COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
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. 2004AP1513 **Cir. Ct. No. 2003CV424**

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

ALISON M. WELIN,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

ELIZABETH A. PYRZYNSKI, HONEYWELL INTERNATIONAL AND ACUITY,

DEFENDANTS,

SECURA INSURANCE,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

JOSHUA J. OPICHKA, WAUSAU BENEFITS AND HASTINGS MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Chippewa County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Alison Welin appeals a summary judgment dismissing American Family Mutual Insurance Company from her personal injury action. The court determined Welin's American Family policy unambiguously defined the scope of her underinsured motorist (UIM) coverage and, based on its language, the tortfeasor was not underinsured. Welin argues the policy is ambiguous and should be construed to provide coverage. We disagree and affirm the judgment.

Background

¶2 On September 10, 2001, a vehicle driven by Elizabeth Pyrzynski crossed the center line and struck a vehicle driven by Welin. Welin and a passenger in the Pyrzynski vehicle, Joshua Opichka, were both injured. Pyrzynski had an insurance policy with limits of $300,000 per person and $300,000 per occurrence. Welin's medical expenses were $180,000 at the time of trial while Opichka's totaled $25,000, but it is undisputed that Welin's total damages will exceed $300,000.

¶3 Welin is insured by American Family under her father's policy. The policy provides UIM limits of $300,000 per person and $300,000 per occurrence. The American Family UIM endorsement, on its face, requires a comparison between Pyrzynski's liability limits and Welin's UIM limits to determine whether the coverage is triggered. Welin argued to the trial court—and now argues on appeal—that the policy is ambiguous. She contended that a special notice to

policyholders, issued in accordance with WIS. STAT. § 632.23(4m), contained a different definition of UIM coverage than the endorsement.[1] American Family maintained the policy was unambiguous and Pyrzynski was not underinsured. Accordingly, American Family sought summary judgment.[2] The court rejected Welin's argument, finding the policy unambiguous, and granted summary judgment dismissing American Family from the case. Welin appeals.

Discussion

¶4 We review summary judgments de novo, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶5 Interpretation of an insurance policy presents a question of law we review de novo. ***Richie v. American Family Mut. Ins. Co.***, 140 Wis. 2d 51, 54, 409 N.W.2d 146 (Ct. App. 1987). Policy language is to be given its ordinary,

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Welin also argues on appeal that because of the ambiguity, the existence of two claimants against Pyrzynski's policy means Welin can never recover $300,000, and that if UIM coverage is triggered, the reducing clause in American Family's policy is unenforceable. We will address the "two claimants" argument later in this opinion, but we need not reach the reducing clause issue. Our holding will mean that Welin's UIM coverage is not triggered and thus the reducing clause is not triggered, either.

common meaning. ***Id.*** This is not necessarily what the insurer intended, "but what a reasonable person in the position of the insured would have understood the words to mean." ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984).

¶6 "Occasionally a clear and unambiguous provision may be found ambiguous in the context of the entire policy." ***Folkman v. Quamme***, 2003 WI 116, ¶19, 264 Wis. 2d 617, 665 N.W.2d 857. The test for contextual ambiguity, however, is the same as that for a disputed term—whether words or phrases in the policy, read in the context of the rest of the policy language, are reasonably or fairly susceptible to more than one construction. ***Id.***, ¶29. "The standard for determining a reasonable and fair construction is measured by the objective understanding of an ordinary insured." ***Id.*** (citations omitted).

Whether The Policy Is Contextually Ambiguous

¶7 Welin's policy provides UIM coverage by endorsement. The endorsement says, in relevant 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 **underinsured motor vehicle**….
>
> ….
>
> … **Underinsured motor vehicle** means 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. …

¶8 Welin's UIM limits were equal to, not less than, Pyrzynski's bodily injury liability limits. When the limits are the same, the tortfeasor is not underinsured. *See* ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶13, 245 Wis. 2d

134, 628 N.W.2d 916; ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990).

¶9 Welin argues, however, that a "Special Notice to Policyholders," which precedes the UIM endorsement, creates an ambiguity in the policy. This special note says in relevant part:

> This special notice is being given in accordance with Wisconsin law to advise you of the availability of Underinsured Motorist (UIM) coverage. If you do not presently carry UIM coverage, this message is especially important to you.
>
> Underinsured Motorist coverage provides payment for legally collectible damages for bodily injury or death if you or any person riding in your vehicle is injured or killed in an accident with a vehicle *whose driver has insurance coverage that is less than the limit of your underinsured motorist coverage*.
>
> Please see the actual policy for terms and conditions. (Emphasis added.)

¶10 Welin contends that a reasonable insured would read this special notice and think that he or she had found the coverage section for UIM protection. She also argues that the phrase "insurance coverage" has a different definition than "liability limits" as used in the endorsement, creating an ambiguity. We disagree with Welin's reading of the special notice.

¶11 First, WIS. STAT. § 632.32(4m) requires insurers notify customers of the availability of underinsured motorist coverage. This statute requires that the notice contain a brief description of UIM coverage. While some descriptions in the past have been found to create ambiguity, *see* ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, ¶¶66-71, 255 Wis. 2d 61, 647 N.W.2d 223, American Family's description does not suffer from the same flaws described in that case.

¶12 The description in ***Badger Mutual*** explained that UIM coverage "will pay the remainder of the bodily injury damages up to the limit of liability you select," without mentioning limits of or comparison to the tortfeasor's policy. ***Id.***, ¶66. In addition, our supreme court stated that the availability notice in the Badger Mutual policy was the most comprehensible definition in the policy. ***Id.***, ¶70. In contrast here, the definitions in the endorsement and the notice are practically identical. Finally, the Badger Mutual availability notice was specifically listed as one of the forms comprising the policy, ***id.***, ¶68, but no such form list exists in this case.

