COURT OF APPEALS DECISION DATED AND FILED

December 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2003AP2482 **Cir. Ct. No. 2002CV4615**

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

TRAVIS L. BAILEY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. The primary issues on this appeal and cross-appeal concern whether and how payments by a second tortfeasor who is not a driver of an underinsured motor vehicle affect the insurer's obligation under the

terms of its underinsured motor vehicle (UIM) policy. We conclude that WIS. STAT. § 632.32(5)(i)1[1] does not permit reducing the limits of UIM liability by amounts paid by or on behalf of a second tortfeasor who is not the UIM driver. Therefore, we construe the clause in State Farm's UIM endorsement that tracks § 632.32(5)(i)1 not to permit a reduction in liability limits for the payment made on behalf of the second tortfeasor in this case. We also conclude that the reducing clause is not ambiguous in the context of the entire policy and, therefore, it validly reduces State Farm's liability limits by the payment on behalf of the underinsured driver. Finally, we conclude that the policy clause providing that State Farm will pay no more than "the amount of damages sustained but not recovered" is not prohibited by § 632.32(5)(i). The result of these conclusions is that State Farm is obligated to pay its UIM insured, Travis Bailey, for damages from bodily injury that exceed $62,500 up to the maximum of its reduced liability limit of $25,000. Accordingly, we affirm in part, reverse in part, and remand for the circuit court to enter a declaratory judgment consistent with this opinion.

BACKGROUND

¶2 Bailey sustained serious injuries when the car in which he was a passenger traveled at a high rate of speed through a red light and struck a vehicle traveling through the intersection on the green light. The driver of the car in which Bailey was riding, Adrian Levy, was insured at the time under a liability policy issued by American Family Insurance that had a single combined limit of $25,000 per person and $50,000 per accident. The driver of the other vehicle,

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

Leticia Regala, also had liability coverage under a policy issued by American Family, with a single combined limit of $250,000 per person and $500,000 per accident. American Family settled Bailey's claims against its insureds by paying the limit of Levy's policy, $25,000, on Levy's behalf and paying $37,500 on Regala's behalf.

¶3 At the time of the accident, Bailey's mother was the named insured on a policy issued by State Farm that provided UIM coverage to her relatives with limits of $50,000 per person and $100,000 per accident. The UIM section of State Farm's policy, as amended by an endorsement, provides:

> We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.

"Underinsured motor vehicle" is defined in the policy as a land motor vehicle:

> 1. the ownership, maintenance or use of which is insured or bonded for bodily injury liability at the time of the accident; and
>
> 2. whose limits of liability for bodily injury liability:
>
> a. are less than the limits of liability of this coverage; or
>
> b. have been reduced by payments to *persons* other than the *insured* to less than the limits of liability of this coverage.

Under this definition, Levy's vehicle was an underinsured motor vehicle because it was covered by a liability policy that had limits for bodily injury that were less than the limits of the State Farm UIM policy. Regala's vehicle was not an underinsured motor vehicle under this definition because the limits of her liability policy were greater than the limits of State Farm's UIM policy.

¶4 Bailey made a claim for UIM benefits under his mother's policy. State Farm denied the claim, relying on clause 2.a.(1) in the Limits of Liability section in the UIM endorsement:[2]

> 2. The most we will pay is the lesser of:
>
> a. the limits of liability of this coverage reduced by any of the following that apply:
>
> (1) the amount paid to the *insured* by or on behalf of any *person* or organization that may be legally responsible for the *bodily injury*; or
>
> (2) the amount paid or payable under any worker's compensation or disability benefits law; or
>
> b. the amount of damages sustained, but not recovered.

State Farm construed clause 2.a.(1)[3] to permit it to reduce the limit of $50,000 by the American Family payments paid on behalf of both Levy and Regala. Since those payments combined exceeded $50,000, State Farm's position was that there was no UIM coverage for Bailey.

¶5 State Farm filed this action seeking a declaratory judgment that its construction of the policy was correct. Both State Farm and Bailey moved for summary judgment. The circuit court denied State Farm's motion and granted Bailey's motion, concluding that, in the context of the entire policy, clause 2.a. was ambiguous because a reasonable insured would not understand that the UIM

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[2] As we discuss later in this opinion, the UM and UIM endorsement are one endorsement, with the two separate coverages identified in the endorsement. When we refer to the UIM endorsement in this opinion, we mean the provisions in the UM/UIM endorsement that relate to UIM coverage.

