**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 21, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP528** **Cir. Ct. No. 2013CV307**

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

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**JOANN PECHACEK,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**TRAVIS M. HAZELTON AND MEMORIAL HEALTH CENTER,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. State Farm Mutual Automobile Insurance Company appeals a summary judgment in this dispute regarding uninsured motorist (UM) coverage. Joann Pechacek has three motor vehicle insurance policies with State Farm, one for each vehicle she owns. Following the accident at issue, State Farm paid Pechacek an amount equal to the per-person limit of UM coverage available under the policy describing the vehicle in which Pechacek was riding at the time of the accident. State Farm contends the circuit court erred when it determined Pechacek was entitled to "stack" UM coverages provided by the other two motor vehicle policies. Because a "drive other car" exclusion in these two policies precludes coverage for the accident at issue (and therefore precludes stacking of the three policies' coverage limits), we agree with State Farm and reverse.

## BACKGROUND

¶2 Pechacek was injured on July 20, 2012. She was riding as a passenger in her 2001 Lexus RX 300 automobile when the vehicle was struck by an uninsured motorist. The Lexus was described in an insurance policy State Farm issued to Pechacek. That policy provided $100,000 per person in UM coverage. State Farm has paid Pechacek the per-person UM limit under the Lexus policy.

¶3 At the time of the accident, Pechacek was the named insured on two other State Farm policies, one describing a 2004 Chevrolet Classic and one describing a 2008 Mercedes E350. Like the Lexus policy, the Chevrolet and

Mercedes policies each provided up to $100,000 per person in UM coverage.[1] It is undisputed that Pechacek sustained injuries in the accident exceeding $300,000, which is the aggregate amount of UM coverage provided by the three policies.

¶4 State Farm denied Pechacek's claim that she was entitled to "stack" UM coverage under the three policies, which would have provided Pechacek with an additional $200,000 in UM benefits.[2] Pechacek then commenced this action and filed a motion seeking a declaratory judgment that she was entitled to UM coverage under the Chevrolet and Mercedes policies. State Farm countered with a motion for summary judgment, arguing the "drive other car" exclusion in the relevant policies precluded coverage and those policies also expressly prohibited stacking.[3]

¶5 The circuit court, characterizing the case as a "close call," concluded Pechacek was entitled to coverage under the Chevrolet and Mercedes policies because a series of endorsements State Farm issued reflecting legislative changes between 2009 and 2011 produced ambiguity regarding the ability to stack policy benefits. Prior to 2009, state law authorized anti-stacking provisions, which prohibited insureds from adding the limits of insurance policies covering other motor vehicles to determine the limit applicable to any one accident. *See* WIS. STAT. § 632.32(5)(f) (2007-08). In 2009, the legislature prohibited insurers from

[1] The Lexus, Chevrolet, and Mercedes policies share the same basic policy form, which is known as policy booklet 9849B.

[2] "Stacking is defined as an insured attempting to collect reimbursement for the same loss under several policies." ***Schult v. Rural Mut. Ins. Co.***, 195 Wis. 2d 231, 237, 536 N.W.2d 135 (Ct. App. 1995).

[3] Pechacek later characterized her motion as one for summary judgment. Thus, the case was decided by the circuit court on cross-motions for summary judgment.

including anti-stacking provisions regarding UM coverage in automobile insurance policies.[4] *See* WIS. STAT. § 632.32(6)(d) (2009-10); *see also* 2009 Wis. Act 28, § 3168. In 2011, the legislature reversed course to once again permit anti-stacking provisions. *See* WIS. STAT. § 632.32(5)(f) (2011-12); *see also* 2011 Wis. Act 14, § 23. The circuit court determined that, following the 2011 legislation, State Farm's "attempt to reinstate the anti-stacking provision of the original contract was ineffectual."

¶6 The circuit court declined to issue a definitive ruling on State Farm's arguments regarding whether the Chevrolet and Mercedes policies' "drive other car" exclusion precluded coverage. The court asserted the exclusion "wasn't really the main thrust of … this case," and it noted Pechacek had "paid insurance on all of these vehicles" and "the other car [for purposes of the exclusion] really is intended to be an 'other' car that you're not insuring." However, because Pechacek's Lexus was "in traffic for its intended use," the court rejected Pechacek's argument that the "drive other car" exclusion was inapplicable because she was merely a passenger.

## DISCUSSION

¶7 We review a grant of summary judgment de novo. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

[4] However, the statute allowed insurers to limit the number of motor vehicles for which the limits of coverage could be added to three vehicles. *See* WIS. STAT. § 632.32(6)(d) (2009-10). State Farm adopted such a provision in several endorsements issued in the wake of the legislative changes.

