

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1706

Cir. Ct. No. 2005CV135

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

REGINA L. LEE AND TAMI JO SCHMIDTKE,

PLAINTIFFS-APPELLANTS,

SENTRY INSURANCE AND ROUNDY'S, INC., WELFARE BENEFIT PLAN,

PLAINTIFFS,

v.

**DUSTIN MANTZ, COLOMA LIONS CLUB, INC., ACE AMERICAN
INSURANCE COMPANY AND ACE AMERICAN REINSURANCE COMPANY,**

DEFENDANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waushara County:
PATRICK J. TAGGART, Judge. *Reversed and cause remanded.*

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

¶1 LUNDSTEN, P.J. Lee and Schmidtke, plaintiffs below, appeal the circuit court’s judgment dismissing their claims against American Family Insurance. Plaintiffs contend that the circuit court erred by interpreting a vehicle exclusion in a homeowner’s insurance policy to preclude coverage for an all-terrain vehicle (ATV) owned by one insured but operated by a different insured off the insured premises. If we were writing on a clean slate, we might agree with the circuit court and conclude that the policy does not provide coverage. However, we agree with plaintiffs that *Northwestern National Insurance Co. v. Nemetz*, 135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986), compels the conclusion that the policy language at issue here is ambiguous and, therefore, we resolve that ambiguity in favor of coverage. Accordingly, we reverse the circuit court and remand for further proceedings.

Background

¶2 Dustin Mantz and his father, Craig Mantz, are insureds under Craig’s American Family homeowner’s insurance policy. Dustin participated in a parade by operating an ATV owned by his father. During the parade, Dustin lost control of the ATV and drove it into a crowd of parade spectators, injuring the plaintiffs.

¶3 The plaintiffs sued Dustin and American Family for their injuries, seeking damages under the American Family policy. American Family moved for summary judgment, arguing that the plain language of the policy denies coverage.

¶4 The American Family policy contains a severability clause reading, in part: “This insurance applies separately to each insured.” The policy also

contains an “exclusion” clause excluding coverage for bodily injury or property damage arising out of the ownership or operation of any type of motor vehicle.

The exclusion clause contains exceptions, including this one:

We will provide ... coverage on ... the following types [of vehicles] ... operated by ... any insured:

....

(3) [an ATV] ... which ... is:

(a) not owned or leased by an insured¹

¹ The full vehicle exclusion, including exceptions, reads:

a. We will not cover bodily injury or property damage arising out of the ownership, supervision, entrustment, maintenance, operation, use, loading or unloading of any type of motor vehicle, motorized land conveyance or trailer, except:

We will provide specific coverage on only the following types owned or operated by or rented or loaned to any insured:

(1) a motor vehicle or motorized land conveyance which is not subject to motor vehicle registration and is:

(a) used for the service of the insured residence;

(b) designed to assist the handicapped; or

(c) kept in dead storage on the insured premises;

(2) a motorized golf cart while used for golfing purposes on a golf course;

(3) a motorized land conveyance including a motorized bicycle, tricycle or similar type of equipment designed principally for recreational use off public roads, which is not subject to motor vehicle registration and is:

(a) not owned or leased by an insured; or

(b) owned or leased by an insured and while on the insured premises;

(continued)

American Family asserts that this exception to the exclusion does not apply here because it requires that the ATV “not [be] owned or leased by an insured,” and it is undisputed that Dustin’s father, another insured, owned the ATV.

¶5 The circuit court agreed with American Family, concluding that ownership of the ATV by Dustin’s father precluded coverage. The court granted summary judgment in favor of American Family, dismissed the plaintiffs’ claims, and awarded costs and disbursements against the plaintiffs. Plaintiffs appeal.

Discussion

¶6 We review summary judgment *de novo*, applying the same method as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

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- (4) a trailer of the boat, camp, home or utility type when not attached to or towed by or carried on a motor vehicle or motorized land conveyance.

This exclusion does not apply to bodily injury to any domestic employee arising out of and in the course of employment by any insured.

- b. We will not cover bodily injury or property damage arising out of any vicarious parental liability, whether or not statutorily imposed by law, for the actions of a child or minor regarding any type of vehicle described in a. above.

¶7 Our review of insurance policy language is, likewise, governed by familiar principles:

The interpretation of an insurance policy is governed by rules of construction similar to those that apply to contracts. If words or phrases in a policy are susceptible to more than one reasonable construction when read in context, they are ambiguous, and we will construe the policy as it would be interpreted by a reasonable insured. Ambiguities in terms affording coverage are to be resolved in favor of coverage; ambiguities in exclusion clauses are construed narrowly, against the insurer.

