COURT OF APPEALS DECISION DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP76

Cir. Ct. No. 2003CV54

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

JILL HILTS AND JEFFREY HILTS,

PLAINTIFFS-RESPONDENTS,

V.

HARTFORD UNDERWRITERS INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Reversed.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 VERGERONT, J. The Hartford Underwriters Insurance Company appeals the circuit court judgment determining that the reducing clause in the underinsured motorist (UIM) endorsement of the personal auto policy issued to Jill and Jeffrey Hilts was unenforceable because it was ambiguous in the context of

the entire policy. Based on this determination, the circuit court concluded Hartford owed the Hiltses $48,500. We conclude the reducing clause is not ambiguous when read in context of the entire policy. Applying the reducing clause, we conclude Hartford has already paid the Hiltses the amount they are entitled to. We therefore reverse.

BACKGROUND

¶2 Jill Hilts was injured in a motor vehicle accident, and her damages are stipulated to exceed $150,000. The other driver had liability insurance with limits of $50,000. Hilts received $48,500 under that policy.[1] At the time of the accident, the Hiltses were insured under a policy issued by Hartford that contained UIM coverage with limits of $100,000 per person. The UIM endorsement contained this reducing clause:

> B. 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. This includes all sums paid under Part A; and
>
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. Workers' compensation law; or
>
> b. Disability benefits law.

¶3 The Hiltses sought to recover from Hartford $100,000 under their UIM coverage. Hartford's position was that, under the reducing clause in the UIM endorsement, the Hiltses were entitled to only $51,500—the $100,000 liability

[1] According to Hartford's brief, the remaining $1,500 was paid to a third party who had also been injured in the accident.

limit minus the $48,500 received from the other driver. Hartford paid $51,500 to the Hiltses.

¶4 The Hiltses then filed this action against Hartford, seeking a declaration that they were entitled to the full UIM limits of $100,000. They argued that the reducing clause was ambiguous when read in the context of the whole policy and therefore unenforceable. Both parties moved for summary judgment.

¶5 The circuit court granted summary judgment in favor of the Hiltses. The court concluded that the reducing clause in the UIM endorsement was ambiguous in the context of the entire policy and thus unenforceable. It therefore awarded judgment against Hartford in the amount of $48,500.

DISCUSSION

¶6 On appeal, Hartford argues that the circuit court erred in concluding that the reducing clause was ambiguous when read in the context of the entire policy. The Hiltses respond that ambiguity arises from their application for insurance; that a reasonable insured would not know the UIM endorsement and other endorsements were part of the policy; and that the contents of the declarations and policy booklet created ambiguity regarding the reducing clause in the UIM endorsement.

¶7 We review a circuit court's decision to grant summary judgment de novo and apply the same summary judgment methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there are no genuine issues of

material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

¶8 We construe an insurance policy, as we do all contracts, to give effect to the intent of the parties as expressed in the language of the policy. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. The meaning of a particular provision within the policy must be determined within the context of the policy as a whole. ***Id.***, ¶24. An insurance policy provision is contextually ambiguous if, when read in the context of the whole policy, it is "reasonably or fairly susceptible" to more than one construction "measured by the objective understanding of an ordinary insured." ***Id.***, ¶29. Inconsistent provisions within a policy that "build up false expectations, and … produce reasonable alternative meanings" create contextual ambiguity. ***Id***., ¶31. The "organization, labeling, explanation … omission, and text of the other provisions" may also render an otherwise clear provision ambiguous in the context of the entire policy. ***Id***., ¶19.