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. § 802.08(2).[5] In this case, neither party contends there are any disputed issues of material fact precluding summary judgment.

¶8 This case also requires that we interpret the Chevrolet and Mercedes insurance policies to determine whether they provide coverage for Pechacek's injuries resulting from the underlying accident. Insurance policy interpretation presents a question of law that we review de novo. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." ***Id.***

¶9 By addressing stacking issues regarding the three separate policies prior to determining whether Pechacek was entitled to coverage under the Chevrolet and Mercedes policies, the circuit court placed the metaphorical cart before the horse. "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. We first examine whether the policy makes an initial grant of coverage. ***Advanced Waste Servs., Inc. v. United Milwaukee Scrap, LLC***, 2015 WI App 35, ¶10, 361 Wis. 2d 723, 863 N.W.2d 634. If so, we then examine the policy's exclusions to determine whether they preclude coverage. ***Id.*** If an exclusion would preclude coverage, we must

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

determine whether there is an exception to the exclusion that reinstates coverage. ***Id.***

¶10 In this case, the relevant insuring language of both the Chevrolet and Mercedes policies provides:

> **Insuring Agreement**
>
> ***We*** will pay compensatory damages for ***bodily injury*** an ***insured*** is legally entitled to recover from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury*** must be:
>
> 1. sustained by an ***insured***; and
>
> 2. caused by an accident that involves the ownership, maintenance, or use of an ***uninsured motor vehicle*** as a motor vehicle.

There is no dispute that, if no exclusion applies, this provision would grant coverage for Pechacek's injuries, as she is an insured who is legally entitled to recover personal injury damages caused by an accident involving an uninsured motor vehicle.[6]

¶11 We therefore turn to examine whether any exclusions in the policies preclude coverage. State Farm argues the "drive other car" exclusion located in the UM provisions of each policy is applicable here. The "drive other car" policy provision, which consists of both an exclusion and an exception to the exclusion, states there is no coverage

> FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY*** RESULTING FROM THE USE OF A MOTOR VEHICLE

[6] Bolded and italicized words and phrases are specifically defined by the relevant policies. Here, there is no dispute that Pechacek is an insured under the Chevrolet and Mercedes policies and that her injuries were caused by an uninsured motor vehicle.

> ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE*** IF IT IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***. This exclusion does not apply to the first ***person*** shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured, for ***bodily injury*** resulting from the use of a motor vehicle not ***owned by*** one or both of them[.[7]]

¶12 Pechacek is a named insured on both the Chevrolet and Mercedes policies. On appeal, she does not appear to dispute that she was "using" the Lexus while riding as a passenger.[8] Moreover, Pechacek does not dispute that she owned the Lexus or that the Lexus did not qualify as "your car" under either the Chevrolet or Mercedes policy.[9] As a result, the only real issue regarding the applicability of the "drive other car" exclusion pertains to the phrase "resulting from the use of a motor vehicle owned by you."

¶13 Pechacek contends this phrase is ambiguous. "Insurance policy language is ambiguous 'if it is susceptible to more than one reasonable interpretation.'" ***Folkman***, 264 Wis. 2d 617, ¶13 (quoting ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150). We

[7] The exclusion was changed immaterially in endorsements State Farm occasionally issued. Pechacek does not respond to State Farm's argument that the "drive other car" exclusion was automatically resuscitated when the legislature repealed WIS. STAT. § 632.32(6)(d) (2009-10), nor does Pechacek address the authorities State Farm cites in support of that argument, which are ***Hanson v. Prudential Property & Casualty Insurance Co.***, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999) and ***Roehl v. American Family Mutual Insurance Co.***, 222 Wis. 2d 136, 585 N.W.2d 893 (Ct. App. 1998). Accordingly, we deem the argument conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[8] In this respect, we note that "[c]ourts have interpreted 'use' broadly" to include "a wide range of non-driving activities." ***Blasing v. Zurich Am. Ins. Co.***, 2014 WI 73, ¶37, 356 Wis. 2d 63, 850 N.W.2d 138.

[9] The phrase "your car" means "the vehicle shown under 'YOUR CAR' on the Declarations Page." Thus, the phrase "your car" refers only to the Chevrolet and Mercedes vehicles under their respective policies.

enforce an insurance policy as written, "without resort to rules of construction or applicable principles of case law," if the relevant policy language is unambiguous. ***Id.*** However, ambiguities in policy language are construed in favor of the insured. ***Id.*** The logic of this rule is that the insurer, as the drafter of the policy, presumably could have drafted an unambiguous policy. *See* ***Hirschhorn v. Auto-Owners Ins. Co.***, 2012 WI 20, ¶23, 338 Wis. 2d 761, 809 N.W.2d 529.

