

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 21, 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. 01-1793-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**A LA MODE DISTRIBUTORS,**

**PLAINTIFF-APPELLANT,**

**V.**

**WESTFIELD INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County:  
JOHN C. ALBERT, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. A La Mode Distributors appeals from the circuit court's judgment in favor of Westfield Insurance Company. The issue is whether the circuit court properly concluded that the policy issued by Westfield did not provide coverage to A La Mode for damage to its truck. Pursuant to our order of

July 31, 2001, this case was placed on the expedited appeal calendar. *See* WIS. STAT. RULE 809.17 (1999-2000).<sup>1</sup> We reverse.

¶2 A La Mode distributes specialty foods throughout Wisconsin and northern Illinois. Westfield issued A La Mode a business automobile insurance policy. The policy states:

**SECTION III – PHYSICAL DAMAGE COVERAGE**

**A. Coverage**

1. We will pay for “loss” to a covered “auto” or its equipment under:

**a. Comprehensive Coverage**

From any cause except:

- (1) The covered “auto’s” collision with another object; or
- (2) The covered “auto’s” overturn.

**b. Specified Causes of Loss Coverage**

Caused by:

....

- (5) Mischief or vandalism ....

¶3 A La Mode’s truck was damaged while making a delivery. A La Mode’s owner pulled the truck off the road when black smoke began billowing from the back of the truck and the engine died. He discovered that the oil drain plug was missing and that oil was leaking from the truck. The oil had been

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

changed twelve days before this incident. A La Mode confronted the business that had changed the oil, but it reported that it had properly reinserted the oil drain plug and suggested that the oil drain plug had been vandalized.

¶4 A La Mode sought coverage for the damage from Westfield. Westfield denied the claim. A La Mode brought an action in the circuit court for breach of contract and bad faith. The circuit court bifurcated the claims and stayed the bad faith claim. After both A La Mode and Westfield moved for summary judgment, the circuit court granted summary judgment in favor of Westfield, concluding that it had not breached its insurance contract.

¶5 Summary judgment must be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We review the circuit court's decision to grant summary judgment de novo. *Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶6, 235 Wis. 2d 103, 612 N.W.2d 332, *review denied*, 2000 WI 102, 237 Wis. 2d 260, 618 N.W.2d 750.

¶6 We conclude that the circuit court erred in granting summary judgment in favor of Westfield and that A La Mode was entitled to summary judgment in its favor because the Westfield policy provides coverage for the damage to the truck. Westfield's adjuster, David Campbell, testified during his deposition that he was aware of only four potential causes for A La Mode's loss: (1) vandalism; (2) the mechanic who changed the oil failed to properly tighten the drain plug; (3) the mechanic improperly cross threaded the plug when he put it back after the oil change; or (4) the drain plug was "worn out." Westfield admitted it would cover damages resulting from vandalism or from the negligence of a third party, such as the mechanic. Westfield also conceded that the mechanic

would have been negligent for failing to replace a worn drain plug when the oil was changed. Because Westfield's policy provides coverage under any of the four different scenarios suggested as a cause of the truck's damage, A La Mode's loss is covered even if A La Mode cannot prove *which* of the four scenarios actually caused the damage. There is no requirement that the particular cause of the damage be identified as long as all of the possible causes are covered under the policy.

¶7 Westfield contends that A La Mode is improperly attempting to shift its burden of proving that there was a covered loss by not identifying exactly how the loss occurred. See *Glassner v. Detroit Fire & Marine Ins. Co.*, 23 Wis. 2d 532, 127 N.W.2d 761 (1964). We disagree. In *Glassner*, the supreme court noted that the insurer was obligated only to pay for "risks" as defined by the policy, not for loss or damage "which is almost certain to happen because of the nature and inherent qualities of the property of the insured." *Id.* at 536. A La Mode does not contend that Westfield is liable for routine wear and tear or some other inevitable expense of owning a vehicle. Instead, A La Mode contends that Westfield is liable because this loss was caused either by vandalism or the mechanic's negligence, both covered risks. That A La Mode cannot identify which risk actually caused the damage does not mean that it has not met its burden of proving that there was a covered loss because either risk is covered.<sup>2</sup>

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<sup>2</sup> In its motion for summary judgment, Westfield contended that the loss was excluded as a mechanical breakdown. It has not renewed this argument on appeal, so we do not address it in any detail. We note, however, that there has been no proof presented that this loss could have occurred but for the negligence or vandalism of a third party. Therefore, this loss is not a simple mechanical breakdown.

¶8 We conclude that the circuit court's decision is erroneous for the aforementioned reasons. Therefore we reverse the judgment and remand for the circuit court to enter summary judgment in favor of A La Mode Distributors on the breach of contract claim.

*By the Court.*—Judgment reversed and cause remanded with directions.

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

