COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2012

Diane M. Fremgen
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. 2012AP1247-FT **Cir. Ct. No. 2010CV435**

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

JOSEPH R. KOTT, JANI KOTT AND DAVID KOTT,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, WISCONSIN MUTUAL INSURANCE COMPANY, EDWARD O. ROSSETER, TIM ROSSETER AND VANESSA ROSSETER,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY AND JESSICA LINVILLE,

DEFENDANTS,

CENTER FOR MEDICARE AND MEDICAID SERVICES,

INVOLUNTARY-DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Joseph, Jani, and David Kott appeal a summary judgment dismissing their claim against their automobile insurer, American Family Mutual Insurance Company.[1] The Kotts sought to recover under their policy's underinsured motorist (UIM) provision after Joseph, who was driving an all-terrain vehicle (ATV) provided by his employer, was injured in an accident with an underinsured vehicle. Pursuant to a reducing clause in the Kotts' policy, the circuit court concluded their $1 million UIM coverage limit should be reduced by a $1 million payment they recovered from Joseph's employer. We agree and affirm.

BACKGROUND

¶2 The relevant facts are undisputed. On September 9, 2006, Joseph suffered a serious brain injury when the ATV he was operating in the course of his employment by Derk's Farm, Inc., collided with a vehicle driven by Edward Rosseter. Joseph was sixteen years old. The ATV, which was owned by Derk's Farm, did not have operable brakes.

¶3 The Kotts subsequently sued both Derk's Farm and Rosseter, alleging their negligence proximately caused Joseph's injuries. Rosseter, who was

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

insured by Wisconsin Mutual Insurance Company, had a liability coverage limit of $100,000. Derk's Farm was insured by American Family under a farm liability policy with a $1 million coverage limit. American Family had also issued the Kotts an auto insurance policy with $1 million in UIM coverage. The Kotts' lawsuit therefore named American Family as a defendant twice, once as the insurer for Derk's Farm, and once as the Kotts' UIM carrier.

¶4 On January 4, 2012, the Kotts settled their claims against Derk's Farm and American Family, in its capacity as the farm's insurer. In exchange for a ***Pierringer***[2] release, American Family paid the Kotts $1 million under the farm liability policy. American Family then moved for summary judgment, in its capacity as the Kotts' UIM carrier. Citing a reducing clause in the Kotts' policy, American Family argued the $1 million UIM coverage limit should be reduced to zero by the $1 million payment the Kotts received on behalf of Derk's Farm. In response, the Kotts argued their UIM coverage could be reduced only by payments made by or on behalf of an underinsured motorist, not by payments received from other sources. The circuit court granted summary judgment in favor of American Family and subsequently denied the Kotts' reconsideration motion. The Kotts now appeal.

[2] *See* ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). A ***Pierringer*** release satisfies "that portion of the plaintiff's cause of action for which the settling joint tortfeasor is responsible" while simultaneously "reserving the balance of the plaintiff's cause of action against a nonsettling joint tortfeasor." ***Imark Indus., Inc. v. Arthur Young & Co.***, 148 Wis. 2d 605, 621, 436 N.W.2d 311 (1989).

DISCUSSION

¶5 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the facts are undisputed, leaving only an issue of law for our review. Specifically, we must determine whether the reducing clause in the Kotts' policy permits their UIM coverage to be reduced by a payment received from a source other than an underinsured motorist.

¶6 The interpretation of an insurance policy presents a question of law subject to our independent review. ***Greene v. General Cas. Co.***, 216 Wis. 2d 152, 157, 576 N.W.2d 56 (Ct. App. 1997). Our goal in interpreting an insurance policy is to give effect to the parties' intent. ***Folkman v. Quamme***, 2003 WI 116, ¶16, 264 Wis. 2d 617, 665 N.W.2d 857. If the policy language is unambiguous, we enforce it as written. ***Id.***, ¶13. We will not rewrite unambiguous policy terms by construction to bind an insurer to a risk it never contemplated and for which it was never paid. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 122, 403 N.W.2d 747 (1987). However, ambiguous policy language will be construed in favor of the insured. ***Folkman***, 264 Wis. 2d 617, ¶13. Policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Id.***