¶13 Second, the notice here clearly directs the insured elsewhere—that is, to the actual policy—to find the terms of UIM coverage. Welin contends the direction is circular: because the notice is between the policy and the endorsement, she argues the notice is in fact part of the "actual policy" to which the insured is referred. We disagree. The notice on its face draws a distinction between itself and the policy. However, even if the notice is part of the policy, we conclude a reasonable insured would look at the direction and realize the details of coverage are elsewhere, not in the special notice.

¶14 Third, in explaining this perceived ambiguity, Welin never sufficiently differentiates "insurance coverage" from "liability limits." Indeed, she defines "insurance coverage" as the "amount of protection or amount available to meet liabilities." But it is also reasonable to describe a liability limit as the "amount of protection or amount available to meet liabilities" an insured has purchased. Ambiguities must be genuine, not strained or fanciful. ***Richie***, 140 Wis. 2d at 55. There is nothing contradictory or ambiguous between the special notice and the endorsement.

¶15 Welin's more compelling argument is the issue of multiple claims against Pyrzynski's policy. Because Welin's passenger also suffered injuries, he and Welin will share Pyrzynski's per occurrence policy limit. *See* ***Wondrowitz v. Swenson***, 132 Wis. 2d 251, 258-59, 392 N.W.2d 449 (Ct. App. 1986). Welin argues that because of this, "insurance coverage" is ambiguous and renders her UIM coverage illusory because she will have less than $300,000 insurance coverage available to her. She contends, without citation to authority: "It is the recovery, the available protection, i.e., the coverage of the tortfeasor that is relevant to the question of whether the tortfeasor is underinsured." She also states that this is a question of first impression in Wisconsin.

¶16 Welin's argument ultimately fails. First, aside from pointing out that she will never recover the maximum $300,000 from Pyrzynski's insurance, American Family, or both, Welin provides no basis for reversal other than her illusory coverage argument. That argument is premised on her perceived ambiguity, which we have rejected.

¶17 Second, the "coverage of the tortfeasor" is different from "recovery." Whether paid to one victim or several, Pyrzynski has $300,000 insurance coverage available to pay for her liabilities. Whether we look to the special notice or the endorsement—which, we hold, mean the same thing in this case—neither clause asks us to go further and consider ultimate recovery of the insured as a factor. Indeed, because the policy is unambiguous on its face, we cannot rewrite it by construction. ***Richie***, 140 Wis. 2d at 54.

¶18 Moreover, following the submission of briefs in this case, we ordered the publication of a case addressing the multiple claimant problem and reaching the same result we reach here: ***Praefke v. Sentry Ins. Co.***, 2005 WI App

50, __ Wis. 2d __, 694 N.W.2d 442. In that case, Roger Praefke was injured in an automobile accident caused by Thomas Grandstaff. Grandstaff's passenger was killed, and Praefke's injuries resulted in over $400,000 in medical expenses. ***Id.***, ¶2.

¶19 Grandstaff had a $100,000 liability limit. His insurance company paid $75,000 to Praefke and $25,000 to the estate of Grandstaff's passenger. ***Id.***, ¶3. Praefke had UIM coverage of $100,000 per person or $300,000 per accident from Sentry. ***Id.*** The Sentry policy defined an underinsured vehicle as: "An underinsured *motor vehicle* is a *motor vehicle* with liability protection afforded by liability insurance policies or bodily injury liability bonds with limits the sum of which are less than the limits *you* have selected for underinsured motorists coverage as shown on the declarations page." ***Id.***

¶20 The parties sought a ruling from the trial court as to whether Grandstaff's vehicle was underinsured so as to trigger the UIM coverage. The court concluded UIM coverage was not triggered because Praefke's $100,000 limit matched—that is, was not less than—Grandstaff's $100,000 limit. ***Id.***, ¶4. We ultimately agreed, explaining:

> The first step in every UIM coverage case is to start with the language of the policy and determine whether the tortfeasor's car satisfies the definition of underinsured motor vehicle. … [The Praefkes] argue that because Mr. Praefke could only recover $75,000, that amount should be the number used when doing the UIM comparison. In other words, his UIM limit of $100,000 should be compared to the $75,000 that he actually recovered …. Although this argument may be logically appealing at first, it cannot withstand close scrutiny given the language of the policy and the lack of any case law to support such an argument.
>
> First, the language of Sentry's insurance policy defining an underinsured motor vehicle is clear: the court must

> apply the *limit* of the liability policy to the *limit* of the UIM coverage purchased. A plain application of that language results in the conclusion reached by the trial court - the Grandstaff vehicle was not an underinsured motor vehicle because the liability limit and the UIM limit were the same.
>
> Although this court can certainly understand the Praefkes' frustration with this result, our review is limited to interpreting the existing language; we do not have the authority to rewrite it. … To accept the Praefkes' position, however, would result in bad law and create opportunity for manipulation and unpredictability. The case law has consistently performed the UIM analysis by comparing the limit of the liability policy to the limit of the UIM coverage, assuming of course that the policy at issue uses limits language.

Id., ¶¶12-14. The same reasoning applies in this case, and we are bound to follow it. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The Reducing Clause

¶21 Welin argues that, if UIM coverage is triggered, the reducing clause in the American Family policy is invalid. Because we reject the ambiguity argument and hold the UIM coverage has not been triggered, we need not address this argument. *See* ***Praefke***, 694 N.W.2d 442, ¶18.

By the Court.—Judgment affirmed.

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