COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

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Appeal No. 2017AP497 **Cir. Ct. No. 2016CV495**

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

MARIO JOHNSON BY HIS GUARDIAN, GLENDORA JONES,

PLAINTIFF-APPELLANT,

KITTY RHOADES, SECRETARY OF STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS,

DEFENDANT-RESPONDENT,

NATIONWIDE MUTUAL INSURANCE COMPANY, AV TRANSPORTATION, LLC AND VADIM V. YAKUBOVSKIY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. Mario Johnson appeals the circuit court's grant of summary judgment against Johnson and in favor of Zurich American Insurance Company of Illinois. Johnson argues that the circuit court erred in granting summary judgment in favor of Zurich when the court concluded that Johnson's injuries did not result from the "use" of an automobile within the meaning of the Zurich insurance policy. We agree with Johnson that the circuit court's "use" decision is in error. We also reject Zurich's argument based on a "completed operations" exclusion in the Zurich policy. Accordingly, we reverse and remand for further proceedings.

Background

¶2 The summary judgment materials include evidence of the following facts and reasonable inferences. Johnson is a developmentally disabled adult with the functionality of a four- or five-year-old child. A company called AV Transportation provided transportation for Johnson on a regular basis. AV had a business automobile insurance policy with Zurich, the pertinent policy here.

¶3 There appears to be no dispute that, when the AV van driver would drop Johnson off at his home, Johnson's mother was ordinarily present (or she ensured that someone else was present) to meet Johnson. On a September day in 2013, however, Johnson's mother was running late and was not present when the AV van driver arrived to drop Johnson off. The AV driver waited for about an

hour while Johnson remained in the van. During that time, Johnson became angry and began screaming and yelling. One other passenger was present in the van. In response to Johnson's behavior, the van driver unbuckled Johnson's safety belt, removed Johnson from the van, and walked Johnson to the front of Johnson's home where Johnson initially sat down in front of the home.

¶4 The AV driver returned to the van and continued to wait for Johnson's mother to arrive while Johnson remained in front of his home. After what could have been as little as a couple of minutes or as much as 15 minutes, Johnson started walking on the sidewalk, away from his home.

¶5 The AV driver exited the van and approached Johnson, apparently attempting to stop him, at which point Johnson pushed the driver and began running away. The van driver returned to the van, this time to follow Johnson. Within a few minutes, the driver caught up to Johnson but, by that time, Johnson was lying in a roadway after having been struck by an unidentified motorist. Johnson suffered serious permanent injuries.

¶6 Johnson brought suit against AV and its insurers. Zurich moved for summary judgment, arguing that the business automobile policy Zurich issued to AV did not provide coverage for Johnson's injuries. The circuit court granted Zurich's motion, agreeing with Zurich that there was no coverage because Johnson's injuries were not "resulting from the … use of" the AV van within the meaning of the Zurich policy. Because the circuit court concluded that there was no coverage under the policy's "use" language, it was not necessary for the court to address Zurich's alternative "completed operations" argument.

Discussion

¶7 As noted, Johnson argues that the circuit court erred in granting Zurich's summary judgment motion. We review the grant or denial of a summary judgment motion de novo. ***Johnson v. Mt. Morris Mut. Ins. Co.***, 2012 WI App 3, ¶8, 338 Wis. 2d 327, 809 N.W.2d 53 (2011). A party is entitled to summary judgment "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. § 802.08(2) (2015-16). Here, our summary judgment analysis involves the interpretation of an insurance policy. This is a question of law subject to de novo review. ***Progressive N. Ins. Co. v. Jacobson***, 2011 WI App 140, ¶8, 337 Wis. 2d 533, 804 N.W.2d 838.

¶8 We address two questions. First, is there an initial grant of coverage under the Zurich policy because Johnson's injuries "result[ed] from the ... use" of the AV van within the meaning of that language in the policy? We answer this question yes. Second, does the "completed operations" exclusion in the Zurich policy apply to exclude coverage? On this topic, we conclude that Zurich's briefing at most demonstrates that there is a factual dispute as to the "completed operations" exclusion's applicability. Therefore, the circuit court erred in granting summary judgment in favor of Zurich.

A. Coverage Based on "Use" of a Vehicle

¶9 The applicable Zurich policy language states:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" ... to which this insurance applies, caused by an "accident" and *resulting from the ... use* of a covered "auto."

(Emphasis added.) Applied here, the question is whether Johnson's injuries "result[ed] from the ... use" of the AV van.

