COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2163 **Cir. Ct. No. 00 CV 1287**

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

NATIONAL CASUALTY COMPANY,

PLAINTIFF-RESPONDENT,

V.

ROBERT JAMES JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Robert James Jackson appeals from the judgment, entered on the jury verdict in a declaratory judgment action, awarding National Casualty Company $505.92 in costs to be recovered from him. He challenges the jury instruction and the special verdict question. We affirm.

I. BACKGROUND

¶2 On May 25, 1998, Jackson was standing on a street, in the vicinity of a van, when he was struck and injured by another automobile. After Jackson settled with the tortfeasor's insurer for the tortfeasor's policy limit of $25,000, he filed a claim against National Casualty, the insurer providing $50,000 underinsured motorist coverage for the van.

¶3 Under the National Casualty policy, underinsured motorist coverage was available to anyone occupying the van while it was "out of service because of its breakdown, repair, servicing, loss or destruction."[1] The policy's underinsured motorist endorsement defines "occupying" as "in, upon, getting in, on, out or off." Jackson contended that he had been "occupying" the van at the time of the accident.

¶4 National Casualty sought a declaratory judgment stating that the policy provided no underinsured motorist coverage for Jackson's injuries or, alternatively, that the available underinsured motorist coverage for Jackson's injuries was $25,000. National Casualty's summary judgment motion was denied, and the case went to trial.[2]

¶5 Jackson testified that he had been standing on the street on the driver's side of the van, looking under its hood at the engine and moving some hoses, in an attempt to assist James Leflore in determining the source of smoke

[1] National Casualty did not dispute that the van was "out of service because of its breakdown, repair, servicing, loss or destruction."

[2] Judge Victor Manian denied National Casualty's summary judgment motion; Judge Elsa C. Lamelas presided over the subsequent proceedings.

that Jackson had observed coming from underneath the hood. Kenneth Fiebiger, a witness to the accident, testified that he had observed Jackson and another person standing in front of the van with its hood up, that they had been "bent over looking into the motor compartment" of the van, and that Jackson then "turned and stepped out … to the side of the vehicle and got hit." City of Milwaukee Police Officer Craig Hedgley, who had been at the accident scene, testified: "Mr. Leflore stated that he was looking under the hood of Mr. Jackson's parked van along with Mr. Jackson, that he heard the sound of impact and looked up in time to see Mr. Jackson flying through the air." Leflore testified that he had been unaware of Jackson's presence in the vicinity of the van until he had heard "a lick, a bump" about thirty seconds after he had lifted the hood of the van, and then turned his head and saw Jackson "gliding through the air." Leflore also testified that he did not remember telling Officer Hedgley that Jackson had been looking under the hood with him.

¶6 The jury, asked only to determine whether Jackson had been "an occupant of the van at the time of the accident," found that he had not. In a postverdict motion requesting a new trial in the interest of justice, Jackson challenged the jury instructions and verdict. He alleged that the jury verdict was "contrary to the greater weight of the evidence" and requested the court to find, as a matter of law, that he was an occupant of the van at the time of the accident. He also alleged that the court committed prejudicial error by giving the jury an instruction that "was too broad regarding the possible definitions of 'occupancy' and was therefore potentially confusing and misleading to the jury." The trial court denied the motion without a hearing, based on the record, and judgment was entered in favor of National Casualty.

II. DISCUSSION

A. Standard of Review

¶7 In ***Runjo v. St. Paul Fire & Marine Insurance Co.***, 197 Wis. 2d 594, 541 N.W.2d 173 (Ct. App. 1995), we summarized our standard of review regarding special verdict questions and jury instructions:

> A trial court has wide discretion in framing the special verdict. We shall not reverse unless the question does not fairly represent the material issue of fact to the jury. Similarly, trial courts have wide discretion in deciding what instructions will be given so long as they fully and fairly inform the jury of the principles of law applied to the particular case. Still, a trial court has the duty to present to the jury instructions "adequate to enable it to intelligently perform its function." Misleading instructions and verdict questions which may cause jury confusion are a sufficient basis for a new trial. We test the prejudicial effect of an improperly given instruction by determining whether the jury was probably misled.

