

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 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. 03-3020
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000765

**IN COURT OF APPEALS
DISTRICT II**

JENNIFER J. LEMON,

PLAINTIFF-RESPONDENT,

V.

ECONOMY PREMIER ASSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
PETER L. GRIMM, Judge. *Reversed and cause remanded for further
proceedings.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Economy Premier Assurance Company appeals an order of the circuit court granting Jennifer J. Lemon's motion for declaratory judgment and denying Economy's cross-motion for declaratory judgment. Economy argues the circuit court erred when it concluded that the

reducing clause limiting underinsured motorist (UIM) coverage in an automobile insurance policy issued by Economy is void and unenforceable because it does not comply with WIS. STAT. § 632.32(5)(i) (2001-02).¹ We agree with Economy and reverse the summary judgment of the circuit court and remand for further proceedings.

BACKGROUND

¶2 This case arises out of an insurance coverage dispute resulting from an automobile accident that occurred on December 30, 2000; the facts are essentially undisputed. Lemon was operating a motor vehicle owned by Jennifer S. Sukowaty that was struck by a motor vehicle owned by Sidney T. Puckett. At the time, Lemon was employed by Kirby Company and was acting in the course of her employment. She received worker's compensation benefits in excess of \$300,000 as a result of the injuries she sustained.

¶3 Puckett was insured by a policy of liability insurance issued by State Farm Mutual Automobile Insurance Company with a \$100,000 limit. State Farm tendered its \$100,000 to Lemon on behalf of Puckett.

¶4 Economy issued an automobile policy of insurance to Lemon. The policy contained underinsured motorist (UIM) coverage with a limit of \$250,000. Economy's UIM coverage has a reducing clause that states as follows:

The Limit of Liability under this coverage shall be reduced
by all sums:

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

A. 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 the Bodily Injury Liability Coverage or Uninsured Motorists Coverage of this policy, and

B. paid or payable because of the **bodily injury** under any workers' compensation law, disability benefits law or any similar law.

¶5 Lemon filed a claim with Economy for payment pursuant to the UIM coverage. Economy denied the claim, relying upon the application of the UIM reducing clause; Economy claimed that because Lemon had received payments from both State Farm and from the worker's compensation carrier in excess of \$400,000, Economy's \$250,000 UIM limit was reduced to zero.

¶6 On December 5, 2002, Lemon sued Economy, seeking a declaratory judgment that (1) Economy's reducing clause was not permitted by the authorizing statute, WIS. STAT. § 632.32(5)(i) and, in the alternative, (2) if the reducing clause was authorized by § 632.32(5)(i), that Economy's UIM reducing clause was ambiguous within the context of the entire policy and therefore could not be enforced. Economy answered denying that Lemon was entitled to declaratory relief, arguing that the UIM reducing clause was enforceable and operated to reduce Economy's UIM liability to zero.

¶7 Lemon moved for declaratory summary judgment. Economy opposed Lemon's motion and filed a cross-motion for declaratory summary judgment. After a hearing on the motions, the circuit court concluded that Economy's UIM reducing clause did not comply with WIS. STAT. § 632.32(5)(i). The circuit court concluded that the reducing clause's phrase "paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible" did not comport with § 632.32(5)(i) because § 632.32(5)(i) requires

that the “legal responsibility” be connected to the bodily injury for which the payment is made. The circuit court concluded that Economy’s reducing clause could be interpreted to require a reduction for sums paid by someone who is not legally responsible for the bodily injury but is otherwise legally responsible to the insured in other respects.

¶8 The circuit court also observed that Economy’s reducing clause included the sentence “This includes all sums paid under the Bodily Injury Liability Coverage or Uninsured Motorist Coverage of this policy.” The circuit court concluded that this language also did not comply with WIS. STAT. § 632.32(5)(i). Furthermore, the circuit court referred to the reducing clause’s use of the phrase “or any similar law.” The circuit court concluded that this phrase was not in § 632.32(5)(i) and was broader than the statute allowed. The circuit court rejected Economy’s various arguments, concluding that the reducing clause was not enforceable because it did not comply with § 632.32(5)(i).

¶9 On September 22, 2003, the circuit court entered the order granting Lemon’s motion for declaratory judgment. Economy appeals.

DISCUSSION

¶10 Economy argues that the policy’s conformity clause expressly conforms the reducing clause to the authorizing statute, WIS. STAT. § 632.32(5)(i). Economy further argues that it has not applied the reducing clause to Lemon in a manner that violates § 632.32(5)(i) and that the reducing clause substantively comports with § 632.32(5)(i) pursuant to case law and a plain reading of the statute. We conclude that the contested language in the reducing clause substantively comports with § 632.32(5)(i). We further conclude that even if the contested language did not comply with § 632.32(5)(i), the nonconforming

language does not affect the resolution of this dispute because Economy relied on language under a valid provision in the reducing clause. Consequently, we will not address whether the policy's conformity clause saves the invalid language of which Lemon complains.

¶11 We first set forth the rules we must apply in our review of this case. The grant or denial of a declaratory judgment is addressed to the circuit court's sound discretion. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. The circuit court's exercise of discretion will be upheld if not based on an error of law. *Id.* Resolution of this dispute requires the construction or interpretation of an insurance policy, which presents a question of law; our review is de novo. *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, ¶50, 255 Wis. 2d 61, 647 N.W.2d 223.

