COURT OF APPEALS
DECISION
DATED AND RELEASED

August 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2461

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

RICHARD G. PAAR and KATHLEEN PAAR,

Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY, a foreign corporation,

Defendant-Respondent,

SECURA INSURANCE, a mutual company, a Wisconsin corporation,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed*.

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

BROWN, J. Richard G. Paar was employed by E&L Transport when he sustained severe injuries while driving the company's utility vehicle. This case concerns the subsequent dispute between E&L Transport's insurance carrier, Liberty Mutual Insurance Company, and Paar's family automobile insurer, Secura Insurance. Secura contends that Liberty Mutual's policy with E&L Transport is ambiguous with respect to how much underinsured motorist (UIM) coverage it provides. Because the policy is ambiguous, Secura argues that we should construe it in favor of E&L Transport and rule that it provides coverage up to the policy maximum of two million dollars. Separately, Secura raises several claims against permitting Paar to "stack" or bundle the UIM coverage it provides for each of Paar's personal vehicles.

We will assume without deciding that the Liberty Mutual policy is ambiguous with regard to the amount of UIM coverage it provides to E&L Transport and the company's drivers. Nonetheless, we conclude, as the circuit court did, that the summary judgment record demonstrates an intention by E&L Transport and Liberty Mutual to include $25,000 of UIM coverage. We also rule against Secura on the stacking question and uphold the circuit court's ruling that Paar may claim a sum equal to the aggregate total of the coverage allocated to each of his vehicles in addition to the $25,000 he receives from Liberty Mutual as an E&L Transport employee.

Liberty Mutual also challenges part of the circuit court's ruling. While Liberty Mutual agrees with the finding that its policy provides $25,000 of

UIM coverage to E&L Transport's employees, it contests the circuit court's decision to permit Paar to tap into this insurance because the $25,000 of UIM coverage is less than the $50,000 of liability coverage already made available to Paar through his settlement with the other driver. We conclude that Liberty Mutual has waived its right to pursue this issue because it did not file a cross-appeal, which is necessary whenever a responding party is aggrieved by the circuit court's result and seeks a change in the judgment.

The traffic accident occurred in January 1992 when Paar was driving E&L Transport's Bronco in the City of Milwaukee. Paar was severely injured, although he stipulates that his total damages are less than two million dollars. The driver who hit Paar has already settled with him for the $50,000 limitation of her liability coverage.

Because the settlement with the other driver did not cover all of Paar's damages, he and his wife subsequently filed a declaratory action against Liberty Mutual and Secura to determine which policy's UIM coverage applied. Liberty Mutual and Secura each responded by moving for summary judgment.

The circuit court ultimately ruled that Liberty Mutual's policy provided $25,000 of coverage and that the two policies that Paar had with Secura for his family vehicles were stackable and in the aggregate covered the remaining damages.[1]

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[1] The circuit court's written decision states that "it appears undisputed that [Secura] insured two (2) of Plaintiff Paar's personally owned motor vehicles, both with uninsured and underinsured coverage." In its brief to this court, however, Secura writes that it "insured three of the Paar's personally-owned vehicles." Paar similarly claims that Secura insured three, not two, of Paar's own

Secura now appeals this decision, and Paar and Liberty Mutual renew the arguments that they each raised before the circuit court. We review alleged errors in summary judgment proceedings de novo and apply the same standards that the circuit court did. *See generally* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983).

We start with a brief description of the Liberty Mutual policy since the dispute centers on what this policy covers. Because E&L Transport is headquartered in Michigan, much of the policy is directed toward Michigan rules on insurance coverage.[2] The declarations page at the beginning of the policy explains that the "coverages" include "underinsured motorists." The declarations page also has blanks where the "limit" of each type of coverage is to be filled in. The policy plainly defines "limit" as "The most we will pay for any one accident or loss." No amount, however, was inserted in the blank set aside for UIM coverage. Instead, the policy says to "see state schedule of limits for underinsured motorists insurance."

With this background information in hand, we now turn to Secura's argument that the Liberty Mutual policy is ambiguous because it does not give a single reasonable definition of what its UIM insurance covers and how much of it there is. Emphasizing what is contained on the declarations page of the Liberty Mutual policy, Secura argues that we cannot reasonably

(..continued)
vehicles. Secura and Paar, however, have not raised any issue about this discrepancy. We therefore do not reach any conclusions regarding how this factual discrepancy affects this case, if at all.