¶10 As an initial matter, we note that, although this policy language refers to injury "resulting from" the use of a vehicle, Zurich agrees with Johnson that this language is equivalent to policy language in case law referring to injury "arising out of" the use of a vehicle. For example, Zurich asserts: "[T]he relevant question for purposes of determining coverage under the Policy is whether Johnson's injuries arose out of the use of the van." We further note that there is case law support for the parties' agreement. *See* ***Tasker v. Larson***, 149 Wis. 2d 756, 759, 439 N.W.2d 159 (Ct. App. 1989) (deeming "*due to* the use" language in a policy to be no different from policies using "*arising out of* … use" language); ***Kemp v. Feltz***, 174 Wis. 2d 406, 411, 497 N.W.2d 751 (Ct. App. 1993); *see also* ***Blasing v. Zurich Am. Ins. Co.***, 2014 WI 73, ¶¶35-41, 356 Wis. 2d 63, 850 N.W.2d 138. Thus, we follow the parties' lead and treat "resulting from" as having, in this context, the same meaning as "arising out of."

¶11 Courts broadly interpret coverage clauses containing this type of "arising out of" "use" language. *See, e.g.*, ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 294, 481 N.W.2d 660 (Ct. App. 1992); ***Tasker***, 149 Wis. 2d at 760. The supreme court in ***Lawver v. Boling***, 71 Wis. 2d 408, 238 N.W.2d 514 (1976), explained as follows:

> The causal connection required to be established between the use of the automobile and the injuries is not of the type which would ordinarily be necessary to warrant a finding of "proximate cause" or "substantial factor" as those terms are used in imposing liability for negligent conduct.
>
> As it is used in the coverage clause of an automobile liability policy, the phrase "arising out of" is not so much concerned with causation as it is with defining the risk for which coverage will be afforded. The issue 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. 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 415-16 (footnotes omitted); *see also* ***Garcia***, 167 Wis. 2d at 294-95.

¶12 ***Lawver*** further states that the concept of "arising out of" in this context is "very broad, general and comprehensive." ***Lawver***, 71 Wis. 2d at 415. The phrase is "commonly understood to mean originating from, growing out of, or flowing from, and require[s] only that there be some causal relationship between the injury and the risk for which coverage is provided." ***Id.***[1]

¶13 In ***Jacobson***, we provided a string cite summarizing several automobile scenarios in published decisions concluding that "use" was present:

> ***Thompson***, 161 Wis. 2d at 458-59 (insurer could reasonably expect that a truck might be used for hunting, and that a hunter might use the truck bed as a platform from which to hunt); ***Lawver***, 71 Wis. 2d at 411, 416 (raising and lowering a platform using a truck and pulley constitutes 'use' of the vehicle); ***Allstate Ins. Co. v. Truck Ins. Exch.***, 63 Wis. 2d 148, 158, 216 N.W.2d 205 (1974) (reasonable and expected 'use' of a van includes loading and unloading hunting equipment); ***Trampf***, 199 Wis. 2d at 389 ('use' includes transportation of dogs in the bed of a vehicle); ***Garcia***, 167 Wis. 2d at 297-98 (driver's call and gesture to pedestrian subsequently hit while crossing the street a 'use' of the vehicle); ***Tasker v. Larson***, 149 Wis. 2d 756, 761,

[1] Zurich relies, in part, on reasoning from ***Saunders v. National Dairy Products Corp.***, 39 Wis. 2d 575, 159 N.W.2d 603 (1968), a supreme court case that predates ***Lawver v. Boling***, 71 Wis. 2d 408, 238 N.W.2d 514 (1976). This court has previously indicated that ***Saunders*** is inconsistent with ***Lawver*** and that we follow ***Lawver*** as the more recent of two supreme court cases. *See* ***Zarnstorff v. Neenah Creek Custom Trucking***, 2010 WI App 147, ¶35, 330 Wis. 2d 174, 792 N.W.2d 594.

> 439 N.W.2d 159 (Ct. App. 1989) (leaving a child in a vehicle during a brief errand reasonably consistent with inherent nature of vehicle).

Jacobson, 337 Wis. 2d 533, ¶18; *see also* ***Blasing***, 356 Wis. 2d 63, ¶37 (providing a similar summary).

¶14 Notably for purposes here, loading and unloading passengers or cargo is generally included within "use," even if a policy does not so specify. *See* ***Austin-White v. Young***, 2005 WI App 52, ¶12, 279 Wis. 2d 420, 694 N.W.2d 436; *see also* ***Blasing***, 356 Wis. 2d 63, ¶37 & n.10, ¶39 & n.12.

