COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2001

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.

No. 00-3047

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

HERITAGE MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. JANDA II AND COLLEEN JANDA,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. Richard and Colleen Janda appeal an order granting summary judgment to Heritage Mutual Insurance Company. The order precludes the Jandas from pursuing an uninsured motorist claim under their Heritage policy for personal injuries they sustained while riding their uninsured motorcycle. We conclude that under the language of the policy, a reasonable

insured would not expect to have coverage for injuries sustained while occupying a vehicle owned by the insured but not covered by the policy, and that the policy's "drive other car" exclusion is valid. Accordingly, we affirm the order of the circuit court.

BACKGROUND

¶2 The case is here on summary judgment and the material facts are undisputed. Richard and Colleen Janda were riding on their motorcycle when an unidentified vehicle failed to yield the right of way and collided with them. At the time of the accident, the Jandas owned two other vehicles that were insured under a Heritage Mutual policy that included uninsured motorists coverage. The Heritage policy did not cover their motorcycle, however. It is undisputed that the unidentified, "hit-and-run" vehicle that collided with their motorcycle meets the definition of an "uninsured motor vehicle" under the Heritage policy.

¶3 The Jandas filed claims with Heritage for the injuries they sustained in the accident. Heritage denied the claims based on an exclusion to the Jandas' uninsured motorists coverage commonly known as a "drive other car" exclusion. The company then commenced this action and moved for summary judgment seeking a declaration that its policy excluded uninsured motorists coverage for the injuries the Jandas sustained on their motorcycle. The Jandas responded by seeking an order that the Heritage policy provided coverage. The court granted summary judgment to Heritage and the Jandas appeal.

ANALYSIS

¶4 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the trial court. ***M&I First Nat'l Bank v.***

Episcopal Homes Mgt., Inc., 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when, as here, there is no genuine issue of material fact and the moving party (or the opposing party) is entitled to judgment as a matter of law. ***Id.*** at 496-97; WIS. STAT. § 802.08(2) & (6) (1999-2000).[1]

¶5 The issue is whether the language of an exclusion to the "Uninsured Motorists Coverage" provided in the Heritage policy excludes coverage for injuries the Jandas sustained while riding on their motorcycle, which was not a vehicle insured under the policy. The relevant provisions of the Heritage policy read as follows:

> **PART III—UNINSURED MOTORISTS**
>
> **COVERAGE C—UNINSURED MOTORISTS COVERAGE**
>
> **We** will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. **Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **uninsured motor vehicle**.[2]
>
> ….
>
> **ADDITIONAL DEFINITIONS USED IN THIS PART ONLY**
>
> As used in this Part:
>
> **1. "Insured person"** means:

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] This paragraph is contained in a "Wisconsin Amendatory Endorsement" to the policy, and it replaces the first paragraph of the uninsured motorists coverage section in the body of the policy.

> a. **You** or a **relative**.[3]
>
> ….
>
> **2. "Uninsured motor vehicle"** means a land motor vehicle or trailer which is:
>
> ….
>
> c. A hit-and-run vehicle whose operator or owner is unknown and which strikes:
>
> (1) **You** or a **relative**.
>
> (2) A vehicle which **you** or a **relative** are **occupying**.
>
> (3) **Your insured car**.
>
> ….
>
> **EXCLUSIONS**
>
> This coverage does not apply to **bodily injury** to a person:
>
> **1. Occupying**, or struck by, a land motor vehicle or trailer owned by **you** or a **relative** for which insurance is not afforded under this Part.

