COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2016

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. 2014AP2592 **Cir. Ct. No. 2012CV876**

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

STEVEN DANIEL FOSTER,

PLAINTIFF-APPELLANT,

V.

REGENT INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

BLUE CROSS BLUE SHIELD OF WISCONSIN,

DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. This underinsured motorist (UIM) insurance coverage dispute arises under the 2009-10 version of WIS. STAT. § 632.32 (Truth in Auto Law).[1] Steven Foster appeals a judgment awarding him $238,244.50 and taxable costs. Foster claims the circuit court erred by reducing the monetary award in the jury's special verdict pursuant to a setoff provision in Regent Insurance Company's UIM endorsement. Foster contends the provision is unenforceable and should not be applied. In the alternative, he argues that even if the setoff provision is valid, the court erred when it eliminated his entire award for past and future loss of earning capacity. We reject Foster's arguments and affirm the judgment.

BACKGROUND

¶2 Foster was injured in a rear-end motor vehicle collision on July 19, 2011, while acting in the scope of his employment at Steve Martell Well Drilling, Inc. (Martell) and driving a company vehicle insured by Regent. As a result of his accident-related injuries, Foster received $52,460.94 in initial workers' compensation benefits,[2] comprised of $23,300.59 for wages and $29,160.35 for medical expenses.[3] He later settled his workers' compensation

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Workers' compensation appears as "worker's compensation" in the Worker's Compensation Act, *see* WIS. STAT. ch. 102, whereas Regent's policy refers to it as workers' compensation. We refer to it as workers' compensation consistent with Regent's policy.

[3] QBE Insurance insured Martell for workers' compensation liability. QBE Insurance acquired Regent Insurance Company in 2007.

claim for an additional $137,500.[4] Foster also began receiving monthly SSDI benefits in January 2012.

¶3 Foster settled his claim against the at-fault driver for the driver's personal automobile insurance policy limit of $100,000.[5] Foster then commenced suit against Regent seeking payment of the limits of its applicable UIM coverage. Central to this appeal, Regent's UIM policy endorsement contained a setoff provision,[6] which stated, in relevant part:

> D. Limit Of Insurance
>
> ....
>
> We will not make a duplicate payment to the extent amounts are paid or payable because of "bodily injury" under workers' compensation, disability benefits or similar law.

¶4 Prior to court-ordered mediation, Regent moved for a declaratory judgment regarding the enforceability of this setoff provision. Regent argued the setoff provision was not a prohibited "reducing clause," but rather a permissible "duplicate payments clause," which served to prevent Foster from obtaining a double recovery or a windfall. Regent further explained the setoff provision served to maximize the amount of UIM insurance available to a plaintiff by

[4] The total settlement agreement was for $140,000 comprised of $137,500 for Foster's injuries related to the automobile accident and $2,500 for a prior work-related injury. Foster does not claim that this prior work-related injury was a factor in computing his Social Security Disability Insurance (SSDI) benefits. To the contrary, at oral argument, his counsel acknowledged that this case was unique because Foster had no pre-existing conditions.

[5] Of the $100,000 liability settlement, $43,969.86 was paid to QBE as reimbursement for medical expenses and compensation, pursuant to WIS. STAT. § 102.29.

[6] Regent refers to this provision as the "duplicate payments clause." Foster conversely refers to it as the "WCA/SSDI set-off provision." We refer to it as the "setoff provision."

applying the coverage only to damages beyond what the plaintiff recovers from the tortfeasor, workers' compensation, and disability insurance. Foster, in turn, argued the setoff provision was void and unenforceable pursuant to binding Wisconsin law and Wisconsin's collateral source rule. The circuit court concluded the setoff provision was not a reducing clause and was thus valid and enforceable. The court reserved making a final decision on what, if any, payments may constitute a duplicate payment and whether the collateral source rule applied.

¶5 A jury awarded Foster $518,000 in damages in a special verdict, distributed as follows:

a.	Past medical and health care expenses	$63,000
b.	Future medical and health care expenses	$155,000
c.	Past loss of earning capacity	$50,000
d.	Future loss of earning capacity	$125,000
e.	Past pain, suffering and disability	$30,000
f.	Future pain, suffering and disability	$95,000

Following the verdict, Regent moved to reduce the jury's award by the $100,000 Foster received from the tortfeasor's insurer. Regent also sought to reduce the jury's award for past medical and health care expenses by $4755.50 based on payments Foster received through workers' compensation, and to deduct the jury's entire award for past and future loss of earning capacity based on payments Foster received from workers' compensation and SSDI. Foster conceded the $100,000 reduction was appropriate but argued Regent was not entitled to the other reductions.

¶6 The circuit court concluded "[t]he collateral source rule does not apply under the circumstances here as the damages that ... Foster is entitled to recover under his UIM policy are governed by the terms of the insurance agreement." The court further concluded "the evidence makes clear" that Regent is entitled to the following deductions: (1) $100,000 paid by the tortfeasor's insurer; (2) $4755.50 for unreimbursed past medical and health care expenses, as Foster "received a duplicate payment for past medical expenses incurred through workers' compensation"; and (3) $50,000 for past loss of earning capacity and $125,000 for future loss of earning capacity that "Foster received from worker[s'] compensation and social security payments for lost earning capacity in excess of $175,000.00, which duplicates the damages awarded by the jury." The circuit court accordingly entered a judgment for Foster in the amount of $238,244.50, along with taxable costs. Foster now appeals.

DISCUSSION

¶7 This case involves the interpretation of an insurance policy and WIS. STAT. § 632.32, both of which present questions of law that we review de novo. *See* ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶9, 293 Wis. 2d 123, 717 N.W.2d 258. An insurance policy is a contract for insurance. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶25, 324 Wis. 2d 325, 782 N.W.2d 682. When determining whether an insured may recover under the terms of an insurance

policy, we generally begin by examining the language of the policy.[7] *See* ***id.*** Our goal in construing an insurance policy is "to determine and carry out the intentions of the parties." ***Id.***, ¶26. "We interpret undefined words and phrases in an insurance policy as they would be understood by a reasonable insured, giving words and phrases their common and ordinary meaning." ***Id.*** If the policy language is clear on its face, we apply the policy's terms. ***Stubbe v. Guidant Mut. Ins. Co.***, 2002 WI App 203, ¶8, 257 Wis. 2d 401, 651 N.W.2d 318. However, if an insurance policy is ambiguous, we will resolve ambiguity in favor of the insured. ***Id.*** "Insurance policy language is ambiguous 'if it is susceptible to more than one reasonable interpretation.'" ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857 (quoting ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150).

