COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP873 **Cir. Ct. No. 1999CV761**

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

MARY SEVCIK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SALLY A. PETERS, AND JUSTIN L. PETERS, BY HIS GUARDIAN AD LITEM, GEORGE BURNETT,

PLAINTIFFS-APPELLANTS,

V.

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Sevcik, as personal representative of the Estate of Sally Peters, and Justin Peters, by his guardian ad litem, (collectively

Sevcik) appeal a judgment in favor of Secura Insurance. Sevcik argues that the reducing clause in the underinsured motorist (UIM) endorsement of the Family Car Policy issued by Secura is ambiguous and therefore unenforceable. We disagree and affirm the judgment.

FACTUAL BACKGROUND

¶2 The Peters' automobile was hit head on by a vehicle driven by Thomas Xiong, who crossed the centerline. Xiong's vehicle was insured by Progressive Insurance Company, which eventually tendered its policy limits of $50,000 to the estate and $50,000 to Justin. Secura provided Sally Peters underinsured motorist coverage with limits of liability at $150,000 per person and $300,000 per accident. Secura tendered $200,000, relying upon the policy's reducing clause, which states in part:

> The Limits of Liability of Underinsured Motorists Coverage applicable 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.

¶3 Sevcik sought declaratory relief on the issue of whether the reducing clause rendered the Secura policy ambiguous or illusory. The parties agreed that the constitutionality of the 1995 amendment to WIS. STAT. § 632.32(5)(i)[1] would not be addressed pending a decision by the Wisconsin Supreme Court in ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W. 2d 557, which subsequently held the statute constitutional. In light of the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Dowhower decision, the circuit court entered a judgment of dismissal. This court affirmed. ***Sevcik v. Secura Ins. Co.***, No. 2000AP2104, unpublished slip op. (Wis. Ct. App. June 19, 2001). A petition for review was denied.

¶4 Sevcik then sought a supervisory writ to compel the clerk of the circuit court to return the record to the supreme court for review, essentially seeking reconsideration of the denial of its petition for review, based upon the fact that ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, was then pending before the court. The supreme court concluded that reconsideration was not an available remedy and noted that the remedy, if any, may lie in a WIS. STAT. § 806.07 motion in the circuit court following the decision in ***Badger Mutual***.

¶5 In ***Badger Mutual***, 255 Wis. 2d 61, ¶42, the supreme court abrogated ***Sukala v. Heritage Mut. Ins Co.***, 2000 WI App 266, 240 Wis. 2d 65, 622 N.W.2d 457, a case that this court relied upon when reaching our previous decision. Sevcik then filed a motion under WIS. STAT. § 806.07 in the circuit court to vacate its prior order of dismissal based on the decision in ***Badger Mutual***. The circuit court summarily denied the motion, but this court reversed and remanded, stating we were uncertain whether the circuit court thought it did not have the authority to reopen the judgment or whether the court simply refused to do so. ***Sevcik v. Secura Ins. Co.***, No. 2002AP3138, unpublished slip op. (Wis. Ct. App. Apr. 29, 2003).

¶6 Sevcik filed a request for substitution of judge, which was granted. Sevcik then moved the circuit court to vacate the order of dismissal issued by the previous circuit court judge. That motion was granted on January 15, 2004. Secura then filed a motion for reconsideration seeking summary judgment. That

motion was granted on March 9, 2005. The circuit court concluded: "I think that the trend of the law and the law which I must follow is clear, irrespective of whether or not I agree with that perception. It is, nonetheless, my duty to follow it. … I think that this policy is not entirely unlike some of the policies which have already been found to be valid." This appeal followed.

STANDARD OF REVIEW

¶7 This case requires us to interpret language in an insurance policy. The interpretation of an insurance policy, including the extent to which a reducing clause affects an insurance claim, presents a question of law that we review de novo. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶9, 245 Wis. 2d 134, 628 N.W.2d 916. 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.

¶8 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.

DISCUSSION

¶9 WISCONSIN STAT. § 632.32(5)(i), enacted by 1995 Wis. Act 21, § 4, permits insurers to include specific types of 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.

¶10 Sevcik does not argue that the reducing clause is in itself ambiguous or that it does not comply with WIS. STAT. § 632.32(5)(i). Indeed, the Secura policy, as amended by a Wisconsin endorsement, tracks the language of § 632.32(5)(i)1. Rather, Sevcik contends the reducing clause is contextually ambiguous.

