COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 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. 2013AP1772 **Cir. Ct. No. 2011CV4050**

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

JANE H. CORDIE,

PLAINTIFF-APPELLANT,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND UNITED WORLD LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

WEST BEND MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, JASON J. MELBY, CITIES AND VILLAGES MUTUAL INSURANCE COMPANY AND CITY OF LA CROSSE,

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed and cause remanded.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 NEUBAUER, P.J. The issue is whether an insured can recover under his or her underinsured motorist (UIM) coverage when the insured's damages exceed the $250,000 statutory liability cap applicable to a claim against a municipality for negligent operation of a vehicle. We conclude that, under the Truth in Auto Law in effect at the time of this accident, the insurer was obligated to provide UIM coverage. We therefore reverse the circuit court order for summary judgment in favor of the insurer and remand for further proceedings.

FACTS

¶2 The core facts surrounding the underlying accident are not in dispute. Jane Cordie was injured in a pedestrian-motor vehicle accident on March 30, 2011. Cordie was walking near her senior apartment home in New Berlin when she was struck by a pickup truck driven by Jason Melby. Melby, a police officer for the City of La Crosse, was staying with his in-laws at the senior apartment home while attending a ten-week police course in West Allis. At the time of the accident he was driving to a class. Melby owned the pickup truck he was driving at the time of the accident, but he was reimbursed by the City for his mileage while he stayed in southeastern Wisconsin for the training class.

¶3 Cordie filed a notice of claim with the City, as required under WIS. STAT. §§ 345.05(3) and 893.80(1d)(a) (2011-12)[1] when one is seeking compensation from a municipality. The City disallowed the claim, meaning it did not pay it, *see* § 893.80(1g), and Cordie filed suit against the City and Melby personally. Cordie named West Bend Mutual Insurance Company as an involuntary plaintiff in the complaint because West Bend had made medical payments to Cordie.

¶4 Cordie reached a settlement with American Family Mutual Insurance Company, which paid its $150,000 liability limit on Melby's personal auto policy, and Cities and Villages Mutual Insurance Company (CVMIC), which paid its $100,000 liability limit on the City's policy. In response to Cordie's ***Vogt***[2] notice, West Bend asserted that it did not owe anything for Cordie's damages under her UIM policy because the maximum Cordie was "legally entitled to recover" under WIS. STAT. § 345.05(3) was $250,000, and therefore Melby's vehicle was not an underinsured motor vehicle.[3] Melby, the City, their insurers, and Cordie entered into a ***Pierringer***[4] release, dismissing the defendants and leaving the UIM claim against West Bend at issue.

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

[2] ***Vogt v. Schroeder***, 129 Wis. 2d 3, 383 N.W.2d 876 (1986).

[3] Cordie's ***Vogt*** notice was the first written notification that she intended to pursue a UIM claim against West Bend. Even though Cordie did not assert a UIM claim against West Bend in the complaint, the parties agreed to allow Cordie to pursue her UIM claim without the formality of amended pleadings.

[4] ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

¶5 West Bend moved for summary judgment, asserting that the personal auto policy issued to Cordie did not provide coverage for her damages under the $300,000 UIM coverage. Under the policy, West Bend agreed to "pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury.'" The policy defines "underinsured motor vehicle" as follows:

> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond, policy, or coverage form applies at the time of the accident but the limits for bodily injury liability of that bond, policy or coverage form are not enough to pay the full amount the "insured" is legally entitled to recover as damages.

West Bend will pay if the "limits of liability under any bodily injury liability bonds, policies or coverage forms applicable to the 'underinsured motor vehicle' have been exhausted by payment of judgments or settlements." The definition excludes any vehicle "[o]wned by any governmental unit or agency."

¶6 West Bend argued that UIM coverage was not triggered because Melby was in the course of his employment with the City at the time of the accident, therefore the WIS. STAT. § 345.05(3) statutory cap applied, and Cordie recovered by settlement the entire $250,000 that she was legally entitled to recover under the cap. In opposition to West Bend's motion, Cordie argued that (1) the statutory cap did not apply because the vehicle was not owned and operated by the City; (2) Melby was not immune from liability because he was not acting in the course of his employment at the time of the accident; and (3) even if the cap did apply, public policy and Cordie's reasonable expectations required coverage.

¶7 The circuit court granted summary judgment in favor of West Bend. The circuit court found that Melby was in the course of his employment with the

City at the time of the accident. The circuit court looked to WIS. STAT. § 345.05 to determine the amount of damages to which Cordie was "legally entitled." Because the settlement provided Cordie with the full $250,000 to reach the cap, reasoned the circuit court, there was "not a basis for further recovery" of damages against the City, and therefore, there was no basis for further recovery for Cordie under her own West Bend UIM coverage. "For those reasons, we'll grant the motion for summary judgment brought by West Bend indicating they do not have an obligation under the terms of the underinsured motorist coverage."

