COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1973 **Cir. Ct. No. 02CV010759**

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

ERIC FOSTER,

PLAINTIFF-RESPONDENT,

V.

PROGRESSIVE NORTHERN INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded.*

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

¶1 CURLEY, J. Progressive Northern Insurance Company (Progressive) appeals the trial court's judgment finding the reducing clause in the underinsured motorist (UIM) provision of Eric Foster's automobile insurance policy unenforceable because of contextual ambiguity in the policy. In its ruling, the trial court relied upon the holding in ***Badger Mutual Insurance Co. v.***

Schmitz, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, that seemingly set forth a "crystal clarity" standard in examining automobile insurance policies for contextual ambiguity. However, since the trial court's decision, ***Badger Mutual*** has been further clarified by the supreme court in ***Folkman v. Quamme***, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857. In ***Folkman***, the supreme court disclaimed the "crystal clarity" standard. While the UIM clause in Progressive's automobile insurance policy is not perfect, in light of ***Folkman***'s directives, it is not contextually ambiguous. Therefore, we reverse and remand.

I. BACKGROUND.

¶2 In 1999, Foster was driving a motorcycle when he was involved in an accident with a station wagon driven by Tony Lewis and owned by Christine Voeltner. Voeltner had an automobile insurance policy with Depositors Insurance Company (Depositors). Her policy had a liability limit of $25,000. Depositors tendered $25,000 to Foster, and Foster provided notice of the settlement to Progressive, his insurance company. Because Foster's damages exceeded Voeltner's policy limit, Foster sought to collect his policy's UIM limit of $50,000 per person. Progressive applied the reducing clause found in Foster's policy and offered to pay him $25,000 under the UIM provision. Foster accepted the reduced amount, but later sought the additional $25,000 after ***Badger Mutual*** was released. Both Foster and Progressive brought declaratory judgment motions. The trial court, relying on ***Badger Mutual*** and ***Dowhower ex rel. Rosenberg v. Marquez***, 2003 WI App 23, 260 Wis. 2d 192, 659 N.W.2d 57 [hereinafter ***Dowhower II***], found that the policy was ambiguous and the reducing clause enforceable because the policy was not "crystal clear." The trial court stated:

> The Court's initial reaction based upon the written materials is that that policy and following the road map through it doesn't meet the [***Badger Mutual]*** and ***Dowhower II*** requirement of being crystal clear, that it is misleading to the insured who begins through most of the entire policy to be led back to the Declarations Page, and that the limits of, in this case, the $50,000 being the critical portion, and that the reasonable insured in this circumstance under the policy would believe that that $50,000 would be paid over any uninsured claim and would not be reduced.
>
> So under the circumstances, the Court finds – the initial reaction is that it's – the policy is ambiguous and not being crystal clear and, therefore, would not be enforceable.

At the time of the trial court's decision, the supreme court had not yet issued ***Folkman***, nor had the court vacated the decision in ***Dowhower II***.

II. ANALYSIS.

¶3 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 analysis. *See* ***id.*** The construction or interpretation of an insurance policy presents a question of law to which we apply *de novo* review. ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). "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." ***Folkman***, 264 Wis. 2d 617, ¶12 (citations omitted).

¶4 "Occasionally a clear and unambiguous provision may be found ambiguous in the context in the context of the entire policy[,]" ***id.***, ¶19, resulting in

contextual ambiguity. "The principle of contextual ambiguity is established precedent." ***Id.***, ¶24. "There is [also] a complementary principle to contextual ambiguity. Sometimes it is necessary to look beyond a single clause or sentence to capture the essence of an insurance agreement[, and thus, t]he language of a policy should not be made ambiguous by isolating a small part from the context of the whole[.]" ***Id.***, ¶21.

