COURT OF APPEALS DECISION DATED AND FILED

May 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 02-0063 **Cir. Ct. No. 01-CV-38**

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

LISA WALBURG, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. MENTE AND DONNA M. MENTE, LORI BINDER, LYNN KUSS, AND JOHN T. MENTE,

PLAINTIFFS-APPELLANTS,

V.

ROGER M. SKRZECZKOSKI, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, MILWAUKEE CASUALTY INSURANCE COMPANY, TOUCHPOINT HEALTH PLAN,

DEFENDANTS,

RANDOLPH A. PETERS,

DEFENDANT-CO-APPELLANT,

WAUSAU-STETTIN MUTUAL INSURANCE COMPANY AND PROGRESSIVE NORTHERN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed in part and reversed in part*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. Randolph Peters and the Estate of John and Donna Mente appeal summary judgment granted to Progressive Northern Insurance Company and Wausau-Stettin Mutual Insurance Company. The circuit court reasoned that Peters's automobile liability policy through Progressive did not cover the accident that occurred when the trailer detached from a pickup truck and collided with John and Donna Mente's vehicle because Peters was not "using" a motor vehicle within the meaning of the policy when he loaded and attached the trailer to the pickup truck prior to the accident. The circuit court also concluded that Peters's homeowner's insurance through Wausau-Stettin did not cover the accident because the policy excluded coverage for accidents resulting from the use of an automobile. Because Peters's attaching the trailer to the pickup truck was an act reasonably consistent with a contemplated use of the truck, *i.e.*, hauling, his acts constitute "use" of a motor vehicle. Additionally, because the accident is alleged to have arisen out of that use, we conclude that the Progressive policy provides coverage, if Peters's negligence is proven. Accordingly, we reverse the circuit court's summary judgment order with regard to Progressive. However, we affirm the circuit court's judgment with regard to Wausau-Stettin because the homeowner's policy excludes coverage for accidents arising out of the use of a motor vehicle.

BACKGROUND

¶2 Donna Mente and her husband, John Mente, were killed in an automobile accident when a loaded trailer detached from the pickup truck that was

pulling it, crossed the centerline and collided with their vehicle. The truck was owned and operated by Roger Skrzeczkoski. The activities leading up to the accident are as follows.

¶3 Skrzeczkoski met with Peters to discuss the purchase of a small metal farm shed owned by Peters. Peters stored the metal shed in his barn and advertised its sale in an effort to clean out the barn. Skrzeczkoski agreed to purchase the shed, but stated that he would need to make arrangements to pick it up at a later date. Because Peters "had to make room in [his] barn" and sought to sell the shed to do so, he suggested to Skrzeczkoski that he purchase a large trailer, also stored in his barn, to transport the shed. Skrzeczkoski agreed and paid Peters a $1000 down payment for the trailer and shed, with the remainder due at a later date.

¶4 After reaching agreement, Skrzeczkoski backed his truck up to the barn to connect the trailer. Because he did not have the correct size ball hitch, Peters agreed to loan him the required two-inch ball, and he attached it to the hitch. Skrzeczkoski used a pipe wrench to tighten its hold. Together, Peters and Skrzeczkoski pulled the trailer towards the truck and Peters coupled the trailer to the truck's trailer hitch. Peters and Skrzeczkoski loaded the shed materials onto the trailer and Skrzeczkoski drove away.

¶5 Two hours later, while being pulled on the highway, the trailer detached from Skrzeczkoski's truck and collided with the Mentes' vehicle. Following the collision, the trailer was found in a field, the latching mechanism open and the safety "pin" missing. Lisa Walburg, individually and as the Mentes' personal representative, brought a wrongful death suit against Peters and his insurers, Progressive and Wausau-Stettin, on behalf of the Mentes' adult children.

Progressive issued Peters's automobile liability policy and Wausau-Stettin issued Peters's homeowner's policy. Both Progressive and Wausau-Stettin moved for summary judgment on the ground that there was no coverage for the accident under either policy. The circuit court agreed and granted summary judgment to both insurers. Walburg and Peters appeal.

DISCUSSION

Standard of Review.

