COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP2099 **Cir. Ct. No. 2012CV56**

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

RILEY STERRY, A MINOR AND WILLIAM STERRY,

PLAINTIFFS-APPELLANTS,

V.

GEORGE J. ACKER, STATE FARM MUTUAL INSURANCE, KRISTY R. STERRY, MCMILLAN-WARNER MUTUAL INSURANCE, INTERNATIONAL ASSOCIATION OF LIONS CLUB, PRAIRIE FARM LIONS CLUB, ACE AMERICAN INSURANCE CO., VILLAGE OF RIDGELAND, ANTHEM HEALTH PLANS OF MAINE, ABC INSURANCE CO., DEF INSURANCE CO., LARRY EDWARDS, AETNA HEALTH INSURANCE, GHI INSURANCE CO. AND JKL INSURANCE CO.,

DEFENDANTS,

PROGRESSIVE CLASSIC INSURANCE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Riley Sterry and his father, William Sterry, (collectively, the Sterrys) appeal a summary judgment dismissing their claims against Progressive Classic Insurance. The circuit court concluded a car insurance policy Progressive issued to Riley's mother, Kristy Sterry, did not provide coverage for the Sterrys' negligence claims against Kristy. The court also rejected the Sterrys' argument that Riley was entitled to underinsured motorist coverage under the Progressive policy. For the reasons explained below, we affirm.

BACKGROUND

¶2 The following facts are undisputed. On May 30, 2010, Kristy drove six-year-old Riley to a tractor pull in Ridgeland, Wisconsin. They were accompanied by Kristy's mother and nephew.

¶3 The tractor pull was held on the east side of Highway 25. Kristy and her passengers arrived at about 6:30 p.m. Kristy parked her vehicle in a grassy area on the west side of Highway 25, approximately six to ten yards from the edge of the highway and twenty yards from the gate leading to the tractor pull. She and her passengers exited the vehicle and walked across Highway 25 without incident.

¶4 At about 8:00 p.m., the tractor pull was canceled due to rain. Kristy, Riley, and Kristy's mother and nephew then sat in Kristy's father's truck on the east side of Highway 25 for twenty to twenty-five minutes, waiting for the rain to subside. After the rain lightened somewhat, Kristy's father moved his truck to the gate on the east side of Highway 25 to allow Kristy and her passengers to return to her vehicle.

¶5 Kristy, Riley, and the others left the truck and waited a minute for traffic on Highway 25 to clear. Kristy then walked onto Highway 25 in an effort to help her father pull his truck onto the highway. When she reached the center of the highway, she shouted to Riley and the others that they should cross. As Riley crossed the highway, he was struck by a vehicle operated by George Acker.

¶6 The Sterrys subsequently sued Acker, Kristy, and Progressive, along with various other defendants not relevant to this appeal. The complaint alleged Kristy was negligent by "fail[ing] to park her automobile in a safe location as to avoid feasible dangers in crossing Highway 25" and "fail[ing] to properly supervise [Riley] immediately prior to and at the time of his crossing of Highway 25." The complaint further alleged Progressive had issued Kristy a car insurance policy that was in effect on the date of the accident, and, pursuant to that policy, Progressive had agreed to pay "all sums which [Kristy] may be legally obligated to pay as a result of the incident material hereto[.]" The complaint made no claim that Riley was entitled to underinsured motorist (UIM) coverage under the Progressive policy.[1]

¶7 Progressive answered the Sterrys' complaint, denying that its policy provided liability coverage for the Sterrys' claims against Kristy. Progressive then successfully moved to bifurcate and stay proceedings on liability, and it subsequently moved for summary judgment on the coverage issue. In support of its motion, Progressive noted its policy requires it to "pay damages for **bodily injury** … for which an **insured person** becomes legally responsible because of an

[1] The Sterrys later filed an amended summons and complaint, adding another defendant who is not relevant to this appeal. Like the original complaint, the amended complaint made no reference to UIM coverage.

accident." The policy defines "insured person," in relevant part, as "[the named insured] … with respect to an accident arising out of ownership, maintenance, or use of an **auto**[.]" Progressive argued Kristy was not an "insured person" with respect to Riley's accident because the accident did not arise out of her ownership, maintenance, or use of an auto. Progressive's arguments focused on the Sterrys' claim that Kristy negligently supervised Riley.