¶5 Progressive submits that ***Folkman***'s clarification of ***Badger Mutual***'s "crystal clarity" standard concerning contextual ambiguity warrants a reversal of the trial court's finding of ambiguity. Commenting on the unintended effect of the language found in ***Badger Mutual***, the supreme court said:

> [W]e acknowledge an unintended effect of some language we used in [*Badger Mutual v.*] *Schmitz*. In that decision, we summed up *Dowhower* as saying "that reducing clauses must be crystal clear in the context of the whole policy" for insureds to understand what they are purchasing. *Schmitz*, 255 Wis. 2d 61, ¶ 46, 647 N.W.2d 223. A series of court of appeals decisions decided post-*Schmitz* reveals that our admonition of "crystal clarity" has been used to alter the analytical focus. Rather than assessing whether a policy, as written, is ambiguous in context, insurers are being required to undertake affirmative, explanatory responsibilities in drafting policies. Aspirational goals and admonitions on how to avoid ambiguity are admittedly different from minimum legal standards.

Folkman, 264 Wis. 2d 617, ¶30 (footnote omitted).

¶6 Foster argues that ***Folkman*** did not abandon the fundamental principles established in ***Badger Mutual***. He submits that although the policy is not subject to the "crystal clear" standard, the policy here is still ambiguous because it contains many of the shortcomings found in the UIM reducing clauses in ***Badger Mutual*** and ***Dowhower v. West Bend Mutual Insurance Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557. Foster contends that the policy is

contextually ambiguous because: (1) the declarations page does not explain the reducing clause nor warn that the listed amounts are unattainable; (2) the policy contains the same troubling "most we will pay" language criticized in ***Badger Mutual***; (3) the reducing clause is buried on page seventeen and, unlike its treatment of exclusions, the policy does not use boldface or capital letters in explaining the reducing clause;[1] and (4) the policy does not consistently state which payments will result in a reduction, thus creating contradictory provisions. We disagree with both Foster's strained reading of ***Folkman*** and his analysis.

¶7 In ***Folkman***, the supreme court set forth the proper analysis for evaluating contextual ambiguity:

> The test for determining whether contextual ambiguity exists is the same as the test for ambiguity in any disputed term of a policy. That is, are words or phrases of an insurance contract, when read in the context of the policy's other language, reasonably or fairly susceptible to more than one construction?

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[1] Foster initially claimed that the reducing clause was inconsistent with WIS. STAT. § 632.32(5)(i) (2001-02), and thus, unenforceable. Later, Foster conceded that the reducing clause appears to be consistent with the statute. Section 632.32(5)(i) 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.

The language of the reducing clause found in the policy comports with the statute's requirements.

264 Wis. 2d 617, ¶29. Thus, the question becomes: "what degree of contextual ambiguity is sufficient to engender an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language?" ***Id.***, ¶30. After recognizing the unintended effect of the "crystal clear" language in ***Badger Mutual***, the supreme court provided the following guidance: "To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings." ***Folkman***, 264 Wis. 2d 617, ¶31.

¶8 ***Folkman*** also warns that "[s]ome ambiguity is unavoidable because words are unable to anticipate every eventuality." ***Id.***, ¶18. Moreover, "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. "Ferreting through a policy to dig up ambiguity should not be judicially rewarded because this sort of ambiguity is insufficient." ***Id.***, ¶32. With ***Folkman***'s directives in mind, we now turn to Foster's arguments.

A. The declarations page is adequate.

¶9 Foster argues that the declarations page is misleading because, while it references UIM insurance, it does not tell the insured that the limits are subject to the reducing clause and it suggests that the amounts listed are attainable. The declarations page contains the following language under coverages:

> UNDERINSURED MOTORIST
> $50,000 EACH PERSON — $100,000 EACH ACCIDENT

¶10 Clearly, the declarations page is an important part of the insurance policy. In ***Folkman***, the court noted its importance: "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." 264 Wis. 2d 617, ¶37 (citations omitted). Foster submits that while the declarations page confirms the existence of UIM coverage and the maximum amounts available per person and per accident, it fails to alert the insured of the reducing clause, and is therefore contextually ambiguous. We are not persuaded.

