COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1662 **Cir. Ct. No. 00-CV-498**

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

MATTHEW KULBISKI AND ESTATE OF KATHLEEN KULBISKI,

PLAINTIFFS-APPELLANTS,

V.

MICHAEL DEMARCO,

DEFENDANT,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Matthew Kulbiski and the Estate of Kathleen Kulbiski appeal from a judgment dismissing State Farm Mutual Automobile Insurance Company on the grounds that State Farm does not owe coverage to Michael DeMarco for the automobile accident caused by Michael's son, Brian DeMarco. We conclude that State Farm timely challenged coverage, the jury was properly instructed on the question of whether Brian "primarily" resided with Michael for purposes of coverage, the jury's finding that Brian did not reside with Michael is supported by sufficient evidence, and Kulbiski waived his argument that State Farm's failure to introduce the policy into evidence at trial had any impact on the case. We affirm the judgment.

¶2 The following facts are undisputed. A vehicle driven by Brian DeMarco rear-ended the Kulbiskis' vehicle. Matthew Kulbiski was injured; Kathleen Kulbiski ultimately died of her injuries. Brian's parents, Michael DeMarco and Patricia Despotovich, sponsored Brian's driver's license under WIS. STAT. § 343.15(2)(b) (1997-98).[1] Despotovich owned the vehicle involved in the accident. Michael DeMarco was insured with State Farm. Matthew Kulbiski sued Brian and his parents on his own behalf and on behalf of Kathleen Kulbiski's estate. Matthew Kulbiski also sued Michael DeMarco's insurer, State Farm.

¶3 Prior to trial, Matthew Kulbiski and the Estate settled with Brian and his mother and Sentry Insurance. Matthew Kulbiski and the Estate reserved their rights against DeMarco. The jury found Brian negligent and awarded the Estate $300,000 for Kathleen Kulbiski's pain and suffering and awarded Matthew Kulbiski $350,000 for the loss of his wife's society and companionship. The jury

[1] The accident occurred on January 14, 1998.

also found that Brian did not reside primarily with Michael DeMarco, a requirement for coverage under Michael DeMarco's State Farm policy. Finally, the jury found that Brian did not operate or have in his possession the vehicle he was driving for each of the forty-two days immediately preceding the accident. The circuit court determined that State Farm did not owe coverage to Michael DeMarco for his sponsorship liability. Kulbiski and the Estate (hereafter Kulbiski) appeal.

¶4 Kulbiski argues that State Farm waived its coverage defense because it did not assert that defense on a timely basis. We disagree. The accident occurred in January 1998, and Kulbiski filed suit in May 2000. State Farm did not assert a coverage defense in its initial pleadings. Brian, his mother and DeMarco were deposed in August 2000, and State Farm advised DeMarco in October 2000 that it was reserving the right to deny coverage, but would continue to provide him a defense. In February 2001, the court issued a scheduling order which granted the parties sixty days to amend their pleadings. State Farm amended its answer in March 2001, within this time period, to assert that it did not owe coverage because Brian did not reside primarily with DeMarco at the time of the accident, a requirement of coverage under the policy. The case went to trial in January 2002.

¶5 While Kulbiski bitterly complains that State Farm did not timely assert a coverage defense, we conclude that State Farm operated within the circuit court's scheduling order when it amended its answer to allege a coverage defense.

¶6 We also hold that the doctrine of waiver or estoppel does not apply in this case. In ***Shannon v. Shannon***, 150 Wis. 2d 434, 450-51, 454, 442 N.W.2d 25 (1989), the court held that these doctrines cannot be invoked to expand coverage. Kulbiski's arguments are an attempt to expand coverage to include a

person whom the jury found did not reside primarily with DeMarco, State Farm's named insured.

¶7 Kulbiski argues that the circuit court erred when it permitted the jury to determine where Brian primarily resided at the time of the accident. Kulbiski argues that the facts were undisputed, and the question should have been decided by the court. Under State Farm's policy, liability coverage exists if the insured is using a non-owned car.[2] For purposes of liability coverage for a non-owned car, "insured" is defined as "the first person named in the declarations; his or her spouse; their relatives …." The policy defines "relative" as "a person related to you or your spouse by blood, marriage or adoption who resides primarily with you." Therefore, the question of where Brian primarily resided was central to the coverage question.

¶8 This question was appropriately decided by the jury because the testimony of Brian and his parents permitted competing inferences about where Brian primarily resided. The determination of residency for purposes of insurance coverage "is fact specific to each case and requires a thorough examination of all relevant facts." ***Ross v. Martini***, 204 Wis. 2d 354, 358, 555 N.W.2d 381 (Ct. App. 1996).

¶9 While the 1993 divorce judgment gave primary physical placement to Brian's mother and secondary physical placement to his father, the parties had operated under other arrangements. For example, Brian resided primarily with his father for the last six months of 1997, and then returned to reside primarily at his

[2] It is undisputed that DeMarco did not own the car Brian was driving at the time of the accident.

mother's for the two weeks preceding the accident. The evidence before the jury included: Brian's testimony at trial that he gave his mother's address as his address during his second deposition, Brian gave his mother's address to the police and at the hospital, Brian was sleeping at his mother's five nights a week at the time of the accident and at his father's on the weekend, Brian's mother's address was listed on Brian's 1997-98 school records, and Brian kept the vehicle used in the accident at his mother's.

