

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP1518

Cir. Ct. No. 2002CV606

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DANIEL J. KNISPEL, JACOB KNISPEL AND RYAN
KNISPEL, BY THEIR GUARDIAN AD LITEM,
MARK P. WENDORFF,**

PLAINTIFFS-APPELLANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-CO-APPELLANT,

v.

NORTHLAND INSURANCE COMPANY AND RICHARD J. BROST,

DEFENDANTS-RESPONDENTS,

**WEST BEND MUTUAL INSURANCE COMPANY, VALLEY
EXPRESS, LLC, UNITED STATES FIRE INSURANCE
COMPANY, WESTCHESTER FIRE INSURANCE COMPANY,
AMERICAN GUARANTEE AND LIABILITY INSURANCE
COMPANY AND THE AMERICAN INSURANCE COMPANY,**

DEFENDANTS.

APPEALS from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed.*

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

¶1 LUNDSTEN, P.J. Daniel Knispel was injured because of the operation of a semi tractor insured by Northland Insurance Company. Daniel and his sons, Jacob and Ryan Knispel, sued Northland and other parties. Daniel and his sons, and Acuity Mutual Insurance Company (collectively referred to as Knispel), appeal an order of the circuit court granting summary judgment in favor of Northland and dismissing Northland from the action. The circuit court granted summary judgment based on its conclusion that the Northland policy contained an endorsement that excluded coverage. The court rejected Knispel’s argument that the endorsement was contextually ambiguous under *Folkman v. Quamme*, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, and that the endorsement had the effect of making coverage illusory. We agree with the circuit court and affirm.

Background

¶2 Richard Brost owns and operates a semi tractor. He purchased insurance for the tractor from Northland Insurance Company. His policy contained an exclusion stating that his “insurance does not apply to: ... [his tractor] while used in the business of anyone to whom the [tractor] is rented.”¹

¹ The record contains two copies of the policy, one submitted by Northland Insurance and one submitted by Knispel, but they are not the same. In his appellate brief, Knispel points out some of the differences, but he does not suggest that there is a factual dispute on this topic that prevents summary judgment. Neither Knispel nor Northland argues that one policy is clearer than the other. It is not apparent from the circuit court’s decision which copy of the policy the

(continued)

¶3 Prior to purchasing his Northland policy, Brost leased his semi tractor to a trucking company named Valley Express. At the same time, Brost was under contract with Valley Express to operate his semi tractor for Valley Express. While the semi tractor was leased to Valley Express and while Brost was operating the tractor for Valley Express, an accident occurred involving the tractor. Plaintiff Knispel was operating a forklift between a trailer attached to the tractor and a loading dock. Brost pulled away from the loading dock while Knispel was backing the forklift out of the trailer that was attached to the tractor. The forklift and Knispel fell to the ground and Knispel was severely injured. As a result of the accident, Knispel is a quadriplegic confined to a wheelchair.

¶4 This appeal involves only whether, with respect to Knispel's injury, there is coverage for Brost's semi tractor under the Northland policy.

Discussion

Standard of Review

¶5 The circuit court dismissed all claims against Northland Insurance on summary judgment. We perform summary judgment analysis *de novo*, applying the same method employed by circuit courts. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That method is well

circuit court relied on. We note that the copy of the policy contained in Knispel's appendix is not an exact copy of either of the copies in the record. Instead, Knispel has added two introductory pages to that copy of the policy, apparently acknowledging that the copy he submitted to the circuit court was incomplete.

Because summary judgment was granted in favor of Northland, we will refer to the copy of the policy submitted by Knispel to the circuit court. We do not, as Knispel does, refer to a combination of both copies of the policy.

established and need not be repeated in its entirety. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. It is sufficient to say here that summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *See id.*, ¶24.

¶6 Knispel argues that the rental exclusion endorsement in the Northland insurance policy is contextually ambiguous and, therefore, must be construed in favor of coverage. The construction of insurance policy language is a question of law, which we review *de novo*. *Van Erden v. Sobczak*, 2004 WI App 40, ¶22, 271 Wis. 2d 163, 677 N.W.2d 718, *review denied*, 2004 WI 114, 273 Wis. 2d 655, 684 N.W.2d 136 (No. 2002AP1595). Knispel also argues that the rental exclusion renders the policy coverage illusory. Whether coverage in an insurance policy is illusory is also a question of law. *Hinrichs v. American Family Mut. Ins. Co.*, 2001 WI App 114, ¶14, 244 Wis. 2d 191, 629 N.W.2d 44.

