COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1579 **Cir. Ct. No. 2003CV447**

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

JEFFREY E. MAROTZ,

PLAINTIFF-APPELLANT,

V.

ARTHUR E. HALLMAN, JR., ACUITY, A MUTUAL INSURANCE COMPANY, THE MEGA LIFE AND HEALTH INSURANCE COMPANY AND IMT INSURANCE COMPANY (MUTUAL),

DEFENDANTS,

RURAL MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

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

¶1 DYKMAN, J. Jeffrey Marotz appeals from a judgment declaring that Marotz was not entitled to recover under the underinsured motorist (UIM) coverage provision of his parents' automobile liability policy with Rural Mutual Insurance Company. Marotz, a passenger in an automobile driven by Arthur Hallman, concedes that Rural may reduce its UIM coverage by the amount he received from Hallman's automobile liability insurer. The issue is whether Rural may also reduce its UIM coverage by the amount paid to Marotz on behalf of a second, adequately insured tortfeasor. The trial court concluded that Rural could do so, and we agree. We therefore affirm.

¶2 The undisputed facts are uncomplicated. Marotz was a passenger in an automobile driven by Hallman. Hallman failed to stop at a stop sign and was struck by a vehicle driven by Donald Hilgemann. Marotz suffered extensive injuries. He settled with Hallman's insurance company for $25,000, its policy limit. He settled with Hilgemann's insurer for $90,000. The dispute is whether his parents' policy with Rural permits Rural to reduce its $100,000 UIM coverage by the $90,000 paid by Hilgemann's insurer.

¶3 This issue is determined by the terms of Rural's insurance policy, the language of WIS. STAT. § 632.32(5)(i)1. (2003-04)[1] and three Wisconsin Supreme Court cases, ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557; ***Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223; and ***State Farm Mut. Auto Ins. Co v. Langridge***, 2004 WI 113, 275 Wis. 2d 35, 683 N.W.2d 75. Whether these permit

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

reduction of UIM coverage by a second, adequately insured motorist is a question 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.

¶4 WISCONSIN STAT. § 632.32(5)(i) permits insurers to include reducing clauses in their 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.

¶5 Marotz gives three reasons why the trial court and Rural's interpretation of its reducing clause and WIS. STAT. § 632.32(5)(i) is wrong. First, he contends the policy's reducing clause is ambiguous. Second, he argues the reducing clause is ambiguous in the context of the entire policy. Finally, he asserts that ***Schmitz*** defines UIM coverage in a way that prevents Rural from reducing its UIM benefits by amounts received from an adequately insured tortfeasor. We address each of these arguments in turn.

Ambiguity

¶6 Insurance policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Folkman v. Quamme***, 2003 WI 116, ¶29, 264 Wis. 2d 617, 665 N.W.2d 857. We review whether a policy is ambiguous de novo. ***Schmitz***, 255 Wis. 2d 61, ¶50. Marotz argues that the reducing clause in

the UIM section of his parents' policy is susceptible to more than one reasonable interpretation. That clause reads: "The limit of liability 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." Marotz focuses on the phrase: "legally responsible," a phrase found in both Rural's policy and WIS. STAT. § 632.32(5)(i)1. He concedes that Rural's interpretation of that phrase as including payments Hilgemann's insurer paid to him is reasonable. But he asserts that interpreting the phrase as meaning "persons who may be legally responsible for the negligence of the owner or operator of the underinsured motor vehicle" is also reasonable.

¶7 Marotz argues that had Rural intended to include payments by adequately insured tortfeasors within the reducing clause, its policy would have so stated. Because it does not, Marotz claims that the policy is ambiguous, and therefore should be construed against Rural. But an insurance policy cannot be written to cover every possible situation. "Some ambiguity is unavoidable because words are unable to anticipate every eventuality." ***Folkman***, 264 Wis. 2d 617, ¶24. Even Marotz's suggestion for an unambiguous policy provision does not avoid the problem he poses: "In this case, if Rural Mutual intended to create a policy which would reduce the insured's UIM coverage by payments made by any person or organization who was legally responsible for all of the damages resulting from the bodily injury, the policy should have stated that." Marotz's brief, page 10.

¶8 But that is what the statute and Rural's policy do. Hilgemann's insurer paid Marotz $90,000 because it apparently concluded that Hilgemann would be found legally responsible for Marotz's bodily injury. The Rural policy need not explain all of the myriad possibilities which would result in a payment to

Marotz. By using the phrase "all sums," the policy unambiguously conveys a meaning that whatever the source, Rural was entitled to reduce UIM benefits by the sums paid. It need not have added: "By 'all' we mean all." Likewise, the statute's use of the phrase "paid by or on behalf of *any* person or organization that may be legally responsible" plainly conveys the same meaning.

¶9 The supreme court has also concluded that this language is unambiguous.

