COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2429 **Cir. Ct. No. 2013CV2824**

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

BONNIE HAHN,

PLAINTIFF-APPELLANT,

V.

HARLEYSVILLE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Bonnie Hahn appeals the trial court's grant of declaratory judgment on her claim for underinsured motorist coverage against Harleysville Insurance Company. Hahn sought underinsured motorist coverage from Harleysville after her husband, Edward Hahn, was tragically killed in an

automobile accident. After Harleysville denied coverage, Hahn filed the instant claim with the trial court, seeking a declaration of coverage. The trial court instead granted declaratory judgment in Harleysville's favor, finding that there was no coverage for the accident because the vehicle Edward was driving when he was hit—a Kawasaki Mule—was not a covered vehicle under the Hahns' policy. Hahn argues we should reverse the trial court because there was in fact coverage under the policy, but we disagree and affirm.

BACKGROUND

¶2 As noted, this case stems from the automobile accident that resulted in Edward Hahn's death. On May 28, 2010, Edward drove his Kawasaki Mule—an all-terrain vehicle ("ATV")—across County Highway G in Dodge County to retrieve his mail. The Hahns lived on Highway G and their mailbox was across the highway from the end of their driveway. According to Hahn, Edward frequently picked up the mail by crossing the highway while riding his Mule as it was part of his daily routine. As Edward was crossing the highway to return home, he was struck by a car operated by Harry Schoephoerster. After the accident, Schoephoerster's insurer, American Family Mutual Insurance Company, paid its policy limit of $150,000 to Bonnie Hahn.[1]

¶3 Hahn subsequently applied for benefits under the insurance policy that she and her husband had purchased from Harleysville. That policy listed two

[1] For ease of reference we will henceforth generally refer to Edward Hahn as "Edward" and to Bonnie Hahn as "Hahn."

vehicles under the heading "what we cover and the cost of your protection" (some formatting altered and capitalization omitted): a 1997 Dodge Ram 1500 and a 2002 Chrysler Town & Country. The policy also provided, under this same heading, the yearly costs for insuring the two covered vehicles: $372 for the Dodge Ram, and $360 for the Chrysler Town & Country. There was also a $30 premium for "Auto Coverage Enhancement." The total annual policy premium was $762. No other vehicles were listed under this policy, and no other charges or premiums applied.

¶4 The Harleysville policy included a number of endorsements, including underinsured motorist (UIM) coverage. As relevant here, the UIM endorsement provided coverage for damages incurred from bodily injury caused by an underinsured motorist:

> We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":
>
> 1. Sustained by an "insured"; and
>
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle."

¶5 The UIM endorsement also contained an exclusion providing that there would be no coverage for injuries sustained while any insured occupied a vehicle that was not covered under the policy:

> We do not provide Underinsured Motorists Coverage for "bodily injury" sustained:

> 1. By an "insured" while "occupying", or when struck by, any motor vehicle owned by that "insured" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

¶6 While no part of the insurance policy, including the UIM endorsement, defined the term "motor vehicle," which, as we have just seen, was used in one of the endorsement's exclusions, the UIM endorsement did explain that an "underinsured motor vehicle" did not include motor vehicles designed for use "off public roads while not upon public roads":

> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury … policy applies at the time of the accident but the limits … of that … policy are not enough to pay the full amount the "insured" is legally entitled to recover as damages.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment:
>
> ….
>
> 4. Designed mainly for use off public roads while not upon public roads.

¶7 As noted, Harleysville denied coverage. Citing the UIM coverage exclusion listed above, Harleysville denied coverage on the basis that the Hahns did not have insurance for the Kawasaki Mule Edward was driving at the time of the accident. In other words, there was no coverage because the Mule was not a vehicle listed under the policy.

¶8 Hahn then sought declaratory relief with the trial court, requesting that the court declare that the Harleysville policy did in fact provide underinsured motorist coverage. The trial court denied her claim, granting judgment in Harleysville's favor instead. Hahn appeals.