¶8 In response, the Sterrys argued Kristy was negligent in two distinct ways: (1) by parking across the highway from the tractor pull; and (2) by directing Riley across the highway without keeping a proper lookout. The Sterrys argued each of these acts "grew out of, had its origin in and flowed from the use of [Kristy's] vehicle." They therefore argued Progressive's policy provided coverage for both of their claims against Kristy.[2]

¶9 In addition, the Sterrys asserted for the first time in their response to Progressive's summary judgment motion that Progressive was a necessary party and could not be dismissed from the case because Riley was entitled to UIM coverage under the Progressive policy. They contended, "Acker's liability insurance limits are insufficient to satisfy plaintiffs' damages; therefore, plaintiffs will make an underinsured motorist claim against … Progressive." (Emphasis added.) The Sterrys noted Progressive's policy requires it to

> pay for damages that an **insured person** is entitled to recover from the owner or operator of an **underinsured motor vehicle** because of bodily injury:

[2] The Sterrys did not argue Progressive's policy provided coverage for their claims against Kristy because the accident arose out of her "ownership" or "maintenance" of her vehicle. Accordingly, the circuit court restricted its analysis to whether the accident arose out of the "use" of Kristy's vehicle, and we do the same.

1. sustained by an **insured person**;
2. caused by an accident; and
3. arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**.

The Sterrys further observed that, for purposes of UIM coverage, the policy defines the term "insured person" to include "any person **occupying**, but not operating, a **covered auto**[.]" The Sterrys argued Riley was "occupying" Kristy's vehicle at the time of the accident and was therefore entitled to UIM coverage.

¶10 In reply, Progressive again argued its policy did not provide liability coverage for the Sterrys' claims against Kristy because the accident did not arise out of her use of an automobile. Progressive's arguments focused on the negligent supervision claim, and it did not separately address the negligent parking claim. Progressive also argued its policy did not provide UIM coverage to Riley because he was not "occupying" Kristy's vehicle at the time of the accident.

¶11 Following a hearing, the circuit court granted Progressive summary judgment. The court agreed with Progressive that Riley's accident did not arise out of the use of Kristy's vehicle. The court focused on the Sterrys' negligent supervision claim and did not separately address the negligent parking claim. The court also concluded Riley was not entitled to UIM coverage under Progressive's policy because he was not "occupying" Kristy's vehicle at the time of the accident. The Sterrys now appeal.

DISCUSSION

¶12 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Fifer v. Dix***, 2000 WI App 66, ¶5, 234 Wis. 2d 117, 608 N.W.2d 740. Summary judgment is appropriate if 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).[3]

¶13 Here, the facts are undisputed. However, the Sterrys argue, for three reasons, that Progressive was not entitled to judgment as a matter of law. First, the Sterrys argue the circuit court should not have granted Progressive summary judgment because neither the court's decision nor Progressive's motion addressed the Sterrys' negligent parking claim. Second, the Sterrys argue the court erred by concluding Riley's accident did not arise out of the "use" of Kristy's vehicle. Third, the Sterrys argue Riley is entitled to UIM coverage under Progressive's policy because Riley is a "relative" of Kristy and therefore qualifies as an "insured person." We address these arguments in turn.

I. Did Progressive and the circuit court fail to address the negligent parking claim?

¶14 The Sterrys first argue the circuit court erred by granting Progressive summary judgment because neither the court nor Progressive addressed the Sterrys' negligent parking claim. The Sterrys contend Progressive's summary judgment motion only addressed the Sterrys' negligent supervision claim. In response, they argued Kristy's negligent parking constituted a "use" of her vehicle distinct from her negligent supervision of Riley. The Sterrys argue Progressive failed to respond to this argument in its reply brief in support of its summary judgment motion. As a result, pursuant to ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), the Sterrys assert the circuit court should have deemed their argument regarding the

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

negligent parking claim conceded. The Sterrys further assert Progressive has forfeited its right to raise any arguments regarding the negligent parking claim on appeal by failing to raise those arguments in the circuit court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited).