Id. at 602-03 (citations omitted).

B. Jury Instruction

¶8 Jackson contends that the trial court erred by instructing the jury that it must decide whether he was "occupying" the van at the time of the accident. He criticizes the instruction's linkage of the term "upon" with the term "occupying," arguing that "[s]ince the common definition of ['occupying'] requires that the person be 'within' the enclosure they [sic] are 'occupying,'… the instruction's repeated use of the term 'occupying' merely served to compound the jury's probable confusion."

¶9 The trial court instructed the jury:

> The defendant, Robert Jackson, claims that he was occupying the van Mr. Leflore was driving on the day of the accident. The question, then, for you, the jury, to

> decide, is whether or not Mr. Jackson was "occupying" the van.
>
> The term "occupying" is defined by the insurance policy as being "in, upon, getting in, on, out, or off" the van. Mr. Jackson's position before you is that at the time of the accident he was occupying the automobile because he was "upon" it.
>
> The law requires that, in determining whether Mr. Jackson was occupying the van, you must consider the nature of the act Mr. Jackson was engaged in at the time of the accident. You must also consider Mr. Jackson's purpose and intent at the time of the accident. The law does not require that Mr. Jackson was actually touching the van at the time of the accident. The law does require that in order for you to conclude that Mr. Jackson was occupying the vehicle at the time of the accident, you must be satisfied to a reasonable certainty by the greater weight of the credible evidence that Mr. Jackson had a connection to the van, and that his connection to the van was so close that he was vehicle-oriented, and therefore occupying the van in the sense of being "upon" it.

¶10 We conclude that the instruction "fully and fairly inform[ed] the jury of the principles of law applied to [Jackson's] case." *See* ***Runjo***, 197 Wis. 2d at 602. It was an accurate statement of the law with specific application to the facts of Jackson's case. Consequently, Jackson's argument has no merit.

C. Rejection of Proposed Special Verdict Question

¶11 Jackson proposed that the court submit the following special verdict question to the jury: "Was Robert Jackson on May 25, 1998 at the time of his accident helping to figure out what was wrong with Ms. LeFlore[']s van?" Jackson contends that the trial court erred in rejecting this proposed question, which he characterizes as "consistent with the material issue in ***Moherek*** [***v. Tucker***, 69 Wis. 2d 41, 230 N.W.2d 148 (1975)]—whether [he] was helping to figure out what was wrong with the van at the time of the accident." He claims that considering his "close physical proximity to the van," an affirmative answer

to his proposed question would have meant that he was "upon" the van and thus covered under the policy, while a negative answer would have meant that he was not "upon" the van and therefore was not covered under the policy.

¶12 National Casualty responds that Jackson's proposed verdict question "does not adequately reflect the law in this area as stated by ***Moherek***." It explains: "The definition of 'occupying' in the insurance policy, and the law interpreting that provision, requires [sic] more than 'helping to figure out' what was wrong with the disabled vehicle." National Casualty is correct.

¶13 In ***Moherek***, the supreme court, construing an automobile insurance policy's uninsured motorist clause, concluded that the word "upon," in relation to the word "occupying," was ambiguous. ***Moherek***, 69 Wis. 2d at 45. Persuaded by the holding of an Ohio case, the court agreed that "[w]hat must be considered … is the nature of the act engaged in at the time and also the purpose and intent of the person injured." ***Id.*** at 46. Additionally, the court adopted the analysis of a New York court: "[A] person has not ceased 'occupying' a vehicle until he has severed his connection with it—*i.e.*, when he is on his own without any reference to it. If he is still vehicle-oriented, as opposed to highway-oriented, he continues to 'occupy' the vehicle." ***Id.*** at 47 (citation omitted). The court also clarified that physical contact with an insured vehicle is not necessary for a finding of coverage under an uninsured motorist clause. ***Id.*** at 47-48.

