STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0248
A07-0357

West Bend Mutual Insurance Company,
Respondent,

vs.

Allstate Insurance Company,
Respondent (A07-248),
Appellant (A07-357),

Thomas Oczak, et al.,
Appellants (A07-248),
Respondents (A07-357).

Filed April 15, 2008
Affirmed
Collins, Judge[*]

Ramsey County District Court
File No. C8-06-5590

Dale M. Wagner, Louis J. Speltz, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402-3707 (for respondent West Bend Mutual Insurance Company)

Brian A. Wood, William L. Davidson, Susan E. Hettich, Lind, Jensen, Sullivan & Peterson, P.A., 150 South Fifth Street, Suite 1700, Minneapolis, MN 55402 (for appellant Allstate Insurance Company)

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

Richard D. O'Dea, Ralph S. Palmer, Palmer O'Dea, L.L.C., 220 Rosedale Towers, 1700 Highway 36 West, Roseville, MN 55113 (for appellants Thomas Oczak, et al.)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.

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

COLLINS, Judge

In these consolidated appeals, appellants Thomas and Connie Oczak and Allstate Insurance Company (Allstate) challenge the district court's grant of summary judgment in favor of respondent West Bend Mutual Insurance Company (West Bend) regarding underinsured-motorist (UIM) claims arising out of a motor-vehicle accident involving Thomas Oczak.

The Oczaks and Allstate argue that the West Bend policy provides both co-primary- and excess-UIM coverage to the Oczaks based on (1) the plain language of Minn. Stat. § 65B.49, subd. 3a(5) (2006), of the No-Fault Act, (2) the "reasonable-expectations" doctrine, and (3) the terms of the garage-business policy issued by West Bend. Because the district court properly concluded that the supreme court's interpretation of the No-Fault Act in *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7 (Minn. 2000), precluded recovery under the West Bend policy, we affirm.

FACTS

Thomas Oczak is an employee of North End 66, Inc., (North End 66) an automobile-repair business.[1] On July 13, 2000, Oczak was involved in a motor-vehicle

[1] Oczak also identifies himself as the sole shareholder of North End 66, Inc.

accident in which he sustained injuries while operating a vehicle owned by Justin Kelly, a customer of North End 66. It is undisputed that Oczak was acting in the course and scope of his employment duties at the time of the accident. The driver of the other vehicle involved in the accident was negligent and underinsured. [2]

Because the at-fault driver was underinsured, Oczak sought recovery under Kelly's auto-insurance policy with Mutual Service Casualty Insurance Company (MSI). MSI settled Oczak's UIM claim by paying him the $100,000 policy limits. Contending that he was still not fully compensated for his injuries, Oczak asserted a claim for UIM benefits under two other policies that were implicated. Oczak carried personal-automobile insurance with Allstate that included $300,000 in UIM coverage. Oczak and his wife Connie Oczak are named insureds under that policy. North End 66 also carried a garage-business policy issued by West Bend that provided $500,000 in UIM benefits. "North End 66, Inc." is the named insured under that policy.

After receiving notice of Oczak's intent to claim UIM benefits, West Bend sought a declaratory judgment to determine the relative obligations and coverage priorities of the putative UIM insurers. The Oczaks[3] responded with a counterclaim against West Bend and a cross-claim against Allstate alleging entitlement to UIM benefits provided under their respective policies. Shortly thereafter, the Oczaks, Allstate, and West Bend brought contemporaneous summary-judgment motions. As part of their motion, the Oczaks

[2] Oczak obtained the full $100,000 in liability coverage available under the negligent driver's auto-insurance coverage.

[3] Connie Oczak asserted her own claims derived from her husband's injuries and joined as a named party to the action.

sought a judgment declaring that (1) the West Bend UIM coverage is either co-primary with MSI's or available as primary-excess-UIM coverage; or (2) the West Bend and Allstate policies both provide available excess-UIM coverage. Conversely, West Bend contended that the UIM coverage identified in its policy was not available to the Oczaks on either a primary or excess basis, and Allstate[4] sought a judgment declaring that the Oczaks must seek excess-UIM benefits under the West Bend policy.