¶6 We review summary judgment decisions *de novo*, applying the same standards employed by the circuit court. ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 210, 588 N.W.2d 375, 376 (Ct. App. 1998). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ***Smith v. Dodgeville Mut. Ins. Co***., 212 Wis. 2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***

¶7 Interpretation of a written insurance policy is a question of law, which we review without deference to the decision of the circuit court. ***Guenther***, 223 Wis. 2d at 210, 588 N.W.2d at 377.

The Progressive Policy.

¶8 Progressive asserts that the plain language of its automobile policy does not provide coverage for the accident[1] on two grounds: first, Peters is not an "insured person" under subsec. (4) because the trailer that collided with the Mentes is not a "vehicle" as defined by the policy; and second, the policy does not provide coverage for accidents that did not arise out of the "use" of a vehicle. We

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[1] The policy states in relevant part:

> **PART I – LIABILITY TO OTHERS**
>
> **INSURING AGREEMENT – BODILY INJURY**
>
> Subject to the Limits of Liability, if **you** pay a premium for **bodily injury** liability coverage, **we** will pay damages, *other than punitive or exemplary damages*, for **bodily injury** for which an **insured person** becomes legally responsible because of an **accident** arising out of the ownership, maintenance, or use of a **vehicle**.
>
> ………………………………………………………………
>
> **GENERAL DEFINITIONS**
>
> 13. "**Vehicle**" means a land motor vehicle:
>
> a. of the private passenger, pickup body, or sedan delivery type;
>
> ….
>
> **ADDITIONAL DEFINITION**
>
> When used in this Part I, "**insured person**" or "**insured persons**" means:
>
> ….
>
> 4. **you** with respect to an **accident** arising out of the maintenance or use of any **vehicle** with the express or implied permission of the **owner** of the **vehicle**.

do not address whether the policy's definition of a vehicle includes coverage for the trailer[2] because Skrzeczkoski's pickup truck unequivocally fits within the policy's definition of a vehicle, and Peters is covered for his use of any vehicle. Therefore, we confine our inquiry to whether the accident arose out of Peters's "use" of Skrzeczkoski's pickup truck.

¶9 Walburg and Peters contend that Peters's act of attaching the loaded trailer to Skrzeczkoski's truck constituted a "use" of a vehicle warranting coverage under the Progressive policy because the truck pulling the trailer was used to haul goods. In contrast, Progressive argues that Peters did not "use" the truck because he performed only a "service function" by assisting Skrzeczkoski in attaching and loading the trailer.

¶10 The interpretation of an insurance policy is governed by rules of construction that are similar to those applied to other contracts. ***Vogel v. Russo***, 2000 WI 85, ¶14, 236 Wis. 2d 504, 613 N.W.2d 177. If words or phrases in a policy are susceptible to more than one reasonable construction, they are ambiguous, ***Smith v. Atlantic Mutual Insurance Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597, 598-99 (1990), and we will construe the policy as it would be interpreted by a reasonable insured. ***Holsum Foods v. Home Ins. Co.***, 162 Wis. 2d 563, 568-69, 469 N.W.2d 918, 920 (Ct. App. 1991). However, if the policy is not ambiguous, we will not rewrite it by construction to impose liability for a risk the insurer did not contemplate and for which it has not been paid.

[2] Walburg and Peters argue that the policy definition of vehicle is ambiguous because the Limits of Liability clause provides that "[a] **vehicle** and attached trailer are considered one (1) **vehicle**. Therefore, the Limits of Liability will not be increased for an **accident** involving a **vehicle** which has an attached **trailer**." They contend we must interpret this ambiguity against the insurer and conclude that the trailer is a vehicle.

Taylor v. Greatway Ins. Co., 2001 WI 93, ¶10, 245 Wis. 2d 134, 628 N.W.2d 916; ***Smith v. Katz***, 226 Wis. 2d 798, 807, 595 N.W.2d 345, 350 (1999).

¶11 As a practical matter, this type of coverage clause is standard in many automobile liability policies, and it has been previously interpreted by the courts. In ***Lawver v. Boling***, 71 Wis. 2d 408, 238 N.W.2d 514 (1976), the supreme court held that such a policy provision is "very broad, general and comprehensive," thereby concluding it is ambiguous in regard to what type of fact-sets fall within its ambit. *See* ***id.*** at 415, 238 N.W.2d at 518.

