COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0579 **Cir. Ct. No. 01 CV 2375**

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

WALTER R. WILKINSON AND
AMMIE C. WILKINSON,

PLAINTIFFS-APPELLANTS,

V.

SAFECO INSURANCE COMPANY OF ILLINOIS,

DEFENDANT-RESPONDENT,

ELECTRICAL CONSTRUCTION INDUSTRY
HEALTH AND WELFARE PLAN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Walter R. Wilkinson and his wife, Ammie C. Wilkinson, appeal from a grant of summary judgment dismissing their declaratory judgment action, which sought to establish that their Safeco automobile insurance policy provided underinsurance motorist coverage. The Wilkinsons claim the trial court erred when it ruled that their Safeco Insurance Company of Illinois policy could not be stacked in order to satisfy the definition of underinsured motor vehicle, and when it ruled that the policy was not ambiguous. Because the tortfeasor's vehicle does not fit the definition of an underinsured vehicle, and because the underinsurance provisions of the Safeco policy are not ambiguous, we affirm.

BACKGROUND

¶2 On April 3, 1999, the Wilkinsons' two minor children, Micah and Courtney, were tragically killed in an automobile accident while riding in the car of their grandmother, Carol Geithman. The Wilkinsons received $100,000 for each child's death from Geithman's insurer, State Farm Insurance Company. They subsequently filed a claim with their insurer, Safeco, for underinsured motorist (UIM) benefits.

¶3 The policy under which they filed their claim contained UIM coverage of $100,000 per person/$300,000 per accident. The policy covered two vehicles, which they owned. A separate premium was paid for coverage of each vehicle. After briefing and a hearing, the trial court rejected the Wilkinsons' claim that the Safeco policy limits could be stacked for determining whether the Geithman vehicle was an underinsured motor vehicle. The Wilkinsons now appeal.

ANALYSIS

¶4 The Wilkinsons present two arguments challenging the trial court's dismissal of their declaratory judgment action. First, they argue that the Safeco policy limits should be stacked to meet both the definition of an underinsured motor vehicle and to determine the total amount of coverage; and second, they argue that the relevant language of the policy is ambiguous, thereby allowing stacking. For reasons set forth below, we reject each contention.

STANDARD OF REVIEW

¶5 A motion for summary judgment may be used to address issues of insurance policy coverage. ***Calbow v. Midwest Sec. Ins. Co.***, 217 Wis. 2d 675, 679, 579 N.W.2d 264 (Ct. App. 1998). For summary judgment to be granted, there must be no genuine issues of material fact and the movant must be entitled to judgment as a matter of law. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We review orders for summary judgments independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates, as it does here, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (1999-2000).[1] To resolve the challenges presented by the Wilkinsons, we must interpret the language in Safeco's insurance policy. Such an exercise presents a

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

question of law, which we review independently. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶9, 245 Wis. 2d 134, 628 N.W.2d 916.

¶6 The undisputed factual underpinnings for the Wilkinsons' claim are as follows. The Safeco policy provides UIM coverage on two motor vehicles. The coverage provides a $100,000 "each person" limit of liability on each vehicle. According to the Wilkinsons, because of the terms of the policies, these limits may be stacked to create $200,000 of coverage for each deceased child. With this stacking, the Geithman vehicle fits within the definition of an "underinsured motor vehicle" because the UIM total coverage available for each child is $200,000 compared to the Geithman State Farm liability limits of only $100,000. Because the reducing clause in the Safeco policy calls for a reduction of $100,000 due to the amount already paid by State Farm, there should remain, for each child, the sum of $100,000.

¶7 The Wilkinsons' contention is based upon a two-fold argument. First, they argue that the definition of an "underinsured motor vehicle" in the Safeco policy, coupled with the "Limit of Liability" provision, permits stacking of the underinsured motorist coverage limits to meet the definition of an underinsured motor vehicle. Second, they contend that because the Safeco policy is ambiguous, stacking is permitted. We shall address these arguments in turn.

¶8 The Wilkinsons claim that the definition of an "underinsured motor vehicle" and the "Limit of Liability" provision provided in the underinsured motorist part of the policy require stacking of policy limits in order to determine whether a vehicle satisfies the UIM definition for the purposes of coverage.

