COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0299 **Cir. Ct. No. 00 CV 5611**

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

PAMELA E. RUBRICH AND ZURICH AMERICAN INSURANCE COMPANY,

PLAINTIFFS,

V.

PAUL J. PIOTRUSZEWICZ,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

BADGER MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Paul J. Piotruszewicz appeals from the order for summary judgment dismissing his third-party claim against Badger Mutual Insurance Company. He argues that the circuit court erred in concluding that the pay-and-walk provision of his Badger Mutual policy was enforceable and thus permitted Badger Mutual to pay its policy limits and not defend him against Rubrich's tort action for damages in excess of the policy's limits. Specifically, Piotruszewicz argues that: (1) Badger Mutual was required to "seek judicial determination of the validity of its 'pay and walk' provision" prior to exercising the option; (2) Badger Mutual's pay-and-walk provision is ambiguous, and, therefore, unenforceable; (3) Badger Mutual's conduct demonstrated bad faith; and (4) the pay-and-walk provision is void as against public policy. We affirm.

I. BACKGROUND

¶2 On July 28, 1999, Pamela Rubrich was seriously injured when her car collided with a car owned and operated by Piotruszewicz. Piotruszewicz had $100,000 of liability coverage through Badger Mutual.

¶3 In April 2000, Badger Mutual informed Piotruszewicz that it was considering entering into a settlement agreement with Rubrich, and advised Piotruszewicz that if Rubrich did not release him, Badger Mutual would exercise its right to pay the policy limits and withdraw from further involvement. The letter also indicated that, in order to give Piotruszewicz the opportunity to seek counsel, Badger Mutual would not make an offer any earlier than May 1, 2000, and it concluded by indicating that if no objection to such tender was received by May 1, Badger Mutual would consider exercising its pay-and-walk provision.

¶4 Piotruszewicz retained counsel and, after negotiations failed, Badger Mutual entered into a settlement agreement in which it paid Rubrich the policy limits of $100,000; in exchange, Rubrich fully released Badger Mutual and partially released Piotruszewicz.

¶5 Two months later, Rubrich brought an action against Piotruszewicz for excess damages beyond the $100,000 Badger Mutual paid. Piotruszewicz, in turn, filed a third-party suit against Badger Mutual, claiming that it was obligated to defend him even after paying the policy limits. Badger moved for summary judgment; the court granted the motion based on the policy's pay-and-walk provision, which provided that Badger had no duty to defend upon exhaustion of its policy limits.

II. ANALYSIS

¶6 We review an order granting summary judgment *de novo* using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1999-2000).[1]

¶7 Interpretation of an insurance policy provision in the context of undisputed facts presents an issue of law for which we owe no deference to the conclusions of the circuit court. ***Danbeck v. American Family Mut. Ins. Co.***,

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

2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. We apply an objective test to the insurance contract and interpret it as it would be understood by a reasonable person in the insured's position. ***Id.*** The words of an insurance policy are given their common and ordinary meaning. ***Henderson v. State Farm Mut. Auto. Ins. Co.***, 59 Wis. 2d 451, 457-59, 208 N.W.2d 423 (1973). "[T]o avoid rewriting the contract by construction and imposing contract obligations that the parties did not undertake," we enforce plain and unambiguous policy language as written. ***Danbeck***, 2001 WI 91 at ¶10.

¶8 Piotruszewicz argues that this pay-and-walk provision is unenforceable because it does not comply with the requirements specified in ***Gross v. Lloyds of London Insurance Co.***, 121 Wis. 2d 78, 358 N.W.2d 266 (1984). He contends that the policy language does not conform with the mandate set forth in ***Gross*** and, further, that absent court approval, Badger Mutual had no right to exercise the provision. His arguments are without merit.

¶9 In ***Gross***, the supreme court held:

> In order for an insurer to be relieved of its duty to defend upon tender of the policy limits, the "tendered for settlements" language must be highlighted in the policy and binder by means of conspicuous print, such as bold, italicized, or colored type, which gives clear notice to the insured that the insurer may be relieved of its duty to defend by tendering the policy limits for settlement.