¶12 In ***Lawver***, Lawver sustained injuries when he fell from a platform rigged to a pickup truck by a rope and pulley. ***Id.*** at 411, 238 N.W.2d at 516. The rope was tied to Boling's truck and Boling had been moving his truck forward and backward when the rope snapped and Lawver fell. ***Id.*** Boling's automobile liability insurance policy covered damages for bodily injury "arising out of the … use" of the truck. ***Id.*** at 412, 238 N.W.2d at 516. In interpreting the insurance policy, the court established the following test for "use" of a vehicle:

> [W]hether 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 parities to the contract reasonably contemplated there would be coverage. This question is usually resolved by determining whether the alleged "use" is one which is reasonably consistent with the inherent nature of the vehicle.

Id. at 416, 238 N.W.2d at 518.

¶13 Therefore, according to ***Lawver***, the coverage question presented here is whether Peters's attaching the trailer to Skrzeczkoski's pickup was sufficiently connected with an expected use of a pickup truck, such that the risk of the accident was one for which Peters reasonably contemplated coverage. *See* ***id.***

We begin our analysis by considering the expected use of a pickup truck to determine whether attaching a trailer to it is one that is reasonably consistent with the inherent nature of this vehicle. *See* ***id.***

¶14 Several Wisconsin cases have addressed the issue of whether an act is reasonably consistent with the inherent nature of the vehicle. In ***Thompson v. State Farm Mutual Automobile Insurance Co.***, 161 Wis. 2d 450, 459, 468 N.W.2d 432, 435 (1991), the supreme court determined that a deer hunter's use of the bed of a truck to hunt from was consistent with the inherent nature of a truck.[3] In ***Tasker v. Larson***, 149 Wis. 2d 756, 761, 439 N.W.2d 159, 161 (Ct. App. 1989), we determined that leaving one's child in a motor vehicle during a brief errand was also reasonably consistent with the inherent nature of the vehicle. By contrast, a driver's repeated stabbing of a police officer who was removing beer cans from the driver's car was not a type of use reasonably contemplated by the parties to the insurance contract, nor was it consistent with the inherent use of the vehicle; therefore, the assault did not "arise out of the use of" a motor vehicle. ***Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.***, 95 Wis. 2d 215, 225, 290 N.W.2d 285, 290 (1980).

¶15 Additionally, in considering whether a particular act falls within an expected use of a vehicle, it is well settled that an insured does not have to "use" the vehicle in the sense of driving it forward, backing it up or putting it in gear. ***Thompson***, 161 Wis. 2d at 458, 468 N.W.2d at 435. Neither does the insured

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[3] In a similar case, a gun discharged as it was being taken from a vehicle, killing the driver. ***Allstate Ins. Co. v. Truck Ins. Exch.***, 63 Wis. 2d 148, 157-58, 216 N.W.2d 205, 209-10 (1974). The court determined that the loading and unloading of hunting equipment fell within the use of the vehicle. ***Id.***

have to be in direct physical contact with the vehicle. ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 296, 481 N.W.2d 660, 664 (Ct. App. 1992) (citing ***Tasker v. Larson***, 149 Wis. 2d 756, 761, 439 N.W.2d 159, 161 (Ct. App. 1989)). Finally, the fact that a negligent act was not foreseen or expected is not determinative. ***Trampf v. Prudential Prop. & Cas. Co.***, 199 Wis. 2d 380, 389, 544 N.W.2d 596, 600 (Ct. App. 1996). Rather, our inquiry must encompass whether the injury causing "use" is reasonably consistent with the inherent purpose of the vehicle. We conclude that the "use" here is reasonably consistent with the inherent purpose of a truck because trucks are often used for hauling, and Peters attached the trailer to the truck so the truck could haul it.

¶16 Progressive attempts to characterize Peters's act of connecting the trailer as a "service function" and not a "use." Progressive relies on ***U-Cart Concrete of Eugene, Inc. v. Farmers Insurance Co. of Oregon***, 45 Or. App. 149, 607 P.2d 791 (Ct. App. 1980), to support its contention that there is no coverage if Peters provided a service. In ***U-Cart***, a customer had rented a portable cement mixer from U-Cart. U-Cart's employee negligently connected the cement mixer to the customer's vehicle which caused a subsequent one-car accident. Without reasoning through to its conclusion, the Oregon court summarily held that the attachment of a trailer to the customer's vehicle did not constitute "use" of the vehicle, but rather the performance of a "service." ***Id.*** at 152, 607 P.2d at 792.