ANALYSIS

¶9 On appeal, Hahn asks us to reverse the trial court's grant of declaratory judgment dismissing her claims against Harleysville. By disposing of all of Hahn's claims against Harleysville, the declaratory judgment in this case had the effect of a summary judgment. *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. "We review such an award *de novo*, applying the same methodology as the [trial] court." *See* ***id.*** Summary judgment is proper "if the pleadings and evidentiary submissions of the parties 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" ***Id.*** (citation omitted).

¶10 Specifically, Hahn argues that the trial court's decision must be reversed because there is coverage under the policy's UIM endorsement for the losses incurred from the accident. According to Hahn, the language of the exclusion under which Harleysville, and the trial court, denied coverage—the "drive other cars" exclusion, *see* ***Westphal v. Farmers Ins. Exch.***, 2003 WI App 170, ¶11, 266 Wis. 2d 569, 669 N.W.2d 166 ("the purpose of the drive other cars exclusion is to … exclude coverage of a vehicle that the insured owns or frequently uses for which no premium has been paid"); *see also* WIS. STAT. § 632.32(5)(j) (2009-10)[2]—is ambiguous. Additionally, Hahn argues that the

[2] WISCONSIN STAT. § 632.32(5)(j) (2009-10) provides:

> A policy may provide that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:
>
> 1. Is owned by the named insured, or is owned by the named insured's spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.

(continued)

exclusion is ambiguous when considered in context of the entire policy. We address each argument in turn.[3]

(1) The "drive other cars" exclusion is not ambiguous.

¶11 "There is an established framework for determining whether coverage is provided under the terms of an insurance policy." ***Olson v. Farrar***, 2012 WI 3, ¶40, 338 Wis. 2d 215, 809 N.W.2d 1. First, we examine whether the policy makes an initial grant of coverage. *See* ***id.***, ¶41. If the initial grant of coverage is triggered by the claim, we then examine the various exclusions to determine whether they preclude coverage. *See* ***id.*** "If so, the court then determines whether there is an exception to the exclusion which reinstates coverage." ***Id.***

> "Of primary importance is that the language of an insurance policy should be interpreted to mean what a reasonable person in the position of the insured would have understood the words to mean." If a word or phrase is susceptible to more than one reasonable interpretation, it is ambiguous. "[B]ecause the insurer is in a position to write its insurance contracts with the exact language it chooses—so long as the language conforms to statutory and

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> 2. Is not described in the policy under which the claim is made.
>
> 3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] Hahn also argues that declaratory judgment must be reversed because "Wisconsin law requires broad construction of WIS. STAT[]. § 632.32 in favor of coverage." (Capitalization and bolding omitted.) Her argument regarding this issue contains a single case citation with no explanation or analysis. Hahn's argument on this point is underdeveloped and we therefore will not consider it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

> administrative law—ambiguity in that language is construed in favor of an insured seeking coverage."

Id., ¶42 (citations omitted; brackets in ***Olson***).

¶12 Applying the relevant framework to the facts before us, we conclude that the exclusion in question unambiguously precludes coverage.[4] We display the exclusion again here for ease of reference:

> We do not provide Underinsured Motorists Coverage for "bodily injury" sustained by an "insured" while "occupying", or when struck by, any motor vehicle owned by that "insured" *which is not insured for this coverage under this policy*….

(Some capitalization omitted; formatting altered; and emphasis added.)

¶13 The meaning of this exclusion is plain: an insured is only entitled to receive UIM benefits if he or she is involved in an automobile accident while driving a vehicle for which a premium was paid. There is no other way to read the exclusion. Applying the plain language of the exclusion to the undisputed facts yields only one conclusion: there is no UIM coverage for Hahn. It is undisputed that Edward was driving his Kawasaki Mule when he was struck by an automobile. It is also undisputed that the policy lists only the Dodge Ram and the Chrysler Town & Country as covered vehicles—not the Mule. It is further undisputed that the only vehicles for which premiums were paid were the Ram and the Town & Country—not the Mule. The Mule was not listed on the policy. Because the Mule was not listed on the policy and because Edward was driving the Mule when he was struck, there is no coverage under the policy.