¶14 Jackson's proposed special verdict question fails to encompass the supreme court's analysis in ***Moherek***. Asking only whether Jackson, at the time of the accident, was "helping to figure out what was wrong" with the van, the question would have directed the jury to address what, essentially, was a non-

issue; it would not have directed the jury to determine whether, under the policy, he was occupying the van. Thus, Jackson's argument has no merit.

D. Special Verdict Question Presented to Jury

¶15 Jackson contends that the trial court erred by asking the jury to determine whether he had been "an occupant of the van at the time of the accident." He maintains that he was "upon" the van at the time of the accident, thus falling within the definition of "occupying," but that common understandings of "occupant" are inconsistent with both his coverage claim and evidence presented at trial in that they would require him to be "within" the van. In support, he cites dictionary definitions of "occupant" and "occupy."

¶16 Citing ***Moherek***, 69 Wis. 2d at 48, Jackson also asserts:

> Wisconsin courts have reached a consensus as to what constitutes being "upon" a vehicle for the purposes of insurance coverage. If a person is struck by an uninsured motorist while trying to solve a mechanical problem with an insured vehicle, and while in close physical proximity to that vehicle, then that person is "upon" that vehicle for the purposes of uninsured motorist coverage.

Arguing that the court erred by failing to frame its special verdict question in terms of whether he was "upon" the van, Jackson maintains that such a formulation "would have been consistent with ***Moherek***, and would have unambiguously presented the material issue for the jury's consideration."

¶17 National Casualty responds that because Jackson failed to challenge the special verdict question in his postverdict motion, he "has therefore waived his right to an appeal of right on this issue." In reply, Jackson concedes that this issue was omitted from his postverdict motion, but he argues that discretionary review of this issue would be "especially appropriate" because he raised his objection to

the question during the instruction and verdict conference, "thereby providing the trial court with an opportunity to correct its alleged error."

¶18 Because Jackson has waived his right to an appeal of right on this issue, we need not address the merits of his argument. We note, however, that his attorney did indeed object to the question at the instruction and verdict conference. Interestingly enough, however, Jackson's attorney did not take exception to "occupant" but, instead, stated that "the problem … is that the verdict question … is couched in terms of 'occupying,' and I think in that situation we need an instruction defining what 'occupying' is." Additionally, we note that waiver of the right to an *appeal of right* on this issue does not deprive us of jurisdiction to exercise our discretion to consider the issue in the interest of justice. *See* ***Hartford Ins. Co. v. Wales***, 138 Wis. 2d 508, 510-11, 518, 406 N.W.2d 426 (1987); WIS. STAT. § 752.35. Thus, continuing our analysis, we effectively reach the merits of Jackson's theory as we address his next argument.

E. Special Verdict Question in Conjunction with Jury Instruction

¶19 Jackson contends that "the jury instruction compounded the misleading nature of the special verdict question," thus further misleading the jury and justifying a new trial. National Casualty responds that "[t]he jury instruction and special verdict [question] employed by the court together state the law in light of the subject provisions from the insurance policy and, therefore[,] 'fairly presented' the issue to the jury."

¶20 The special verdict question asked whether Jackson was "an occupant of the van at the time of the accident." That, standing alone, could have been misleading because, as Jackson fairly argues, common understandings of "occupant" would not correspond to the policy's definition or to ***Moherek***. As we

have explained, however, the trial court's instruction accurately defined "occupying" and properly directed the jury to determine "whether Mr. Jackson was occupying the van." Thus, viewing the special verdict question and the jury instruction together, we are not convinced that the jury was misled or confused by the special verdict's use of the term, "occupant." Accordingly, the verdict stands. *See* ***Runjo***, 197 Wis. 2d at 603.

By the Court.—Judgment affirmed.

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