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Litigation Flash

The Wisconsin Supreme Court Examines "Use" of a Motor Vehicle in Two Recent Decisions

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In the last weeks of its term, the Wisconsin Supreme Court addressed in two cases what it means to "use" a motor vehicle for purposes of insurance coverage under various policies and the Omnibus Statute. In *Jackson v. Wisconsin County Mutual Insurance Corp.*, 2014 WI 36, 847 N.W.2d 384, the Court held that a sheriff's deputy was not "using" a vehicle that struck her as she was about to direct it into traffic, which precluded her from recovering under an underinsured motorist provision. One month later, in *Blasing v. Zurich American Insurance Company*, 2014 WI 73, the Court concluded that a store employee loading lumber into a customer's truck was "using" that vehicle—and that the customer's own automobile insurer had a duty to defend and indemnify the store for injuring the customer during loading.

In *Jackson*, Milwaukee County Sheriff's Deputy Rachelle Jackson was injured on duty when a driver to whom she had given directions struck her with his car as she prepared to guide him back into traffic at General Mitchell International Airport. Jackson sought coverage under the underinsured motorist provision in her employer's public entity liability policy, which covered injuries suffered "while using an automobile" in the course of employment. Coverage hinged on whether Jackson had been "using" the car that struck her within the meaning of the Omnibus Statute, Wis. Stat. § 632.32(2)(h), under which "using" "includes driving, operating, manipulating, riding in and any other use."

The Court unanimously held that Jackson was not "using" the car that hit her and therefore had no coverage. The Court acknowledged that Wisconsin cases have recognized uses that go beyond "what the ordinary person would" necessarily call "using a vehicle"—like beckoning to an outside passenger from the driver's seat, hunting from the bed of a pickup truck, and transporting dogs. 2014 WI 36, ¶ 25. But Jackson was "not employing the vehicle for Jackson's purposes," nor did she "exercise such control over the vehicle to the extent that she essentially became the user." *Id.* ¶¶ 33, 40. The Court distinguished Jackson's conduct from cases in other jurisdictions where someone guiding a vehicle—like a worker directing a tractor-trailer as it backs into a site—effectively determined its movements and therefore became a user. *Id.* ¶¶ 36-39.

In *Blasing*, the Court focused less on the meaning of "use" and more on the identities of the parties: the injured victim was the named insured, under whose policy the tortfeasor sought permissive user coverage. Vicki Blasing suffered injuries when an employee of Menard, Inc. dropped lumber on her foot in the course of loading lumber into Blasing's truck. Blasing sued Menard and its general liability insurer. Menard tendered Blasing's claims to Blasing's own automobile liability carrier, claiming her insurer had a duty to defend and indemnify Menard as a permissive "user" of Blasing's vehicle. The insurer and the Wisconsin Insurance Alliance told the Court it would be absurd to consider Menard a permissive user of the vehicle its employee was loading where the injury was to the insured herself.

By a narrow 4-3 decision, the Court held that Menard was a permissive user of Blasing's vehicle and entitled to defense and, possibly, indemnity under her policy. To reach that decision, the Court first concluded, based on many of the same cases cited in *Jackson*, that loading lumber was a "use" of the truck. 2014 WI 73, ¶¶ 30-41. Turning to the central question—whether the policy required Blasing's insurer to defend and, potentially, indemnify Menard when the injured party was the named insured—the Court answered "yes," and denied that such an outcome is absurd. *Id.* ¶¶ 42-63. Limiting its holding to the facts of the case and the policy at issue, the Court said the policy language covered permissive users for injury to *all persons* without excluding injury to an insured. *Id.* ¶ 54.

Blasing is particularly noteworthy for what the Court *declined* to decide. The Court did not address whether the Omnibus Statute, Wis. Stat. § 632.32(3), *requires* "an automobile liability insurance policy to provide a permissive user tortfeasor coverage when the permissive user injures a named insured." *Id.* ¶ 64. In other words, whether insurers can draft an exclusion to avoid this result is a question the Court would not answer "without knowing the precise language of the exclusion and the facts to which the exclusion is applied." *Id.* ¶ 66. In her dissent, Justice Roggensack disagreed with the majority's failure to resolve the Omnibus Statute issue and noted that the majority's decision "erroneously converts Blasing's automobile liability policy into comprehensive liability insurance for Menard." *Id.* ¶ 78.

Another likely outgrowth of *Blasing* is litigation over the respective obligations of the different insurers. It was undisputed that Menard's own general liability policy would fully cover its liability for Blasing's damages—but the Court left "for another day" any dispute over the relative obligations of Menard's own policy versus its customer's automobile policy. *Id.* ¶ 7.

Jackson also leaves many questions unresolved. The Court grounded its decision on the unique facts of the case: although Jackson "had just told the driver she was about to stop traffic and 'help' the driver into traffic," she "had not yet begun to do so." 2014 WI 36, ¶ 34. If Jackson already had started "helping" the driver when he hit her, would that render her a user? Or would the fact that she was "not employing the vehicle for [her own] purposes" distinguish those facts from a worker guiding a tractor-trailer?

The cases collectively reinforce that what constitutes "use" under the Omnibus Statute often goes well beyond "what the ordinary person would" consider using a vehicle—but that the term will not "be read so expansively as to include a boundless number of activities." *Id.* ¶¶ 25, 28. The precise location of that boundary, however, remains unresolved.

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