

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 01-0746
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-4

**IN COURT OF APPEALS
DISTRICT III**

**JANE M. CRAWFORD, INDIVIDUALLY, AND AS
SPECIAL ADMINISTRATOR OF THE ESTATE OF
DONALD G. CRAWFORD,**

PLAINTIFF-APPELLANT,

v.

**PROGRESSIVE NORTHERN INSURANCE COMPANY AND
WAUSAU UNDERWRITERS INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jane Crawford, individually and as special administrator of the estate of her late husband, Donald Crawford, appeals from a judgment declaring that the auto insurance policy issued to the Crawfords by

Progressive Northern Insurance Company does not provide coverage for the damages at issue in this appeal. Jane argues that the policy's exclusionary language is ambiguous and should therefore be construed in favor of coverage. In the alternative, Jane contends that the exclusionary clause is void pursuant to WIS. STAT. § 632.32(4)(a) as a matter of law and public policy.¹ We reject Jane's arguments and affirm the judgment.

BACKGROUND

¶2 The circuit court found the following facts. In March 1999, the Crawfords were involved in an automobile accident with an uninsured motorist. As a result of the collision, Donald was killed and Jane sustained personal injuries. At the time of the accident, the Crawfords were in the process of delivering newspapers for Al Holstin, an acquaintance of theirs. Since late fall of 1997, the Crawfords had arranged with Holstin to deliver his rural newspaper route on two or three weekends per month. In exchange, Holstin paid the Crawfords \$100 for each weekend they delivered newspapers.

¶3 The Crawfords' vehicle was insured under a policy issued by Progressive. Citing exclusionary language in its policy, Progressive subsequently advised Jane that it was not going to pay anything under the policy's terms. Jane commenced the underlying action for declaratory judgment arguing that the policy's exclusionary language is ambiguous and should therefore be construed in favor of coverage. The circuit court declared the language unambiguous and rendered judgment in Progressive's favor. This appeal followed.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

ANALYSIS

¶4 Crawford argues that the trial court erred by declaring that exclusionary language in the auto insurance policy proscribed coverage for the accident. Resolution of this case turns on the interpretation of an insurance contract, a question of law that we review independently, although benefiting from the circuit court's analysis. *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998).

¶5 An insurance policy is construed to give effect to the intent of the parties, expressed in the language of the policy itself, which we interpret as a reasonable person in the position of the insured would understand it. *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. The words of an insurance policy are given their common and ordinary meaning. *Id.* Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law. *Id.* This is to avoid rewriting the contract by construction and imposing contract obligations that the parties did not undertake. *Id.* Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation. *Danbeck*, 2001 WI 91 at ¶10. If the language is ambiguous, it is construed in favor of coverage. *Id.*

¶6 The Crawfords' policy contains three identical exclusions in its uninsured motorist, comprehensive and medical payment provisions. The exclusion provides:

Coverage under this Part III is not provided for bodily injury sustained by any person while using or occupying:

1. a covered vehicle while being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools.

Jane argues that this exclusionary language is ambiguous pursuant to this court's analysis in *Ennis v. Western Nat. Mut. Ins. Co.*, 225 Wis. 2d 824, 593 N.W.2d 890 (Ct. App. 1999). We disagree.

¶7 There, Michelle Ennis was injured in an automobile accident that occurred as she accompanied her father, William, on his newspaper delivery route. *Id.* at 828. Michelle argued that an exclusion to liability coverage under the insurance policy applied to make her father an uninsured motorist, thus allowing her to collect \$400,000 in uninsured motorist benefits. *Id.* at 829-30.

¶8 The exclusion at issue in *Ennis* proscribed coverage for liability arising out of a person's "ownership or operation of a vehicle while it is being used to carry persons or property for a fee." *Id.* at 828. The *Ennis* court concluded that the exclusion was ambiguous because the reference to "fee" could be interpreted as applying to either "any use of a vehicle to transport property when there is any payment to the insured, including wages, or only when there is a payment specifically for the particular act of transporting property." *Id.* at 832. The exclusion was ultimately construed in favor of liability coverage for William, thus precluding Michelle from collecting uninsured motorist benefits.

¶9 Here, unlike *Ennis*, the exclusion specifies that coverage is not provided for injuries sustained while a vehicle is being used to carry persons or property "for compensation or a fee, including ... delivery of ... newspapers." We must therefore consider whether this language is susceptible to more than one reasonable interpretation. *Danbeck*, 2001 WI 91 at ¶10.

