COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0874

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

SONIA M. HEINZ AND ROBERT G. HEINZ,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, A FOREIGN INSURANCE CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Order affirmed; order reversed and cause remanded with directions.*

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

¶1 BROWN, P.J. In this case, we conclude that the language in an insurance policy unambiguously affords the insureds the underinsured motorist

(UIM) coverage they sought to enforce through this lawsuit. We thus reverse the trial court's order granting the insurance company summary declaratory judgment and dismissing the insureds' contract and bad faith claims. Furthermore, we decline the insurer's invitation on cross-appeal to reverse the trial court's decision not to stay discovery on the bad faith claim pending resolution of the contract claim. Rather, we conclude that the trial court may utilize its discretion to exclude material relevant only on the bad faith claim from the contract trial. We reverse in part and affirm in part.

¶2 This case arose when United Services Automobile Association (USAA) denied UIM coverage to Sonia M. and Robert G. Heinz after a car driven by Shirley Lueck hit Sonia. Lueck carried $300,000 coverage per person per accident, for which the Heinzes settled with her insurance company after duly notifying USAA. The Heinzes' USAA policy defines an underinsured motorist as one who has liability insurance "but its limit for bodily injury liability is less than the limit of liability for this coverage." The policy defines its own limit of liability as "the limit of **BI** [bodily injury] liability shown in the Declarations for 'each person' … multiplied by the number of premiums shown." At the time of the accident, the Heinzes had three vehicles insured under their USAA policy. Their liability limit for UIM coverage was $300,000 per person and $500,000 per accident. In a March 4, 1998 letter to the Heinzes' attorney, a USAA representative wrote: "You asked … to confirm the available limit of liability for UIM coverage. The Heinzes did have 300,000 multiplied by three vehicles they insured with USAA, or 900,000 total." Later, USAA again stated that the UIM coverage applied; it deemed the entire claim worth $525,000—the "300,000 received from [Lueck's insurer], 25,000 medical payments paid by USAA and 200,000 to be paid under the underinsured motorist coverage of this policy."

¶3 In response to USAA's offer of $200,000, the Heinzes commenced this action against USAA, alleging breach of contract, a violation of WIS. STAT. § 628.46(1) (1997-98),[1] and insurer bad faith. USAA counterclaimed requesting dismissal of the Heinzes' complaint, alleging that Lueck did not meet the USAA policy definition of underinsured motorist because her $300,000 liability limit is "equal to, not less than, the limits of liability available to the plaintiffs under their UIM policy issued by … USAA." USAA moved the trial court to bifurcate the contract and bad faith claims and to stay discovery on the bad faith claim until the contract claim was resolved. The trial court granted the motion to bifurcate, ordering that the bad faith trial would commence immediately after the breach of contract trial should the Heinzes prevail on their breach of contract claim. However, the trial court refused to stay discovery on the bad faith claim. USAA also moved for summary declaratory judgment, asking the trial court to declare that it had no obligation to the Heinzes under the policy. The trial court granted the motion, dismissing the Heinzes' complaint. The Heinzes appeal the dismissal. USAA cross-appeals, claiming that the trial court erred in ordering back-to-back trials and in refusing to stay discovery on the bad faith claim. We reverse and remand on the appeal and affirm on the cross-appeal.

¶4 The interpretation of an insurance contract is a question of law and thus our review is de novo. *See* ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis. 2d 375, 382, 480 N.W.2d 1 (1992). Any ambiguity in the policy language is to be construed in favor of coverage. *See* ***id.*** Where language in an insurance contract is unambiguous, we simply apply the policy language to the facts of the case. *See* ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis. 2d 437, 447, 492

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

N.W.2d 131 (1992). In doing so, we give the policy terms their plain meaning—the meaning a reasonable person in the position of the insured would give them. *See* ***id.***

¶5 Here, we have two policy provisions at issue—the definition of underinsured motorist and the limit of liability. We set out the relevant language from each.

> **Underinsured motor vehicle** means a land motor vehicle or **trailer** of any type to which a 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.
>
> ….
>
> For **BI** sustained by you or any **family member** in any one accident, our maximum limit of liability for all resulting damages … recoverable by any persons, is the limit of **BI** liability shown in the Declarations for "each person" for UM Coverage or UIM Coverage multiplied by the number of premiums shown for UM Coverage or UIM Coverage.