Westphal v. Farmers Ins. Exch., 2003 WI App 170, ¶21, 266 Wis. 2d 569, 669 N.W.2d 166 (citations omitted).

¶8 The plaintiffs argue that here, as in *Nemetz*, the combination of a severability clause and an exclusion clause creates coverage ambiguity. We agree, and conclude that we are bound by *Nemetz*. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶9 *Nemetz* involved husband and wife insureds. *Nemetz*, 135 Wis. 2d at 250-51. An explosion destroyed the couple's tavern and an adjacent hardware store. *Id.* at 251-52. Their property insurance policy provided coverage unless an intentional-acts exclusion applied. Evidence indicated that the husband intentionally caused the explosion, but the wife was innocent. See *id.* At issue was whether the exclusion clause deprived the wife of coverage.² See *id.* at 250, 253, 257. We concluded that the wife was covered under the policy because of ambiguity. *Id.* at 250, 256-57.

² In fact, there were two policies at issue in *Northwestern National Insurance Co. v. Nemetz*, 135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986). However, only one of those policies is germane here and, therefore, our discussion ignores the other policy.

¶10 The *Nemetz* policy had a severability clause, which read: “This insurance applies separately to each insured person against whom a claim or suit is brought” The exclusion clause at issue read, in relevant part: “[W]e do not cover ... property damage ... [e]xpected or intended by an insured person.” *Id.* at 253-54 n.2. We concluded in *Nemetz* that the interplay of these two provisions created ambiguity:

Here, ... we face an insurance contract with a severability clause purporting to separate the insureds’ interests while the exclusion clause, “we do not cover ... damage ... expected or intended by an insured,” attempts to join the insureds’ obligations. We conclude that this contract is ambiguous because the severability clause creates a reasonable expectation that each insured’s interests are separately covered, while the exclusion clause attempts to exclude coverage for both caused by the act of only one. Thus, we must construe the policy against [the insurer].

Id. at 256. The same reasoning applies here.

¶11 First, the severability clauses are nearly identical. The clause in this case reads, in pertinent part: “This insurance applies separately to each insured.” Thus, as in *Nemetz*, this severability clause “purport[s] to separate the insureds’ interests.” *Id.*

¶12 Second, like *Nemetz*, the exclusion clause here limits coverage using the term “an insured.” The clause denies coverage if the occurrence is off the insured premises and the ATV is “not owned or leased by an insured.” We perceive no relevant distinction between denying coverage for “property damage ... [e]xpected or intended by an insured person,” as in *Nemetz*, and denying coverage for bodily injury or property damage arising out of the operation of an ATV “not owned or leased by an insured.” Accordingly, as in *Nemetz*, the exclusion clause here “attempts to join the insureds’ obligations.” *Id.*

¶13 It follows that, as in *Nemetz*, we must conclude that the policy here is ambiguous because the severability clause creates a reasonable expectation that each insured's interests is separately covered, while the exclusion clause attempts to exclude coverage by using "an insured" as a reference to any insured. The concurring opinion suggests that, absent *Taryn E.F. v. Joshua M.C.*, 178 Wis. 2d 719, 505 N.W.2d 418 (Ct. App. 1993), *Nemetz* might be distinguishable from this case on the basis that in *Nemetz* we were focused on the particular nature of the exclusion clause in that case. It is true that in *Nemetz* we discussed the nature of the particular exclusion clause and incorporated the nature of that exclusion into our ambiguity conclusion. *Nemetz*, 135 Wis. 2d at 256. However, the obvious underlying analysis in *Nemetz* is that ambiguity is present when a severability clause purports to view the insureds separately and, inconsistently, an exclusion clause purports to look to all insureds. Therefore, even absent *Taryn E.F.*, we would conclude that we are bound by *Nemetz*.

