

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 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. 03-2609
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000053

**IN COURT OF APPEALS
DISTRICT II**

TERRY SPAULDING AND RONALD SPAULDING,

PLAINTIFFS-RESPONDENTS,

v.

WESTERN NATIONAL MUTUAL INSURANCE CO.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Reversed and cause remanded with directions.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Western National Mutual Insurance Co. has appealed from a judgment awarding \$250,000 to Terry and Ronald Spaulding, representing underinsured motorist (UIM) benefits under a policy issued by Western National to the Spauldings. The trial court also awarded the Spauldings

interest, costs and disbursements of \$28,095, including prejudgment interest of \$27,749. Because we conclude that the Spauldings are not entitled to UIM benefits under their policy with Western National, we reverse the judgment in its entirety and remand the matter with directions to enter judgment dismissing the Spauldings' complaint.

¶2 The material facts underlying this appeal are undisputed. Terry Spaulding was struck by a truck driven by Karl Hendricks as she walked in the parking lot of the high school where she was employed. Hendricks had a liability insurance policy with a limit of \$50,000 per person for bodily injury. Based upon that policy, Hendricks' insurer paid Terry \$50,000. In addition, she has been paid more than \$235,000 in workers' compensation payments.

¶3 At the time of the accident, the Spauldings were insured under a policy issued by Western National. In addition to other coverage, the policy provided UIM benefits for bodily injury of \$250,000 per person and \$500,000 per accident. The Spauldings made a claim against Western National for the full \$250,000 "per person" UIM benefit. Western National rejected the claim, relying on the policy's reducing clause, which stated that the limit of liability shown in the declarations page for each person "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," and "2. Paid ... because of the 'bodily injury' under ... : a. Workers' compensation law." Because the payments to the Spauldings from Hendricks' insurer and workers' compensation exceeded the maximum UIM benefit of \$250,000, Western National rejected the Spauldings' UIM claim.

¶4 The Spauldings commenced this action to recover UIM benefits from Western National. Cross-motions for summary judgment were filed. The

trial court granted summary judgment in favor of the Spauldings, determining that the reducing clause in the policy issued by Western National was ambiguous in the context of the entire policy, illusory, and unenforceable. It awarded the Spauldings the full \$250,000 of UIM benefits provided by the policy, without reduction for benefits received from Hendricks' insurer and workers' compensation. It also awarded prejudgment interest of \$27,749. On appeal, Western National challenges the trial court's determination that the reducing clause was ambiguous and unenforceable, and the award of prejudgment interest.

¶5 The trial court relied on *Badger Mutual Insurance Co. v. Schmitz*, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, in holding that the policy issued by Western National was ambiguous and the reducing clause was illusory and unenforceable. After the trial court granted judgment, the Wisconsin Supreme Court clarified *Schmitz* in *Folkman v. Quamme*, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857. With the benefit of *Folkman* and its progeny, we reverse the trial court's judgment.

¶6 The interpretation of an insurance contract presents a question of law which we review de novo. *Id.*, ¶12. Similarly, our review of a trial court's decision granting or denying summary judgment is de novo. *Commercial Union Midwest Ins. Co. v. Vorbeck*, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665, *review denied*, 2004 WI 20, 269 Wis. 2d 200, 675 N.W.2d 806 (Wis. Feb. 24, 2004) (No. 03-0100). Summary judgment is commonly used to resolve coverage issues under insurance policies. *Id.*

¶7 Insurance policies are controlled by the same rules of construction that govern other contracts. *Folkman*, 264 Wis. 2d 617, ¶12. An insurance policy must be construed to give effect to the intentions of the parties as expressed in the

language of the policy. *Id.* If the language of an insurance policy is unambiguous, it is enforced as written, without resort to the rules of construction or applicable principles of case law. *Id.*, ¶13. Ambiguities in coverage are construed in favor of the insured. *Id.*

¶8 Policy language is ambiguous if it is reasonably susceptible to more than one reasonable interpretation. *Id.* In addition, the *Folkman* court recognized the concept of “contextual ambiguity,” indicating that a clear phrase within a policy can be rendered ambiguous by contradictory language elsewhere in the policy. *Vorbeck*, 269 Wis. 2d 204, ¶11. The test for contextual ambiguity is whether words or phrases of the insurance contract, when read in the context of the policy’s other language, are reasonably or fairly susceptible to more than one construction. *Id.*, ¶12. However, contextual ambiguity, in and of itself, does not render an otherwise clear policy provision unenforceable. *Id.*, ¶13. Rather, the inquiry is whether the contextual ambiguity engenders an objectively reasonable alternative meaning. *Id.* When a provision is subject to more than one interpretation, illogically located and labeled within the policy, and inconsistent with other provisions, it will be found to be ambiguous. *Id.* Such a provision will not be enforced because it builds up false expectations and produces reasonable alternative meanings. *Id.*