[2] For example, the policy sets out the definition of what it terms UIM coverage in an endorsement entitled "Michigan Uninsured Motorists Coverage." We observe that it applies to all vehicles principally garaged in Michigan.

discern the amount of coverage that the policy provides. Although the policy says to "see state schedule," Secura complains that the schedule was never made part of the policy. Moreover, Secura argues that any person would be further confused when he or she compares the two million dollar maximum and the instruction to see a nonexistent "state schedule." Secura contends that a person could reasonably interpret these two sections to mean that the default amount of UIM coverage is the policy maximum of two million dollars and only changes when the "state schedule" is made part of the insurance package.

Liberty Mutual responds to these charges in the following manner. It begins with the concession that its policy "does not contain a specifically designated limit for underinsured motorist coverage for operations carried on by E&L Transport in the State of Wisconsin." In fact, at oral argument, counsel for Liberty Mutual further conceded that the company made "a clerical error" when it forgot to include the apparently necessary state schedule. Nonetheless, it suggests that a person would readily infer that the reference to "state schedule" means whatever the mandated minimums are in the given state.

Alternatively, Liberty Mutual argues that discussion about the possible interpretation of the policy language is not relevant in this case. Based on case law, such as ***D'Angelo v. Cornell Paperboard Prods. Co.,*** 59 Wis.2d 46, 49, 207 N.W.2d 846, 848 (1973), Liberty Mutual asserts that the most important consideration for this court is the intent of the contracting parties. Here, it points to the affidavit of the sales agent who was involved in formulating the E&L Transport policy. Liberty Mutual claims that this evidence conclusively

demonstrates that it and E&L Transport intended the policy to provide $25,000 of UIM coverage. So even if this court concludes that the language which Liberty Mutual and E&L Transport used to capture their intent is ambiguous, Liberty Mutual believes that we must ultimately rest our determination on the uncontested evidence that the contracting parties designed their policy to provide $25,000 of UIM coverage.

We agree with Liberty Mutual and thus uphold the circuit court's ruling that its policy provides $25,000 of UIM coverage. Indeed, we may assume that Secura's various contentions about the ambiguity of the Liberty Mutual policy are correct. Still, such a finding only takes us to the next level of inquiry which is to determine the contracting parties' intent. *See* ***United States Fire Ins. Co. v. Ace Baking Co***., 164 Wis.2d 499, 502-03, 476 N.W.2d 280, 282 (Ct. App. 1991). And when we make this inquiry, we have the undisputed evidence submitted by Liberty Mutual which shows that it and E&L Transport wanted the policy to provide $25,000 of UIM coverage. We hold that this evidence controls our analysis on this issue.

We are aware of Secura's citation to ***Vidmar v. American Family Mut. Ins. Co***., 104 Wis.2d 360, 365, 312 N.W.2d 129, 131 (1981), and its rule that courts should construe ambiguity in insurance contracts against the insurer and in favor of coverage. But the premise of this rule is that insurance companies control the drafting process and thus courts should balance the inquiry towards the insured who had a limited role in formulating how the policy was written. *See* ***Carrington v. St. Paul Fire & Marine Ins. Co***., 169 Wis.2d 211, 219, 485

N.W.2d 267, 270 (1992). In this case, however, the insured (E&L Transport) does not dispute the evidence of intent that is being advanced by the insurer. Thus, without any rebuttal evidence that the $25,000 limit was not the intent of Liberty Mutual and E&L Transport, we must affirm the circuit court's conclusion that Liberty Mutual was entitled to summary judgment on this question.

Having concluded that the Liberty Mutual policy does provide UIM coverage to Paar as an employee of E&L Transport, we next turn to Secura's separate arguments that Paar may not, nonetheless, rely on the UIM coverage within the Secura policy covering his personal vehicles. Secura first contends that its policy has an "other use" exclusion which prevents Paar from tapping into his family coverage; it states:

We do not cover *bodily injury* to a person:

> 1. *Occupying*, or struck by, a motor vehicle owned by or furnished or available for regular or frequent use by you, a *relative* or any other person living in your household, for which insurance is not afforded under this Coverage.

Secura argues that its UIM coverage is not applicable because Paar was operating a vehicle not mentioned in the policy, but was otherwise available for his regular use.

