COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1171 **Cir. Ct. No. 2004CV9511**

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

SPENCE M. KELLEY,

PLAINTIFF-APPELLANT,

MICHAEL LEAVITT, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES AND WISCONSIN INSURANCE SECURITY FUND,

PLAINTIFFS,

V.

AAA AUTO CLUB INSURANCE ASSOCIATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed and cause remanded with directions*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. Spence M. Kelley appeals from a judgment entered after a jury trial and postverdict motions. He raises several contentions: (1) the trial court erred in ruling that his underinsured motorist (UIM) coverage under the two policies he had from the AAA Auto Club Insurance Association could not be stacked; (2) the reducing clause in the policy was both ambiguous and contextually ambiguous and therefore should not have been applied; and (3) the trial court erred in ruling that the postverdict interest would commence from the date the motions were decided, rather than the date of the verdict. Because AAA's policy contains a valid anti-stacking clause, the trial court did not err in ruling that the two policy limits could not be stacked in this case. Because the reducing clause in AAA's policy was neither ambiguous nor contextually ambiguous, the trial court did not err in reducing the jury award by the amount paid by the tortfeasor in this case and the worker's compensation payments. Because WIS. STAT. § 814.04 (2003-04)[1] requires interest to commence on the date of the verdict in this case, the trial court erred in delaying the start of interest to the date the postverdict motions were decided. Accordingly, we affirm the judgment, but order the trial court to amend the judgment so that postverdict interest is calculated from the date of the jury verdict.

BACKGROUND

¶2 On December 18, 2001, Kelley was working as a crossing guard when he was hit by a van, causing substantial injury to his right shoulder. The

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

driver of the van's insurance company paid its $25,000 liability policy limit to Kelley. When Kelley's damages exceeded that amount, he filed a claim against his own insurance carrier, AAA, under the UIM provision of the policy. Kelley's policy insured two different vehicles and each had $250,000 UIM limits. When Kelley and AAA could not reach an agreement on the damage amount, Kelley filed this lawsuit in October 2004.

¶3 Kelley filed a motion for declaratory judgment requesting that the trial court allow him to stack the two $250,000 UIM policy limits on each vehicle, so as to have a total of $500,000 available to cover damages. The trial court ruled that the language of the policy precluded stacking and further determined that the reducing clause should be applied.

¶4 The case was tried to the jury on damages only. On November 29, 2006, the jury returned a verdict in favor of Kelley in the amount of $351,360.40. Motions after verdict were heard on January 5, 2007. At that time, the trial court ruled that the UIM limit of $250,000 would be reduced by the $25,000 paid to Kelley by the tortfeasor's insurance carrier and would also be reduced by the $29,352.63 in worker's compensation benefits. It was discovered at this time that a judgment had not yet been entered. As a result, the trial court held a phone conference on February 7, 2007. At this time, the trial court ruled that postverdict interest would begin to run from January 5th rather than November 29th. Judgment was entered. Kelley now appeals.

DISCUSSION

A. Stacking.

¶5 Kelley argues that he should be allowed to stack the two $250,000 UIM limits in the policy "because the policy does not contain critical language required for the provisions of Section 632.32(5)(f) to be given effect." We are not convinced.

¶6 This issue involves interpretation of an insurance policy and the interpretation of a statute. These are both legal issues and therefore will be reviewed independently. *See* ***Martin v. Milwaukee Mut. Ins. Co.***, 146 Wis. 2d 759, 766, 433 N.W.2d 1 (1988); ***West Bend Mut. Ins. Co. v. Playman***, 171 Wis. 2d 37, 40, 489 N.W.2d 915 (1992). We interpret an insurance policy using the same rules of construction that are applied to other contracts. ***Allstate Ins. Co. v. Gifford***, 178 Wis. 2d 341, 346, 504 N.W.2d 370 (Ct. App. 1993). "The policy language, as the agreed-upon articulation of the bargain reached between the parties, is dispositive to the extent it is plain and unambiguous." ***Id.*** If the terms of an insurance contract are plain on their face, the policy must not be rewritten by construction. ***Id.*** An insurance contract is to be construed so as to give effect to the intentions of the contracting parties. ***Kennedy v. Washington Nat'l Ins. Co.***, 136 Wis. 2d 425, 428, 401 N.W.2d 842 (Ct. App. 1987). When the terms of the policy are unambiguous, they should be applied according to their everyday meaning, except where the policy itself provides an application definition. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 736, 351 N.W.2d 156 (1984). We do this in order to ascertain what a reasonable insured's anticipation of coverage would be. ***Id.*** at 736. The "test" is "not what the insurer intended the words to mean but what a reasonable person in the position of the

insured would have understood them to mean." ***Ehlers v. Colonial Penn Ins. Co.***, 81 Wis. 2d 64, 74-75, 259 N.W.2d 718 (1977).

WISCONSIN STAT. § 632.32(5)(f) provides:

> A policy may provide that regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident.

This statute is commonly referred to as the "anti-stacking" statute. Kelley argues that the AAA policy did not contain the specific "may not be added" language, and therefore the anti-stacking statute does not apply. We reject this contention.