¶8 "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute. ***Id.***, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** Statutory language is also

[7] The record contains two different insurance policies issued to Martell: (1) a "Commercial Automobile Policy"; and (2) a "Commercial Umbrella Policy." Foster cites both policies without differentiating between them. Regent cites the Commercial Automobile Policy. The Commercial Umbrella Policy contains a UIM endorsement titled "Wisconsin Excess Underinsured Motorists Coverage." The Commercial Automobile Policy contains a UIM endorsement titled "Wisconsin Underinsured Motorists Coverage." Both endorsements contain the same setoff provision. The limit of underinsured motorist coverage in the Commercial Automobile Policy is $500,000. Because Foster's request for a $418,000 judgment is within the limit of the Commercial Automobile Policy, we focus only on that policy.

"interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. If the meaning of the statute is plain, the inquiry ordinarily ends there. ***Id.***, ¶45. "[I]f a statute is ambiguous, we examine extrinsic sources, such as legislative history, to ascertain the legislative intent." ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶17, 290 Wis. 2d 421, 714 N.W.2d 130.

I. Foster claims use of the setoff provision will provide him with less than a full recovery.

¶9 Foster first contends Regent's policy "entitles the insured full compensation for all elements of tort damages that the underinsured driver is liable for under Wisconsin tort law, up to the UIM policy limits." According to Foster, "$418,000 is the amount of UIM coverage required under the policy to fully compensate [him] for the amount he is legally entitled to recover from the underinsured tortfeasor." Foster acknowledges the setoff provision is not a limits reducing clause. Nonetheless, he claims that Regent improperly seeks to pay less than full compensation based on the setoff provision.

¶10 We note from the outset that many of Foster's arguments hinge on the fundamentally false premise that Regent must stand in the shoes of the tortfeasor for all purposes. Foster selectively relies upon various cases to support this proposition. However, in so doing, Foster ignores other legal principles—most notably, properly giving effect to the clear contract language in Regent's policy.

¶11 Foster correctly observes that Regent's UIM endorsement begins with a broad grant of coverage. It provides Regent "will pay all sums the 'insured'

is legally entitled to recover as compensatory damages from the owner or driver of an 'underinsured motor vehicle.'" However, Regent's broad grant of coverage is limited by additional language in the UIM endorsement. Among other exclusions and limitations, the UIM endorsement contains two provisions relevant to this appeal, both of which appear under the heading "Limit Of Insurance."

¶12 The first provision states that Regent "will not make a duplicate payment under this coverage for any element of 'loss' for which payment has been made by or for anyone who is legally responsible." Foster agrees the circuit court properly applied this provision in reducing the judgment against Regent by the $100,000 received from the tortfeasor's insurer.

¶13 The second provision—the setoff provision at issue in this case—states that Regent "will not make a duplicate payment to the extent amounts are paid or payable because of 'bodily injury' under workers' compensation, disability benefits or similar law." This provision is unambiguous both when considered in isolation and when considered within the context of the policy as a whole. Under the UIM endorsement, Regent will not include in its payment to Foster sums that workers' compensation and disability benefits paid for Foster's injuries from the same automobile accident giving rise to the UIM claim. Contrary to Foster's claims, the setoff provision does not result in Foster being less than fully compensated for the accident. Rather, it ensures Foster does not receive duplicate compensation—that is to say, reimbursement in excess of the sums required to make him whole.

¶14 Foster next contends that, to the extent the setoff provision is valid, it applies only when the benefits "exactly duplicate an element of tort damages for which the tortfeasor is liable under the special verdict."[8] (Emphasis omitted.) He concedes the $4755.50 in medical expenses covered under workers' compensation exactly duplicate the special verdict award for past medical expenses. Therefore, Foster agrees, to the extent the setoff provision is valid, the circuit court properly offset the judgment by that amount. However, he claims the SSDI benefits and remaining workers' compensation benefits do not "exactly duplicate" any element of tort damage.[9] While acknowledging the overlap between SSDI and workers' compensation payments and tort damages, Foster argues they arise under different rules and do not provide identical amounts of compensation. As a result, he contends Regent is not entitled to offset those payments. He further claims that because more than one reasonable definition exists for the term "duplicate," the term is ambiguous, and we are required to construe the term "duplicate" against Regent as the drafter and in favor of coverage.

¶15 We are unpersuaded by Foster's attempt to create ambiguity by reading additional terms into the contract. "Terms or phrases in an insurance

[8] Foster relies on the following definitions of "duplicate" to support this claim: "exactly like or corresponding to something else," DICTIONARY.COM, http://dictionary.reference.com/browse/duplicate (last visited July 18, 2016); "exactly the same as something else: made as an exact copy of something else," MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/duplicate (last visited July 18, 2016); and "[e]xactly like something else, especially through having been copied," OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/duplicate (last visited July 18, 2016).

[9] In the alternative, Foster claims if we agree the SSDI reduction is "allowable and duplicative," then Regent has established an offset only for past loss of earning capacity in the amount of $26,669.41. Foster calculates this figure by subtracting the amount already reimbursed under the workers' compensation distribution formula from the jury's award for past loss of earning capacity. We reject this argument for the reasons stated in ¶¶16-17 *infra*.

contract are ambiguous only 'if they are fairly susceptible to more than one reasonable interpretation.'" ***Wilson Mut. Ins. Co. v. Falk***, 2014 WI 136, ¶24, 360 Wis. 2d 67, 857 N.W.2d 156 (citations omitted). "The mere fact that a word has more than one dictionary meaning, or the parties disagree about the meaning, does not necessarily make the word ambiguous if [we] conclude[] that only one meaning applies in the context and comports with the parties' objectively reasonable expectations." ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 537, 514 N.W.2d 1 (1994).

¶16 According to the UIM endorsement, the compensatory damages Regent is required to pay "must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.'"[10] Foster would have us construe the policy in a manner so as to permit the setoff of workers' compensation and SSDI benefits only if those benefits exactly duplicate the specific types of damages recovered under the jury verdict. The policy does not state that the workers' compensation and SSDI payments must "exactly" duplicate specific types of damages, nor is the term "duplicate" ambiguous when read in context. Rather, the setoff provision states, "We will not make a duplicate payment to the extent amounts are paid or payable because of 'bodily injury' under workers' compensation, disability benefits or similar law." The phrase "duplicate payment" immediately precedes "to the extent amounts are paid or payable because of 'bodily injury' under workers' compensation, disability benefits or similar law." Reasonable insureds would understand this provision to mean that the amount of UIM recovery will be

[10] Regent's policy defines "bodily injury" to mean "bodily injury, sickness or disease sustained by a person including death resulting from any of these." "Accident" "includes continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'"

arrived at by determining the total value of the damages due because of bodily injuries sustained as a result of an accident, less workers' compensation, SSDI, and other similar benefits paid or payable for the bodily injuries resulting from that accident. In other words, the setoff provision will be applied to prevent an insured from receiving double compensation (duplicate payment) for the damages he or she sustained due to the bodily injuries resulting from an accident. Workers' compensation or SSDI benefits paid for bodily injuries from another accident, or a pre-existing condition, will not be offset because they are not duplicate payments.