¶14 At the same time, we note that it is difficult to reconcile the result in *Taryn E.F.* with the holding in *Nemetz*. *Nemetz* and *Taryn E.F.* involve equivalent severability clauses. See *Nemetz*, 135 Wis. 2d at 253-54 n.2; *Taryn E.F.*, 178 Wis. 2d at 723-24. In *Nemetz*, we assumed that the exclusion clause "attempt[ed] to join the insureds' obligations." *Nemetz*, 135 Wis. 2d at 256. In context, this means that we read "an insured" as meaning "any insured" because it is that reading that leads to joining the insureds' obligations with respect to damages caused by intentional acts. In *Taryn E.F.*, the exclusion clause expressly said "any insured" and, therefore, joined the insureds' obligations with respect to damages "attributable to ... outrageous conduct." *Taryn E.F.*, 178 Wis. 2d at 724. Thus, it appears the policy in *Taryn E.F.* contained comparable conflicting provisions that would, presumably, lead to the same ambiguity we found in

Nemetz. Nonetheless, we concluded in *Taryn E.F.* that the policy unambiguously denied coverage. *Taryn E.F.*, 178 Wis. 2d at 724. To the extent, if any, that *Taryn E.F.* conflicts with *Nemetz*, *Nemetz* controls because it is earlier in time. See *State v. Bolden*, 2003 WI App 155, ¶¶9-10, 265 Wis. 2d 853, 667 N.W.2d 364.

¶15 We also observe that in *Taryn E.F.* we disagreed with the proposition that there is no logical or grammatical difference between “an” and “any.” *Taryn E.F.*, 178 Wis. 2d at 725-26. But our discussion of the meaning of the two terms does not appear to reveal a difference that matters. If “an insured” may be read as meaning something other than “any insured” in a policy, the import of that difference is that sometimes using “an insured” distinguishes a *particular* insured from one or more other possible insureds. However, our explanation in *Taryn E.F.* that “an” “refers to one object (an oak tree)” does not explain how such use of “an” specifies which object (e.g., which oak tree) is being identified. See *id.* It may be that there is a difference between “an” and “any” that matters for purposes of policy construction, but we now fail to see how our discussion in *Taryn E.F.* established that difference.

¶16 American Family argues that its proffered construction is consistent with the coverage a reasonable insured would expect. However, American Family does not argue that the reasonable expectations of an insured may act to deny coverage in light of case law holding that “ambiguities in a policy’s terms are to be resolved in favor of coverage.” *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997). Because *Nemetz* compels the conclusion that the language before us is ambiguous, we construe that language in favor of coverage. Thus, we do not address whether a reasonable insured would expect coverage.

Conclusion

¶17 For the above reasons, we reverse the judgment dismissing plaintiffs' claims against American Family and awarding American Family costs and disbursements. We remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

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¶18 VERGERONT, J. (*concurring*). I agree that existing case law compels a construction of the policy language in favor of coverage. I write separately because I arrive at that conclusion using a different analysis than that of the majority.

¶19 American Family argues that *Nemetz*, 135 Wis. 2d 245, and *Taryn E.F.*, 178 Wis. 2d 719, are not applicable because they concern intentional act exclusions, “the interpretation of which [have] developed into an extensive body of case law.” In contrast, American Family points out, in this case the exclusion concerns recreational vehicles that do not meet certain requirements.

¶20 It may be that, based on *Nemetz*, there is room for arguing that the substance of the exclusion was critical to our ambiguity analysis there. In *Nemetz*, 135 Wis. 2d at 256, we concluded that the “contract [was] ambiguous because the severability clause creates a reasonable expectation that each insured’s interests are separately covered, while the exclusion clause attempts to exclude coverage for both caused by the act of only one.” One might reasonably argue that it was central to our analysis in *Nemetz* that a reasonable insured would not expect that, given the severability clause, the conduct of one insured could prevent coverage for another insured. In other words, one might argue, the ambiguity in *Nemetz* was not that “an” did not clearly refer to an insured other than the one seeking coverage, but that an exclusion based on the conduct of another insured, no matter how clearly stated, was inconsistent with the reasonable expectation created by the severability clause.

¶21 However, in my view that argument is foreclosed by *Taryn E.F.* There we read *Nemetz* as concluding that the use of “an insured” did not unambiguously refer to all insureds. *Taryn E.F.*, 178 Wis. 2d at 724, 725. In contrast, we held, the use of “any insured,” “[e]ven when read with the severability clause, ... unambiguously operates to preclude coverage to all insureds for liability attributable to the excludable acts of any one of the insureds.” *Id.* at 725. We went on to distinguish the meaning of “an” and “any.” *Id.* at 725-26. Whether or not that distinction is sound, we are bound by it. *See Cook*, 208 Wis. 2d at 189-90. And I do not see a reasoned basis on which to conclude that the *Taryn E.F.* discussion of the meaning of “an” does not apply in this case simply because “an insured” describes who owns or leases the recreational vehicle rather than who is engaging in the described conduct.

¶22 For these reasons, I respectfully concur.

