COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2588 **Cir. Ct. No. 2006CV1270**

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

AMY ST. LAURENT,

PLAINTIFF-APPELLANT,

V.

AMERICAN MANUFACTURER'S MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Amy St. Laurent appeals summary judgments dismissing her underinsured motorist (UIM) coverage claims against American Manufacturer's Mutual Insurance Company and State Farm Mutual Automobile

Insurance Company. St. Laurent contends the circuit court erred when it determined: (1) her husband, Andre, was not using a "substitute vehicle" under American's insurance policy, and (2) State Farm's reducing clause was not ambiguous, precluding any further recovery from the company. We discern no error and affirm the judgments.

Background

¶2 Andre was a hydrogeologist for Envirogen, Inc. To accomplish his job, it was often necessary to transport heavy equipment. Employees were required to use their own vehicles to haul the supplies and were compensated accordingly. Andre used his Ford F150 pickup truck approximately twice a month to move machinery. Envirogen did have a minivan for employee use, although it was for local overnight assignments only, not for hauling equipment.

¶3 On June 30, 2000, while Andre was traveling in his truck for Envirogen, another driver crossed the center line, colliding with and killing Andre. The tortfeasor was insured for $25,000, and Envirogen's worker's compensation carrier paid St. Laurent $148,000.[1]

¶4 American insured Envirogen's minivan and State Farm insured Andre's truck. St. Laurent sought UIM payments under both policies. Both companies moved for summary judgment. American argued that no coverage applied to Andre under its policy. St. Laurent responded that the truck was a "temporary substitute" for Envirogen's minivan. State Farm argued that because

[1] State Farm also made some payments for incidental expenses, but those payments are not at issue in this appeal.

St. Laurent had received payments totaling $173,000, the policy's reducing clause meant she had exceeded the policy's $100,000 UIM limit. St. Laurent asserted the reducing clause was ambiguous. The circuit court agreed with the insurers and granted their motions, dismissing St. Laurent's claims.

Discussion

¶5 We review summary judgments de novo, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

¶6 The interpretation of the language in an insurance policy presents a question of law we review de novo. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶9, 245 Wis. 2d 134, 628 N.W.2d 916. We apply the same general rules we use in construing contracts to our review of insurance policies. ***Id.***, ¶10. We construe ambiguities against the drafter, and our interpretation should advance an insured's reasonable expectation of coverage, but we do not engage in construction of an unambiguous policy. ***Id.***

I. American's Policy

¶7 American issued a business automobile policy to Envirogen. The policy included UIM coverage through an endorsement and, as relevant here,

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

defined covered vehicles as: "Only those 'autos' you [the named insured] own…." This coverage thus applied to Envirogen's minivan.

¶8 The UIM coverage provision in the policy states:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "underinsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "underinsured motor vehicle."

The UIM endorsement also defined "insured," which included the named insured and "[a]nyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction." (Internal quotation marks omitted.) St. Laurent focuses solely on this latter definition, arguing Andre was occupying a temporary substitute for the minivan.

¶9 The policy does not define "temporary substitute." In interpreting such a phrase, we give words their common and ordinary meanings. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. St. Laurent argues a substitute is simply "one that takes the place of another; a replacement" and because the minivan could not haul equipment, the truck was therefore a substitute.[3]

[3] American asserts that even if the truck were a substitute for the minivan, St. Laurent could still not recover because she does not meet the definition of an insured. Only Andre occupied the truck, and St. Laurent has brought this suit in her individual capacity, not as the representative of Andre's estate. We need not reach this issue. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

¶10 American responds that the minivan is completely incapable of hauling heavy equipment and, because of the different mechanical capabilities between the minivan and the pickup truck, the truck is not a substitute. American asserts Andre and other employees knew they would have to provide their own vehicles for hauling equipment. Further, American argues even if the truck were a substitute, it was not a temporary substitute because Andre had been using his truck in the course of his employment for approximately two years.

¶11 The circuit court agreed the truck was not a substitute because of the vehicles' different capabilities. Further, the court stated, Andre used the truck not because a substitute for the minivan was needed but because providing his own vehicle was a condition of employment.[4]

¶12 While we deem the circuit court's reasoning sound, we affirm for a different reason.[5] *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992). We conclude summary judgment was appropriate because whether or not, under any meaning of the word, we consider the truck a "substitute" for the minivan, the minivan had to be out of service before the UIM coverage could be transferred to another vehicle. While St. Laurent makes much of the minivan's unfitness for hauling Envirogen equipment, there is absolutely nothing in the record suggesting the minivan was unusable because of its "breakdown, repair, servicing, loss or destruction." Indeed, there is no evidence

[4] Contrary to St. Laurent's characterization, the court did not require a substitute to be an exact replacement of the original.

[5] Alternatively, we agree with the circuit court that the truck was not a substitute, temporary or otherwise, for the minivan.

the minivan was ever unavailable for its designated functions. Thus, the American policy does not apply to the truck.