Id. at 89. "The court fashioned the conspicuous language requirement in order to place insureds on notice that 'they are buying a policy of indemnity and a defense only up to the point where the insurer tenders the policy limits for settlement and that the insurer's duty to defend ceases once such a tender has been made.'" ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶5, 232 Wis. 2d 53, 606 N.W.2d 590 (citation omitted).

¶10 Here, the Badger Mutual Personal Auto Policy's Insuring Agreement provided:

> **PART A-LIABILITY COVERAGE**
>
> **INSURING AGREEMENT**
>
> **A.** We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. OUR DUTY TO SETTLE OR DEFEND ENDS WHEN OUR LIMIT OF LIABILITY FOR THIS COVERAGE HAS BEEN EXHAUSTED. WE HAVE NO DUTY TO DEFEND ANY SUIT OR SETTLE ANY CLAIM FOR "BODILY INJURY" OR "PROPERTY DAMAGE" NOT COVERED UNDER THIS POLICY.

(Capitalization in original.) The paragraph's headings and first four sentences were in black type; the capitalized last two sentences were in blue. Clearly, Badger Mutual's pay-and-walk provision complied with the mandates of ***Gross***; the provision was in capital letters and a different colored type, and the text explicitly stated that the insurer's duty to defend ended when its limit of liability for the coverage had been exhausted. No court order was required for Badger Mutual to exercise its pay-and-walk provision.

¶11 Piotruszewicz next argues that the pay-and-walk provision is ambiguous and, therefore, unenforceable. Citing ***Brown v. Lumbermens Mutual Casualty Co.***, 390 S.E.2d 150, 153-54 (N.C. 1990), Piotruszewicz maintains that Badger's pay-and-walk language is "ambiguous because it did not specify in what manner the limits would have to be 'exhausted' before its duty to defend was discharged." We disagree.

¶12 In ***Brown***, the North Carolina Supreme Court found what it termed to be a latent ambiguity in the duty-to-defend provision of an automobile liability insurance policy and construed the ambiguity in favor of the insured. ***Id.*** at 153-54. The duty-to-defend provision at issue in ***Brown*** provided:

> We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

Id. at 153. The court concluded that this language was ambiguous because it did not specify in what manner the limits would have to be exhausted before its duty to defend was discharged. ***Id.*** at 153-54. Specifically, the court reasoned:

> "The various terms of the policy are to be harmoniously construed, and if possible, every word ... is to be given effect." The second sentence in the provision requires the insurer to "settle or defend" covered claims against its insured. The third sentence requires the insurer to bear defense costs in addition to paying liability limits, indicating that the duties to pay claims and to defend are separate and independent.
>
> When the final sentence regarding exhaustion of coverage limits and termination of the duty to settle or defend is read together with the prior sentences, the entire provision's ambiguity becomes apparent. As the plaintiffs argue and the Court of Appeals correctly recognized, the insurer could "exhaust" its coverage limits in any number of ways. It could pay them into and interplead conflicting claimants in a declaratory judgment action…. It could, as was done here, pay them to the injured party, in return for a release only of the insurer and not the insured….
>
> The ambiguity in the questioned provision thus lies not in the meaning of the word "exhausted." It lies in the manner by which the coverage must be exhausted before the duty to defend terminates….

Id. at 154 (citations omitted). The ***Brown*** court determined that under the policy's ambiguous terms relating to the duty to defend, the insurer's unilateral tender to and the injured party's acceptance of the policy's limit without a release of the insured did not relieve the insurer of its duty to defend. ***Id.*** at 155-56.

¶13 ***Brown***'s interpretation of this pay-and-walk language, however, is not universally accepted. In ***Pareti v. Sentry Indemnity Co.***, 536 So. 2d 417 (La. 1988), the defendants' insurer negotiated a compromise and release whereby the insurer and its insureds were released from all liability for the policy's limit. ***Id.*** at 419-20. The plaintiffs' uninsured carrier filed a cross claim seeking indemnity against the defendants. ***Id.*** Subsequent to the compromise, the defendants were still represented by the insurer's attorney whose motion for a summary judgment (on the uninsured motorist carrier's cross claim) was denied. ***Id.*** The insurance company then notified its insureds, i.e., the defendants, that it would no longer provide a defense against the cross claim. ***Id.*** at 420. The defendants cross claimed against their insurer alleging a breach of its duty to defend and seeking attorney's fees and costs. ***Id.***