¶6 The Heinzes argue that the above language clearly provides $900,000 total UIM coverage, as they have $300,000 "per person" coverage and they pay three premiums—one for each of their automobiles insured with USAA. USAA responds that coverage is never triggered to begin with because Lueck's liability limit was $300,000 and this is "equal to plaintiffs' own UIM limits, not less than those limits" so Lueck does not come within the definition of underinsured motorist. USAA claims that the Heinzes' approach is stacking—aggregating policies—and may not be done before determining coverage. *See* ***Krech v. Hanson***, 164 Wis. 2d 170, 173, 473 N.W.2d 600 (Ct. App. 1991).

¶7 The Heinzes' USAA auto insurance policy unambiguously provides for stacking. Thus, ***Krech*** is inapposite. There, Krech wanted to stack UIM

coverage for each vehicle under his policy to establish that the other driver's truck qualified as an underinsured motor vehicle. While at first blush that factual pattern appears identical to the one before us now, there is one crucial difference: here, we have policy language that specifically allows stacking. There is no hint of such language in ***Krech***. USAA cannot get around its own policy language. The contract says the limit of liability is the limit of liability shown multiplied by the number of premiums shown. It is undisputed that the limit is $300,000 and that there are three premiums. USAA's total liability, therefore, is $900,000. If USAA did not want to allow stacking, it should not have explicitly mandated it in its policy.[2]

¶8 USAA's liability might be decreased by the reducing clause in the policy. Because the trial court ruled there was no coverage, it did not reach the applicability of the reducing clause. Such clauses are valid and enforceable under WIS. STAT. § 632.32(5)(i). However, the Wisconsin Supreme Court recently accepted certification of an appeal questioning the constitutionality of that statute on due process grounds.[3] Thus, were we to take up the issue, we would have to hold the appeal pending the Wisconsin Supreme Court's decision despite the fact that we have resolved the coverage question and despite the fact that the case awaits further action in the trial court. We think it is in the best interests of judicial administration for us to refuse to take up the reducing clause issue and instead remand this case to the trial court. The trial court can proceed with trial and reserve its judgment on the reducing clause issue pending the supreme court

[2] We note that USAA has since eliminated this language from its policies.

[3] The case is ***Dowhower v. West Bend Mutual Insurance Co.***, No. 98-2762, *cert. granted*, Nov. 17, 1999.

decision, if it so wishes. Or the trial court may handle the matter in any other manner consistent with the broad discretion it has to run its own court.

¶9 USAA's cross-appeal has two related issues. First, should the bifurcated trial be tried consecutive to one another before the same jury? Second, should discovery on the bad faith claim be stayed pending resolution of the contract claims and then, if needed, be conducted between the termination of the first trial and the start of the second? At the outset, we note that both decisions are discretionary. *See* ***Zawistowski v. Kissinger***, 160 Wis. 2d 292, 300, 466 N.W.2d 664 (Ct. App. 1991) (trial court has discretionary power to bifurcate issues for trial); ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996) (discovery rulings are reviewed under misuse of discretion standard). Thus, we will not reverse the trial court's decision unless it is clearly shown that the trial court failed to consider the relevant facts, apply the proper standard of law and reach a conclusion a reasonable judge could reach. *See* ***Zawistowski***, 160 Wis. 2d at 302. We first address the bifurcation issue and then the discovery question.

¶10 While the decision to bifurcate a trial is discretionary, such discretion is not unfettered. *See* ***id.*** at 301. WISCONSIN STAT. § 805.05(2) grants the trial court authority to order separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy." In considering separate trials, the trial court should consider "potential prejudice to the parties, the complexity of the issues and potential to confuse the jury, and the relative convenience, economy or delay that might result." ***Zawistowski***, 160 Wis. 2d at 301.

¶11 USAA's argument is essentially as follows: Even if coverage exists, there still remains an issue regarding the damages sustained by the Heinzes despite

the fact that Sonia is now a quadriplegic. USAA also insists that there is still an issue of whether Lueck's negligence caused Sonia to become a quadriplegic. In other words, USAA insists on a trial to determine the Heinzes' actual tort damages to which the UIM limits are to be applied. At this trial, the jury will be asked to determine the dollar amount of the damages sustained by the Heinzes as a result of Lueck's negligence. USAA properly notes that preparation for trial of the underlying tort aspects of the contract claim requires discovery by way of depositions, interrogatories and other methods to determine the facts to be presented to the jury.

