

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 2003

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. 03-0583-FT
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000118

**IN COURT OF APPEALS
DISTRICT III**

**SHARON KNIGHT, PERSONALLY AND AS SPECIAL
ADMINISTRATOR OF THE ESTATE OF THE DECEASED,
EDWARD KNIGHT,**

PLAINTIFF-RESPONDENT,

v.

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Acuity, a mutual insurance company, appeals a judgment denying its motion for a declaration that no coverage exists under its uninsured motorist provisions for injuries sustained by Edward and Sharon

Knight.¹ Acuity argues the circuit court erred by concluding that its uninsured motorist policy and concomitant reducing clause are ambiguous and unenforceable. We agree and reverse the judgment.

BACKGROUND

¶2 The Knights were injured in an accident with an uninsured driver in Iowa. At the time of the accident, the Knights were working as truck drivers for Karl's Transport of Antigo, Wisconsin, and thus received worker's compensation benefits for their medical expenses and wage loss. The Knights also sought uninsured motorist benefits under a policy Acuity issued to them.

¶3 The policy provided uninsured motorist coverage in the amount of \$25,000 per person/\$50,000 per accident and included a reducing clause for amounts received in worker's compensation. Acuity filed a motion for declaratory judgment seeking interpretation and enforcement of its policy. The circuit court, citing *Hanson v. Prudential Prop. & Cas. Ins. Co.*, 2002 WI App 275, 258 Wis. 2d 709, 653 N.W.2d 915, denied Acuity's declaratory judgment motion, concluding that the uninsured motorist provision and reducing clause were ambiguous and unenforceable. This appeal follows.

ANALYSIS

¶4 The grant or denial of relief in a declaratory judgment action is a matter within the discretion of the circuit court. *United Fire & Cas. Co. v. Kleppe*, 174 Wis. 2d 637, 640, 498 N.W.2d 226 (1993). A circuit court acts

¹ This is an expedited appeal under WIS. STAT. RULE 809.17.

outside the ambit of that discretion when it bases its discretionary decision upon an error of law. *Id.* Resolution of this case turns on the interpretation of an insurance contract, a question of law that we review independently, although benefiting from the circuit court's analysis. *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). A court gives insurance policy language its common and ordinary meaning, construing the insurance policy as would a reasonable person in the position of the insured. *See Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 221 Wis. 2d 800, 806, 586 N.W.2d 29 (1998).

¶5 Here, the Knights argue that Acuity's uninsured motorist policy and reducing clause are confusing, unclear and ambiguous, suffering the same faults as the underinsured motorist policies in *Hanson* and *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223. We are not persuaded.

¶6 Reducing clauses are expressly allowed pursuant to WIS. STAT. § 632.32(5)(i) which provides:

(i) A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:

1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.
2. Amounts paid or payable under any worker's compensation law.
3. Amounts paid or payable under any disability benefits laws.

Acuity's policy, adopting much of the language found in § 632.32(5)(i), provides in relevant part:

We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Bodily injury must be sustained by an insured person and must be caused by accident and result from the ownership, maintenance or use of the uninsured motor vehicle.

....

The limits shown are subject to the following:

....

3. The Uninsured Motorists limits will be reduced by any of the following that apply:

a. 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.

b. Amounts paid or payable under any Workers' Compensation law.

c. Amounts paid or payable under any disability benefits law.

¶7 Although the policy's language is substantially consistent with WIS. STAT. § 632.32(5)(i), our supreme court has concluded that § 632.32(5)(i) is not a "blanket endorsement" to validate a reducing clause. *Badger Mutual*, 255 Wis. 2d 61, ¶46. The Knights therefore contend that the test for determining whether a reducing clause is enforceable is whether it is "crystal clear" in context of the whole policy. *Id.*; *Hanson*, 258 Wis. 2d 709, ¶7. After the parties' briefs were filed in this case, however, our supreme court addressed the "crystal clear" language, noting that a series of court of appeals decisions had used the "crystal clarity" admonition "to alter the analytical focus." *Folkman v. Quamme*, 2003 WI 116, ¶30, ___ Wis. 2d ___, 665 N.W.2d 857.

¶8 The *Folkman* court clarified that "any contextual ambiguity in an insurance policy must be genuine and apparent on the face of the policy, if it is to

upset the intentions of an insurer embodied in otherwise clear language.” *Id.*, ¶29. The court further noted that the test for determining whether contextual ambiguity exists is whether words or phrases of an insurance contract, when read in the context of the policy’s other language, are reasonably or fairly susceptible to more than one construction. *Id.* “The standard for determining a reasonable and fair construction is measured by the objective understanding of an ordinary insured.”² *Id.*

¶9 Here, we conclude that the provision and attendant reducing clause when read in context of the entire policy are neither ambiguous nor illusory. Acuity’s policy, including the declarations page, is seventeen pages long and is preceded by an “Index of Policy Provisions” that references the uninsured motorist coverage under Part 3 of the policy and directs the reader to page 5. On page 5, the uninsured motorist provision then plainly refers the reader to the “State Uninsured/Underinsured Motorists Endorsement.” The actual uninsured motorist policy is less than two pages long and contains all language relevant to coverage, including definitions and the limits of liability, in which the reducing clause at issue is located. The uninsured motorist provision clearly indicates that the

² To the extent the court of appeals used the “crystal clarity” admonition “to alter the analytical focus,” our supreme court clarified that “[a]spirational goals and admonitions on how to avoid ambiguity are admittedly different from minimum legal standards.” *Folkman v. Quamme*, 2003 WI 116, ¶29, ___ Wis. 2d ___, 665 N.W.2d 857.

Ultimately, the court noted that *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, and its predecessors “do not demand perfection in policy draftsmanship.” *Folkman*, 2003 WI 116, ¶31. Rather, they “advise insurers to draft policies in a clear manner if they upset the reasonable expectations of insureds.” *Id.* The *Folkman* court added that “[t]o prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings.” *Id.* Further, “inconsistencies in the context of a policy must be material to the issue in dispute and be of such a nature that a reasonable insured would find an alternative meaning.” *Id.*, ¶32.

uninsured motorist benefits will be reduced by amounts paid or payable under any workers' compensation law. We discern no contextual ambiguity.

¶10 Likewise, the combined effect of the policy and its reducing clause does not render the uninsured motorist coverage illusory, as is often seen in underinsured motorist policies. Application of a reducing clause in the underinsured motorist context results in an insured never receiving the full underinsured motorist limits shown on the declarations page. Where neither the declarations nor the limits of liability provide notice to the insured that the coverage limits shown on the declarations page are intended to include all amounts received from the statutory sources, an insured is led to believe the limits are obtainable when, in reality, the reducing clause guarantees they will rarely, if ever, be paid. In contrast to underinsured motorist coverage, the full limits of uninsured motorist coverage are always available unless the insured has received payments as a result of the injury from those supplemental sources referenced in WIS. STAT. § 632.32(5)(i).

¶11 Here, the Knights received worker's compensation benefits for their medical expenses and wage loss. Because they received benefits from this specifically referenced statutory source, the reducing clause properly operated to offset the limits otherwise payable by their uninsured motorist coverage.

By the Court.—Judgment reversed and cause remanded with directions for further proceedings consistent with this opinion.

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