¶9 We first consider whether the application the Hiltses filled out is relevant to our analysis of contextual ambiguity. The circuit court considered this application, over Hartford's objection, in deciding that the reducing clause was ambiguous in the context of the entire policy. The Hiltses' position is that the application's failure to mention the reducing clause misled them and constituted fraud. However, the Hiltses provide no authority for the proposition that the application is part of the insurance contract or that it is proper to consider the

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

application in deciding whether the insurance contract itself is ambiguous. The Hiltses state that "[i]n other contexts, this [the application] might be viewed as fraud in the inducement." However, such a claim is distinct from the claim for a declaratory ruling on whether the reducing clause is "unenforceable in light of … ***Badger Mutual Insurance Company v. Schmitz***, 2002 WI 98, ¶46, 255 Wis. 2d 61, 647 N.W.2d 223," which is how the Hiltses describe the dispute with Hartford in their complaint. In the absence of any authority that the application is part of the insurance contract, we conclude it is not relevant to the analysis whether the reducing clause is ambiguous in the context of the entire policy. We do not further consider any argument of fraud in the inducement.[3]

¶10 We next consider the Hiltses' argument that a reasonable insured would not know the UIM endorsement was part of the policy. We begin with a description of the declarations, the Form 8348 booklet, and the endorsements, and we then describe the Hiltses' argument in more detail.

¶11 The declarations consist of three pages. The very top of the first page contains the following notice, "This DECLARATIONS Page, With Policy Jacket Form 8348 And Forms And Endorsements Listed Below COMPLETES your PERSONAL AUTO POLICY." The first page also lists the coverages, limits of liability, and premiums, including "C. Underinsured Motorists Bodily Injury—Each Person $100,000 Each Accident $300,000."

[3] We also observe that the Hiltses submitted no affidavit to support the assertion that they were misled by the application. Their counsel's affidavit with the underwriting file attached, as well as letters and documents he states were sent to the Hiltses, do not meet the requirements of WIS. STAT. § 802.08(3). *See infra* ¶16.

¶12 Page two of the declarations, after completing the list of coverages, contains the heading "Forms and Endorsements Now Made a Part of This Policy." There follows a list of eight titles with corresponding numbers, one of which is: "A-5561-0 Underinsured Motorists Coverage – Wisconsin."

¶13 Form 8348 is a booklet of twenty-four pages with a two-page cover sheet. Each page in the booklet, as well as the cover sheet, is identified as Form 8348. The cover sheet contains an index preceded by this statement: "The following is an index of the major provisions of your policy.... Amendatory endorsements may be attached to your policy to modify these provisions or provide you with additional coverage(s)." The index directs an insured to Part C Section II for information on Underinsured Motorist Coverage and tells the insured that Part C begins on page seven. Part C Section II contains the insuring agreement with definitions, exclusions, a "Limits of Liability" subsection, and provisions on other insurance, arbitration, and the insured's duties. There is no reducing clause.

¶14 The UIM endorsement is four pages, and each page contains the identifier "Form A-5561-0" in the bottom left-hand corner. This endorsement begins with the following heading in bold font: THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. UNDERINSURED MOTORSTS COVERAGE – WISCONSIN. Beneath this heading there is this statement: "With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsements." The insured is then informed, "Part C Section II – UNDERINSURED MOTORIST COVERAGE is replaced by the following …." The endorsement conforms to the headings and organization of Part C Section II of Form 8348 but there are substantive differences. In particular, the reducing

clause set forth in paragraph 2 of this opinion is subsection B of the Limit of Liability section, which is contained on the third page of the endorsement.

¶15 The Hiltses contend a reasonable insured would believe that their insurance policy was contained entirely and solely in Form 8348, and would not know the endorsements are part of the policy. The primary basis for this argument is the order in which, they assert, the documents were sent to them. Specifically, they assert: (1) the "welcome" letter the Hiltses received from Hartford did not mention the endorsements; (2) the Hiltses received the declarations and the endorsements in a twenty-two-page packet, which was stapled separately from Form 8348; and (3) the cover sheet to Form 8348 states "Amendatory endorsements may be *attached* to your policy to modify these provisions or provide you with additional coverage(s)," (emphasis added) but the endorsements were not physically attached to Form 8348.

¶16 These arguments are not supported by an affidavit of either of the Hiltses describing the ordering or arrangements of the documents they received. The affidavit of their attorney is insufficient to meet the requirements of WIS. STAT. § 802.08(3), which provides that affidavits in support of or opposing summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence."