¶10 This evidence permitted competing inferences regarding where Brian primarily resided. Although he spent an extended period prior to the accident residing primarily at his father's, at the time of the accident, the jury could infer that Brian resided primarily with his mother. The competing inferences about where Brian primarily resided were for the jury to decide, and the circuit court correctly submitted the question to the jury for its determination.

¶11 Kulbiski argues that the jury was improperly instructed on the "resides primarily" issue. The trial court instructed the jury:

> You may consider all evidence bearing on the subject [of Brian's residence]. No one factor is controlling. You may consider the age of the person, the self-sufficiency of the person, the frequency and duration of the stay in the residence in question and intent to return and that person's relationship to others at that residence. In case of divorced parents sharing joint custody of a minor child, the child may be a resident of a father's household, even if the child's primary physical placement is with the mother, if the child visited the father at regular intervals in a consistent pattern. A person may have more than one residence. You may consider statements made by that person to others in the community about the location of his residence, and you may consider the conduct of that person which may indicate whether he resides primarily at that location.
>
> You will note the verdict question asks you whether Brian DeMarco did quote "reside primarily," closed quote, with

> his father. In this regard, I can tell you the word, quote, "primarily," closed quote, means "chiefly or for the most part." It also means "principally" or "mainly."

¶12 Kulbiski argues that this definition was incomplete and compelled the jury to find that Brian did not reside primarily with his father at the time of the accident. State Farm argues that the instruction was proper.

¶13 At the instructions conference, the court stated that it intended to employ a dictionary definition of "primarily" as "chiefly" and "mainly." Kulbiski objected and argued that the use of "primarily" in the policy was ambiguous and that the definition should include some reference to where Brian resided "originally." The court reasoned that referring to Brian's original residence would change the instruction's emphasis to a time other than at the time of the accident.

¶14 The circuit court has broad discretion in instructing the jury as long as the instruction fully and fairly informs the jury of the applicable law. ***Muskevitsch-Otto v. Otto***, 2001 WI App 242, ¶5, 248 Wis. 2d 1, 635 N.W.2d 611, *review denied*, 2002 WI 2, 249 Wis. 2d 582, 638 N.W.2d 591 (Wis. Dec. 17, 2001) (No. 00-3353). A court may employ a dictionary definition to discern the plain meaning of a policy term. ***Holsum Foods v. Home Ins. Co.***, 162 Wis. 2d 563, 569, 469 N.W.2d 918 (Ct. App. 1991). The instruction, taken as a whole, clearly charges the jury with analyzing the evidence under the appropriate standards. We agree with the circuit court that an instruction which would have defined "primarily" in the context of "originally" would have confused the jury because the necessary inquiry was Brian's residence at the time of the accident, not at an earlier period.

¶15 Kulbiski argues that DeMarco has coverage for his sponsorship liability because a non-owned vehicle was involved. He argues that the vehicle

Brian crashed into the Kulbiskis' vehicle was not owned by DeMarco; it was owned by Brian's mother. The State Farm policy provides coverage for use of non-owned vehicles by an insured. However, in the context of coverage for non-owned vehicles, "insured" means "relative," which the policy defines as a person related by blood who resides primarily with the named insured. Because the jury properly determined that Brian did not reside primarily with DeMarco, Kulbiski cannot prevail on his argument that DeMarco has coverage under the non-owned car coverage of his State Farm policy.[3]

¶16 Finally, Kulbiski argues that State Farm neglected to offer the insurance policy into evidence at trial and therefore did not meet its burden of proof on the coverage question. This argument is without merit. The policy was before the court by virtue of the parties' agreement that it controlled the coverage question, and Kulbiski did not raise this argument until postverdict motions. It is apparent that the parties tried this case based upon the language of the relevant portions of the policy. Throughout the trial, the parties referred to, relied upon and litigated regarding the language of the policy, particularly at summary judgment and during the jury instructions conference. Furthermore, a certified copy of the policy was before the court on summary judgment and is contained in the record.

¶17 Before we conclude this opinion, we admonish appellants' counsel for the acerbic tone of the appellants' brief. On more than one occasion, the brief

[3] We distinguish ***LaCount v. Salkowski***, 2002 WI App 287, 258 Wis. 2d 635, 654 N.W.2d 295, *review denied*, 2003 WI 16, 259 Wis. 2d 104, 657 N.W.2d 708 (Wis. Feb. 19, 2003) (No. 02-0630). The issue in ***LaCount*** was one of sponsorship under WIS. STAT. § 343.15(2)(b), the sponsorship statute, not insurance coverage. There is no dispute in the pending appeal that Michael DeMarco sponsored his son's driver's license. In ***LaCount***, the father argued that the mother should have sponsorship liability when she did not comply with the sponsorship statute. ***LaCount***, 258 Wis. 2d 635, ¶¶3, 16.

crosses the line from zealous appellate advocacy to untoward attacks on the circuit court. Fortunately, the respondent's brief surmounts the unprofessional tone of the appellants' brief.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").