¶17 Foster correctly notes that Regent's policy indicates Foster, as the insured, is entitled to full compensation for all tort damages up to the UIM policy limits. However, nothing in Regent's policy requires Foster's total recovery for damages he suffered to come dollar for dollar from Regent.[11] The UIM endorsement, under its plain terms, allows for an offset from the UIM benefits owed to an insured based on the workers' compensation and disability benefits received. Under the unique facts of this case, Foster's workers' compensation claim, his SSDI claim, and his UIM claim all arose out of the same injuries from the same accident. There were no other tortfeasors, and there was no claim Foster had any pre-existing conditions. In other words, all three sources are paying for his accident-related bodily injuries. Under the plain language of this policy, Foster cannot reasonably argue that he is entitled to UIM coverage for bodily injury

[11] Foster also claims allowing a setoff for SSDI payments undermines the purpose of UIM coverage and contravenes public policy. He relies exclusively on ***Barnett v. American Family Mutual Insurance Co.***, 843 P.2d 1302 (Colo. 1993), to support this claim. Without a more-compelling rationale than provided in that single case or from Foster's own argument, we are unpersuaded that this articulation of Colorado law should govern the outcome of this Wisconsin case.

losses previously paid by workers' compensation and SSDI. Foster presents no argument refuting this plain reading of the policy.[12]

¶18 Foster also correctly notes the insured's right to a full recovery, commensurate with the jury's verdict, is reiterated in the UIM policy's subrogation/reimbursement provisions, which state, in part, "[Regent] shall be entitled to the right to recover damages from another *only after the 'insured' has been fully compensated for damages*." (Emphasis added.) However, that provision is not violated by Regent's enforcement of its policy's setoff provision. Regent is neither seeking to recover damages from another under a right of subrogation nor pursuing a result that keeps Foster from being fully compensated for his damages. Instead, Regent is enforcing a contract provision permitting it to offset damages previously paid to Foster by others against the amount awarded by the jury for bodily injury. Foster's effort to recover portions of his damages twice goes against the expressed terms of Regent's insurance contract.

II. Foster claims that the setoff provision is void and unenforceable.

¶19 Regardless of whether the plain language of Regent's policy permits an offset for duplicate amounts paid or payable under workers' compensation and disability benefits because of bodily injury resulting from an accident, Foster claims the setoff provision should not be applied because it is "completely void and unenforceable." Foster raises several arguments in support of this claim, relying on various legal authorities we discuss in the sections below.

[12] In the circuit court, Regent decided to pursue the offset for workers' compensation and SSDI only against the jury award for past and future loss of earning capacity, and decided to forgo any offset against the amount awarded for pain, suffering, and disability. As a result, we do not address any possible offset against those damages in our decision.

A. *United Fire & Casualty Co. v. Kleppe*

¶20 Foster argues the setoff provision is void and unenforceable under our supreme court's decision in ***United Fire & Casualty Co. v. Kleppe***, 174 Wis. 2d 637, 498 N.W.2d 226 (1993). In ***Kleppe***, an insured employee acting within the scope of her employment was injured in a motor vehicle accident with an uninsured motorist. ***Id.*** at 639. The insured received workers' compensation benefits as a result of the accident. ***Id.*** She and her husband also filed a claim for their entire damages under her motor vehicle insurance policy, which provided uninsured motorist (UM) benefits. ***Id.*** The insurer sought a declaratory judgment to enforce a "limit of liability" provision in its policy based on the workers' compensation benefits that the insured was receiving. ***Id.*** The policy provided:

> B. Any amounts otherwise payable for damages under this coverage [uninsured motorist] shall be reduced by all sums:
>
> 1. Paid ... by or on behalf of persons ... who may be legally responsible. This includes all sums paid under Part A [liability coverage]; and
>
> 2. Paid or payable because of the "bodily injury" under any of the following or similar law:
>
> a. workers' compensation law ....
>
> C. Any payment under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A [liability coverage].

Id. (alterations and omissions in ***Kleppe***).

¶21 The question before the supreme court was whether the "reducing clause" in the policy, "which seeks to reduce uninsured motorist coverage by sums already paid or payable to its insured ... by her employer's worker[s']

compensation carrier, violates [WIS. STAT. §] 632.32(4)(a)"[13] and is thus unenforceable. ***Kleppe***, 174 Wis. 2d at 641. The court concluded, pursuant to its holding in ***Nicholson v. Home Insurance Cos.***, 137 Wis. 2d 581, 405 N.W.2d 327 (1987),[14] that "a reducing clause which is unavailable to a tortfeasor and seeks to reduce UM benefits by amounts received under worker[s'] compensation is invalid in all circumstances, regardless of the amount to which it reduces the UM benefits." ***Kleppe***, 174 Wis. 2d at 642. The court emphasized the need to place the insured in the same position that she would have been had the tortfeasor been insured, which would not be achieved if the reducing clause was applied. ***Id.*** at 642-43. The court further held, pursuant to that version of § 632.32(4), "a clause which reduces compensation available to an insured under a UM policy is void and unenforceable, as a matter of law, if such reduction would be unavailable to a tortfeasor." ***Kleppe***, 174 Wis. 2d at 643.

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[13] The ***Kleppe*** decision does not indicate which version of the Wisconsin Statutes is cited. The court quoted WIS. STAT. § 632.32(4)(a) as follows:

> REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES. Every policy of insurance subject to this section ... shall contain therein ... provisions ...
>
> 1. [f]or the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles ... in limits of at least $25,000 per person and $50,000 per accident.

United Fire & Cas. Co. v. Kleppe, 174 Wis. 2d 637, 640 n.1, 498 N.W.2d 226 (1993) (alteration and omissions in ***Kleppe***).

