COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2104

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

MARY G. SEVCIK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SALLY A. PETERS, AND JUSTIN L. PETERS, BY HIS GUARDIAN AD LITEM, GEORGE BURNETT,

PLAINTIFFS-APPELLANTS,

V.

SECURA INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: J.D. MCKAY, Judge. *Affirmed.*

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

¶1 CANE C.J. This is a wrongful death action arising out of an automobile accident in which Sally Peters was killed and her son, Justin, was

severely injured. Mary Sevcik, as personal representative of the Estate of Sally Peters, and Justin, by his guardian ad litem, (collectively, the Peters) appeal a judgment in favor of Secura Insurance Company. The Peters argue that the policy is ambiguous and illusory. We conclude that the trial court correctly interpreted the policy to provide that the limits of liability for underinsured motorist coverage be reduced by the amount received from a tortfeasor's liability insurer. Therefore, we affirm the judgment.

¶2 The Peters' automobile was hit head on by a vehicle driven by Thomas Xiong, who had crossed the centerline. His vehicle was insured through Progressive Insurance Company, which eventually tendered its policy limits of $50,000 to the estate and $50,000 to Justin.

¶3 Secura had issued a policy to Sally that included underinsured motorist coverage. The policy provided limits of liability for underinsured motorist coverage at $150,000 per person and $300,000 per accident. After negotiations, Secura tendered only $200,000, relying on the policy's reducing clause, which states:

> The Limits of Liability of Underinsured Motorists Coverage applicable 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.

¶4 The Peters brought this action seeking declaratory relief that the reducing clause was invalid. The court entered judgment denying relief and this appeal follows.

¶5 The Peters state the issue on appeal as follows:

> Is an underinsured motorist policy [that] promises that its "limits of liability" will be the "maximum payable" ambiguous, misleading and illusory when read in conjunction with a reducing clause that requires the same limit of liability be reduced by the amount received from a tortfeasor's liability insurer so that the insured will never recover the limit of liability promised in the policy?

For the reasons that follow, we answer the question in the negative.

I. AMBIGUITY

¶6 The interpretation of an insurance contract is a question of law that we review de novo. ***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. ***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, 115, 479 N.W.2d 557 (Ct. App. 1991).

¶7 The terms of an insurance policy are ambiguous only when they are fairly susceptible to more than one construction. *See* ***Maas v. Ziegler***, 172 Wis. 2d 70, 79, 492 N.W.2d 621 (1992). Whether a contract is ambiguous is a question of law decided independently of the circuit court. ***Wausau Underwriters Ins. Co. v.***

Dane County, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). "Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured." ***Garriguenc v. Love***, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975).

¶8 The Peters argue that the limits of liability clause conflicts with the reducing clause. They assert that if an insured were to read the declarations section, he or she would simply see a dollar figure representing the maximum limits of underinsured motorist coverage, an amount that is not fully available according to the terms of the reducing clause. They contend that this alleged conflict between the declarations page and the reducing clause renders the policy ambiguous. We disagree.

¶9 This issue has been previously addressed in ***Sukala v. Heritage Mut. Ins. Co.***, 2000 WI App 266, ¶11, 240 Wis. 2d 65, 622 N.W.2d 457, where we stated:

> It is true that if an insured were only to read the declarations section [of the policies,] she or he would simply see a dollar figure representing the maximum UIM coverage, an amount that is not fully available under the circumstances of some auto accidents. However, most insurance policies contain limitations and exclusions, and that does not make them ambiguous. A declarations page is intended to provide a summary of coverage and cannot provide a complete picture of coverage under a policy. Therefore the question we must ask is whether the UIM provisions, read together with the declarations page, are fairly susceptible to more than one construction. We conclude that they are not.

