

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0453
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000327

**IN COURT OF APPEALS
DISTRICT IV**

**WOODROW A. WIEDENHOEFT,
PLAINTIFF-RESPONDENT,**

V.

**ALLSTATE INSURANCE COMPANY,
DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded with
directions.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Allstate Insurance Company appeals a judgment awarding \$22,500 to its insured, Woodrow Wiedenhoeft, under his auto insurance policy. The issue is whether the reducing clause contained in the policy's

underinsured motorists provision (UIM) bars Wiedenhoef's claim. We conclude that it does, and therefore reverse.

¶2 Wiedenhoef's wife died in an automobile accident. His wrongful death claim against the person responsible for the accident resulted in a \$22,500 payment from the tortfeasor's insurance company. Because Wiedenhoef's damages were at least \$100,000 greater than the tortfeasor's settlement, he also claimed the \$100,000 per person limit on the UIM coverage in his policy. However, Allstate invoked a reducing clause in the policy, and paid Wiedenhoef only \$77,000, resulting in this litigation over the enforceability of the reducing clause.

¶3 Wiedenhoef's policy defines the \$100,000 per person UIM limit as "the maximum that **we** will pay for damages arising out of **bodily injury** to one person in any one **motor vehicle** accident" On the same page of the policy, this qualification (the reducing clause) appears:

The limit of this Underinsured Motorist Coverage shall be reduced by:

1. all amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury for which the payment is made, including, but not limited to, any amounts paid under the bodily injury liability coverage of this or any other insurance policy

The trial court held that the two quoted provisions conflicted, and therefore created ambiguity, because the former promised a payment of up to \$100,000, whereas the latter guaranteed that Allstate would always pay some lesser amount. The apparent conflict prompted the trial court to declare the latter provision unenforceable.

¶4 The appeal came to this court following the supreme court's explanation that a reducing clause "must be crystal clear in the context of the whole policy." *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, ¶46, 255 Wis. 2d 61, 647 N.W.2d 223. After this appeal commenced, however, the supreme court clarified that *Schmitz* did not change the long-standing appellate standard of review for ambiguity in an insurance contract. *Folkman v. Quamme*, 2003 WI 116, ¶31, 264 Wis. 2d 617, 665 N.W.2d 857.

¶5 Insurance policy interpretation is a question of law that we review de novo. *Id.*, ¶12. Determining whether ambiguity exists is the first step in construing an insurance policy. *Id.*, ¶13. A policy provision is ambiguous if it susceptible to more than one reasonable interpretation, and we resolve ambiguities against the insurer. *Id.* We may hold that an otherwise unambiguous provision is ambiguous when viewed in the context of the entire policy. *Id.*, ¶19. The supreme court acknowledged in *Folkman*, however, that some ambiguity in a policy may be unavoidable. *Id.*, ¶18. Ambiguity creates unenforceability only if it is so confusing that it "befuddles the understanding and expectations of a reasonable insured." *See id.*, ¶20.

¶6 In a post-*Folkman* decision examining provisions comparable to those before us now, we held that, although the conflict between a "maximum we will pay" clause and a closely following reducing clause may create some ambiguity, it does not render the reducing clause unenforceably ambiguous. *Gohde v. MSI Ins. Co.*, 2004 WI App 69, ¶15, No. 01-2121. Here, a reasonable insured reading Wiedenhoeft's policy would understand that the "maximum we will pay" provision is subject to the terms of the reducing clause, which closely follows and plainly modifies it. No reasonable interpretation of the policy is

available by which a reasonable insured could expect a maximum UIM payment after collecting from the tortfeasor.

¶7 Consequently, on remand the trial court shall enter judgment dismissing Wiedenhoef's claim against Allstate.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