[4] There is no dispute about whether the policy makes an initial grant of coverage, so we will assume that it does. *See* ***Olson v. Farrar***, 2012 WI 3, ¶¶40-41, 338 Wis. 2d 215, 809 N.W.2d 1.

¶14 Moreover, we are not persuaded by Hahn's argument that the text of the exclusion is ambiguous because the policy does not define "motor vehicle." According to Hahn, the fact that the policy does not define "motor vehicle" means that the exclusion is ambiguous when applied to the facts of this case because the Mule was not actually a "motor vehicle." Hahn points us to the definition of "motor vehicle" found in WIS. STAT. § 632.32(2)(at) (2009-10), which states that "'[m]otor vehicle' means a self-propelled land motor vehicle designed for travel on public roads and subject to motor vehicle registration under ch. 341." Hahn argues that the Mule is not a "motor vehicle" because it is an ATV not created for use on public roads. Therefore, according to Hahn, because Edward was not actually driving a "motor vehicle," the exclusion did not clearly preclude coverage under the circumstances here and we should construe the contract in favor of coverage.

¶15 Hahn's reasoning is illogical. What is clear—regardless of whether the Mule fits the statutory definition of "motor vehicle" found in the Wisconsin Statutes—is that the vehicle Edward was driving at the time of the accident was not listed on the policy and had no premium associated with it. We fail to see, given the clear language of the policy and these undisputed facts, how a reasonable insured would have understood him or herself to have coverage for circumstances in which coverage simply was not bargained for. *See* ***Olson***, 338 Wis. 2d 215, ¶42.

¶16 Additionally, adopting Hahn's reasoning would lead to absurd results. First, allowing coverage in this situation would require the insurer to confer a benefit for which no premium was paid. While a "drive other cars" exclusion may "provide coverage to the insured while he or she has only infrequent or merely casual use of a vehicle other than one described in the

policy," it does not insure "against personal liability with respect to the use of a vehicle which the insured frequently uses or has the opportunity to do so as that increases the risk to an insurance company without a corresponding increase in premium." *See* ***Hochgurtel v. San Felippo***, 78 Wis. 2d 70, 81, 253 N.W.2d 526 (1977); ***Westphal***, 266 Wis. 2d 569, ¶11. Hahn stated in her deposition that Edward *frequently* used his Mule to cross the highway to retrieve their mail. Second, adopting Hahn's reasoning would encourage dishonest and potentially reckless behavior among insureds. An insured could list and pay for a single car on his or her policy, but then drive any vehicle, legal or illegal—including, as Harleysville notes in its brief, a "hot rod" that is not "street legal" and that may not have the standard safety equipment required of registered vehicles—with the expectation of coverage should an accident occur. We decline to adopt reasoning that would lead to such disastrous results.

¶17 Nor do we agree that the circumstances before us are analogous to the cases Hahn cites to support her arguments. Hahn cites several cases she claims should control the outcome here, including: ***Olson***; ***Fletcher v. Aetna Casualty and Surety Co.***, 165 Wis. 2d 350, 477 N.W.2d 90 (1991); and ***Ruenger v. Soodsma***, 2005 WI App 79, 281 Wis. 2d 228, 695 N.W.2d 840. None are dispositive.

