

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP2575

Cir. Ct. No. 2006CV12634

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STANLEY M. BRODER AND SANDRA BRODER,

PLAINTIFFS-APPELLANTS,

v.

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Stanley M. and Sandra Broder appeal from the trial court order declaring that the \$1,000,000 personal umbrella policy they had with Acuity Insurance Company did not provide underinsured motorist coverage (UIM) for the damages the Broders incurred following an automobile accident. The

Broders contend that the policy provisions create contextual ambiguity and, therefore, the umbrella policy should provide UIM coverage. Because the insurance policy is not contextually ambiguous, we reject the Broders' contention and affirm.

BACKGROUND

¶2 On January 11, 2006, the Broders were together in their automobile, with Stanley driving, heading north on Highway 57 near LaFayette, Illinois. They were struck by a vehicle coming in the opposite direction, driven by Jarrod Curtis. Curtis lost control of his car, crossed the median and crashed into the Broders' vehicle. The Broders suffered substantial injuries in the crash.

¶3 As a result of the accident, the insurance companies covering Curtis paid their limits, under two policies, to the Broders. The Broders then turned to their insurer, Acuity, to recover additional monies to cover their damages. The Broders had an insurance policy with Acuity that included homeowners, automobile liability, uninsured/underinsured motorist, and personal umbrella liability coverages. In December 2006, the Broders filed suit against Acuity seeking underinsured motorists coverage under the policy. Acuity eventually paid its \$300,000 UIM limit to the Broders as well as the \$50,000 penalty required by the Wisconsin Supreme Court in *Stone v. Acuity*, 2008 WI 30, ¶2, 308 Wis. 2d 558, 747 N.W.2d 149 for Acuity's failure to provide the Broders with notice that excess UIM coverage under the umbrella was available at the time they purchased their insurance policy. *See also* WIS. STAT. § 632.32(4m) (2007-08)¹ (insurer is

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

obligated to provide written notice to insured “of the availability of underinsured motorist coverage”).

¶4 Acuity asserted, however, that based on the policy issued, there was no UIM excess coverage under the umbrella policy. The Broders filed a declaratory judgment action seeking a declaration from the trial court that the policy was contextually ambiguous and therefore should be construed to provide excess UIM coverage under the umbrella policy. The trial court denied the motion, ruling that: “the ACUITY policy issued to The Broders at the time of the motor vehicle accident, which is the subject of the lawsuit, does not provide umbrella uninsured/underinsured motorist coverage due to contextual ambiguity.” An order was entered to that effect. The Broders now appeal.

DISCUSSION

¶5 The Broders contend that the Acuity policy is contextually ambiguous because of the way it is organized and because it creates a false expectation of excess UIM coverage under the umbrella policy; as a result, the Broders argue that the policy should be construed to provide excess UIM coverage of \$1,000,000 pursuant to the personal umbrella coverage. Acuity responds that the policy is organized and clear and the coverage grant in the umbrella portion of the policy applies only to liability claims made against the Broders. Acuity asserts that the Broders’ argument is based on an unreasonable “ferreting” through the policy in an attempt to create contextual ambiguity where none exists. *See Folkman v. Quamme*, 2003 WI 116, ¶¶21, 32, 264 Wis. 2d 617, 665 N.W.2d 857. We affirm the trial court’s determination that the Acuity policy is not contextually ambiguous and, therefore, the Broders are not entitled to coverage for their UIM claim from the \$1,000,000 umbrella policy.