[14] The supreme court in ***Nicholson*** concluded a reducing clause was void and unenforceable because it contravened WIS. STAT. § 632.32(4)(a) (1979). ***Nicholson v. Home Ins. Cos.***, 137 Wis. 2d 581, 585-86, 405 N.W.2d 327 (1987). The 1979 version of the statute is comparable to the version quoted in ***Kleppe***, although the limits were lower, requiring a minimum coverage of $15,000 per person and $30,000 per accident. *See* ***Nicholson***, 137 Wis. 2d at 591. The ***Nicholson*** court emphasized the purpose of UM coverage is to compensate an insured to the same extent as if the uninsured motorist were insured. ***Id.*** at 591-92.

¶22 Assuming without deciding that Regent's setoff provision would be void and unenforceable under ***Kleppe***, we are unpersuaded that ***Kleppe*** is still good law and controls the outcome of this case. WISCONSIN STAT. § 632.32 has undergone substantial revisions since ***Kleppe*** was decided. In particular, 1995 Wis. Act 21 created WIS. STAT. § 632.32(5)(i) (1995-96), which read,

> 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.
>
> 2. Amounts paid or payable under any worker[s'] compensation law.
>
> 3. Amounts paid or payable under any disability benefits laws.

1995 Wis. Act 21, § 4.

¶23 In his appellate briefs, Foster concedes 1995 Wis. Act 21 "was enacted to modify [WIS. STAT.] § 632.32 with the intent to 'remedy' the refusal of Wisconsin courts to allow insurers to reduce uninsured motorist limits by amounts received by an injured person from other sources." He also acknowledges that, "[w]hile such amendments [to WIS. STAT. § 632.32] were in force and effect, ***Kleppe*** was overruled by statute." However, Foster argues the 2009 Truth in Auto Law expressly repealed the reducing clause provisions put in place under the 1995 amendments and, thereby, "resurrect[ed]" ***Kleppe***. According to Foster, "[u]nder [the] Truth in Auto Law, ***Kleppe*** is no longer overruled by statute and is once again good law and reflects the public policy of Wisconsin."

¶24 A brief overview of the Truth in Auto Law is necessary to understand Foster's claim. The Truth in Auto Law was in effect for policies

issued or renewed on or after November 1, 2009, until the legislature replaced it, which legislation became effective November 1, 2011. ***Wolf v. American Family Mut. Ins. Co.***, 2015 WI App 36, ¶1, 361 Wis. 2d 756, 865 N.W.2d 186, *review dismissed*, 2015 WI 47, 366 Wis. 2d 61, 862 N.W.2d 901; *see also* 2009 Wis. Act 28, §§ 9326(6), 9426(2); 2011 Wis. Act 14, § 29(1). The Truth in Auto Law changed WIS. STAT. § 632.32 in several respects. *See* ***Wolf***, 361 Wis. 2d 756, ¶6. Among those changes, it required insurers to include UIM coverage in their policies, *see* 2009 Wis. Act 28, §§ 3156, 3161, and it created statutory definitions for "underinsured motorist coverage" and "underinsured motor vehicle," ***id.***, §§ 3152, 3153. As relevant to Foster's argument, it also renumbered WIS. STAT. § 632.32(5)(i), *see supra* ¶22, to § 632.32(6)(g), 2009 Wis. Act 28, § 3171. As renumbered, § 632.32(6)(g) was amended to read:

> *No* policy may provide that the *limits* under the policy for uninsured motorist coverage 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.
>
> 2. Amounts paid or payable under any worker[s'] compensation law.
>
> 3. Amounts paid or payable under any disability benefits laws.

See 2009 Wis. Act 28, § 3171 (emphasis added); *see also* WIS. STAT. § 632.32(6)(g).

¶25 Foster claims the legislature restored ***Kleppe*** by expressly repealing the reducing clauses put in place under the 1995 amendments. However, "the legislature is presumed to act with knowledge of the existing case law."

Ziulkowski v. Nierengarten, 210 Wis. 2d 98, 104, 565 N.W.2d 164 (Ct. App. 1997). Additionally, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Kalal***, 271 Wis. 2d 633, ¶46. With these principles in mind, we find the legislature's use of the word "limits" in WIS. STAT. § 632.32(6)(g) instructive.

¶26 In 2006, our supreme court indicated 1995 Wis. Act 21 "was intended to overturn the ***Nicholson/Kleppe*** line of cases that refused to enforce reducing clauses in the context of uninsured motorist coverage." ***Teschendorf***, 293 Wis. 2d 123, ¶49. Despite this statement in ***Teschendorf***, the legislature in 2009 amended WIS. STAT. § 632.32(6)(g) to read, "No policy may provide that the *limits* under the policy for ... underinsured motorist coverage ... resulting from any one accident shall be reduced by ... [a]mounts paid or payable under any worker[s'] compensation law [or] ... [a]mounts paid or payable under any disability benefits laws." *See* 2009 Wis. Act 28, § 3171 (emphasis added). Thus, while renumbering and changing the substance of the statute, the legislature retained the word "limits." Accordingly, this language expressly prohibits insurers from reducing the *limits* of UIM coverage based on the workers' compensation and disability benefits an insured receives; however, it does not, under the plain language of the statute, prohibit provisions that reduce the amount paid to an insured based on specified third-party payments but do not otherwise reduce the UIM coverage limits. *See* § 632.32(6)(g). If the legislature intended to fully restore ***Kleppe***, such that all reductions otherwise unavailable to the tortfeasor were void, it could have inserted the words "or benefits" after the word "limits."

¶27 During oral argument, Foster presented two alternative arguments to support his claim that ***Kleppe*** is still good law and requires reversal of the judgment. First, Foster argued ***Kleppe*** held that benefits-reducing clauses and

limits-reducing clauses were generally invalid. He contended the setoff provision is a benefits-reducing clause and the 1995 legislation only restored limits-reducing clauses. Thus, according to Foster, benefits-reducing clauses remained invalid under the 1995 legislation, and, as a result, ***Kleppe*** was not overruled. We are unpersuaded by this argument as it would require us to ignore the supreme court's statement in ***Teschendorf*** that the 1995 legislation "was intended to overturn the ***Nicholson/Kleppe*** line of cases[.]" *See* ***Teschendorf***, 293 Wis. 2d 123, ¶49; *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶28 Second, Foster argued that, to the extent the 1995 legislation was intended to overrule ***Kleppe***, the statement in WIS. STAT. 632.32(5)(i) (1995-96), that "[a] policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury ... resulting from any one accident shall be reduced" must be read as referring to both benefits- and limits-reducing clauses. Thus, according to Foster, when the Truth in Auto Law changed the statute to provide "[n]o policy may provide that the limits under the policy ... shall be reduced," "limits" in WIS. STAT. § 632.32(6)(g) applies to prohibit both limits- and benefits-reducing clauses.

