COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

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. 2004AP1921

Cir. Ct. No. 2003CV2887

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

ETHEL M. PAYNE AND FLETCHER H. PAYNE,

PLAINTIFFS,

MIKE LEAVITT,[1] SECRETARY OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

ACUITY, A MUTUAL INSURANCE COMPANY F/N/A HERITAGE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

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[1] When this action was filed, Tommy G. Thompson was the Secretary of the Department of Health & Human Services. He resigned and Mike Leavitt is now the Secretary. Accordingly, pursuant to WIS. STAT. RULE 803.10(4), Secretary Leavitt is automatically substituted as a party in this action.

ANNETTE PAYNE, AND RIO PAYNE, A MINOR,

DEFENDANTS,

DEPOSITORS INSURANCE COMPANY,

INTERVENING-DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 FINE, J. Depositors Insurance Company appeals from an order granting summary judgment to Acuity, a Mutual Insurance Company f/n/a Heritage Insurance Company. The trial court concluded that injuries Ethel M. Payne sustained when her oxygen tank exploded in a car are covered under Depositors's and Acuity's automobile insurance policies, and not Acuity's homeowner's insurance policy. We affirm.

I.

¶2 The explosion occurred while Annette Payne, Ethel Payne's daughter, was driving her car. Ethel Payne was in the front passenger seat with her portable oxygen tank, and Rio Payne, Ethel Payne's grandson, was in the back seat. Rio Payne flicked a lighter, the oxygen tank exploded, and a fire erupted. Ethel Payne suffered first and second-degree burns on her hands and feet.

¶3 Several insurance policies were potentially in effect at the time of the explosion. Annette Payne had an automobile insurance policy with Acuity that had a per-person liability limit of $50,000. She also had a homeowner's policy with Acuity that had a per-accident personal liability limit of $300,000. Ethel Payne, and her husband, Fletcher Payne, had an automobile insurance policy with Depositors that provided $300,000 in underinsured-motorist coverage.

¶4 Ethel and Fletcher Payne sued Acuity, Annette Payne, and Rio Payne.[2] They alleged that Ethel Payne's injuries were caused by: (1) Rio Payne's negligent handling of the lighter, and (2) Annette Payne's negligent supervision of Rio Payne. They further alleged that the accident was covered by Annette Payne's homeowner's insurance or, in the alternative, her automobile insurance.

¶5 Depositors moved to intervene in order to assert that Ethel Payne's automobile insurance did not cover the accident. It also requested an order "bifurcating insurance coverage issues … and staying proceedings until insurance coverage issues have been resolved." Pursuant to a trial-court order, Depositors was allowed to intervene as a defendant, and the insurance-coverage issues were bifurcated from the liability and damages issues.

¶6 Annette Payne was deposed. She testified that her mother had emphysema and that for years, when her mother went anywhere in a car, she used a portable oxygen tank to help her breathe. On the day of the explosion, she picked her mother up for a trip to a shopping mall. According to Annette Payne,

[2] The Department of Health & Human Services has a subrogated interest in Ethel Payne's recovery by virtue of payments made through the Medicare program. The Department is not a party to this appeal.

while she was driving to the mall, she heard a whistling sound coming from the oxygen tank. Her mother made an adjustment to the tank and the whistling stopped. Annette Payne further testified that, at some point during the trip, Rio Payne told her that he saw smoke, but that she did not see or smell any smoke. Three or four minutes later, the oxygen tank exploded. Annette Payne claimed that she did not know Rio Payne had a lighter.

¶7 Rio Payne was also deposed. He testified that, on the way to the shopping mall, he heard a whistling noise, which stopped after his grandmother straightened the oxygen tank. According to Rio Payne, he then told his mother that he saw smoke. He further testified that, while he was in the car he was playing with the lighter and the oxygen tank exploded.

¶8 Edward M. Schaefer, an engineer with Schaefer Engineering, submitted a report after reviewing the deposition testimony and photographs of the car. He opined that the car was not the source of ignition; rather, the oxygen tank provided the fuel for the fire, and Rio Payne ignited the fire by playing with the cigarette lighter.

¶9 Acuity then sought summary judgment that Annette and Rio Payne were covered under its automobile policy and the underinsured provision in Depositors's automobile policy because, it alleged, Ethel Payne's injuries arose out of the use of the car.[3] *See **Kemp v. Feltz***, 174 Wis. 2d 406, 414–415, 497 N.W.2d 751, 755 (Ct. App. 1993) (injury must have a causal connection to inherent use of the car).

[3] Ethel and Fletcher Payne filed a brief supporting Acuity's motion for declaratory judgment. They are not parties to this appeal.

¶10 Depositors opposed Acuity's motion, and sought a declaration that the accident was covered under Acuity's homeowner's policy, not the automobile policies, because Ethel Payne's injuries were not related to the use of the car.