¶14 Reviewing a virtually identical pay-and-walk provision, the Louisiana Supreme Court concluded:

> When the paragraph of the policy containing this language ... is read as a whole, there is no ambiguity. The promise to defend "any" covered claim is clearly qualified, almost immediately thereafter in the same paragraph, by the statement: "Our duty to defend or settle ends when our limit of liability … has been exhausted." Read as a whole, the only reasonable interpretation of this section is that the insurer will defend any claim, *but* the defense obligation will terminate if and when the insurer's policy limits are exhausted. These provisions are not subject to more than one reasonable interpretation. The policy in this regard is not ambiguous.

> ….
>
> This standard policy provision ["In *addition* to our limit of liability, we will pay all defense costs we incur"] simply means that defense costs will be paid separately by the insurer and will not be applied against its policy limits…. This language cannot be taken to mean that the company will *continue* to pay defense costs once its policy limits have been exhausted, and in fact the very next sentence of the policy expressly states that this will not be the case. Once again, these sentences must be construed together, and when they are so construed there is no ambiguity.

Pareti, 536 So. 2d at 420-21 (citations and footnotes omitted). Similarly, we conclude that the Badger Mutual policy language is clear; neither the word, "exhausted," nor the manner of "exhausting" the policy limits is ambiguous and, therefore, the policy is enforceable.

¶15 In Wisconsin, a liability insurer generally has a contractual duty to defend its insured in an action for damages, and may be required to furnish a defense to its insured prior to the determination of coverage. ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 527-28, 385 N.W.2d 171 (1986); *see also* ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). An obligation to defend arises when the complaint alleges facts which, if proven, support liability covered under the terms and conditions of the policy. ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580, 427 N.W.2d 427 (Ct. App. 1988). However, when an insurer exhausts its liability by judgment or settlement, it fully discharges its obligation to the insured. ***Teigen v. Jelco of Wis., Inc.***, 124 Wis. 2d 1, 8, 367 N.W.2d 806 (1985). As long as the insurer carries out the terms of its insurance contract and fully protects itself and the insured from further exposure of liability, it may discharge the duty to defend upon exhaustion of the policy limits by judgment or settlement. ***Id.*** at 8-9.

¶16 Although no Wisconsin court has analyzed the exact pay-and-walk language found in the Badger Mutual policy, several of our recent decisions support our conclusion. *See* ***Novak v. American Family Mut. Ins. Co.***, 183 Wis. 2d 133, 136, 515 N.W.2d 504 (Ct. App. 1994). In ***Novak***, this court considered a pay-and-walk provision—"We will not defend any suit after our limit of liability has been offered or paid"—and concluded that it was enforceable. ***Id.*** at 136. Badger Mutual argues that if the pay-and-walk provision of Piotruszewicz's policy were ambiguous, the pay-and-walk provision in ***Novak*** "should have been invalidated as being even broader than the Badger Mutual clause at issue in the instant case." Badger Mutual explains:

> This is because the American Family [Insurance pay-and-walk provision at issue in ***Novak***] allows American Family to terminate its defense once its limits have been either paid or offered, whereas the Badger Mutual clause authorizes Badger Mutual to terminate its defense only when it has actually exhausted its limits. The breadth of the American Family clause notwithstanding, the Court of Appeals had no problem with its wording.

¶17 Badger Mutual is correct. The facts here are analogous to those in ***Novak***. In ***Novak***, American Family sought to withdraw from defending its insured, having already paid the entire policy limit, and a partial settlement in the tort suit had released the insured to the extent of the policy limit only. ***Id.*** at 135, 139. Novak argued that American Family's duty to him would be fulfilled only upon payment of policy limits incidental to an agreement or judgment that met his approval or finally settled the pending claim against him within the policy limits. ***Id.*** at 137. Novak contended that the insurer breached its duty to defend him when it paid policy limits and refused to defend him on the excess liability claim. ***Id.*** We rejected Novak's argument and concluded that the duty to defend was a creature of contract, subject only to contractual limitations and fair notice. ***Id.***

Citing ***Gross***, we explained that the contract provision was enforceable as long as the insureds were aware of the policy provision. ***Id.*** at 137-38. We noted that if they were aware of the provision, they could "'choose to afford themselves greater protection in the defense of claims by increasing the amount of their policy limits or seek a policy which provides for unlimited defense.'" ***Id.*** at 139 (quoting ***Gross***, 121 Wis. 2d at 89). The same could be said here.