¶9 The UIM endorsement and reducing clause in the Western National policy are clear and unambiguous, both alone and in the context of the entire policy. We first address the organization and structure of the policy. The policy is twenty-seven pages long, including a three-page endorsement captioned in bold as “UNDERINSURED MOTORISTS COVERAGE-WISCONSIN.” The first page of the policy is the declarations page. Beneath the title of the declarations page are the words: “PLEASE READ YOUR POLICY CAREFULLY.” The declarations

page then lists items of coverage and premiums, including “UNDERINSURED MOTORISTS” bodily injury coverage of \$250,000 per person and \$500,000 per accident. Immediately beneath the list of types of coverage and premiums, the declarations page advises the insured: “Personal Auto Coverage is subject to the policy Forms and Endorsements listed on the attached Auto Forms Summary.” Below these words, at the bottom of the declarations page, are the words: “THIS DECLARATIONS PAGE WITH THE PERSONAL AUTO POLICY FORM, TOGETHER WITH ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.”

¶10 The Personal Auto Forms Summary constitutes the next page of the policy. It states: “The following forms and endorsements are made a part of this policy at the time of inception.” It then lists nine separate items, including Underinsured Motorists Coverage, as well as the form number for the UIM coverage, WNPP08 0699. The policy and endorsements then follow, including the endorsement for “UNDERINSURED MOTORISTS COVERAGE-WISCONSIN.”

¶11 The form number of the UIM endorsement which was set forth in the Personal Auto Forms Summary is clearly typed in bold in the upper right corner of the first page of the UIM endorsement. It is also set forth in bold at the bottom of pages two and three of the endorsement. Consequently, although not listed by page number in a table of contents or index, the UIM endorsement is easily located in the policy by its large, bolded title and by the bolded form number that appears on the top of the first page, and the bottom of the second and third pages of the endorsement.

¶12 The declarations page thus informs the insured, at the inception of the policy, that the UIM coverage of \$250,000 per person and \$500,000 per

accident is subject to the forms and endorsements on the next page, the Personal Auto Forms Summary. The Personal Auto Forms Summary clearly informs the insured that the UIM endorsement contained in form WNPP08 0699 is part of the policy.¹ The endorsement is easy to locate in the following pages, and commences with the words: “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.”

¶13 The endorsement itself is clear and unambiguous, both alone and in the context of the entire policy. Immediately below the cautionary words advising the insured that the endorsement changes the policy and should be read carefully, the endorsement states in bold, capital letters: “UNDERINSURED MOTORISTS COVERAGE—WISCONSIN.” Immediately below those words, it states: “With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement.”

¹ The declarations page clearly informs the insured that policy coverage is subject to the forms and endorsements on the attached Personal Auto Forms Summary, and the Personal Auto Forms Summary clearly informs the insured that the UIM endorsement, which includes the reducing clause, is part of the policy. We therefore reject the Spauldings’ argument that the declarations page creates an illusion of coverage because it does not state that the UIM coverage is subject to a reducing clause. See *Bellile v. American Family Mut. Ins. Co.*, 2004 WI App 72, ¶¶17-20, 272 Wis. 2d 324, 679 N.W.2d 827 (declarations page did not mention that UIM coverage was subject to reduction by payments from other sources, but adequately referred insured to endorsement); see also *Van Erden v. Sobczak*, 2004 WI App 40, ¶¶19-20, 271 Wis. 2d 163, 677 N.W.2d 718, review denied, 2004 WI 114, ___ Wis. 2d ___, 684 N.W.2d 136 (Wis. May 12, 2004) (No. 02-1595).

We also reject the Spauldings’ argument that the declarations page misleads the insured about where to find UIM coverage by listing it under “PART C-UNINSURED MOTORISTS,” which does not address UIM coverage. The declarations page merely lists “UNDERINSURED MOTORISTS” as a separate entry between “PART C-UNINSURED MOTORISTS” and “PART D-DAMAGE TO YOUR AUTO.” Any ambiguity is eliminated by the information in the declarations page indicating that policy coverage is subject to the forms and endorsements on the attached Personal Auto Forms Summary, and the listing of the UIM endorsement on the Personal Auto Forms Summary.

¶14 The term “underinsured motor vehicle” is defined on the first page of the three-page endorsement. The reducing clause is on the second page of the endorsement in a section labeled “LIMIT OF LIABILITY.” It provides:

LIMIT OF LIABILITY

A. The limit of liability shown in the Schedule or in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages ... 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 Schedule or 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. Workers’ compensation law; or
 - b. Disability benefits law.

C. 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.

D. We will not make a duplicate payment under this coverage for any element of loss for which payment

has been made by or on behalf of persons or organizations who may be legally responsible.

- E. We will not pay for any element of loss if a person is entitled to receive payment for the same element of loss under any of the following or similar law;
1. Workers' compensation law; or
 2. Disability benefits law.

