COURT OF APPEALS DECISION DATED AND FILED

August 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2443

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

JUDITH MORENO AND JESSE MORENO,

PLAINTIFFS-APPELLANTS,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND CITY OF WAUWATOSA,

INVOLUNTARY-PLAINTIFFS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Judith and Jesse Moreno appeal from a judgment entered in favor of American Family Mutual Insurance Company and dismissing their claim for benefits under their policy's underinsured motorist (UIM) provision. The Morenos argue that coverage is triggered because the policy is ambiguous as to the per person limits of UIM coverage and, alternatively, because the tortfeasor's $150,000 per person liability limits must be compared with the Morenos' per accident limits of $300,000 as required by the definition of "underinsured motor vehicle."

¶2 We conclude that the Morenos' arguments are without merit. The definition of "underinsured motor vehicle" is unambiguous; its plain meaning requires a comparison of the tortfeasor's $150,000 liability limits to the Morenos' per person liability limits of $100,000. Because the tortfeasor's liability limits were greater than the Morenos' UIM limits, no coverage is afforded. We therefore affirm the circuit court's judgment.

FACTS

¶3 The facts are undisputed. On July 31, 1996, Judith Moreno was driving a vehicle insured by American Family when she was struck by Naomi Werner. Judith suffered severe injuries. She and her husband subsequently sought remuneration from Werner's automobile insurer, also American Family.[1] The parties stipulated that Werner was 100% causally negligent for Judith's injuries. The liability limits for Werner's policy were $150,000 per person. In October 1997, Werner reached a settlement with the Morenos whereby American Family

[1] Jesse Moreno sought damages for lost wages, sick time and retirement benefits, among other things.

paid them the liability limits on Werner's policy. The Morenos' damages, however, exceeded Werner's liability coverage.[2]

¶4 The Morenos then sought UIM coverage under their own policy. This policy provided UIM coverage of $100,000 per person and $300,000 per accident. American Family denied the Morenos' request, so they filed suit. American Family moved for summary judgment, arguing that UIM coverage was not triggered because its per person UIM liability limit of $100,000 was less than the $150,000 paid under Werner's policy. The circuit court agreed and dismissed the Morenos' action.

DISCUSSION

¶5 We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *See* ***Tower Ins. Co. v. Carpenter***, 205 Wis. 2d 365, 369, 556 N.W.2d 384 (Ct. App. 1996). Summary judgment is proper if there are no disputed issues of fact and one party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (1997-98).

¶6 The interpretation of an insurance contract is a question of law which we review de novo. *See* ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). When reading an insurance policy, our objective is to ascertain the intentions of the parties. *See* ***Davis v. Allied Processors, Inc.***, 214 Wis. 2d 294, 298, 571 N.W.2d 692 (Ct. App. 1997). This is determined by considering what a reasonable person in the position of the insured would have understood the policy to mean. *See* ***id.*** Whether the policy's language is ambiguous is a question of law. *See* ***id.*** Ambiguity exists if the

[2] The parties stipulated that the Morenos' damages totaled $240,000.

policy's words or phrases are susceptible to more than one reasonable interpretation. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990). Any ambiguities should be construed in favor of coverage. *See* ***id.*** Absent an ambiguity, the plain language of the policy controls. *See* ***Davis***, 214 Wis. 2d at 298.

¶7 The endorsement to the declarations page of the Morenos' policy defined an "underinsured motor vehicle" as

> a motor vehicle which is insured by a liability bond or policy at the time of the accident which provides bodily injury liability limits less than the limits of liability of this Underinsured Motorists coverage.

In other words, a tortfeasor's vehicle is an underinsured motor vehicle if the limits of liability for the insured's UIM coverage exceed the tortfeasor's policy limits. In this case, Werner's liability limits were $150,000 and the Morenos' UIM policy limits for a single person were $100,000. The single person limit of $100,000 applies because Judith was the only insured under the Morenos' policy who sustained bodily injury in the July 31, 1996 accident. Therefore, based on the definition above, Werner's vehicle is not underinsured because her policy limits exceeded the Morenos' UIM liability limits for a single person.

¶8 This conclusion is in keeping with our supreme court's decision in ***Smith***. There, Smith had $50,000 of UIM coverage and the tortfeasor had a liability limit of $50,000 which was paid in full to Smith. The court determined that the definition of "underinsured motor vehicle" was unambiguous. That definition stated that an "underinsured motor vehicle" is a motor vehicle "to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." ***Smith***, 155 Wis. 2d at 811. The court held that the plain meaning of the definition

did not permit Smith to recover under her UIM coverage because the tortfeasor did not have policy limits less than Smith's UIM coverage. In reaching its conclusion, the court explained that because it decided "in the first instance" that the tortfeasor's vehicle was not an underinsured motor vehicle, it need not reach an issue pertaining to the policy's reducing clause. *See* ***id.*** at 814.