¶17 Even if we overlook the deficiency in the evidentiary submissions, we conclude the Hiltses' arguments are without merit. While the welcome letter does inform the Hiltses that "[t]he enclosed green Policy Booklet [Form 8348] describes the provisions and coverages of your policy," the letter also tells the Hiltses that the declarations constitute is "one of the most important documents you [will] receive." As noted above, both the declarations and Form 8348 inform

the insured that the endorsements constitute part of the policy. Even if the endorsements and declarations were stapled separately from Form 8348, a reasonable insured would understand from the plain language of the declarations that the endorsements were part of the policy, along with Form 8348.

¶18 We also note that the declarations contain information specifically applicable to the Hiltses: their names, their address, and policy premiums, among other items specifically relevant to them. Form 8348 contains no such personalized references, and it frequently refers an insured to his or her declarations. For example, the title of Part C Section II "Underinsured Motorists Coverage" is followed by the statement: "This Section Applies Only If Underinsured Motorists Coverage Is Indicated On The Declarations Page." In short, we conclude that the materials Hartford sent to the Hiltses would not lead a reasonable insured to believe that their entire policy was contained solely in Form 8348, unmodified by any endorsements. Instead, we conclude that a reasonable insured would understand, based on reading both Form 8348 and the declarations, that the endorsements as well as Form 8348 constituted the policy.

¶19 The Hiltses also argue that a reasonable insured would not know the endorsements were part of the policy because the declarations fail to define and explain "forms" and "endorsements." In ***Van Erden v. Sobczak***, 2004 WI App 40, ¶18, 271 Wis. 2d 163, 677 N.W.2d 718, we held that the meaning of the word endorsement is well-known. Likewise, we conclude that the meaning of the word "form" is well-known.

¶20 Having concluded that a reasonable insured would understand that the declarations, Form 8348 and the endorsements, were all part of the policy, we

now examine the contents of these to determine if they create ambiguity regarding the reducing clause.

¶21 To determine whether a provision is contextually ambiguous, we "trace the route" the insured takes from the declarations to the reducing clause at issue.[4] ***Dowhower v. Marquez (Dowhower III)***, 2004 WI App 3, ¶19, 268 Wis. 2d 823, 674 N.W.2d 906. We are to start with the declarations because an insured generally considers this the most important part of an insurance policy and turns to this first. ***Folkman***, 264 Wis. 2d 617, ¶37 (citations omitted).

¶22 Here, as we have already noted, the declarations plainly set forth the UIM limits of liability and refer to the UIM endorsement, where the reducing clause is found. A reasonable insured desiring information about his or her UIM coverage would be able to understand that it was necessary to read Form A-5561-0 and would be able to locate this clearly labeled and numbered form.

¶23 The Hiltses argue that the reducing clause is ambiguous in part because it is not mentioned in the declarations. However, the declarations need not inform an insured that the limits are subject to reduction. ***Van Erden***, 271 Wis. 2d 163, ¶20. A declaration page that states the upper limits of liability and refers to an endorsement that sets forth a more detailed explanation of the UIM limits of liability and reductions for certain payments, does not "build [] false hopes, [or] give the illusion of coverage." ***Id.*** That is true of the declarations here.

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[4] The Hiltses do not argue that the reducing clause is in itself ambiguous or that it does not comply with WIS. STAT. § 632.32(5)(i). We therefore consider only whether it is ambiguous in the context of the entire policy.