Contextual Ambiguity

¶7 The seminal case on contextual ambiguity is *Folkman*, 264 Wis. 2d 617. We recently summarized the pertinent law from that case:

When we construe insurance policy provisions, our goal is to give effect to the intent of the parties as expressed in the language of the policy. *Folkman v. Quamme*, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We first inquire whether the language regarding the disputed coverage issue is ambiguous, that is, susceptible to more than one reasonable interpretation. *Id.*, ¶13. If there is no ambiguity, we apply the language as written, without resort to rules of construction or principles of case law. *Id.* On the other hand, if there is ambiguity, we construe the clause in favor of the insured. *Id.*

A provision that is unambiguous in itself may be ambiguous in the context of the entire policy. *Id.*, ¶19.

The test for determining contextual ambiguity is the same as that for determining whether a particular clause is ambiguous: is the language of the particular provision, “when read in the context of the policy’s other language, reasonably or fairly susceptible to more than one construction ... measured by the objective understanding of an ordinary insured.” *Id.*, ¶¶29 (citations omitted). In determining whether there is contextual ambiguity, we inquire whether “the organization, labeling, explanation, inconsistency, omission, and text” of other relevant provisions in the policy create an “objectively reasonable alternative meaning and, thereby, disrupt an insurer’s otherwise clear policy language.” *Id.*, ¶¶19, 30.

Ruenger v. Soodsma, 2005 WI App 79, ¶¶9-10, ___ Wis. 2d ___, 695 N.W.2d 840.

We now apply this law to the case before us.

¶8 Brost’s Northland insurance policy provides liability coverage for his semi tractor. The policy contains an exclusion titled: “TRUCKERS – INSURANCE FOR NON-TRUCKING USE.” This exclusion states:

Liability Coverage [for Brost’s semi tractor] is changed as follows:

1. The following exclusions are added:

This insurance does not apply to:

....

b. A covered “auto” while used in the business of anyone to whom the “auto” is rented.

Thus, this exclusion means that the policy does not provide coverage for Brost’s semi tractor when the tractor is being used in the business of anyone to whom the tractor is being rented. Knispel implicitly concedes that the above exclusion language, viewed alone, unambiguously excludes coverage because Brost’s semi tractor was rented to Valley Express and was being used in the business of Valley Express when the accident occurred.

¶9 Instead, Knispel argues that this rental exclusion is ambiguous in the context of the entire policy under the contextual ambiguity analysis explained in *Folkman* and more recent decisions such as *Dowhower v. Marquez*, 2004 WI App 3, 268 Wis. 2d 823, 674 N.W.2d 906, *review denied*, 2004 WI 20, 269 Wis. 2d 198, 675 N.W.2d 804 (No. 2001AP1347). Tracking language in these cases, Knispel asserts that ambiguity is created by organizational complexity, poor labeling, poor explanations, inconsistencies, and omissions. However, when Knispel tracks through the policy and comments on various aspects of it, it becomes clear that the thrust of his argument is that the rental exclusion clause is difficult to find. He does not show that any of the asserted problems with the organization of the policy create an “objectively reasonable alternative meaning.” See *Folkman*, 264 Wis. 2d 617, ¶30. Indeed, nowhere in his arguments does Knispel provide an alternative reasonable meaning for the rental exclusion clause.

¶10 We agree with Knispel that the policy has some of the organizational problems identified as factors in other cases. For example, as in *Badger Mutual Insurance Co. v. Schmitz*, 2002 WI 98, ¶62, 255 Wis. 2d 61, 647 N.W.2d 223, the declarations page does not make specific reference to the exclusion at issue. But drawing isolated comparisons with prior cases does not explain why the context of the policy in this case creates a reasonable alternative meaning for the rental exclusion clause.

¶11 Knispel makes a few arguments that seem to assert that there is ambiguity, but when we examine these arguments we find that they lack merit. For example, Knispel points to the “Automobile Insurance Identification Card”

page in the policy.² This page is divided in quarters by dotted lines, and each quarter-page contains an identification card. Three of the cards are stamped “Void.” The remaining card identifies Northland as the insurer, Brost as the insured, and the insured vehicle, a “1999 Freightliner Tractor” with a specified vehicle identification number. Knispel points out that this identification card states: “The coverage provided by this policy meets the minimum liability insurance requirements as prescribed by law.” He says the card contains no restrictions or limitations on the liability coverage and in particular does not contain any reference to the rental exclusion clause. Knispel argues that this card adds to the confusion regarding the meaning of the policy because it says the coverage provided meets the minimum liability requirements prescribed by law. This argument is meritless because Knispel does not demonstrate that the rental exclusion clause somehow causes the policy to fail to afford the minimum coverage prescribed by law and, therefore, does not show how the card is misleading.