¶9 To trigger underinsurance motorist coverage, the tortfeasor's vehicle must fit the definition of an "underinsured motor vehicle" in the claimant's

liability policy, and this must be done before "the 'stacking' of insurance policies." ***Krech v. Hanson***, 164 Wis. 2d 170, 173, 473 N.W.2d 600 (Ct. App. 1991). In addition, we compare the limits of the insured's UIM policies individually to determine whether the vehicle at issue satisfies a policy definition of underinsured motor vehicle. ***Taylor***, 2001 WI 93 at ¶13 n.6.

¶10 Here, the Safeco policy definition of an underinsured motor vehicle reads: "'Underinsured motor vehicle' means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the limits of liability for this coverage." The policy defines an underinsured vehicle as one with liability limits less than the limits for UIM coverage. Here, the Geithman vehicle had limits of $100,000 per person and the Safeco policy had UIM limits of $100,000 per person. Thus, the Geithman vehicle was not underinsured, and consequently, no UIM coverage exists.

¶11 The Wilkinsons cite ***Ginder v. General Casualty Co.***, 2000 WI App 197, ¶¶12-13, 238 Wis. 2d 506, 617 N.W.2d 857, to support their contention that stacking of individual limits is allowed to determine whether a vehicle qualifies as an underinsured vehicle. This reliance, however, is misplaced. Prior to 1995, the same type of Safeco policy presently under examination contained language in the UIM provision of the policy that is not present here. In the pre-1995 version, the maximum limit of liability was defined as the "sum of the limits of liability shown in the Declarations for each person." In 1995, this language was removed. The policy under examination in ***Ginder*** contained the same language that existed in the pre-1995 Safeco policy. At the time of the Wilkinsons' accident, the language deemed acceptable to support stacking in ***Ginder*** did not exist in the Safeco policy. Thus, under the Safeco policy involved here, ***Ginder*** provides no support

to allow stacking to determine whether the Geithman vehicle satisfied the definition of underinsured motor vehicle.

¶12 The Wilkinsons assert that the basis for allowing the limits of their insured vehicles to be stacked derives from an analysis of the "Limit of Liability" provision, in conjunction with the definition of an "underinsured motor vehicle."[2] The Wilkinsons argue that use of the plural "*limits* of liability for this coverage" in Safeco's definition of "underinsured motor vehicle" and of the singular "*limit* of liability" provision in the Limit of Liability section of the policy has significant implications. (Emphasis added.) They reason that the distinction between the plural and the singular demonstrates an intent to permit stacking. The logic of this argument eludes us.

---

[2] Limit of Liability

> ….
>
> A. The limit of liability shown in the Declarations for "each person" for Underinsured Motorists Coverage is our maximum limit of liability for all damages including damages for care and loss of services (including loss of consortium and wrongful death) arising out of bodily injury sustained by any one person in any one accident.
>
> Subject to this limit for "each person", the limit of liability shown in the Declarations for "each accident" for Underinsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury 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 Declarations; or
>
> 4. Vehicles involved in the accident.

¶13 The "Limit of Liability" section contains two paragraphs of limitation. The first paragraph delineates the limit of liability "for each person." The second paragraph delineates the limit of liability "for each accident." In the two separate paragraphs it is grammatically correct to use the singular "limit" because it refers to a singular, distinct limitation. In the definitional section of the policy, where each limitation, per person and per accident, is collectively referred to, the plural "limits" is proper. We are unable to surmise how an "intent to permit stacking" can be inferred from this proper usage. The Wilkinsons have failed to develop this argument. Under the circumstances, this court is under no obligation to engage in such an exercise. *See* ***In re Estate of Balkus***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

¶14 Next, the Wilkinsons claim that the anti-stacking provision in the Safeco policy is not valid because it does not conform to the language of WIS. STAT. § 632.35(5)(f). They assert that the language of the anti-stacking provision must bear some resemblance to the statute. Because the language of the policy does not contain language that "one limit may not be added to another" in the Limits of Liability section, the anti-stacking provision fails to qualify as an authorized exception, and the general rule, as expressed in WIS. STAT. § 632.43(1), prohibiting anti-stacking, prevails.[3]

[3] WISCONSIN STAT. § 631.43(1) and (3) provide:

(continued)

¶15 Prior to 1995, under the provisions of WIS. STAT. § 631.43(1), language in insurance policies that prohibited stacking was deemed invalid. In 1995, however, the Legislature, in an effort to temper the effects of this provision, enacted WIS. STAT. § 632.32(5)(f). It reads:

> 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.

