COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1429-FT **Cir. Ct. No. 2005CV1602**

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

KRISTIN A. SAWOTKA,

PLAINTIFF-APPELLANT,

V.

AMERICAN MERCHANTS CASUALTY COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kristin Sawotka appeals a declaratory judgment and an order dismissing her underinsured motorist (UIM) coverage case.[1] The circuit court dismissed the case after American Merchants Casualty Company paid the statutory minimum $50,000 limit after stipulating to UIM coverage in Sawotka's umbrella policy. Sawotka argues the court erroneously concluded the stipulation did not incorporate the $1,000,000 policy limit. We agree and reverse and remand for further proceedings.

BACKGROUND

¶2 Sawotka was severely injured in 1999 in a head-on automobile collision that resulted in multiple fatalities.[2] The tortfeasor's insurance company paid its $100,000 liability insurance limit and American Merchants paid its $150,000 UIM limit on Sawotka's automobile policy. Sawotka's settlement letter to American Merchants stated she "expressly reserves her rights under her [umbrella policy] which has $1,000,000.00 in Underinsured Motorists coverage." After Sawotka sued for coverage under the umbrella policy, American Merchants moved for summary judgment.

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[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Neither party provides proper citations to the record on appeal in their statements of fact, procedural history, or arguments. The parties also, without citation, attribute throughout their briefs certain statements, intentions, or rulings to the circuit court. We disregard those representations unless we have found independent record support.

Counsels' persistent failure to provide citation to the record violates WIS. STAT. RULES 809.19(1)(d)-(1)(e), does a disservice to their clients, and seriously hampers our ability to efficiently resolve the appeal, contrary to the intent of the expedited appeal process. Additionally, Sawotka's reply brief includes an appendix containing documents that are not part of the appellate record. We therefore sanction both parties' appellate counsel, and direct Sawotka's counsel to pay $200 and American Merchants' counsel to pay $150 to the clerk of this court within thirty days of this decision. *See* WIS. STAT. RULE 809.83(2).

¶3 American Merchants contended the umbrella policy did not provide UIM coverage, but Sawotka argued the policy was ambiguous and claimed American Merchants failed to provide the statutorily required notice of availability of UIM coverage. The circuit court denied the summary judgment motion based on American Merchants' failure to provide the notice required by WIS. STAT. § 632.32(4m). The court then scheduled a one-day coverage trial to determine whether Sawotka's parents would have purchased the UIM coverage if given the notice.

¶4 Three days before trial, Sawotka filed a trial brief and appended a copy of ***Stone v. Acuity Insurance***, which was decided August 15, 2006. ***Stone v. Acuity Ins.***, 2006 WI App 205, 296 Wis. 2d 240, 723 N.W.2d 766 (***Stone I***), *aff'd*, 2008 WI 30, 308 Wis. 2d 558, 747 N.W.2d 149 (***Stone II***). The single-page brief asserted that ***Stone I*** "declared that reformation is an appropriate remedy for a violation of [WIS. STAT. §] 632.32(4m). Reformation would provide the plaintiff with the umbrella coverage under the [umbrella policy]." On September 18, 2006, the day before trial, American Merchants faxed a letter to Sawotka indicating it "agreed to provide coverage under the umbrella." The letter stated the coverage trial could therefore be cancelled and American Merchants would contact her "as to how we wish to proceed on the damage issue." Following a scheduling conference a few weeks later, a trial was scheduled for September 18, 2007.[3]

¶5 American Merchants paid the jury fee and arranged an independent medical examination of Sawotka. Shortly before the scheduled trial date, a new

[3] Sawotka provides no citation documenting the scheduled trial date, but American Merchants does not dispute it.

judge was assigned to the case. According to Sawotka, the damages trial was then postponed due to her continuing medical treatment. In June 2008, American Merchants moved for declaratory judgment based on ***Stone II***, arguing it was only obligated to provide the minimum $50,000 UIM limit required by statute. The circuit court agreed and, after American Merchants paid the $50,000, dismissed the case. Sawotka now appeals.

