Appeal No. 04-0356 **Cir. Ct. No. 02CV001069**

WISCONSIN COURT OF APPEALS
DISTRICT I

GLEN H. ROCKER AND THERESA ROCKER,

PLAINTIFFS-APPELLANTS,

v.

USAA CASUALTY INSURANCE COMPANY, GENERAL CASUALTY COMPANY OF WISCONSIN, AND CORNELL COUSINS,

DEFENDANTS-RESPONDENTS.

FILED

JAN 11, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Fine, Curley and Kessler, JJ.

Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

I. ISSUES.

- Does a full-service car wash fall within the definition of a "motor vehicle handler" found in WIS. STAT. § 632.32(2)(b) (2003-04)?

- Does the holding in ***Heritage Mutual Insurance Co. v. Wilber***, 2001 WI App 247, 248 Wis. 2d 111, 635 N.W.2d 631—that all policies covering a motor vehicle, including, presumably, a commercial umbrella liability policy, must conform to the requirements of WIS. STAT. § 632.32—retain its vitality, since § 632.32 has been amended, and significantly altered, and now requires,

inter alia, uninsured motorist coverage, medical payments and coverage, and prohibits exclusion of coverages for relatives of the insured?

- Was ***Gorzalski v. Frankenmuth Mutual Insurance Co.***, 145 Wis. 2d 794, 429 N.W.2d 537 (Ct. App. 1988), decided correctly when it failed to enforce the requirement of coverage for a motor vehicle handler as mandated by WIS. STAT. § 632.32(6)(a)?

II. BACKGROUND.

On February 3, 1999, Andrew Paretti, an occasional customer of the Octopus Car Wash, followed the routine procedure for getting his car washed. He drove his car to the overhead door area, spoke to an attendant about the type of wash he wanted, and left the car running when he exited the car and turned it over to the attendant. The car proceeded along the car wash conveyor belt until it reached the end, at which time another employee of the car wash, Cornell Cousins, got into Paretti's car with the intent of driving it to the drying area. Unfortunately, Cousins accidentally stepped on the accelerator, causing the car to hit a wall and to strike Glen H. Rocker, a co-worker who was standing in the drying area. Rocker was seriously injured, and subsequently brought suit against General Casualty Company of Wisconsin, the car wash's insurer, USAA Casualty Insurance Company, Paretti's insurer, and Cousins.[1]

The car wash had a General Casualty commercial general liability policy and a commercial umbrella liability policy. The commercial general liability policy named the car wash's employees as insureds, "but only for acts within the

[1] Others entities were sued but later dismissed.

scope of their employment by [the car wash] or while performing duties related to the conduct of [the car wash's] business." The policy goes on to explain that the employees are not insured for any bodily injury or personal injury caused by a co-employee.

Additionally, the General Casualty policy contains an exclusion for bodily injury caused by an auto. However, the exclusion does not apply to "[p]arking an 'auto' on, or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured[.]" An endorsement entitled "OPERATION OF CUSTOMERS [sic] AUTOS ON PARTICULAR PREMISES" also contains an exception to the "bodily injury caused by an auto" exclusion. This endorsement reads that the exclusion:

> does not apply to any "customer's auto" while on or next to those premises you own, rent or control that are used for any of the following businesses:
>
> **1.** Auto Repair or Service Shops;
> **2.** Car Washes;
> **3.** Gasoline Stations;
> **4.** Tire Dealers;
> **5.** Automobile Quick Lubrication Services.

The General Casualty commercial umbrella liability policy also provides coverage for bodily injury. This policy provides bodily injury coverage for an insured defined in the policy as:

> Your "employees" … but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:
>
> **(1)** "Bodily injury" or "personal injury":
>
> **(a)** To you, to your partners or members … or to a co-"employee" while that co-"employee" is either in the course of his or

> her employment or performing duties related to the conduct of your business….

