Cite as 2018 Ark. App. 98

# ARKANSAS COURT OF APPEALS

DIVISIONS I & II
**No.** CV-17-169

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| GARA CROSS<br><br>APPELLANT<br><br>V.<br><br>STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY<br><br>APPELLEE | **Opinion Delivered** February 7, 2018<br><br>APPEAL FROM THE LITTLE RIVER COUNTY CIRCUIT COURT<br>[NO. 41CV-12-76]<br><br>HONORABLE CHARLES A. YEARGAN, JUDGE<br><br>REVERSED AND REMANDED |

**LARRY D. VAUGHT, Judge**

Gara Cross appeals the order entered by the Little River County Circuit Court granting summary judgment to State Farm Mutual Automobile Insurance Company (State Farm) finding that she was not entitled to uninsured-motorist (UM) coverage. Cross argues on appeal that the circuit court erred in granting summary judgment because (1) she presented a factual question on the issue of whether her injuries arose "out of the operation, maintenance or use of an uninsured motor vehicle"; (2) she presented a factual question on the issue of whether she was legally entitled to recover from the owner or driver of an uninsured motor vehicle; and (3) the government-owned-vehicle exclusion violates public policy. We agree and reverse and remand.

The Arkansas Highway and Transportation Department (AHTD) was performing "chip-and-seal" road-construction work on State Highway 108 in July 2006. The project

involved heavy equipment laying down liquid asphalt and pea gravel in the roadway. In the early morning of July 13, 2006, Cross was driving to work when her vehicle slid on loose gravel, and she suffered injuries in a single-vehicle accident.

Cross was the permissive driver of Glenn Hankins's vehicle, which was insured by State Farm. Hankins had UM coverage as required by state law.[1] Cross filed a complaint against State Farm for UM benefits, asserting that because the AHTD was not required to maintain liability insurance, it qualified as an uninsured motorist.

State Farm answered and filed a motion for summary judgment, arguing that the accident was not caused by the negligence of a driver of an uninsured vehicle; Cross's injuries did not arise out of the operation, maintenance, or use of an uninsured motor vehicle; the alleged uninsured motor vehicle and driver had not been identified and thus physical contact was required (under the "hit-and-run" provision of the UM coverage); and the policy excluded government-owned vehicles from the definition of an "uninsured motor vehicle." After a hearing, the circuit court found in favor of State Farm and entered summary judgment. Specifically, the circuit court found that (1) because there was no "collision" between Cross's vehicle and the AHTD dump truck, the accident did not arise

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[1]Arkansas Code Annotated section 23-89-403(a)(1) (Repl. 2014) provides,

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto and is not less than limits described in § 27-19-605, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

out of the operation, maintenance, or use of an uninsured motor vehicle; (2) because Cross was unable to identify which truck and driver caused the alleged negligence, physical contact between her vehicle and the uninsured motorist was required under the hit-and-run provision of the UM coverage; and (3) the AHTD vehicles were excluded from UM coverage pursuant to the government-owned-vehicle exclusion. Cross timely appealed.

The first issue on appeal revolves around the State Farm UM insuring clause:

> We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by an accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.

(Emphasis in policy.) Cross argues on appeal that the circuit court erred in finding that she did not present a factual question on the issue of whether her accident arose out of the operation, maintenance, or use of an uninsured vehicle because there was no "collision." The phrase "arising out of the operation, maintenance or use of" in the context of underinsurance motorist (UIM) coverage was discussed at length in *Hisaw v. State Farm Mutual Automobile Insurance Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003). In *Hisaw*, the plaintiff was injured when he leaned into a wrecked car and the car door hit his back, causing neck and back injuries. The circuit court granted summary judgment to the UIM carrier, finding that the plaintiff's injuries did not arise out of the operation, maintenance, or use of the underinsured vehicle.

