COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2652

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

PAMELA J. KRANSKI,

PLAINTIFF-RESPONDENT,

MAYSTEEL CORPORATION,

INTERVENOR-RESPONDENT,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. West Bend Mutual Insurance Company (West Bend) appeals from the trial court's order finding "that the reducing clause in Pamela Kranski's [automobile] insurance policy with [West Bend] is invalid." The trial court found that West Bend's reducing clause rendered Kranski's coverage illusory and, thus, was contrary to public policy. The trial court then went on to conclude that WIS. STAT. § 632.32(5), which authorized reducing clauses, was unconstitutional.[1]

¶2 West Bend argues that ***Dowhower v. West Bend Mutual Insurance Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557, is dispositive. In that case, the supreme court determined that reducing clauses found in automobile underinsured motorist policies are not illusory, and it upheld the constitutionality of the statute. West Bend also submits that it is entitled to summary judgment because, in Kranski's policy, the reducing clause in the underinsured motorist provision is unambiguous and, inasmuch as the provision provides for the reduction of its limit of liability based on payments Kranski already received,[2] West Bend submits it is entitled to summary judgment. We agree with West Bend and reverse.

I. BACKGROUND.

¶3 The facts in this case are undisputed. Kranski purchased automobile insurance from West Bend. Coverage was provided from April 30, 1996, through April 30, 1997. On August 16, 1996, Kranski was injured while a passenger in a

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

[2] The trial court did not reach this issue based on its finding that WIS. STAT. § 632.32(5) was unconstitutional.

car owned by Robert L. Kraus and operated by Thomas J. Gouvion. Kraus's insurance carrier paid Kranski the policy limits of $50,000.

¶4 Kranski then filed a claim with West Bend under her automobile insurance policy, seeking the $300,000 of underinsured motorist coverage contained in her policy.[3] The underinsured motorist provision of Kranski's policy contained a clause limiting liability for bodily injury, commonly known as a reducing clause:

> 1. The limit of liability for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply.
>
> a. 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.

West Bend offered Kranski $239,300 as a full and complete settlement of her claim. West Bend arrived at the sum by invoking the reducing clause and subtracting from the $300,000 underinsured motorist policy limit the $50,000 payment Kranski received from Kraus's insurance carrier, as well as a $10,000 medical payment she received from the same insurer, and $700 in medical expenses West Bend had paid her previously.

¶5 Kranski filed a motion with the circuit court seeking a declaration that the reducing clause in the underinsured motorist provision of her policy was unenforceable and that WIS. STAT. § 632.32(5)(i), authorizing such reducing clauses, was unconstitutional. Following a hearing, the trial court granted

[3] When Kranski and West Bend could not agree on settlement of her claim, she filed suit seeking "to establish the amount that she is entitled to under the underinsured motorist provision," as well as compensatory and punitive damages for West Bend's alleged bad faith.

Kranski's motion declaring that West Bend's reducing clause rendered Kranski's coverage illusory, that the clause was contrary to public policy, and that § 632.32(5)(i) was unconstitutional. West Bend then filed its notice of appeal; however, both parties moved this court to stay appellate proceedings pending our supreme court's decision in ***Dowhower***. This court granted the motion. The supreme court rendered its decision in ***Dowhower*** on June 30, 2000. This court subsequently lifted the stay on these proceedings.

II. ANALYSIS.

¶6 West Bend first argues that the trial court erred in finding that the operation of the reducing clause in the underinsured motorist provision of Kranski's insurance policy rendered her coverage illusory, that the clause was against public policy, and that WIS. STAT. § 632.32(5)(i), authorizing reducing clauses, is unconstitutional. Kranski now acknowledges that ***Dowhower*** defeats her arguments because our supreme court upheld the constitutionality of the statute, asserting that § 632.32(5)(i) does not deprive an insured "of any state or federal constitutional right to enter into insurance contracts" in violation of substantive due process. ***Dowhower***, 2000 WI 73 at ¶ 36. Therefore, we reverse the circuit court's findings that § 632.32(5)(i) is unconstitutional and that Kranski's coverage under her underinsured motorist provision was illusory and contrary to public policy. We next address West Bend's argument that the underinsured motorist provision of Kranski's insurance policy is unambiguous and summary judgment should have been granted.