Secura acknowledges that the stacking statute, § 631.43, STATS.,[3] generally applies to void these clauses, thus enabling injured motorists to stack

[3] The legislature amended § 631.43, STATS., to enable automobile insurers to write such exclusions. *See* 1995 Wis. Act 21, § 2. These changes, however, did not become effective until July 1995 and do not affect our analysis. *See* ***id.*** at § 6.

individual policies. However, Secura claims that the determination of whether the policyholder may stack turns on a three-part test that may be "distilled" from the supreme court's analysis in ***Wood v. American Family Mut. Ins. Co.***, 148 Wis.2d 639, 436 N.W.2d 594 (1989), and ***Schwochert v. American Family Mut. Ins. Co.***, 139 Wis.2d 335, 407 N.W.2d 525 (1987).

> (1) Does the insurance policy written on the car which the insured was occupying at the time of the accident – "the accident vehicle" – offer coverage to the insured?
>
> (2) Would there be *additional* coverage *of the same type* under the non-accident policy(ies) but for a provision in the policy(ies)?
>
> (3) Does the provision which operates to deny coverage under the non-accident policy(ies) function as an "other insurance" provision which operates to reduce coverage to that afforded under the policy written on the accident vehicle?

In sum, Secura contends that the stacking statute only invalidates "other car" exclusions when the answer to all three questions is "yes."

Paar responds, correctly in our view, that there is no three-part test and that the stacking statute instead requires that the court only determine if the policies, which are allegedly stackable, provide the same type of coverage. The stacking statute provides in pertinent part:

> When 2 or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions.

Section 631.43(1), STATS.

In our view, only the second of Secura's proposed tests is pertinent to understanding the difference between a ***Schwochert*** type of case and a ***Wood*** case. If one insurance policy covers uninsurance and the other policy covers underinsurance, for example, stacking is disallowed because an insured cannot stack policies covering a different type of risk upon one another. On the other hand, if the risks insured against are the same, stacking is permitted. So, the sole question before us is whether the Liberty Mutual policy and the Secura policies insured against the same type of risk. If they did, stacking is permitted. If not, stacking is not allowed and the "other use" exclusion would be applicable since the stacking statute would be irrelevant to the analysis.

Secura addresses this question by asserting two alternative explanations of why the Liberty Mutual policy is an uninsurance policy and the Secura policies are underinsurance policies. First, Secura observes that the Liberty Mutual policy places underinsurance within the umbrella of uninsurance. In other words, Liberty Mutual has made a conscious decision not to separate the two types of risk with separate definitions, but has decided that an underinsured driver is defined as though he or she is an uninsured driver. Secura then cites to our decision in ***Sobieski v. Farmers Ins. Exch.***, 181 Wis.2d 324, 510 N.W.2d 796 (Ct. App. 1993), and claims that the case stands for the proposition that when an insurer includes underinsured motorist protection within its uninsured motorist coverage, the policy becomes uninsurance coverage.

Secura is wrong. To begin with, while it is true that the undersinsured protection was placed in the uninsurance section of the policy, the fact is that an uninsured motor vehicle is defined in the policy separately from the definition of an underinsured motor vehicle. What this means is that the reasonable insured would read the contract to say that there are two separate types of harm which the insurer is protecting against; the harms are not defined the same and are not subject to the same limitations and coverages. The policies clearly insure against two different kinds of harm. Also, ***Sobieski*** does not stand for what Secura claims. In ***Sobieski,*** ambiguities in coverage were read in favor of the insured such that an insured had "all the benefits" of such coverage. *See* ***id.*** at 330, 510 N.W.2d at 798. Contrary to Secura's claim, ***Sobieski*** did not set out a per se rule that requires us to disregard the intent of the drafting parties and automatically deem uninsured motorist coverage as only uninsurance coverage.

Secura's second argument for why the Liberty Mutual policy should be construed as an uninsured policy rather than an underinsurance policy is that the underinsurance policy of Liberty Mutual is illusory and, because it is so, it is either a nullity or the underinsurance definition must be interpreted to provide only the same kind of protection that would be afforded in a case involving uninsurance. Here again, the rationale underlying the rule of insurance construction governing allegedly illusory coverage requires that such policies be construed in favor of the insured. *See* ***Allstate Ins. Co. v. Gifford***, 178 Wis.2d 341, 349, 504 N.W.2d 370, 373 (Ct. App. 1993). Additionally, we again note that we have the summary judgment record which shows that

the Liberty Mutual policy was designed to provide Paar with UIM coverage. Our reliance on extrinsic evidence to reach a conclusion that Liberty Mutual's policy provides UIM coverage does not prevent the beneficiary, Paar, from taking full advantage of this holding and stacking other UIM coverage from the Secura policy, which plainly indicates that it provides UIM coverage.