On appeal, the supreme court construed the phrase "arising out of the operation, maintenance, or use of an uninsured motor vehicle." The court held that the phrase must be interpreted broadly and that the term "use" was vague and ambiguous and susceptible to more than one reasonable interpretation. *Id.* at 681, 122 S.W.3d at 7–8. The *Hisaw* court

noted that "courts have held that an injury arises out of the use of [an] insured vehicle, for insurance purposes, if it is shown that some causal connection exists between the liability-causing event and a proper use of the vehicle." *Id.* at 680, 112 S.W.3d at 7 (citing *Georgeson v. Fidelity & Guar. Ins. Co.*, 48 F. Supp. 2d 1262 (D. Mont. 1998) (internal citations omitted)). The *Hisaw* court continued:

> Whether an accident is caused by the use of a vehicle must be determined on a case-by-case basis. *Bredemeier v. Farmers Ins. Exchange*, 950 P.2d 616, 617 (Colo. App. 1997). "An injury arises out of the use of a vehicle within the provisions of an automobile insurance policy when a causal connection is reasonably apparent between the use to which the vehicle is being put and the resulting injury." *Id.*, quoting, G. Couch, *Cyclopedia of Insurance Law* § 45:56 (R. Anderson 2d ed. 1981). To prove causation under such circumstances, a plaintiff need only show that the injury originated in, grew out of, or flowed from the use of a vehicle, not that the vehicle itself was the source of the injury. Thus, the vehicle need only be integrally related to the claimant's activities and the injury at the time of the accident. *Id.*, citing, *Aetna Casualty & Surety Co. v. McMichael*, 906 P.2d 92 (Colo. 1995). The causal requirement is more than "but-for" causation, but less than legal, proximate cause.

*Hisaw*, 353 Ark. at 680–81, 122 S.W.3d at 7 (quoting *Georgeson*, *supra*). Ultimately, the court found that whether the plaintiff's injuries were caused by an accident "arising out of the operation, maintenance or use of an underinsured motor vehicle" was a question for the jury to resolve. *Id.* at 683, 122 S.W.3d at 9. Summary judgment was reversed and remanded on this issue.

Likewise, in the case at bar, we must reverse the circuit court's summary-judgment finding that the accident did not arise out of the operation, maintenance, or use of an uninsured motor vehicle. The AHTD project supervisor, Kathy Barham, explained in her affidavit the proper method for the "chip-and-seal" construction project. She said that AHTD employees would spray liquid asphalt onto the roadway. Then, dump trucks would haul pea gravel from a storage area to a spreader located at the jobsite. The trucks would

connect to the spreader, and the spreader would pull the dump truck along the highway. As they traveled together, the truck would dump the pea gravel into the spreader as needed, and the spreader would control the flow of the gravel onto the roadway surface. Two large rollers would follow behind the dump truck/spreader tandem to compact the gravel into the liquid asphalt.

However, Cross presented the deposition of Ricky Carter, who testified that at approximately noon on July 12, 2006, the day before Cross's accident, he was driving through the construction zone and witnessed AHTD employees dumping pea gravel out of the dump truck directly onto the roadway. Further, the deposition testimony of Raymond Smith demonstrated that he had been involved in a very similar accident in the same area under identical conditions on July 12, 2006, the day before Cross's accident. He stated that he lost control of his vehicle when it hit the loose gravel and oil on the road.

Employing a broad interpretation of the word "use" as we are required to do, we hold that Cross presented sufficient evidence to create a question of fact about whether her accident arose out of the operation, maintenance, or use of an uninsured motor vehicle. A jury should determine whether Cross's injuries were causally connected to the use of the AHTD dump truck. Accordingly, we hold that the circuit court erred in finding that the accident did not arise out of the operation, maintenance, or use of an uninsured motor vehicle.

We further hold that the circuit court erred in finding that because there was no collision between Cross and an AHTD dump truck, the accident did not arise out of the operation, maintenance, or use of an uninsured motor vehicle. The insuring clause of the

policy does not require a collision; instead, it requires only that the accident arise out of the operation, maintenance, or use of the uninsured vehicle. Accordingly, we reverse on this point.

The second issue on appeal also revolves around the UM insuring clause. The UM policy provides,

> We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.
>
> *Uninsured Motor Vehicle*—under coverage U means:
>
> 1. a land motor vehicle, the ownership, maintenance or use of which is:
>    a. not insured or bonded for bodily injury liability at the time of the accident.
>
> . . . .
>
> 2. a "hit-and-run" land motor vehicle whose owner or driver remains unknown and which strikes:
>    a. the *insured*; or
>    b. the vehicle the *insured* is *occupying*
>
>    and is the proximate cause of *bodily injury* to the *insured*.

