COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1883

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

CAROLE F. EDLAND, DR. ROBERT W. EDLAND AND ECONOMY PREFERRED INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

VERGERONT, J. Economy Preferred Insurance Company, Carole Edland, and Dr. Robert Edland appeal from a declaratory judgment that Wisconsin Physicians Service Insurance Corporation (WPS) has a contractual right of subrogation that entitles it to reimbursement under the Edlands' underinsured

motorist policy (UIM) with Economy. The Edlands and Economy contend that the trial court erred in deciding that WPS has a contractual right of subrogation and in deciding that right prevails over the terms of the UIM policy. We conclude that the trial court correctly decided these issues and therefore affirm.

BACKGROUND

The facts are undisputed. Economy issued an insurance policy to the Edlands that provides UIM coverage of $500,000. Carole Edland was hit by a car and sustained bodily injuries requiring medical treatment. WPS, the Edlands' health insurer, paid at least $47,385 in medical expenses on behalf of Carole Edland under its Q-Care policy with Gundersen Clinic, Ltd.[1]

When WPS attempted to exercise subrogation rights by recovering under Economy's UIM policy, Economy and the Edlands disputed WPS's right to recovery. Eventually Economy and the Edlands filed a complaint for declaratory judgment against WPS, asking the court to declare the rights of the parties. The complaint raised three issues: (1) Does the language of the WPS Q-Care policy grants WPS a contractual right of subrogation against UIM carriers? (2) May the terms of a UIM policy prevent a subrogated insurer from exercising its contractual subrogation right against the UIM carrier? (3) Does the definition of "insured" in Economy's UIM policy prevents WPS from exercising its contractual subrogation rights?

[1] WPS also made payments on Carole Edland's behalf under its Administrative Services Agreement with Gundersen Clinic, Ltd. WPS's subrogation right under that agreement was an issue before the trial court but is no longer an issue on this appeal.

The trial court decided that WPS has a contractual right of subrogation against Economy under its Q-Care policy. The court also decided that the UIM policy provisions do not override WPS's contractual subrogation rights. The court ordered that WPS has the right to be reimbursed under Economy's UIM policy to the extent it made payments on Carole Edland's behalf under its Q-Care policy.[2]

Economy and the Edlands appeal, contending that the language of the WPS Q-Care policy does not grant WPS a contractual right of subrogation against Economy's UIM policy and, even if it does, the terms of Economy's UIM policy prevent WPS from exercising its right of subrogation.

DISCUSSION

Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally liable to the insured for a loss paid by the insurer. ***WEA Ins. Corp. v. Freiheit***, 190 Wis.2d 111, 118, 527 N.W.2d 363, 366 (Ct. App.1994). The right of subrogation can arise by statute, through equity or by contract. ***Id***. An insurer may assert a claim against another insurer on the basis of contractual subrogation. ***Id***.

[2] The trial court entered its order on October 9, 1995. However, despite the court's intention to mail the order to the parties' attorneys, the court did not do so. The parties and their attorneys were unaware that the court entered an order until after the deadline for filing an appeal had run. The plaintiffs moved the court to vacate that order and reinstate it. The trial court did so. The plaintiffs then appealed the order, addressing the substantive issues in the case. On July 31, 1996, we ordered memoranda on whether this court had jurisdiction over the appeal since no timely appeal was taken from the trial court's October 9, 1995 order. On October 16, 1996, we certified to the Wisconsin Supreme Court, pursuant to RULE 809.61, STATS., several questions about the circuit court's decision to vacate and re-enter a judgment in order to extend the time to appeal. On July 22, 1997, the supreme court affirmed the circuit court's order vacating and reinstating the October 9, 1995 order. ***Edland v. WPS***, 210 Wis.2d 639, 563 N.W.2d 519 (1997). The supreme court remanded the case to this court for further proceedings on the substantive issues. The parties then briefed the substantive issues, which we now decide.

We first address the issue whether WPS has a contractual right of subrogation under its Q-Care policy. The interpretation of an insurance contract presents a question of law, which we review de novo. *See* ***Katz v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984).

WPS's Q-Care policy contains these provisions regarding subrogation:

> WPS retains the right of subrogation with respect to all participants. Whenever WPS provides services or other benefits to any participant, WPS shall, to *the extent permitted by law*, be subrogated to all such participant's rights or recovery for, and to the extent of, any such services or other benefits received by the participant, which the participant may have against *any other party, person or corporation*.
>
> Any participant who receives services or other benefits from WPS and has any right of recovery against *any other third party*, must be or on behalf of WPS execute and sign all instruments or papers as may be required, deliver the same to WPS, and perform whatever acts, including an assignment of rights, that are necessary to secure the rights of WPS. Each participant must do nothing which will prejudice the rights of WPS to recover as against such *outside third parties*. Each participant shall promptly advise WPS in writing whenever a claim against *another party* is made on behalf of the participant and will further provide such additional information as is reasonably requested by WPS. (Emphasis added.)