II. State Farm's Policy

¶13 Andre's State Farm policy includes a reducing clause, which states, in relevant part:

> 2. The most we will pay is the lesser of:
>
> a. the limits of liability of this coverage reduced by any of the following that apply:
>
> (1) the amount paid to the insured by or on behalf of any person or organization that may be legally responsible for the bodily injury; or
>
> (2) the amount paid or payable under any worker's compensation or disability benefits law; or
>
> b. the amount of damage sustained, but not recovered.

St. Laurent received a total of $173,000 from the worker's compensation carrier and the tortfeasor. State Farm therefore asserts the $100,000 policy limit has been exhausted and there is nothing for St. Laurent to collect. St. Laurent claims the reducing clause is contextually ambiguous and unenforceable.

¶14 The first issue in construing an insurance policy is to determine whether an ambiguity exists regarding the disputed coverage. ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857. Our supreme court recently determined this exact clause to be unambiguous on its face and in

compliance with WIS. STAT. § 632.32(5)(i).[6] ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, ¶26, 302 Wis. 2d 409, 734 N.W.2d 386. Thus, the only issue we must address is whether, as St. Laurent asserts, the clause is contextually ambiguous. *See* ***id.***, ¶27.

¶15 Contextual ambiguity exists if an otherwise unambiguous provision is reasonably susceptible to more than one construction when read in context of the policy's other language. *See* ***id.***, ¶28. Contextual ambiguities must be genuine and on the policy's face. ***Folkman***, 264 Wis. 2d 617, ¶29. Inconsistencies must be material to the issue in dispute. ***Id.***, ¶32. Policy language should not be made ambiguous by isolating a small part from the whole. ***Id.***, ¶21.

¶16 The ***Bailey*** court determined this reducing clause was not contextually ambiguous and was therefore valid and enforceable. ***Bailey***, 302 Wis. 2d 409, ¶¶32-33. St. Laurent attempts to distinguish that case by comparing the clause's location within each policy. The ***Bailey*** insurance policy's declaration page directed the insured to an amendatory endorsement to find the UIM coverage

---

[6] WISCONSIN STAT. § 632.32(5)(i), part of the subsection on permissible provisions, 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.

and the reducing clause—that is, the reducing clause was not in the main policy. Here, the reducing clause is part of the primary policy form itself. St. Laurent claims that the ***Bailey*** policy's reference to the endorsement "foreshadowed the existence of a reducing clause" and made that policy clearer. This argument is unpersuasive; the ***Bailey*** declarations page makes no reference to a reducing clause, only to an endorsement for UIM coverage.

¶17 In fact, while St. Laurent essentially asserts that incorporating the clause into the actual policy, instead of attaching it as a separate endorsement after the main policy, makes the clause contextually ambiguous, we consider the reverse to be true. Rather than having two documents—a main policy and an endorsement changing the terms of the main policy—which purport to describe coverage, the incorporation of the reducing clause into the main policy eliminates the second document. This reduces the chance of confusion between two documents and, therefore, is less likely to result in contextual ambiguity.

¶18 Viewing the policy as a whole, if an insured were only to read the declarations page of a policy, he or she would generally see only a figure representing the maximum amount of UIM coverage available. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2000 WI App 266, ¶11, 240 Wis. 2d 65, 622 N.W.2d 457. But most insurance policies contain limits or exclusions; that does not make them ambiguous. ***Id.*** The question is whether the UIM provisions, read with the declarations page, are ambiguous. ***Id.*** Here, there is no ambiguity.

¶19 The declarations page here states that $100,000 UIM coverage is available to each person. The declarations page also states: "Your policy consists of this declarations page, the policy booklet, form 9849.6 and any endorsements

that apply ...." Further, the declarations page designates UIM coverage as coverage W.

¶20 The policy book, which is form 9849.6, is immediately appended to the declarations page. The cover of the policy book advises the insured to "PLEASE READ YOUR POLICY CAREFULLY." The policy index correctly identifies where information on "coverage W" begins, and the reducing clause is within that section. When an insurance policy correctly refers an insured to a relevant potion of the policy without confusion, the insured is properly charged with the obligation to read that provision. ***Myers v. General Cas. Co.***, 2005 WI App 49, ¶24, 279 Wis. 2d 432, 694 N.W.2d 723.

¶21 The declarations page appropriately identifies State Farm's designation for UIM coverage, the policy index accurately directs the insured to the section on that coverage, and the reducing clause is unambiguous on its face. There is no contextual ambiguity. Thus, consistent with ***Bailey***, the reducing clause is valid and enforceable.[7]

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] We reject St. Laurent's invitation to ignore ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, 302 Wis. 2d 409, 734 N.W.2d 386, in favor of ***Gresens v. State Farm Mut. Auto. Ins. Co.***, 2006 WI App 233, 297 Wis. 2d 223, 724 N.W.2d 426, which was vacated and remanded to us in light of ***Bailey***. St. Laurent asserts the reasoning in ***Gresens*** is better than that in ***Bailey***. Even if we agreed, we are bound by decisions of the supreme court and we cannot modify its decisions, and any attempt by this court to relieve a party of the obligations imposed by the supreme court would be "patently erroneous and usurpative." *See* ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985).