We also reject Secura's final contention that ***Koshiol v. American Family Mut. Ins. Co.,*** 171 Wis.2d 192, 491 N.W.2d 776 (Ct. App. 1992), prevents Paar from using the family's UIM coverage. The ***Koshiol*** panel upheld an "other car" exclusion and seemingly concluded that the stacking statute may not always prevent an insurance company from enforcing an "other car" exclusion. *See* ***id.*** at 198, 491 N.W.2d at 778.

Nonetheless, that panel's analysis must be confined to the peculiar circumstances of that case. The injured driver in ***Koshiol*** received her injuries when she was riding with her husband in the family car. She knowingly waived any claims that she might have had to the liability portion of the family policy because she was concerned that the other drivers injured in the crash would use up the liability insurance and then seek recovery directly out of the family's assets. *See* ***id.*** at 194, 491 N.W.2d at 777. Still, the wife tried to assert a claim under the family's UIM coverage arguing that the party liable for her injuries, her husband, now had no liability insurance to pay for her damages. *See* ***id.*** at 194-95, 491 N.W.2d at 777.

The ***Koshiol*** panel upheld the "other car" exclusion written into the UIM coverage and denied the wife's claim. It did so, however, on the basis

of public policy. Specifically, the court was concerned that voiding the exclusion in such circumstances would wrongly encourage families to take out UIM coverage on only one of the family's automobiles and save premiums. ***Id.*** at 197, 491 N.W.2d at 778.

In the present case, however, we face no similar concerns of chicanery by the Paar family. They purchased UIM coverage, in equal amounts, for their family vehicles. The special circumstances within ***Koshiol*** are not present in this case and we see no reason to apply that panel's analysis.

Having answered all of Secura's appellate claims, we will now turn our attention to Liberty Mutual's concerns with the circuit court's judgment and briefly discuss our decision to dismiss its appellate challenges. After the circuit court found that the Liberty Mutual policy provided Paar with $25,000 of UIM coverage, it went forward to examine the effect of this finding. Normally, the first question asked when interpreting a UIM provision is whether the tortfeasor is actually underinsured. The driver who hit Paar had $50,000 of liability coverage and Liberty Mutual thus contended that its coverage did not apply because the tortfeasor's $50,000 of coverage was more than its $25,000 of UIM coverage. *See, e.g.,* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810-11, 456 N.W.2d 597, 598-99 (1990).

The circuit court, however, observed that Wisconsin requires that drivers with liability insurance carry at least $25,000 of coverage. *See* § 344.33(2), STATS. Hence, a driver who buys $25,000 of *under*insured motorist coverage would not have anything of real value because he or she would never

be in a situation where an *insured* driver had less than $25,000 of coverage. *See* ***Hoglund v. Secura Ins.***, 176 Wis.2d 265, 269, 500 N.W.2d 354, 356 (Ct. App. 1993). The circuit court therefore concluded that Liberty Mutual's coverage was illusory and required Liberty Mutual to fulfill its coverage obligations on top of the $50,000 that had already been paid by the tortfeasor.

In its appeal, Liberty Mutual contends that the circuit court erred when it arrived at this remedy. At oral argument, we asked counsel for Liberty Mutual why it did not present this issue in a cross-appeal pursuant to RULE 809.10(2)(b), STATS.[4] He claimed that the circuit court's ruling generally addressed the coverage available under the Liberty Mutual policy. Thus, he believed that he was free to renew all of his arguments because the appropriateness of summary judgment was again addressed on appeal.

Liberty Mutual, however, undoubtedly wants to change the result that the circuit court reached. The circuit court found that it must pay $25,000 and Liberty Mutual argues before this court that it should not have to pay anything. As a responding party, it was therefore required to file a cross-appeal. *See* ***id.*** Because Liberty Mutual has not done so, we are unable to address the arguments it raises against the circuit court's conclusion. *See* ***State***

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[4] The rule on filing a cross-appeal provides in pertinent part:

> A respondent who *seeks a modification of the judgment or order appealed from* or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal within the period established by law ….

RULE 809.10(2)(b), STATS. (emphasis added).

v. Huff, 123 Wis.2d 397, 407-09, 367 N.W.2d 226, 231-32 (Ct. App. 1985). We affirm the circuit court's ruling.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.