The umbrella policy also contains an automobile liability endorsement which states that the policy does not apply to bodily injury arising out of the use of an automobile, except to the extent the coverage is available under the underlying insurance.

Paretti had two policies issued by USAA. One was a casualty personal auto policy, and the other a personal umbrella policy. The auto policy provided for coverage for bodily injury for which any "covered person" becomes responsible while using the covered auto. However, the policy contained an exclusion for "auto business":

> **EXCLUSIONS**
>
> A. We do not provide Liability Coverage for any person:
>
> ….
>
> 6. While employed or otherwise engaged in the **auto business**. This exclusion does not apply to the ownership, maintenance or use of:
>
> a. **your covered auto** by any person, if there is no other valid and collectible insurance, whether such insurance is primary, excess or contingent, at limits equal to or greater than the limits of liability required by the Wisconsin financial responsibility law, available to respond for damages for which that person is legally responsible. In this event, we will provide liability coverage for that person up to the limits of liability required by the Wisconsin financial responsibility law.

The term "auto business" is defined in the policy as: "the business of altering, customizing, leasing, parking, repairing, road testing, delivering, selling, servicing, or storing vehicles."

The USAA umbrella policy also makes reference to motor vehicle coverage. The "WISCONSIN SPECIAL PROVISIONS" portion of that policy provides in part:

> **LIABILITY COVERAGE. We** will pay for damages an **insured** becomes legally obligated to pay in excess of the **retained limit**. **We** will also pay for damages arising out of the ownership, maintenance, use, loading or unloading of a **motor vehicle** below the **retained limit**, but only up to the amount required by the Wisconsin Financial Responsibility law and only in the event that there is no other valid and collectible insurance with at least those limits available….

The umbrella policy additionally contains the following exception to the definition of "insured":

> 5. **"Insured"** means **you** and:
>
> ….
>
> b. But an "**insured**" does not include:
>
> ….
>
> 2. Sales agencies, repair shops, service stations, storage garages or public parking lots, their owners, agents or employees.

However, the "WISCONSIN SPECIAL PROVISIONS" endorsement also amends the above exception in the following manner:

> **DEFINITIONS**, 5.b.2. is deleted and replaced by the following:
>
> 5.b.2. Sales agencies, repair shops, service stations, storage garages or public parking lots, their owners, agents or employees unless there is no other valid and collectible

> insurance and then only up to the limits required by the Wisconsin Financial Responsibility Law.

General Casualty brought a motion for declaratory judgment, arguing that neither of its policies covered Rocker's damages. It submitted that due to the exception to the definition of "insured," which states that "none of those 'employees' is an insured for … 'bodily injury' … to a co-'employee' while that co-'employee' is either in the course of his or her employment or performing duties related to the conduct of your [the name insured's] business[,]" the policies do not provide any liability coverage for the accident. It cited ***Gorzalski***, 145 Wis. 2d at 803-05, as support. Although Rocker and USAA argued that ***Gorzalski*** was wrongly decided, and asserted that because the car wash is a motor vehicle handler as defined by WIS. STAT. § 632.32(2)(b), General Casualty's attempt to preclude coverage for Cousins violated § 632.32(6)(a), the trial court disagreed, finding that the exclusion in the policy stating that there is no coverage when an employee is injured by a co-employee was unambiguous. Further, the trial court determined, by implication, that the car wash was a motor vehicle handler, but concluded that it was obligated to follow the precedent of ***Gorzalski***. Consequently, the trial court granted the motion and dismissed General Casualty from the suit.