¶12 Moreover, we disagree with Knispel’s assessment that “it is [only] by sheer luck that a reasonable insured stumbles upon the one-page [rental exclusion] endorsement found in the back of the policy.” It is not difficult to figure out that there are several endorsements or where to find them.

¶13 The first page of the policy is a page entitled “Common Policy Declarations.”³ It states that the policy consists of the “following coverage parts

² This page is contained in the version of the policy submitted by Knispel, but not in the version submitted by Northland.

³ In footnote 1, we explain why we treat this page as the first page of the policy. But even if the true policy has a cover sheet and a “quick reference” page preceding the page we treat as the first page, it would not affect our conclusion.

for which a premium is indicated.” Six types of coverage are listed on this declarations page, but only one has a premium indicated. That one is “Commercial Auto/Garage Coverage Part.” Policy coverage limits are not provided on this page.

¶14 The next six pages of the policy consist of “Common Policy Conditions,” such as cancellation rights and policy transfer rights, and two endorsements. These pages do not indicate policy coverage limits. Thus, as Northland points out, nothing to this point in the policy affirmatively provides coverage.

¶15 On the eighth page of the policy is a declarations page entitled “Commercial Auto Coverage Form Declarations.” This page is a typical declarations page. It lists Borst’s 1999 Freightliner tractor as the insured vehicle and, among other coverages and limits, provides \$1,000,000 coverage for each “accident.” This declarations page states: “Forms and endorsements contained in this policy at its inception: Per Schedule of Forms and Endorsements N-2500 (4/94).” This is a reference to the next page in the policy, designated N-2500 (4/94). This next page lists twenty “forms and endorsements” using alpha/numerical designations and dates, for example, “CA 01 37 (07/01).” This page is not difficult to find. It does not provide descriptive titles for the forms and endorsements—which would be better—but it does inform a reasonable insured that there are several forms and endorsements affecting coverage. Thereafter, finding these forms and endorsements is simple because they follow just one page later, after the identification card page. It is true that one must read through the forms and endorsements to ascertain their meaning, but it is not true that they are hard to find.

¶16 In sum, we conclude that, although the policy is not a model of clear organization and labeling, there is no contextual ambiguity that produces a reasonable alternative meaning for the rental exclusion clause.⁴

Illusory Coverage

¶17 Knispel also argues that Northland should not have been dismissed from the case on summary judgment because the coverage in Brost's Northland policy is rendered illusory by the rental exclusion clause and, therefore, Northland should be precluded from relying on the rental exclusion to deny coverage. In this part of his brief, Knispel does not cite to any legal authority. Instead, he simply makes the following argument:

- 1) Under the Northland policy, the rental exclusion endorsement excludes coverage when Brost's semi tractor is used in the business of anyone to whom the tractor is rented.
- 2) There is no dispute that when Brost purchased his Northland policy, his semi tractor was leased by Brost to Valley Express.
- 3) The lease contract between Brost and Valley Express provides that "Valley Express will have exclusive control, possession and use of said Equipment which shall not, at any time during the term of this Contract, be operated for any purpose other than the business of Valley Express"

⁴ The parties spend time disputing the meaning of various terms in the policy, such as "non-truckman" and "non-trucking use," and whether these terms have established meaning within the trucking community. We conclude that an understanding of these terms is unnecessary to an understanding of the rental exclusion clause and that such terms do not, either separately or in combination with other aspects of the policy, render the rental exclusion ambiguous. In addition, Knispel argues that we should not rely on a Brost affidavit submitted by Northland because it was submitted late and it contains Brost's irrelevant subjective understanding of the policy. Like the circuit court, we conclude that we need not address this dispute because we do not rely on the disputed Brost affidavit.