¶29 We are equally unpersuaded by this argument. Foster's request that we construe "limits" in WIS. STAT. § 632.32(6)(g) as referring to both policy provisions that reduce the limits of coverage and those that affect the total damages paid under the coverage part to avoid having an insured receive duplicate payments would require us to ignore basic principles of statutory interpretation. *See* ***Kalal***, 271 Wis. 2d 633, ¶45 (statutory language is generally given its common, ordinary, and accepted meaning). Furthermore, this argument is

contrary to Foster's own concession that the setoff provision is not prohibited by WIS. STAT. § 632.32(6)(g).

B. Truth in Auto Law

¶30 Foster also argues, aside from whatever precedential effect ***Kleppe*** may still have, the setoff provision is nonetheless void and unenforceable under the Truth in Auto Law, which was in effect for purposes of the claims in this case. Foster agrees this case does not involve the limits-reducing clauses prohibited under the Truth in Auto Law, as the setoff provision does not subtract from or reduce the limits under the UIM policy.[15] *See* WIS. STAT. § 632.32(6)(g). Rather, Foster argues the setoff provision is a "benefits reducing clause that would subtract from or set-off the sum of benefits payable under the policy[,]" which he claims "violates the statutory definition for UIM coverage under [the] Truth in Auto Law." He relies on the statutory definitions of both "underinsured motorist coverage"[16] and "underinsured motor vehicle"[17] to support this claim. According

[15] In its amicus curiae brief, Wisconsin Association for Justice argues the setoff provision violates the plain language of WIS. STAT. § 632.32(6)(g). We disagree. Regent's setoff provision does not change the overall limit of UIM coverage set forth in the declarations page of the policy and, therefore, does not run afoul of § 632.32(6)(g).

[16] WISCONSIN STAT. § 632.32(2)(d) defines "[u]nderinsured motorist coverage" as "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."

[17] WISCONSIN STAT. § 632.32(2)(e) defines "[u]nderinsured motor vehicle" as

> 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.

(continued)

to Foster, based on these definitions, the Truth in Auto Law "mandates that UIM coverage 'fully compensate' the insured up to the amount the insured is legally entitled to recover from the underinsured tortfeasor." He further argues the setoff provision is unenforceable as a matter of law, because Regent's setoff provision would reduce the UIM coverage to less than the full compensation he would be entitled to recover under tort law from the underinsured tortfeasor.

¶31 We are unpersuaded by Foster's arguments in this respect. Nothing in the statutory definitions of "underinsured motorist coverage" and "underinsured motor vehicle" requires UIM insurers to stand in the shoes of the tortfeasor for all purposes. Likewise, nothing in those definitions prohibits insurers from taking into consideration payments that insureds have received or will receive from other sources when computing the payment amount that is necessary for the insured to be fully compensated, up to the policy limits. The jury determined the amount that will fully compensate Foster for his bodily injuries received as a result of the accident. Taken together, the circuit court's judgment against Regent, workers' compensation, and SSDI payments provide Foster with that full compensation.

> 2. At the time of the accident, a bodily injury liability insurance policy applies to the motor vehicle or the owner or operator of the motor vehicle has furnished proof of financial responsibility for the future under subch. III of ch. 344 and it is in effect or is a self-insurer under another applicable motor vehicle law.
>
> 3. The limits under the bodily injury liability insurance policy or with respect to the proof of financial responsibility or self-insurance are less than the amount needed to fully compensate the insured for his or her damages.

Foster directs our attention only to § 632.32(2)(e)3.

¶32 As relevant here, WIS. STAT. § 632.32(2)(d) describes the purpose of UIM coverage—"for the protection of persons insured under that coverage"—and sets forth who is covered—"persons insured under that coverage who are legally entitled to recover damages for bodily injury ... from owners or operators of underinsured motor vehicles." *See* § 632.32(2)(d). It does not set forth what level of protection must be provided. Rather, the minimum level of protection that UIM policies must provide is set forth in § 632.32(4)(a)2m., which requires insurance policies to provide UIM coverage of at least $100,000 per person and $300,000 per accident. Regent's UIM coverage exceeds these minimum limits. Similarly, § 632.32(2)(e)3. specifies when an insured can invoke his or her UIM coverage, that being when the vehicle's bodily injury liability limits "are less than the amount needed to fully compensate the insured for his or her damages," among other factors. It does not, however, require that Regent draft a policy in which it alone is responsible for fully compensating an insured to the same extent as if the underinsured motorist had insurance coverage to compensate Foster for his total damages incurred.

¶33 Foster further argues "the amount of damages mandated by UIM coverage is fixed by [the] Truth in Auto Law as interpreted by Wisconsin courts." According to Foster, under ***State Farm Mutual Automobile Insurance Co. v. Gillette***, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662,[18] and ***State Farm Mutual Automobile Insurance Co. v. Hunt***, 2014 WI App 115, 358 Wis. 2d 379, 856 N.W.2d 633, *review denied*, 2015 WI 47, 366 Wis. 2d 59, 862 N.W.2d 899, "Regent must compensate [him] for the full amount of his tort damages up to its

[18] ***State Farm Mutual Automobile Insurance Co. v. Gillette***, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, was decided before the Truth in Auto Law was enacted.

UIM limits[,]" without any setoffs that would be unavailable to the underinsured tortfeasor. We disagree.

¶34 In ***Gillette***, a driver and his passenger were injured in an automobile accident in Manitoba, Canada, which accident was caused by a negligent, underinsured motorist. ***Gillette***, 251 Wis. 2d 561, ¶¶11-13. The driver, a Wisconsin resident, had UIM coverage with State Farm, which provided State Farm would pay "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle." ***Id.***, ¶¶11, 14-17. Under Manitoba law, an insured is not entitled to collect noneconomic damages from a motorist, including damages for pain and suffering. ***Id.***, ¶21. The driver and passenger sought to recover compensation for noneconomic damages from State Farm under the UIM coverage. ***Id.***, ¶23. On appeal to the Wisconsin Supreme Court, the following question was presented:

> Is an insured who is a Wisconsin resident and who has underinsured motorist coverage in a policy issued in Wisconsin (which policy promises to pay "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle") entitled to recover noneconomic damages for pain and suffering from that Wisconsin insurance company for bodily injury arising from an automobile accident that occurred in Manitoba, Canada, between the insured and a Manitoba driver, when Manitoba law precludes the recovery of noneconomic damages?

Id., ¶2. The court first decided Wisconsin law governed the interpretation of State Farm's policy. ***Id.***, ¶¶24-27. It then analyzed how to interpret the phrase in State Farm's policy "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle." ***Id.***, ¶29.