¶12 *Folkman v. Quamme*, 2003 WI 116, ¶17, 264 Wis. 2d 617, 665 N.W.2d 857, teaches that, “[a]s a general rule, the language in an insurance contract ‘is given its common, ordinary meaning,’ that is, ‘what the reasonable person in the position of the insured would have understood the words to mean.’” *Id.* (citation omitted). In other words, we “will interpret the words of an insurance contract against the insured when the interpretation conforms to what a reasonable person in the position of the insured would have understood the words to mean.” *Van Erden v. Sobczak*, 2004 WI App 40, ¶22, 271 Wis. 2d 163, 677 N.W.2d 718 (citation omitted), *review denied*, 2004 WI 114, ___ Wis. 2d ___, 604 N.W.2d 136 (Wis. May 12, 2004) (No. 02-1595).

¶13 With these rules in mind, we turn to the policy's reducing clause. Economy's reducing clause reads

The Limit of Liability under this coverage shall be reduced by all sums:

A. 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 the Bodily Injury Liability Coverage or Uninsured Motorists Coverage of this policy, and

B. paid or payable because of the **bodily injury** under any workers' compensation law, disability benefits law or any similar law.

WISCONSIN STAT. § 632.32(5) addresses permissible provisions of motor vehicle policies; subsection (5)(i) specifically states

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.

¶14 Lemon contends that the phrase “paid because of the bodily injury by or on behalf of person or organizations who may be legally responsible” does not comply with WIS. STAT. § 632.32(5)(i) because this phrase may be construed as permitting a reduction in coverage based on payments made by others (not the tortfeasor) who may be “legally responsible” in other respects. Lemon argues this phrase is broader than the statutory language and is therefore invalid and unenforceable. We are not persuaded.

¶15 We recognize that the language in paragraph A may be construed in the manner as suggested by Lemon. However, the language in paragraph A would

not cause a reasonable insured to believe that reductions in payment would be caused by payments from a source other than the tortfeasor or an organization on behalf of the tortfeasor. This provision is not ambiguous; it clearly conveys that recovery under the UIM policy will be limited by payments received from or on behalf of the person or organization “legally responsible” for the damages suffered by the insured. To the extent that the policy language differs from the statute, that difference is negligible and not offensive to the legislative intent. In any event, in this case Economy seeks to limit its liability to Lemon from payments made by the tortfeasor’s liability insurer and worker’s compensation carrier, sources explicitly permitted by WIS. STAT. § 632.32(5)(i).

¶16 Lemon also argues that Paragraph B of the reducing clause fails to comport with WIS. STAT. § 632.32(5)(i) by including the phrase “or any similar law.” Lemon contends this language does not comply with § 632.32(5)(i)2 and 3 because it permits a reduction for payments from sources other than worker’s compensation law or disability benefits law. We considered and rejected this argument in *Van Erden*, 271 Wis. 2d 163, ¶25.

¶17 In *Van Erden*, we examined an American Family policy containing the same reducing clause language as Economy’s. *Id.*, ¶¶24-25 There, as Lemon contends here, the insured argued that the clause was invalid because of the phrase “or any similar law.” We rejected this argument by concluding that “[t]he wording merely acts as a catchall phrase for jurisdictions that may call their disability benefits law by another name.” *Id.*, ¶25. We are bound by this decision. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶18 Lemon contends *Van Erden* does not control here because we did not have an opportunity to fully consider the issue; Lemon claims the *Van Erden*

plaintiffs did not fully address the issue but simply adopted the argument made by the Wisconsin Academy of Trial Lawyers (WATL) in its brief. Lemon also argues that the *Van Erden* court did not fully consider whether a reasonable insured would understand the phrase “any similar law” and that the policy in *Van Erden* was different than the policy at issue here. We reject these arguments. Lemon attempts to make a distinction without a difference between *Van Erden* and this case. Both policies contain the phrase “any similar law” in the same context. The court’s reasoning in *Van Erden* applies with equal force here.

¶19 The only offending provision of the reducing clause is the second sentence of paragraph A which attempts to reduce the UIM limit by payments made under uninsured motorist (UM) coverage. The second sentence of paragraph A reads “This includes all sums paid under the Bodily Injury Liability Coverage or Uninsured Motorists Coverage of this policy.” An insurer is not permitted to reduce the limit of UIM or UM coverage by amounts paid by an uninsured motorist insurer. *Janssen v. State Farm. Mut. Auto. Ins. Co.*, 2002 WI App 72, ¶15, 251 Wis. 2d 660, 643 N.W.2d 857. Under WIS. STAT. § 632.32(5)(i), payments for UIM coverage cannot be reduced by payments under an UM policy. To that extent, the policy does not comply with § 632.32(5)(i). However, that is of no consequence because Economy attempts to reduce its limits of liability under a valid provision of the policy. The policy language in question does not apply to the facts of this case. *See Van Erden*, 271 Wis. 2d at ¶25; *see also Remiszewski v. American Family Ins. Co.*, 2004 WI App 175, ¶ 17, ___ Wis. 2d ___, ___ N.W.2d ___.

CONCLUSION

¶20 We conclude that the reducing clause in Economy's policy complies with WIS. STAT. § 632.32(5)(i) and is therefore enforceable. We therefore reverse the summary judgment in Lemon's favor and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