¶15 We reject these arguments because the record shows that Progressive and the circuit court adequately addressed the negligent parking claim. The Sterrys are correct that both of Progressive's briefs on summary judgment addressed the general question of whether "the accident" arose out of the "use" of Kristy's vehicle. Progressive did not distinguish between the negligent parking and negligent supervision claims, and its arguments focused on the negligent supervision claim. However, at the summary judgment hearing, counsel for Progressive clarified that Progressive's arguments regarding the negligent supervision claim also applied to the negligent parking claim, stating:

> *I think the arguments that are in my original brief and the reply brief—I think that applies to both arguments the Plaintiff makes for coverage here, both as to a negligent supervision claim and as to alleged—I guess it's alleged improper parking of the vehicle.* … I think what the case is—the case that is cited—it is the events subsequent to the use that define coverage. And in here, of course, we have the events subsequent to the use of the vehicle, being the running across the highway by the young man and the gesturing or at least the discussion by the mother, are the key events.
>
> I think [***Miller v. Keating***, 339 So. 2d 40 (La. Ct. App. 1976), affirmed and amended by 349 So. 2d 265 (La. 1977)] that is cited says it best. And it says, is there a connection between the use of the vehicle or is the use of the vehicle so remote and insignificant that it cannot be said that plaintiff's injury arose out of the use of the vehicle? *And I think that is the case here with the—any allegation that accompanied—that had to do with the parking of the*

> *vehicle in a particular location. That quote from what is the **Miller** case applies very well.*

(Emphasis added.)

¶16 Thus, at the summary judgment hearing, Progressive asserted its arguments regarding the negligent supervision claim also applied to the negligent parking claim. Moreover, Progressive specifically asserted the accident did not arise from Kristy's negligent parking under the test articulated in ***Miller***. Although the circuit court did not explicitly address the negligent parking claim in its summary judgment decision, it implicitly adopted Progressive's arguments regarding that claim when it granted Progressive summary judgment. We therefore reject the Sterrys' assertion that Progressive and the circuit court inadequately addressed the negligent parking claim. Progressive did not concede the issue by failing to respond to the Sterrys' negligent parking arguments, and it has not forfeited its right to raise arguments related to the negligent parking claim on appeal.

II. Did the accident arise out of the use of Kristy's vehicle?

¶17 The Sterrys next argue the circuit court erred by concluding Progressive's policy did not cover their claims against Kristy because the accident did not arise out of the use of her vehicle. This presents an issue of insurance policy interpretation, which we review independently. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We construe insurance policies to give effect to the intent of the parties as expressed in the policy language. ***Id.*** We interpret policy language according to "what a reasonable person in the position of the insured would have understood the words to mean." ***Id.***, ¶20.

¶18 As explained above, the Sterrys argue Riley's accident arose out of two uses of Kristy's vehicle—her negligent supervision of Riley as he crossed Highway 25, and her negligent parking of her vehicle. We conclude Kristy's supervision of Riley did not constitute a use of her vehicle under the circumstances of this case. We also conclude that, while parking is a use of Kristy's vehicle, the accident did not arise out of that use. As a result, the circuit court properly determined the Progressive policy did not provide liability coverage for the Sterrys' claims against Kristy.

A. Negligent supervision

¶19 The Sterrys first argue Kristy's negligent supervision of Riley while he crossed Highway 25 constituted a use of her vehicle. Specifically, the Sterrys assert Kristy was negligent by instructing Riley to cross the highway without keeping a proper lookout and thereby directing him into the path of an oncoming vehicle.