¶18 First, we do not find ***Olson*** controlling. In that case, Olson bought a trailer home and asked Farrar to help him move it. ***Id.***, 338 Wis. 2d 215, ¶6. Farrar obliged, and hitched Olson's trailer home to his tractor. ***Id.***, ¶7. Unfortunately, Farrar's tractor stalled on a hill, the trailer home rolled backwards, and crashed into Olson's car. ***Id.*** Farrar submitted a claim with his insurer, who denied coverage, as is relevant here, on the basis that an exclusion precluded coverage for damage caused by a mobile home trailer if the trailer was attached to

a "motor vehicle," which the policy defined as any motorized vehicle subject to registration or designed for use on public roads. *See* ***id.***, ¶¶9-13. The parties disagreed on whether the tractor pulling the motor home was in fact a "motor vehicle" under the policy. *See* ***id.***, ¶¶54-57. The supreme court found the exclusion ambiguous, concluding:

> We conclude that the definition of "motor vehicle" is susceptible to more than one reasonable meaning. The phrase "designed for use" could refer to any conceivable purpose to which a vehicle could be put, and one conceivable purpose for a farm tractor is use on a public road. By contrast, the phrase "designed for use" could refer more narrowly to the particular purpose for which the vehicle is contrived. The particular purpose for which a farm tractor is contrived is use on a farm, not a public road.

See ***id.***, ¶60.

¶19 While Hahn argues that, under the teachings of ***Olson***, the Kawasaki Mule that Edward was driving should not be considered a motor vehicle because it was not designed for use on public roads, she misses the point. In ***Olson***, whether the tractor was in fact a "motor vehicle" mattered because the exclusion precluded coverage when a trailer home was attached to a "motor vehicle." *See* ***id.***, ¶13. In this case, on the other hand, it does not matter whether the Mule fits another case's definition of "motor vehicle" because the Mule was not a vehicle that was listed on the policy. Again, under the Hahns' policy, no reasonable insured would think there was coverage for an unlisted vehicle for which no premium had been paid. *See* ***id.***, ¶42.

¶20 Likewise, we do not find the circumstances of ***Fletcher*** analogous. In ***Fletcher***, the exclusion at issue was in an uninsured motorist (UM) endorsement, which precluded coverage for "any vehicle 'which is a farm type tractor or equipment designed mainly for use off public roads while not on public

roads.'" *See* ***id.***, 165 Wis. 2d at 355 (brackets omitted). This court held in ***Fletcher*** that the exclusion was ambiguous because "the phrase 'farm type' could reasonably be read to modify both 'tractor' and 'equipment'"—not just a "tractor." *See* ***id.*** at 354-55. The distinction was important in ***Fletcher*** because the vehicle in question was not a tractor but a dune buggy; the insurer said there was no coverage because the dune buggy was "equipment designed mainly for use off public roads," while the insured said that there *was* coverage because the buggy was uninsured but not "farm type" "equipment" as the policy could be construed to read. ***Id.*** at 353-54. ***Fletcher*** is not analogous because whether the dune buggy was "farm type" equipment or simply "equipment" mattered for the purposes of coverage. *See* ***id.*** Unlike the Hahns' policy, there was no language excluding coverage for vehicles that were not listed on the policy. *See* ***id.*** Thus, there is a key difference distinguishing ***Fletcher*** from the circumstances before us.

¶21 Additionally, the circumstances here are not analogous to those in ***Ruenger***. The exclusion in ***Ruenger*** was a "drive other cars" exclusion to UIM insurance that precluded coverage when the accident involved a vehicle that was not a covered "auto" under the policy. *See* ***id.***, 281 Wis. 2d 228, ¶¶29-30. The insured had gotten into an automobile accident while using her skid loader to clear snow from around her mailbox. ***Id.***, ¶3. The insurer argued there was no coverage under the aforementioned exclusion because the skid loader was not a covered auto under the policy, while the insured argued that the references to a "covered auto" under the policy were ambiguous. ***Id.***, ¶26. This court agreed that the exclusion was ambiguous, concluding:

> We also agree with Ruenger that the declarations do not unambiguously provide that there is UIM coverage for the named insured only if that insured is occupying the covered auto. Item Two of the declarations plainly tells the insured that UIM coverage applies only to an auto that is a covered

> auto. However, it is clear from the definition of "auto" that a skid loader is not an auto. Item Two does not plainly tell a named insured that he or she does not have UIM coverage if he or she is not occupying *any* auto when injured by an underinsured motorist. Thus, when Item Two is read in conjunction with the coverage section of the UIM endorsement, a reasonable named insured could understand that he or she would have UIM coverage for injuries caused by an underinsured motor vehicle while the named insured is operating his or her skid loader.