¶17 Although ***U-Cart*** is not binding authority, we agree that there is a common sense distinction between a "use" of a vehicle and performing a service function that one is in business to provide, as was the case in ***U-Cart***. In our view, persons in the business of providing a paid service function in connection with a vehicle, such as repairing an axle, are not "using" the vehicle. *See e.g.*, ***Yandle v. Hardware Mut. Ins. Co.***, 314 F.2d 435 (9th Cir. 1963). However, Peters was not

in the business of providing services for pay. Furthermore, it is not apparent to us that one cannot "use" a vehicle while at the same time provide a "service" without charge. For example, "service" is defined as a "contribution to the welfare of others." WEBSTER'S NEW COLLEGIATE DICTIONARY 1059 (1977). Therefore, if the driver of a car gives his neighbor's child a ride home from school, he would be providing a service to his neighbor, but he would also be using his vehicle. Accordingly, we conclude that Progressive's arguments are not persuasive here.

The Wausau-Stettin Policy.[4]

¶18 In an attempt to secure coverage under the Wausau-Stettin homeowner's policy, Peters argues that there remains a factual issue as to whether his negligent maintenance of the trailer and his failure to have and maintain proper equipment constitute independent concurrent causes of the accident.[5] Accordingly, he requests that we remand to the circuit court to determine whether conduct outside of the "ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading, or unloading" of Skrzeczkoski's truck caused the accident to occur. We decline to do so.

¶19 The Wausau-Stettin policy provides coverage for "all sums for which any **insured** is liable by law because of **bodily injury** or **property damage** caused by an **occurrence**." An occurrence is defined as "an accident, including

[4] Because Walburg concedes that if there is coverage under the Progressive policy, there cannot be coverage under the Wausau-Stettin policy, we address only the arguments set forth by Peters under the Wausau-Stettin policy.

[5] On appeal, Peters does not assert the truth of this conduct or allege any specific facts to support his assertion that he negligently maintained the trailer and failed to keep and maintain proper equipment for the trailer. He relies solely on the plaintiffs' amended complaint that alleged this negligent conduct.

repeated exposures to similar conditions, that results in **bodily injury** or **property damage**." The policy excludes coverage for "**bodily injury** or **property damage** which results directly or indirectly from … [t]he ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading, or unloading of **motorized vehicles** by any person."

¶20 In ***Bankert v. Threshermen's Mututal Insurance Co.***, 110 Wis. 2d 469, 329 N.W.2d 150 (1983), the supreme court considered a similar exclusion in a farm owner's policy and whether the negligent entrustment of a motor vehicle was an independent cause, separate from the operation of a motor vehicle. The court reasoned as follows:

> [T]he company becomes legally liable to pay only when the insured incurs liability for personal injury or property damage caused by an "occurrence." An occurrence is defined as an accident. This is what is insured against—— not theories of liability. Accordingly, when the event insured against involves an automobile …, the exclusion applies. There is no coverage.

Id. at 480, 329 N.W.2d at 154-55. Accordingly, the court held that because the two theories of liability were intimately connected to an excluded occurrence—an automobile accident resulting in bodily injury—all coverage was excluded. ***Id.*** at 484, 329 N.W.2d at 157.

¶21 For coverage to exist under the Wausau-Stettin policy, Peters's alleged conduct must be an independent concurrent cause, provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable. *See* ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis. 2d 322, 332, 531 N.W.2d 376, 380 (Ct. App. 1995). We conclude that the alleged negligent maintenance of the trailer and equipment do not open the door to

coverage because, as in ***Bankert***, these acts are irrelevant without the use of the truck.

Waiver and Estoppel.

¶22 And finally, Peters contends that Wausau-Stettin waived the automobile exclusion and is therefore estopped from asserting it. Peters's contention centers on an alleged statement by a Wausau-Stettin representative following the accident that he "had coverage" and because Wausau-Stettin hired a lawyer to represent Peters at a deposition without first issuing a reservation of rights letter. We are not persuaded by this argument.