DISCUSSION

¶6 The parties agree "interpretation of a stipulation must, above all, give effect to the intention of the parties." ***Stone II***, 308 Wis. 2d 558, ¶67. Contract law principles apply in interpreting stipulations. ***Id.*** Thus, in determining the parties' intentions, the terms of a stipulation should be given their plain or ordinary meaning. ***Id.*** Unless the agreement is ambiguous, "ascertaining the parties' intent 'ends with the four corners of the contract, without consideration of extrinsic evidence.'" ***Id.*** (quoting ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807). A contract is ambiguous when it may be reasonably construed in more than one way. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). In the case of ambiguity, construction is a question for the trier of fact. *See* ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 379, 254 N.W.2d 463 (1977).[4]

[4] Both parties assert our review is of a question of law that we decide independently of the circuit court. Sawotka cites ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989), where we stated, "The construction of a stipulation is a question of law." That statement, however, appears to be overly broad, and to the extent it conflicts with pronouncements of our state supreme court, we may not rely on it.

¶7 Sawotka argues the background facts set forth herein demonstrate the parties' intent that there was $1,000,000 UIM coverage. American Merchants, on the other hand, discusses ***Stone II*** and argues the stipulation in this case must be distinguished from the stipulation there, which specifically stated an amount of damages agreed to by the insurer. Specifically, American Merchants argues the stipulation unambiguously does not set forth an agreement as to the *amount* of coverage under the umbrella policy.

¶8 We conclude the stipulation is ambiguous. While the stipulation letter does not specifically state American Merchants agreed to the amount of coverage, neither does it suggest American Merchants disputed that "coverage under the umbrella" was anything but the full coverage limit that would have applied had Sawotka purchased the policy's UIM coverage. Further, despite the lack of an explicit reference to a coverage limit, the letter suggests there were only two contested issues to be decided: coverage and damages.[5] Thus, considering only what is contained within the "four corners" of the stipulation, a person might reasonably interpret it consistent with either party's interpretation.

[5] The letter from American Merchants' counsel to Sawotka's counsel states, in full:

> This correspondence is with regards to the *Sawotka v. American Merchants* matter. American Merchants has agreed to provide coverage under the umbrella. There will be no costs to either party. Therefore, based on the fact that the trial set for tomorrow ... is based solely on the coverage issue, we can remove that from the Court's calendar. I will contact you as to how we wish to proceed on the damage issue. I will contact my client to discuss further, and get back to you in the next few days.
>
> In the meantime, if you have any questions or comments, please feel free to let me know.

¶9 In its declaratory judgment decision, the circuit court did not seek to determine the parties' intent. The court recognized Sawotka's argument "that the stipulation reflects the intent of the parties that the full coverage limit of the policy applies." But, the court then proceeded to distinguish the stipulation from the one in ***Stone II***, stating that "unlike *Stone*, there is no agreement or stipulation as to what amount plaintiff is entitled to recover if there is coverage under the umbrella policy." While the court correctly noted the distinction, this merely reflects the stipulation's language that the amount of damages remained to be determined. This does not resolve the issue of whether the parties believed they were agreeing to full coverage.

¶10 As recognized above, the construction of an ambiguous stipulation presents a question of fact. Thus, ordinarily we would remand to the circuit court for a determination of the parties' intent. Nonetheless, we conclude a remand is unnecessary because we are able to resolve the question as a matter of law. *See* ***Kellar v. Lloyd***, 180 Wis. 2d 162, 176, 509 N.W.2d 87 (Ct. App. 1993) (where the evidence is undisputed, the issue of intent may be determined as a matter of law). When considering extrinsic factors in addition to the stipulation's language, we conclude the stipulation can only be interpreted as an agreement to provide full coverage under the $1,000,000 umbrella policy.

