COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0889 **Cir. Ct. No. 03CV003887**

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

JANET KIELAS AND WALTER KIELAS,

PLAINTIFFS-RESPONDENTS,

V.

FARMERS INSURANCE EXCHANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed*.

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

¶1 WEDEMEYER, P.J. Farmers Insurance Exchange appeals from a judgment declaring that the reducing clause in the insurance policy issued to Janet and Walter Kielas could not be enforced because of contextual ambiguity. Farmers contends that the trial court erred in reaching that conclusion and asks this court to reverse the trial court's decision. We agree with Farmers that the policy

does not present contextual ambiguity. We, however, conclude that in applying the clear language of the policy to the facts in this case, the trial court reached the right result for the wrong reason. As explained in the body of this opinion, the outcome of the trial court's decision was correct: the Kielases are entitled to an additional $25,000 from Farmers. However, the reason for that entitlement is quite different from the rationale employed by the trial court. Based on the analysis that follows, we affirm the declaratory judgment as amended by this opinion.

BACKGROUND

¶2 On December 8, 2000, Janet Kielas was driving her automobile when another automobile, driven by Latisha Leichman, collided with Kielas. Leichman carried liability insurance in the amount of $25,000. The Kielases' policy with Farmers provided $100,000 of underinsured motorist coverage (UIM).

¶3 Leichman's insurer paid the policy limits of $25,000 to Janet, and Farmers paid $75,000 of the UIM benefits to Janet. As a result, Janet received $100,000 in compensation. Janet contends, however, that she suffered at least $125,000 in damages.

¶4 Janet and her husband filed this declaratory judgment action against Farmers asking the court to declare the amount of UIM benefits available under the Kielases' policy. The Kielases contended that they were entitled to the full $100,000 in UIM benefits available. Farmers argued that the reducing clause in the UIM endorsement operates to reduce the $100,000 limit by the amount Janet recovered from the tortfeasor, $25,000—thus resulting in the $75,000 payment.

¶5 The parties dispute a whole host of issues, including the complexity of the policy, the lack of reference to UIM on the declarations page and index, the typographical errors throughout the UIM endorsement, and the location of the reducing clause. The trial court ruled that the reducing clause itself was not ambiguous, but that other language within the UIM endorsement created contextual ambiguity and therefore, the reducing clause could not be enforced. A judgment was entered to that effect and Farmers now appeals.

DISCUSSION

¶6 This case arises from a declaratory judgment which is addressed to the discretion of the trial court. ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. When the exercise of discretion depends upon a question of law, however, we review the question independently. ***Id.*** In this case, the issue involves interpretation of an insurance contract, which is a question of law. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. If an insurance policy is ambiguous as to coverage, it will be construed in favor of the insured. ***Id.***, ¶16. Provisions in an insurance policy are ambiguous if the language is "susceptible to more than one reasonable interpretation." ***Id.***, ¶13 (citation omitted).

¶7 Before addressing the issue, we set forth an overview of UIM coverage. There are two schools of thought regarding UIM coverage. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶16, ___ Wis. 2d ___, 683 N.W.2d 75. Under the older view, UIM coverage was seen as a benefit to "'compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver (or other responsible party).'" ***Id.*** (citation

omitted). In other words, under this view, the entire UIM limit was available to the insured as "excess coverage."

¶8 The more contemporary view presents UIM coverage as an amount "'to put the insured in the same position as he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured.'" ***Id.***, ¶17 (citation omitted). In other words, it is a "'predetermined, fixed'" sum "made up of payments from both policies." ***Id.*** (citation omitted). In this scenario, the reducing clause operates to reduce policy limits to reach the "predetermined, fixed" sum.

¶9 In 1995, our legislature enacted law recognizing the legitimacy of the latter type of policy. *See* WIS. STAT. § 632.32(5)(i). Likewise, courts began to acknowledge the same. ***State Farm***, 2004 WI 113, ¶18. In determining whether a particular policy offers the older type of UIM coverage or the newer type of UIM coverage, the court must look to the language of the policy.