(Emphasis in policy.)

Cross argues on appeal that she was entitled to UM coverage because she presented a question of fact on the issue of whether she was legally entitled to collect from the owner or driver of an uninsured vehicle. This language is consistent with the language of section 23-89-403, which states that its purpose is to protect those who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. Ark. Code Ann. § 23-89-403(a)(1) (Repl. 2014). Our supreme court has held that the policy requirement that an insured must be "legally entitled to recover from an uninsured motorist is intended only to

require a showing of fault on the part of the uninsured motorist." *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 570–71, 42 S.W.3d 443, 463 (2001) (citing *Hettel v. Rye*, 251 Ark. 868, 870, 475 S.W.2d 536, 538 (1972)).

Arkansas case law has further interpreted the phrase "legally entitled to recover from an uninsured motorist" as requiring the plaintiff to prove that the other *vehicle* is uninsured. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 341, 150 S.W.3d 276, 279 (2004); *Home Ins. Co. v. Harwell*, 263 Ark. 884, 885, 568 S.W.2d 17, 18 (1978); *Ward v. Consol. Underwriters*, 259 Ark. 696, 698, 535 S.W.2d 830, 832 (1976); *Sw. Underwriters Ins. Co. v. Miller*, 254 Ark. 387, 391–92, 493 S.W.2d 432, 434 (1973). This interpretation is consistent with the language of the policy, which puts the focus on whether the motor vehicle is uninsured.[2] Therefore, to survive summary judgment, Cross had to present a question of fact showing that AHTD dump trucks were at fault and that AHTD dump trucks were uninsured.

We hold that Cross met her burden of presenting evidence to create a question of fact and survive summary judgment on this issue. First, State Farm admitted in its responses to requests for admission that AHTD was not covered by liability insurance at the time of the collision in this case. Further, AHTD's attorney stated in his affidavit that there was no insurance on the AHTD trucks that were used to transport and place materials on Highway 108. Second, Cross presented evidence of AHTD's fault. Her deposition testimony, along with that of Ricky Carter and Raymond Smith, was sufficient evidence to present a question of fact on the issue of AHTD's fault. Furthermore, the circuit court, in its order, expressly

[2]The UM coverage defines an "uninsured motor vehicle" as "a land motor vehicle, the ownership, maintenance or use of which is not insured or bonded for bodily injury liability at the time of the accident."

found that there were material questions of fact on the issue of negligence of AHTD's dump truck and/or drivers. Therefore, we hold that Cross presented sufficient evidence to create a question of fact on the issue of her entitlement to UM coverage.

We acknowledge the supreme court's holding in *Gailey v. Allstate Insurance Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005), which appears to be contrary to our holding. In *Gailey*, the appellant was struck by a vehicle driven by Bianca Sills and owned by Jerry Woods. The appellant made a claim with her UM carrier, the appellee. After a trial, the jury found that Sills and the vehicle she was driving were uninsured. *Gailey*, 362 Ark. at 572, 201 S.W.3d at 43. The UM carrier cross-appealed, contending that while the insured presented sufficient evidence to prove that Sills was uninsured, the insured failed to present sufficient evidence that the vehicle was uninsured. *Id.* at 577, 210 S.W.3d at 45–46. Citing *Home Insurance Co. v. Harwell*, the supreme court stated that "[i]n order to recover uninsured-motorist benefits under Arkansas law, a plaintiff must prove that both the driver of the vehicle and the vehicle itself were uninsured." *Id.* at 577, 210 S.W.3d at 46. The court went on to find that substantial evidence supported the jury's finding that the vehicle was uninsured. *Id.* at 578–79, 210 S.W.3d at 47–48.

We distinguish *Gailey* for two reasons. First, the *Gailey* court did not recite the UM policy language at issue in that case. Therefore, we do not know what it required. Referring back to the policy language in the instant case, it expressly provides that an insured is legally entitled to collect from the owner *or* operator of the uninsured motor vehicle, which is a clear basis on which to distinguish *Gailey*.