Months later, USAA brought its own motion seeking declaratory judgment. In it, the insurance company requested the trial court to declare, with regard to Cousins' coverage, that its maximum limit was the $25,000 minimum amount required under the Wisconsin Financial Responsibility Law. Its rationale was that the car wash was a motor vehicle handler, and, as a result, WIS. STAT. § 632.32(5)(c) entitled USAA to reduce its policy limits. Section 632.32(5)(c) reads:

> **(5)** PERMISSIBLE PROVISIONS.
>
> ….
>
> (c) If the policy is issued to a motor vehicle handler, it may restrict coverage afforded to anyone other than the motor vehicle handler or its officers, agents or employees to the limits under s. 344.01 (2) (d) and to instances when there is no other valid and collectible insurance with at least those limits whether the other insurance is primary, excess or contingent.

The trial court agreed, finding the car wash to be a "service station," falling within the definition of a "motor vehicle handler" found in § 632.32(2)(b).[2] Eventually, USAA was permitted to pay its policy limit of $25,000 into court and was declared to have no further duty to defend or indemnify Cousins. It is from these two orders that Rocker and Cousins appeal.[3]

III. DISCUSSION.

This case presents the supreme court with an opportunity to revisit the holdings in two cases and to resolve a question of first impression—whether a car wash is a "motor vehicle handler" pursuant to WIS. STAT. § 632.32(2)(b), thereby permitting a reduction in coverage pursuant to § 632.32(5)(c).

A. Is a car wash a "motor vehicle handler" pursuant to WIS. STAT. § 632.32(2)(b)?

WISCONSIN STAT. § 632.32 is the omnibus motor vehicle coverage statute. *See* ***Miller v. Amundson***, 117 Wis. 2d 425, 429, 345 N.W.2d 494 (Ct. App. 1984).

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[2] Because of rotation, a different judge heard USAA's motion.

[3] Cousins has not filed a separate brief. Instead, he joined and adopted portions of both Rocker and USAA's arguments.

Generally speaking, the omnibus statute is remedial in nature and is to be construed broadly. ***Home Ins. Co. v. Phillips***, 175 Wis. 2d 104, 111, 499 N.W.2d 193 (Ct. App. 1993). Its purpose is to afford compensation to victims of automobile accidents. ***Id.*** However, the omnibus statute specifically authorizes insurers to incorporate exclusions that limit coverage connected with automobile accidents. *See* § 632.32(5)(e).[4] To determine if an exclusion violates the omnibus statute, a two-part test must be applied. *See* ***Mau v. North Dakota Ins. Reserve Fund***, 2001 WI 134, ¶32, 248 Wis. 2d 1031, 637 N.W.2d 45. First, § 632.32(6) should be reviewed to determine whether the exclusion falls within one of the enumerated prohibitions. *See* ***id.*** If it does, the matter is resolved. *See* ***id.*** If not, it must be determined whether any other applicable law proscribes the exclusion. *See* ***id.***

Rocker submits that the first question to be answered is whether a car wash falls within the definition of a "motor vehicle handler" found in WIS. STAT. § 632.32(2)(b).[5] Rocker reasons that the answer to this question serves as the key

[4] WISCONSIN STAT. § 632.32(5)(e) provides: "A policy may provide for exclusions not prohibited by sub. (6) or other applicable law. Such exclusions are effective even if incidentally to their main purpose they exclude persons, uses or coverages that could not be directly excluded under sub. (6) (b)."

[5] WISCONSIN STAT. § 632.32(2)(b) provides:

> **(2)** DEFINITIONS. In this section:
>
> ….
>
> (b) "Motor vehicle handler" means any of the following:
>
> 1. A motor vehicle dealer, as defined in s. 218.0101 (23) (a).
> 2. A lessor, as defined in s. 344.51 (1g) (a), or a rental company, as defined in s. 344.51 (1g) (c).
> 3. A repair shop, service station, storage garage or public parking place.

to resolving the other issues raised in the case. Rocker suggests that the likely rational behind the statute—to protect employees of motor vehicle handlers and require coverage for them when in a customer's car—applies equally well to car washes. If, as Rocker advances, the car wash is a motor vehicle handler, then General Casualty must cover Cousins because § 632.32(6)(a) contains a prohibition that "[n]o policy issued to a motor vehicle handler may exclude coverage upon any of its officers, agents or employees when any of them are using motor vehicles owned by customers doing business with the motor vehicle handler." Rocker also points out that if the car wash is *not* a motor vehicle handler, then USAA cannot limit its coverage under WIS. STAT. § 344.01(2)(d) as § 632.32(5)(b) permits.[6] USAA joins Rocker's argument that the car wash is a motor vehicle handler, and it observes that if the motor vehicle handler provisions apply, General Casualty will have to provide coverage for Cousins and USAA's coverage would then drop to zero.