¶7 The methodology of summary judgment motions is well known and will not be repeated here. The interpretation of an insurance contract presents this court with a question of law, which we review *de novo*. ***Smith v. Katz***, 226

Wis. 2d 798, 805, 595 N.W.2d 345 (1999). In ***Dowhower***, the supreme court set forth the well-established rules for interpreting insurance contracts:

> "Insurance contracts are controlled by the same rules of construction as are applied to other contracts. Ambiguities in coverage are to be construed in favor of coverage, while exclusions are narrowly construed against the insurer. Words or phrases are ambiguous when they are susceptible to more than one reasonable construction. However, when the terms of an insurance policy are plain on their face, the policy must not be rewritten by construction."

Id. at ¶ 34 (citation omitted). The court further asserted that "a reducing clause may be ambiguous within the context of the insurance contract. If the terms of the policy are ambiguous, then the court may attempt 'to determine what a reasonable person in the position of the insured would have understood the words of the policy to mean.'" ***Id.*** at ¶ 35.

¶8 West Bend argues that "[b]ecause the language in the Kranski's policy is identical to the statute authorizing reducing clauses [WIS. STAT. § 632.32(5)(i)], and because the trial court determined there were no factual disputes, the reducing clause found in Kranski's policy cannot be considered ambiguous as a matter of law."[4] Kranski counters that "above and beyond any

[4] WISCONSIN STAT. § 632.32(5)(i) 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 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.

issue of ambiguity, the policy on its face does not contain a reducing clause for underinsured motorist coverage." Specifically, Kranski asserts that the reducing clause at issue states: "The following section applies whether your *uninsured* motorist coverage is written on a single liability or split liability limit basis." (Emphasis added.) Kranski contends that "[n]owhere in the policy is there a statement that there is a reduction applicable to *underinsured* motorist coverage." (Emphasis added.) West Bend replies that the mistaken use of the word "uninsured" for the word "underinsured," found only in the introductory clause of its underinsured motorist provision, does not make the policy ambiguous. Instead, West Bend contends that "[w]hen the [underinsured motorist] reducing clause is properly read in the context of the entire [underinsured motorist] coverage endorsement and the entire policy of insurance, it is both valid and unambiguous." We agree.

¶9 In order to ascertain the intention of the parties when interpreting an insurance policy, "[t]he policy is to be considered as a whole in order to give each of its provisions the meaning intended by the parties." ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 562, 278 N.W.2d 857 (1979); *see also* ***Wausau Joint Venture v. Redevelopment Auth.***, 118 Wis. 2d 50, 58, 347 N.W.2d 604 (Ct. App. 1984) ("Contract terms being construed should be considered in context."). This court must not "put a trick interpretation or twist on one word," but rather, we must give a reasonable meaning to all of the provisions in the contract so that no single provision is rendered mere surplusage. ***Hammel v. Ziegler Financing Corp.***, 113 Wis. 2d 73, 76, 334 N.W.2d 913 (Ct. App. 1983). Although Kranski is not suggesting that this court "put a trick interpretation or twist on one word" in her insurance policy, her interpretation would, nevertheless, be removing the provision at issue from its context within the whole policy and

rendering that provision surplusage. Therefore, after considering the West Bend policy as a whole, we conclude that it is clear that the reducing clause applies to Kranski's *underinsured*, as opposed to *uninsured*, motorist coverage.

¶10 A complete reading of the policy, including the declarations page, index, body and relevant endorsements, clearly notifies the insured of the reduction in underinsured motorist coverage limits. Although Kranski correctly asserts that "[t]he declaration page ... gives no indication that there is any reduction of the $300,000 [underinsured motorist coverage] limit stated on the declaration page itself," the declaration page unmistakenly identifies several forms and endorsements that are included in the policy which modify the coverage. Two of the forms identified are of particular relevance here – WB1838, "Uninsured Motorists Coverage – Wisconsin," and WB1839, "Underinsured Motorists Coverage – Wisconsin." Both forms are attached to the policy. The reducing clause in question is located in the latter form. Thus, the declaration page alerts the insured to additional provisions contained in the policy not set forth on the declaration page, and by reading the declaration page, the insured is easily directed to the endorsement containing the reducing clause at issue here.