[3] When we refer to clauses 2.a. and 2.b. in this opinion, we are referring to the clauses thus numbered in the limits of liability section, quoted in ¶4.

limits would be reduced by payments received from other sources. Therefore, the court held, clause 2.a. was not enforceable. Because of that conclusion, the court did not reach the issue whether clause 2.a.(1) permitted the limits to be reduced by the payments on behalf of Regala as well as on behalf of Levy.

¶6 State Farm moved for reconsideration and the court denied the motion. State Farm also asked for a ruling on the extent of its UIM obligation given the court's ruling that clause 2.a. was invalid. The court concluded that, applying clause 2.b., State Farm's liability to Bailey was for provable damages in excess of $62,500 (the combined total of American Family's payments on behalf of Levy and Regala) up to State Farm's $50,000 UIM limit.[4]

DISCUSSION

¶7 On appeal, State Farm contends that the circuit court erred in concluding that clause 2.a. is ambiguous when considered in the context of the entire policy. Bailey agrees with that ruling but, on his cross-appeal, he contends that the circuit court erred in concluding that under 2.b. State Farm's obligation is determined by adding the payments made on behalf of both Levy and Regala. According to Bailey, whether or not clause 2.a. is invalid because it is ambiguous in the context of the entire policy, WIS. STAT. § 632.32(5)(i) does not permit the payment by a tortfeasor who is not the driver of an underinsured motor vehicle to reduce State Farm's obligation under its UIM policy. Thus, in Bailey's view

[4] State Farm also moved for summary judgment on Bailey's counterclaim, alleging that State Farm's denial of his claim was in bad faith. The circuit court granted summary judgment in favor of State Farm on that claim. Bailey does not appeal that decision.

neither 2.a.(1) nor 2.b. may be construed to permit the sums paid on behalf of Regala to reduce the UIM payments.

¶8 Because the appeal and cross-appeal raise overlapping issues on the proper construction of insurance policy provisions and the proper construction of WIS. STAT. § 632.32(5)(i), we organize the discussion around these issues rather than around the appeal and cross-appeal. We consider, in this order, the following issues: (1) Does § 632.32(5)(i) permit a construction of clause 2.a. whereby Regala's payment may reduce State Farm's limits of liability? (2) Is clause 2.a. ambiguous in the context of the entire policy? (3) Is clause 2.b. invalid under § 632.32(5)(i)?

¶9 When we review a grant or denial of summary judgment, we employ the same methodology as the circuit court and our review is de novo. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶12, 275 Wis. 2d 35, 683 N.W.2d 75. Where, as here, the material facts are undisputed, the question is which party is entitled to judgment as a matter of law. ***Id***. The construction and application of statutes and insurance policy provisions to undisputed facts are both questions of law, which we review de novo. ***Van Erden v. Sobczak***, 2004 WI App 40, ¶¶11, 22, 271 Wis. 2d 163, 677 N.W.2d 718.

I. Construction of WIS. STAT. § 632.32(5)(i) and Clause 2.a.

¶10 WISCONSIN STAT. § 632.32(5)(i), enacted by 1995 Wis. Act 21, § 4, allows a specific type of reducing clause in uninsured motorist (UM) and UIM policies:

> (i) 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.

Clause 2.a.(1) tracks the language of § 632.32(5)(i)1, except that the policy language does not contain the words "for which the payment is made." Leaving aside that difference—which neither party suggests has any bearing on the issues before us—we note that the statute, like clause 2.a.(1), does not expressly state whether the "person or organization that may be legally responsible" includes a second tortfeasor who is not the UIM or the UM tortfeasor. Because the reducing clause in the policy must be consistent with the statute, we first analyze the meaning of the statutory language. *See* ***Teschendorf v. State Farm Ins. Cos.***, 2005 WI App 10, ¶9, 278 Wis. 2d 354, 691 N.W.2d 882.