DISCUSSION

Standard of Review

¶8 Our review of a summary judgment is de novo, applying the same standard as the circuit court. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Additionally, the interpretation of an insurance contract is a question of law we review de novo, ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis. 2d 375, 382, 480 N.W.2d 1 (1992), as is the interpretation of a statute, ***Grosse v. Protective Life Ins. Co.***, 182 Wis. 2d 97, 105, 513 N.W.2d 592 (1994).

Truth in Auto Law Applies

¶9 This case comes to us on a summary judgment granted after Cordie had reached a settlement for $250,000 with the underlying liability insurers, exhausting the policy limits. The issue presented is whether Cordie can recover under her own UIM coverage when her claim against the tortfeasor is limited to the $250,000 statutory cap applicable to municipalities. WISCONSIN STAT. § 345.05(2) allows an injured party to make a claim against a municipality for injuries resulting from the negligent operation of a motor vehicle owned and operated by the municipality, but caps damages at $250,000. Sec. 345.05(2), (3). Under the statute, "a motor vehicle is deemed owned and operated by a municipality [or authority] if the vehicle is either being rented or leased." Sec. 345.05(2).

¶10 The circuit court found that the City was in effect leasing Melby's truck from him because it paid for his mileage while he was out of La Crosse for the training course and that Melby was in the scope of employment at the time of the accident. We need not reach whether the WIS. STAT. § 345.05 damages cap applies because the City and Melby (and their insurers) settled out of the case, and because we determine that, under the Truth in Auto Law, West Bend is liable to compensate Cordie for her damages beyond the municipal liability cap. *See* ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 409 n.2, 570 N.W.2d 739 (Ct. App. 1997) (cases should be decided on the narrowest possible ground). Thus, we assume without deciding that the § 345.05 damages cap applies.

¶11 2009 Wis. Act 28, signed into law in June 2009, set forth various motor vehicle insurance requirements. This law, WIS. STAT. § 632.32 (2009-10), called the Truth in Auto Law, was only in effect for policies issued or renewed on

or after November 1, 2009, *see* 2009 Wis. Act 28, § 9426(2), until November 1, 2011, when a new law was enacted, *see* 2011 Wis. Act 14, §§ 15c, 29(1). Cordie's West Bend policy was effective July 6, 2010. There is no dispute that the Truth in Auto Law applies to this case.

¶12 The Truth in Auto Law mandated UIM coverage for the first time, with minimum policy limits of $100,000 per person and $300,000 per accident. *See* 2009 Wis. Act 28, § 3161. Among other provisions, the Truth in Auto Law defines "underinsured motorist coverage" and "underinsured motor vehicle." "'Underinsured motorist coverage' means coverage for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury, death, sickness, or disease from owners or operators of underinsured motor vehicles." WIS. STAT. § 632.32(2)(d) (2009-10). The statute goes on to define "underinsured motor vehicle":

> (e) "Underinsured motor vehicle" means a motor vehicle to which all of the following apply:
>
> 1. The motor vehicle is involved in an accident with a person who has underinsured motorist coverage.
>
> 2. At the time of the accident, a bodily injury liability insurance policy applies to the motor vehicle….
>
> 3. The limits under the bodily injury liability insurance policy … are less than the amount needed to fully compensate the insured for his or her damages.

Sec. 632.32(2)(e) (2009-10).

Application to Cordie's Case

¶13 This case involves the application of a statute and an insurance policy. As noted above, the interpretation of a statute is a question of law we review de novo. ***Grosse***, 182 Wis. 2d at 105. We cannot read part of a statute in

isolation, we must look at the meaning of the entire statute. ***State ex rel. B'nai B'rith Found. of the U.S. v. Walworth Cnty.***, 59 Wis. 2d 296, 308, 208 N.W.2d 113 (1973). A statute is ambiguous if reasonable minds could differ as to its meaning. ***Hauboldt v. Union Carbide Corp.***, 160 Wis. 2d 662, 684, 467 N.W.2d 508 (1991). "Ambiguity in a statute can be created by the interaction of two separate statutes." ***Jones v. State***, 226 Wis. 2d 565, 577, 594 N.W.2d 738 (1999). Furthermore, statutory language that is unambiguous on its face can be rendered ambiguous by the context in which it is applied. ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 145, 585 N.W.2d 893 (Ct. App. 1998). Our goal in interpreting a statute is to effect the legislative intent. ***Voss v. City of Middleton***, 162 Wis. 2d 737, 749, 470 N.W.2d 625 (1991). If a statute is ambiguous, we look to the scope, history, subject matter, context, and purpose of the statute. ***Beard v. Lee Enters., Inc.***, 225 Wis. 2d 1, 10, 591 N.W.2d 156 (1999).