¶11 Next, contrary to Kranski's assertions, the policy provides an index which directs the insured to the provisions regarding both uninsured and underinsured motorist coverage. Under the West Bend logo and the heading on the first page following the declaration page, but preceding the body of the policy, is the wording: "The index below provides a brief outline of some of the important features of **your** policy." In the index, a section entitled "Section II – Your Personal Liability Insurance" indicates that uninsured and underinsured motorist coverage can be found in Part C on page 9 of the policy. This provision provides that "[f]or Uninsured and Underinsured Motorist Coverages, if

applicable, please refer to **your** states' coverage form(s) attached. Attached to the policy are several endorsements that are individually labeled under a general heading." Therefore, the index directs the insured to the location of the specific provisions relating to her underinsured motorist coverage in Wisconsin.

¶12 Moreover, a complete reading of the underinsured motorist endorsement, within the context of the entire policy, makes it obvious that the reducing clause applies to Kranski's *underinsured*, not her *uninsured* motorist coverage limits. The reducing clause provision is located in a separate coverage endorsement attached to Kranski's policy that is clearly labeled "Underinsured Motorists Coverage – Wisconsin." As noted, this form is also identified on the declaration page. Immediately preceding the underinsured motorist coverage endorsement is another separate endorsement entitled "Uninsured Motorist Coverage – Wisconsin." Each endorsement is distinguishable from the other. Both endorsements are individually numbered and labeled, independently paginated, and divided into different sections and subsections applicable only to that particular endorsement.

¶13 Further, when the reducing clause is considered in context with the surrounding provisions, it is obvious that it was intended to apply to the underinsured motorist coverage limits. Within the underinsured motorist coverage endorsement, the reducing clause appears under the section labeled "Limit of Liability," in subsection C. In subsection A, the first paragraph states, "The following section applies if **your** Underinsured Motorists Coverage is written on a Single Liability Limit basis." Subsection B. begins, "The following section applies if **your** Underinsured Motorists Coverage is written on a Split Liability Limit basis." However, the first paragraph of the reducing clause in subsection C directs that "[t]he following section applies whether **your** *Uninsured* Motorists

Coverage is written on a Single Liability Limit or Split Liability Limit basis." (Emphasis added.) As a result, despite the typographical error, it is clear that the reducing clause, considered within the context of the whole policy, applies to Kranski's underinsured motorist coverage.

¶14 We also note that the separate uninsured motorist coverage endorsement contains a similar reducing clause. Consequently, if we were to interpret the reducing clause in the underinsured motorist coverage endorsement to apply only to uninsured motorist coverage, as advocated by Kranski, one or the other of the reducing clauses would be rendered mere surplusage. We reject such an interpretation.

¶15 Having determined that ***Dowhower*** upheld the constitutionality of WIS. STAT. § 632.32(5)(i), authorized reducing clauses like that contained in Kranski's automobile insurance policy, and that the underinsured motorist reducing clause in Kranski's automobile insurance policy was unambiguous despite the typographical error, we next address whether summary judgment was appropriate. The clauses in Kranski's policy unambiguously limited West Bend's liability to $300,000, less any payments to, or on behalf of, Kranski. Given that there were no disputes over the amount of money Kranski had received, West Bend's maximum liability here was $239,300, which it tendered to Kranski. Because the evidentiary materials contained in the record demonstrates that there is no genuine issue of material fact, West Bend is entitled to judgment as a matter of law. We remand this case to the circuit court with directions to enter summary judgment in favor of West Bend. *See* WIS. STAT. RULE 802.08(2).

By the Court.—Order reversed and cause remanded with directions.

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