¶11 We have located no case, and the parties have provided none, in which this court or the supreme court has considered WIS. STAT. § 632.32(5)(i) in the context of payments by a second non-UIM or non-UM tortfeasor. The supreme court has held this statute unambiguous, but not in the context of addressing the issue presented here. *See* ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, ¶17, 236 Wis. 2d 113, 613 N.W.2d 557. Nonetheless, the supreme court's discussion of the statute in ***Dowhower, Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, and ***Langridge*** provides the foundation for answering the question before us.

¶12 Prior to the enactment of WIS. STAT. § 632.32(5)(i), some court decisions had invalidated reducing clauses in UIM policies based, either implicitly

or explicitly, on the premise that the purpose of UIM coverage is to provide a separate fund for the payment of the UIM insured's uncompensated damages. ***Schmitz***, 255 Wis. 2d 61, ¶¶17, 24-30. Under this theory, "a reducing clause operates to decrease the amount of the insured's total damages subject to UIM coverage from the insurer by any amounts received from the underinsured tortfeasor." ***Id.,*** ¶20. With the enactment of § 632.32(5)(i), the legislature expressed its approval of another theory of UIM coverage under which a reducing clause reduces the limits of the insurer's liability by payments from prescribed sources. ***Langridge***, 275 Wis. 2d 35, ¶¶17-18; ***Schmitz***, 255 Wis. 2d 61, ¶¶21, 33; ***Dowhower***, 236 Wis. 2d 113, ¶18. The purpose of this second theory, the supreme court has consistently stated, "is solely to put the insured in the same position he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured." (Citations omitted.) ***Langridge***, 275 Wis. 2d 35, ¶17; ***Schmitz***, 255 Wis. 2d 61, ¶18;. ***Dowhower***, 236 Wis. 2d 113, ¶18 (citations omitted).

¶13 This purpose of the second theory of UIM coverage is inconsistent with reducing the UIM limits of liability by payments from a second, non-UIM tortfeasor. If Levy's liability policy had a limit of $50,000, then Bailey would have had that sum available to him in addition to the liability limits of Regala's policy. If only the $25,000 payment on behalf of Levy reduces Bailey's UIM limit of $50,000, then Bailey is in the same position he would have been if Levy had had a liability policy of $50,000: Bailey has $25,000 from Levy, another $25,000 available to him under his reduced UIM policy limits, and whatever he receives under Regala's liability policy. However, if the payment from Regala may also reduce the UIM liability limits, then Bailey is entitled to no UIM coverage. Thus,

Bailey is worse off than if Levy had a $50,000 liability policy by whatever amount his damages exceed $62,500, up to $87,500.

¶14 State Farm argues that two cases, ***Janssen v. State Farm Mutual Auto Insurance Co.***, 2002 WI App 72, 251 Wis. 2d 660, 643 N.W.2d 857, and ***Calbow v. Midwest Security Ins Co.***, 217 Wis. 2d 675, 579 N.W.2d 264 (Ct. App. 1998), support its position that clause 2.a.(1) validly permits reducing the limits of liability by Regala's payment as well as by Levy's. However, we conclude that neither case addresses the issue presented in this case.

¶15 In ***Janssen***, we held that the language "legally responsible for bodily injury or death" in WIS. STAT. § 632.32(5)(i) and in the injured passenger's UM policy did not include payments she received under her parent's UM policy. 251 Wis. 2d 660, ¶¶2-3, 14-15. The drivers of both vehicles involved in the accident were uninsured. ***Id.***, ¶¶2-3. We arrived at our holding by examining the meaning of "responsible" and concluding that it refers to "the person or organization that *cause*d the bodily injury or death—the tortfeasor." ***Id.***, ¶17. From our reference to "the tortfeasor" and "tortfeasors" throughout the opinion, State Farm argues that "legally responsible for bodily injury or death" includes *any* tortfeasor, and, thus, a second tortfeasor who is not the UIM tortfeasor. However, our reference to "tortfeasor" in ***Janssen*** was in the context of distinguishing the UM *insurer* from a person who caused the injury. We were not addressing whether there was any distinction between a second non-UM tortfeasor and the UM tortfeasor.