¶11 First, Sevcik insists the reducing clause is ambiguous in part because it is not mentioned on the declarations page. However, the declarations page need not inform an insured that the limits are subject to reduction. ***Van Erden v. Sobczak***, 2004 WI App 40, ¶20, 271 Wis. 2d 163, 677 N.W.2d 718. Nevertheless, the endorsement for UIM coverage in this case is referenced on the declarations page, "the most crucial section of the policy for the typical insured." *See*

Folkman, 264 Wis. 2d 617, ¶37 (citing ***Dowhower***, 236 Wis. 2d 113, ¶40 (Bradley, J., concurring)).[2]

¶12 The declarations page states in capital letters: "ENDORSEMENTS WHICH ARE PART OF THIS POLICY: FCE0815-9703 FCE0822-9603." The Wisconsin amendatory endorsement is identified by form number FCE0815. A reasonable insured reading the declarations page of Secura's policy would understand that he or she needs to read the endorsements listed in order to understand the details of coverage. The Wisconsin endorsement states at the top and in capital letters: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY."

¶13 Under Part III – Coverage C-2 Underinsured Motorists Coverage, the endorsement states:

> 6. Section D. Reductions in Limits of Liability of Underinsured Motorists Coverage is deleted and replaced by the following:
>
> The limits of Liability of Underinsured Motorists Coverage applicable 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.

[2] We note that the endorsements were also apparently listed on the declarations page in ***Folkman***. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶56, 264 Wis. 2d 617, 665 N.W.2d 857. ("The index page states: 'Please Note: There may be State Amendatory Endorsements.' These endorsements are then listed on the declarations page.").

3. Amount paid or payable under any Disability Benefits Law.

¶14 The listing of endorsements for UIM coverage on the declarations page is sufficient to alert an insured to the presence of policy amendments that are relevant to the insured's UIM benefit. ***Dempich v. Pekin Ins. Co.***, 2006 WI App 24, ¶16 (No. 2004AP1861); *see also* ***Van Erden***, 271 Wis. 2d 163, ¶20. Our role is not to set "aspirational goals" or "demand perfection" in draftsmanship, but to determine if a policy as written is susceptible to more than one reasonable interpretation. ***Folkman***, 264 Wis. 2d 617, ¶¶30-31. We conclude that Secura's declarations page does not render the policy ambiguous when considered in the context of the entire policy.

¶15 Sevcik next argues that the table of contents, entitled the "Index of Policy Provisions," makes the policy confusing. Sevcik appears to concede the index subheading in capital letters, "Reductions in Amounts Payable" under "COVERAGE C-2 UNDERINSURED MOTORISTS COVERAGE" alerts the insured to the presence of a reducing clause. Sevcik contends, however, that our supreme court long ago in ***Kaun v. Industrial Fire & Cas. Ins. Co.***, 148 Wis. 2d 662, 669, 436 N.W.2d 321 (1989), held the term "amounts payable" to itself be ambiguous when used in connection with a UIM reducing clause. Sevcik also contends that the index does not specifically reference the Wisconsin endorsement, but actually directs the insured to the wrong location in the policy. Because the index directs the insured to the reducing clause found at page 7 of the policy, Sevcik insists that Secura "instructs the insured to look in the wrong place for a policy passage superseded elsewhere." We disagree.

¶16 First, the "amounts payable" language is not utilized in the actual reducing clause language at issue in the Secura policy. Moreover, ***Kaun*** did not

hold that the phrase "amounts payable" was in itself ambiguous, regardless of usage or placement. In addition, after ***Kaun*** was decided in 1989, the legislature amended the UIM statute, WIS. STAT. § 632.32(5)(i). Thus, the court in ***Kaun*** did not consider the current statute. As discussed previously, the Secura policy tracks the language of § 632.32(5)(i)1.

¶17 That the index directs the insured to page 7 of the policy for the reducing clause, when that provision is deleted and replaced by the Wisconsin endorsement, also does not render the policy ambiguous. As mentioned previously, a reasonable insured reading the declarations page of Secura's policy would understand that he or she needs to read the endorsements listed in order to understand the details of coverage. The Wisconsin endorsement advises the insured that the reducing clause found on page 7 of the policy is deleted and replaced.