General Casualty argues that the car wash is not a motor vehicle handler and disputes the trial court's conclusion that a car wash is a service station. General Casualty contends that the common usage of "service station" implies a gasoline or filling station. It also points to other statutes that define a "service station" as a place that sells gasoline. General Casualty analogizes that following the trial court's logic, a store such as Radio Shack, which performs services like installing radios, would be a service station. It submits that such a definition casts its net too wide.

[6] The General Casualty motion was for declaratory and summary judgment. USAA entitled its motion as a declaratory judgment.

We thus ask the supreme court to answer the question of whether a car wash falls within the ambit of a "motor vehicle handler" pursuant to WIS. STAT. § 632.32(2)(b).

B. Is the holding in **Heritage Mutual** *still good law?*

While General Casualty disputes Rocker's contention that the car wash is a motor vehicle handler, it also contends that its policy does not fall within WIS. STAT. § 632.32 because it is not an automobile insurance policy. Rather, it argues, it is exempt because the policy is a commercial liability policy. General Casualty rejects the holding in ***Heritage Mutual***—that a non-owned auto liability endorsement in a general liability policy is subject to § 632.32—claiming that the facts here are distinguishable. General Casualty contends that because the injured party in ***Heritage Mutual*** was an innocent third party rather than a co-employee, the holding does not apply. The insurance company also argues that "the court's reasoning in ***Heritage Mutual*** is flawed." Finally, General Casualty submits that applying the ***Heritage Mutual*** holding will produce absurd results.

WISCONSIN STAT. § 632.32(1) advises that the omnibus statute applies "to every policy of insurance issued or delivered in [Wisconsin] against the insured's liability for loss or damage resulting from accident caused by any motor vehicle…." As early as 1966, the supreme court, in ***Nelson v. Ohio Casualty Insurance Co.***, 29 Wis. 2d 315, 139 N.W.2d 33 (1966), held that the omnibus statute, WIS. STAT. § 204.30(3), the predecessor statute to WIS. STAT. § 632.32, applied to a comprehensive liability policy. *See* ***id.*** at 320-21. In 1969, in ***Lukaszewicz v. Concrete Research, Inc.***, 43 Wis. 2d 335, 168 N.W.2d 581 (1969), the court reiterated its earlier ***Nelson*** holding, stating that the omnibus statute "applies not only to automobile liability policies but [sic] to a

comprehensive liability policy to the extent it covers an automobile liability." 43 Wis. 2d at 341.

In ***Bindrim v. B. & J. Insurance Agency***, 190 Wis. 2d 525, 534, 527 N.W.2d 320 (1995), a similar argument was raised concerning WIS. STAT. § 632.32(6)(b)1. (1991-92), which prohibits excluding coverage for persons related by marriage. The argument was considered and rejected by our supreme court. In ***Bindrim***, an insurance carrier attempted to limit coverage to the named insured and refused to provide coverage for the named insured's wife, who had negligently injured the plaintiff. The supreme court affirmed the trial court and the court of appeals, concluding that the insurance policy was fatally flawed because "the plain language of Chapter 632.32, states that it applies to *all* policies unless 'otherwise provided.'" ***Id.*** at 535 (citation and footnote omitted). Thus, the court determined that coverage was available to the insured's wife.