¶35 The court, in part, stated,

> [T]he only reasonable interpretation is that "damages for bodily injury an insured is legally entitled to collect from

> the owner or driver of an underinsured motor vehicle" means in the present case that an insurance company will compensate an insured for damages for bodily injury that the insured actually incurs up to the amount of damages for which a driver of an underinsured motor vehicle is liable under the applicable law up to the policy's liability limits.

Id., ¶48. Foster claims "[p]lainly put, this means the measure of damages for full UIM coverage cannot be less than the amount for which the underinsured motorist is liable under tort law." (Emphasis omitted.) However, in making this claim, Foster ignores other principles discussed in ***Gillette***. First, the court was interpreting the phrase "legally entitled to collect" in State Farm's policy under principles of contract interpretation; contrary to Foster's argument, the court was not interpreting the definitions in WIS. STAT. § 632.32(2)(d). *See* ***Gillette***, 251 Wis. 2d 561, ¶¶10, 29. In so interpreting the policy language, the court determined which forum's law to apply in calculating the amount Gillette was legally entitled to collect from State Farm. ***Id.***, ¶7.

¶36 Further, the court indicated, "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." ***Id.***, ¶36. While the court recognized UIM coverage has two purposes—"to put an insurance company in the shoes of an underinsured motorist and to compensate an insured fully for damages incurred up to the policy liability limits"—the court explained, "a policy need not necessarily provide coverage to fulfill both of these purposes." ***Id.***, ¶47. "[I]nsureds might want to buy a policy authorizing compensation for all damages incurred, but [insurers] need not sell this kind of policy." ***Id.***

¶37 Here, Regent has entered into a contract to provide UIM coverage up to the limits on the declaration page. As part of the contract, Regent specified it will not make a duplicate payment to the extent the amounts have already been

paid or are payable because of bodily injuries under workers' compensation, disability benefits, or similar laws. We find nothing in ***Gillette*** that renders the setoff provision void under the Truth in Auto Law or that requires Regent to stand in the shoes of the tortfeasor in the manner Foster contends in this case.

¶38 We reach the same conclusion regarding Foster's arguments related to ***Hunt***. There, a driver, Hunt, sustained serious injuries after his vehicle collided with a snowplow operated by a county employee. ***Hunt***, 358 Wis. 2d 379, ¶¶1, 4. He and his wife claimed $5,850,000 in damages. ***Id.***, ¶4. However, the damages recoverable from the county and its negligent employee were capped by statute at $250,000. ***Id.***, ¶5; *see also* WIS. STAT. § 345.05(3) (2011-12). It was undisputed the damages up to that amount were fully covered. ***Hunt***, 358 Wis. 2d 379, ¶8. The Hunts then sought recovery under the underinsured motorist coverage provided in their motor vehicle liability insurance policy with State Farm. ***Id.***

¶39 Ultimately, in granting State Farm's motion for summary judgment, the circuit court concluded the Hunts were not "legally entitled to recover" sums in excess of the $250,000 statutory cap, and therefore State Farm's underinsured motorist coverage did not apply. ***Id.***, ¶9. The court also concluded the exclusion for government-owned vehicles from the definition of an underinsured motor vehicle found in State Farm's policy was valid pursuant to WIS. STAT. § 632.32(5)(e). ***Hunt***, 358 Wis. 2d 379, ¶9.

¶40 On appeal, the Hunts argued the circuit court erred in granting summary judgment for two reasons, one of which is pertinent here. *See* ***id.***, ¶10. The Hunts argued the phrase "legally entitled to recover" in WIS. STAT. § 632.32(2)(d) "means that the Hunts' underinsured motorist coverage applies whenever the insured demonstrates a valid tort claim for damages against the operator of an underinsured motor vehicle." ***Hunt***, 358 Wis. 2d 379, ¶10. We

agreed with the Hunts' interpretation of § 632.32(2)(d). ***Hunt***, 358 Wis. 2d 379, ¶10.

¶41 Foster draws our attention to statements in ***Hunt*** regarding the legislative purpose of the Truth in Auto Law. Specifically, in ***Hunt***, we stated that the governor had explained the purpose behind the Truth in Auto Law amendments was "to ensure that policy holders obtained the full benefit of the coverage they have purchased ...." ***Id.***, ¶23 (omission in ***Hunt***) (citation omitted). We also indicated that the governor's statement reflects the legislature's intent "that insureds seeking underinsured motorist coverage should receive coverage up to their policy limits." ***Id.*** According to Foster, given this legislative purpose, Regent is precluded from taking a setoff that is unavailable to the tortfeasor. However, in allowing a recovery against the UIM carrier in ***Hunt***, we concluded the carrier did not stand in the shoes of the negligent tortfeasor. ***Id.***, ¶36. Nothing about Regent's policy runs counter to the legislative purpose discussed in ***Hunt***. The setoff provision was part of the policy that was purchased, and the provision does not affect the limits of UIM coverage.

¶42 Further, ***Hunt*** is distinguishable. The Hunts were seeking UIM coverage for their uncompensated damages. *See* ***id.***, ¶24. Here, Foster is seeking payment for damages that have already been compensated. ***Hunt*** did not address the validity of a setoff provision nor did it suggest that an insurer cannot insert provisions into an insurance contract that would allow the insurer to offset UIM payments based on already compensated damages. In other words, we find nothing in ***Hunt*** that suggests Foster is entitled to receive duplicate compensation or that Regent must stand in the shoes of the tortfeasor for all purposes.

C. Collateral Source Rule

¶43 Foster again argues that, based, in part, on ***Gillette*** and ***Hunt***, Regent's UIM coverage cannot be less than the amount he is legally entitled to collect as damages from the underinsured tortfeasor. He further argues any setoff for workers' compensation or SSDI benefits is precluded under the ruling expressed in ***Orlowski v. State Farm Mutual Automobile Insurance Co.***, 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775, and the "***Orlowski*** ruling is ... determinative in this case." Based upon ***Orlowski***, ***Gillette***, and ***Hunt***, Foster argues "mandatory UIM coverage must include any payments made by collateral sources, including [workers' compensation] and SSDI benefits."

¶44 We disagree that the collateral source rule or ***Orlowski*** prevent the setoff provision from being applied in this case. First, Foster's claim that "mandatory UIM coverage must include any payments made by collateral sources" is based on the inaccurate premise that, under ***Gillette*** and ***Hunt***, a UIM insurer must stand in the shoes of the tortfeasor. *See supra* ¶¶33-42.