¶6 To determine if the exclusion applies on the present facts, we first consider whether its language unambiguously excludes coverage for the injuries the Jandas sustained on their motorcycle. *See* ***Peabody v. American Family Mut. Ins. Co.,*** 220 Wis. 2d 340, 346-49, 582 N.W.2d 753 (Ct. App. 1998). The question requires us to interpret an insurance contract, which is a question of law we review de novo. ***Oaks v. American Family Mut. Ins. Co.***, 195 Wis. 2d 42, 47, 535 N.W.2d 120 (Ct. App. 1995). Our goal in interpreting the language of the

[3] Under definitions provided elsewhere in the policy, "you or a relative" would include the policyholder and any of the following that live in the "same household" as the policyholder: a spouse or anyone else "related … by blood, marriage or adoption, including a ward or foster child."

policy is to ascertain and carry out the intention of the parties. ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 536, 514 N.W.2d 1 (1994).

¶7 If there is any ambiguity, we are to "narrowly construe exclusions in coverage against the insurer" and in favor of coverage. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶10, __ Wis. 2d __, 628 N.W.2d 916 (citation omitted). More specifically, our task is to determine "'what a reasonable person in the position of the insured would have understood the words of the policy to mean' … [in order to] advance the insured's reasonable expectations of coverage." ***Id***. (citation omitted). However, "a policy may not be construed to bind the insurer to a risk which it did not contemplate and for which it received no premium." ***Bartel v. Carey***, 127 Wis. 2d 310, 314-15, 379 N.W.2d 864 (Ct. App. 1985) (citation omitted).

¶8 The Jandas contend that the language of the policy provides uninsured motorists coverage for their injuries. They reason as follows: Under "Part III" of the policy, they are entitled to uninsured motorists coverage because they are the named policyholders and sustained bodily injuries for which they are legally entitled to recover from the owner or operator of an uninsured vehicle. The exclusion which removes coverage for injuries incurred while "[o]ccupying … a land motor vehicle … owned by you or a relative for which insurance is not afforded under this Part," does *not* exclude them from coverage because, they claim, "under this Part" refers only to Part III of the policy. And, according to the Jandas, "[t]here is nothing in this part discussing uninsured motorist coverage which says anything about whether insurance is afforded to any vehicle."

¶9 More specifically, the Jandas argue that the use of the word "part" instead of "policy" renders the exclusion ambiguous and thus, we must construe

the language in favor of coverage. The Jandas argue that absent a clearly written exclusion to the contrary, a reasonable insured would expect uninsured motorists coverage while riding a motorcycle, because uninsured motorists coverage is "portable" and thus accompanies an insured even while on foot or on a bicycle. *See* ***Welch v. State Farm Mut. Auto. Ins. Co.,*** 122 Wis. 2d 172, 179, 361 N.W.2d 680 (1985) ("[U]ninsured motorist coverage is personal and portable coverage which protects the insured from uninsured motorists in all instances."). In short, the Jandas argue that if Heritage wishes to exclude coverage for injuries sustained while occupying a vehicle that is owned by a policyholder but not insured under the policy, it must employ the word "policy" instead of "part" in the exclusion, as the policy form of at least one other insurer apparently does. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 140, 585 N.W.2d 893 (Ct. App. 1998).

¶10 We are not persuaded by the Jandas' arguments. The wording at issue in this appeal is virtually identical to that which we reviewed in ***Parks v. Waffle,*** 138 Wis. 2d 70, 406 N.W.2d 690 (Ct. App. 1987). The exclusion in ***Parks*** stated that uninsured motorists coverage would not apply to bodily injury resulting "'while occupying … a motor vehicle that is not insured *under this Part*, if it is owned by you or a relative.'" ***Id***. at 72 (emphasis added). We stated in our opinion that "[w]e have little difficulty in concluding that the language of the exclusionary clauses here readily conveys to the reasonable insured that uninsured motorist protection does not apply to an uninsured vehicle being operated by the insured." ***Id***. at 75. Even though our central holding in ***Parks*** did not rest directly

on our interpretation of policy language,[4] in light of our expressed conclusion regarding what the language in question "readily conveys to the reasonable insured," we would find it difficult here to conclude either that the present exclusion plainly means something else, or that it is sufficiently ambiguous that we must construe it against Heritage.