Policy language may still be unambiguous even when it is complex or cumbersome. ***Id.*** at ¶14. We note that here, the reducing clause essentially tracks the language of WIS. STAT. § 632.32(5)(i), "which we assume is an example of what the legislature viewed as an unambiguous means of conveying the allowable

limitations." ***Id.*** at ¶12 n.10.[1] "The type of reducing clause authorized in § 632.32(5)(i)1 is neither ambiguous [n]or contrary to public policy." ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, ¶20, 236 Wis. 2d 113, 613 N.W.2d 557.

¶10 We are satisfied that the policy language in question is unambiguous. The Peters essentially concede as much in their reply brief where they state that the limitation of liability clause, when read in conjunction with the reducing clause, "leads to the inescapable conclusion" the limits of liability are not the maximum payable.

¶11 Nonetheless, the Peters claim that the policy creates an ambiguity because the policy filed by Secura is a blend of an original policy authored by Home Mutual Insurance Company, containing multiple amendments and endorsements that create a maze of confusion. We are unpersuaded. As the Peters point out, the record contains two policies, one filed by Secura and one filed by the Peters. The policies are not the same. We reviewed the policy filed by the Peters, because its provisions govern. The complexities complained of are not

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[1] It is undisputed that this clause is authorized by WIS. STAT. § 632.32(5)(i), which provides:

> (i) 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.

All references to the Wisconsin Statutes are to the 1999-2000 version.

contained in the Peters' policy. Accordingly, their argument that the policy filed by Secura is confusing does not offer grounds for reversal.

2. ILLUSORY

¶12 Even though we have concluded that the policy is unambiguous, we address whether it might nevertheless provide "illusory" coverage. *See* ***Sukula***, 2000 WI App 266 at ¶77. The Peters contend that while WIS. STAT. § 632.32(5) authorizes the reducing clause, it does not allow a policy to do so in a misleading manner. They claim that the legislature never intended to change case law holding that certain reducing clauses were illusory and never announced a desire to authorize illusory or ambiguous reducing clauses. We conclude that under ***Sukula***, the Peters' arguments must be rejected.

¶13 Whether an insurance contract is illusory is a question of law. ***Sukula***, 2000 WI App 266 at ¶15 n.11. We review questions of law de novo. ***Hoglund v. Secura Ins.***, 176 Wis. 2d 265, 268, 500 N.W.2d 354 (Ct. App. 1993). In some cases, before the legislature enacted WIS. STAT. § 632.32(5)(i), we held that underinsured motorist coverage reducing clauses were invalid when they rendered coverage illusory. ***Sukula***, 2000 WI App 266 at ¶15 (citing ***Hoglund***, 176 Wis. 2d at 267, and ***Kuhn v. Allstate Ins. Co.***, 181 Wis. 2d 453, 465, 510 N.W.2d 826 (Ct. App. 1993), *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995)).

¶14 ***Sukula*** held that under WIS. STAT. § 632.32(5)(i), underinsured reducing clauses, like the one at issue here, can no longer be considered to render coverage illusory. "In the past, our analysis of whether UIM provisions rendered coverage 'illusory' has been closely linked to a determination that such provisions violated public policy." ***Id.*** at ¶16. The plain language of § 632.32(5)(i) indicates the legislature's view that underinsured motorist coverage reducing clauses are

permissible and do not violate public policy. *See* ***id.*** The primary policy-making branch of government is the legislature. ***Id.*** "If appellate courts and the legislature differ on the appropriate public policy, the legislative view prevails as long as the legislature is acting within constitutional limitations." ***Id.***

¶15 The Peters assert that a long line of cases support their position, including ***Sweeney v. General Cas. Co.***, 220 Wis. 2d 183, 582 N.W.2d 735 (Ct. App. 1998), ***Kuhn*** and ***Hoglund***. We reject this argument. Aside from the fact that these cases pre-date WIS. STAT. § 632.32(5)(i), the supreme court in ***Dowhower***, 2000 WI 73 at ¶¶ 25-31, concluded otherwise.