¶7 Reducing clauses are permissible policy provisions under WIS. STAT. § 632.32(5)(i) (2005-06),[3] which states in relevant part:

> A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.[4]

Our supreme court has held that § 632.32(5)(i)1. permits an insurer "to reduce the limit of UIM liability by the amount paid to an insured by a non-UIM tortfeasor." ***Marotz v. Hallman***, 2007 WI 89, ¶2, 302 Wis. 2d 428, 734 N.W.2d 411; *see also* ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, ¶2, 302 Wis. 2d 409, 734 N.W.2d 386. Consequently, the Kotts concede that, if the reducing clause in their policy were identical to the language of the statute, American Family could reduce their UIM coverage by the $1 million payment made on behalf of Derk's Farm. However, the Kotts argue the reducing clause in their policy is narrower than the statutory language and, as a result, allows their UIM coverage to be reduced only for payments made by or on behalf of an underinsured motorist. We disagree.

[3] All references to WIS. STAT. § 632.32 are to the 2005-06 version, which was in effect at the time of Joseph's accident. In 2009, the legislature amended § 632.32 to prohibit reducing clauses. *See* 2009 Wis. Act 28, § 3171. The statute was amended again in 2011, however, and the language from the 2005-06 version was reinstated. *See* 2011 Wis. Act 14, § 26.

[4] The statute also states that a policy may provide for a reduction in UIM coverage for "[a]mounts paid or payable under any worker's compensation law" and "[a]mounts paid or payable under any disability benefits laws." *See* WIS. STAT. § 632.32(5)(i)2. and 3. Neither party argues these additional provisions are relevant to this case.

¶8 The reducing clause in the Kotts' policy provides:

> The limits of liability of this coverage will be reduced by:
>
> 1. A payment made by or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle.[5]

(Boldface omitted.) The plain language of the reducing clause requires two conditions to be met for the limits of liability to be reduced. First, there must be a payment made or amount payable either: (1) by or on behalf of any person or organization which may be legally liable; or (2) under any collectible auto liability insurance. Second, the payment must be "for loss caused by an accident with an underinsured motor vehicle." The $1 million payment the Kotts received from American Family meets both of these conditions.

¶9 First, American Family made the payment on behalf of Derk's Farm. It is undisputed that Derk's Farm "may be legally liable" for Joseph's injuries.

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[5] The reducing clause also provides that UIM coverage will be reduced by "[a] payment under the Liability coverage of this policy" and "[a] payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law or any similar law." Neither party contends these additional provisions apply.

Citing ***Remiszewski v. American Family Insurance Co.***, 2004 WI App 175, 276 Wis. 2d 167, 687 N.W.2d 809, and ***Van Erden v. Sobczak***, 2004 WI App 40, 271 Wis. 2d 163, 677 N.W.2d 718, American Family argues the reducing clause in the Kotts' policy "has been interpreted and upheld as unambiguous twice by the Wisconsin Court of Appeals." However, neither ***Remiszewski*** nor ***Van Erden*** addressed the operative issue in this case. ***Remiszewski*** dealt with whether the reducing clause impermissibly added the words "amount payable" to the statutory language, and whether the policy contained a contextual ambiguity. ***Remiszewski***, 276 Wis. 2d 167, ¶¶15, 18-19. In ***Van Erden***, we rejected the plaintiffs' argument that the reducing clause impermissibly added to the language involving disability benefits found in WIS. STAT. § 632.32(5)(i)3. ***Van Erden***, 271 Wis. 2d 163, ¶¶24-25. Thus, ***Remiszewski*** and ***Van Erden*** are not controlling on the issue before us—that is, whether the reducing clause allows for a reduction in UIM coverage for payments made by or on behalf of non-UIM tortfeasors.

Thus, the $1 million payment was a "payment made" on behalf of a "person or organization which may be legally liable[.]"

¶10 Second, the payment compensated the Kotts for losses caused by the September 9, 2006 accident. During that accident, Joseph's ATV collided with a vehicle operated by Rosseter. The Kotts' policy defines 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." (Boldface omitted.) Rosseter's policy had a liability limit of $100,000, which is far less than the Kotts' $1 million UIM limit. Rosseter's vehicle therefore qualified as an "underinsured motor vehicle" under the Kotts' policy. Accordingly, the $1 million payment on behalf of Derk's Farm constituted a payment "for loss caused by an accident with an underinsured motor vehicle."

