COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1616 **Cir. Ct. No. 02CV012300**

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

LEE NICHOLAS AND KIM STARZ NICHOLAS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

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

¶1 PER CURIAM. General Casualty Company of Wisconsin (General Casualty) appeals both the order finding its automobile policy's underinsured motorist (UIM) reducing clause unenforceable and a $60,000 judgment awarded to the insured. General Casualty submits that the reducing clause found in the UIM portion of the Nicholas's policy does not violate WIS. STAT. § 632.32(5)(i)

(2001-02),[1] and that the UIM reducing clause is not contextually ambiguous.[2] We affirm.

I. BACKGROUND.

¶2 In October 2001, Lee Nicholas was a passenger in a car driven by Michael Hayden. As a result of Hayden's negligence, the car swerved off the road and struck a utility pole. Nicholas was ejected from the automobile and seriously injured. Hayden had an automobile liability policy with State Farm Mutual Automobile Insurance Company (State Farm) with a policy limit of $100,000. State Farm paid this limit to Nicholas. Nicholas had an automobile liability insurance policy with General Casualty containing a UIM provision. Nicholas sought the entire $250,000 referenced in his policy as the limit of UIM liability. Relying on a reducing clause found in the policy, General Casualty reduced the UIM limit by $100,000—the amount paid by State Farm—and paid Nicholas only $150,000 of UIM coverage.

¶3 The parties agreed to litigate this dispute. As a result, General Casualty filed a declaratory judgment motion requesting a trial court finding that General Casualty was only responsible for paying Nicholas $150,000 of UIM coverage because of the reducing clause in its policy. Nicholas opposed General

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] After the parties submitted their briefs, the Supreme Court released ***Folkman v. Quamme***, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, and later vacated the decisions in four court of appeals cases, several of which were cited by the parties, touching on the issue of ambiguity in automobile insurance policies. Following the Supreme Court's actions, this court permitted the Wisconsin Academy of Trial Lawyers to file an amicus brief. The parties also filed supplemental briefs.

Casualty's claim and sought an additional $60,000.[3] After ordering briefs, the trial court ruled that although the reducing clause complied with the statute, it was nevertheless ambiguous when read in the context of the whole policy. For this reason, the trial court found the policy's reducing clause unenforceable. Consequently, the court ordered General Casualty to pay Nicholas an additional $60,000.

II. ANALYSIS.

¶4 General Casualty makes two arguments. First, it submits that, contrary to Nicholas's assertion, its reducing clause does not violate WIS. STAT. § 632.32(5)(i). Second, General Casualty argues that the policy "issued to Nicholas unambiguously permitted [it] to reduce from its stated $250,000 UIM limit of liability the sum … previously paid to Nicholas by State Farm." It submits that the trial court "erred by concluding that the policy, when considered in its entirety, was ambiguous." While we agree with both General Casualty and the trial court that the clause satisfies WIS. STAT. § 632.32(5)(i), we agree with Nicholas's second contention—the policy, when considered in its entirety, is contextually ambiguous.

¶5 The grant or denial of a declaratory judgment is addressed to the trial court's discretion. ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. However, when the exercise of such discretion turns upon a question of law, we review the question *de novo*, benefiting from the trial court's

[3] Nicholas's total damages were $315,000. Besides the aforementioned payments by State Farm and General Casualty, Nicholas was awarded an additional $5,000 under the medical pay provisions in his policy, thus leaving $60,000 unpaid.

analysis. *See* ***id.*** When interpreting an insurance policy, this court's standard of review is *de novo*. ***Kosieradzki v. Mathys***, 2002 WI App 191, ¶7, 256 Wis. 2d 839, 649 N.W.2d 717. Here, one of the issues concerns the construction of an insurance contract, which presents a question of law. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "The same rules of construction that govern general contracts are applied to the language in insurance policies. An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." ***Id.*** (citation omitted).

A. The reducing clause conforms to WIS. STAT. § 632.32(5)(i).

¶6 Nicholas maintains that the reducing clause in his policy is overly broad and unenforceable. Relying on ***Hanson v. Prudential Property & Casualty Insurance Co.***, 2002 WI App 275, 258 Wis. 2d 709, 653 N.W.2d 915, Nicholas argues that the reducing clause is invalid because of the inclusion of the phrase "or similar law" in General Casualty's policy.

¶7 Although previously unenforceable, reducing clauses in automobile policies have been permitted under limited circumstances since 1995. *See* 1995 Wis. Act 21.