¶14 Similarly, the interpretation of an insurance contract is a question of law. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. The purpose in interpreting an insurance contract is to give effect to the parties' intent, as expressed in the terms of the policy. ***Id.*** "An insurance policy may expand but not reduce the coverage required by [law]." ***Trampf v. Prudential Prop. & Cas. Co.***, 199 Wis. 2d 380, 386, 544 N.W.2d 596 (Ct. App. 1996). Policy provisions that restrict coverage required by statute are void. ***Id.***

¶15 Here, we have a statute that requires UIM coverage and defines underinsured motor vehicle. West Bend agrees that the statutory definition of underinsured motor vehicle controls and that Melby's truck was an underinsured motor vehicle. It is undisputed that the tortfeasor's policy limits are less than the amount needed to fully compensate Cordie for her damages. Thus, our focus is on the statutory coverage definition, which states that UIM coverage is for the

protection of an insured who is legally entitled to recover damages for bodily injury from the owner or operator of an underinsured motor vehicle. The key phrase upon which the arguments and our decision turn is "legally entitled to recover."

¶16 West Bend argues that Cordie cannot recover under her own UIM coverage because she is not "legally entitled to recover" more than $250,000 from the municipal tortfeasor. The mandated statutory UIM coverage does not define the phrase "legally entitled to recover," and goes on to state that an auto is underinsured when the negligent tortfeasor's policy limits do not "fully compensate the insured for his or her damages." WIS. STAT. § 632.32(2)(e)3 (2009-10). A statute is ambiguous if reasonable minds could differ as to its meaning. ***Hauboldt***, 160 Wis. 2d at 684. In this context, reasonable minds could differ as to whether "legally entitled to recover" precludes recovery beyond the municipal liability cap because the insured could not have recovered those damages from the tortfeasor or whether "fully compensate" requires that the insured recover for damages actually incurred. The interaction of these two phrases creates ambiguity in the statute. *See* ***Jones***, 226 Wis. 2d at 577 ("Ambiguity in a statute can be created by the interaction of two separate statutes."). Therefore, we look to the statutory language, the purpose and the history of the statute.

¶17 The 2009 Truth in Auto Law mandated UIM coverage for the protection of those insured persons who are "legally entitled to recover damages for bodily injury … from owners or operators of underinsured motor vehicles." WIS. STAT. § 632.32(2)(d) (2009-10). The coverage definition thus identifies who is protected, and, in turn, the underinsured motor vehicle definition states that an auto is underinsured when the negligent tortfeasor's policy limits are "less than the

amount needed to fully compensate the insured for his or her damages." Sec. 632.32(2)(e)3 (2009-10).

¶18 The Truth in Auto Law adopted several provisions indicating an intent to ensure that people who purchased UIM coverage receive the limits for which they paid. The statute prohibited both reducing clauses and anti-stacking provisions. *See* WIS. STAT. § 632.32(6)(g) (2009-10) (prohibiting reducing clauses); § 632.32(6)(d) (2009-10) (prohibiting anti-stacking provisions); *see also* ***Belding v. DeMoulin***, 2013 WI App 26, ¶1, 346 Wis. 2d 160, 828 N.W.2d 890 (prohibition on anti-stacking clauses trumps "drive other car" exclusion).

¶19 Furthermore, the legislature specifically rejected an exclusion for motor vehicles owned by a governmental unit from the definition of an underinsured motorist vehicle. Wisconsin Legislative Council Amendment Memo, Mar. 15, 2010 (regarding Assembly Amendments 1 and 2 to 2009 A.B. 701). In doing so, the legislature underscored its intent to provide full UIM compensation even when the negligent tortfeasor happens to be in a government-owned vehicle. To conclude otherwise would undermine that legislative intent as it would permit the insurer to avoid providing the full UIM benefit the insured bargained for based on the happenstance that the insured's injury was caused by the driver of a government-owned vehicle. And, the legislature rejected the exclusion of government-owned vehicles with good reason. First, the statutory cap absolves the City from further liability but has no relation to the insured's UIM coverage, so permitting full UIM compensation does not undermine the statutory cap. Second, there is no apparent public policy reason that a person should not have access to his or her own policy limits that he or she paid for based on something the insured had absolutely no control over—that the negligent tortfeasor was driving a government-owned vehicle.