¶9 ***Smith*** informs us that the first decision to be made when an insured claims UIM coverage is whether the tortfeasor's vehicle fits the definition of an "underinsured motor vehicle." Where that definition requires a comparison of an insured's UIM policy limits to the tortfeasor's policy limits, a court must determine coverage before "analyz[ing] other provisions in the policy and their potential effects on UIM coverage." ***Taylor v. Greatway Ins. Co.***, 2000 WI App 64, ¶11, 233 Wis. 2d 703, 608 N.W.2d 722.

¶10 The "underinsured motor vehicle" definition here is substantively the same as that in ***Smith***; both prescribe a comparison of an insured's UIM policy limits to the tortfeasor's policy limits. Having made this comparison above, we know that Werner's policy limits exceeded the Morenos'. The Morenos nonetheless urge us to consider other policy language, namely, the "limits of liability" provision. This provision, they assert, muddies the waters of coverage so that an ambiguity is created. Because there is an ambiguity, they argue that the policy must be interpreted in their favor. We decline to go down this path. As ***Smith*** instructs, we do not reach the issue of the effect of other policy provisions where coverage has been determined. Since the definition of "underinsured motor vehicle" tells us that no UIM coverage exists, our analysis stops here.

¶11 The Morenos offer an alternative argument for coverage. They claim that the "underinsured motor vehicle" definition does not expressly indicate

whether the "limits of liability of this Underinsured Motorists coverage" pertain to the per person liability limits or the per accident liability limits. Therefore, because the policy is unclear in this regard, they again argue that the policy should be construed in their favor; thus, the tortfeasor's $150,000 per person liability limits should be compared to their $300,000 per accident limits. We reject this interpretation of the policy.

¶12 In ***Filing v. Commercial Union Midwest Insurance Co.***, 217 Wis. 2d 640, 579 N.W.2d 65 (Ct. App. 1998), we addressed the issue of whether the per person or the per accident limits should apply in determining UIM coverage. In that case, the plaintiffs consisted of Filing and three family members, all of whom were injured by a tortfeasor who carried liability coverage of $100,000 per person and $300,000 per accident. Filing had two insured vehicles with a single limit of $300,000 UIM coverage for each vehicle. Filing argued that in determining whether the tortfeasor was underinsured, the court should compare his $300,000 UIM liability limits to the tortfeasor's $100,000 per person limit, not the tortfeasor's $300,000 per accident limit.[3] *See **id.*** at 644. The policy's definition of "underinsured motor vehicle" required a comparison of the tortfeasor's "limit for bodily injury liability" to Filing's "limit of liability for this coverage."[4] ***Id.*** at 645.

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[3] Because ***Filing v. Commercial Union Midwest Insurance Co***., 217 Wis. 2d 640, 579 N.W.2d 65 (Ct. App. 1998), involved split liability limits, we determined that ***Smith v. Atlantic Mutual Insurance Co.***, 155 Wis. 2d 808, 456 N.W.2d 597 (1990), did not control because only single liability limits were at play in ***Smith***. *See* ***Filing***, 217 Wis. 2d at 646 n.2.

[4] Filing's policy contained a definition of "underinsured motor vehicle" comparable to the Morenos' policy.

¶13 In reaching our decision in ***Filing***, we observed that the policy at issue did not indicate whether the “limit for bodily injury liability” comprised the per person or the per accident limit. *See* ***id.*** We did not, however, conclude that the policy was ambiguous. Rather, we looked at the purpose of UIM coverage, which is to provide an insured with benefits to recover for losses caused by a negligently and financially underinsured motorist, subject to the policy limits. UIM coverage also seeks “to place the insured party in the same position as if the underinsured had liability limits equal to the insured’s coverage.” ***Id.*** at 649. We then concluded that where there are multiple insureds under a policy, a court should look at what limit the individual insured could recover from the tortfeasor’s liability policy and compare that amount to the UIM policy limit in order to decide whether the tortfeasor’s vehicle is underinsured. *See* ***id.*** at 649-50.

¶14 Our reasoning in ***Filing*** applies here. UIM coverage should put the insured party in the same position as if the underinsured had liability limits equal to the insured’s coverage. Therefore, if the tortfeasor in this case, Werner, had the same liability limits as the Morenos, Werner would have $100,000 per person and $300,000 per accident liability limits. If we extended these limits to the Morenos where only a single person sustained bodily injury, the $100,000 per person limits are in effect. Thus, when we apply the definition of an “underinsured motor vehicle,” we compare Werner’s $150,000 actual liability limits to the Morenos’ $100,000 per person limit and conclude that Werner’s vehicle was not underinsured. The Morenos’ argument therefore fails.

¶15 In sum, the definition of “underinsured motor vehicle” in this case, as in ***Smith***, is unambiguous and controlling. The definition requires a comparison of the tortfeasor’s liability limits to the insured’s per person liability limits.

Because Werner's $150,000 liability limits were greater than the Morenos' UIM limits, the Morenos do not have coverage. We affirm the circuit court's decision.

By the Court.—Judgment affirmed.

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