> The public policy of this state, as reflected in [WIS. STAT. § 632.32(5)(i)], is to allow insurers to reduce UIM liability only by amounts paid to the insured by or on behalf of persons or organizations legally responsible for the injury suffered, or by worker's compensation or disability benefits law.

Hanson, 258 Wis. 2d 709, ¶17 (citing ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, ¶20, 236 Wis. 2d 113, 613 N.W.2d 557). General Casualty contends that its reducing clause complies with the requirements of § 632.32(5)(i), which provides:

> 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 law.

General Casualty's reducing clause differs slightly from the statutory wording. It reads:

> The limit of liability shall be reduced by all sums:
>
> 1. Paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A; and
>
> 2. Paid or payable because of the "bodily injury" under any of the following or similar law;
>
> a. Workers' compensation law; or
>
> b. Disability benefits law.

The reducing clause found to be impermissible in ***Hanson***, stated:

> The limit of liability for this coverage will be reduced by any amounts paid by the person responsible for the accident. The limit of liability for this coverage will also be *reduced by any amount paid under any other source*[.]

258 Wis. 2d 709, ¶14 (emphasis added). The court reasoned:

> The reducing clause in [the policy's] UIM coverage reduces liability by any amounts paid by the person responsible for the accident or "paid under any other source." This goes beyond the permissible reducing sources allowed by the statute. A UIM policy with a reducing clause must clearly inform the insured he or she is

> "purchasing a fixed level of UIM recovery that will be arrived at by combining payments made from all sources." "All sources," however, can only include the three listed in the statute.

Id., ¶17 (citations omitted). Thus, ***Hanson*** concluded that the UIM coverage language, which stated that it would be reduced by payments from any and every source, rather than the three allowed by statute, fell outside the statute and misinformed the insured of the level of UIM coverage actually purchased. *See* ***id.*** While still good law, ***Hanson*** is distinguishable and not dispositive. A later decision of this court, ***Van Erden v. Sobczak***, 2004 WI App 40, ___ Wis. 2d ___, ___ N.W.2d ___, which approved a reducing clause more akin to the one found in General Casualty's policy, guides our determination.

¶8 In ***Van Erden***, the challenge to the reducing clause found in a UIM provision was resolved in favor of the insurance company. The ***Van Erden*** reducing clause included the sentence: "A payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law *or any similar law*." ***Id.***, ¶25 (emphasis omitted). In examining the validity of the reducing clause, this court concluded that the additional phrase "or any similar law" did not render the clause invalid. Rather, we determined: "The inclusion of the additional language does no disservice to the legislative intent. The wording merely acts as a catchall phrase for jurisdictions that may call their disability benefits law by another name." ***Id.***

¶9 Extrapolating from the holding in ***Van Erden***, we are satisfied that the inclusion of the phrase "or similar law" in the reducing clause, when referring to both workers' compensation and disability benefits, is a catchall for jurisdictions that may call these laws by different names. Thus, the clause does not violate the statute and is valid.

B. General Casualty's policy language is contextually ambiguous.

¶10 Next, we address General Casualty's complaint that the trial court erred when it found the policy contextually ambiguous. In the recent ***Folkman*** decision, the court reiterated the general rules that insurance policy language is ambiguous "if it is susceptible to more than one reasonable interpretation," and "[i]f there is an ambiguous clause in an insurance policy, we will construe that clause in favor of the insured." 264 Wis. 2d 617, ¶13 (citation omitted). Ambiguity can also occur in the context of the entire policy. The ***Folkman*** court explained:

> Occasionally a clear and unambiguous provision may be found ambiguous in the context of the entire policy. Insurers dislike this principle. Yet, the opposite principle—that courts must mechanically apply a clear provision *regardless* of the ambiguity created by the organization, labeling, explanation, inconsistency, omission, and text of the other provisions in the policy—is not acceptable.
>
> [C]ourts will not surrender the authority to construe insurance contracts in favor of the insured when a policy is so "ambiguous or obscure," or deceptive that it befuddles the understanding and expectations of a reasonable insured.

Id., ¶¶19-20 (citations omitted).

¶11 In addressing what degree of contextual ambiguity will trigger a finding of ambiguity, such that a reasonable insured's expectations are not met, ***Folkman*** pronounced:

> To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings….
>
> … [I]nconsistencies 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., ¶¶31-32. With these principles in mind, we turn to the policy in question.

¶12 At the onset, we note that we evaluate the policy from the viewpoint of a lay person. "Language in [the policy] is to be given the common and ordinary meaning that it would have in the mind of a lay person." ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984).