¶11 Consequently, the reducing clause in the Kotts' policy unambiguously allowed their UIM coverage to be reduced by the $1 million payment they received on behalf of Derk's Farm. While the Kotts argue that the phrase "for loss caused by an accident with an underinsured motor vehicle" means that coverage may be reduced only by payments from underinsured motorists, their interpretation runs counter to the plain language of the policy. The phrase "for loss caused by an accident with an underinsured motor vehicle" clarifies the purpose of the payment, not the identity of the payer. Indeed, the reducing clause plainly states that the payment may be made "by or on behalf of *any* person or organization which may be legally liable[.]" (Emphasis added.) *C.f.* ***Marotz***, 302 Wis. 2d 428, ¶25 (statutory language "amounts paid by or on behalf of *any* person or organization" indicates broad application and suggests the person or organization need not be an underinsured motorist (emphasis added)). To accept

the Kotts' interpretation would be to rewrite unambiguous policy language by construction, which this court will not do. *See* ***Gonzalez***, 137 Wis. 2d at 122.

¶12 The Kotts make much of the fact that the reducing clause in their policy differs from the language of WIS. STAT. § 632.32(5)(i)1. They note that the statute uses the phrase "for the bodily injury or death for which payment is made[,]" whereas the policy uses the phrase "for loss caused by an accident with an underinsured motor vehicle." We are not convinced that this difference in wording creates a difference in meaning.

¶13 Our supreme court has explained that the statutory language "for the bodily injury or death for which the payment is made" "resolves a potential ambiguity as to which 'amounts paid by or on behalf of any person or organization that may be legally responsible' may reduce the limit of UIM liability." ***Marotz***, 302 Wis. 2d 428, ¶26 (quoting WIS. STAT. § 632.32(5)(i)1.). Specifically, the language clarifies that coverage limits "may not be reduced by amounts paid by a person who may be legally responsible in the accident, but whose payment is not made for a bodily injury arising from the accident." ***Id.*** For instance, the language "would prevent a reduction where an accident occurs between persons who had previously entered into an unrelated purchase agreement, and where the subsequent payment from the buyer to the seller is attributable to that purchase agreement and not to injuries arising from the accident." ***Id.***, ¶26 n.6. In the Kotts' policy, the phrase "for loss caused by an accident with an underinsured motor vehicle" serves the same purpose—it prevents coverage from being reduced by a payment that is not attributable to losses arising from the accident. Thus, we do not agree with the Kotts that the reducing clause in their policy is narrower than the language of the statute. Instead, like the statutory language, the Kotts'

reducing clause permits their UIM coverage to be reduced by payments from non-UIM tortfeasors.

¶14 In a related argument, the Kotts contend that, because they settled their claims against Derk's Farm and American Family on a ***Pierringer*** basis, reducing their UIM coverage by the settlement amount impermissibly affords American Family a double reduction. They assert that, if a jury finds Derk's Farm fifty percent liable for Joseph's injuries and awards $2 million in damages, American Family will receive a $1 million offset by virtue of the ***Pierringer*** release. They therefore contend, "To allow further reduction for the American Family payment from [Derk's Farm] permits a double offset."

¶15 The Kotts' argument relies on the fact that American Family insured both Derk's Farm and the Kotts, and, consequently, receives the benefit of both the ***Pierringer*** release and the reducing clause. However, any benefit American Family receives by operation of the ***Pierringer*** release accrues to American Family in its capacity as the insurer for Derk's Farm, while the reducing clause benefits American Family in its capacity as the Kotts' UIM carrier. The Kotts do not explain why American Family, as the Kotts' insurer, should be treated any differently than it would be if another entity insured Derk's Farm. We do not see why the mere fact that Derk's Farm and the Kotts had the same insurer should change our interpretation of the Kotts' policy, and the Kotts cite no legal authority for their argument that it should. The policy plainly and unambiguously permits the Kotts' UIM coverage to be reduced by the payment they received on behalf of Derk's Farm. Accordingly, the circuit court properly granted American Family summary judgment.

By the Court.—Judgment affirmed.

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