I. Standard of Review

¶6 The issue in this case is whether an insurance policy is contextually ambiguous. Our review, therefore, requires interpretation of an insurance policy, which is a question of law reviewed *de novo*. *Id.*, ¶12. In reviewing an insurance policy, we look at the language of the policy to ascertain the intent of the parties. *Id.* If the language is clear, we apply the plain meaning of the language and stop there. *Id.*, ¶¶13, 16-17. If the language, or the policy as a whole is ambiguous, we construe the policy in favor of the insured. *Id.*, ¶13. Language is ambiguous if it is reasonably susceptible to more than one interpretation. *Id.* Moreover, when a provision is not ambiguous, it may be ambiguous in the context of the entire policy—that is, based on “the organization, labeling, explanation, inconsistency, omission, and text of the other provisions in the policy.” *Id.*, ¶19. An insurance policy is contextually ambiguous when one of the preceding factors creates obscurity or deception “that ... befuddles the understanding and expectations of a reasonable insured.” *Id.*, ¶20.

II. Policy Provisions

¶7 The policy that the Broders purchased from Acuity was a “Road and Residence” policy. The Road and Residence Amended Declarations consists of two pages. Page one sets forth “**COVERAGES**” as:

Section I –	Property Limit.....	\$300,000
	Property Deductible	\$250
	Part A – Residence Limit.....	\$20,000
	Part B – Personal Property Limit.....	\$54,000
Section II –	Liability Limit.....	\$300,000
	Medical Payments Limit.....	\$5,000
	Medical Payments Limit if wearing a seat belt.....	\$10,000

Section III – Uninsured Motorists Limit.....\$300,000
 Underinsured Motorists Limit.....\$300,000

Umbrella – Personal Umbrella Liability Insurance Limit\$1,000,000
 with self-insured retention of.....\$250

¶8 Coverages on page one of the Road and Residence Amended Declarations is followed by sections entitled “**DWELLING,**” and “**VEHICLES,**” which carries over onto page two of the Amended Declarations. Page two of the Road and Residence Amended Declarations lists sections entitled “**PRIMARY INSURANCE FOR UMBRELLA,**” “**FORMS,**” and “**PREMIUMS**” and then lists a section on “**ADDITIONAL RATING INFORMATION.**” The personal umbrella section sets forth: “**PRIMARY INSURANCE FOR UMBRELLA**” and lists:

PRIMARY INSURANCE – Exposures:

Type of Exposure	Limits of Insurance
PERSONAL LIABILITY EXPOSURE	\$300,000 Each Occurrence
AUTO LIABILITY EXPOSURE	\$300,000 Combined Single Limit

¶9 The policy then has a table of contents that separates the policy into three sections: Section I is “**PROPERTY**”; Section II is “**LIABILITY AND MEDICAL PAYMENTS**”; and Section III is “**UNINSURED MOTORISTS AND UNDERINSURED MOTORISTS.**” “**SECTION III**” is followed by a section entitled “**GENERAL PROVISIONS**” ending at page twenty-four, followed by the final section on the page entitled “**ENDORSEMENTS.**” The word “umbrella” does not appear on the table of contents page. The “**ENDORSEMENTS**” section notes that “Endorsement(s) Follow Page 24.” The page following page twenty-four of the policy is entitled “**ENDORSEMENTS.**” It contains eight “RR” endorsements. The first endorsement is “**ROAD AND RESIDENCE COVERAGE ENHANCEMENTS RR-243(6-02).**” The second endorsement is the “**WISCONSIN PERSONAL UMBRELLA RR-15(6-02),**”

which states in pertinent part: “The following provisions apply with respect to Personal Umbrella insurance provided by this endorsement.”

¶10 The umbrella endorsement then lists six “parts”: Part I is “**DEFINITIONS**” under the umbrella policy. The umbrella “**DEFINITIONS**” section then sets forth the definitions of eighteen words or phrases, which are set off by numbers one to eighteen, and, if necessary, broken down further using lower case letters, then parenthesized numbers and then parenthesized lower case letters. Part II is the “**COVERAGE**” grant: “**We** will pay sums in excess of the **primary limit** that an **insured** is legally obligated to pay as damages because of **personal injury** or **property damage** caused by an **occurrence** to which this insurance applies.” Part III is entitled “**EXCLUSIONS**” to the personal umbrella policy. The “**EXCLUSIONS**” section lists exclusions numbered one to twenty-three. Part IV is “**LIMITS OF INSURANCE**” consisting of a single paragraph. Part V is “**WHAT TO DO IN CASE OF ACCIDENT OR LOSS,**” which consists of a single sentence. Part VI is “**CONDITIONS.**” This section lists conditions numbered one to ten addressing: “**1. Defense; Settlement.... 2. Additional Payments.... 3. Appeals.... 4. Suits Against Us.... 5. Other Insurance.... 6. Our Right to Recover Payment.... 7. Death.... 8. Maintenance of Primary Insurance.... 9. Wisconsin Extension of Coverage....**” and condition number 10 addressing cancellation.