- 4) “As a result [of items 1, 2, and 3 above], it is appropriate to assume that Northland had full knowledge of the terms of [Brost’s] lease regarding the ‘covered auto’ as of the inception of the policy or, at a minimum, had full opportunity to avail itself of those terms.”
- 5) Therefore, coverage was illusory because the interaction of the rental exclusion clause and the lease means that the rental exclusion was in effect at all times during the term of the policy.

¶18 In response, Northland cites several cases from other jurisdictions to support the proposition that coverage is not rendered illusory by a rental exclusion clause because coverage is provided when the insured vehicle, although leased to another, is not being operated in the other’s business, such as personal errands or traveling to and from the driver’s home. Northland, however, does not analyze any of the nine cases and does not even provide pinpoint cites. Apparently Northland believes we should read the nine cases and figure out on our own whether those cases involve comparable policy language and legal reasoning supporting Northland’s view. We decline to do so.

¶19 Despite Northland’s inadequate response, we reject Knispel’s argument that coverage was illusory because Knispel has failed to present a developed argument.

¶20 Illusory coverage is against public policy. *Malik v. American Family Mut. Ins. Co.*, 2001 WI App 82, ¶¶17-18, 243 Wis. 2d 27, 625 N.W.2d 640. In *Link v. General Casualty Co. of Wisconsin*, 185 Wis. 2d 394, 400, 518 N.W.2d 261 (Ct. App. 1994), we explained that coverage is illusory when benefits would not be paid under any reasonably expected set of circumstances.

¶21 There are many flaws in Knispel’s argument, but it is sufficient to identify two.

¶22 First, Knispel ignores the fact that he is not the insured. Our non-exhaustive research indicates that cases addressing allegations that a policy provides illusory coverage involve *insureds* arguing that they have purchased illusory coverage. *See, e.g., Remiszewski v. American Family Ins. Co.*, 2004 WI App 175, ¶¶3-4, 12, 15, 276 Wis. 2d 167, 687 N.W.2d 809, *review denied*, 2004 WI 138, 276 Wis. 2d 30, 689 N.W.2d 57 (No. 2003AP2653); *Van Erden*, 271 Wis. 2d 163, ¶¶6, 33; *Janssen v. State Farm Mut. Auto. Ins. Co.*, 2003 WI App 183, ¶¶2-3, 8-15, 266 Wis. 2d 430, 668 N.W.2d 820; *Link*, 185 Wis. 2d at 396-401; *Hoglund v. Secura Ins.*, 176 Wis. 2d 265, 267-69, 500 N.W.2d 354 (Ct. App. 1993). Knispel fails to explain why a non-insured party may compel an insurance company to provide coverage based on the argument that coverage is illusory. If Brost purchased a policy that provides him no benefit because of his lease arrangement with Valley Express, that might be a matter between Brost and the insurer, or between Brost and the agent who sold him the policy, but it is not apparent why Knispel is a person who may force Northland to provide coverage. Knispel's argument is inadequate because he does not address the matter.

¶23 Second, Knispel's argument assumes that, when courts construe a policy to determine whether some part of its coverage is illusory, the court may look outside the policy to the particular facts of the case at hand. This proposition is not self-evident. Our non-exhaustive review of cases indicates that Wisconsin courts typically assess whether coverage is illusory by looking to the policy and governing law, not to the particular circumstances of the insured. *See, e.g., Link*, 185 Wis. 2d at 396-401 (although definition in policy prevented insured from collecting under the policy's UIM provision, UIM coverage was not illusory because there are other circumstances in which the insured could collect under the UIM provision); *Hoglund*, 176 Wis. 2d at 270-71 (UIM coverage was illusory

both because the policy provided UIM motorists coverage only when a tortfeasor's policy limits are \$25,000 or less and by statute an insured motorist must have \$25,000 in coverage and because another policy term defined out-of-state vehicles uninsured if its policy limit is less than \$25,000).⁵

Conclusion

¶24 As did the circuit court, we reject Knispel's argument that the endorsement was contextually ambiguous and that the rental exclusion clause had the effect of making coverage illusory. Accordingly, we affirm the circuit court's order granting summary judgment in favor of Northland.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁵ Even if we could look outside the policy to the particular facts of a case in an effort to determine whether coverage is illusory, something we doubt, Knispel does not support his assertion that "it is appropriate to assume that Northland had full knowledge of the terms of its insured's lease regarding the 'covered auto' as of the inception of the policy or, at a minimum, had full opportunity to avail itself of those terms." Knispel does not provide record cites. We decline to search the record for facts relevant to this topic, unassisted by either party.