¶16 In ***Calbow***, the injured party settled a claim against the responsible party for one of the vehicles involved in the accident for $250,000 and executed a

Pierringer[5] release freeing that party from all liability for damages. ***Calbow***, 217 Wis. 2d at 677-78. The injured party then filed a claim under his UM policy for damages resulting from the negligence of the driver of another vehicle, which was uninsured.[6] ***Id***. The UM policy provided that "any amounts otherwise payable for damages under this coverage shall be reduced by all sums … [p]aid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible…." ***Id.*** at 679 n.3. The arbitration panel, which was required by the policy, determined that the damages of the injured party were $130,000 and his spouse's damages were $1000. ***Id.*** at 678. The UM insurer then denied the claim without determining the allocation of causal negligence. ***Id***.

¶17 The position of the injured party in ***Calbow*** was that the reducing clause was void and unenforceable as a matter of law because it reduced the UM benefits even though the reduction would not have been available to the UM tortfeasor had he been insured. Had the UM tortfeasor been insured, the injured party argued, he (the injured party) could have collected the portion of the $130,000 damages attributable to that tortfeasor in addition to the $250,000 received in the settlement with another tortfeasor. ***Id.*** at 679-80. The injured party relied on ***Nicholson v. Home Insurance Cos.***, 137 Wis. 2d 581, 597-99, 604, 405 N.W.2d 327 (1987),[7] which invalidated a reducing clause in a UM policy

[5] ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

[6] We explained in ***Calbow*** that the claim may have been referred to by the insured as a UIM claim at one time but that this did not matter because both the UM and the UIM policies contained reducing clauses. ***Calbow v. Midwest Security Ins. Co.***, 217 Wis. 2d 675, 678 n.2, 579 N.W.2d 264 (Ct. App. 1998).

[7] ***Nicholson v. Home Insurance Cos.***, 137 Wis. 2d 581, 597-99, 604, 405 N.W.2d 327 (1987), was superseded by 1995 Wis. Act 21, § 4. ***Blazekovic v. City of Milwaukee***, 2000 WI 41, ¶¶19-20, 234 Wis. 2d 587, 610 N.W.2d 467.

because the legislature's purpose in mandating UM coverage was to place the insured in the same position he would have been in if the uninsured motorist were insured. In ***Calbow***, we read ***Nicholson*** as not permitting a reducing clause to put a UM insured in a worse position than if the tortfeasor had been insured, and we read ***Matthiesen v. Continental Casualty Co.***, 193 Wis. 2d 192, 196, 200, 532 N.W.2d 729 (1995), as holding that reducing clauses may be valid to prevent double recovery.[8] ***Calbow***, 217 Wis. 2d at 681. We concluded "that the reducing clause should be invoked to prevent a double recovery," noting that to do so "would not reduce the protection of the insured below the lesser of the actual loss suffered by the insured ($130,000) or the total indemnification promised were no other amounts paid on behalf of a legally responsible party ($100,000 'each person')." ***Id.*** at 682.

¶18 ***Calbow*** does not support State Farm's construction of WIS. STAT. § 632.32(5)(i)1 for several reasons. First, because the accident occurred before 1995, we did not consider the statute. Second, and related to the first point, we decided ***Calbow*** before the supreme court discussed the statute in ***Dowhower***, ***Schmitz***, and ***Langridge***. Third, our decision to enforce the reducing clause in ***Calbow*** was based on the "windfall" that would occur if we did not; indeed, we suggested we would not have enforced the reducing clause if the result would be to reduce the protection for the insured below the $100,000 liability limit of the policy. ***Calbow***, 217 Wis. 2d at 682. This rationale does not provide a basis for

[8] ***Matthiesen v. Continental Casualty Co.***, 193 Wis. 2d 192, 196, 200, 532 N.W.2d 729 (1995), held that the reducing clauses in two UIM polices violated the anti-stacking provision of WIS. STAT. § 631.43(1) (1993-94) except to the extent they prevented double recovery. Section 631.43(1) was modified by the same legislation that enacted WIS. STAT. § 632.32(5)(i). *See* 1995 Wis. Act 21 § 1.

construing § 632.32(5)(i)1 to allow in all cases a reduction in the limits of liability for payments by a second tortfeasor.