¶11 In Part VI, condition number five addresses other insurance:

This insurance is excess over all **primary insurance** and all other recoverable insurance (except insurance purchased to apply in excess of the sum of the **primary insurance** limit and **our** limit of insurance) available to an **insured** including a self-insurance plan.

¶12 In Part VI, condition number eight requires maintenance of primary insurance: “a. **Primary insurance** must be maintained during the policy period at the limits as shown in the Primary Insurance for Umbrella in the Declarations.”

¶13 The endorsements then continue with “**SCHEDULED PERSONAL PROPERTY RR-19(3-93),**” “**JEWELRY,**” “**BOAT AND OUTBOARD MOTOR FORM RR-20(03-99),**” “**CONDOMINIUM UNIT-OWNERS RR-70(12-2000),**” “**INCREASED LOSS ASSESSMENT COVERAGE RR-71(09-97),**” “**UNINSURED MOTORISTS-PROPERTY DAMAGE RR-182(7-98),**” “**LIMITED FUNGI, WET OR DRY ROT, OR BACTERIA COVERAGE RR-245(6-02),**” and “**COVERAGE FOR DAMAGE TO YOUR CAR EXCLUSION RR-248(8-03).**” Each of these sections contains additional information below the heading, setting forth what is covered and/or what is not covered under that specific endorsement, or, in some cases replaces and modifies language in the Road and Residence policy.

III. Application

¶14 The sole issue in this case is whether Acuity must provide excess UIM coverage to the Broders under the umbrella policy. If the policy is contextually ambiguous, then Acuity must provide coverage because ambiguity is construed in favor of the insured. If the policy is not contextually ambiguous, then the Broders are not entitled to coverage.

¶15 Based on our review of the policy, we conclude that the policy is clear, well-organized and easy to understand. It is not contextually ambiguous. First, the organization and labeling of this policy makes it easy to follow and understand. On the Amended Declarations page, it clearly sets forth the coverages: Section I is “Property Limit”; Section II is “Liability Limit”; Section

III is “Uninsured Motorists Limit” and “Underinsured Motorists Limit”; and then listed directly below, which would be Section IV, is “Umbrella.” Although not labeled “Section IV,” “Umbrella” is clearly set off as a separate and distinct section. The Amended Declarations page then has a section on “Dwelling,” followed by a section on “Vehicles,” which is followed by a section on “Primary Insurance for Umbrella.” This latter section, as set forth above, clearly delineates the limits for personal *liability* exposure and auto *liability* exposure. It says nothing about UIM coverage.

¶16 The policy contains a table of contents, which also is clear and well-organized. Again, Section I is “Property”; Section II is “Liability and Medical Payments”; and Section III is “Uninsured Motorists” and “Underinsured Motorists.” (All caps and bolding omitted). Those sections are followed by a separate section on “General Provisions,” which is followed by a separate section entitled “Endorsements.” (All caps and bolding omitted). Although the table of contents page does not specifically list the umbrella policy, it is reasonable to conclude that it will be found under the endorsement section because it was just listed under “**COVERAGES**” on the Amended Declarations page.