¶11 Here, the declarations page alerts the insured that not only is UIM coverage being purchased, but also that additional information is necessary to understand the policy's coverages. Printed on the declarations page is the following cautionary statement: "Coverages are defined in the policy and are subject to the terms and conditions contained in the policy, including amendments and endorsements." Two pages later, a well-organized index specifies that UIM insurance can be found on page fourteen of the policy. The declarations page also invites the reader to call a toll free number, available twenty-four hours a day, if the reader has "any questions or concerns on the information on your Declarations Statement[.]"

¶12 While alerting the insured on the declarations page that the limit is subject to reduction might improve the readability of the policy, no case law requires the reducing clause to be placed on the declarations page. An insured may momentarily think that the declarations page's listed amounts of $50,000 and $100,000 are unqualified, but if an insured follows the policy's recommendation and reads the entire policy, particularly the UIM provision, an insured would know these amounts are subject to reduction.

¶13 Also, the declarations page does not suffer from some of the shortcomings identified in the declarations page found in ***Badger Mutual***. In

Badger Mutual, the declarations page contained no mention of UIM coverage other than in a list of several endorsements. No indication was given that limitations on coverage may exist and the UIM coverage was buried in the policy. Here, the index sends the reader to the pages containing the UIM coverage information.

¶14 Moreover, as ***Folkman*** observes: "Courts cannot ask for an informative declarations page and then fault the insurer for failing to address every nuance and speculative interpretation of coverage that an insured might raise." 264 Wis. 2d 617, ¶56. Considering the policy as a whole, the declarations page here is not "reasonably or fairly susceptible to more than one construction[.]" *See* ***id.***, ¶29. Thus, we conclude that the declarations page neither built false hopes, nor gave the illusion of coverage where there was none.

B. The "most we will pay" language does not render the policy ambiguous.

¶15 Foster argues that "the most we will pay" language found in the UIM limits of liability section and elsewhere in the policy, when read in conjunction with the reducing clause, renders the policy ambiguous because it implies that the maximum amount of UIM coverage is attainable when, generally, it is not due to the mandatory reductions. This identical issue was recently discussed in ***Gohde v. MSI Insurance Co.***, 2004 WI App 69, No. 01-2121:

> The [plaintiffs] argue the conflict between "the most we will pay" language and the reducing clause causes ambiguity. Even if we were to assume that some degree of ambiguity exists, it is not "sufficient to engender an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language[.]" ***Folkman***, 264 Wis. 2d 617, ¶30. The policy's statement regarding the most it will pay cannot be read to the exclusion of all other relevant provisions of the policy. ***Id.***, ¶21.

Id., ¶15.

¶16 Another recent case, ***Commercial Union Midwest Insurance Co. v. Vorbeck***, 2004 WI App 11, ___ Wis. 2d ___, 674 N.W.2d 665, discussed the phrase "our maximum limit of liability," and reached a similar conclusion. There, we said:

> We do not agree with Lynn that Commercial's statement in the substituted paragraph represents an unequivocal commitment to pay the maximum limits of its liability *to the exclusion of other relevant provisions of the policy*. Instead, we view this paragraph as stating nothing more than the obvious under the well-established precepts of insurance contract law: Commercial will pay the maximum of its limits of liability *in the appropriate case and under the appropriate circumstances subject to the terms of the insurance policy read as a whole*. Reducing clauses are common to insurance policies. The reducing clause in paragraph B unambiguously qualifies Commercial's obligation to pay the maximum limits of liability recited in the substituted paragraph A.

Id., ¶39 (emphasis in original). The logic and reasoning of the two cited cases applies here. An insured is obligated to read all of the policy to understand its terms. Further, "[f]erreting through a policy to dig up ambiguity should not be judicially rewarded because this sort of ambiguity is insufficient." ***Folkman***, 264 Wis. 2d 617, ¶32. While a better word choice might have sped up the insured's understanding of the policy, the policy's intent can be gleaned from a reading of the entire policy. No significant contextual ambiguity occurs here to render the reducing clause unenforceable.