¶14 Pechacek argues the policy is ambiguous because her injuries "result[ed] from" (i.e., were caused by) the negligence of an uninsured driver. In Pechacek's view, her "occupancy as a passenger in her own vehicle did not have any effect in producing the accident or her injuries." She invokes the notion of an insured's reasonable expectations, arguing that, upon reading the "drive other car" exclusion, an insured would believe that injuries sustained under the circumstances of this case did not "result from" the insured's use of a motor vehicle, and were therefore within the scope of coverage. We reject Pechacek's arguments in this regard.

¶15 The "drive other car" exclusion is a common exclusion in motor vehicle policies. In 1985, our supreme court stated such provisions "serve[] to prohibit stacking of uninsured motorist benefits against the same insurer." ***Welch v. State Farm Mut. Auto. Ins. Co.***, 122 Wis. 2d 172, 176, 361 N.W.2d 680 (1985). Accordingly, the court held that "drive other car" exclusions were unenforceable by virtue of WIS. STAT. § 631.43(1) (1983-84), which prohibited insurers from using "other insurance" provisions to reduce the aggregate coverage available under two or more policies covering the same loss. ***Welch***, 122 Wis. 2d at 176-77. In response to ***Welch*** and its progeny, the legislature enacted WIS. STAT. § 632.32(5)(j), "which statutorily validated 'drive other car' exclusions."

***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 143, 585 N.W.2d 893 (Ct. App. 1998).

¶16 Although WIS. STAT. § 632.32(5)(j) "has replaced the broad proposition of [***Welch***] and its progeny that uninsured motorist coverage is available in *all* circumstances," the statute has not "eviscerated the general prohibition against 'drive other car' exclusions." ***Blazekovic v. City of Milwaukee***, 2000 WI 41, ¶22, 234 Wis. 2d 587, 610 N.W.2d 467. Paragraph 632.32(5)(j) validates a particular type of "drive other car" exclusion that meets three conditions:

> 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.

***Id.*** (formatting altered). "A 'drive other car' exclusion that does not comport with this set of circumstances is not permitted." ***Blazekovic***, 234 Wis. 2d 587, ¶21.

¶17 The "drive other car" exclusion contained in the Chevrolet and Mercedes policies comports with the requirements of WIS. STAT. § 632.32(5)(j). Indeed, the exclusion very closely tracks the language of the statute. When the legislature sets forth the contours of a permissible exclusion, we typically "assume this is an example of what the legislature viewed as an unambiguous means of

conveying" the relevant exclusion. ***Estate of Dorschner v. State Farm Mut. Auto. Ins. Co.***, 2001 WI App 117, ¶12, 244 Wis. 2d 261, 628 N.W.2d 414.

¶18 Moreover, as State Farm points out, Pechacek's proposed interpretation of the "resulting from" language in the "drive other car" exclusion is nonsensical. The exclusion applies if bodily injury results to an insured from the use of a motor vehicle that the insured owns and that is not described in the specific policy. All necessary circumstances for the exclusion to apply were present in this case. To contend that Pechacek's injuries did not result from her use of the Lexus at the time of the accident ignores the reality of the situation. She was in the Lexus and "using" it as a passenger when the accident occurred.

¶19 Furthermore, by definition, an uninsured motorist has no applicable insurance on which to make a claim. Coverage is afforded only by virtue of the insured's own policy, which must include UM coverage. *See* WIS. STAT. § 632.32(4)(a)1. Thus, if Pechacek's proposed interpretation of the relevant policy language—and by extension § 632.32(5)(j)—were correct, the "drive other car" exclusion located in the UM provisions of Pechacek's policy would be rendered meaningless. An insured's injuries at the hands of an uninsured driver would never "result from" the insured's use of the vehicle. The exclusion, and the statute, must refer to bodily injury the insured sustained while using his or her own motor vehicle, regardless of fault.

¶20 Because the "drive other car" exclusion in the Chevrolet and Mercedes policies generally tracks the language of the statute authorizing such provisions, and Pechacek's proposed alternative interpretation is unreasonable, we conclude the exclusion is unambiguous. "Absent a finding of ambiguity, we will not apply rules of construction to rewrite an insurance policy to bind an insurer to

a risk it did not contemplate and for which it did not receive a premium." ***Hirschhorn***, 338 Wis. 2d 761, ¶24. Contrary to Pechacek's belief, she clearly did not pay a premium for UM coverage under the Chevrolet and Mercedes policies for injuries sustained while "using" her Lexus automobile.

