COURT OF APPEALS
DECISION
DATED AND RELEASED

June 3, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-0134 &
96-0976

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

96-0134

MARY L. LARSON,

PLAINTIFF-APPELLANT,

V.

CONTINENTAL CASUALTY INS. CO.,
A/K/A CNA INS. COS.,

DEFENDANT-RESPONDENT,

ARTURO FUENTES, JOSE FUENTES AND
AMERICAN FAMILY MUTUAL INS. CO.,

DEFENDANTS,

V.

CNA INSURANCE COMPANIES,

SUBROGATED PARTY-PLAINTIFF.

96-0976

SHANE C. BRICKNER,

PLAINTIFF-APPELLANT,

CONTINENTAL CASUALTY COMPANY,
A FOREIGN CORPORATION,

PLAINTIFF,

V.

CONTINENTAL CASUALTY COMPANY,
A FOREIGN CORPORATION,

DEFENDANT-RESPONDENT,

PAYNE & DOLAN, A DOMESTIC CORPORATION AND
BARRICADE FLASHER SERVICES, INC.,
A DOMESTIC CORPORATION,

DEFENDANTS.

APPEAL from orders of the circuit court for Milwaukee County: JOHN E. McCORMICK and MICHAEL D. GUOLEE, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Mary L. Larson and Shane C. Brickner appeal from orders granting summary judgment to their employer's business automobile insurer, Continental Casualty Insurance Company. Larson also appeals from an order denying her motion to amend her complaint. Larson and Brickner claim that the trial court erred as a matter of law in granting summary judgment in Continental's favor. Larson alternatively claims that there is a disputed issue of

material fact so as to preclude summary judgment. Finally, Larson claims that the trial court erroneously exercised its discretion in refusing to allow her to amend her complaint. We affirm.

Larson and Brickner, road construction workers employed by Cape and Sons Construction, sustained serious injuries after exiting one of Cape's company vans at a construction site. The van had dropped them off at or near the site and approximately 30 seconds later, when the van was approximately one-half block away, they were struck by another vehicle as they were crossing the street. Damages exceeded the coverage under the policy covering the vehicle that hit them. Larson and Brickner, therefore, brought actions against Continental seeking underinsured motorist benefits. Larson and Brickner then moved the trial court for a declaration of rights under the policy's underinsured motorist provision. The policy insured "[a]nyone else 'occupying' a 'covered auto.'" The policy further provided that "'[o]ccupying' means in, upon, getting in, on, out or off."

Continental filed a brief in opposition to their motions for declaratory judgment and also filed a motion for summary judgment, claiming that Larson and Brickner were not "occupying" the vehicle insured by it at the time of the accident and therefore they were not "insureds" and not entitled to underinsured-motorist benefits. The trial court granted Continental's motion. Larson then moved the trial court to limit and modify the ordered judgment to only partial summary judgment and for leave to amend her complaint to directly claim liability damages from Continental. The trial court denied both motions.

A trial court's grant of summary judgment will be reversed only if the trial court incorrectly decided a legal issue or if material facts are in dispute. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820

(1987). The construction of insurance contract provisions is a question of law, which this court decides without deference to the trial court. ***Martin v. Milwaukee Mut. Ins. Co.***, 146 Wis.2d 759, 766, 433 N.W.2d 1, 3 (1988). Unless otherwise indicated, the words of an insurance policy are to be understood in their ordinary sense. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis.2d 722, 735, 351 N.W.2d 156, 163 (1984). The problem here is although the relevant components of the policy definition of "occupy"—"in, upon, getting in, on, out or off"—appear to be easily definable, they can appear ambiguous when determining the scope of coverage under the multitude of fact patterns that can exist. *See* ***Kreuser v. Heritage Mut. Ins. Co.***, 158 Wis.2d 166, 173, 461 N.W.2d 806, 808 (Ct. App. 1990).

Larson and Brickner have relied most heavily on three Wisconsin cases that have interpreted the word "occupy" in different fact situations. *See* ***Sentry Ins. Co. v. Providence Washington Ins. Co.***, 91 Wis.2d 457, 460, 283 N.W.2d 455, 457 (Ct. App. 1979); ***Moherek v. Tucker***, 69 Wis.2d 41, 47–48, 230 N.W.2d 148, 151–152 (1975); ***Kreuser***, 158 Wis.2d at 173–174, 461 N.W.2d at 808–809. All three cases indicate that the determination of whether Larson and Brickner were "occupying" the van at the time of the accident depends upon whether they had severed their connection with the van. *See* ***Sentry***, 91 Wis.2d at 460, 283 N.W.2d at 457; ***Moherek***, 69 Wis.2d at 47–48, 230 N.W.2d at 151–152; ***Kreuser***, 158 Wis.2d at 173–174, 461 N.W.2d at 808–809. A determination of whether they had severed their connection with the van is based on whether they were "vehicle oriented" at the time of the accident. ***Sentry***, 91 Wis.2d at 460–461, 283 N.W.2d at 457; ***Moherek***, 69 Wis.2d at 47–48, 230 N.W.2d at 151–152; ***Kreuser***, 158 Wis.2d at 173–174, 461 N.W.2d at 808–809.

The common threads between ***Moherek, Sentry*** and ***Kreuser,*** where the plaintiffs were found to be "vehicle oriented" and occupying the vehicles at the time of injury, were either that the plaintiffs had some physical contact with the insured vehicles at the time of injury or they were within close physical proximity of the vehicles at the time of contact. In ***Moherek***, everything the plaintiff did after exiting the vehicle was related to restarting the vehicle in order to resume the journey and was therefore "vehicle oriented." ***Moherek,*** 69 Wis.2d at 43, 230 N.W.2d at 149. In ***Kreuser***, the plaintiff was injured approximately ten feet from the vehicle and thus was within a "reasonable geographical perimeter" of the vehicle. ***Kreuser***, 158 Wis.2d at 173–174, 461 N.W.2d at 808–809. In ***Sentry***, the plaintiff was within arm's reach of and made physical contact with the covered vehicle while injured and thus was "vehicle oriented." ***Sentry***, 91 Wis.2d at 460–461, 283 N.W.2d at 457.

The record establishes that Larson and Brickner did not have physical contact with the van at the time of their injury and there is no contention otherwise. The record also establishes that Brickner and Larson were not in close physical proximity of the van at the time of their accident. Brickner and Larson were dropped off at the construction site and the van traveled approximately one-half block down the road before they were hit by the car. At that point, they were pedestrians; the van had simply gone too far from them for Larson and Brickner to have been occupants of it.

Larson alternatively claims that there is a disputed issue of material fact as to whether she was "occupying" the van. As noted, no facts indicate that she was "in, upon, getting in, on, out or off" the van at the time she was struck; instead, the uncontroverted facts demonstrate that Larson had completed the act of

leaving the vehicle and was approximately one-half block away from it when the accident occurred.

Larson finally argues that the trial court erroneously exercised its discretion in refusing to allow her to amend her complaint to assert a liability claim against Continental. *See* § 802.09, STATS. We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the trial court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). A review of the record shows that Larson's request to amend the pleading came over one and a half years after the commencement of this suit and after the complaint already had been amended once. At the time Larson filed her motion to amend, all pending claims against Continental had been dismissed. A trial in this case under a new theory of liability, in all likelihood, would have begun the entire litigation anew. Larson gave no explanation why she failed to allege negligence on the part of Cape and Son and its employees. We conclude that the trial court properly exercised its discretion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.