¶23 Peters concedes that the general rule in Wisconsin regarding the doctrine of waiver or estoppel provides that conduct or action of an insurer or its agent may not expand the scope of coverage or create coverage where none existed under a policy. *See* ***Shannon v. Shannon***, 150 Wis. 2d 434, 450-51, 442 N.W.2d 25, 33 (1989); ***Ahnapee & W. Ry. Co. v. Challoner***, 34 Wis. 2d 134, 142-43, 148 N.W.2d 646, 650 (1967) ("[Waiver and estoppel] are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom." (citation omitted)). Peters attempts to circumvent the rule on the following grounds: (1) the presence of a factual dispute regarding whether the exclusion applies renders the rule inapplicable and (2) representations made by the insurance company unfairly prejudiced Peters's ability to develop a defense.

¶24 With regard to his first argument, Peters states only that a factual dispute "is present" regarding the cause of the accident. However, he fails to cite any facts to substantiate his claim that conduct outside the "ownership, operation, maintenance, use … loading or unloading of motorized vehicles by any person"

caused the automobile accident to occur. We decline to "embark on our own search of the record, unguided by references and citations to specific testimony," to look for specific evidence to support the factual basis underlying Peters's argument. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990). Furthermore, Peters does not cite any legal authority to support his claim that the presence of a factual dispute causes the doctrines of waiver and estoppel to apply. We do not consider arguments unsupported by citations to authority. ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

¶25 With regard to his second ground, we disagree with Peters that "fairness" principles estop Wausau-Stettin from asserting the exclusion. Representations made by the insurance company did not "diminish" Peters's ability to obtain a factual determination in his favor or prejudice his defense. The record demonstrates that Wausau-Stettin hired an attorney to represent Peters at his deposition taken on April 20, 2001. Peters was added as a defendant on May 4, 2001, received a reservation of rights letter from Wausau-Stettin on June 6, 2001, and retained independent counsel. We fail to see how Wausau-Stettin prejudiced Peters's ability to develop a defense. The automobile exclusion defines the scope of coverage, and it has not been waived.

CONCLUSION

¶26 Because Peters's attaching the trailer to the pickup truck was an act reasonably consistent with a contemplated use of the truck, *i.e.*, hauling, his acts constitute "use" of a motor vehicle. Additionally, because the accident is alleged to have arisen out of that use, we conclude that the Progressive policy provides coverage if Peters's negligence is proven. Accordingly, we reverse the circuit

court's summary judgment order in regard to Progressive. However, we affirm the circuit court's judgment with regard to Wausau-Stettin because the homeowner's policy excludes coverage for accidents arising out of the use of a motor vehicle.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.

¶27 DYKMAN, J. (*concurring*). The majority cites the test we are to use in deciding whether a person was using a motor vehicle. This test was originally set out in ***Lawver v. Boling***, 71 Wis. 2d 408, 416, 238 N.W.2d 514 (1976):

> [W]hether 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. This question is usually resolved by determining whether the alleged "use" is one which is reasonably consistent with the inherent nature of the vehicle.

¶28 This test is really two tests. The first test is an inquiry into what the parties to the contract contemplated about the risk that eventually became reality. But this test is "usually" determined by examining whether the use, which was a cause of the accident, was reasonably consistent with the inherent nature of the vehicle. ***Id.*** Those tests can, and in the case before us, do lead to different conclusions. Thus, which test we use dictates the result of this case.

¶29 Peters bought liability insurance which covered him while he was using another motor vehicle with the owner's permission. So it is Peters's use of Skrzeckoski's truck that we examine. Peters was using Skrzeckoski's truck to pull a trailer. He wasn't driving the truck, but he attached the trailer to the truck, and attaching a trailer to a truck is certainly consistent with the inherent nature of a truck. The only question is whether he was doing it negligently. If he was, Peters's policy covered the risk that eventually happened.

¶30 But if we examine the situation from the point of view of Peters and his insurance company when Peters purchased his policy, the answer is different. Did Peters and Progressive Northern Insurance Company reasonably contemplate that Peters's newly purchased policy would provide coverage for an accident that occurred far away from Peters in a non-owned vehicle driven by a stranger? Assuming that insurance companies have dreams, not in Peters's or Progressive's wildest dreams did they contemplate that Peters was purchasing insurance to cover this risk.