¶12 These same methods of preparation are also available to the parties in preparing to try the bad faith claim, but with one more aspect—an aspect that disturbs USAA. USAA observes that in Wisconsin, in order to prove bad faith against an insurer, the plaintiff "must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). In answering the question of bad faith, the jury is able to "consider whether the plaintiff's claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review." WIS J I—CIVIL 2761. USAA acknowledges, therefore, that its conduct with regard to handling the merits of the case is a primary issue in the bad faith claim. Thus, what would not be relevant or discoverable in preparing for the underlying tort claim, such as the thought processes, procedures, evaluative and investigative steps taken by the insurer, *would* be discoverable in a bad faith claim.

¶13 In sum, USAA fears that the Heinzes, through discovery, will be able to find out USAA's "in-house" assessment of how much the case was worth

and its evaluation regarding whether Heinz's quadriplegia is a direct result of the accident with Lueck. This, USAA claims, will prejudice its underlying tort case. For that reason, USAA insists that it should not have to try the underlying tort claim and the bad faith claim consecutively and that discovery on the bad faith claim should be stayed until the underlying tort claim is resolved.

¶14 USAA cites cases from foreign jurisdictions in support of its claim. However, we note that in the cases to which USAA refers, the insurer's liability for coverage was still at issue. *See, e.g.,* ***Bartlett v. John Hancock Mut. Life Ins. Co.***, 538 A.2d 997, 1000 (R.I. 1988). In such a case, where a coverage dispute accompanies a bad faith claim, those courts have held that discovery on the bad faith claim should be held in abeyance pending the result on the coverage issues.

¶15 While these cases do not come right out and say so, they obviously recognize that discovery regarding coverage issues, including the underlying issues of the underinsured motorist's liability and the insured's resultant damages, does not include access to the insurer's work product regarding evaluations and investigation of the claim while discovery on a bad faith claim does include access to that information. Thus, the courts have been reluctant to allow discovery on the bad faith claim unless and until coverage has been determined. As one court observed, if the rule were otherwise, the discovery rule preventing access to an insurer's work product in mine-run personal injury actions could be circumvented simply by combining the two causes of action. *See* ***Allstate Ins. Co. v. Swanson***, 506 So. 2d 497, 498 (Fla. Dist. Ct. App. 1987). In other words, the law militates against allowing information to be passed to the other party unless or until a right of action actually accrues.

¶16 Here, however, coverage is no longer at issue. We have determined this to be the case earlier in this opinion. Moreover, negligence on Lueck's part has been admitted. The only issues left on the contract claim, according to USAA, are the underlying tort claims regarding whether Lueck's negligence caused Sonia's quadriplegia and the extent of the Heinzes' damages. USAA does not explain how simultaneous discovery is going to prejudice it here. Will it prejudice it in settlement discussions? That is highly unlikely. Given the fact that the plaintiff is now a quadriplegic, settlement for anything less than the full amount of the legally available underinsurance coverage is not going to happen. USAA simply has not shown how it is going to be prejudiced by the trial court's ruling. In this case, we cannot say that the decision to allow discovery on the bad faith claim to occur while the contract claim is pending was unreasonable. If necessary, the trial court, in its discretion, may act as a filter to ensure that no information relevant only to the bad faith claim is introduced when trying the contract claim. In short, the trial court's plan is reasonable and we will not overturn it.

¶17 We are certain that the trial court will not allow evidence relevant to the bad faith claim, such as settlement offers or USAA's pretrial conclusions on verdict potential, to be heard by the jury during the underlying tort claim phase. Bifurcation of the trial facilitates keeping this irrelevant information out of the first trial. Furthermore, given the different nature of the two claims—one essentially being a negligence action and the other being an intentional tort—separate trials will lessen juror confusion. In short, we cannot say that the trial court's decision to have the two causes of action tried by the same jury, consecutively, was unreasonable. We reach the same conclusion on the discovery issue.

¶18 To summarize, we reverse on the coverage issue. We will not, and indeed should not at this time, reach the reducing clause issue. The trial court's

order on the bifurcation and discovery issues is upheld as reasonable. We remand the case to the trial court with directions to proceed in any manner consistent with the best interests of judicial administration. The trial court may, if it wishes, proceed with scheduling the balance of the case on its calendar and hold the reducing clause issue until the supreme court has released its decision.

By the Court.—Order affirmed; order reversed and cause remanded with directions.

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