Later, in ***Heritage Mutual***, we determined that a general liability policy is subject to WIS. STAT. § 632.32(6)(a), the identical provision in play here:

> [W]e conclude that even though the Heritage policy is a general liability policy, WIS. STAT. § 632.32(6)(a) applies. While not required by law to offer automobile liability coverage, Heritage did provide coverage with the endorsement for non-owned auto liability. … The scope of § 632.32 applies to "every policy of insurance issued … against the insured's liability for loss or damage resulting from accident caused by any motor vehicle …" WIS. STAT. § 632.32(1). Therefore, the policy was required to comply with § 632.32(6)(a).

Heritage Mutual, 248 Wis. 2d 111, ¶17.

However, General Casualty points out that the omnibus statute now mandates additional coverage that was not required at the time these earlier cases were decided, and maintains that it is absurd to require commercial liability

policies to provide uninsured motorist coverage and medical payments or to require the policies to include coverage for persons related by blood, marriage or adoption to the insured, simply because the policy may also cover certain automobiles. General Casualty warns that requiring comprehensive commercial liability policies to abide by all of the omnibus statute requirements may result in commercial umbrella policies refusing to cover motor vehicles. As such, we ask the supreme court to decide whether ***Heritage Mutual*** is still good law with regard to commercial liability policies.

C. Was **Gorzalski** *correctly decided?*

General Casualty claims that even if the car wash is a "motor vehicle handler" under WIS. STAT. § 632.32(2)(b), the co-employee exclusion is valid pursuant to the holding in ***Gorzalski***. Gorzalski, an employee of an auto dealership, was seriously injured when another employee drove an automobile into him. 145 Wis. 2d at 797. Gorzalski sued the co-employee and the dealership's insurer, among others. *See* ***id.*** The trial court concluded that the co-employee exclusion in the employer's insurance policy was valid and precluded recovery against it. ***Id.*** at 798. The policy language in ***Gorzalski*** read:

> This insurance does not apply, under the Garage Liability coverages:
>
> ….
>
> (c) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (d) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury;
>
> ….

> Each of the following is an insured under this insurance to the extent set forth below:
>
> A. Under the Garage Bodily Injury and Property Damage Liability Coverages:
>
> (1) the named insured;
>
> (2) with respect to the automobile hazard:
>
> (a) any person while using, with the permission of the named insured, any automobile to which the insurance applies under the automobile hazard, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission.
>
> ….
>
> None of the following is an insured:
>
> (i) any person while engaged in the business of his employer with respect to bodily injury to any fellow employee of such person injured in the course of his employment.

Gorzalski, 145 Wis. 2d at 802-03. Noting the Gorzalski's argument that the exclusion appeared to conflict with the statutory language mandating that "[n]o policy issued to a motor vehicle handler may exclude coverage upon any of its officers, agents or employes when any of them are using motor vehicles owned by customers doing business with the motor vehicle handler[,]" ***id.*** at 803, this court concluded that the holding in ***Dahm v. Employers Mutual Liability Insurance Co.***, 74 Wis. 2d 123, 246 N.W.2d 131 (1976), controlled:

> [O]ur supreme court stated that the fellow employee exclusion clause will violate no rule of law in this state if it is held to be valid only where the injured party and the tortfeasor are employees of the named insured under the policy, and where the named insured employer is required to provide workmen's compensation coverage.

Id. at 804 (citation and footnote omitted).

Rocker and USAA argue that ***Gorzalski*** was wrongly decided because the policy exclusion in ***Gorzalski*** did violate the statute, and the court failed to consider the application of WIS. STAT. § 632.32(6)(a). Moreover, they submit that the court's reliance on ***Dahm*** was misplaced, as ***Dahm*** did not involve a motor vehicle handler and the statute defining "motor vehicle handler" was not enacted until three years after ***Dahm*** was decided.

We are bound by this precedent, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), and ask the supreme court to resolve this apparent anomaly in the case law.