

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2008

David R. Schanker
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.

Appeal No. 2007AP1889

Cir. Ct. No. 2006CV462

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**ERNEST ZILLMER, CYNTHIA ZILLMER AND THE ESTATE OF BRIAN
ZILLMER,**

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE GROUP,

DEFENDANT-RESPONDENT,

**SENTRY SELECT INSURANCE COMPANY AND ACUITY MUTUAL
INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County:
PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. In this wrongful death action, Ernest Zillmer, Cynthia Zillmer and the Estate of Brian Zillmer appeal from an order granting summary judgment in favor of American Family Mutual Insurance Group. The Zillmers¹ contend that their son Brian, a passenger in the subject vehicle, was an insured person under the uninsured motorist (UM) provisions of Cynthia’s American Family policy. We disagree because, under those provisions and WIS. STAT. § 632.32(2)(c) (2005-06),² Brian was “using” the vehicle without permission. We affirm the order dismissing American Family from the lawsuit.

¶2 The relevant facts are undisputed. Seventeen-year-old Brian was killed while a passenger in a vehicle driven by Dustin Dominick. Dominick, Brian and another boy, Zachary Crawford, took the car for a joyride while at an underage drinking party. The car, an Infiniti G35, was owned by Phillip Morelli’s car dealership. Morelli’s eighteen-year-old daughter, Michelle, drove the Infiniti to the party without her parents’ knowledge or consent. Michelle’s parents had expressly forbidden her to drive the Infiniti generally, and her mother again denied permission on that night.

¶3 At some point during the party, Brian asked Michelle for cigarettes, and she answered that she had some in her car. Michelle testified that after she gave him the car keys to retrieve the cigarettes, Brian “got this little smile on his face [and] I said, Zillmer, you’re not going anywhere with my car, if that’s what

¹ Ernest and Cynthia divorced in 1989. The parents shared custody but Brian lived in Cynthia’s household.

² All references to the Wisconsin Statutes are to the 2005-06 version.

you think.” Dominick heard this exchange. Nonetheless, Dominick, Brian and Crawford drove off in the car at a high rate of speed. They crashed into a tree, killing Brian and seriously injuring Dominick and Crawford. Dominick had no insurance. The Infiniti was insured by Sentry Select Insurance, which ultimately denied coverage. The Zillmers filed a claim under the UM provision of Cynthia’s American Family policy for the wrongful death of Brian.³ American Family moved for summary judgment on grounds that Brian was not an insured under Cynthia’s policy. The circuit court granted the motion. The Zillmers appeal.

¶4 We review a grant of summary judgment de novo, applying the same standards as the circuit court under WIS. STAT. § 802.08. *Janikowski v. State Farm Mut. Auto. Ins. Co.*, 187 Wis. 2d 424, 427, 523 N.W.2d 130 (Ct. App. 1994). The familiar methodology, *see Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987), need not be repeated here. The meaning of an insurance contract also is a question of law that we review without deference to the circuit court, but benefiting from its analysis. *Schleusner v. IMT Ins. Co.*, 2006 WI App 240, ¶5, 297 Wis. 2d 368, 724 N.W.2d 430, *review denied*, 2007 WI 59, 299 Wis. 2d 328, 731 N.W.2d 637 (No. 2006AP265).

¶5 The question is whether Brian was an “insured person” under Cynthia’s American Family policy. The UM coverage terms provide in part:

We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. The **bodily injury** must be sustained by an **insured person** and

³ The Zillmers also sued the Morellis, Sentry Select Insurance and Acuity Insurance, which issued a UM policy to Ernest, Brian’s father. The Zillmers represent that they have settled with all of the defendants except American Family.

must be caused by accident and arise out of the **use** of the **uninsured motor vehicle**.

¶6 The policy defines “insured person” as, among other things, “a relative,” which means “a person living in your household, related to you by blood” Since Brian lived in his mother’s household at the time of the accident, he was a relative. The policy then narrows the definition, however:

But the following are not **insured persons**:

....

- c. Any person using a vehicle without the permission of the person having lawful possession.
- d. Any person using a vehicle with the permission of the person having lawful possession, but who exceeds the scope of that permission.

“Using” means “driving, operating, manipulating, *riding in* and any other use.” WIS. STAT. § 632.32(2)(c) (emphasis added). The definitions in § 632.32(2) apply to every policy of automobile insurance issued or delivered in Wisconsin against an insured’s liability for loss or damage, whether to property or to a person, resulting from accident caused by any motor vehicle. Sec. 632.32(1).

¶7 The facts are clear. No one at the party had permission to drive the Infiniti. Michelle’s parents generally prohibited it, and her mother specifically denied permission that night. Michelle expressly told Brian not to “go[] anywhere with my car.” The Zillmers concede that Dominick did not have permission, and Dominick testified he heard Michelle tell Brian not to take it.

¶8 Thus, the plain terms of the American Family policy exclude Brian as an insured person. Under paragraph c. he is not an insured because he was

using—riding in—the Infiniti without the permission of the person having lawful possession, Michelle’s father and/or his car dealership.

¶9 Relying on *Home Insurance Co. v. Phillips*, 175 Wis. 2d 104, 106-07, 499 N.W.2d 193 (Ct. App. 1993), the Zillmers make a strained argument that eighteen-year-old Michelle had lawful possession because as an adult she could give herself permission to use the Infiniti, and thus could give Brian permission to use it. In *Home Insurance*, the adult son of a company CEO drove one of the business’s cars and hit a tree, injuring a passenger. *Id.* at 107. Home Insurance argued that since only the company was named as an insured, only it could give the son permission to drive the car. *Id.* This court held that because the insurer knew the vehicle was owned by the CEO and kept for his family’s personal use, it could not deny coverage to an innocent injured party, and the adult child could give himself permission to drive the vehicle. *Id.* at 114-15. The holding of *Home Insurance* is expressly confined to situations where the insured is a corporation and the insurer knows the covered vehicle is owned by an individual whose family members will drive it. *Id.* at 107. We see no applicability to a fact situation like the one here.

¶10 Still contending that Michelle had lawful possession, the Zillmers next assert that by giving Brian a ride to the party, Michelle granted him a degree of permission to use the Infiniti, such that a factual issue remains as to what Brian understood the scope of that permission to be. Even if we accepted their shaky premise, which we do not, Brian still would not be an insured under Cynthia’s policy. Paragraph d. excludes one using a vehicle in excess of the scope of the permission granted. Michelle gave Brian the keys to the Infiniti for the sole purpose of retrieving some cigarettes. Anything more exceeded that authorization.

There is no possibility that the scope of her permission included going for a joyride. Summary judgment was properly granted.

By the Court.—Order affirmed.

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