¶18 Piotruszewicz next argues that the court erred in dismissing his bad faith claim. Essentially, he contends that: (1) the facts demonstrate Badger's bad faith; and (2) public policy prohibits an insurance company from terminating its defense after the policy limits have been paid. We disagree.

¶19 Tracing the circumstances and chronology of Badger Mutual's communication with him and, ultimately, his attorney, Piotruszewicz argues that Badger's conduct, and particularly its failure to seek court approval prior to exercising its pay-and-walk provision, demonstrates bad faith. We disagree.

¶20 As noted, Badger Mutual was unable to reach a settlement with Rubrich that included "a full and final release" of Piotruszewicz. But Badger had no obligation to do so. Indeed, Piotruszewicz offers no reply, aside from his policy arguments, to Badger's assertion that it had absolutely no obligation to communicate with Piotruszewicz at all; it simply could have paid its policy limits, thus triggering the pay-and-walk provision. *See* ***Hoffman***, 2000 WI App 22 at ¶9; *see also* ***Blank v. USAA Prop. & Cas. Ins. Co.***, 200 Wis. 2d 270, 276-78, 546 N.W.2d 512 (Ct. App. 1996) (holding "that acceptance of an offer of settlement directed only at the insurer for its policy limits, after insurer's reasonable efforts to settle the claim against its insured have been refused, creates no reasonable grounds to fear a bad faith claim," and explaining that "a valid bad faith claim in

Wisconsin requires proof of a significant disregard of the insured's interest"). Thus, Piotruszewicz's bad-faith theory is premised on a legal proposition that simply does not exist.

¶21 Piotruszewicz argues, however, that public policy prohibits an insurance company from terminating its defense after the policy limits have been exhausted. We disagree. Wisconsin courts have implicitly concluded that an insurer's termination of its defense under such circumstances does not violate public policy. *See* ***Gross v. Lloyds of London Ins. Co.***, 118 Wis. 2d 367, 375, 347 N.W.2d 899 (Ct. App.), *rev'd on other grounds,* 121 Wis. 2d 78, 358 N.W.2d 266 (1984); *see also* ***Novak***, 183 Wis. 2d at 141.

¶22 Again, in ***Novak***, the plaintiff argued that even if the pay-and-walk provision was enforceable, the insurer's unilateral decision to pay the limit and abandon the defense of the action was a breach of contract and tortious bad faith because it had a duty to submit its settlement to the court for approval. ***Novak***, 183 Wis. 2d at 141-42. This court disagreed and held that American Family "had not failed to fulfill its obligations under the contract." ***Id.*** at 142. Additionally, this court reiterated: "'[T]here is nothing contrary to public policy in an insurer's explicit policy language which limits the duty to defend to the policy limits.' In the absence of a statement from the supreme court stating otherwise, our holding is controlling. Thus, we conclude that the limitation on the duty to defend is enforceable and is not contrary to public policy." ***Id.*** at 141 (quoting ***Gross***, 118 Wis. 2d at 375); *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) ("court of appeals may not overrule, modify or withdraw language form a previously published decision of the court of appeals").

¶23 An automobile liability insurance policy may specifically provide for the termination of a duty to defend upon payment of policy limits. Public policy requires the insurer to act in good faith in the interest of the insureds. Here, Badger Mutual complied with the unambiguous language of the policy; its conduct showed no bad faith. Badger Mutual attempted to obtain a settlement on behalf of Piotruszewicz but, when Rubrich refused, it made a reasonable settlement on behalf of Piotruszewicz for the policy limits. *See* ***Blank***, 200 Wis. 2d at 276-79 (no bad faith if insurer employed diligence but failed to obtain full release of insured). The unambiguous policy language allowed Badger Mutual to terminate its duty to defend upon exhaustion of the policy limits. Thus, Badger Mutual was entitled to summary judgment.

By the Court.—Order affirmed.

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