

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 2002

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. 02-0355
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-41

**IN COURT OF APPEALS
DISTRICT III**

AUTO-OWNERS INSURANCE COMPANY,

**PLAINTIFF-RESPONDENT-CROSS-
APPELLANT,**

v.

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Six-year-old Ty Hulleman was killed by an uninsured motorist just after exiting a school bus. Ty's parents and sister witnessed the accident or arrived shortly after it happened. Western National Mutual Insurance Company provided liability and uninsured motorist coverage to

the Hullemans, while Auto-Owners Insurance Company provided the same to the owners of the school bus. The Hullemans settled claims with the insurance companies for negligent infliction of their own emotional distress, as well as for Ty's wrongful death. Auto-Owners commenced this action against Western to determine each company's share of the settlement. Auto-Owners also filed a counterclaim on this issue. The trial court held that the Auto-Owners policy did not cover the emotional distress claims. The court also held that Western had paid out its maximum per person limit and therefore had no further exposure.

¶2 Western appeals from the trial court's judgment. Western contends that (1) the emotional distress claims are derivative claims within Auto-Owners' uninsured motorist coverage; (2) Western's policy is excess as to the Auto-Owners policy; (3) if the claims for emotional distress are not derivative, Western has expended its per person limit and therefore has no further exposure; and (4) if Auto-Owners does not have primary coverage, Western's and Auto-Owners' uninsured motorist policies apply on a pro-rata basis to the entire loss so that Western is entitled to reimbursement from Auto-Owners for sums paid in excess of Western's pro-rata share.¹

¶3 Auto-Owners cross-appeals, arguing that (1) Western has not exhausted its policy limit and (2) the policies apply on a pro-rata basis to the wrongful death claim. We affirm the trial court in all respects.

¹ After briefing, Western brought to our attention the case of *Kosieradzki v. Mathys*, 2002 WI App 191, 649 N.W.2d 717. However, this case does not give us any new guidance beyond that in *Estate of Gocha v. Shimon*, 215 Wis. 2d 586, 573 N.W.2d 218 (1997), upon which we base part of this decision.

BACKGROUND

¶4 When the Hullemans sought damages for Ty's wrongful death and their emotional distress, the insurers were unable to agree on their obligations under their policies, but jointly settled the Hullemans' claims for \$782,838.63. Auto-Owners paid \$532,838.63, and Western paid \$250,000.² Both insurers reserved rights to reimbursement and contribution. Auto-Owners initiated this action, arguing that Western's policy also covered the wrongful death claim and, therefore, Western should have to pay its pro-rata share of that payment. Western counterclaimed, arguing that the Auto-Owners policy covered the emotional distress claims.

¶5 Upon summary judgment motions by both parties, the trial court first held that the Auto-Owners policy did not cover the emotional distress claims, denying Western's motion. The court then held that Western's liability was limited to one per person limit. Because Western had paid out that limit, it had no further liability, so the court denied Auto-Owners' motion. Based on its summary judgment ruling, the court dismissed the action. Western appeals, and Auto-Owners cross-appeals.

STANDARD OF REVIEW

¶6 We review a denial of summary judgment independently, using the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). "[I]f

² Western's payment of \$250,000 represented its per person limit. Auto-Owners' per person limit is \$1,000,000.

a genuine dispute of material fact exists or if the evidence presented is subject to conflicting inferences or factual interpretations, summary judgment must be denied.” *Hanson v. Prudential Prop. & Cas. Ins. Co.*, 224 Wis. 2d 356, 362, 591 N.W.2d 619 (Ct. App. 1999).

DISCUSSION

I. Coverage for Emotional Distress Claims

¶7 Western’s argument rests on the fact that Ty’s claims are covered by Auto-Owners’ uninsured motorist coverage. Western contends that the uninsured motorist coverage protects Ty to the same extent as he would be covered under Auto-Owners’ liability policy. Western argues that Ty’s family’s emotional distress claims are derivative claims arising from Ty’s injuries. Because the Hulleman’s claims are derivative, Western contends the claims are within the scope of Auto-Owners’ liability coverage. As a result, they are also within the scope of Auto-Owners’ uninsured motorist coverage. However, because the Auto-Owners policy by its language insured Ty’s damage claim only and not his family’s claims, Western’s premise fails.

¶8 The proper construction of an insurance policy is a question of law, which we review independently. *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. An insurance policy is construed to give effect to the parties’ intent as expressed in the language of the policy itself. *Id.* If the policy’s language is unambiguous, we enforce it as written, without resort to rules of construction or principles of case law. *Id.*

¶9 The Auto-Owners policy states that:

We will pay compensatory damages any person is legally entitled to recover:

1. from the owner or operator of an uninsured automobile;
2. for bodily injury sustained while occupying or getting into or out of an automobile that is covered by ... the policy.