¶24 The Hiltses next argue that the UIM endorsement is ambiguous because, following the first page of the endorsement, there is a page mistakenly inserted from the UM endorsement. As we have already explained, there is no submission meeting the requirements of WIS. STAT. § 802.08(3) to show the order of the pages when the Hiltses received them. In any event, even if the page was out of order, a reasonable insured would not on that basis be confused regarding the UIM reducing clause. Each of the four pages making up the UIM coverage endorsement is labeled as Form 0-5561-0, and each is numbered as "1 of 4," "2 of 4," etc. A reasonable insured encountering a page labeled Form 0-5560-0 and numbered "4 of 4" in the place where he or she expected to find page "2 of 4" of Form 0-5561-1 would realize that the page was out of order and would be able to determine, based on its clear identification, where it belonged. A reasonable insured would also turn the misplaced page and discover the next three consecutive, clearly labeled pages of the UIM endorsement. *See* ***Ruenger v. Soodsma***, 2005 WI App 79, ¶23, 281 Wis. 2d 228, 695 N.W.2d 840 (reasonable insured would be able to understand that the split-limit endorsement, which preceded the UIM endorsement and which contained a paragraph stating that it modified the UIM endorsement, modified the subsequently appearing UIM endorsement).

¶25 The Hiltses next argue that this language in Form 8348 Part C Section II – Underinsured Motorists Coverage, when read in conjunction with language in the UIM endorsement, renders the UIM endorsement ambiguous:

> With respect to the coverage provided by this Part C Section II, the provisions of the policy apply unless modified by this Part C Section II.

The foregoing statement, the Hiltses contend, creates ambiguity when considered together with this language at the beginning of the UIM endorsement:

> With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement.
>
> PART C – UNINSURED/UNDERINSURED MOTORIST COVERAGE
>
> PART C SECTION II - UNDERINSURED MOTORIST COVERAGE is replaced by the following:

¶26 We see no ambiguity that relates to the reducing clause. A reasonable insured would understand from the quoted language in the UIM endorsement that the endorsement, which contains the reducing clause, supercedes Part C Section II, which does not contain a reducing clause. A reasonable insured would also understand from that language, as well as the quoted language in Part C Section II, that provisions in other parts of Form 8348 (such as the definitions) apply if not modified by the UIM endorsement. The Hiltses do not point to any provisions in other parts or sections of Form 8348 that would mislead or confuse a reasonable insured regarding the reducing clause in the UIM endorsement. *See* ***Ruenger***, 281 Wis. 2d 228, ¶¶15, 16, 18 (inconsistent language in a policy that is not material to the issue in dispute does not prevent an insurer from relying on an otherwise valid reducing clause). We conclude that the quoted language from Form 8348 Part C Section II in the preceding paragraph does not "engender an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language" regarding the reducing clause. ***Folkman***, 264 Wis. 2d 617, ¶30.

¶27 Finally, the Hiltses argue that ***Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, ¶46, 255 Wis. 2d 61, 647 N.W.2d 223, requires insurance

policy provisions to be "crystal clear," and that the reducing clause here in the context of the entire policy does not meet this standard. However, in ***Folkman*** the court explained that the "crystal clear" language from ***Schmitz*** had unintentionally altered the analytical focus and it clarified the standards to be applied in determining contextual ambiguity. ***Folkman***, 264 Wis. 2d 617, ¶30. In ***Dowhower III***, 268 Wis. 2d 823, ¶¶19, 29, we discussed the effect of ***Folkman*** on ***Schmitz*** and concluded that, while a policy cannot be so obscure or deceptive that it "befuddles the understanding and expectations of a reasonable insured," it "need not be 'crystal clear' to meet minimum legal standards …." ***Dowhower III***, 268 Wis. 2d 823, ¶29 (citations omitted). The Hiltses also provide examples of ways Hartford could have made the effect of its reducing clause clearer. But that is not the test, either. *See* ***Folkman***, 264 Wis. 2d 617, ¶¶30-31 ("***Schmitz*** and its predecessors do not demand perfection in policy draftsmanship.").

¶28 We conclude that the reducing clause is not ambiguous in the context of the entire policy. Hartford correctly determined that the reducing clause operated to reduce its UIM liability limit to $51,500. Because it paid this sum to the Hiltses, it did not owe any additional amount. The circuit court therefore erred in granting summary judgment in favor of the Hiltses and ordering Hartford to pay the Hiltses $48,500. Accordingly, we reverse and direct the circuit court to enter summary judgment in favor of Hartford.

By the Court.—Judgment reversed.

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