

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1996

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(1), STATS.

NOTICE

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No. 96-1113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NAO S. THAO and LIA V. THAO,

Plaintiffs-Co-Appellants,

CARVER BOAT CORPORATION,

Involuntary Plaintiff,

v.

**THE TRAVELERS INSURANCE COMPANY,
EXPERIENCE MARINE, INC., KENNETH J.
BERNA, SECURA INSURANCE, a mutual
company, and AMERICAN PREMIER
INSURANCE COMPANY,**

Defendants.

**MAI KHO LEE; YOUA THAO and
BRENDA THAO, minors, by
their guardian ad litem,
RANDALL E. REINHARDT,**

Plaintiffs-Appellants,

v.

**THE TRAVELERS INSURANCE COMPANY,
EXPERIENCE MARINE, INC., and KENNETH
R. BERNA,**

Defendants,

SECURA INSURANCE, a mutual company,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, P.J., Myse and Carlson, JJ.

CANE, P.J. Nao S. Thao, Lia V. Thao, Mai Kho Lee, Youa Thao and Brenda Thao (appellants) appeal a summary judgment granted to Secura Insurance, applying Secura's car insurance policy exclusion for the regular or frequent use of a vehicle, thus barring coverage for Kenneth Berna's use of his employer's truck in the automobile accident in which appellants were injured. Secura had issued a personal car insurance policy to Berna. The court concluded that Berna's use of his employer's truck fell within Secura's regular or frequent use exclusion, dismissed all claims against Secura, and decided that Secura had no duty to defend or indemnify Berna.

Appellants argue that the court erred when it considered Berna's use of the employer's truck for both business and personal purposes in order to determine that his use was regular or frequent. They assert that Berna's use of the truck on the night of the accident was restricted, isolated, of limited duration and, therefore, insufficient as a matter of law to constitute regular or frequent use. Because we conclude that Berna's indisputably consistent use of the truck to commute to and from work in the weeks preceding the accident constituted both personal and regular or frequent use, we affirm the judgment.

The accident occurred on March 16, 1994, on State Highway 32 near Quarry Road in the town of Pittsfield. Berna drove his employer's Ford pickup truck from work to a restaurant to meet with his boss, another employee, and a truck driver from another company for a drink. As Berna was on his way home from the restaurant, he strayed into oncoming traffic and hit a vehicle driven by Cheng Thao head on, killing Cheng Thao and injuring Nao S. Thao, a passenger. Berna was arrested at the scene for operating a motor vehicle while intoxicated, and subsequently entered a plea of no contest to one count of homicide by intoxicated use of a vehicle. Appellants sued Berna and his insurer, Secura, whose policy contained an exclusion for Berna's regular or frequent use of a vehicle not insured in Berna's name by Secura.

Berna was an employee of Experience Marine, Inc. (EMI). EMI owned the Ford truck involved in the accident and a Ford Bronco. Berna testified that as a regular part of his job, he used the vehicles to pick up or move supplies around. His use of the vehicles for business purposes fluctuated, depending on the duties he performed for EMI. Berna testified that sometimes he would use an EMI vehicle once a week, and sometimes he would use one five times a week. In the weeks preceding the accident, EMI was moving to a new location, and the truck was being used frequently because the employees were driving it back and forth between the two facilities. Additionally, as a part of his job and upon EMI's owner's request, Berna would sometimes take the truck home to his residence in Pulaski, pick up supplies at Carver Boat in Pulaski the next morning, and then drive twenty-two miles to EMI in Ashwaubenon.

During the three or four weeks preceding the accident, EMI's owner, Leonard J. Ginter, gave Berna permission to use the truck as a replacement for his own vehicle when Berna's own vehicle, a Ford Pinto, would not start and then was in a repair shop for one week because of transmission and electrical problems.¹ Berna testified that the repairs were completed approximately one week after the accident. While the Pinto was out of service and in the repair shop, Berna drove the truck during the three to four weeks leading up to the accident to commute to and from work, with Ginter's

¹ Secura issued a family car policy to Berna and his wife to cover a Ford Pinto and a Chevrolet Corsica. Because Berna canceled the coverage for the Pinto effective December 8, 1993, the only insured car on the policy at the time of the accident was the Corsica.

permission to use the truck, without restriction, as a substitute for the Pinto for whatever purpose he may have needed it. When Ginter gave Berna permission to use the truck, he knew that Berna's Pinto was broken down and would subsequently be in the repair shop. Although Ginter testified that he asked Berna to get the Pinto fixed as soon as possible, he did not set a finite time period for Berna to use the truck for his usual, everyday activities.

The issue on appeal is whether Secura's regular or frequent use exclusion applies to Berna's use of his employer's truck. Here, both parties moved for summary judgment. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS. However, "[w]hen both parties move by cross-motions for summary judgment, it is 'the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues.'" *Friendship Village v. Milwaukee*, 181 Wis.2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993) (citation omitted). The interpretation of an exclusionary clause in an insurance policy presents a question of law, which we review independently of the trial court. See *American States Ins. Co. v. Skrobis Painting & Decor., Inc.*, 182 Wis.2d 445, 450, 513 N.W.2d 695, 697 (Ct. App. 1994).

The pertinent provision of Secura's insurance policy excludes liability coverage for the following:

Bodily injury or property damage resulting from the ownership, maintenance or use of a vehicle, other than *your insured car*, which is owned by, registered in the name of or furnished or available for regular or frequent use by you, a *relative*, or any other person living in your household. (Emphasis in original.)