¶10 When read in context, the exclusion targets any payment of money, whether described as compensation or a fee. The identical exclusionary language appears in three different policy provisions. The recurrence of this exclusion in conjunction with its specific reference to delivery of newspapers advises the reader that Progressive would provide no coverage for injuries sustained while a vehicle was being used to deliver newspapers for payment. Because the accident occurred while the Crawfords were delivering newspapers for compensation, their claim is unambiguously excluded from coverage.²

¶11 In the alternative, Jane contends that the exclusion is void pursuant to WIS. STAT. § 632.32(4)(a) as a matter of law and public policy. Section 632.32(4)(a) mandates that every policy of automobile insurance issued in the state include uninsured motorist coverage. However, WIS. STAT. § 632.32(5)(e) states that “[a] policy may provide for exclusions not prohibited by sub. (6) or other applicable law.” Based on this statutory language, our supreme court “has fashioned a two-part test to determine the validity of a particular exclusion.” *Blazekovic v. City of Milwaukee*, 2000 WI 41, ¶12, 234 Wis. 2d 587, 610 N.W.2d 467.

² Jane contends that the \$100 payment per weekend did not constitute a fee or compensation because it did not cover expenses. Although the \$100 per weekend may have seemed inadequate, it was the amount agreed to by Holstin and the Crawfords. The payment constituted compensation for the Crawfords’ delivery service.

Challenging what she claims is an unlimited scope to the exclusion at issue, Jane also cites various hypotheticals involving use of a vehicle for charitable purposes such as delivering baked goods for sale at a church bazaar. As the trial court recognized, however, courts cannot reach decisions based upon hypothetical facts. *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 808, 813-814, 456 N.W.2d 597 (1990). In any event, the specific activity of delivering newspapers for compensation was unambiguously excluded from coverage.

¶12 First, we must decide whether the exclusion fits the description of any of the enumerated prohibitions of WIS. STAT. § 632.32(6).³ If it does, the exclusion is invalid. Otherwise, we proceed to the second part of the test, which requires that we examine any “other applicable law” that may prohibit the exclusion. *Id.* at 594-95. “Absent any other applicable law prohibiting the exclusion, it remains valid.” *Id.* at 595.

³ WISCONSIN STAT. § 632.32(6) provides:

(a) No 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.

(b) No policy may exclude from the coverage afforded or benefits provided:

1. Persons related by blood, marriage or adoption to the insured.

2. a. Any person who is a named insured or passenger in or on the insured vehicle, with respect to bodily injury, sickness or disease, including death resulting therefrom, to that person.

b. This subdivision as it relates to passengers, does not apply to a policy of insurance for a motorcycle ... or a moped ... if the motorcycle or moped is designed to carry only one person and does not have a seat for any passenger.

3. Any person while using the motor vehicle, solely for reasons of age, if the person is of an age authorized to drive a motor vehicle.

4. Any use of the motor vehicle for unlawful purposes, or for transportation of liquor in violation of law, or while the driver is under the influence of an intoxicant or a controlled substance or controlled substance analog ... or a combination thereof, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or any use of the motor vehicle in a reckless manner.

(c) No policy may limit the time for giving notice of any accident or casualty covered by the policy to less than 20 days.

¶13 Turning to the present case, it is apparent that the exclusion does not fall under any of the enumerated prohibitions of WIS. STAT. § 632.32(6). With respect to the second part of the test, Jane cites *Blazekovic* for the proposition that the legislature intended to “prohibit restrictions of uninsured motorist coverage except in a singular set of circumstances.” *Blazekovic*, 2000 WI at ¶27. *Blazekovic*, however, is distinguishable from the present case because there our supreme court dealt specifically with a “drive other car” exclusion to uninsured motorist coverage.⁴ We do not interpret *Blazekovic* as preventing the exclusion at issue in the present case. Because Jane cites no applicable law prohibiting the exclusion, we conclude that it is valid as a matter of law and public policy.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁴ In *Blazekovic v. City of Milwaukee*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467, our supreme court analyzed whether a “drive other car” exclusion satisfied the requirements of WIS. STAT. § 632.32(5)(j), which 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.
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.

The court ultimately concluded that because the “drive other car” exclusion did not satisfy the statutory requirements of § 632.32(5)(j), it was prohibited under Wisconsin law. *Id.* at ¶42.

