COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2040 **Cir. Ct. No. 02CV008319**

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

THOMAS FELLER AND SUSAN FELLER,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

BADGER MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

UNITY HEALTH PLAN,

DEFENDANT.

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

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Badger Mutual Insurance Company appeals from the trial court's grant of summary judgment in favor of Thomas and Susan Feller. Badger Mutual sought to enforce a reducing clause in the Fellers' underinsured motorist policy and limit its liability to $50,000, based on payments the Fellers received from the underinsured motorist's insurer. The trial court determined that the reducing clause was unenforceable because it was ambiguous when read within the context of the entire policy. Badger Mutual alleges that the trial court erred because its reducing clause is not ambiguous under ***Folkman v. Quamme***, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, which was decided after the trial court's decision. We agree and reverse.

¶2 The Fellers cross-appeal the trial court's denial of prejudgment interest under WIS. STAT. § 628.46 (2001–02) on an additional $50,000 they claim that Badger Mutual was required to pay.[1] Our reversal of the summary judgment motion renders the issue moot.

I.

¶3 The facts of this case are undisputed. On March 18, 1997, Thomas Feller was permanently injured in a car accident caused by Jeffrey Westfahl. At the time of the accident, Westfahl was insured by the American Family Mutual Insurance Company and had liability insurance with a per person limit of $50,000. American Family paid the Fellers $50,000 in full and final satisfaction of all liability claims against Westfahl.

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

¶4 The Fellers were insured by the Badger Mutual Insurance Company. In addition to other coverage, the Badger Mutual policy had a per person underinsured motorist limit of $100,000. The Fellers made a claim against Badger Mutual for the full underinsured motorist policy limits of $100,000. Badger Mutual stipulated that damages exceeded $150,000, but paid the Fellers $50,000, asserting that, under the policy's reducing clause, it had the right to reduce the amount of coverage by the $50,000 American Family paid to the Fellers. The reducing clause in the Fellers' policy provided, as relevant: "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." (Bolding in original.)

¶5 The Fellers sued Badger Mutual, and the parties filed cross motions for summary judgment.[2] The Fellers argued that the reducing clause in Badger Mutual's policy was invalid because it was ambiguous when read within the context of the entire policy. The Fellers also requested prejudgment interest of twelve percent on what they claimed was the remaining policy limit of $50,000. Badger Mutual argued that its reducing clause was unambiguous and that it had paid all it was obligated to pay under the policy.

¶6 The trial court granted the Fellers' motion for summary judgment and denied Badger Mutual's motion for summary judgment. In an oral ruling, it determined that Badger Mutual's reducing clause was "ambiguous when taken in light of the entire policy and, therefore, is unenforceable." It also denied the Fellers' request for prejudgment interest, determining that Badger Mutual had a

[2] The Fellers also moved for a declaratory judgment that they were entitled to an additional $50,000 from Badger Mutual.

good faith basis for its argument. The trial court entered judgment for the Fellers in the amount of $50,000 plus costs.

II.

A. Appeal

¶7 We review a summary judgment decision *de novo*, using the same methodology as the trial court. ***Rural Mut. Ins. Co. v. Welsh***, 2001 WI App 183, ¶4, 247 Wis. 2d 417, 633 N.W.2d 633. Summary judgment is appropriate if the pleadings and other information on file show there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2).

¶8 The construction of language in an insurance policy also involves a question of law that we review *de novo*. ***Mullen v. Walczak***, 2003 WI 75, ¶12, 262 Wis. 2d 708, 664 N.W.2d 76. An insurance policy is construed to give effect to the parties' intent as expressed by the policy language and interpreted as a reasonable person in the position of the insured would understand it. ***Id.*** A policy that is clear and unambiguous on its face should not be rewritten by interpretation to bind an insurer to a risk it never contemplated and for which the insured never paid. ***Id.***

¶9 Neither party in this case disputes that Badger Mutual's reducing clause complies with WIS. STAT. § 632.32(5)(i). Thus, the clause itself is not ambiguous or contrary to public policy, ***Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, ¶61, 255 Wis. 2d 61, 647 N.W.2d 223, and the sole question before us is whether the underinsured motorist endorsement is ambiguous when

read within the context of the entire policy, ***Folkman***, 264 Wis. 2d 617, ¶¶22–35. We conclude that it is not.

¶10 As noted, ***Folkman*** was decided after the trial court ruled on the summary judgment motions. It came down, however, before the parties filed their briefs on appeal. Both sides have briefed ***Folkman*** on appeal. ***Folkman*** governs.

¶11 Contextual ambiguity occurs where a provision's words or phrases, when read within the context of the policy's other language, reasonably or fairly lead to more than one construction. ***Id.***, ¶29. We may not isolate "a small part [of the policy] from the context of the whole" to find ambiguity. ***Id.***, ¶21. We must also be cognizant of the fact that some ambiguity is unavoidable. ***Id.***, ¶18. "To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings." ***Id.***, ¶31. Contextual ambiguity will only exist, however, if the policy is so ambiguous, obscure, or deceptive that it "befuddles the understanding and expectations of a reasonable insured." ***Id.***, ¶20. "[A]ny 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.