¶45 Second, Foster's reliance on ***Orlowski*** is misplaced. Orlowski was involved in a motor vehicle accident caused by an underinsured driver. ***Orlowski***, 339 Wis. 2d 1, ¶6. She submitted a claim to her UIM insurer after exhausting the tortfeasor's policy limits. ***Id.***, ¶7. Pursuant to the terms of the policy, her claim went to arbitration. ***Id.*** Two questions were submitted to the arbitration panel: (1) Was she "legally entitled to collect damages from the owner or driver of the ... underinsured motor vehicle"; and (2) "If so, in what amount?" ***Id.*** The panel calculated the amount of damages Orlowski was entitled to collect from the underinsured motorist and, in so doing, excluded written-off medical expenses. ***Id.***, ¶8. The panel's decision to exclude the written-off medical expenses was

based on ***Heritage Mutual Insurance Co. v. Graser***, 2002 WI App 125, 254 Wis. 2d 851, 647 N.W.2d 385.[19] ***Orlowski***, 339 Wis. 2d 1, ¶8 & n.3.

¶46 On appeal, the supreme court affirmed the circuit court's decision, which had modified the arbitration panel's award to include the reasonable value of Orlowski's medical services. ***Id.***, ¶5. The court also expressly overruled the blanket statement in ***Graser*** that the collateral source rule has no application in cases involving UIM coverage. ***Orlowski***, 339 Wis. 2d 1, ¶¶4, 28. However, the court did not consider the effect of a reducing clause in the UIM policy. ***Id.***, ¶39 n.15. Rather, the court explained:

> As noted previously, State Farm argues that subsection b of the reducing clause in the "Limits of Liability" section of Orlowski's policy, including only damages "sustained, but not recovered," precludes the recovery of written-off medical expenses. State Farm asserts that this clause provides a basis to affirm the arbitration panel's decision. However, ... the arbitration clause in Orlowski's policy directed the panel to determine the amount that Orlowski was "legally entitled to collect" from the underinsured motorist. In this case, the amount of the award is controlled by our case law on the collateral source rule and damages, as well as the language of the policy concerning what she was "legally entitled to collect." The arbitration clause did not ask the arbitration panel to decide the effect of the reducing clause. ... Therefore, because we review the decision of the arbitration panel, which was not asked to go beyond the scope of the questions submitted to determine the limits of Orlowski's policy, we do not address the effect of the reducing clause any further.

Id.

[19] In ***Graser***, we held, in part, that the collateral source rule is inapplicable to claims made by an insured under a UIM policy. ***Heritage Mut. Ins. Co. v. Graser***, 2002 WI App 125, ¶1, 254 Wis. 2d 851, 647 N.W.2d 385, *overruled in part by* ***Orlowski v. State Farm Mut. Auto. Ins. Co.***, 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775.

¶47 Here, the jury determined the amount Foster was legally entitled to collect from the underinsured motorist. The jury was not informed that Foster received workers' compensation and SSDI benefits. As a result, the jury's special verdict of $518,000 did not account for Foster's receipt of those benefits. The terms of the insurance contract then governed the amount Foster was entitled to receive from Regent under the UIM coverage policy provisions. Again, Regent's policy expressly states it will "not make a duplicate payment to the extent amounts are paid or payable because of 'bodily injury' under workers' compensation, disability benefits or similar law." Based on this language—which, as we have explained, is permissible under Wisconsin law—the circuit court properly reduced the jury's verdict based on the setoff provision in Regent's policy.

¶48 Foster correctly observes the ***Orlowski*** court stated, "Ensuring that a person injured by tortious conduct is fully compensated is no less important in a UIM case than it is in a negligence action." ***Id.***, ¶26. However, we fail to see how Foster's reliance on this statement controls the outcome of this case. Foster *has* been fully compensated for his damages. He obtained a judgment against Regent for $238,244.50. He received $100,000 from the tortfeasor's liability insurer, and $52,460.94 in initial workers' compensation benefits. Of the $100,000 from the tortfeasor's liability insurer, he was required to reimburse the workers' compensation carrier $43,969.86 in subrogation, leaving an initial wage benefit of

$3736.08 and an initial healthcare benefit of $4755.00.[20] He also received an additional $137,500 through his final settlement with the workers' compensation carrier and received $62,218 in SSDI benefits between January 2012 and June 2014.[21] Through these combined figures, Foster received $546,453.58 as a result of his bodily injuries from the accident ($238,244.50 + $100,000 + $3736.08 + $4755.00 + $137,500 + $62,218). This amount is $28,453.58 in excess of the jury's special verdict of $518,000.

D. *Calbow v. Midwest Security Insurance Co.*

¶49 Foster cites ***Calbow v. Midwest Security Insurance Co.***, 217 Wis. 2d 675, 579 N.W.2d 264 (Ct. App. 1998), as further support for his argument that the setoff provision in Regent's policy is invalid. In ***Calbow***, there were two tortfeasors, and the Calbows received $250,000 from one tortfeasor under a ***Pierringer***[22] release. ***Calbow***, 217 Wis. 2d at 677-78. The Calbows sought UM coverage based upon the liability of the other tortfeasor. ***Id.*** at 678. The UM claim was submitted to arbitration where the total tort damages sustained by the Calbows was determined to be $131,000. ***Id.*** A reducing clause in the insurer's UM policy stated: "Any amounts otherwise payable for damages under this coverage shall be reduced by all sums ... [p]aid because of the bodily injury by or

[20] The record contains different calculations for the amount of initial workers' compensation benefits Foster received. The amounts listed above are taken from "Regent Insurance Company's Trial Brief Regarding Duplicate Payments Clause and Collateral Source." During oral argument, the parties confirmed these amounts are correct. However, both of the parties' briefs list $4755.50, not $4755.00, as the medical benefit Foster received, and the circuit court reduced the jury's verdict by $4755.50. Given that both parties cite $4755.50, we view this figure for purposes of the circuit court's calculation of the judgment as the undisputed amount of duplicate medical benefits.

[21] Regent is not seeking to offset future SSDI payments.

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

on behalf of persons or organizations who may be legally responsible ...." ***Id.*** at 678 n.3 (second omission in ***Calbow***). The court invoked this provision to prevent the Calbows' recovery under their UM policy. ***Id.*** at 682.