¶19 We conclude we must construe WIS. STAT. § 632.32(5)(i)1 in a manner consistent with the supreme court's statements in ***Dowhower***, ***Schmitz***, and ***Langridge*** on the purpose of UIM coverage that underlies this statute. Accordingly, we conclude that the "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" does not include payments by or on behalf of a second tortfeasor who is not the UIM tortfeasor. It follows that clause in 2.a.(1) in State Farm's UIM endorsement also does not include these payments. Accordingly, under that clause, State Farm's limit of liability is reduced by the $25,000 payment on behalf of the UIM tortfeasor, Levy, but not by the payment on behalf of Regala.

II. Contextual Ambiguity of Clause 2.a.[9]

¶20 Having decided on the proper construction of clause 2.a., we turn to the parties' dispute over whether it is ambiguous in the context of the entire policy. Bailey argues that clause 2.a. is ambiguous in the context of the entire policy and therefore is not enforceable to reduce the $50,000 per person limits of State Farm's liability by the $25,000 payment on behalf of Levy.

¶21 A provision that is unambiguous in itself may be ambiguous in the context of the entire policy. ***Folkman v. Quamme***, 2003 WI 116, ¶19, 264 Wis. 2d 617, 665 N.W.2d 857. The circuit court in this case concluded that clause 2.a. was ambiguous in the context of the entire policy because its meaning was not "crystal clear" as required by ***Schmitz***, 255 Wis. 2d 61, ¶46. Shortly after the circuit court made that decision, the supreme court clarified the standard for determining contextual ambiguity in ***Folkman***. The ***Folkman*** court explained that the "crystal clear" language contained in ***Schmitz*** had unintentionally altered the analytical focus in cases involving contextual ambiguity, and it articulated the correct analysis in some detail. ***Folkman***, 264 Wis. 2d 617, ¶¶30, 31-35. Subsequently this court considered the effect of ***Folkman*** on ***Schmitz*** and stated: "[A]lthough a policy need not be 'crystal clear' to meet minimum legal standards, a policy cannot be 'so ambiguous or obscure' or deceptive that it befuddles the understanding and expectations of a reasonable insured." (Citation omitted.)

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[9] As noted above, the circuit court decided that clause 2.a. was ambiguous in the context of the entire policy. We do not understand the parties' arguments on contextual ambiguity to include clause 2.b., and we therefore refer only to clause 2.a. in this section of the opinion. However, if the contextual ambiguity of the entire clause 2 were at issue, our analysis and conclusion would be the same.

Dowhower v. Marquez, 2004 WI App 3, ¶29, 268 Wis. 2d 823, 674 N.W.2d 906 (***Dowhower III***).

¶22 As articulated in ***Folkman***, the test for determining contextual ambiguity is the same as that for determining whether a particular clause is ambiguous: is the language of the particular provision, "when read in the context of the policy's other language, reasonably or fairly susceptible to more than one construction … measured by the objective understanding of an ordinary insured." ***Id.***, ¶29 (citations omitted). In determining whether there is contextual ambiguity, we inquire whether "the organization, labeling, explanation, inconsistency, omission, and text" of other relevant provisions in the policy create an "objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language." ***Id.***, ¶¶19, 30. Applying this test, we conclude that clause 2.a. is not ambiguous in the context of the entire policy.

¶23 The declarations page, which is generally the portion of the insurance policy to which the insured looks first, ***Schmitz***, 255 Wis. 2d 61, ¶62, is the first page of State Farm's policy. After the information on the named insured, the effective date, and the covered auto, there is a heading "COVERAGES (AS DEFINED IN POLICY)—SYMBOL—PREMIUM—COVERAGE NAME—LIMITS OF LIABILITY." Thereafter the various coverages under the policy are listed, including UIM coverage, identified by the symbol "W," with the premium and the limits of liability for this coverage. When the policy was initially issued the limits of liability for UIM coverage, as stated on the declarations page, was "each person, $25,000; each accident, $50,000." A renewal notice in effect at the time of the accident stated that the limits of UIM coverage were "Bodily Injury 50,000/100,000."

¶24 After the list of coverages on the declarations page there is a dividing line followed by the title "EXCEPTIONS AND ENDORSEMENTS," one of which is "6083BB AMENDMENT TO UNINSURED MOTOR VEHICLE AND UNDERINSURED MOTOR VEHICLE COVERAGES—EFF MAR-23-96." The bottom of the declarations page states "THIS IS YOUR DECLARATIONS PAGE. PLEASE ATTACH IT TO YOUR AUTO POLICY BOOKLET," AND "YOUR POLICY CONSISTS OF THIS PAGE, ANY ENDORSEMENTS, AND THE POLICY BOOKLET, FORM 9849.4…. PLEASE KEEP TOGETHER."