¶20 Progressive's policy does not define the term "use." However, the term "is commonly found in auto insurance policies and has been defined in our case law." ***Progressive N. Ins. Co. v. Jacobson***, 2011 WI App 140, ¶12, 337 Wis. 2d 533, 804 N.W.2d 838. Case law tells us that "use" is a broad term that is given a liberal construction. *See* ***id.***; *see also* ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 294, 481 N.W.2d 660 (Ct. App. 1992). It is not synonymous with operation of a vehicle; thus, the insured need not be moving the vehicle forward, backing it up, or putting it into gear for his or her activities to constitute use of the vehicle. ***Jacobson***, 337 Wis. 2d 533, ¶17; ***Garcia***, 167 Wis. 2d at 296. Instead, "use" encompasses activities incidental to actual vehicle operation. ***Garcia***, 167 Wis. 2d at 296.

¶21 The term "use" is not, however, without limitation. ***Jacobson***, 337 Wis. 2d 533, ¶12. An activity constitutes use of a vehicle only if it is "reasonably consistent with the inherent nature or 'use' of the vehicle." ***Garcia***, 167 Wis. 2d at 295. This is measured by whether the activity is "reasonably expected as a normal incident to the vehicle's use." ***Id.*** at 297. In other words, we must ask whether "the vehicle's connection with the activities which gave rise to the injuries is sufficient to bring those general activities, and the negligence connected therewith, within the risk for which the parties to the contract reasonably contemplated there would be coverage." ***Id.*** at 295.

¶22 The Sterrys rely mainly on ***Garcia*** in support of their argument that Kristy's negligent supervision of Riley constituted a use of her vehicle. In ***Garcia***, the defendant drove his vehicle to a park to inform his stepdaughter that he and her mother were going grocery shopping. ***Id.*** at 291. When the defendant saw the child, he pulled his vehicle over to the curb. ***Id.*** "With the motor running and [the defendant] still behind the wheel, [he] called across the street to [the child], advising her of their plans." ***Id.*** The child called back that she wanted to come along. ***Id.*** The defendant then "gestured with his hand to [the child] that it was all right for her to come with them." ***Id.*** The child ran into the street and was struck by an oncoming car. ***Id.***

¶23 The issue on appeal was whether the accident arose out of the use of the defendant's vehicle, so that the child's claims against the defendant were covered under his car insurance policy. ***Id.*** at 290-91. We concluded the defendant's "call and gesture to [the child] constituted 'use' of the vehicle within the meaning of the policy and the reasonable contemplation of the contracting parties." ***Id.*** at 298. We reasoned the defendant's vehicle was designed to carry passengers, and "the necessary incidental activities of boarding and alighting"

were within "the reasonable ambit" of that use. ***Id.*** at 297-98. We also stated one would reasonably expect that, in certain instances, the vehicle's operator would be collaterally involved in passengers' boarding and alighting. ***Id.*** at 298. Accordingly, we concluded the defendant's call and gesture to the child inviting her to enter the vehicle were part of the inherent use of his vehicle. ***Id.*** at 300.

¶24 The Sterrys argue this case is on all fours with ***Garcia***, and Kristy's act of shouting to Riley that he should cross Highway 25 was therefore part of the inherent use of her vehicle. We disagree. In ***Garcia***, the defendant was sitting behind the wheel of his vehicle with the engine running when he gestured to his stepdaughter to invite her into the vehicle. In contrast, when Kristy shouted to Riley that he should cross Highway 25, she was not sitting in her vehicle, and the vehicle was not running. In fact, Kristy was standing over six yards away from the vehicle, in the middle of the road. Further, unlike the defendant in ***Garcia***, Kristy did not call or gesture to Riley in order to invite him to enter her vehicle. Rather, she shouted to him that he should cross the highway. Consequently, her call was not associated with a passenger's boarding or alighting, which the ***Garcia*** court held were inherent uses of a vehicle designed to carry passengers.