¶50 Foster acknowledges the ***Calbow*** court approved the use of a reducing clause akin to the setoff provision in Regent's policy to prevent a double recovery. Nonetheless, he argues the clause approved in ***Calbow*** involved an "apples to apples" reduction because the case involved only tort damages. He asserts the court did not consider statutory damages that do not arise under tort law in determining any offset to avoid that double recovery. However, the ***Calbow*** court did not limit its holding in that fashion, and it was not concerned about the theory of recovery from various sources of compensation in its decision to avoid a double recovery to the Calbows. Instead, the court stated,

> Even though we agree that the purpose of uninsured motorist coverage is to place the insured in the same position as if the uninsured motorist had been insured, we conclude that an insured who has been fully compensated for injuries from other sources is not entitled to an additional recovery—a windfall—under his or her uninsured motorist benefits.

Id. at 677. ***Calbow*** undermines Foster's attempt to gain a double recovery here.

E. Worker's Compensation Act (WCA)

¶51 Foster next argues Regent's setoff provision "upsets the legislative compromise adopted by the WCA to address the competing interests of the employer and the employee." Foster's argument is premised on a statement from ***Threshermens Mutual Insurance Co. v. Page***, 217 Wis. 2d 451, 460, 577 N.W.2d 335 (1998), in which the court stated, "Because the employer's liability [under the WCA] is solely statutory, there is no common liability of the employer and a third-party tortfeasor to the injured employee, even though their concurring negligence

may have caused the injury." According to Foster, "[b]ecause there is no common liability between a WCA claim and a tort claim, it is not possible to have duplicate payments for the same elements of loss under the WCA and tort law." (Emphasis omitted.)

¶52 However, in making this argument, Foster again mischaracterizes the nature of the setoff provision in Regent's policy. Nothing in that provision requires workers' compensation benefits or SSDI payments be offset against the same elements of loss payable under the jury's verdict. All that is necessary for the setoff of workers' compensation benefits and SSDI payments against the amount due under the UIM coverage is that the payments made arise out of the same bodily injury. In addition, the lack of common liability between an employer and a third-party tortfeasor does not preclude payment for the damages for the same bodily injury by a workers' compensation carrier and the tortfeasor to an injured party. In fact, that is the basis for the distribution of proceeds under WIS. STAT. § 102.29(1) that are received from a tortfeasor.

¶53 Foster then argues, "Because there is no common liability between a WCA claim and a tort claim, there is no WCA subrogation." He asserts, "[I]t is the intent of the legislature that the WCA carrier not be reimbursed out of any UIM/UM recovery." Furthermore, according to Foster, "The WCA's statutory distribution scheme has been interpreted by the Wisconsin Supreme Court to clearly and unambiguously set forth that the recovery rights of the employer or compensation insurer are limited to claims in tort and that claims based on contract are not permitted." Foster claims ***Berna-Mork v. Jones***, 174 Wis. 2d 645, 498 N.W.2d 221 (1993), rejected concerns about the potential for double recovery

under such circumstances, stating, "Even if a double recovery does occur, it is clearly mandated by the language of [WIS. STAT. § 102.29(1)]."[23] ***Id.*** at 654.

¶54 Foster's reliance on ***Berna-Mork*** is misplaced. In ***Berna-Mork***, the workers' compensation insurer commenced an action against the UM insurer to participate in the third-party action, alleging under WIS. STAT. § 102.29(1) it was entitled to reimbursement from the sums available under the applicable UM insurance coverage for the workers' compensation benefits it paid. ***Berna-Mork***, 174 Wis. 2d at 649. For the facts in this case to parallel those facts in ***Berna-Mork***, QBE, the workers' compensation insurer, would have to be seeking reimbursement from Regent, the UIM carrier, for its additional workers' compensation paid, which it is not.

¶55 Foster's real argument here is based upon the faulty premise that QBE and Regent are to be treated as one and the same. He argues, "Regent seeks to do an 'end around' the governing statute to overcome the intent of the legislature regarding the [WIS. STAT. §] 102.29 distribution." Foster contends QBE already received the full statutory amount it was entitled to recover for workers' compensation benefits paid to Foster, and it is precluded from recouping any additional amount based upon available UIM insurance coverage. Foster argues since Regent and QBE are "essentially the same entity," if Regent is permitted a reduction under the setoff provision, "QBE/Regent would be recouping amounts beyond what is allowed under ... § 102.29." He contends the

[23] It is unclear which version of the Wisconsin Statutes the court was citing; however, the court quoted the relevant language from WIS. STAT. § 102.29(1) as follows: "The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right to make claim or maintain an action in tort against any other party for such injury or death." ***Berna-Mork v. Jones***, 174 Wis. 2d 645, 649 n.1, 498 N.W.2d 221 (1993).

setoff provision would allow for a 100% reduction for workers' compensation benefits, thus overriding the § 102.29 protection that the insured receive a one-third recovery before any amount is recouped by the WCA insurer. According to Foster, the result would be that the insured is "far less well off than he or she would be if the underinsured driver carried full liability coverage and the WCA carrier was reimbursed under the statutory distribution formula."

¶56 The fact that QBE and Regent are related entities is of no consequence here. QBE properly compensated Foster under its workers' compensation policy. It was reimbursed from funds received from the underinsured tortfeasor pursuant to WIS. STAT. § 102.29(1). The circuit court correctly accounted for the WCA reimbursement to QBE when it applied the setoff provision under Regent's policy to the jury award. The judgment holds Regent responsible under its UIM coverage to pay Foster for his uncompensated damages. And, as made clear above, Foster has certainly been made whole, as he will receive more in total compensation than the value of the loss for his bodily injuries as determined by the jury. *See supra* ¶48.

¶57 Finally, Foster raises two public policy concerns over the effect of Regent's setoff provision for workers' compensation benefits. First, he contends an insured with UIM coverage in a policy containing a setoff provision may have difficulty finding representation in a case involving a large WCA recovery because the insured's attorney will be unable to claim a percentage fee on the full amount of tort damages proved. Second, Foster claims the setoff provision creates a strong incentive to delay the settlement of workers' compensation claims until UIM claims are resolved.

¶58 We are unpersuaded by Foster's speculative public policy arguments. Foster's claim that enforcement of UIM setoff provisions will delay

the settlement of workers' compensation claims is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments). His contention that the setoff provision will adversely affect the ability of insureds with UIM coverage and a large WCA claim to locate counsel ignores that counsel is compensated for attorney's fees on a WCA claim through the workers' compensation distribution formula. *See* WIS. STAT. § 102.26(2). Thus, counsel will be paid a percentage fee on the insured's full recovery through the WCA and UIM coverage.[24] The setoff provision is intended to prevent a double recovery to Foster. While counsel may be very motivated to represent a party entitled to a double recovery, no disincentive to representation is created by counsel's inability to collect a fee on that windfall.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[24] Unless, of course, there are different attorneys for the WCA claim and the UIM claim, in which case they are nonetheless compensated proportionally to their efforts.