¶31 What has happened is that courts have shifted from ***Lawver***'s "usually determined" test to an "always determined" test. In ***Thompson v. State Farm Mut. Auto. Ins.***, 161 Wis. 2d 450, 468 N.W.2d 432 (1991), the court quoted the portion of ***Lawver*** we have quoted, but focused on the use of the truck: "That is, Mr. Yndestad's 'use' of the bed of the truck to hunt must be reasonably consistent with the inherent nature of the truck." ***Id.*** Had the court focused on whether the parties to the insurance contract contemplated that the automobile policy would cover death by gunshot, the result would probably have been different. I conclude that although we continue to cite ***Lawver***'s "contemplation of the parties" language, we really decide cases such as this by inquiring only into whether the act of the defendant is reasonably consistent with the inherent nature of the vehicle. We should say that this change has occurred rather than confusing the issue by continuing to use a two-test rule which inquires into the intent of the parties to the insurance contract.

¶32 We have done just that. In ***Van Dyn Hoven v. Pekin Ins. Co.***, 2002 WI App 256, 258 Wis. 2d 133, 653 N.W.2d 320, *review dismissed*, 2003 WI 1, 258 Wis. 2d 111, 655 N.W.2d 130 (No. 02-0722), we analyzed a case in which a jogger was pushed into a truck by its driver, stabbed with a hunting knife, and left

dead on a highway. We did not cite ***Lawver*** or consider whether the jogger and her insurance company contemplated this event when the jogger's uninsured motorist policy was purchased, though the answer to that question would have inevitably been "no." Instead, in a short opinion, we concluded that the truck driver's actions were not consistent with the inherent use of a vehicle.

¶33 Were I writing for the majority, I would conclude that ***Lawver***'s "contemplation of the parties" test has slipped into obscurity, and that its second test, the "inherent use of the vehicle," is now the test courts are to use. This would clarify the law for cases to come, and not continue what is often a divergence of result depending on which ***Lawver*** test we use. Using the "inherent use of the vehicle" test, I agree with the majority that when Peters attached a trailer to Skrzeckoski's truck, he was using Skrzeczkoski's truck. Because the majority reaches this result but continues the confusion caused by conflicting tests, I respectfully concur with the majority's result but not with its reasoning. I agree with the majority that once we decide that Peters's auto policy covers this accident, it is axiomatic that his homeowner's policy does not.

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¶34 LUNDSTEN, J. (*concurring*). I join the majority opinion with the exception of paragraphs 16 and 17. The majority correctly determines that, under the longstanding test in Wisconsin, attaching a trailer to a truck is "use" of the truck as that term is used in the automobile insurance policy because the action is "reasonably consistent with the inherent nature of the vehicle." *See* ***Lawver v. Boling***, 71 Wis. 2d 408, 416, 238 N.W.2d 514 (1976) (footnote omitted). This "use" test is relatively simple and provides broad coverage. Progressive Northern Insurance Company has not presented a persuasive reason to add to this test the limitation that we should also look to whether the actor is paid for the action or actions that allegedly constitute "use." I find no support in Wisconsin law for such an approach to determining "use." Moreover, I have reviewed the cases cited by Progressive and in the majority opinion and find those cases unpersuasive. In my view, cases such as ***Yandle v. Hardware Mutual Insurance Co.***, 314 F.2d 435 (9th Cir. 1963); ***U-Cart Concrete of Eugene, Inc. v. Farmers Insurance Co. of Oregon***, 607 P.2d 791 (Or. Ct. App. 1980); and the cases cited in ***U-Cart***—***International Business Machines Corp. v. Truck Insurance Exchange***, 474 P.2d 431 (Cal. 1970); ***Travelers Insurance Co. v. Northwestern Mutual Insurance Co.***, 104 Cal. Rptr. 283, 27 Cal. App. 3d 959 (1972); and ***State Farm Mutual Automobile Insurance Co. v. Pan American Insurance Co.***, 437 S.W.2d 542 (Tex. 1969)—confuse coverage with negligence issues.

¶35 In many situations, the suggested distinction poses no apparent problem. However, I am concerned about unintended consequences. For example, it appears that the end result of such an approach to "use" in some cases

will be that harmed vehicle owners with blue ribbon automobile policies will be left high and dry if they hire someone to "use" their vehicle and the hired person is not insured or is underinsured. In my view, we ought to simply apply the well-established test and leave it at that. If an additional limitation on coverage, such as the one suggested by Progressive, is to be imposed, it should be done with great care and a more persuasive explanation than presented by Progressive in this case.

¶36 I am authorized to state that Judge Charles P. Dykman joins in this concurrence.