> Pursuant to § 632.32(5)(i), "[a] policy may provide that the limits under the policy … shall be reduced by … [a]mounts paid by or on behalf of any person … that may be legally responsible" for causing death or injury. The statute plainly allows a motor vehicle insurance contract to state that the maximum amount that the insurer will pay under the policy will be setoff by amounts paid by a tortfeasor.

Dowhower v. West Bend Mut. Ins. Co., 236 Wis. 2d 113, ¶17.

¶10 ***Dowhower*** involved a pedestrian injured by an underinsured motorist. No third-party, fully insured tortfeasor was involved. While language in a statute or a contract may be ambiguous on one set of facts and unambiguous on another, ***Reyes v. Greatway Ins. Co.***, 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999), it defies common sense to say that the phrase in ***Dowhower***, "amounts paid by a tortfeasor," means one thing where there is one tortfeasor and another where there are two. Even Marotz must concede that Hilgemann is a tortfeasor, for without that, Marotz could recover nothing from him. We conclude that Rural's UIM reducing clause in its policy is unambiguous and permits Rural to reduce the amount it must pay Marotz by the $90,000 Hilgemann's insurer paid Marotz.

Contextual Ambiguity

¶11 Next, Marotz argues that Rural's UIM reducing clause is ambiguous in the context of the policy as a whole. He bases this claim on Rural's insuring clause and its definition of the phrase "underinsured motor vehicle." The insuring clause of the UIM coverage of the Rural Mutual policy provides:

> 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."

(Emphasis added.) The Rural Mutual policy defines the term "underinsured motor vehicle" as follows:

> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.

¶12 Contextual ambiguity in an insurance policy must be genuine and apparent on the face of the policy if it is to invalidate the intentions of an insurer embodied in otherwise clear language. ***Folkman***, 264 Wis. 2d 617, ¶29.

> The test for determining whether contextual ambiguity exists is the same as the test for ambiguity in any disputed term of a policy. That is, are words or phrases of an insurance contract, when read in the context of the policy's other language, reasonably or fairly susceptible to more than one construction?

Id.

¶13 Marotz contends that contextual ambiguity exists here because Rural's insuring clause does not suggest to an insured that damages recovered

from a fully insured tortfeasor may reduce UIM coverage. Marotz is correct; Rural's UIM insuring clause does not mention fully insured tortfeasors. But ambiguity does not exist because one clause in Rural's UIM coverage requires Rural to pay for damages caused by an underinsured motorist and another reduces that payment by amounts paid by other persons or organizations. The two clauses are readily understandable and do not conflict. There is no contextual ambiguity here.

¶14 Marotz next focuses on Rural's definition of "underinsured motor vehicle." His argument is similar to his previous one. He claims that nothing in the definition "suggests that the limits of the underinsured coverage would be compared to the limits of the liability policy for the underinsured motor vehicle *and* coverage available from a tortfeasor who was not underinsured." Again, we agree that Marotz correctly characterizes the phrase he cites. But our answer is the same. We agree that Marotz was involved in an accident with an underinsured motor vehicle. Hallman's vehicle fits that description. But the fact that Hallman's vehicle was underinsured has nothing to do, either factually or logically, with the different question of whether Rural is entitled to reduce the payment it is required to make by a payment made on behalf of a fully insured motor vehicle driver, or for that matter, worker's compensation payments, as also permitted under the statute and Rural's policy. There is no contextual ambiguity caused by Rural's definition of an underinsured motor vehicle.

Case Law

¶15 Marotz argues that ***Schmitz***, 255 Wis. 2d 61, ¶18, holds that where an insurer chooses to define an underinsured motorist by comparing the policy limits of the UIM policy with the liability limits of the tortfeasor's policy, the

purpose of the UIM coverage 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."[2] The supreme court initiated this language in ***Dowhower***, 236 Wis. 2d 113, ¶18, then relied on it again in ***Schmitz***, 255 Wis. 2d 61, ¶18, and ***Langridge***, 275 Wis. 2d 35, ¶17. Significantly, these three cases involved an injured party's UIM coverage and a single tortfeasor. Thus, when the court spoke of tortfeasor liability, it used the word "tortfeasor's" and not the word "tortfeasors'." It is not surprising, then, that the supreme court did not speak of multiple tortfeasors. Appellate courts usually do not speculate on the result they would reach on different facts.