Id., ¶31 (footnotes omitted).

¶22 While Hahn argues that ***Ruenger*** is analogous to the case before us because Edward's Kawasaki Mule was not a "motor vehicle," just as Ruenger's skid loader was not an "auto," *see* ***id.***, ¶31 & n.5, we disagree because it is clear that Edward was in fact using his Mule as a motor vehicle. Wisconsin case law makes clear that an off-road vehicle operated on a public highway is a "motor vehicle" for purposes of determining insurance coverage. *See* ***Snorek v. Boyle***, 18 Wis. 2d 202, 211, 118 N.W.2d 132 (1962); ***Rice v. Gruetzmacher***, 27 Wis. 2d 46, 49, 133 N.W.2d 401 (1965) ("there are several decisions of this court which suggest that the words 'motor vehicle' refer to a vehicle which is operated on a public highway"); *see also* ***Smedley v. Milwaukee Auto. Ins. Co.***, 12 Wis. 2d 460, 465-67, 107 N.W.2d 625 (1961) (stationary truck on which a crane was mounted was not a "motor vehicle" under facts of the case, but would have been one if it were "being driven on a public street"); ***Hakes v. Paul***, 34 Wis. 2d 209, 213-14, 148 N.W.2d 699 (1967) (definition of "motor vehicle" is broad). Edward was driving his Mule on a public highway—County Highway G in Dodge County—in a manner that one would drive a "motor vehicle" when he was struck by Schoephoerster. In contrast, in ***Ruenger*** the skid loader was not being driven across a public highway, but was instead being used to shovel snow from around

the insured's mailbox. *See* ***id.***, 281 Wis. 2d 288, ¶3. Given these factual differences, we do not find the reasoning of ***Ruenger*** controlling here.

(2) There is no contextual ambiguity.

¶23 Finally, we are not persuaded by Hahn's argument that the "drive other cars" exclusion is ambiguous when considered in context of the entire policy.

> The test for determining whether contextual ambiguity exists is the same as the test for ambiguity in any disputed term of a policy. That is, are words or phrases of an insurance contract, when read in the context of the policy's other language, reasonably or fairly susceptible to more than one construction? The standard for determining a reasonable and fair construction is measured by the objective understanding of an ordinary insured.

Folkman v. Quamme, 2003 WI 116, ¶29, 264 Wis. 2d 617, 665 N.W.2d 857 (footnote omitted).

¶24 Hahn points to portions of the liability and medical payments coverage to argue that the "drive other cars" exclusion could be more clearly written. The language in the liability coverage she points to states: (a) that there is no coverage for vehicles "designed mainly for use off public roads," and (b) that there is no coverage for any autos which are not "covered under the policy." The language in the medical payments coverage Hahn points to says that there is only coverage for an insured while struck by a motor vehicle "designed for use mainly on public roads." According to Hahn, the language of these exclusions is clearer than the "drive other cars" exclusion in the UIM endorsement and consequently renders the UIM endorsement ambiguous.

¶25 We disagree; the various exclusions held up by Hahn as examples of ambiguity are entirely consistent with the exclusion at issue. Notably, the liability portion of the policy states, as does the UIM endorsement, that there is only coverage for covered vehicles under the policy. Additionally, the UIM endorsement explains that an "underinsured motor vehicle" does not include motor vehicles designed for use "off public roads *while not upon public roads*" (emphasis added). Under this definition, a vehicle such as Edward's Mule would be considered a motor vehicle because he was operating it on a public highway. We fail to see how reading the various portions of the policy together would yield more than one reasonable interpretation for a reasonable insured. *See* ***id.*** The policy is clear and unambiguously denies coverage for the circumstances at issue here.

¶26 Consequently, for all of the foregoing reasons, we conclude that declaratory judgment is proper in this case, and affirm the trial court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.