C. The reducing clause is not buried.

¶17 Next, Foster complains that the reducing clause is buried in the policy because it is not listed until page seventeen of the policy and because the

presentation of the reducing clause differs from the presentation of the exclusions. As evidence of Progressive's intent to hide the reducing clause, Foster points to the fact that the exclusions are in boldface capital letters while the reducing clause is not. We disagree.

¶18 First, unlike the reducing clause in ***Badger Mutual***, the quick index located at the beginning of the Progressive policy lists the UIM coverage and the page where it can be found. Thus, it is not buried in the policy. Second, no statute or case law requires an insurance policy to highlight or bold the UIM reducing clause, and Foster has cited no authority to support this contention.

¶19 Addressing Foster's specific criticisms of the UIM provision, we observe that the provision begins by advising the insured that the UIM coverage is "[s]ubject to the Limits of Liability." It then explains what UIM insurance is and defines some of the terms found in the section. It also explains what is *not* an underinsured motor vehicle and lists the exclusions. Following this, in boldface capital letters, is a section entitled "**LIMITS OF LIABILITY**"; several paragraphs later, the reducing clause appears:

> The Limits of Liability under this Part III shall be reduced by all sums:
>
> 1. paid because of **bodily injury** by or on behalf of any persons or organizations who may be legally responsible, including, but not limited to, all sums paid under Part I – Liability To Others;
>
> 2. paid or payable under Part II – Medical Payments Coverage; and
>
> 3. paid or payable because of **bodily injury** under any of the following or similar laws….

¶20 We cannot find fault with the placement or treatment of the reducing clause. All of the information contained in the UIM provision prior to the

reducing clause is important and necessary to understand the policy's operation. As ***Folkman*** instructs:

> [***Badger Mutual***] and its predecessors do not demand perfection in policy draftsmanship. These decisions advise insurers to draft policies in a clear manner if they upset the reasonable expectations of insureds. To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings.

264 Wis. 2d 617, ¶31. The wording and placement of the reducing clause is logical. It comes after the UIM coverage is explained and the exclusions are listed. The policy's UIM instructions contemplate that two different types of UIM coverage may have been offered and explain both. Although the provision is lengthy, Foster does not claim that this language, when read in its entirety, is capable of another responsible interpretation. "[A] policy is not ambiguous simply because the insured has offered a 'remotely possible second interpretation.'" ***Hause v. Bresina***, 2002 WI App 188, ¶8, 256 Wis. 2d 664, 649 N.W.2d 736 (citations omitted).

D. The policy's failure to always state the payments that will result in a reduction does not make it contextually ambiguous.

¶21 Finally, Foster asserts that, because the wording of the policy is not always identical when mentioning the various payments that factor in to determine the amounts available under the policy, the policy is ambiguous. As an example, Foster notes that on page fourteen of the policy, under the section entitled "Insuring Agreement – Underinsured Motorist Coverage," appears the following sentence: "**We** will pay under this Part III only after the limits of liability under all applicable **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements." Foster claims that because there is no

mention of the reductions, the policy sends contradictory messages to the insured. Again, we disagree.

¶22 ***Folkman*** cautions that not every seemingly ambiguous part of a policy renders it ambiguous.

> In determining whether an insurance policy is ambiguous, we must read the policy as a whole: "There is a complementary principle to contextual ambiguity. Sometimes it is necessary to look beyond a single clause or sentence to capture the essence of an insurance agreement." ***Folkman***, 264 Wis. 2d 617, ¶21. Furthermore, "The language of a policy should not be made ambiguous by isolating a small part from the context of the whole." ***Id.***

Gohde, 2004 WI App 69, ¶8. Foster's reading of the policy violates ***Folkman***'s principles. No contextual ambiguity occurs if the entire policy is considered.

¶23 In sum, we find no perfection in Progressive's policy language, but it contains none of the serious flaws found in the policies in ***Badger Mutual*** and ***Dowhower***. ***Folkman*** dictates that we read the policy as a whole. In doing so, we find no contextual ambiguity. Accordingly, the trial court's decision is reversed and remanded.

By the Court.—Judgment reversed and cause remanded.

Recommended for publication in the official reports.