STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1180

Farmers Insurance Exchange,
Respondent,

vs.

Susan Van Eschen,
as Trustee for the Heirs and Next of Kin of Michael J. Brown,
decedent,
Appellant.

Filed April 2, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-10-27848

Roger H. Gross, Brock P. Alton, Gislason & Hunter, LLP, Minneapolis, Minnesota (for respondent)

Arlo H. Vande Vegte, Arlo H. Vande Vegte, P.A., Plymouth, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from summary judgment, appellant challenges the decision of the district court that respondent insurer's underinsured motorist (UIM) policy's "reducing

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

clause" for motorcycles is not ambiguous and limits the UIM coverage to the difference between appellant's UIM limits and the liability insurance paid to appellant. We affirm.

FACTS

Michael J. Brown, who was insured under a motorcycle policy issued by respondent Farmers Insurance Exchange, died when the motorcycle he was driving collided with a motorcycle driven by Gary Arens. For purposes of this lawsuit, the parties stipulated that Arens was solely at fault for the accident and that Brown's damages exceeded $150,000. Arens had $50,000 in liability coverage, which has been paid to appellant Susan Van Eschen, as Trustee for the Heirs and Next of Kin of Michael J. Brown, decedent. The declaration page of Brown's insurance policy set the coverage limit for bodily injury to each person at $100,000.

Brown's insurance policy stated:

> Additional Definitions Used In This Part Only
> As used in this Part:
>
> . . . .
>
> **3. Uninsured (Underinsured) motor vehicle** means a motor vehicle which is:
>
> a. Not insured by a **bodily injury** liability bond or policy at the time of the **accident**.
>
> b. Insured by a **bodily injury** liability bond or policy at the time of the **accident** which provides coverage in amounts less than the amount of the **insured person's damages**.
>
> . . . .
> Limits of Liability
> The limits of liability shown in the Declarations apply subject to the following:

. . . .

> 4. We will pay an **insured person** for unpaid **damages** resulting from a **motor vehicle accident** when the amount the **insured person** is legally entitled to recover against the owner of the **uninsured (underinsured) motor vehicle** exceeds such owner's **bodily injury** policy limit, but not more than:
>
> a. The lesser of the difference between the limit of **uninsured (underinsured)** motorist coverage and the amount paid to the **insured person** by any party held to be liable for the **accident**; or
>
> b. the amount of the **damages** sustained but not recovered.

Respondent paid appellant $50,000 in underinsured benefits and brought this action seeking a declaratory judgment that, under section 4.a of Brown's policy, it did not owe additional benefits. Appellant counterclaimed, alleging that she is entitled to recover an additional $50,000 under section 4.b. The district court granted summary judgment for respondent based on its conclusion that Brown's policy unambiguously provided for underinsured benefits that are "the lesser of" the difference-of-limits amount under section 4.a or the unrecovered damages amount under section 4.b. This appeal followed.

D E C I S I O N

"Interpretation of an insurance policy and its application to the facts in a case are questions of law subject to de novo review. When interpreting an insurance contract, we give words their natural and ordinary meaning, and we resolve ambiguities in favor of the insured." *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 397 (Minn. App. 2010) (citation omitted). But an interpretation that "entirely neutralizes one provision should not be adopted if the contract is susceptible of

another construction which gives effect to all its provisions and is consistent with the general intent." *Reinsurance Ass'n of Minnesota v. Johannessen*, 516 N.W.2d 562, 565 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994); *see also Nat'l City Bank v. Engler*, 777 N.W.2d 762, 766 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010) (stating that court cannot ignore contract language and construing contract in manner to give effect to all language).

Brown's policy states:

> 4. We will pay an **insured person** for unpaid **damages** resulting from a **motor vehicle accident** when the amount the **insured person** is legally entitled to recover against the owner of the **uninsured (underinsured) motor vehicle** exceeds such owner's **bodily injury** policy limit, but not more than:
>
> a. The lesser of the difference between the limit of **uninsured (underinsured)** motorist coverage and the amount paid to the **insured person** by any party held to be liable for the **accident**; or
>
> b. the amount of the **damages** sustained but not recovered.