¶12 We first look at the organization and structure of Badger Mutual's policy. *See* ***Gohde v. MSI Ins. Co.***, 2004 WI App 69, ¶12, No. 01-2121. The policy is thirty pages long and consists of a title page, declarations, "quick reference guide," terms of coverage, and endorsements. The bottom of the title page provides: "THIS POLICY IS A LEGAL CONTRACT BETWEEN YOU AND US. PLEASE READ YOUR POLICY CAREFULLY. THIS POLICY JACKET WITH THE PERSONAL AUTO POLICY FORM, DECLARATIONS

PAGE AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETES THE ENTIRE POLICY." The declarations follow the title page and provide that Badger Mutual's limit of liability for an underinsured motorist is $100,000 for each person. The second page of declarations list "POLICY AND ENDORSEMENT FORMS APPLICABLE TO THIS POLICY" and state that "UNDERINSURED MOTORISTS COVERAGE" can be found at Form "BA 04 28," Edition "12-95." The fourth page of the policy is a "quick reference guide," and pages five through twenty-two contain the original policy.

¶13 The underinsured motorist coverage is a three-page endorsement that appears at the end of the policy. The top of the first page of the endorsement provides: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." The second page of the endorsement contains the reducing clause which, as we have seen, informs the insured that the maximum limit of liability will be reduced by any amounts paid by or on behalf of those legally responsible.

¶14 Nothing in the organization and structure of the policy produces contextual ambiguity. The policy takes the insured through an orderly and logical sequence. The declarations page informs the insured that he or she has $100,000 of underinsured motorist coverage per person. The declarations page further directs the reader to the underinsured motorist endorsement by its title (Underinsured Motorists Coverage) and number (BA 04 28). A reasonable insured would read the declarations page and then go to the underinsured motorist endorsement. The first page of the underinsured motorist endorsement is clearly labeled: "UNDERINSURED MOTORISTS COVERAGE." Thus, a reasonable insured would have little difficulty locating the endorsement and finding the reducing clause, which we set out in full below.

¶15 The Fellers argue, however, that the policy is misleading for several reasons. First, they claim that the declarations allegedly "promise[]" a limit of $100,000 without warning that this payment is subject to reduction. We disagree. A "declarations page [is] not ambiguous simply because [it] fail[s] to list every limit of liability and exclusion." ***Id.***, ¶13. As ***Folkman*** explains: "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." ***Id.***, 264 Wis. 2d 617, ¶56.

¶16 Second, the Fellers complain that the "quick reference guide" does not refer to the underinsured motorist coverage. The "quick reference guide's" failure to list the underinsured motorist coverage does not mislead a reasonable insured. *See* ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶21, No. 03-0416. As we have seen, a reasonable insured would know where to find the underinsured motorist endorsement after reading the declarations. The fact that the endorsement is not mentioned in the "quick reference guide" does not change this.

¶17 Finally, the Fellers point out that the definitions section does not define "declarations," "endorsements," "underinsured motorist," or "reducing clause." The Fellers do not point to and we do not know of any statute or case law, however, that requires an insurance policy to define these terms in its definitions section. As we will see, the information contained in the underinsured

motorist endorsement is sufficient to explain the limits of the coverage to the insured.[3]

¶18 We now turn to the endorsement's language. *See* ***id.***, 2004 WI App 72, ¶22. As relevant, the underinsured motorist endorsement's limits-of- liability section provides:

> **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, loss of services or 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.
>
> **B.** 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.** Worker's compensation law; or

[3] The endorsement defines "'[u]nderinsured motor vehicle'" as "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 is less than the limit of liability for this coverage."

b. Disability benefits law.

(Emphasis added; bolding in original.) The Fellers claim that this section is misleading and confusing because the "maximum limit of liability" language in paragraph A implies that the maximum amount of coverage is attainable, while the reducing clause in paragraph B allegedly makes the maximum impossible to attain.

¶19 We addressed this issue in ***Commercial Union Midwest Insurance Co. v. Vorbeck***, 2004 WI App 11, ___ Wis. 2d ___, 674 N.W.2d 665. The underinsured motorist policy in ***Vorbeck*** had the same "maximum limit of liability language" as does the policy in this case. ***Id.***, ¶37. Like the Fellers, the insured in ***Vorbeck*** claimed that the "maximum limit of liability" language rendered the policy's reducing clause contextually ambiguous. ***Id.***, ¶35. We rejected this argument:

> We do not agree with [the insured] 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); *see also* ***Gohde***, 2004 WI App 69, ¶¶15–17. We reach the same conclusion here. When the "maximum we will pay" language and the reducing clause are read together, a reasonable insured is informed that his or her underinsured motorist coverage will be reduced pursuant to the reducing

clause. *See* ***Bellile***, 2004 WI App 72, ¶23. "In other words, the reducing clause unambiguously qualifies [Badger Mutual's] obligation to pay the maximum limits of liability [referenced] in the immediately preceding paragraph and declarations." ***Id.***

¶20 In conclusion, Badger Mutual's policy passes muster under ***Folkman***. There is nothing in the location, labeling, or language of the provisions that produces any contextual ambiguity. Accordingly, the trial court erred when it granted summary judgment in favor of the Fellers. We thus reverse the judgment and remand with directions to grant summary judgment in favor of Badger Mutual.

B. Cross-Appeal

¶21 We do not address the remaining issue—whether the trial court erred when it denied the Fellers' request for prejudgment interest under WIS. STAT. § 628.46—because our reversal of the summary judgment motion renders it moot on this appeal. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264, 270 (Ct. App. 1994) (if a decision on another point disposes of the appeal, we need not decide the other issues raised).

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.