¶11 We also agree with Heritage that the Jandas' proffered interpretation of the exclusion would lead to unreasonable results. The Jandas contend that the lack of vehicle-specific coverage language in "Part III" of the policy should result in their obtaining uninsured motorists coverage while occupying all vehicles they may own but choose not to insure. The Jandas' construction of the language would thus render the exclusion virtually meaningless. "[I]nterpretations which render insurance contract language superfluous are to be avoided where a construction can be given which lends meaning to the phrase." ***Bulen v. West Bend Mut. Ins. Co.,*** 125 Wis. 2d 259, 263, 371 N.W.2d 392 (Ct. App. 1985). The Jandas' interpretation would also contravene the public policy argument we found "convincing" in ***Parks***:

> American Family makes a convincing public policy argument contending that [invalidating the exclusion in this case] would encourage individuals to purchase but one automobile insurance policy, operate numerous other vehicles with no liability insurance, yet remain secure in the knowledge that they would be covered if involved in an accident with an uninsured motorist. This, reasons

[4] Although we noted in ***Parks v. Waffle,*** 138 Wis. 2d 70, 72, 406 N.W.2d 690 (Ct. App. 1987), that the "only issue … was the legal question as to the construction of the exclusionary clauses," the dispositive inquiry was whether the "drive other car" exclusion at issue was valid under Wisconsin law. We concluded that under the supreme court's "broad language" in ***Welch v. State Farm Mut. Auto. Ins. Co.,*** 122 Wis. 2d 172, 361 N.W.2d 680 (1985), it was not. *But see* WIS. STAT. § 632.32(5)(j); ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 140, 585 N.W.2d 893 (Ct. App. 1998) (noting that legislature has "legislatively overruled" ***Welch***).

> American Family, runs counter to the public interest which seeks to assure that *all* motor vehicles are covered by liability insurance.

Parks, 138 Wis. 2d at 75.[5]

¶12 We thus conclude that the present policy language sufficiently expresses an exclusion from uninsured motorists coverage for injuries sustained by an insured when occupying an owned vehicle that is not afforded insurance coverage under the policy. We next address, briefly, whether the exclusion may be validly applied on the present facts. "Drive other car" exclusions are governed by WIS. STAT. § 632.32(5)(j), which permits such exclusions in certain specified circumstances. The exclusion is valid if: (1) it pertains to a vehicle that is owned by the insured or a relative of the insured residing in the same household; (2) the vehicle in question is not described in the policy under which the claim for uninsured motorists coverage is made; and (3) the vehicle is also not one that is covered under the policy as a newly acquired or replacement motor vehicle. ***Blazekovic v. City of Milwaukee,*** 2000 WI 41, ¶21, 234 Wis. 2d 587, 610 N.W.2d 467; section 632.32(5)(j). The Jandas' motorcycle was owned by them, it was not named in their policy as an insured vehicle, and it was not a newly acquired or replacement vehicle. Thus, we conclude, as did the circuit court, that the "drive other car" exclusion in the Heritage policy effectively excludes uninsured

[5] We also observe that a result contrary to the one the Jandas advocate might as easily flow from their contention that we may look only to "Part III" of the policy to determine the vehicles "for which insurance is … afforded under this Part." If that is indeed the case, because "Part III" does not expressly grant coverage to any vehicle, uninsured motorists coverage is arguably excluded whenever an insured is occupying *any* owned vehicle, including those vehicles for which the insured purchased liability and property damage coverages provided in other "parts" of the policy. This result would also be unreasonable, thus providing a further indication that the Jandas' restrictive reading of the word "part" is flawed.

motorists coverage for the injuries the Jandas sustained while occupying the motorcycle.

CONCLUSION

¶13 For the reasons discussed above, we affirm the order of the circuit court granting summary judgment to Heritage Mutual Insurance Company.

By the Court.—Order affirmed.

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