COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0088

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

DAVID GERVAIS, CINDY KWIATKOWSKI, AND JESSICA ANN BOYD-GERVAIS, BY HER GUARDIAN AD LITEM, JAMES E. LOW,

PLAINTIFFS-APPELLANTS,

V.

MSI INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jessica Ann Boyd-Gervais, by her guardian ad litem, and her parents, David Gervais and Cindy Kwiatkowski (collectively Gervais), appeal a summary judgment dismissing their claims against MSI

Insurance Company. Gervais argues that (1) MSI's policy is ambiguous and should be construed in favor of $225,000 coverage; (2) WIS. STAT. § 632.32(5)(g)[1] does not permit a reduction in coverage; and (3) if construed to permit the reduction in coverage, § 632.32(5)(g) would be unconstitutional. We reject her arguments and affirm the judgment.

BACKGROUND

¶2 Jessica Boyd-Gervais was severely and permanently injured while walking on a sidewalk when a pickup truck, driven by Michael Hudy, jumped the curb and drove over her. There is no dispute that Gervais's injuries far exceed any potential insurance coverage.

¶3 Hudy's insurer paid its limits of $25,000. Jessica was insured under two policies. Rural Mutual Insurance Company paid $75,000 of its $100,000 underinsured motorist (UIM) coverage. The second policy, issued by MSI, paid $178,571.43 of its $250,000 limits. MSI relied on its "other insurance" policy provision to limit its responsibility. The policy states:

> **OTHER INSURANCE**
>
> If there is other applicable similar insurance available under more than one policy or provision of coverage:
>
> 1. Any recovery for damages for **bodily injury** sustained by an **insured** may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
> 2. The following priorities of recovery apply:
>
>   First: The policy affording the Underinsured Motorist Coverage to the vehicle the **insured** was **occupying** at the time of the accident.

[1] All statutory references are to the 1997-98 version unless otherwise noted.

> Second: Any policy affording Underinsured Motorist Coverage to the **insured** as a named insured or a relative who is not a named **insured** under another car insurance policy.
>
> 3. We will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all limits applicable on the same level of priority.

¶4 MSI calculated its payment based on its $250,000 highest applicable limits, together with Rural's limits of $100,000, to equal $350,000 total applicable limits. MSI's proportionate share was five-sevenths of the total UIM coverage ($250,000 divided by $350,000). Consequently, MSI paid five-sevenths of $250,000, equaling $178,571.43.

¶5 Gervais filed this action seeking $46,428.57, the difference between the $225,000 Gervais contends that she is owed and the amount MSI paid. The trial court concluded that the policy was not ambiguous. The court agreed with MSI's interpretation and granted MSI summary judgment.[2] Gervais appeals the summary judgment.

STANDARD OF REVIEW

¶6 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.

[2] The trial court noted that Gervais has recovered $253,571.43 in UIM payments plus the $25,000 that Hudy's liability carrier paid. The court's conclusion is not challenged on appeal.

DISCUSSION

1. Is the policy ambiguous?

¶7 Gervais argues that MSI's "OTHER INSURANCE" provision defining its proportionate share of its UIM coverage creates an ambiguity and therefore should be construed in favor of $225,000 coverage. We disagree. The interpretation of an insurance contract is a question of law which we review de novo. *See* ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). General rules of contract construction govern. *See* ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 536, 514 N.W.2d 1 (1994). To determine the contracting parties' intent, we consider the language used to express their agreement. *See* ***Bank of Barron v. Gieseke***, 169 Wis. 2d 437, 455, 485 N.W.2d 426 (Ct. App. 1992). "[P]olicy language should be given its common everyday meaning and should be interpreted as a reasonable person in the insured's position would understand it." ***Filing v. Commercial Union Midwest Ins. Co.,*** 217 Wis. 2d 640, 648, 579 N.W.2d 65 (Ct. App. 1998). If the terms are plain and unambiguous, the agreement is construed as it stands. *See* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991).

¶8 An ambiguity is found if the contract is reasonably susceptible to more than one meaning. *See* ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). Whether a contract is ambiguous is a question of law decided independently of the circuit court. *See* ***id.*** "Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured." ***Garriguenc v. Love***, 67 Wis. 2d 130, 134-35, 226 N.W.2d 414 (1975).

¶9 Gervais offers an alternative interpretation of the policy language defining MSI's proportionate share. She agrees with the initial proposition that the total of all limits of liability equals $350,000 (consisting of $250,000 of MSI's limits together with $100,000 of Rural's limits.) However, because both policies reduce their coverage by the $25,000 payment from Hudy's insurer, Gervais argues that the actual limits for MSI is $225,000 and for Rural, $75,000. According to Gervais, MSI's proportionate share should be three-fourths of $300,000, or $225,000.

¶10 She obtains this ratio by subtracting the $25,000 from each of MSI's and Rural's limits, and adding the remainder of MSI's limits ($225,000) to the remainder of Rural's limits ($75,000) to achieve $300,000. Comparing MSI's actual $225,000 coverage to the total actual coverage of $300,000 gives a three-fourths ratio. Gervais argues that applying this three-fourths ratio to the total of all limits of $300,000 results in MSI's liability of $225,000.