Economy and the Edlands argue that the references to "any other party, person or corporation," "any other third party," "outside third parties" and "another party" means "tortfeasor" and thus does not include a UIM carrier. They rely on ***Employers Health v. General Cas. Co.,*** 161 Wis.2d 937, 469 N.W.2d 172 (1991). In ***Employers Health***, the subrogation clause provided that if the insured had a "right to recover damages from a responsible third party," Employers Health

was subrogated to the insured's right to recover. The supreme court decided this language did not confer a right to subrogation against an entity that was not the wrongdoer causing the injury. ***Employers Health,*** 161 Wis.2d at 950, 469 N.W.2d at 177. Therefore, the court concluded that this language did not create a contractual right of subrogation against an uninsured motorist carrier because the uninsured motorist insurer was not the wrongdoer causing the injury. ***Id.***

Unlike the contract language in ***Employers Health***, which restricted subrogation to "responsible third parties," the Q-Care contract extends the right of subrogation to "any other party, person or corporation" and to "third parties." This language is broader than the language in ***Employers Health*** as it includes any party, person or corporation from whom Edland may have the right to recover. The language in the Q-Care contract is also similar to that in ***Dailey v. Secura Ins. Co.,*** 164 Wis.2d 624, 476 N.W.2d 299 (Ct. App. 1991), and in ***Gurney v. Heritage Mut. Ins. Co.***, 183 Wis.2d 270, 515 N.W.2d 526 (Ct. App. 1994).

In ***Dailey***, we held that a health insurance policy which provided for a right of subrogation "against any party who may be liable" conferred a contractual right of subrogation against an uninsured motorist carrier because any party who may be liable is not limited to wrongdoers. ***Dailey***, 164 Wis.2d at 629, 476 N.W.2d at 301. *See also* ***WEA***, 190 Wis.2d at 116-17, 527 N.W.2d at 365-66. And in ***Gurney***, we held that language providing for subrogation to the insured's rights "to damages … for illness or injury a third party … is liable for"[3] was not

[3] The complete clause in ***Gurney v. Heritage Mut. Ins. Co.***, 183 Wis.2d 270, 515 N.W.2d 526 (Ct. App. 1994), was "for illness or injury a third party caused or is liable for"; it was the "liable for" part of the disjunctive that, the court held, included the UIM carrier.

fault based, and included an insurer who was contractually liable under a UIM policy.

We conclude that the subrogation clause in WPS's policy does not limit subrogation to recovery from tortfeasors. Rather, it provides a contractual right of subrogation against any party, person or corporation from which Carole Edland has the right to recover. Since she has a right to recover from Economy under her UIM policy, WPS's contractual right to subrogation includes recovery from Economy.[4]

The Edlands and Economy next argue that even if WPS has a contractual right of subrogation, the terms of the UIM policy prevent WPS from exercising those contractual subrogation rights. The limiting definition of "insured," in the UIM policy, they contend, overrides WPS's contractual subrogation rights. The UIM policy provides:

> A. We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** sustained by an **insured** and caused by an auto accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle.**
>
> **….**
>
> B. **Insured** as used in this endorsement means:
>
> 1. You or any **family member**.
> 2. **any person occupying your covered auto**.
> 3. **any person** for damages that person is entitled to recover because of **bodily injury** to which this

[4] Economy and the Edlands also argue that WPS does not have a claim for equitable subrogation. However, in light of our conclusion that it has a contractual right of subrogation, we need not address this argument.

> coverage applies sustained by a person described in 1 or 2. Above.

The definition section of the policy provides:

> [A]ny person means every possible individual including you or any family member.

The Edlands and Economy contend that Economy limits UIM coverage to an individual and WPS is not an individual. The premise of Economy's and the Edlands' argument is that the terms of the UIM policy may prevent WPS from exercising its right of subrogation regardless of the terms of WPS's contract with Carole Edland. This is a faulty premise. If the subrogation clause prohibits the insured from impairing the insurer's subrogation rights at any time, that is enough to preserve an insurer's right of subrogation even if the UIM policy expressly excludes recovery by a subrogated party. ***WEA,*** 190 Wis.2d at 120, 527 N.W.2d at 366-67. The dispositive question is not whether the UIM policy language includes or excludes a subrogated insurer, but whether the subrogation clause in the health insurer's policy with the insured contains language that prohibits the insured from interfering with the insurer's subrogation rights at any time. ***Demmer v. American Family Mut. Ins. Co.,*** 200 Wis.2d 94, 102, 546 N.W.2d 169, 172 (Ct. App.1996).