¶20 Finally, the legislature employed a parallel construction, using the same phrase, "legally entitled to recover," in the uninsured motorist coverage definition. WIS. STAT. § 632.32(2)(f). And yet, it then went on to define "uninsured motor vehicle" to include situations in which an insured is not able to recover from the tortfeasor—involving an unidentified motor vehicle or a hit-and-run motor vehicle. Section 632.32(2)(g). The inclusion of these scenarios, in which there could be no recovery from the tortfeasor, squarely trumps the possible limitation in the phrase "legally entitled to recover." Similarly, defining an underinsured motor vehicle as one whose limits are insufficient to "fully compensate" the insured demonstrates an intent to provide coverage for the insured regardless of whether the insured is "legally entitled to recover" the full amount of his or her damages because of the statutory cap.

¶21 Cordie cites many decisions from other jurisdictions adopting the "majority" position that the phrase "legally entitled to recover" language, in cases involving immunity or statutory caps, simply requires the insured to demonstrate that the tortfeasor was at fault in causing the accident and the damages that the insured suffered. *See* ***Jenkins v. City of Elkins***, 738 S.E.2d 1, 12 (W. Va. 2012) (collecting cases); ***Speer v. Farm Bureau Mut. Ins. Co.***, 226 P.3d 558 (Kan. Ct. App. 2010); ***Cincinnati Ins. Co. v. Trosky***, 918 N.E.2d 1, 9 (Ind. Ct. App. 2009) ("[T]he sovereign immunity defense is not available to UIM carriers who argue that once the statutory cap has been paid by the governmental unit, the insured is no longer 'legally entitled to recover.'"). These courts reason that the often-unstated purpose of UIM coverage is to protect insureds from negligent motorists who cannot or will not pay for the damages they have caused and that there is little difference between an underinsured tortfeasor and one who is entitled to immunity or a statutory cap. In contrast to the more limited statutory language at issue in

those cases, the Truth in Auto Law spells out the intent to provide full compensation with its (1) mandatory UIM coverage, (2) prohibition of anti-stacking and reducing provisions, (3) definition of underinsured motor vehicle as one in which the tortfeasor's limits are inadequate to fully compensate the insured, (4) definition of uninsured motor vehicle as including vehicles for which there can be no recovery against the tortfeasor, and (5) rejection of a government-owned vehicle exclusion from the definition of an underinsured motor vehicle.[5]

¶22 Thus, in the context of a case involving the municipal liability statutory cap, the legislative language, purpose and history inform us that "legally entitled to recover" does not thwart UIM recovery for a victim who has not been fully compensated for his or her damages. We conclude that the Truth in Auto Law demands UIM recovery beyond the statutory cap for this March 30, 2011 accident.

[5] West Bend relies on ***State Farm Mutual Automobile Insurance Co. v. Gillette***, 2002 WI 31, ¶42, 251 Wis. 2d 561, 641 N.W.2d 662, and ***Orlowski v. State Farm Mutual Automobile Insurance Co.***, 2012 WI 21, ¶34, 339 Wis. 2d 1, 810 N.W.2d 775, for the proposition that "legally entitled to collect" refers to those damages actually recoverable from the tortfeasor. Neither case addressed the Truth in Auto Law's mandatory UIM coverage and its language directly addressing full compensation for the insured's damages. Moreover, the ***Gillette*** court specifically recognized that viewing the purpose of UIM coverage as to fully compensate the insured "emphasizes" coverage "for all damages incurred up to the policy liability limits, regardless of whether the insured is legally entitled to collect the full amount … from the underinsured motorist." ***Gillette***, 251 Wis. 2d 561, ¶45. Furthermore, the ***Gillette*** court noted that "an insurance company does not, for all purposes, stand in the shoes of the tortfeasor in a lawsuit between an insurance company and the insured," and that immunity may present different considerations than that case, which involved noneconomic damages that were not recoverable under the applicable foreign tort law. ***Id.***, ¶¶36, 40. The ***Gillette*** court also recognized the distinction between situations in which the insured is fully indemnified under applicable tort law and those in which the tortfeasor is underinsured or immune. ***Id.***, ¶¶5 n.6, 40. Here, unlike in ***Gillette***, a controlling statute defines coverage in terms of full compensation for the insured's damages, and Cordie is not fully compensated for her damages because the statutory cap limits the amount of her recovery.

¶23 Finally, West Bend points to the "[o]wned by any governmental unit or agency" exception to the definition of underinsured motor vehicle in its policy to restrict coverage in this case. We reject this attempt to deny UIM coverage to Cordie under this provision. West Bend cannot narrow the coverage required under the statute by adding this exception to its policy definition of underinsured motor vehicle, ***Trampf***, 199 Wis. 2d at 386 (policy cannot narrow coverage required by law), especially when, as noted above, such an exception was specifically considered and rejected by the legislature.

CONCLUSION

¶24 Coverage under a UIM policy for an accident that occurred while the Truth in Auto Law was in force cannot be truncated by application of the statutory cap on municipal damages. Therefore, we reverse the circuit court's grant of summary judgment in favor of West Bend and remand for proceedings not inconsistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.