¶25 The Sterrys note the ***Garcia*** court stated the insured does not have to be "in direct physical contact with the vehicle to be using it." ***Id.*** at 296. They therefore argue it is immaterial that Kristy was not in her vehicle when she called to Riley to cross the highway. We agree with the Sterrys that Kristy's lack of physical contact with her vehicle, standing alone, would be insufficient to show she was not using the vehicle. However, as discussed above, not only was Kristy not in physical contact with her vehicle when she called to Riley, she was at least six yards away from it. Moreover, Kristy was not inviting Riley to enter the vehicle. Our analysis might be different had Kristy been standing directly next to

the vehicle when she called to Riley or had she specifically instructed him to enter the vehicle. On the facts before us, however, we conclude Kristy's actions did not constitute a use of her vehicle.[4]

¶26 Finally, we find persuasive the Alabama Supreme Court's decision in ***Chamblee v. State Farm Mutual Automobile Insurance Co.***, 601 So. 2d 922 (Ala. 1992). There, Brenda Kay Battles, a minor, traveled with her aunt, Patricia Todd, and several other family members to attend wrestling matches in Birmingham, Alabama. ***Id.*** at 923. Todd drove the group in her pick-up truck, which was insured by State Farm. ***Id.*** Todd parked the truck across the street from the auditorium where the wrestling matches were being held. ***Id.*** The group got out of the truck and began crossing the street toward the auditorium. ***Id.*** When they reached the median, they stopped to check for oncoming traffic. ***Id.*** "At that moment, Brenda suddenly ran into the street and was hit by a motorist[.]" ***Id.*** Brenda subsequently sued Todd and State Farm, arguing State Farm's policy provided coverage for her claims because the accident arose out of the use of Todd's vehicle. ***Id.***

[4] In addition, we note that ***Garcia v. Regent Insurance Co.***, 167 Wis. 2d 287, 296, 481 N.W.2d 660 (Ct. App. 1992), cited ***Tasker v. Larson***, 149 Wis. 2d 756, 761, 439 N.W.2d 159 (Ct. App. 1989), for the proposition that direct physical contact is not necessary for an insured to be using his or her vehicle. However, ***Tasker*** is distinguishable. There, the insured father temporarily left his children in his vehicle while he went to check a minnow trap forty-five to fifty feet away. ***Tasker***, 149 Wis. 2d at 758. While he was gone, one of the children left the vehicle and was struck by an oncoming car. ***Id.*** We held the accident arose out of the father's use of the vehicle because the act of leaving his children in the vehicle during a brief errand was reasonably consistent with the inherent nature of the vehicle and was within the reasonable contemplation of the parties to the insurance contract. ***Id.*** at 761. Conversely, the act of telling one's child to cross a highway while standing over six yards away from one's vehicle is neither reasonably consistent with the vehicle's inherent use nor within the reasonable contemplation of the contracting parties.

¶27 In support of her argument, Brenda cited two cases, each of which found coverage where a minor was injured after exiting an insured's vehicle and immediately running into the street. ***Id.*** at 923-24. Both cases concluded the negligent supervision of the minor "could not be disassociated from" the unloading of the vehicle, which constituted a use of the vehicle under the respective insurance policies. ***Id.*** at 924. However, the Alabama Supreme Court distinguished these cases, explaining:

> In those cases, the children were injured *during* the immediate process of exiting the insureds' vehicles and liability arose from the insureds' failure to adequately supervise this process. In the instant case, it is uncontroverted that Brenda safely disembarked from the truck and paused, then walked across the road with Todd, and arrived without mishap into the median. When Brenda stopped at this point of safety, she had completed the act of exiting Todd's truck. The events of the accident were set in motion only after Brenda left the median and ran toward the auditorium, thus beginning a new activity that was disassociated from a "use" of the insured's vehicle.

Id.

¶28 Here, it is undisputed that Riley safely disembarked from Kristy's vehicle and crossed Highway 25 at about 6:30 p.m. He was not injured until he attempted to cross the highway a second time about two hours later. As in ***Chamblee***, Riley's second crossing of the highway, at Kristy's instruction, was a "new activity" disassociated from his earlier act of exiting Kristy's vehicle. *See* ***id.*** Moreover, Riley had not yet begun the act of entering Kristy's vehicle when the accident occurred. We therefore reject the Sterrys' argument that Kristy's negligent supervision of Riley while he crossed Highway 25 constituted a use of her vehicle under Progressive's policy.