¶15 Here, there can be no dispute that the loading and unloading of developmentally disabled passengers, including Johnson, were reasonably expected and inherent uses of the AV van. In particular, we agree with Johnson that the AV van driver's act of unbuckling Johnson's seat belt and removing Johnson from the van supplies "use." We do not understand Zurich to argue otherwise.

¶16 Rather, Zurich's not-resulting-from-use argument, as we understand it, is that Johnson's injuries did not "result[] from" the AV van driver's use of the van, but instead Johnson's injuries resulted from, in Zurich's words, "independent forces." In this way of thinking, Johnson's own actions, perhaps in concert with the actions of the hit-and-run driver, were "independent forces" that caused Johnson's injuries, and the AV van driver's use merely preceded the harm. We are not persuaded.

¶17 The cases Zurich points to in support of its "independent forces" argument are inapposite. Zurich relies on cases in which a vehicle was involved in criminal or intentional conduct that led to injury or death. *See* ***Tomlin v. State***

Farm Mut. Auto. Liab. Ins. Co., 95 Wis. 2d 215, 217, 290 N.W.2d 285 (1980); ***Van Dyn Hoven v. Pekin Ins. Co.***, 2002 WI App 256, ¶¶1-2, 258 Wis. 2d 133, 653 N.W.2d 320; ***Snouffer v. Williams***, 106 Wis. 2d 225, 226-27, 229, 316 N.W.2d 141 (Ct. App. 1982). In each of these cases, the court concluded that the conduct at issue was *not* consistent with the inherent nature or uses of the vehicle, or that the injury-causing conduct was "wholly independent" of the vehicle's use. *See* ***Tomlin***, 95 Wis. 2d at 217, 225 (driver of a vehicle who stabbed a police officer who had stopped the vehicle was, while stabbing the officer, not engaged in the "type of use reasonably contemplated by the parties to the insurance contract and [the stabbing was] not consistent with the inherent use of an automobile"); ***Van Dyn Hoven***, 258 Wis. 2d 133, ¶¶2, 10, 12 (driver of truck who pushed a passing jogger into his truck and stabbed the jogger was not engaged in a use that triggered coverage because such "use [was] not consistent with the inherent use of the vehicle"); ***Snouffer***, 106 Wis. 2d at 229 (transporting boy in a truck to a location where an angry neighbor fired a pistol at the truck, injuring the boy, was not a covered use of the vehicle because the injury-causing shooting was a "wholly independent" action from any use of the vehicle). Here, in contrast, the AV van driver's actions in removing Johnson from the van—essentially an unloading activity—were consistent with the inherent nature of the van and such actions were causal in the minimal sense ***Lawver*** requires, and not, therefore, wholly independent. *See* ***Trampf v. Prudential Prop. & Cas. Co.***, 199 Wis. 2d 380, 389, 544 N.W.2d 596 (Ct. App. 1996) ("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.").

¶18 Zurich's independent-forces argument includes the assertion that Johnson's injuries were "far too removed" from any use of the AV van. Zurich

apparently takes the position that the allegedly negligent "use" must immediately cause injury without any additional contributing factor. This, however, is a legal proposition that case law has rejected.

¶19 ***Tasker*** is very nearly directly on point. In that case, a parent left a young child unattended in a truck along a highway and, at some "brief[]" but unspecified time thereafter, the child exited the truck and was injured by a passing motorist. *See* ***Tasker***, 149 Wis. 2d at 758, 761. The court in ***Tasker*** concluded that the act of leaving the child unattended in the vehicle provided the requisite "use" even though the immediate cause of the injury was the later activity of the child leaving the vehicle and the passing motorist striking the child. *See* ***id.*** at 759-61.

¶20 Moreover, the time lag involved here does not preclude coverage. In ***Amery Motor Co. v. Corey***, 46 Wis. 2d 291, 174 N.W.2d 540 (1970), the supreme court explained that, although it might *normally* be true that injury is caused at the time of the underlying negligent conduct, coverage for injury arising out of the "use" of a vehicle, which includes loading and unloading, does not require that the injury occur during or immediately after a qualifying "use" of a vehicle. *See* ***id.*** at 297-99. The court wrote:

> One engaged in loading or unloading a truck could be injured by a cause unconnected with the acts of loading and unloading and his cause of action could not be based upon the "use" of the truck. It is likewise true negligent acts of loading or unloading need not result in an injury occurring during such loading or unloading. Normally, an injury is caused at the time of the occurrence of negligence; but in ***Komorowski v. Kozicki***, [45 Wis. 2d 95, 172 N.W.2d 329 (1969)], *supra*, where the negligence included stacking the lumber as part of the unloading operation, the negligence did not result in an injury until the lumber pile fell sometime after the truck had departed and the unloading was completed. That case pointed out the language of the

> policy contained no limitation that the injury must occur during the loading or unloading.