¶10 The first place to look to is the definition of "underinsured motor vehicle." An insurer may "define 'underinsured motor vehicle' to reflect either the first [older] or second [modern] view of UIM coverage." ***Id.***, ¶19. "The most crucial difference is whether the definition is based on the underinsured motorist motor vehicle policy *limits* or on the *damages* sustained by the insured." ***Id.*** (citation omitted; emphasis added). If the definition is based on the insured's *damages*, the insured would expect the UIM coverage to conform to the old view of UIM coverage. ***Id.***, ¶20. The insured would expect that his or her UIM coverage would operate as excess coverage above the amount recovered from the tortfeasor.

> That is, since the policy considers a vehicle "under"-insured when the tortfeasor's liability coverage is inadequate to fully compensate the insured, the insured could reasonably expect that the entire available limit of the policy would be available to cover part or all of the difference between the tortfeasor's liability limits and the insured's damages.

Id., ¶20.

¶11 If, however, the "UIM policy defines an 'underinsured motor vehicle' by comparing the tortfeasor's limits of liability to the insured's limits of UIM coverage, the insured ought reasonably to expect that the second, more common, view of UIM coverage is in effect." ***Id.***, ¶21. That is, this language clearly indicates to the insured that the UIM coverage will be "the difference between the insured's higher UIM limit and the tortfeasor's lower liability limit." ***Id.***

¶12 In applying this analysis to the Kielases' case, we address first the policy's definition of underinsured motor vehicle: "3. Underinsured Motor Vehicle – means a land motor vehicle when: … 2. its limit for bodily injury liability is less than the amount of the insured persons damages." Clearly, the definition in this case triggers the older view of UIM coverage because it is talking in terms of the *damages*, rather than policy *limits*. Policies which embody the predetermined fixed sum type of UIM coverage do not refer to the insured's damages in defining an underinsured motor vehicle. Instead, one sees a definition such as "a land motor vehicle … to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990) (emphasis omitted). The Kielases' policy clearly uses the language of the older UIM school of thought and, having

read that definition, one would expect that the entire $100,000 UIM limit would be available to cover the difference between the $25,000 liability limits paid by the tortfeasor and Janet's $125,000 in damages.

¶13 The analysis, however, does not stop after an examination of the definition. We next examine the language of the UIM "limit of liability" itself, which provides:

> 1. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of the UNDERinsured Motorist Coverage stated in this policy, and our maximum liability under the UNDERinsured Motorist Coverage is the amount of ***damages*** *sustained but not recovered* from the insurance policy of the driver or owner of any underinsured at fault vehicle.

(Emphasis added.) This is the language that the trial court found created contextual ambiguity when read together with the qualification language. The UIM liability is qualified by the next sentence, which provides:

> 2. We will pay up to the limits shown in the schedule below as shown in the Declarations.
>
> | Coverage Designation | Limits |
> |---|---|
> | U7 | 50/100 |
> | U8 | 100/200 |
> | U9 | 100/300 |
> | UA | 150/300 |
> | U10 | 250/500 |
> | U11 | 500/500 (Combined Single Limit). |

On the Kielases' declarations page, the "U9" code was listed, thus indicating that the coverage limits for the Kielases were "100/300." The Kielases argue that the code designation on the declarations page created ambiguity. We disagree.

Although certainly it would be preferable to have the UIM designation and limits listed, a reasonable person in the Kielases' position could figure out the limits based on the code. In fact, it was not disputed that the Kielases knew and expected both that their policy contained UIM coverage, and had a limit of $100,000.

¶14 We also conclude that the trial court was incorrect in concluding that the UIM endorsement language and qualification of limits created contextual ambiguity. Actually, this language is quite clear and consistent with the language used to define underinsured motor vehicle. The UIM limit is the amount of Janet's *damages*, which were not *recovered* from the tortfeasor. Here, Janet's damages were $125,000. She recovered $25,000 from the tortfeasor. Therefore, the UIM liability is the difference between those two numbers—or $100,000.