Second, *Gailey* cites *Home Insurance Co. v. Harwell* for the proposition that in order to recover uninsured-motorist benefits, the insured must prove that both the driver of the vehicle and the vehicle itself were uninsured; however, the *Harwell* court did not, in fact, state that the uninsured status of both the driver and the vehicle had to be proved. In *Harwell*, the driver of the vehicle who caused the accident, John Hinman, was not the owner of the vehicle; the vehicle's owner was Donald Eoff. It was stipulated that Hinman did not have liability insurance. The insured, however, introduced no evidence as to whether Eoff had insurance on his vehicle. The supreme court did not hold that the insured had to prove that both the owner and the operator of the offending vehicle were uninsured; rather, the court held that the insured failed to prove that the vehicle was an "uninsured vehicle" within the meaning of the plaintiff's uninsured-motorist policy and the predecessor statute to section 27-89-403. *Harwell*, 263 Ark. at 885–86, 568 S.W.2d at 18. For these reasons, we hold that *Gailey* is inapplicable to the case at bar.[3]

On the issue of UM coverage, the circuit court also found that Cross failed to identify which AHTD truck and which AHTD driver caused the alleged negligence that led to her accident. The circuit court found that because both the truck and the driver were unknown, Arkansas law and the "hit-and-run" provision of the UM coverage required physical contact between the unidentified truck and Cross's vehicle. The court then found that there was no such contact; therefore, Cross was not entitled to UM coverage as a matter of law.

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[3]For the same reasons, we hold that the circuit court erred in relying on AMI Civ. 2301 and finding that Cross was required to prove that both the dump truck and the operator of the truck did not have liability insurance before UM coverage was available to her.

We hold that the circuit court erred in applying the "hit-and-run" provision of the UM coverage and in finding that there had to be contact between an AHTD truck and Cross's vehicle. Under the policy, an "uninsured motor vehicle" is also defined as a "hit-and-run" land motor vehicle whose owner or driver remains unknown and which strikes the insured or the vehicle the insured is occupying.

In this case, it was undisputed that the AHTD owned the dump trucks used in the construction project. There was also evidence presented that one of five named AHTD employees drove the dump truck in question, which is some evidence of the identity of the driver of the truck. Because the owner of the motor vehicle or the driver was not unknown, it is clear that the "hit-and-run" provision does not apply. Accordingly, the requirement that the dump truck "strike" Cross's vehicle does not apply either. This case is not a hit-and-run case, in which the insured has no idea who hit him or her. Therefore, the circuit court erred in granting summary judgment in favor of State Farm based on the requirement in the "hit-and-run" provision that an AHTD dump truck strike Cross's vehicle. We reverse the circuit court's summary-judgment order in favor of State Farm finding that Cross was not entitled to UM coverage as a matter of law.

Because we hold herein that Cross presented factual questions sufficient to survive summary judgment on the issue of whether she was entitled to UM coverage, we must next determine whether the circuit court erred as a matter of law in finding that Cross was excluded from UM coverage based on State Farm's government-owned-vehicle exclusion. This exclusion provides, "An *uninsured motor vehicle* does not include a land motor vehicle . . . [o]wned by any government or any of its political subdivisions or agencies." (Emphasis in

policy.) The circuit court noted that in *Vaught v. State Farm Fire & Casualty Co.*, 413 F.2d 539 (8th Cir. 1969) (interpreting Arkansas law), the exclusion was held to be void against public policy; however, the circuit court found that the issue had not been addressed by Arkansas appellate courts, and until the appellate courts held otherwise, the exclusion was valid and not void as against public policy.

In *Vaught*, the insured was involved in a collision with a vehicle owned by the City of North Little Rock. The insured filed an UM suit against State Farm, and State Farm responded that the claim was excluded under a government-owned-vehicle exclusion similar to the one in the instant case. The district court found the exclusion was against public policy and invalid, and the insured recovered a judgment. State Farm appealed based on the policy exclusion.