Our supreme court has decided that regular or frequent use exclusions in car insurance policies are unambiguous. *Jones v. Perkins*, 75 Wis.2d 18, 23, 248 N.W.2d 468, 471 (1977). The purpose of a regular or frequent use exclusion is to cover the insured for infrequent or casual use of a vehicle not described in the insurance policy, but not to provide liability coverage to the

insured who regularly or frequently uses such a vehicle "as that increases the risk to an insurance company without a corresponding increase in premium." *Hochgurtel v. San Felippo*, 78 Wis.2d 70, 81, 253 N.W.2d 526, 530 (1977). Additionally, we are mindful that the "signposts" of "regular use" include "continuous use rather than sporadic use; frequent use rather than infrequent or merely casual use; unqualified use rather than restricted use; use for an indefinite period rather than a definite period; usual use rather than unusual use." See *id.* at 82, 253 N.W.2d at 531.

Secura contends that Berna now seeks liability coverage from Secura for his use of EMI's truck as a replacement for the Pinto when he had canceled coverage and stopped paying an insurance premium to Secura for the Pinto more than three months prior to the accident. Had Berna been driving his uninsured Pinto at the time of the accident, there appears to be no dispute that Secura's regular and frequent use exclusion would apply. However, Berna did continue insurance coverage for his Corsica, and the issue remains whether Berna's use of the company vehicle falls within the regular and frequent use exclusion.

Our interpretation and application of the term "regular use" depends upon the particular facts and circumstances of this case. See *Le Mense v. Thiel*, 25 Wis.2d 364, 367, 130 N.W.2d 875, 876 (1964). It is undisputed that Berna used the truck to drive to and from work at least five days a week for the entire three to four week period before the accident. In *Moutry v. American Mut. Liab. Ins. Co.*, 35 Wis.2d 652, 151 N.W.2d 630 (1967), our supreme court decided that the regular use exclusion in a car insurance policy applied when the defendant-insured used a non-owned vehicle not named in his insurance policy for a two and a half week period to commute between Milwaukee and Kenosha for work. *Id.* at 658-59, 151 N.W.2d at 633. In the words of the court,

[I]t is manifest the automobile furnished [to defendant-insured] without restriction and for an indefinite period was "furnished for his regular use" That [the defendant-insured] used the automobile as a mode of transportation to and from his employment and apparently not on other occasions does not negate a finding of "regular use."

Id. Pursuant to *Moutry*, the exclusion applies because Berna had regular or frequent use of the truck for the commute in the three or four weeks before the accident. See *id.* at 659, 151 N.W.2d at 633. We consider Berna's consistent use of the truck for the commute between work and home to be his personal use of the truck. See *Doering v. LIRC*, 187 Wis.2d 472, 479, 523 N.W.2d 142, 145 (Ct. App. 1994) ("An employee going to work is ordinarily in the prosecution of his or her own business, not performing services incidental to employment."). Because we are satisfied that Berna's personal use of the truck for the commute falls within Secura's regular or frequent use exclusion, we do not address the distinction between Berna's use of the vehicle for business and personal purposes.

In summary, we conclude that the court did not err when it decided that Berna had regular or frequent use of the vehicle. The court properly granted summary judgment to Secura, and we therefore affirm the judgment.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

No. 96-1113(C)

MYSE, J. (*concurring*). I agree with the majority that the regular use of the vehicle to drive back and forth from work, five days a week for a three- or four-week period constitute regular use of the vehicle. *Moutry v. American Mut. Liab. Ins. Co.*, 35 Wis.2d 652, 151 N.W.2d 630 (1967), involved comparable facts over a shorter period of time and was determined to be regular use by our supreme court. While it is unusual to grant summary judgment when the resolution is very fact specific, we are compelled to conclude that Berna's use of an employer's vehicle for personal purposes is sufficient to constitute regular use.

I write separately because the trial court combined business and personal use in reaching its determination that Berna had the regular use of his employer's vehicle. I believe that this combination is infirm and that personal use and business use are discrete functions which must be analyzed independently of each other. While the issue is unresolved in Wisconsin, several states have written persuasively that in applying the regular use exclusion it is first necessary to determine whether the use was for business or personal purposes. The Illinois Supreme Court in *Auto Owners Ins. Co. v. Miller*, 561 N.E.2d 630 (Ill. 1990), the California Court of Appeals in *Safeco Ins. Co. v. Thomas*, 249 Cal. App.2d 204 (Cal. Ct. App. 1966), and the Louisiana Appellate Court in *Nevels v. Hendrix*, 367 So.2d 33 (La. Ct. App. 1978), each explained the reasons such a distinction must be made. If an employee regularly uses an employer's vehicle for business purposes only and is prohibited from using the vehicle for his personal use at any time, the regular use exclusion should not apply if for a single day the employer allows the vehicle to be used for personal business. The regular use exclusion in an insurance policy seeks to prohibit an insurer from covering other vehicles used by the insured without the payment of an additional premium. When used as a temporary substitute vehicle for his own vehicle, and the use is singular and limited, it is irrelevant that he had access to that vehicle for business purposes previously. I find the reasoning of these cases to be persuasive.

The trial court's analysis should properly be to determine the purpose for which the vehicle was being used at the time of the accident. If, as here, the use was personal, the court should determine whether the personal use of the employer's vehicle transformed the vehicle into a temporary replacement for the insured's personal automobile. If the accident had occurred during a business use of the vehicle, the court should examine the regularity with which the individual drove the business vehicle. In this case, three to four

weeks of daily use of the vehicle to commute to and from work is sufficient to be categorized as a regular use of the employer's vehicle for personal purposes and, accordingly, the trial court could properly grant Secura's motion to dismiss based on the regular or frequent use exclusion contained in Berna's policy. The trial court's failure to make this discrete analysis was in my view error, but because the evidence is sufficient to support the conclusion that Berna had the regular and frequent use of his employer's vehicle for personal purposes the error was harmless. I therefore concur in the result.