¶11 We reject Gervais's interpretation because it is not supported by the plain policy language. The MSI policy defines its "limit of liability" on its declaration page. It is undisputed that its limit of liability is $250,000. Gervais agrees that Rural's limit of liability is $100,000. Therefore, under the policy's plain language, the "total of all limits applicable" is $350,000, not the $300,000 as Gervais uses in her calculation.[3] The ratio is to be obtained by comparing MSI's limit of liability ($250,000) to the total limit of liability ($350,00) to equal five-sevenths. Under this computation, MSI's share of the loss equals $178, 571.43.

[3] Indeed, in her appellate brief, Gervais states that "it is quite clear that the total of 'all limits' of UIM coverage is $350,000."

¶12 Gervais contends that the policy is susceptible to more than one interpretation because the term "limit of liability" could be interpreted to mean the policy limits, or the policy limit reduced by the amount of Hudy's insurer. We disagree. We are satisfied that the limit of liability should be interpreted according to the policy definition. If the limit of liability were to be defined as "the limit reduced by a tortfeasor's payment," the policy could have easily said so.

¶13 Nevertheless, Gervais argues that MSI itself was confused when, in its trial brief, it maintained that it had actually overpaid because it should have paid five-sevenths of $225,000, not five-sevenths of $250,000. We reject Gervais's argument. The origin of MSI's alleged confusion lies not in the clause defining its proportionate share, but in the prior section of the policy that states that the limit of liability "shall be reduced by: 1. all sums paid because of the **bodily injury** by or on behalf of persons or organizations who may be legally responsible." This section actually bolsters the trial court's interpretation because it demonstrates that the "limit of liability" terminology does not otherwise include the reduction for a tortfeasor's payment.

¶14 Also, because MSI paid the higher amount, any confusion was resolved in favor of the insured. Accordingly, the alleged ambiguity is not germane to this appeal.

¶15 Gervais argues, however, that because there are three different interpretations, the policy must be found ambiguous.[4] This argument essentially recasts Gervais's previous contentions. As we have explained, we conclude that

[4] The first interpretation is that advanced by Gervais; the second is that advanced by MSI on appeal; and the third is the "overpayment" scenario (five-sevenths of $225,000) discussed in MSI's trial brief.

Gervais's interpretation is not reasonably supported by the policy language, and that MSI has paid the higher alternative of the two remaining possible interpretations. Accordingly, no asserted ambiguity supports relief on appeal.

2. Does WIS. STAT. § 632.32(g)(5) bar MSI's proportionate share provision?

¶16 Gervais contends that WIS. STAT. § 632.32(5)(g) bars MSI from reducing coverage by its proportionate share ratio. She argues that the plain language of the statute fails to authorize MSI to deduct any amount from its UIM coverage based upon payments of other policies carried by other insurers and issued to other insureds. She maintains, without citation to authority, that "[f]or MSI to take credit for the amount of a UIM policy of another insurance company there must be specific language authorizing such a procedure." Gervais therefore argues that MSI should not obtain any credit for the Rural policy. We disagree.

¶17 "Construction of a statute, or its application to undisputed facts, is a question of law that we decide independently, without deference to the circuit court's determination." *See* ***Dehnel v. State Farm Mut. Auto. Ins. Co***., 231 Wis. 2d 14, 16, 604 N.W.2d 575 (Ct. App. 1999). The plain and generally understood meaning of the language should be applied in the construction of a statute. *See* ***State v. Childs***, 146 Wis. 2d 116, 120, 430 N.W.2d 353 (Ct. App. 1988). We conclude that the plain language of WIS. STAT. § 632.32(5)(g) fails to support Gervais's interpretation.

¶18 "In 1995, the legislature enacted WIS. STAT. §§ 632.32(5)(f)—5(j). 1995 Wis. Act 21. The first four provisions, §§ 632.32(5)(f)—(5)(i), primarily address anti-stacking and reducing clauses, validating such clauses to avoid the

duplication of benefits permitted under prior case law."[5] ***Blazekovic v. City of Milwaukee***, 2000 WI 41, 234 Wis. 2d 587, 597, 610 N.W.2d 467 (footnote omitted). Subsection (5) is titled "PERMISSIBLE PROVISIONS." WISCONSIN STAT. § 632.32(5)(g) states:

> A policy may provide that the maximum amount of uninsured or underinsured motorist coverage available for bodily injury or death suffered by a person who was not using a motor vehicle at the time of an accident is the highest single limit of uninsured or underinsured motorist coverage, whichever is applicable, for any motor vehicle with respect to which the person is insured.

¶19 This section provides that a policy may provide that the maximum coverage is the highest single limit of the underinsured or uninsured motorist coverage. It does not forbid the use of ratios to determine proportionate shares of loss. Nor does it state that the only provisions permissible are set out in the statute. Gervais offers no legal authority for her proposition that unless expressly authorized, the policy provision is prohibited. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). Consequently, we reject this argument.