On appeal, State Farm contended that "because the Uninsured Motorist Act refers to the Motor Vehicle Safety and Responsibility Act [MVSRA] for the purpose of prescribing the limits of coverage,[4] it is fair to look at the latter act to determine legislative intent as to exclusions." *Vaught*, 413 F.2d at 541. State Farm also argued that since the MVSRA contained an exclusion for vehicles owned by the government,[5] a similar exclusion should be read into the Uninsured Motorist Act. *Id.* The Eighth Circuit disagreed, stating that "the answer to this contention is if the legislature had so intended, it could have been as explicit with respect to one as it was with the other." *Id.* The Eighth Circuit held that the policy exclusion defeated the purpose of the Uninsured Motorist Act, which is to provide insureds

[4]*See* Ark. Code Ann. §§ 27-19-101 et seq. (Repl. 2014).

[5]*See* Ark. Code Ann. § 27-19-604(8).

protection against inadequate compensation for injuries in a collision with uninsured motor vehicles. *Id.* The Eighth Circuit also held that the Uninsured Motorist Act and the MVSRA are not codified in in the same chapter and that the Uninsured Motorist Act does not specifically exclude government-owned vehicles. *Id.*

We apply the reasoning in *Vaught* to the instant case and hold that the application of the government-owned-vehicle exclusion violates Arkansas public policy. The purpose of UM coverage is to protect the insured from financially irresponsible motorists, *Jacobs v. Gulf Insurance Co.*, 85 Ark. App 435, 438, 156 S.W.3d 737, 738–39 (2004) (citing *Pardon v. State Farm Bureau Cas. Ins. Co.*, 315 Ark. 537, 868 S.W.2d 468 (1994)), and this exclusion deprives Cross of that benefit.

The "the majority of courts in other jurisdictions that have considered the validity of exclusions for government-owned vehicles have found them to be void and unenforceable as contrary to their respective [uninsured] insurance laws." *Jenkins v. City of Elkins*, 738 S.E.2d 1, 16 (W. Va. 2012) (citing *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265, 1270 (Colo. App. 2001); *Carter v. Saint Paul Fire & Marine Ins. Co.*, 283 F. Supp. 384 (E.D. Ark. 1968); *Higgins v. Nationwide Mut. Ins. Co.*, 282 So. 2d 301 (Ala. 1973); *Cropper v. State Farm Mut. Auto. Ins. Co.*, 671 A.2d 423 (Del. Super. Ct. 1995); *United Servs. Auto. Ass'n v. Phillips*, 740 So. 2d 1205 (Fla. Dist. Ct. App. 1999); *Franey v. State Farm Mut. Auto. Ins. Co.*, 285 N.E.2d 151 (Ill. Ct. App. 1972); *Cincinnati Ins. Co. v. Trosky*, 918 N.E.2d 1 (Ind. Ct. App. 2009) (UIM coverage); *Hillhouse v. Farmers Ins. Co.*, 595 P.2d 1102 (Kan. 1979); *Nationwide Mut. Ins. Co. v. Hatfield*, 122 S.W.3d 36 (Ky. 2003) (UIM coverage); *Mednick v. State Farm Mut. Auto. Ins. Co.*, 31 So. 3d 1133 (La. Ct. App. 2010); *Young v. Greater Portland Transit Dist.*, 535 A.2d 417 (Me.

1987); *W. Am. Ins. Co. v. Popa*, 723 A.2d 1 (Md. 1998); *Mass. Insurers Insolvency Fund v. Premier Ins. Co.*, 869 N.E.2d 576, 583 (Mass. 2007); *Ronning v. Citizens Sec. Mut. Ins. Co.*, 557 N.W.2d 363 (Minn. Ct. App. 1996) (UIM coverage); *Welch v. Auto. Club Inter-Ins. Exch.*, 948 S.W.2d 718 (Mo. Ct. App. 1997); *Bartell v. Am. Home Assur. Co.*, 49 P.3d 623 (Mont. 2002); *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 156 P.3d 25 (N.M. 2007); *Gabriel v. Minn. Mut. Fire & Cas.*, 506 N.W.2d 73 (N.D. 1993) (UIM coverage); *Jennings v. Dayton*, 682 N.E.2d 1070 (Ohio App. 1996); *State Farm Auto. Ins. Co. v. Greer*, 777 P.2d 941 (Okla. 1989); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 746 A.2d 1118 (Pa. Super. Ct. 1999); *Rueschemeyer v. Liberty Mut. Ins. Co.*, 673 A.2d 448 (R.I. 1996); *Kyrkos v. State Farm Mut. Auto. Ins. Co.*, 852 P.2d 1078 (Wash. 1993) (UIM coverage)).

