



LAW NOTES

from the Law Offices of
Kay & Andersen, LLC

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What Every Insurer Should Know

ABOUT THE INTERPLAY BETWEEN SUMMARY JUDGMENT AND PLEADINGS

In cases involving coverage disputes, the insurance carrier and its legal counsel will often try to seek early dismissal of the claim through dispositive motions. A recent Wisconsin Court of Appeals decision reiterated the significance of the insurance company’s pleadings at the summary judgment stage. In Gillund v. Meridian Mutual Insurance Company, Appeal No. 2008AP1301 (Dec. 1, 2009) (recommended for publication), found at: <http://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=44012>, Gillund filed a lawsuit against her aunt and uncle (the Pfeiffers) seeking damages for Mr. Pfeiffers’ alleged surreptitious videotaping and photographing Gillund in various states of undress while she periodically resided with them. Gillund sued the Pfeiffers and “XYZ Insurance Company” based on Mr. Pfeiffers’ conduct. After Meridian Mutual Insurance Company answered the complaint alleging that it was “XYZ Insurance Company”, Harleysville Insurance Company filed a motion to intervene, stating in its motion that it had provided a homeowner’s coverage policy to the Pfeiffers. Harleysville did not file any pleading with the motion to intervene, although it requested bifurcation of coverage and a stay of liability proceedings. The circuit court granted Harleysville’s motion to intervene. Thereafter, Harleysville moved for summary judgment, submitting a supporting brief, an affidavit from Harleysville’s attorney, and a document entitled, “Memorandum of Fact.” Attached to the affidavit was a certified copy of Harleysville’s policy and copies of the deposition transcripts of Gillund and the Pfeiffers. The “Memorandum of Fact” contained factual averments that were signed by Harleysville’s attorney but were not notarized. The circuit court granted Harleysville’s motion for summary judgment, concluding that Gillund was a resident-insured at the Pfeiffer residence during the policy period and

therefore the Harleysville policy did not provide coverage for Gillund’s claims because Gillund fell within the exclusion for personal injury to a resident-insured. On appeal, the Court of Appeals concluded, “We cannot apply the summary judgment analysis here because Harleysville never filed any pleading in this matter.” *Id.*, ¶36. As such, coverage under the Harleysville policy was never put in issue. *Id.* In the absence of a pleading from Harleysville, the Court could not determine if actual issues existed between the parties. *Id.* Gillund also pointed out that Harleysville’s affidavit was not submitted in proper form. The Court of Appeals held, “Even if we were to overlook the deficiencies in the affidavit submitted here, we cannot get past the absence of any pleading. To the extent that the circuit court overlooked both, we find the circuit court erred. Where a party files no pleading at all and where its supporting affidavits fail to conform to the statutory requirements of notarization and summary of evidentiary facts on which they rely, we have no basis for affirming the granting of summary judgment.” *Id.*, ¶38. Gillund reminds insurers that they should always file a pleading if they intend to seek dismissal of a claim through intervention or some other motion. This procedural necessity should not be overlooked merely because the insurance company was not named as a party to the lawsuit.

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