¶25 The cover page of the policy booklet is identified as "Policy Form 9849.4" and states "PLEASE READ YOUR POLICY CAREFULLY." The policy booklet contains 28 pages. Section III of the policy booklet, on page 14, is clearly identified as "UNINSURED MOTOR VEHICLE—COVERAGE U AND UNDERINSURED MOTOR VEHICLE—COVERAGE W" and consists of four pages. The endorsements follow the policy booklet and are identified by numbers and titles that match those on the declarations page and appear in that order. The UM/UIM endorsement is plainly numbered as 6083BB, plainly titled, and the page numbers at the bottom tell the insured there are three pages to this endorsement. Counting the declarations page, this amendment is located on page thirty-six.

¶26 The first paragraph of the UM/UIM endorsement states:

> This endorsement is a part of ***your*** policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as ***your*** policy unless a different effective date is shown for the endorsement on the Declarations Page.
>
> ….
>
> The following changes are made under **SECTION III – UNINSURED MOTOR VEHICLE – COVERAGE U**

AND UNDERINSURED MOTOR VEHICLE – COVERAGE W:

The insured is then told "The following changes are made under SECTION III—UNINSURED MOTOR VEHICLE—COVERAGE U AND UNDERINSURED MOTOR VEHICLE—COVERAGE W": The third numbered change, still on the first page of this endorsement, informs the insured in bold print that item 2 under "LIMITS OF LIABILITY—COVERAGE W …." has been changed, and it sets forth the provision at issue in this case, as quoted in ¶4 of this opinion.[10]

¶27 A reasonable insured reading the declarations page of State Farm's policy would understand that he or she needs to read the policy booklet on UIM coverage and the UM/UIM endorsement in order to understand the details of UIM coverage. The organization and labeling of the booklet and endorsements would enable a reasonable insured to easily locate this information.

¶28 The circuit court viewed the absence of reference to the reducing clause on the declarations page as "a strong strike against State Farm," and Bailey

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[10] Items 2 and 5 under "**Limits of Liability—Coverage W**" in the policy booklet read:

> 2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the ***insured*** under any worker's compensation, disability benefits, or similar law.
>
> ….
>
> 5. The most we pay will be the lesser of:
>
> a. the difference between the amount of the ***insured's*** damages for ***bodily injury***, and the amount paid to the ***insured*** by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury***; or
>
> b. the limits of liability of this coverage.

In addition to changing item 2, the UIM endorsement deleted item 5.

makes this assertion on appeal. However, case law establishes that the absence of a reference to the reducing clause on the declarations page does not in itself create ambiguity, because the policy must be read as a whole. ***Dowhower III***, 268 Wis. 2d 823, ¶20. The absence of reference to the reducing clause on a declarations page that contains the UIM limits of liability and clearly refers to the UIM endorsement builds neither false hopes nor gives the illusion of coverage. ***Van Erden***, 271 Wis. 2d 163, ¶20. That is true of the declarations page in this policy.

¶29 The circuit court also considered the number of combined pages in the declarations, the policy booklet and the amendments—forty-four—as contributing to ambiguity, and Bailey contrasts this number to the thirteen pages of the policy in ***Van Erden***. ***Id.***, ¶19. However, nothing in ***Van Erden*** suggests that the number of pages is dispositive, and we have concluded that reducing clauses are not ambiguous in the context of policies that are thirty-seven pages long, ***Commercial Union Midwest Insuranc. Co. v. Vorbeck***, 2004 WI App 11, ¶26, 269 Wis. 2d 204, 674 N.W.2d 665, and thirty-four pages long, ***Ruenger v. Soodsma***, 2005 WI App 79, ¶22, 281 Wis. 2d 228, 695 N.W.2d 840. If the policy clearly informs a reasonable insured how to find the parts of the policy that address UIM coverage, and the organization of the policy enables an insured to easily find them, then the length of the policy does not contribute to any misunderstanding or confusions about UIM coverage.