The policy unambiguously states that it does not cover claims by persons who did not suffer any bodily injury while occupying or getting into or out of an automobile. Therefore, while Ty's damages were covered by the Auto-Owners policy, the rest of his family's claims were not.

¶10 Western notes that an insurance company cannot provide less than statutory coverage mandated by WIS. STAT. § 632.32(5).³ However, there is no statutory language mandating coverage for emotional distress claims. Nor does Western cite any statute or case law requiring an insurance company to provide coverage for claims of persons who are not its insureds.

¶11 The purpose of uninsured motorist coverage is "to compensate an *insured* who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured." *Clark v. American Family Mut. Ins. Co.*, 218 Wis. 2d 169, 178, 577 N.W.2d 790 (1998) (emphasis added; citation omitted). Ty's injuries are covered by Auto-Owners; his family's injuries are not. As a result, whether or not their claim is derivative, Ty's parents and sister do not have a claim against Auto-Owners for emotional distress.

³ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶12 The Hullemans, however, are insured under their policy with Western. That policy states:

We will pay compensatory damages which an “insured” is legally entitled to recover from the owner or operator of an “uninsured motor vehicle” because of “bodily injury”:

1. Sustained by “an insured”

By this language, the Hullemans, as insureds, can recover from Western based on injury suffered by Ty, another insured. There is no language in the Western policy requiring that the Hullemans themselves suffer injury while entering or exiting a vehicle, as the Auto-Owners policy requires. As a result, the Hullemans’ claims are covered by the Western uninsured motorist policy.

¶13 Western next argues that its policy is excess for the entire loss. Therefore, Western contends that it should only be liable for damages that exceed Auto-Owner’s per person limit. However, we have concluded that Auto-Owners is not liable for the emotional distress claims. As a result, we do not decide this issue because Western is not entitled to reimbursement from Auto-Owners for the \$250,000 it paid on the Hullemans’ claims.

II. Western’s Policy Limit

¶14 The trial court held that Western has paid its policy limit and therefore has no further exposure. Auto-Owners cross-appeals arguing that because Western only paid one person’s policy limit, Auto-Owners is entitled to reimbursement for Western’s pro rata share of the wrongful death claim.

¶15 This issue turns on the application of our decision in *Estate of Gocha v. Shimon*, 215 Wis. 2d 586, 573 N.W.2d 218 (Ct. App. 1997). The insurance policy in *Gocha* stated that “each person” means the amount of

coverage for damages resulting from “this bodily injury” to one person, in that case the Gochas’ son. *Id.* at 589-90. We determined that the parents’ emotional distress claims arising out of their son’s death were not separate from their son’s injuries and death, but were the “natural and probable consequence of witnessing the accident that killed [their son].” *Id.* at 593-94. As a result, the parents’ recovery was limited to a one per person limit. *Id.*

¶16 Auto-Owners argues that the holding in *Gocha* is specific to the language of the insurance policy in that case, and contends that the language in Western’s policy compels a different result. The Western policy states that the maximum limit of liability covers all damages for “bodily injury sustained by any one person in any one accident.” It also defines “bodily injury” as “bodily harm, sickness or disease including death that results.” Auto-Owners contends that this language is much broader than the language in the Gochas’ policy. Under this interpretation, each of the Hullemans has a separate injury and may collect per person limits under the policy.

¶17 Auto-Owners cites *Doyle v. Engelke*, 219 Wis. 2d 277, 580 N.W.2d 245 (1998), as support for the idea that emotional distress claims are separate claims for bodily injury. While we do not disagree that the Hullemans’ emotional distress claims constitute bodily injury, they cannot be separated from Ty’s injuries. In *Gocha*, we stated that “[t]here is no doubt that the ... severe emotional distress is an injury, but it is not a separate bodily injury as defined under the limits of ... the policy.” *Gocha*, 215Wis. 2d at 594.

¶18 Here, as in *Gocha*, “the severe emotional distress [the Hullemans] suffered is not independent of the injuries to [Ty]. Their injuries arise from the intensity of the emotional distress from seeing [Ty] struck by the car and from

coming upon the gruesome aftermath.” *See id.* at 593-94. Although the language in Western’s policy refers to all damages arising out of injury to one person and does not specifically mention damage sustained by others, the Hullemans’ claims all arise out of injury to one person—Ty. We are therefore satisfied that Western’s policy limits recovery in this case to the one person limit. Because Western has paid out its full per person limit, it has no further exposure and Auto-Owners is not entitled to reimbursement.

By the Court.—Judgment affirmed.

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