B. Negligent parking

¶29 The Sterrys next argue Kristy was negligent by parking her vehicle across Highway 25 from the tractor pull, "thereby requiring Riley to cross the dangerous highway twice[.]" They assert Kristy's negligent parking constituted a use of her vehicle, the accident arose out of that use, and, as a result, Progressive's policy covers the negligent parking claim.

¶30 We agree with the Sterrys that it cannot reasonably be argued Kristy's parking was not a "use" of her vehicle. Parking is "reasonably expected as a normal incident to the vehicle's use." *See* ***Garcia***, 167 Wis. 2d at 297. The issue is therefore whether the accident that injured Riley arose out of Kristy's parking. For the reasons explained below, we conclude it did not.

¶31 The words "arising out of," as used in liability insurance policies, are "very broad, general and comprehensive." ***Lawver v. Boling***, 71 Wis. 2d 408, 415, 238 N.W.2d 514 (1976). They mean "originating from, growing out of, or flowing from[.]" ***Id.*** Thus, an accident arises out of the use of a vehicle when there is "some causal relationship" between the accident and the use of the vehicle. ***Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.***, 95 Wis. 2d 215, 225, 290 N.W.2d 285 (1980). This causal connection need not rise to the level of proximate cause, as that term is used in the negligence analysis. ***Lawver***, 71 Wis. 2d at 415. However, the mere fact that use of a vehicle was part of the wider factual circumstances surrounding an accident does not automatically mean the accident arose out of the vehicle's use. *See* ***Snouffer v. Williams***, 106 Wis. 2d 225, 228-29, 316 N.W.2d 141 (Ct. App. 1982).

¶32 In ***Snouffer***, the plaintiff was a passenger in a truck owned by his parents and driven by his brother. ***Id.*** at 226. The plaintiff's brother drove the

truck to the defendant's house, where two other passengers got out and vandalized the defendant's mailbox. ***Id.*** at 226-27. The defendant then emerged from his house and fired a pistol at the truck, injuring the plaintiff. ***Id.*** at 227. The issue on appeal was whether the plaintiff's injuries arose out of the use of the truck, for purposes of his parents' car insurance policy. ***Id.*** We concluded the plaintiff's injuries did not arise from the use of his parents' truck because the causal relationship between his injuries and the use was too attenuated. ***Id.*** at 227, 229. We reasoned the truck was used only as a means to transport the plaintiff to the defendant's house. ***Id.*** at 229. Once there, acts wholly independent from the use of the truck caused the plaintiff's injuries. ***Id.***

¶33 In support of this conclusion, we quoted with approval the following passage from COUCH ON INSURANCE:

> The use of an automobile may result in a condition which is an essential part of the factual setting which later results in harm. Such antecedent "use" of the automobile is distinct from the harm which thereafter arises from the condition created by the use of the automobile and such later harm does not arise from the "use" of the automobile and is not covered; the mere fact that the use of the vehicle preceded the harm which was later sustained is not sufficient to bring such harm within the coverage of the policy.

Snouffer, 106 Wis. 2d at 228 (quoting 12 COUCH ON INSURANCE 2d § 45.57 (rev. ed. 1981)). We also cited a Florida case, which held that "it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile … there must be a causal connection or relation between the two for liability to exist." ***Id.*** at 229 (quoting ***Stonewall Ins. Co. v. Wolfe***, 372 So. 2d 1147 (Fla. Dist. Ct. App. 1979)). Finally, we cited ***Miller***, 339 So. 2d at 46, in which the Louisiana Court of Appeals concluded the connection between an assault and the use of a truck to transport individuals to and from the scene of the

assault was "so remote and insignificant that it [could not] reasonably be said that plaintiff's injury arose out of the use[.]" ***Snouffer***, 106 Wis. 2d at 229.

¶34 We similarly conclude that, in this case, it cannot reasonably be said that Riley's injuries arose out of Kristy's parking. The connection between her parking and the accident is too remote and insignificant. The accident did not occur until two hours after Kristy parked the vehicle. Moreover, Riley was over six yards from the vehicle when the accident occurred. He was not in the act of entering or exiting the vehicle. As in ***Snouffer***, the vehicle was merely a means of transportation to the site of the accident. *See* ***id.*** at 229. We therefore agree with Progressive that the accident did not arise out of Kristy's parking. Accordingly, the circuit court correctly concluded Progressive's policy did not provide liability coverage for the Sterrys' negligent parking claim.