¶30 Bailey argues that the auto renewal notice creates an ambiguity because it lists the limits for UIM coverage as "bodily injury $50,000/$100,000" but "does not direct the insured to attach the document to the policy, read the policy or endorsements in conjunction with the renewal or warn that the limits stated on the renewal will be reduced." We do not understand this argument. The auto renewal notice is an invoice informing the insured of the amount of premium

for the policy period, March 23, 1998 to September 23, 1998, and when it is due. The notice states that the date of preparation is February 16, 1998. The notice lists the coverages and limits along with the premiums that make up the total amount of premium due. Nothing in this document would cause a reasonable insured to question whether the endorsements identified on the declarations page and the policy booklet referred to on the declarations page remained in effect.

¶31 Bailey appears to suggest that, at the same time this auto renewal notice was issued, the UM/UIM endorsement went into effect and this should have been explained to the insured on the notice. Again we do not understand this argument. The declarations page states a policy period of January 11, 1996 to March 23, 1996, and the notation "Eff MAR-23-96" follows the reference to the UM/UIM endorsement. This endorsement, as we have noted above, contains the clause permitting the limits of UIM liability to be reduced by certain payments. A reasonable insured receiving the declarations page, the policy booklet referenced on that page, and the endorsements identified on that page would have understood that the UM/UIM endorsement would take effect on March 23, 1996. A reasonable insured would read the UM/UIM endorsement and understand from it that item 2 of the Limits of Liability for UIM Coverage, coverage W, in the policy booklet was replaced by item 2 in the endorsement, effective March 23, 1996. We see nothing in the auto renewal notice that would alter the understanding of a reasonable insured that the terms of the UM/UIM endorsement were in effect on March 23, 1998 and would continue to apply.

¶32 Nor is there anything in the record to support Bailey's apparent argument that the UIM limits were increased from $25,000/$50,000 to $50,000/$100,000 at the time that the UM/UIM amendment went into effect, which was March 23, 1996. What is apparent from the record is that sometime

after March 23, 1996, and on or before March 23, 1998, the UIM limits were increased from $25,000/$50,000 to $50,000/$100,000.[11] However, Bailey presents no developed argument as to why this change would confuse a reasonable insured regarding the plain language of clause 2.a. in the UIM endorsement.

¶33 Because we conclude that clause 2.a. of the UIM endorsement is not ambiguous when considered in the context of the entire policy, it is enforceable to reduce the $50,000 per person limits of State Farm's liability by the $25,000 payment on behalf of Levy.

III. WIS. STAT. § 632.32(5)(i) and the Validity of Clause 2.b.

¶34 Bailey argues that clause 2.b.—which provides that regardless of the reduced limits of liability, State Farm will pay no more than "the amount of damages sustained but not recovered"—is in essence a reducing clause because it reduces State Farm's obligation by the amount paid by a second tortfeasor. According to Bailey, because WIS. STAT. § 632.32(5)(i) does not permit a reduction for a payment by or on behalf of a second tortfeasor who is not the UIM tortfeasor, clause 2.b. is invalid.

¶35 Bailey's argument overlooks the fact that WIS. STAT. § 632.32(5)(i) applies to reducing "the limits under the policy…." Clause 2.b., unlike clause 2.a., does not reduce the limits of the UIM coverage; rather, it provides that, regardless of the limits of liability, State Farm will pay only for damages that have not been compensated. The following examples illustrate the distinction. Under 2.a. as we

[11] WISCONSIN STAT. § 632.32(4m), enacted along with § 632.32(5)(i), requires an insurer to offer UIM coverage, at a prescribed time and in a prescribed manner, of at least $50,000 per person and $100,000 per accident.

have construed it, the reduced limits of State Farm's liability to Bailey is $25,000. If his damages are $100,000, and given that he has received $37,500 on behalf of Regala and $25,000 on behalf of Levy, then the amount of his "unrecovered damages" is $37,500 and State Farm must pay him the entire reduced limit of liability—$25,000. If Bailey's damages are $75,000, however, then his "unrecovered damages" would be $12,500, and that is all State Farm would be obligated to pay him. In essence, clause 2.b. prevents a UIM insured from recovering more under the policy than necessary to compensate for the insured's damages; in the words of ***Calbow***, it prevents a "windfall." 217 Wis. 2d at 682.