¶16 In ***Dowhower***, our supreme court stated, "The state of the law was summed up in a concurrence to ***Sweeney*** by Judge Deininger," and quoted his analysis.[2] ***Dowhower***, 2000 WI 73 at ¶32. The court held:

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[2] In ***Sweeney***, we invalidated a UIM reducing clause under pre-WIS. STAT. § 632.32(5)(i) case law. ***Sweeney v. General Cas. Co.***, 220 Wis. 2d 183, 196-97, 582 N.W.2d 735 (Ct. App. 1998). Judge Deininger concurred:

> I have difficulty understanding what public policy is served by our present and prior holdings on the issue presented. We insist here and in ***Kuhn*** [***v. Allstate Ins. Co.***, 181 Wis. 2d 453, 510 N.W.2d 826 (Ct. App. 1993)] that an insurance policy may not be written so as to guarantee that a certain dollar amount of insurance coverage will be available to compensate an insured when he or she is injured in an accident caused by another driver, if the policy provides that the specified sum will be paid in part by the tortfeasor's insurer and in part by the insured's own company. Yet, the coverage in question may be written, with judicial blessing, so as to limit the compensation available to the insured to the same fixed sum, provided it is paid entirely by the tortfeasor's insurer. The legislature apparently does not share this court's view that policy language such as the reducing clause at issue here violates public policy. Section 632.32(5)(i)1, STATS., effective July 15, 1995, now permits a motor vehicle insurance policy to "provide that the limits under the policy for uninsured and underinsured motorist coverage for bodily injury ... shall be reduced by ... [a]mounts paid by or on behalf of any person or

(continued)

> 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.

Dowhower, 2000 WI 73 at ¶33.

¶17 As a result, in ***Sukula*** we concluded that "unambiguous UIM reducing clauses can no longer be considered 'illusory'" and "asking whether unambiguous UIM reducing clauses are illusory is no longer a valid inquiry." ***Sukula***, 2000 WI App 266 at ¶19. "[U]nder ***Dowhower*** and the declared public policy of the legislature in WIS. STAT. § 632.32(5)(i), UIM reducing clauses complying with § 632.32(5)(i) cannot render UIM coverage 'illusory.'" ***Sukula***, 2000 WI App 266 at ¶20. Once we have concluded that the UIM provisions of the policy are unambiguous, as we have here, then our inquiry ends. ***Id.***

¶18 Because the reducing clause in question is unambiguous and its use has been legislatively sanctioned, we conclude that it is not illusory and therefore affirm the judgment.

> organization that may be legally responsible for the bodily injury ... for which the payment is made."

Id. at 199 (emphasis added).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶19 HOOVER, P.J. *(concurring).* I am compelled to write a brief concurrence. Controlling precedent mandates the result in this case. I agree with the Peters' contention in their principal brief that the policy, when read as a whole, is oppressively cumbersome. I further agree with the majority, and with the Peters' concession in their reply brief, that the policy is unambiguous. Nevertheless, I am concerned that the current state of the law promotes confusion for the average insurance consumer.

¶20 There is nothing inherently misleading about the concept that underinsurance protection is a guarantee that a specific amount of insurance coverage, regardless of the source, will be available to compensate for injury. "Limits of liability," however, now has two meanings as a result of ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557. If you are purchasing liability insurance with a certain limit, it generally is understood that your premium commands that amount of protection from your insurer. If, however, you purchase underinsured protection, "limits of liability" now means the maximum amount of insurance benefits from all sources.

¶21 One could hypothecate an extraordinary consumer who prudently insists upon reading the declarations page, the primary policy, all of the amendments and the endorsements before purchasing, thereby discovering that a commonly understood term now has two meanings. This is not what consumers do. They purchase limits of liability from their insurance company. Thus, they assume, if there is an accident, at least they will have a known amount to add to the responsible driver's inadequate limits. Unless the dual meaning of the term is

made readily known to consumers, they will be misled and will thereby not be afforded the opportunity to purchase the amount of protection they desire.

¶22 Hopefully the insurance industry will soon rectify this problem by taking the simple step of providing meaningful disclosure of what the consumer is really purchasing, "up front."