¶13 The General Casualty policy issued to Nicholas is lengthy, complex and cumbersome. It is thirty-two pages in length and contains eight endorsements, including an endorsement for UIM coverage.

¶14 Actually finding the UIM provision endorsement proves difficult. The "Your Personal Auto Policy Quick Reference" found at the beginning of the policy is of little assistance, as it contains absolutely no mention of UIM coverage. While the declarations page references an endorsement for "underinsured motorist bodily injury," it fails to clearly identify where the coverage can be found in the thirty-two-page policy. The declarations page also fails to advise the policy holder that the listed UIM coverage limit is subject to reduction.

¶15 While not dispositive, we are troubled by the lack of information about the UIM coverage in the declarations page because the declarations page is critical to an understanding of the policy's content. This is particularly true since, unlike the short ***Van Erden*** policy, this policy is lengthy. In ***Folkman***, the court noted the importance of the declarations page: "We start with the declarations page, which is generally the portion of an insurance policy to which the insured looks first, and is the most crucial section of the policy for the typical insured." ***Folkman***, 264 Wis. 2d 617, ¶37 (citations omitted). Here, with regard to UIM coverage, the policy holder is left virtually clueless by the declarations page. After reading the declarations page, the reader knows nothing about the

whereabouts, the definition of, or the limits of UIM coverage, except that the upper limit is $250,000 per person. Compounding the confusion, while a clever insured might believe that the UIM provisions could be found in "Part C" where the uninsured motorist bodily injury coverage is located, since the UIM limit is listed immediately after "uninsured motorist bodily injury" on the declarations page, he or she would be disappointed, as "Part C" contains no reference to UIM provisions. In fact, the UIM coverage can only be found by thumbing through the policy to Page 29.

¶16 The UIM endorsement is also remarkably uninformative to a reasonable insured trying to understand the policy. The endorsement includes a one-paragraph definition of what an underinsured motor vehicle is:

> "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 limit for bodily injury liability is less than the limit of liability for this coverage.

This is followed by almost an entire page describing what is not an underinsured motor vehicle and various policy exclusions.

¶17 The policy does list the limits of liability, but in doing so, the policy tells the reader that the limits found on the declarations page for each person and for each accident are "our maximum limit[s] of liability." This identical language was scrutinized in both ***Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, ¶¶65, 72, 255 Wis. 2d 61, 647 N.W.2d 223, and ***Dowhower v. Marquez***, 2004 WI App 3, ___ Wis. 2d ___, 674 N.W.2d 906, because it was argued that this language "impl[ies] that the stated full limit is attainable, when it is not because of the reducing clause." 2004 WI App 3, ¶27. Although this language, standing alone, is not fatal, it is deceptive.

¶18 Next, the UIM clause lists the previously discussed reducing clause, followed by a cryptic one-paragraph statement concerning duplicate payments. This paragraph reads: "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A, Part B or Part C of this policy." We find this language confusing. Given the language preceding the duplicate payment provision, a reasonable insured would know little about the parameters of the UIM coverage and, after reading the duplicate payment clause, a reasonable policy holder may now think: if payments for UIM coverage are totally different from those in Part A (containing liability coverage), Part B (listing medical payments coverage), and Part C (listing uninsured motorist coverage), what then is UIM coverage? Thus, after reading the endorsement, we conclude that a reasonable insured is left to wonder how exactly the UIM payouts are determined.

¶19 This flaw, coupled with the policy's other shortcomings, tips the scales in favor of the insured. This is so because the policy provides the insured with no clear understanding of what UIM coverage is being purchased or where the endorsement is located in the policy. Only after finding and reading the endorsement is the reader alerted to the reducing clause, which contradicts the assumption that the maximum limits are attainable. Further, the UIM endorsement also offers little practical explanation as to what is covered and appears to contain contradictory statements, as the policy confuses the reader further by claiming not to cover "payments for the same elements of loss under this coverage."[4]

[4] While in ***Van Erden*** we approved a policy where UIM coverage was located in an endorsement, there the policy was neither lengthy nor organizationally complex.

¶20 In reaching this conclusion, we determine, as did the supreme court in examining the policy in ***Badger Mutual***, that this policy "is a maze that is organizationally complex and plainly contradictory[,] and "not user friendly." 255 Wis. 2d 61, ¶72. Similarly, like the policy found in ***Hanson***: "The policy requires the insured to leap too many hurdles in the form of assumptions and guesses." 258 Wis. 2d 709, ¶29. For the reasons stated, the trial court is affirmed.

By the Court.—Judgment affirmed.

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