The language of the AAA policy states in pertinent part:

> **TWO OR MORE AUTO POLICIES**
>
> If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

(Bolding in original). The UIM endorsement, which tracks the same language of the insuring agreement specifically states:

> **LIMIT OF LIABILITY**
>
> A. The limit of liability shown in the Schedule or in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:
>
> 1. "Insureds";
>
> 2. Claims made;

> 3. Vehicles or premiums shown in the Schedule or in the Declarations; or
>
> 4. Vehicles involved in the accident.

(Bolding in original).

¶7 Kelley contends that in order for the anti-stacking statute to apply, the language of the policy must exactly match the language of the statute. Although an exact match of the statutory language would eliminate arguments such as the one raised in this case, case law has not required that "magic language" or an exact "parrot [of] the statute" be used in order to prohibit stacking. ***Hanson v. Prudential Prop. & Cas. Ins. Co.***, 224 Wis. 2d 356, 370, 591 N.W.2d 619 (Ct. App. 1999). In comparing the language of the AAA policy to the language of the statute, we conclude that the provisions are sufficient to prohibit stacking of the policies in this case. Accordingly, the trial court did not err in so ruling.

¶8 In his reply brief, Kelley cites for the first time WIS. STAT. § 632.32(5)(g), which specifically references pedestrian accidents:

> A policy may provide that the maximum amount of uninsured or underinsured motorist coverage available for bodily injury or death suffered by a person who was not using a motor vehicle at the time of an accident is the highest single limit of uninsured or underinsured motorist coverage, whichever is applicable, for any motor vehicle with respect to which the person is insured.

He argues that sub. (g) governs and that the AAA policy does not contain the language of sub. (g). Accordingly, he asserts that the two $250,000 policies can be stacked. His argument is without merit. The AAA policy, quoted above, clearly contains the anti-stacking language set forth in sub. (g).

¶9 Finally, with respect to this issue, Kelley argues there is a material issue of disputed fact. He contends that there were two different policies

presented in this case. The first was the policy he had, which did not contain the UIM endorsement. The second was the policy AAA had, which did contain the UIM endorsement. Kelley argues that this case should be sent back to the trial court so that a jury could determine exactly which version of the insurance policy should be interpreted.

¶10 During trial court proceedings, Kelley contended that he never received the UIM endorsement. AAA submitted an affidavit averring that the endorsement was mailed to Kelley. The trial court ruled that there was no material issue of disputed fact, noting that Kelley was contending he had UIM coverage at the same time he was arguing he never received the UIM endorsement. In any event, we conclude that any dispute relative to the endorsement is immaterial. As AAA points out, Kelley's counsel conceded that "just because there are two different policies I don't think it makes much of a difference." By telling the trial court that the differences between the policies were immaterial, Kelley waived the right to raise the issue that he raises herein. *See* ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 642-43, 566 N.W.2d 158 (Ct. App. 1997).

B. Reducing Clause.

¶11 Kelley also contends that the AAA policy's reducing clause was ambiguous and contextually ambiguous and therefore, the trial court should not have ordered that the award be reduced by the $25,000 liability payment from the tortfeasor or the $29,352.63. We are not convinced.

¶12 Again, this issue involves interpretation of an insurance contract and a statute; thus, our review is *de novo*. ***Martin***, 146 Wis. 2d at 766, ***West Bend Mut. Ins. Co.***, 171 Wis. 2d 40.

The reducing clause in the AAA policy provides:

> 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.

¶13 Kelley contends that the reducing clause is ambiguous because it does not track the language of WIS. STAT. § 632.32(5)(i), which provides:

> A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.

Kelley does not address the limit of liability policy language set forth above. Rather, his argument is focused on the following language in the policy:

> D. We will 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.

¶14 Kelley confuses the "duplicate payment" clause with the reducing clause. The same argument was made and rejected in ***Ruenger v. Soodsma***, 2005 WI App 79, 281 Wis. 2d 228, 695 N.W.2d 840:

> [The duplicate payment 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. The two

> provisions are not inconsistent. We are satisfied that a reasonable insured would not be misled by [the duplicate payment clause] to believe that if there is no duplication under that subsection, there is no reduction under the reducing clause.

Id., ¶24. Thus, Kelley's contention that AAA's reducing clause is ambiguous because of the duplicate payment clause fails.

¶15 Kelley also argues that the reductions were unfair because he did not actually receive all of the $25,000 liability from the tortfeasor or the $29,352.63. He states that he only received $5,523.80 of the liability proceeds and $8,428.58 of the worker's compensation proceeds. The balance went to pay medical bills, attorney bills, etc. Although this court can certainly sympathize with Kelley's position, we are without authority to alter this outcome. Such is the price of proceeding through our legal system. We are bound to interpret the contract and apply the reductions as required by the contract. Here, the contract requires the reductions and the statutory law permits the reductions. Thus, we must affirm.

¶16 Because we have concluded that the reducing clause in AAA's policy is not ambiguous, we turn to the next question: Is the reducing clause ambiguous in the context of the other provisions of the policy? *See* ***Marotz v. Hallman***, 2007 WI 89, ¶¶27, 38, 302 Wis. 2d 428, 734 N.W.2d 411; ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, ¶27, 302 Wis. 2d 409, 734 N.W.2d 386.

