20,000 judgment and execute on it. However, if the partial summary judgment were reversed, the parties agreed to expunge the judgment and to try all of Cascade’s claims.” *Id.* The appellate court concluded that the plaintiff waived its right to appeal by stipulating to the entry of a conditional judgment. *Id.* at 269. We conclude that, unlike *Cascade*, this was not a conditional judgment that was contrived solely to set up an appeal.

V. REPLACEMENT COST COVERAGE

¶9 The Strands argue that their policy does not require that property actually be replaced in order for them to receive its replacement value. They contend that “when the policy is read as a whole the language is clear, unambiguous and does not require interpretation.” Auto-Owners argues the policy unambiguously provides replacement coverage only for property that is in fact either replaced or repaired. It contends that if the Strands elect not to repair or replace their property, then they are entitled only to the actual cash value of the property, with a deduction for depreciation. Here, the Strands already have received payment for the cash value of their property.

¶10 We agree with Auto-Owners’ construction of the policy. The Strands are not entitled to the additional cost of replacing their property unless and until they actually do so. The relevant policy language provides:

- (a) Unless replacement cost coverage is indicated in the Declarations, losses will be settled at the Actual Cash Value of the damaged property at the time of loss. Actual Cash Value includes a deduction for depreciation.

We will pay no more than:

- (1) the cost to repair or replace the damaged property with property of like kind and quality;
or
- (2) the limits of liability on this policy.

....

- (c) If replacement cost is indicated in the Declarations for Household Personal Property Coverage, we will settle loss to covered property on the basis of the full cost of repair and replacement, without deduction for depreciation.

....

(4) We do not cover:

- (i) any rare or antique item that cannot be repaired or replaced; or
- (ii) any other property unless and until actually repaired or replaced.

(d) You may disregard these replacement cost loss settlement provisions when making a claim. If you do, you may make further claim within 180 days after the loss for any additional cost you incur in replacing the damaged property.

¶11 The Strands assert that §§ 1(c)(4)(i) and (ii) should be read together to mean that, “if rare or antique items are damaged, Auto-Owners will not cover them unless repaired or replaced.” The Strands patently misconstrue the applicable policy language. Sections 1(c)(4)(i) and (ii) are separate provisions and describe two categories of items not covered by replacement cost coverage. Section (4)(i) excludes rare or antique items “that cannot be repaired or replaced,” and § (4)(ii) precludes recovery of replacement costs for “any other property unless and until actually repaired or replaced.”

¶12 The Strands also argue that § 1(d) conflicts with the rest of the policy.² They argue that § 1(d) “provides that if, within 180 days of the loss, you find out that actually replacing the property costs more than originally thought, you can make a claim for the additional costs.” The Strands maintain that § 1(d)

² The Strands contend that a strict interpretation of the policy frustrates public policy because it provides no coverage if the insured does not have the financial resources to repair or replace the damaged property. Nevertheless, they concede that Auto-Owners does not propose such a drastic construction. More to the point, § 1(d) prevents such a result. The policy is not illusory. See *Hoglund v. Secura Ins.*, 176 Wis. 2d 265, 268, 500 N.W.2d 354 (Ct. App. 1993). The insured receives the cash value of the property and would incur only the additional costs of actual replacement.

only makes sense if replacement cost is provided under the policy, regardless whether they actually replace the property.

¶13 However, Auto-Owners' construction of § 1(d) is consistent with its plain meaning. Under § 1(d), the insured promptly receive the cash value of their property. Then, if the insureds actually replace the item within 180 days, they receive the difference between the cash value and the actual replacement cost. Although the Strands argue that the policy does not contemplate this process, the policy unambiguously sets forth this procedure.

¶14 Because the replacement cost coverage is clear and unambiguous, we conclude that there is no replacement coverage unless and until the property is actually replaced. Also, the policy provides cash value coverage for property until it is replaced. Section 1(d) provides the mechanism by which an insured is reimbursed for additional costs incurred replacing the items within 180 days.

¶15 The Strands promptly received the cash value of the property. They could have been reimbursed for any additional replacement costs if they had replaced the property within 180 days. Because the Strands did not replace the property at issue, they were not entitled to the difference between the cash value and the actual replacement cost.

VI. VEHICLE ACCESSORIES

¶16 The Strands argue the policy covers vehicle accessories purchased separately and not attached to vehicles at the time of the loss. The vehicle accessories are dump truck tires, floodlights, mirrors, towing wheel straps, a towing dolly, chains, pickup truck mirrors and steel plows. The Strands contend the policy simply excludes from coverage "land motorized vehicles." They further

argue that the policy does not mention unattached vehicle accessories and that Auto-Owners could have excluded unattached auto accessories but chose not to do so. Auto-Owners maintains that the “items were related to and utilized with the appellants[’] land motorized vehicles, which are excluded under the policy.”

¶17 The trial court found that the items are “used in connection with one of the plaintiffs[’] land motorized vehicles,” and “these items seem more related to the business conducted by plaintiffs rather than items which are commonly used and referred to as household personal property.” We review a trial court’s findings of fact under the clearly erroneous standard. WIS. STAT. § 805.17(2).

¶18 The trial court found that “common sense” indicates that vehicle accessories are not part of the Strands’ household and determined they were related to the Strands’ business. In interpreting the coverage, we can consider the provision’s heading. See *Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 451-52,

492 N.W.2d 131 (1992). All of the claims at issue are made under a section entitled “Household Personal Property.” Listed exclusions to the household personal property include land motorized vehicles and business property.

¶19 All the property claimed by the Strands was necessarily used in connection with a dump truck, tow truck or pickup truck, which are land motorized vehicles and are specifically excluded under the policy’s terms. Also, the trial court found that these heavy-duty accessories are more likely to relate to a business than to be part of someone’s household personal property. The Strands have not shown this finding to be clearly erroneous. The heading informs on the coverage, and motor vehicle accessories are not logically household personal property.

¶20 We conclude that the trial court's findings were not clearly erroneous. The business property exclusion precludes recovery for the Strands' vehicle accessories.

By the Court.—Judgment affirmed.

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