These courts have reasoned "that the exclusion of government[-]owned vehicles from uninsured . . . motorist coverage thwarts the expressed public policy of the statute setting forth the purpose of such coverage, namely to protect those innocent insureds who are harmed by an uninsured . . . tortfeasor." *Jenkins*, 738 S.E.2d at 16 (citing *Mednick*, 31 So. 3d at 1137). The minority of jurisdictions that have upheld the government-owned-vehicle exclusion have done so because either their statutes or regulations affirmatively authorized the exclusion. *Jenkins*, 738 S.E.2d at 16–17 (citing *Giglio v. Am. Econ. Ins. Co.*, 900 A.2d 27 (Conn. 2006); *Cont'l W. Ins. Co. v. Conn*, 629 N.W.2d 494 (Neb. 2001); *Norcia v. Liberty Mut. Ins. Co.*, 688 A.2d 679 (N.J. Super. Law Div. 1996); *Jones v. S. Farm Bureau Cas. Co.*, 163 S.E.2d 306 (S.C. 1968); *Francis v. Int'l Serv. Ins. Co.*, 546 S.W.2d 57 (Tex. 1976)).

Accordingly, we hold that State Farm's government-owned-vehicle exclusion is void as it is contrary to the public-policy purpose behind the UM statute. Therefore, we reverse on this issue.

Reversed and remanded.

ABRAMSON, MURPHY, and BROWN, JJ., agree.

KLAPPENBACH and WHITEAKER, JJ., concur in part and dissent in part.

**PHILLIP T. WHITEAKER, Judge, concurring in part and dissenting in part**. I agree with the majority's decision that appellant Gara Cross presented sufficient questions of material fact with regard to whether her injuries arose "out of the operation, maintenance, or use of an uninsured motor vehicle." I also agree with the majority's decision that Cross presented a fact question on the issue of whether she was legally entitled to recover from the owner or driver of an uninsured motor vehicle. I cannot agree, however, with the majority's conclusion that the government-owned-vehicle exclusion violates public policy.

Our supreme court has stated the law regarding insurance-policy exclusions: once it is determined that coverage exists under a policy of insurance, it then must be determined whether the exclusionary language within the policy eliminates the coverage. *Castaneda v. Progressive Classic Ins. Co.*, 357 Ark. 345, 351, 166 S.W.3d 556, 560–61 (2004); *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). As the majority notes, the State Farm policy in this case provides that an uninsured motor vehicle "does not include a land motor vehicle . . . owned by any government or any of its political subdivisions or agencies." Cross argues, and the majority agrees, that the Eighth Circuit's decision in

*Vaught v. State Farm Fire & Casualty Co.*, 413 F.3d 538 (8th Cir. 1969), compels a result that the application of such an exclusion is void as against public policy.

The Eighth Circuit concluded its opinion by asserting that it was "convinced that if the Arkansas Supreme Court were faced with the question raised here that its opinion would be the same." Vaught, 413 F.3d at 543. To date, however, our supreme court has not been faced with this identical question. In *Harasyn v. St. Paul Guardian Insurance Co.*, however, the supreme court held that "[u]nless the legislature has specifically prohibited exclusions, courts will not find the restrictions void as against public policy. An exclusion to coverage cannot violate public policy when one considers that a driver can opt out of the coverage altogether." 349 Ark. 9, 15, 75 S.W.3d 696, 699 (2002) (addressing the validity of an exclusion in an underinsurance policy); see also *Majors v. Am. Premier Ins. Co.*, 334 Ark. 628, 977 S.W.2d 897 (1998) (holding that where an insurance provision is in accordance with a statute, it cannot run contrary to public policy).

The Arkansas General Assembly has not specifically prohibited a government-owned-vehicle exclusion. In the absence of such prohibition, and in the absence of clear direction from our supreme court on this issue, I am unwilling to take the leap that the majority has taken. I would therefore affirm the circuit court's conclusion that the exclusion in Cross's insurance policy is not void as against public policy.

Klappenbach, J., joins.

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