¶17 In addressing contextual ambiguity, we start with the declarations page. As in ***Bailey***, wherein no contextual ambiguity was found, AAA's declarations page lists the types of coverage and the liability for each. The list includes "Underinsured Motorists Bodily Injury" and references form PP0428. Form PP0428 is the UIM endorsement. It states at the top in all bold and capital

letters: **"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**." The endorsement then sets forth the reducing clause language.

¶18 Based on this review, we are not convinced that the reducing clause is contextually ambiguous. The AAA policy "'clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining payments made from all sources."' ***Bailey***, 302 Wis. 2d 409, ¶32 (citation omitted).

¶19 We are not persuaded by Kelley's additional arguments that the trial court erroneously believed that the reducing clause was referenced on the declarations page, or that failure to state on the declarations page that a reducing clause appears within the UIM endorsement voids the reducing clause. First, the record does not suggest to us that the trial court believed the reducing clause was referenced on the declarations page. Kelley was mistaken in that regard. Rather, the record reflects the trial court's statement that the declarations page *and* the reducing clause must be read together. The trial court noted that the declarations page contained a form reference to the endorsement and that endorsement, in turn, contained the reducing clause. We similarly reject Kelley's contention that the trial court mistakenly believed the language "This endorsement changes the policy. Please read it carefully" appeared on the declarations page. The record reflects that the trial court was reading from the actual endorsement when it referred to this language.

¶20 Second, we are not convinced that the failure to state on the declarations page that the reducing clause is contained within the UIM endorsement voids the reducing clause in this case. A reference to the UIM

endorsement that contains the reducing clause was sufficient here as it was in ***Id.***, ¶32. *But see* ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, ¶¶62-72, 647 N.W.2d 223 (contextual ambiguity found in part because the declaration page did not reference a reducing clause).

¶21 Finally, Kelley argues that because the quick reference sheet, which acts as a table of contents in the AAA policy does not reference the UIM endorsement, there is contextual ambiguity. We disagree. Failure to reference the UIM endorsement in the quick reference sheet did not cause ambiguity. ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶21, 272 Wis. 2d 324, 679 N.W.2d 827.

¶22 Based on the foregoing review, we conclude that the AAA policy is not contextually ambiguous. The declarations page clearly references the UIM endorsement form number. The form is clearly identified and labeled. The UIM endorsement contains an unambiguous reducing clause and does not contradict policy provisions found elsewhere. Accordingly, based on the law set forth in ***Bailey***, AAA's reducing clause is not contextually ambiguous. Thus, the trial court did not err in applying the reducing clause in this case.

C. Postverdict Interest.

¶23 Kelley's last argument is that the trial court erred when it determined that postverdict interest would commence from the postverdict motions date of January 5, 2007, rather than the date of the verdict, November 29, 2006. We agree that the trial court so erred.

WISCONSIN STAT. § 814.04(4) provides in pertinent part:

> "[I]nterest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs."

This statutory language uses the mandatory term "shall" and specifically states that interest runs from the time of the *verdict*. AAA concedes that the trial court erred in commencing the interest calculation from the postverdict motion date. AAA concedes that interest should commence from the date of the verdict, November 29, 2006.

¶24 This rule applies even though the amount of the verdict rendered was reduced at postverdict motions. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 224 Wis. 2d 312, 324, 592 N.W.2d 279 (Ct. App. 1998) (When the verdict serves as the basis for the judgment, regardless of whether the defendant knows the exact amount of damages for which he is liable, interest begins to run on the date of the verdict.) Here, the judgment is based on the verdict. Accordingly, interest must be calculated based on the November 29, 2006 verdict date.

¶25 We are, however, not convinced by Kelley's assertion that AAA must pay interest on the *actual* jury verdict amount, rather than the amount determined by the trial court at postverdict motions. The *actual* jury verdict award was $351,360.40. However, because AAA's UIM limit was $250,000, it would not be obligated to pay more than $250,000. In addition, that amount was reduced, pursuant to the reducing clause. After reductions, the trial court set AAA's liability at $195,647.37.

¶26 Controlling case law very clearly sets forth that interest cannot be based on a jury verdict amount which exceeds an insurer's liability. *See* ***Blank v. USAA Prop. & Cas. Ins. Co.***, 200 Wis. 2d 270, 281, 546 N.W.2d 512 (Ct. App. 1996) ("WIS. STAT. Section 814.04(4) … does not impose interest on the verdict upon the insurer for sums in excess of policy limits.") Both common sense and the law dictate that the insurer should only be required to pay interest on the amount it is liable for. ***Overbeek v. Heimbecker***, 101 F.3d 1225, 1227-28 (7th Cir. 1996).

¶27 Accordingly, we affirm the judgment, but direct the trial court to amend the judgment so that postverdict interest is calculated from the date of the jury verdict on the total amount AAA was ultimately found to owe.

By the Court.—Judgment affirmed and cause remanded with directions.

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