COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2682

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

BADGER MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

DENNIS SCHMITZ,

DEFENDANT-RESPONDENT,

THE AMERICAN HARDWARE INSURANCE GROUP,

DEFENDANT-APPELLANT,

VALERIE SCHMITZ AND SCI MANAGEMENT CORP.,

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Deininger, JJ.

¶1 PER CURIAM. American Hardware Insurance Group (AHIG) appeals an order requiring it to pay Dennis Schmitz the $250,000 liability limit on his underinsured motorist's (UIM) coverage. The issue is whether the policy sets forth an unambiguous, enforceable reducing clause, limiting AHIG's liability in this case to $150,000. We conclude that it does, and therefore reverse.

¶2 Schmitz was injured in an automobile accident and recovered $100,000 from the driver who caused the accident. Because his damages greatly exceeded that amount, he also sought recovery under his $250,000 UIM coverage with AHIG. His policy provided, in relevant part, that "[$250,000] is our maximum limit of liability for all damages [per person, per accident]…. The limit of liability shall be reduced by all sums: 1. paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible."

¶3 The trial court acknowledged that WIS. STAT. § 632.32(5)(i) (1999-2000)[1] allows UIM insurers to add reducing clauses to their coverage. However, the court concluded that the policy language quoted above did not clearly enough set forth AHIG's right to reduce its liability, and therefore held it unenforceable.[2]

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The trial court concluded:

> The policy as written certainly gives to the average insured the expectation that if he is injured and the primary tortfeasor does not have enough insurance to cover the full extent of his injuries [t]hat Badger Mutual will pay the difference between the amount of insurance available and the exten[t] of the defendant's injuries, up to the sum of $250,000.00. By applying the reducing clause in the instant policy that scenario could never appear. The contract is illusory and therefore unenforceable.

¶4 WISCONSIN STAT. § 632.32(5)(i)1., provides:

> 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 … [a]mounts 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.

A policy that contains an unambiguous reducing provision under this statute is valid and enforceable, and may no longer be deemed illusory. ***Sukala v. Heritage Mut. Ins. Co.***, 240 Wis. 2d 65, 78-81, 622 N.W.2d 457 (Ct. App. 2000).[3] An insurance policy provision is ambiguous only if it is fairly susceptible to more than one meaning. ***Id.*** at 75. We determine if an insurance contract is ambiguous as a matter of law. ***Id.*** at 74.

¶5 AHIG's policy provision quoted above plainly states that $250,000 is the maximum amount of liability. It just as plainly and unmistakably provides that the $250,000 limit shall be reduced by any compensation for bodily injury paid over by a person legally responsible for the injury. The provision is not fairly susceptible to an interpretation that would allow Schmitz to recover the full $250,000 policy limit over and above the $100,000 received from the party responsible for his injuries.

¶6 Included with Schmitz's policy was a statutorily required notice that UIM coverage was available from AHIG. The notice contained no mention of the reducing clause, and instead generally informed the reader that UIM coverage pays the difference between the amount recovered from the responsible driver and

[3] Our opinion in ***Sukala*** was issued November 9, 2000, some four months after the trial court's decision under review.

"the remainder of the bodily injury damages up to the limit of liability you select …." However, this notice was not part of the policy's terms, and it specifically informed policyholders with UIM coverage, such as Schmitz, to disregard the information it provided.[4]

¶7 Schmitz contends that ***Sukala*** is not only wrongly decided, but should be disregarded because it overrules previous decisions of this court holding that comparable reducing clauses render the policy illusory. However, as we noted in ***Sukala***, those cases applied the law existing in Wisconsin before enactment of WIS. STAT. § 632.32(5)(i) and the determination of its constitutionality in ***Dowhower v. West Bend Mut. Ins. Co.***, 236 Wis. 2d 113, 613 N.W.2d 557 (2000). ***Sukala***, 240 Wis. 2d at 77-82. "We conclude that under ***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.' Once we have concluded that the UIM provisions of a policy are unambiguous, as we have here, then our inquiry is at an end." ***Id.*** at 81-82.

By the Court.—Order reversed and cause remanded.

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

[4] "If you have purchased this coverage, please disregard this notice."