Id. at 298-99. To be clear, ***Amery*** indicates that the purpose of automobile coverage like that afforded here is "coverage of causal negligence in the 'use' of the automobile," ***id.*** at 297, meaning that the underlying negligent act must be part of the "use" of the vehicle. But, contrary to Zurich's apparent position, ***Amery*** makes clear that the resulting injury need not occur during or immediately following the "use."

¶21 For that matter, even apart from the ***Tasker*** and ***Amery*** decisions, and directly applying the ***Lawver*** standards, we see no reason to treat the facts here differently from a scenario in which Johnson immediately ran from the van after being removed and was struck in the immediate vicinity. In either instance, the van driver's removal activities would be a "use" of the van with a logical "causal connection" within the meaning of ***Lawver***.

¶22 In sum, we conclude that, under the undisputed facts, Johnson's injuries "result[ed] from the ... use" of the AV van within the meaning of the Zurich policy. Whether the AV van driver's actions were negligent and sufficiently causal under the negligence law that applies to the cause of action brought by Johnson is a different matter that is not before us.

B. The Completed Operations Exclusion

¶23 Zurich argues that, even if Johnson's injuries arose out of the use of the AV van, Zurich was entitled to summary judgment because coverage is excluded by the "completed operations" exclusion in the Zurich policy. For the following reasons, this argument does not persuade us.

¶24 Zurich relies on the following language in that exclusion:

> This insurance does not apply to any of the following:
>
> ….
>
> **10. Completed Operations**
>
> "Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.
>
> In this exclusion, your work means:
>
> **a.** Work or operations performed by you or on your behalf ....
>
> ….
>
> Your work will be deemed completed at the earliest of the following times:
>
> **(1)** When all of the work called for in your contract has been completed.

¶25 Zurich's more specific arguments based on this exclusion are difficult to follow. As we understand it, Zurich argues that this exclusion applies because the scope of AV's contracted work was limited to "transportation" of its clients and did not include "supervision" of clients once the van arrived at the drop-off location. According to Zurich, AV's work was, therefore, complete when Johnson arrived at his intended destination. It follows, according to Zurich, that Johnson's injury occurred more than an hour after its "operation" was complete. This argument is flawed in at least two ways.

¶26 First, Zurich does not point to undisputed information showing that AV's contractual obligation was complete when the van arrived at the drop-off location for Johnson. The limited testimony that Zurich points to does not address whether AV's responsibility included an AV van passenger's ingress or egress

from the van. Common sense suggests that "transportation" includes entering and exiting the van.

¶27 Thus, Zurich does not point to undisputed evidence that its "operation," within the meaning of the exclusion, ended when the van arrived at Johnson's home.

¶28 Second, we agree with Johnson that there is evidence to support a reasonable inference that AV was contractually obligated to perform more than ordinary transportation, and that the company had an express or implied contractual obligation to ensure that Johnson was not left unattended. This includes evidence that an AV manager instructed the AV van driver to wait for Johnson's mother; that the driver continued to wait; and that the driver acted to try to stop Johnson when Johnson began walking away from Johnson's home.

¶29 Zurich does not point to a written or oral agreement. And, the limited testimony that Zurich *does* point to at most supports a competing reasonable inference as to AV's contractual obligations. Thus, Zurich's briefing at most shows that there is a factual dispute that would preclude summary judgment. *See* ***Johnson***, 338 Wis. 2d 327, ¶8 ("We construe all facts and reasonable inferences in the nonmoving party's favor.").

¶30 Before concluding, we note that Zurich points to an acknowledgment by Johnson's attorney before the circuit court that Johnson's mother did not need to be present for Johnson to be "finally delivered." Zurich seemingly contends that this is a binding concession that AV's "operation" was complete when Johnson arrived at his intended destination. However, our review of the cited portion of the record indicates that Johnson's attorney made this

acknowledgment in reference to a *different* exclusion. This acknowledgment was not a concession with respect to the "completed operations" exclusion.

Conclusion

¶31 For the reasons stated, we reverse the circuit court's grant of summary judgment against Johnson and in favor of Zurich, and we remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.