¶11 The trial court denied Depositors's motion, and granted summary judgment to Acuity. It concluded that Ethel Payne's injuries arose out of the use of the car, and that the use of the car was causally connected to the injuries:

> What we need to look at is whether this particular use is reasonably expected under the normal use of the vehicle, or -- as opposed to an incidental, unrelated use of the vehicle.
>
> ….
>
> The use of the vehicle had to have a causal connection to the injury.
>
> Now, the particular facts and circumstances of -- in this case that are not in dispute is that the actual operator used this vehicle on more than one occasion, with some frequency, it appears, to transport this woman and the oxygen, and that was a regular use of the vehicle, of this vehicle, by the actual operator.
>
> And that the particular conditions of the vehicle created an opportunity for this incident, in that it was a very small, closed area.
>
> And certainly, combustion has to do with -- would have to do with the nature of the space around it and how much oxygen, air, was available to the vehicle.
>
> If it was a house, it may not even have combusted. I mean, if it was an open air situation, there may not have been an incident at all.
>
> So I think it is relevant that it was in this closed environment and that it was used for this transportation on a regular basis; and therefore, it was the use of the vehicle -- this use of the vehicle was reasonably expected, and it did have a causal connection to the injury.

The trial court thus concluded that Ethel Payne's injuries were covered under Acuity and Depositor's automobile insurance policies. It further concluded that Ethel Payne's injuries were not covered under Acuity's homeowner's policy, and dismissed all claims under that policy. After the trial court's ruling, Acuity tendered its automobile policy limits of $50,000, and the trial court dismissed Acuity, Annette Payne, and Rio Payne.

II.

¶12 As we have seen, the trial court decided this case on summary judgment. Thus, our review is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." WIS. STAT. RULE 802.08(2).

¶13 Depositors asserts that the trial court should not have decided this case on summary judgment because multiple inferences can be drawn from the undisputed facts. *See* ***Ricchio v. Oberst***, 76 Wis. 2d 545, 551, 251 N.W.2d 781, 784 (1977) ("Summary judgment … should not be granted … where reasonable inferences can be drawn from undisputed facts that would lead to alternative and opposite results.") (quoted source omitted). It claims that a jury needs to evaluate the evidence to determine whether Ethel Payne's injuries were causally related to the use of the car. We disagree. Depositors is merely trying to recast the coverage issue as an issue of fact. The only allegedly "competing inference" it points to is whether Ethel Payne's injuries are covered under the automobile policies or the homeowner's policy, and application of insurance-policy language to undisputed

facts is an issue of law. ***Novak v. American Fam. Mut. Ins. Co.***, 183 Wis. 2d 133, 136, 515 N.W.2d 504, 505 (Ct. App. 1994). Thus, summary judgment is an appropriate method to determine insurance policy coverage. ***Home Ins. Co. v. Phillips***, 175 Wis. 2d 104, 109, 499 N.W.2d 193, 196 (Ct. App. 1993). Accordingly, we turn to the issue of whether Ethel Payne's injuries are covered under the automobile insurance policies or the homeowner's insurance policy.

A. *Automobile Insurance*

¶14 As we have seen, Annette Payne had an automobile insurance policy with Acuity. As material, the policy provided: "**We** will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** *resulting from the* ownership, maintenance or *use*, including loading and unloading, *of a car* or **utility trailer**." (Bolding in original; italics added.) Ethel and Fletcher Payne had underinsured-motorists coverage under their automobile policy with Depositors. As relevant, that policy provided:

> A. 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."*

(Italics added.) Both of these policies contain similar "arising out of the use" clauses. Thus, the issue is whether Annette Payne's liability for the explosion arose out of the "use" of her car. This requires us to engage in a two-step analysis: (1) whether Annette Payne was "using" her car as that term is defined by

Wisconsin case law; and, if Annette Payne was "using" her car, (2) whether there was a causal connection between Annette Payne's "use" of the car and Ethel Payne's injuries. *See* ***Kemp***, 174 Wis. 2d at 414–415, 497 N.W.2d at 755. We address each step in turn.

¶15 Neither automobile insurance policy defines the term "use." As a practical matter, however, an "arising out of the use" clause is standard in many automobile liability policies. "The words 'arising out of the use' are very broad, general and comprehensive terms" that should be broadly construed in favor of coverage. ***Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.***, 95 Wis. 2d 215, 225, 290 N.W.2d 285, 290 (1980). The interpretation of such a clause, however, is not unlimited. *See* ***id.***, 95 Wis. 2d at 225, 290 N.W.2d at 291. The alleged "use" of the car must be reasonably consistent with the car's inherent nature. *See* ***Thompson v. State Farm Mut. Auto. Ins. Co.***, 161 Wis. 2d 450, 462, 468 N.W.2d 432, 435 (1991).

¶16 Here, the explosion happened while Annette Payne was driving Ethel Payne to a shopping mall. Transporting passengers is, obviously, consistent with the inherent nature of a car. *See* ***Kemp***, 174 Wis. 2d at 414, 497 N.W.2d at 754 (use of truck "as a means of transportation" consistent with truck's inherent use); *cf.* ***Tomlin***, 95 Wis. 2d at 225, 290 N.W.2d at 290 (insured's stabbing of police officer who stopped his car not consistent with inherent use of a car). It can also be reasonably expected that, in addition to passengers, the necessary incidentals, such as portable medical supplies for passengers for whom they are necessary, will be transported in the car. Accordingly, we conclude that Annette Payne was "using" her car at the time of the explosion. We thus turn to the issue of causation.