¶15 The placement of the reducing clause in subsection B immediately after the "LIMIT OF LIABILITY" section is logical. See *Bellile v. American Family Mut. Ins. Co.*, 2004 WI App 72, ¶21, 272 Wis. 2d 324, 679 N.W.2d 827. It clearly informs the insured that the limit of liability for UIM coverage will be reduced by all sums paid to the insured by the underinsured motorist's insurer or under workers' compensation law. The reducing clause is clear, and the policy is neither organizationally complex nor misleading, as was the situation in *Dowhower v. Marquez*, 2004 WI App 3, ¶29, 268 Wis. 2d 823, 674 N.W.2d 906 (*Dowhower III*), review denied, 2004 WI 20, 269 Wis. 2d 198, 675 N.W.2d 804 (Wis. Feb. 24, 2004) (No. 01-1347).² A reasonable insured would review the declarations page and the attached Personal Auto Forms Summary, and then be directed by the summary to the UIM endorsement and reducing clause. As in *Vorbeck*, the policy takes the insured through the policy in an orderly and logical sequence, allowing the insured to transition from section to section without undue

² In *Dowhower v. Marquez*, 2004 WI App 3, 268 Wis. 2d 823, 674 N.W.2d 906 (*Dowhower III*), review denied, 2004 WI 20, 269 Wis. 2d 198, 675 N.W.2d 804 (Wis. Feb. 24, 2004) (No. 01-1347), the declarations page of the policy misled the insured about where to find the UIM coverage, stating that it was listed under "Coverage C," which did not even reference UIM coverage. *Id.*, ¶20. The remainder of the policy was virtually a maze of roadblocks and detours which failed to guide the insured to the realization that there was a change in the policy reducing the insurer's maximum limit of liability by the amount of the payments made to the insured from other sources. See *id.*, ¶29. This is not the situation with the Western National policy.

confusion and without building up false expectations or producing an objectively reasonable alternative meaning to the policy. See *Vorbeck*, 269 Wis. 2d 204, ¶¶29-30. While reading the policy may not be easy, a careful reading does not produce a reasonable alternative meaning to the reducing clause, and the clause is therefore enforceable. See *id.*, ¶34.

¶16 In reversing the judgment, we reject the Spauldings' argument that the UIM endorsement is ambiguous because the reducing clause conflicts with the endorsement language indicating that the limit of liability is the maximum that Western National will pay. The Spauldings contend that the endorsement misleads the insured into believing that the insurer will pay a limit of \$250,000 per person for UIM coverage which will rarely, if ever, be attainable because of the reducing clause. However, this identical argument has been rejected by this court in *Bellile*, 272 Wis. 2d 324, ¶¶22-23, and *Gohde v. MSI Insurance Co.*, 2004 WI App 69, ¶¶15-17, 272 Wis. 2d 313, 679 N.W.2d 835, *review denied*, 2004 WI 114, ___ Wis. 2d ___, 684 N.W.2d 136 (Wis. June 8, 2004) (No. 01-2121). Similarly, we reject the Spauldings' claim that the policy is ambiguous because the words "declarations," "endorsement," and "reducing clause" are not defined in the definitions section of the policy. This court has previously rejected the argument that failure to define "endorsement" in an insurance policy renders it ambiguous. See *Van Erden v. Sobczak*, 2004 WI App 40, ¶18, 271 Wis. 2d 163, 677 N.W.2d 718, *review denied*, 2004 WI 114, ___ Wis. 2d ___, 684 N.W.2d 136 (Wis. May 12, 2004) (No. 02-1595). Like the word "endorsement," the words "declarations" and "reducing clause" have well-known meanings in the insurance

context. Failure to explicitly define them in the definitions section of an otherwise clear and unambiguous policy does not render the policy unenforceable.³

¶17 Reading the UIM endorsement as a whole and in conjunction with the other provisions of the policy, we conclude that it unambiguously conveys that the maximum \$250,000 per person UIM benefit is reduced by payments to the insured by the underinsured motorist's insurer or under workers' compensation law. Because we therefore conclude that Western National is entitled to dismissal of the Spauldings' complaint based on the reducing clause, the prejudgment interest issue is moot and we need not address it.

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).

³ In an amicus brief, the Wisconsin Academy of Trial Lawyers (WATL) also argues that the reducing clause in the Western National policy violates WIS. STAT. § 632.32(5)(i) (2001-02). This conflicts with the position taken by the Spauldings at page 8 of their respondents' brief, where they concede that the reducing clause complies with § 632.32(5)(i). In any event, WATL argues that the reducing clause violates § 632.32(5)(i) because Western National added the words "or similar law" to it. This same argument was rejected by this court in *Van Erden*, 271 Wis. 2d 163, ¶¶24-25.

WATL also argues that the endorsement is misleading because the "duplicate payments" provision in the "LIMIT OF LIABILITY" section of the endorsement conflicts with the portion of the declarations which informs the insured that UIM damages are covered under "PART C," which discusses only uninsured motorist coverage, not UIM coverage. However, as discussed in footnote one, the reference to "PART C" in the declarations does not render the policy ambiguous. WATL's contention that the "duplicate payments" provision incorporates an ambiguity in the declarations therefore also fails.