¶15 This language, together with the definition of underinsured motor vehicle, clearly reflects that the UIM endorsement offered by Farmers was the older type—the type that treated UIM coverage as excess coverage. Farmers' attempt to persuade us that this policy operates under the modern view of UIM coverage and therefore it is entitled to start with the $100,000 UIM limit, then subtract the liability limit paid by the tortfeasor and only be obligated to pay Janet $75,000 is unconvincing. It is simply not possible to force a square peg into a round hole. The language throughout the UIM endorsement consistently speaks in terms of *damages* rather than *limits*, sending a clear signal to the policyholder that her UIM coverage will operate as an excess amount to cover her damages up to $100,000 over the tortfeasor's liability limit and that if her damages exceed what is paid by the tortfeasor by that amount, she will actually be entitled to recover the full $100,000. Thus, based on this language, the full $100,000 UIM limit should be available to Janet.

¶16 The reducing clause itself is also consistent with this interpretation. The reducing clause states: "1. The *amount* of Uninsured Motorist Coverage[1] we will pay to an insured person shall be reduced by the amount: a. Of any other bodily injury coverage available to any party held to be liable for the occurrence." (Emphasis and footnote added.) Again, this is the language used in the older versions of UIM coverage. The word "amount" is consistent with the language of the UIM endorsement, which refers to the "amount of damages." The newer, modern forms of UIM coverage do not use this same phraseology in the reducing clause. Instead, the newer version speaks in terms of the "*limits* of this coverage [being] reduced." *See* ***Van Erden v. Sobczak***, 2004 WI App 40, ¶21, 271 Wis. 2d 163, 677 N.W.2d 718 (emphasis added).

¶17 Thus, a reasonable insured here would expect that the reducing clause operates consistently with the other language of the policy for the purpose of preventing double recovery. This insurance policy is written to provide up to $100,000 in UIM coverage if the insured's damages exceed what the tortfeasor paid on its liability policy. Thus, if you change the facts of this case and the tortfeasor had $75,000 in liability limits paid to Janet and Janet suffered $175,000 in damages, she would still get the $100,000 UIM limit because you start with her damages of $175,000, subtract the $75,000 liability payment, and end up with $100,000, which is the UIM limit under her policy. However, if the tortfeasor paid $75,000 and Janet's damages were only $100,000, Farmers would only have to pay her $25,000 in UIM coverage. This is so, because you start with her

[1] The trial court found that the reference to "uninsured" was a typographical error and should be interpreted to be "underinsured." We accept the trial court's finding of fact, but note that it is incumbent upon insurers to take every precaution necessary to ensure that the language in their policies is correct.

damages of $100,000, and then subtract the liability payment of $75,000 and arrive at $25,000. She is not entitled to the $100,000 UIM coverage limit under this scenario because it would result in double recovery.

¶18 We conclude that the language in the UIM endorsement is not ambiguous. It clearly establishes that this policy was written to reflect the older view of UIM coverage. Thus, the trial court was correct to enter declaratory judgment in favor of the Kielases, but did so for the wrong reasons. We order that the judgment in favor of the Kielases be amended to reflect the correct reason for judgment in their favor.[2]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.[3]

[2] The Kielases' other arguments in support of ambiguity are not pertinent to our analysis. Nevertheless, these same arguments have been rejected in recent cases: failure to refer to UIM coverage and the reducing clause effect on the declarations page or index, *see* ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶18, 272 Wis. 2d 324, 679 N.W.2d 827; complexity of lengthy policy in location and labeling, *see* ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶30, 269 Wis. 2d 204, 674 N.W.2d 665; and using a separate UIM endorsement, *see* ***Remiszewski v. American Family Ins. Co.***, 2004 WI App 175, ¶20, ___ Wis. 2d ___, 687 N.W.2d 809.

[3] Farmers requests publication of this opinion. We decline the request. The Farmers policy, unlike most of the UIM insurance policies up for review, contains language consistent with the older and less common view of UIM coverage. Accordingly, publication is not necessary and may, in fact, result in additional confusion rather than assistance in this area of the law.