In ***Demmer***, we considered whether a UIM policy that specifically excluded subrogated parties from its definition of "insured persons" prevented two subrogated health insurers—WHO and Prime Care—from exercising their contractual rights of subrogation. ***Demmer,*** 200 Wis.2d at 100, 546 N.W.2d at 171. Relying on ***WEA***, we applied the principle that if the health insurance policies contain language that prohibits the insured from impairing the health insurer's subrogation rights at any time, those rights were preserved

notwithstanding the UIM policy language. ***Id***. We concluded that because the WHO contract prohibited the insured from "tak[ing] [any] action without [WHO's] consent, which would prejudice the rights and interest of [WHO]," WHO's subrogation rights prevailed over the UIM policy exclusion. ***Id***. On the other hand, we concluded that because the Prime Care health insurance policy did not contain such a prohibition but required only that the insured "cooperate fully with Prime Care in recovering paid benefits," that contract did not preserve Prime Care's subrogation rights over the specific UIM policy exclusion. ***Id.*** at 103, 546 N.W.2d at 172. We also applied the same principle in ***Kulekowskis v. Bankers Life & Cas. Co.***, 209 Wis.2d 324, 334, 563 N.W.2d 533, 536 (Ct. App. 1996), and again concluded that the language in the health insurance policy prohibiting the insured from taking any action to prejudice the insurer's rights prevailed over subrogation exclusion language in a UIM policy and secured subrogation rights as against the UIM carrier.

WPS's subrogation clause provides that "[e]ach participant must do nothing which will prejudice the rights of WPS to recover as against such outside third parties." This language is nearly identical to the language in ***WEA***, ***Demmer*** and ***Kulekowskis***. We conclude that WPS's subrogation rights prevail over any language in the UIM policy that might exclude coverage for WPS. It is therefore unnecessary to decide whether Economy's UIM policy does in fact include or exclude WPS in its definition of "person."

Finally, Economy argues that a holding that forces it to pay UIM benefits when its policy excludes such payments[5] is unfair because such a holding

[5] Because we have not decided whether WPS is excluded or included by the definition of "person" in Economy's UIM policy, we will assume for purposes of deciding this last issue that WPS is excluded by this definition.

forces it to assume a risk for which it was not compensated. Economy relies on these supreme court cases in support of this position: ***Kopp v. Home Mut. Ins. Co.***, 6 Wis.2d 53, 94 N.W.2d 224 (1959), ***McPhee v. American Motorists Ins. Co.***, 57 Wis.2d 669, 205 N.W.2d 152 (1973), and ***Olguin v. Allstate Ins. Co.***, 71 Wis.2d 160, 237 N.W.2d 694 (1976). According to Economy, this court's ruling in ***Freiheit***, ***Demmer*** and ***Kulekowskis*** contravene these supreme court cases.

In ***Kulekowskis***, the UIM carrier argued that "arbitrarily and capriciously giving effect to the terms of the [health insurer's] policy while disregarding the terms of the [UIM] policy violates the [UIM carrier's] constitutional right to contract." ***Kulekowskis***, 209 Wis.2d at 335, 563 N.W.2d at 537. We stated in response:

> We do not address this argument on several grounds. First, this argument was not raised to the trial court, and therefore is waived. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Second, as should be apparent from the foregoing analysis, the law in Wisconsin does not "arbitrarily and capriciously" give effect to one insurer's policy in contravention of another. After examining the conflicting policies in the instant case, we conclude that the subrogation rights outlined in the Bankers Life policy must prevail.

Kulekowskis, 209 Wis.2d at 335-36, 563 N.W.2d at 538.

Economy argues that it raised the "unfairness issue" in its brief before the trial court[6] and we should therefore "revisit" the issue we "summarily

[6] Economy refers us to its reply brief before the trial court. On the page we are referred to, Economy argues that WPS's position requires Economy to assume a risk it did not pay for, but there is no discussion of case law or mention of freedom of contract. The trial court's eleven-page decision does not address the issue of unfairness or freedom of contract. Apparently the trial court did not consider that Economy defined this as an issue to be decided.

addressed" in ***Kulekowskis***. Economy, however, does not develop the issue of a constitutional right to freedom of contract in any meaningful way. It does not even discuss the three supreme court cases it cites or explain how they support its argument. Two of the three cases, ***Kopp*** and ***McPhee***, address ambiguous clauses in insurance contracts. In ***Kopp***, the court rejected the insured's proposed construction because it would lead to an "absurd and socially undesirable result." ***Kopp***, 6 Wis.2d at 57, 94 N.W.2d at 226. In ***McPhee***, the court rejected the insurer's argument that the insured's construction was unjust because it imposed a liability that the insurer did not contemplate and for which the insured did not pay. ***McPhee***, 57 Wis.2d at 680, 205 N.W.2d at 160. In ***Olguin***, the court held that the policy language was not ambiguous and that accepting the insured's definition would impose on the insurer a risk it did not contemplate and for which the insured did not pay. ***Olguin***, 71 Wis.2d at 165, 237 N.W.2d at 697. None of these cases discuss the constitutional right to freedom of contract, nor do they discuss conflicting insurance policies. In view of Economy's failure to adequately develop its argument on unfairness or freedom of contract, we decline to consider it further. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

By the Court.—Judgment affirmed.

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