¶17 Turning to the Endorsements, “**WISCONSIN PERSONAL UMBRELLA**” is easily found and set off by bold and all caps. This section, as noted above, is organized into six easily identifiable parts. The first part is clearly marked as the definitions part. The second part is clearly marked as the coverage grant. The umbrella coverage grant provides: “**We** will pay sums in excess of the **primary limit** that an **insured** is legally obligated to pay as damages because of **personal injury** or **property damage** caused by an **occurrence** to which this insurance applies.” Neither the Broders nor Acuity contend that the coverage grant is ambiguous. In fact, if we stop our analysis based on the clarity of the

umbrella coverage grant, the Broders would concede that there is no excess UIM coverage based on the plain language of the policy. This language does not mention UIM coverage and can be reasonably interpreted only one way: Acuity will pay any sums above the primary limit to a third person when the Broders are legally obligated to pay for damages as a result of personal injury or property damage. In other words, the umbrella policy applies when the Broders are liable to pay damages to someone else. The coverage grant, standing alone, is clear and unambiguous.

¶18 Part III of the umbrella policy lists exclusions. There is no exclusion for UIM coverage. There is, however, an exclusion for personal injury to you or a relative, which should signal to a reasonable insured that Acuity is not going to pay out under the umbrella policy for injuries the insured sustains. This exclusion supports the clarity of the umbrella coverage grant. The Broders argue that the exception, that follows this exclusion creates ambiguity: “This exclusion does not apply to damages arising out of the ownership, maintenance or use, loading or unloading of an **auto**.” It is well-established, however, that an exception to an exclusion cannot create coverage where the coverage grant did not extend coverage. *Jaderborg v. American Family Mut. Ins. Co.*, 2000 WI App 246, ¶17, 239 Wis. 2d 533, 620 N.W.2d 468. The coverage grant here, clearly does not extend umbrella coverage for UIM claims and thus, this exception, in an otherwise clear and unambiguous policy cannot be interpreted to create false expectations of UIM umbrella coverage.

¶19 Part VI of the umbrella policy sets forth conditions and describes “other insurance” and “maintenance of primary insurance.” These conditions spell out that the umbrella policy only works if the insured has primary insurance. Although the conditions do not specifically indicate whether the insured is

required to maintain primary insurance on the auto or on the personal property policies that they have, it is clear that the insured must have primary insurance in order to have umbrella insurance. The definitions section of the umbrella policy clarifies the meaning of primary limit and can only be reasonably interpreted in one way: the umbrella policy applies to either personal liability exposure or auto liability exposure, whatever the insured maintains.

¶20 Based on our review of the policy, we conclude that it is not contextually ambiguous. The structure and organization of the policy is presented in an orderly and easy to follow format. It allows the insured to move from one section to another without undue confusion or frustration. An insured picking up this policy would be able to easily locate the personal umbrella part, and after reading the coverage grant, conclude that the umbrella policy is not going to cover the UIM damages the Broders were seeking. If they continued to read the remainder of the umbrella policy, including the definitions, exclusions and conditions, a reasonable insured would not be “befuddled” or confused into thinking UIM coverage exists under this umbrella policy. UIM coverage is nowhere to be found in the umbrella policy language.

¶21 The Broders argue that *Stubbe v. Guidant Mutual Insurance Co.*, 2002 WI App 203, 257 Wis. 2d 401, 651 N.W.2d 318 supports their position. We cannot agree. The *Stubbe* court held that an umbrella policy was contextually ambiguous despite a clear coverage grant because the policy made three prominent references to UIM coverage in the umbrella policy. *Id.*, ¶10. First, the Stubbe’s umbrella policy listed UIM coverage as a subheading under the automobile liability coverage. *Id.*, ¶11. Second, the Stubbe’s umbrella policy contained an exclusion for UIM coverage. *Id.*, ¶14. Third, the Stubbe’s umbrella policy contained an endorsement deleting the UIM exclusion. *Id.*