¶16 We conclude that Marotz's parents, when they purchased UIM coverage from Rural, received a promise that regardless of the liability coverage of the person or persons responsible for an accident, their son, while a passenger in another's automobile, would be able to recover at least $100,000. He has done so. It is undisputed that the tortfeasors' liability limits of $25,000 and at least $90,000 not only equal Marotz's UIM coverage, they exceed it. Marotz focuses solely on Hallman's status as an underinsured motorist, and argues that had Hallman been fully insured, Marotz would have been entitled to $100,000 from Hallman's insurer and $90,000 from Hilgemann's insurer. That is true, but it does not alter the fact that, under the language of Marotz's policy, Rural is entitled to reduce the

[2] We are aware that another panel of this court has recently issued an opinion that adopts this rationale in denying a reduction for payments received from tortfeasors other than the underinsured driver. *See* ***State Farm Mutual v. Bailey***, No. 2003AP2482 (WI App Dec. 1, 2005, recommended for publication). A majority of this panel, however, reached a different conclusion. We assume the losing parties in both appeals will seek review by the supreme court, which we recommend be granted.

amount it is obligated to pay Marotz by the amounts he received from both tortfeasors, a result permitted by WIS. STAT. § 632.32(5)(i)1.

¶17 Our conclusion is buttressed by the supreme court's conclusion in ***Dowhower*** that "[t]he type of reducing clause authorized in § 632.32(5)(i)1. is neither ambiguous nor contrary to public policy," ***Dowhower***, 236 Wis. 2d 113, ¶20, and the fact that Marotz has not argued that the statute, which Rural's policy nearly mimics, is ambiguous. Finally, were we to conclude that the purpose of UIM coverage as Marotz defines it overcomes the plain language of WIS. STAT. § 632.32(5)(i)1., the same reasoning would excise subds. 2. and 3. from § 632.32(5)(i). The result would be that even though the legislature has expressly permitted insurers to reduce UIM payments by worker's compensation and disability payments, insurers would be prevented from doing so by judicial fiat. Amending statutes is the prerogative of the legislature, not this court.

UIM Cases from Foreign Jurisdictions

¶18 Marotz's final argument is that two Illinois cases, ***Hoglund v. State Farm Mut. Auto. Ins. Co.***, 592 N.E.2d 1031 (Ill. 1992) and ***King v. Allstate Ins. Co.***, 645 N.E.2d 503 (Ill. 1994), adopt his interpretation of reducing clauses in UIM coverage. The difficulty with using foreign cases in the UIM area is that foreign statutes and foreign UIM insurance policy clauses must match Wisconsin's in order for foreign cases to be persuasive. ***Hoglund*** involved a subrogation clause in an uninsured motorist policy, and the court found this ambiguous. *See* ***Hoglund***, 592 N.E.2d at 1033-35. We have found Marotz's UIM policy clause unambiguous. ***King*** was decided under an Illinois statute which permitted an insurer to reduce UIM payments by amounts "actually recovered under the applicable bodily injury insurance policies, bonds or other security maintained *on*

the underinsured motorist's policy." ***King***, 645 N.E.2d at 507 (emphasis added). Both ***Hoglund*** and ***King*** were decided under "public policy considerations." ***Dowhower***, 236 Wis. 2d 113, ¶22, notes that the Wisconsin Supreme Court has not held that reducing clauses are per se contrary to public policy.

¶19 A similar problem exists with ***Allstate Insurance Company v. Dejbod***, 818 P.2d 608 (Wash. App. 1991). There, the court concluded that on facts similar to Marotz's, an insurer could reduce its UIM payment by legally recoverable sums paid by any insured motorist. ***Dejbod***, 818 P.2d at 612. But the Washington statute permitted a reduction for all liability policies applicable to a covered person after an accident. ***Id.*** And the court found the applicable statute ambiguous. ***Id.*** Though the Washington court reached a similar result to the one we reach, we cannot rely on it because the supreme court and now we have concluded that WIS. STAT. § 632.32(5)(i)1. is unambiguous. Nor does the Washington statute track ours. We therefore conclude that these foreign cases are of little assistance to us.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

¶20 HIGGINBOTHAM, J. (*concurring*). I agree with the majority that the plain language of WIS. STAT. § 632.32(5)(i)1. (2003-04) compels the result reached here. I write separately, however, to explain my reasons for this conclusion in light of our recently released opinion in ***State Farm Mutual Automobile Ins. Co., v. Bailey***, No. 2003AP2482, slip op. ¶1 (WI App Dec. 1, 2005, recommended for publication), on which I joined the majority view that § 632.32(5)(i)1. "does not permit reducing the limits of UIM liability by amounts by or on behalf of a second tortfeasor who is not the UIM driver."

¶21 Simply stated, this case is best resolved based on the clear and unambiguous language of WIS. STAT. § 632.32(5)(i)1. and Rural's policy's reducing clause. In ***Bailey***, we reached what, in my view, was a reasonable conclusion based on the supreme court's stated purpose of UIM coverage, which "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." ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, ¶18, 236 Wis. 2d 113, 613 N.W.2d 557 (citations omitted); ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, ¶18, 255 Wis. 2d 61, 647 N.W.2d 223; ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶17, 275 Wis. 2d 35, 683 N.W.2d 75. However, after having the unusual and rare opportunity to reconsider the issue here, I conclude that the better and more proper analysis is to consider the plain and unambiguous language of the statute and of the policy. I believe the majority opinion has done so here.

¶22 For this reason I concur.