¶16 In addition, the Legislature created WIS. STAT. § 631.43(3), which provided that WIS. STAT. § 631.43(1) "d[id] not affect the rights of insurers to exclude, limit or reduce coverage under s. 632.32 (5) … (f) …."

¶17 Recently, in both ***Hanson v. Prudential Property & Casualty Ins. Co.***, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999), and ***Gragg v. American***

> **(1)** GENERAL. When 2 or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions. The policies may by their terms define the extent to which each is primary and each excess, but if the policies contain inconsistent terms on that point, the insurers shall be jointly and severally liable to the insured on any coverage where the terms are inconsistent, each to the full amount of coverage it provided. Settlement among the insurers shall not alter any rights of the insured.
>
> ….
>
> **(3)** EXCEPTION. Subsection (1) does not affect the rights of insurers to exclude, limit or reduce coverage under s. 632.32 (5) (b), (c) or (f) to (j).

Family Mutual Ins. Co., 2001 WI App 272, 248 Wis. 2d 735, 637 N.W.2d 477, we have had the occasion to consider whether "two or more cars insured" provision was a valid anti-stacking provision under WIS. STAT. § 632.32(5)(f). In both cases, we concluded that the statute required no magical language to withstand adverse scrutiny. ***Hanson***, 224 Wis. 2d at 370; ***Gragg***, 2001 WI App 272 at ¶8.

¶18 The limit of liability "per person" as shown in the declaration section for underinsurance motorist coverage is $100,000 and, as clearly stated, is Safeco's maximum limit of liability for any one person in any one accident. When coupled with the language, "This is the most we pay …," there is no doubt that this anti-stacking provision passes the substantive scrutiny test. For this reason, this claim of error fails.

¶19 Lastly, the Wilkinsons contend that the failure to amend the "two or more autos insured" provision included in the UIM provision lends additional support to their argument that the underinsured motorist coverage stacking is allowed. The basis for this contention is that the "two or more autos insured" provision does not apply to underinsured insured motorist coverage.

¶20 The Wilkinsons reason that the 1993 amendment in the "General Provision" section to the "two or more autos insured" removed or excluded "underinsured coverage" from the "two or more autos" provision. They further assert that this exclusion was left unchanged by the 1994 and 1995 amendments and still exists. We are not convinced by this line of thought for reasons both historical and logical.

¶21 In Part F of the "General Policy Provisions" section of the original Safeco policy, is the "two or more autos insured" provision. In the second

paragraph is a caveat that the "two or more autos" clause does not apply to uninsured motorist coverage.

¶22 In the next section, "Additional Coverage," is the underinsured motorist coverage, containing the definition of an underinsured vehicle and the limits of liability. Toward the end of the policy is another section, "General Provisions," which amended original Part F, "General Provisions." In it, the "two or more autos insured" section is amended to state that the "two or more autos" clause does not apply to underinsured motorist coverage. Although this amendment is not a role model of clarity, it is a sufficient amendment to the General Provisions section. Then, in 1995, the Part F "General Provisions" was amended again by eliminating the non-application to underinsurance clause and replacing it with the following provision: "If this policy insures two or more autos or if any other auto insurance policy issued to you by us applies to the same accident, the maximum limit of liability shall not exceed the highest limit applicable to any one auto."

¶23 Further, the 1994 amendment, by excluding underinsured motorist coverage from the "two or more autos insured" provision, was narrowing the general policy provisions, not expanding the underinsurance coverage. Moreover, the new 1995 amended restriction on coverage is quite clear in its expression. It is not an amendment to the previously existing provision, but rather, as stated, a "replacement." There is no specific exclusion which existed under the 1994 amendment. With the 1995 amendment to the General Provisions section, the "two or more autos insured" restriction does apply to both uninsured and underinsured coverage. This was the provision that was in effect on the day of the fatal accident. Thus, in clear terms, at the time of the accident, the policy did not permit stacking.

¶24 From our examination of the Safeco policy provisions and their amendments, we conclude that the Geithman vehicle was not, by definition, an underinsured vehicle; the provisions of the policy are in conformity to statutory and case law, and therefore, are not ambiguous.

By the Court.—Judgment affirmed.

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