¶11 When evaluating extrinsic evidence, it is proper to consider the parties' conduct and the negotiations that took place, both before and after the document was executed, as well as all related documents. ***Pleasure Time***, 78 Wis. 2d at 380 n.3. We have reviewed the record and found no reference to any dispute as to the amount of UIM coverage, if it existed, prior to the date of the stipulation. This context alone is strong evidence that American Merchants

intended, and Sawotka understood, that American Merchants agreed to provide coverage pursuant to the full policy limit.

¶12 It was also clear from the outset that Sawotka claimed there was $1,000,000 UIM coverage under the umbrella. Her initial settlement letter stated precisely that. Her trial brief, citing ***Stone I***, then asserted she was entitled to "*the* umbrella coverage under the [umbrella policy]." (Emphasis added.) *The* coverage clearly referred to the $1,000,000 coverage claimed, which was also the amount of coverage that would have existed had Sawotka's parents purchased the UIM coverage. American Merchants' response to the trial brief days later—the stipulation letter—then stated it "agreed to provide coverage under the umbrella." Considering the language of these three documents together, the stipulation can only be interpreted as an agreement to provide the full policy coverage. The stipulation's omission of a reservation of right to argue coverage in an amount less than that stated in the policy is also telling.

¶13 Additionally, the whole point of the cancelled coverage trial was to determine whether Sawotka's parents would have purchased the UIM coverage. If American Merchants had intended to argue her parents would have purchased a lesser amount of UIM coverage under the umbrella—apparently an impossibility—then it would have had to do so at the coverage trial. Thus, when American Merchants stipulated to coverage and cancelled the trial, it was essentially conceding Sawotka's parents would have purchased the $1,000,000 UIM coverage.

¶14 American Merchants' conduct following its stipulation highlights its intent. Following the stipulation, American Merchants decided to continue to a damages trial and paid its jury fee. It continued on the trial track without moving

to limit Sawotka's damages to a lesser amount of UIM coverage prior to the scheduled trial date. As a matter of fortuity, Sawotka's continuing medical care postponed the damages trial until after ***Stone II*** was decided. When the circuit court declared the coverage was limited to $50,000 pursuant to ***Stone II***, American Merchants then simply dropped its trial plans and paid the $50,000. Thus, it appears American Merchants was proceeding under the assumption it was facing full liability under the umbrella policy for the damages sought by Sawotka from the catastrophic accident. At the very least, American Merchants' conduct demonstrates it believed it had agreed to more than $50,000 in UIM coverage.

¶15 As noted, American Merchants argues the stipulation unambiguously does not agree to provide *full* coverage, because it merely states an agreement to provide "coverage." It argues the supreme court specifically distinguished between coverage and coverage limits in ***Stone II***. However, that was because the court was conforming the insurance contract to the statute. Here, American Merchants did not agree to conform its policy to the statute. Rather, it promised to provide coverage under the existing policy language. Thus, like in ***Stone II***, the insured here is not limited to the statutorily mandated $50,000 coverage.

¶16 Further, American Merchants relies solely on its position that the stipulation was unambiguous on its face, and points to no extrinsic evidence that would support an interpretation that it intended to provide less coverage than that stated in the policy. American Merchants also does not request a remand in the event we determine the stipulation is ambiguous. Thus, once we have deemed the stipulation ambiguous, American Merchants essentially concedes the intent issue by failing to respond to Sawotka's argument. *See* ***Charolais Breeding Ranches,***

Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶17 Finally, though not necessary to the analysis given our conclusion that American Merchants intended to agree to full coverage, we observe that ambiguity in the stipulation should be construed against American Merchants as the drafter. *See* ***Walters v. National Props., LLC***, 2005 WI 87, ¶¶13-14, 282 Wis. 2d 176, 699 N.W.2d 71.

By the Court.—Judgment and order reversed and cause remanded; attorneys sanctioned.

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