¶21 Pechacek argues the scope of the "drive other car" exclusion should be limited to the circumstances for which it was designed. Such exclusions exist "to provide coverage to the insured when he or she has infrequent or casual use of a vehicle other than the one described in the policy, but to exclude coverage of a vehicle that the insured owns or frequently uses for which no premium has been paid." ***Westphal v. Farmers Ins. Exch.***, 2003 WI App 170, ¶11, 266 Wis. 2d 569, 669 N.W.2d 166. This contention is simply a variation of Pechacek's argument that, because she has paid a premium for UM coverage under the Chevrolet and Mercedes policies, she should be entitled to collect on all the policies. However, we reiterate that, given the policy language at issue, the premium paid clearly did not contemplate aggregate coverage on the facts of this case.

¶22 Pechacek also relies on our supreme court's recent decision in ***Belding v. Demoulin***, 2014 WI 8, 352 Wis. 2d 359, 843 N.W.2d 373. There, the court held that State Farm's "drive other car" exclusion was unenforceable given the legislative prohibition on anti-stacking clauses that was in effect between 2009 and 2011, which legislation covered the insurance policies at issue in that case. *See* ***id.***, ¶¶20-23, 45. Importantly, the court's analysis was primarily an exercise in statutory construction, as the court attempted to reconcile the paragraph permitting "drive other car" exclusions with the paragraph prohibiting anti-stacking clauses. *See* ***id.***, ¶¶15-17, 24-26, 31-40. The court applied the "legislative test" set forth in WIS. STAT. § 632.32(5)(e) to harmonize these statutory provisions. ***Belding***, 352 Wis. 2d 359, ¶3. Because the legislature has repealed the 2009 prohibition on

anti-stacking clauses, and that prohibition was not in effect at the time of the accident here, there is no longer any conflict between that provision and the provision authorizing "drive other car" exclusions. Accordingly, ***Belding*** has no application to this case.

¶23 Relatedly, Pechacek asserts the "drive other car" exclusion is ambiguous when read in light of the various iterations of policy language in the State Farm policies related to stacking, which generally tracked the recent statutory changes regarding anti-stacking provisions. *See supra* ¶5. Pechacek asks, "How can the policy promise an insured the ability to stack UM limits on up to three vehicles which the insured owns and has insured but then add an exclusion which prevents the insured from doing so[?]" In Pechacek's view, this rendered the grant of UM coverage illusory.

¶24 There are numerous problems with Pechacek's "illusory coverage" argument. First, it assumes the policy promised the insured the ability to stack UM policy limits. This is by no means clear.[10] But more importantly, the ability to stack coverage is, logically enough, only available if the insured is entitled to coverage under the policies sought to be "stacked." *See* ***Tahtinen v. MSI Ins. Co.***, 122 Wis. 2d 158, 159 n.1, 361 N.W.2d 673 (1985) ("The term stacking is … used when the same insurer issues multiple policies and the insured seeks to aggregate the coverage from each of the policies."). Because the "drive other car" exclusion

[10] The parties have extensively briefed the issue of whether the relevant policies included valid anti-stacking provisions. However, given our holding that the "drive other car" exclusion in the Chevrolet and Mercedes policies applies, we need not decide whether the policies contained a valid anti-stacking provision that also precluded coverage. *See* ***Barber v. Weber***, 2006 WI App 88, ¶19, 292 Wis. 2d 426, 715 N.W.2d 683 ("When the resolution of one issue disposes of an appeal, we will not address additional issues.").

precludes coverage under the Chevrolet and Mercedes policies in this instance, there is no coverage to stack. This does not render the grant of UM coverage under those policies "illusory," as Pechacek would be entitled to UM benefits had she been using the motor vehicle specified in those policies at the time of the accident. She would also be entitled to coverage to the extent the exception in the "drive other car" provision applies.[11]

*By the Court.*—Judgment reversed.

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

[11] Pechacek does not argue that, if the "drive other car" exclusion precludes coverage, the exception to that exclusion applies to reinstate coverage. We do not abandon our neutrality to make arguments for the parties, *see* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 , and, in any event, it does not appear the exception to the exclusion would apply because Pechacek did not suffer bodily injury "resulting from the use of a motor vehicle" that she did not own.