III. Is Riley entitled to UIM coverage?

¶35 The Sterrys next argue that, even if Progressive's policy does not provide liability coverage for their claims against Kristy, the circuit court erred by dismissing Progressive from the case because Riley is entitled to UIM coverage under Progressive's policy. The Sterrys note the policy requires Progressive to "pay for damages that an **insured person** is entitled to recover from the owner or operator of an **underinsured motor vehicle**[.]" For purposes of UIM coverage, the policy defines the term "insured person" to include "a **relative**[.]" The policy further defines the term "relative" to mean "a person residing in the same household as [the named insured], and related to [the named insured] by blood, marriage, or adoption[.]" The Sterrys argue it is undisputed that Riley is related to Kristy by blood and resides in her household. As a result, they argue Riley

qualifies as a "relative" under the policy as a matter of law and is therefore an "insured person" entitled to UIM coverage.

¶36 We conclude the Sterrys have forfeited their right to raise this argument on appeal by failing to raise it in the circuit court. *See* ***Van Camp***, 213 Wis. 2d at 144. In the circuit court, the Sterrys argued Riley was entitled to UIM coverage because he was "occupying" Kristy's vehicle at the time of the accident. The circuit court rejected that argument, reasoning Riley was not "in, on, entering, or exiting" Kristy's vehicle when the accident occurred. The Sterrys never argued in the circuit court that Riley was entitled to UIM coverage because he is Kristy's relative. The circuit court addressed the issue the Sterrys actually raised regarding UIM coverage, and the Sterrys do not challenge that ruling on appeal. We therefore decline to consider the Sterrys' argument, raised for the first time on appeal, that Riley is entitled to UIM coverage because he is Kristy's relative.

¶37 The Sterrys argue we should address their "relative" argument, even though they failed to raise it below, because "all the evidence necessary to determine coverage was before the [circuit] court," and the undisputed facts establish Riley is entitled to UIM coverage as a matter of law. We disagree. To show he was entitled to UIM coverage, Riley needed to do more than establish he was Kristy's relative. He also needed to establish that Acker's vehicle qualified as an "underinsured motor vehicle." The Progressive policy defines an "underinsured motor vehicle" as a motor vehicle

> to which a bodily injury liability bond or policy applies at the time of the accident, but the sum of the limits of liability for bodily injury under all applicable policies or bonds is less than the amount needed to fully compensate the insured person for his or her bodily injury damages.

Applying this definition to the present case requires an analysis of Riley's damages and the liability limits available to pay those damages. The Sterrys have not cited any evidence, either in the circuit court or on appeal, that Riley's damages exceed the sum of the available liability limits. Thus, even if we were to determine as a matter of law that Riley is Kristy's "relative" and therefore qualifies as an "insured person" for purposes of UIM coverage, it would nevertheless be inappropriate for us to conclude Riley is entitled to UIM coverage under Progressive's policy.

¶38 Finally, we note there is an alternative basis to affirm the circuit court's grant of summary judgment to Progressive on the Sterrys' purported UIM claim. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm circuit court on different grounds). The first step in our summary judgment methodology is to examine the plaintiff's complaint to determine whether it states a claim. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Here, neither the Sterrys' original complaint nor their amended complaint even mentioned UIM coverage, much less stated a UIM claim. The Sterrys seemingly acknowledged this fact in their response to Progressive's summary judgment motion, in which they stated, "[P]laintiffs *will make* an underinsured motorist claim against … Progressive." (Emphasis added.) However, the Sterrys never sought leave to file a second amended complaint asserting a UIM claim. Accordingly, because neither the Sterrys' original complaint nor their amended complaint stated a UIM claim, summary judgment for Progressive was proper under the first step of our summary judgment methodology.

By the Court.—Judgment affirmed.

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