¶22 These three factors led the *Stubbe* court to conclude that a reasonable insured would expect UIM coverage under the umbrella policy because the endorsement deleted the UIM exclusion. *Id.*, ¶15. That is, “An insured may reasonably expect that when an insurance company deletes limiting language in the policy, the purported limitations no longer apply ... and therefore, there is coverage.” *Id.*

¶23 *Stubbe* does not control here because the Acuity umbrella policy did not contain any UIM exclusion, and likewise, did not contain an endorsement deleting an UIM exclusion. There is no reference to UIM coverage anywhere in the umbrella policy. Moreover, unlike *Stubbe*, the UIM coverage in Acuity’s primary policy is not found as a subheading under the automobile liability coverage, but rather is set out as a separate section in the policy. Accordingly, this case is completely distinguishable from *Stubbe*.

¶24 We hold that the Broders’ policy is not contextually ambiguous. The umbrella endorsement clearly indicates that umbrella coverage is only for liability claims the insured is legally obligated to pay. Nothing in the other sections of the umbrella policy creates a false expectation of excess UIM coverage. UIM is never mentioned in the umbrella policy. We also reject the Broders’ argument that the failure to define “liability” or “legal responsibility” creates contextual ambiguity. The meaning of these words is plain and can only be reasonably interpreted in one way: the personal umbrella insurance applies when the Broders must pay a third party’s damages, which exceed the limits of the primary policy.

¶25 We further hold that the Broders’ reliance on *Muehlenbein v. West Bend Mutual Insurance Co.*, 175 Wis. 2d 259, 499 N.W.2d 233 (Ct. App. 1993)

is misplaced. In *Muehlenbein*, West Bend Mutual Insurance Company added an endorsement to clarify that the commercial umbrella policy did not include UM/UIM coverage. *Id.* at 262-63. The issue was whether the endorsement made an otherwise clear policy ambiguous. *Id.* at 262. The *Muehlenbein* court held that the endorsement did not create ambiguity. *Id.* at 265. Contrary to the Broders' assertion, *Muehlenbein* does not stand for the proposition that an insurer *must* add an endorsement to clarify that the umbrella policy does not cover UM/UIM claims. Rather, it held that an insurance company *may* "us[e] an endorsement to protect itself from potential arguments about what is covered." *Id.* at 269. *Muehlenbein* is inapplicable to the instant case because Acuity did not add an endorsement similar to the one in *Muehlenbein*.

¶26 Finally, we are not convinced that any comments the trial court made in conducting a complete review of all the arguments somehow renders the Acuity policy contextually ambiguous. Insurance policies are complicated. They get more complicated every time a court issues a decision on a coverage issue. The two cases referenced here give a prime example. In *Muehlenbein*, this court ruled that an endorsement did not expand coverage. *Id.* at 262. In *Stubbe*, this court determined that the policy was contextually ambiguous based on an endorsement. *Id.*, 257 Wis. 2d 401, ¶15.

¶27 Insurance coverage cases must be examined individually, based on the specific language in each policy. Difficulty in reading an insurance policy does not automatically render the policy contextually ambiguous. *Commercial Union Midwest Ins. Co. v. Vorbeck*, 2004 WI App 11, ¶34, 269 Wis. 2d 204, 674 N.W.2d 665. Similarly, the trial court expressing the difficulty it had in reaching its conclusion does not render the policy ambiguous. Rather, the trial court's

careful consideration given to the arguments on both sides is what makes our justice system impartial and fair.

¶28 The Acuity policy involved in this case was set forth in a clear and easy to understand format. The different sections were set off and clearly labeled. We hold that the coverage grant in the umbrella policy was clear and that nothing else in the policy created contextual ambiguity. A reasonable insured reading this policy would not expect the umbrella policy to cover damages the insured incurs as a result of an accident with a underinsured motorist. Rather, an insured reading this policy would expect the umbrella policy to cover damages an insured is legally obligated to pay to a third party. Accordingly, we hold that the Broders are not entitled to excess UIM coverage under the umbrella policy. We affirm the declaration of the trial court to that effect.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