¶36 Neither the language of WIS. STAT. § 632.32(5)(i) nor the case law discussing it suggests that the statute was intended to prohibit clauses such as 2.b., which do not reduce the limit of liability but instead prevent recovery of more than necessary to compensate for the insured' s damages. In a recent case decided by this court, ***Ruenger***, 281 Wis. 2d 228, ¶24, we discussed the distinction between a reducing clause that conformed to § 632.32(5)(i) and a clause that had in essence the same purpose as 2.b. The clause in ***Ruenger*** provided that the UIM insurer would "not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible." ***Id.*** In rejecting that insured's argument that the reducing clause was ambiguous when considered together with this "duplicate payment" clause, we explained that the latter clause "plainly serves a purpose distinct from that of the reducing clause: it prevents a double recovery by the insured for the same loss in cases when the UIM insurer has not yet paid the limit of its UIM liability as reduced by the reducing clause." ***Id.*** Although in ***Ruenger*** we were not addressing the issue whether § 632.32(5)(i) prohibited a clause preventing double recovery, our discussion of the distinct purposes of the two

types of clauses supports the conclusion that the statute does not prohibit clauses that prevent double recoveries.

¶37 Bailey argues that the theory of UIM coverage underlying WIS. STAT. § 632.32(5)(i)—to put a UIM insured in the same position he or she would be in if the underinsured driver had liability insurance with the same limits as the UIM limits—is inconsistent with clause 2.b. According to Bailey, if Levy had $50,000 in liability coverage, Bailey would be able to collect from Levy the full amount of his damages up to $50,000 regardless of the $37,500 that he received on behalf of Regala. Whether or not this is true, we are satisfied that it is not a purpose of UIM coverage—under either theory—to compensate insureds beyond the amount of their actual damages. As noted above, in ***Calbow***, 217 Wis. 2d 675, this was our reading of pre-1995 cases on UM coverage. We acknowledged in ***Calbow*** that the purpose of UM coverage was to put a UM insured in the same position as if the uninsured driver had insurance, but we also stated that the purpose was not to permit a UM insured to recover more than his or her actual damages. ***Id.*** at 681-82. We have recently reaffirmed this principle in ***Kappus***, 229 Wis. 2d 699, 708, 600 N.W.2d 274 (Ct. App. 1999). We conclude this principle applies equally to UIM coverage. Thus, although ***Calbow*** does not support the view that § 632.32(5)(i) permits the reduction of liability limits by the amount of payments from a second tortfeasor who is not the UIM driver, ***Calbow*** does support the view that UIM insurance policy provisions that prevent recovery in excess of the insured's actual damages are permissible.

¶38 We conclude that clause 2.b. is not prohibited by WIS. STAT. § 632.32(5)(i).[12]

CONCLUSION

¶39 In summary, we hold that WIS. STAT. § 632.32(5)(i)1 does not permit reducing the limits of UIM liability by amounts paid by or on behalf of a second tortfeasor who is not a driver of an underinsured motor vehicle. Therefore, we construe clause 2.a.(1) in the Limits of Liability section for coverage W in the UIM endorsement not to permit a reduction for the payment made on behalf of Regala. We also conclude that clause 2.a. is not ambiguous in the context of the entire policy. Therefore, that clause reduces State Farm's UIM liability limits of $50,000 by the $25,000 payment on behalf of Levy, the UIM driver. Finally, we conclude that clause 2.b. is not prohibited by § 632.32(5)(i). Because State Farm may properly consider the payment on behalf of Regala under 2.b., as well as the payment from Levy, State Farm is obligated to pay for Bailey's damages from bodily injury that exceed $62,500 up to the maximum of its reduced limits of liability—$25,000. On remand, the court shall enter a declaratory judgment consistent with this paragraph.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

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[12] Because of the conclusions we have reached in sections I and III of this opinion, it is unnecessary to address Bailey's argument that the payment on behalf of Regala is not "by or on behalf of any person or organization that may be legally responsible for the bodily injury" within the meaning of WIS. STAT. § 632.32(5)(i)1 because her fault is at most twenty percent, according to his settlement agreement with her.