¶17 Depositors contends that Annette Payne's "use" of the car is not causally connected to Ethel Payne's injuries because neither the car nor Annette Payne's driving caused the explosion. It contends that the explosion could have happened anywhere, and thus argues that, other than occurring in the car, there is no connection between the car and the explosion. To support this argument, it points to ***Saunders v. National Dairy Products Corp.***, 39 Wis. 2d 575, 159 N.W.2d 603 (1968), and ***Snoufer v. Williams***, 106 Wis. 2d 225, 316 N.W.2d 141 (Ct. App. 1982). We disagree.

¶18 In ***Saunders***, a truck driver slipped and fell on an icy loading dock after he got out of his truck to see if the truck was in the proper position for unloading cargo. ***Id.***, 39 Wis. 2d at 580, 159 N.W.2d at 605. The injuries sustained from falling on the ice were held to be not causally connected to the truck's use: "the presence of the ice … caused plaintiff's injury. At most, the insured vehicle merely provided him with the means to transport himself to [the] premises, where independent forces caused him to slip and fall." ***Id.***, 39 Wis. 2d at 582–583, 159 N.W.2d at 607.

¶19 Similarly, in ***Snoufer***, a passenger in a truck was shot when a homeowner fired a pistol at the passenger's two friends, who had just vandalized the homeowner's mailbox. ***Id.***, 106 Wis. 2d at 226–227, 316 N.W.2d at 142. We held that the injuries were not caused by the driver's use of the truck. Rather, the injuries were caused by the passenger's friends; actions that were wholly independent from the use of the truck. ***Id.***, 106 Wis. 2d at 229, 316 N.W.2d at 143.

¶20 The focus of our inquiry is on the risk for which coverage has been afforded. ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 295, 481 N.W.2d 660, 664

(Ct. App. 1992). That is, "our inquiry is whether the vehicle's connection with the activities which gave rise to the injuries is sufficient to bring those general activities, and the negligence connected therewith, within the risk for which the parties to the contract reasonably contemplated there would be coverage." ***Ibid.*** In both ***Saunders*** and ***Snoufer***, forces unrelated to the inherent use of a vehicle caused the injuries. Here, however, transporting a passenger with medical supplies she needs for her mobility is consistent with a car's "use" as was the transporting of a dog in ***Trampf v. Prudential Property & Casualty Co.***, 199 Wis. 2d 380, 544 N.W.2d 596 (Ct. App. 1996).

¶21 In ***Trampf***, a man left his dogs in the back of a jeep while he went into a restaurant. ***Id.***, 199 Wis. 2d at 383, 544 N.W.2d at 597. One of the dogs leaned over and bit a woman pedestrian in the face. ***Id.***, 199 Wis. 2d at 383, 544 N.W.2d at 597–598. In determining whether the dog bite arose out of the "use" of the jeep, we recognized that:

> In considering whether a particular incident falls within an expected use of a vehicle, the fact that a negligent act was not foreseen or expected is not determinative. "The fact that the activities that occurred here … could have occurred and the accident taken place without the use of the vehicle is irrelevant."
>
> As long as a causal connection exists between the injury and the risk for which coverage is provided, it is not necessary for the vehicle to have caused the injuries. The accident producing the injury must simply bear a causal relationship to the inherent use of the vehicle.

Id., 199 Wis. 2d at 389, 544 N.W.2d at 600 (quoted source and citations omitted). We thus concluded that transporting dogs was consistent with the "use" of a jeep, and that the injuries from the dog bite were an expected risk of that "use." ***Id.***, 199 Wis. 2d at 389–390, 544 N.W.2d at 600. Similarly here, the transportation of Ethel Payne and her oxygen tank was within the reasonable contemplation of the

parties. The connection between Annette Payne's "use" of her car to transport Ethel Payne and her oxygen tank is sufficiently connected to Ethel Payne's injuries. Accordingly, the trial court correctly concluded that the automobile policies covered Ethel Payne's injuries.

B. *Homeowner's Insurance*

¶22 As we have seen Annette Payne had a homeowner's insurance policy with Acuity that provided personal liability coverage:

> **COVERAGE E PERSONAL LIABILITY**
>
> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> **1.** Pay up to our limit of liability for the damages for which the **insured** is legally liable.

(Bolding in original.) The homeowner's policy also had an exclusion for bodily injury arising out of the use of a motor vehicle:

> **1. Coverage E Personal Liability and Coverage F Medical Payments to Others** do not apply to **bodily injury** or **property damage**:
>
> ....
>
> e. Arising out of:
>
> (1) *The* ownership, maintenance, *use*, loading or unloading *of motor vehicles* or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an **insured**.

(Bolding in original; italics added.) Depositors concedes on appeal that the "arising out of use" analysis applies to the homeowner's policy. As we have seen,

the explosion arose out of Annette Payne's "use" of the car. Accordingly, the exclusion bars recovery under the homeowner's policy.

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.