3. The constitutionality of WIS. STAT. § 632.32(5)(g)

¶20 Gervais argues the trial court's interpretation of WIS. STAT. § 632.32(5)(g) violates substantive constitutional guarantees because it authorizes deception against consumers and legislatively sanctioned deception serves no legitimate governmental purpose. Gervais refers us to case law invalidating

[5] Stacking denotes the availability of more than one policy in the reimbursement of the insured's losses. The second insurer's liability does not arise until the policy limits of the first are exhausted; nor does the third's arise until the combined limits of the first and second carriers are exhausted. *See* ***Tahtinen v. MSI Ins. Co.***,122 Wis. 2d 158, 159 n.1, 361 N.W.2d 673 (1985).

reducing clauses in underinsured policies as creating illusory contracts.[6] She contends: "If reducing clauses like those sanctioned by WIS. STAT. § 632.32(5)(g) are enforceable, insureds who pay a full premium for underinsured coverage will never be in a position to collect the full policy limit" resulting in illusory coverage. We disagree.

¶21 Gervais relies on the arguments advanced by the plaintiffs in ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, __ Wis. 2d __, 613 N.W.2d 557, making a similar substantive due process challenge to WIS. STAT. § 632.32(5)(i).[7] At the time Gervais submitted her brief, ***Dowhower*** was pending before our supreme court on certification from the court of appeals. ***Dowhower***, released June 30, 2000, rejected the plaintiff's constitutional challenge.

¶22 Like Gervais does here, the Dowhowers claimed that freedom to contract without fraud or deception is both a liberty and property right arising from the due process clause. They alleged that WIS. STAT. § 632.32(5)(i) unconstitutionally deprived them of this right.[8] *See* ***Dowhower***, 2000 WI at ¶9.

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[6] *See* ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, __ Wis. 2d __, 613 N.W.2d 557.

[7] In her appellate brief, Gervais credits the plaintiff's brief in the ***Dowhower*** case for her constitutional argument.

[8] WISCONSIN STAT. § 632.32(5)(i) permits certain reducing clauses. It states:

> 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.

Our supreme court assumed without deciding that the Dowhowers identified a constitutionally protected liberty or property interest. *See* ***id.*** at ¶14. The court summarized the Dowhowers' contentions as follows:

> The Dowhowers' argument, as we understand it, is that Wis. Stat. § 632.32(5)(i)1 authorizes fraudulent insurance coverage because it permits the insurer to set forth within the policy that its UIM limit of liability is $50,000, even though the maximum amount of coverage that the insurance company will expend on a single claim will be less than $50,000. The Dowhowers contend that the statute permits the insurance policy to omit an explanation that the UIM liability limit is reached by combining all sources of payment. As a result, the Dowhowers assert that the UIM coverage in the policy is rendered illusory by the reducing clause. Based upon rulings by the courts that declared illusory UIM coverage to be void as contrary to public policy, the Dowhowers assert that the statute is unconstitutional because it authorizes illusory UIM coverage. As a result, the Dowhowers contend that the statute deprives them of their right to contract free of fraud and is a violation of substantive due process.

Id. at ¶16 (footnote omitted).

¶23 The court recognized that the "'purpose of underinsured motorist coverage is solely to put the insured in the same position he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured.'" ***Id.*** at ¶23 (citing 3 IRVIN E. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 57.01, p. 57-2 (3d ed. 1995)). The court concluded that WIS. STAT. § 632.32(5)(i) unambiguously established that the UIM coverage limit purchased by the insured may be reached by the combination of contributions from all legally responsible sources. *See* ***id.*** at ¶¶19-20.

¶24 The court observed: "While reducing clauses have in some instances rendered UIM coverage illusory, we have not held that reducing clauses are per se contrary to public policy." ***Id.*** at ¶22. It determined:

> When we consider these cases in conjunction with Wis. Stat. § 632.32(5)(i)1, we conclude that an insurer may reduce payments made pursuant to a UIM policy by amounts received from other legally responsible persons or organizations, provided that the policy clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining payments made from all sources.

Id. at ¶33.

¶25 Because the type of reducing clause authorized in WIS. STAT. § 632.32(5)(i)1 was found not to be ambiguous nor contrary to public policy, the court in ***Dowhower*** rejected the notion that § 632.32(5)(i) perpetuated an illusion as to the amount that can be recovered from a UIM policy. *See* ***id.*** at ¶36. It concluded that the statute did not deprive the Dowhowers of a constitutionally protected right and remanded for a determination whether the insurance policy was ambiguous. *See* ***id.***

¶26 We are satisfied that our supreme court's analysis of WIS. STAT. § 632.32(5)(i) also applies to WIS. STAT. § 632.32(5)(g). This subsection's plain language permits a policy to clearly set forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by using the highest single limit of UIM coverage. This provision is consistent with the purpose of underinsured motorist coverage, which "is solely to put the insured in the same position he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured." ***Id.*** at ¶18 (citation omitted). We reject the claim that WIS. STAT. § 632.32(5)(g) legislates deception.

We conclude that it does not deprive Gervais of any state or federal constitutional right to enter into insurance contracts without fraud and, as a result, it does not violate substantive due process.

By the Court.—Judgment affirmed.

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