¶18 The absence of specific reference to the Wisconsin endorsement in the index is also not critical. The policy is a generic policy intended for use in all jurisdictions. As such, the index does not reflect any endorsements unique to a particular jurisdiction. ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶31 n.8, 269 Wis. 2d 204, 674 N.W.2d 665. Further, the index specifically states on the top of the page in capital letters: "THESE POLICY PROVISIONS WITH THE DECLARATIONS PAGE AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THIS POLICY." As noted previously, the declarations page specifically refers to endorsements by form number, which corresponds to the Wisconsin endorsement. Armed with those warnings and this information, a reasonable insured would seek out the Wisconsin endorsement, even though it is not expressly referenced in the index. ***Id.***, ¶31.

¶19 Sevcik next argues that the interplay between the limit of liability clause and reducing clause renders the policy ambiguous. Sevcik contends that ***Badger Mutual*** is controlling. Sevcik insists that "to the average insured 'limit of liability' means the most Secura will pay and nothing on the declarations page dispels this notion."[3] Sevcik further insists that "[b]y using the identical term to describe every coverage it sold, Secura reinforces the impression its 'limits of liability' are the most Secura will pay, including for UIM coverage."

¶20 We do not agree that the limits of liability clause commits Secura to pay the maximum limits of its liability to the exclusion of other relevant provisions of the policy. Indeed, this argument was rejected by this court in ***Vorbeck***, where we viewed the language as stating nothing more than the obvious under well-established precepts of insurance contract law: the insurer will pay the maximum of its limits of liability "*in the appropriate case and under the appropriate circumstances subject to the terms of the insurance policy read as a whole.*" ***Id.***, ¶39 (emphasis in original). *See also* ***Gohde v. MSI Ins. Co.***, 2004 WI App 69, ¶16, 272 Wis. 2d 313, 679 N.W.2d 835; ***Van Erden***, 271 Wis. 2d 163, ¶¶17-19.

¶21 For reasons discussed previously, Sevcik is also incorrect in insisting that nothing on the declarations page dispels the perceived notion that the limits of liability represent an unequivocal commitment to pay the maximum amount. A reasonable insured would review the declarations page and be directed to the Wisconsin endorsement. Here the insured would find the reducing clause. The

[3] Sevcik provides no authority for the statement concerning the meaning of the provision to the average insured.

reducing clause states the most that will be paid under the policy "shall be reduced" in certain circumstances. *See* ***Gohde***, 272 Wis. 2d 313, ¶¶14-16.

¶22 Quite simply, ***Badger Mutual*** is distinguishable from the vastly different policy language and format utilized by Secura, and the numerous other cases that have found UIM reducing clauses to be unambiguous. Unlike ***Badger Mutual***, the Secura policy contains an informational declarations page that lays out the limits of liability and also specifically references the endorsement form that corresponds to the Wisconsin endorsement. The index advises that the endorsements are a part of the policy. *See* ***Folkman***, 264 Wis. 2d 617, ¶¶51-56. The reducing clause contained in the Wisconsin endorsement advises the insured that the limits of liability of UIM coverage shall be reduced by amounts paid on behalf of any person that may be legally responsible. In short, the Secura policy does not represent the organizational maze condemned in ***Badger Mutual***. *See* ***Vorbeck***, 269 Wis. 2d 204, ¶¶29-30.

¶23 Sevcik also argues "the policy format is oppressively cumbersome which makes it ambiguous in combination with other flaws." In this regard, we observed in ***Vorbeck*** that the reading of most insurance policies is not an easy task. As the trial court in that case aptly put it, the process is often "cumbersome." ***Id.***, ¶34. However, this difficulty does not render a policy contextually ambiguous. ***Id.*** Rather, the question is whether the provisions under inquiry lead to a reasonable alternative meaning because of the language, location, labeling, or inconsistency with other provisions. ***Id.*** In the present case, we conclude the organization and structure is not contextually ambiguous. The policy takes the insured through a reasonably orderly and logical sequence. We reject Sevcik's contention that the policy is significantly unlike the policies that have already been found to be unambiguous. For the foregoing reasons, the judgment is affirmed.

By the Court.—Judgment affirmed.

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