This language is similar to the UIM statute enacted in 1985, which states:

> With respect to underinsured motor vehicles, the maximum liability of an insurer is the lesser of the difference between the limit of underinsured motorist coverage and the amount paid to the insured by or for any person or organization who may be held legally liable for the bodily injury; or the amount of damages sustained but not recovered.

1985 Minn. Laws ch. 168, § 12 (codified at Minn. Stat. § 65B.49, subd. 4a (1986)).

In *Thompson v. Allstate Ins. Co.*, this court construed the 1986 version of the UIM statute as follows:

> Under Minn. Stat. § 65B.49, subd. 4a the maximum liability of the insurer is the lesser of two amounts. The first amount is the difference between (1) the amount of the policyholder's underinsured motorist coverage and (2) the amount received by the policyholder from the tortfeasor or the tortfeasor's insurer. The second amount is the damages sustained, but not recovered. Which ever amount is less establishes the upper limit of the insurer's liability with respect to underinsured motorist coverage.

412 N.W.2d 386, 388 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). The *Thompson* court noted that this result was mandated by the plain statutory language. *Id.* In a case decided shortly after *Thompson*, the supreme court construed the statute in the same manner, holding that

> the maximum liability of the insurer with respect to underinsured motorist coverage is the lesser of the difference between the limits of UIM coverage set out in the policy declarations or schedules and the amount which has been paid or will be paid to the insured by or for the tortfeasor or tortfeasors, or the amount of damages sustained but not recovered.

Broton v. W. Nat'l Mut. Ins. Co., 428 N.W.2d 85, 89 (Minn. 1988).

In 1989, the legislature amended the UIM statute to provide for add-on coverage, under which the insurer's maximum liability is "the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle." 1989 Minn. Laws ch. 213, § 2 (codified at Minn. Stat. § 65B.49, subd. 4a (1990)); *see also Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598, 600-01 (Minn. 2001) (discussing amendments to UIM statute). In *Johnson v. Cummiskey*, this court held that because the no-fault act does not require UIM coverage for motorcycles, a limits-less-

paid provision was enforceable in a motorcycle policy. 765 N.W.2d 652, 660-62 (Minn. App. 2009).

The issue before us is whether the UIM provision in respondent's policy is a limits-less-paid provision. We conclude that it is, but we reached this conclusion only after determining that the phrase "[t]he lesser of," which begins clause 4.a, should appear before the colon in paragraph 4. However, for three reasons, we are persuaded that the misplacement of this phrase is an error that does not prevent us from determining the meaning of paragraph 4.

The first reason is that the general structure of paragraph 4 suggests that determining the amount that will be paid for UIM benefits involves identifying which of two alternative amounts will be paid. The overall meaning of paragraph 4 is that the insurer will pay for UIM benefits not more than "a" or "b." The use of "or" between clauses a and b demonstrates that the amount to be paid must be selected from the amounts described in the two clauses.

The second reason is that, as written, clause 4.a does not describe an amount. The clause begins with the phrase "[t]he lesser of," which suggests that the clause is going to describe two amounts and the lesser of those two amounts is the amount that applies.[1] But the language that follows "[t]he lesser of" in clause 4.a describes just one amount, not two. The amount described is "the difference between" two separately described amounts. The first separately described amount is the limit of UIM coverage, which, in

[1] "Lesser" means "Smaller in amount, value, or importance, especially in a comparison between two things." *The American Heritage Dictionary of the English Language* 1032 (3d ed. 1992).

this case, is $100,000. The second separately described amount is the amount paid to Van Eschen by Arens' insurer, which is $50,000. The difference between these two amounts is $50,000. However, because the difference between the two amounts is just one amount, there is no way to apply the phrase "[t]he lesser of" to determine the amount described by clause 4.a.

The third reason is that even if clause 4.a could be interpreted in a way that describes an amount, the phrase "not more than," which immediately precedes clause 4.a, would require that the lesser of the amounts described in clauses 4.a and 4.b is the amount that will be paid for UIM benefits because the greater of the two amounts would be more than the lesser of the two. The limitation that the insurer will pay "not more than" "a" or "b" means that the insurer's obligation is limited to paying the lesser of "a" or "b."

These three reasons persuade us that, despite the apparent drafting or printing error, the district court did not err in determining that under Brown's policy, UIM coverage is limited to the difference between appellant's UIM limits and the liability insurance paid to appellant.

Affirmed.