The district court granted summary judgment in favor of West Bend and denied the other parties' motions. The court ruled that Minn. Stat. § 65B.49, subd. 3a(5) (2006), and the supreme court's decision in *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7 (Minn. 2000), precluded the Oczaks from recovering UIM benefits from West Bend because the Oczaks were not named insureds under the garage-business policy. However, in the event that the Oczaks' damages exceeded the $100,000 UIM limits paid under the MSI policy, the court permitted them to maintain their claims for excess-UIM benefits from Allstate. The Oczaks and Allstate filed separate appeals which were consolidated by this court.

[4] Allstate concedes excess-UIM coverage here by virtue of its policy language that identifies "insured autos" as those "not owned by you or a resident relative, if being operated by you with the owner's permission." Oczak was driving Kelly's vehicle with his permission. However, Allstate contends that West Bend also provides excess coverage and, in this instance, should bear the liability under a "closeness to the risk" analysis between the two competing policies.

D E C I S I O N

I.

The Oczaks and Allstate agree that Minn. Stat. § 65B.49, subd. 3a(5) (2006), sets forth the order of priority by which an injured party is required to seek UIM coverage. And they argue that the statute does not operate to bar the Oczaks from pursuing primary- or excess-UIM benefits from West Bend.

On appeal from summary judgment, we must determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). Interpretation of statutory language and the construction of insurance policies are issues of law reviewed de novo. *Auto-Owners Ins. Co. v. Forstrom***,** 669 N.W.2d 617, 619 (Minn. App. 2003), *aff'd by* 684 N.W.2d 494 (Minn. 2004).

The extent of an insurer's liability is generally determined by the contract with its insured as long as that insurance policy does not omit coverage required by law and does not violate applicable statutes. *Lynch ex rel. Lynch v. Am. Family Mut. Ins. Co.*, 626 N.W.2d 182, 185 (Minn. 2001). This court must construe an insurance policy as a whole and must give unambiguous language its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). But when language in an insurance contract is ambiguous, such that it is reasonably subject to more than one interpretation, we will construe it in favor of the insured. *Hammer v. Investors Life Ins. Co. of N. Am.*, 511 N.W.2d 6, 8 (Minn. 1994).

The statute provides in pertinent part:

> If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverages available to the injured person is the limit specified for that motor vehicle. However, if the injured person is occupying a motor vehicle of which the injured person is not an insured, the injured person may be entitled to excess insurance protection afforded by a policy in which the injured party is otherwise insured. The excess insurance protection is limited to the extent of covered damages sustained, and further is available only to the extent by which the limit of liability for like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle.

Minn. Stat. § 65B.49, subd. 3a(5).

A. Primary-UIM Coverage

The supreme court has held that the first sentence of subdivision 3a(5) "directs injured occupants to seek UM/UIM coverage initially from the insurer of the motor vehicle they occupied at the time of the accident and establishes as limits of liability those specified in the policy on the occupied vehicle." *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7, 11 (Minn. 2000). Here, the Oczaks complied with that statutory directive by first seeking UIM coverage from MSI, the insurer of the car Oczak was driving. However, the Oczaks assert that the West Bend policy is also contemplated as primary coverage available under the first sentence because, although the policy does not explicitly identify the Kelly vehicle as an insured vehicle for purposes of UIM coverage, it was covered because it was a customer's car being operated by Oczak in the course and scope of his employment with North End 66.

The Oczaks cite *Norton v. Tri-State Ins. Co. of Minn.*, 590 N.W.2d 649 (Minn. App. 1999), *review denied* (Minn. May 26, 1999), for the proposition that multiple policies may provide primary-UIM coverage under the first sentence of the subdivision. In *Norton*, an injured party brought a declaratory-judgment action seeking a determination that he was entitled to recover UIM benefits under two separate policies written on his personal vehicle, which he was occupying at the time of the accident: one policy that he purchased and the other purchased by a previous owner of the vehicle that was still in force. 590 N.W.2d at 651. This court rejected the argument that the first sentence of subdivision 3a(5) precluded recovery under both policies, stating "[t]he statute limits the liability of each insurance company but does not limit the insured's recovery if more than one insurance company has written a policy covering the automobile involved in the accident." *Id.* at 653 n.2.

Allstate argues that the West Bend garage-business policy should be considered co-primary to MSI's because, like the two policies in *Norton*, both MSI and West Bend have contractually agreed to provide UIM coverage on the automobile involved in the accident. However, *Norton* is distinguishable from the facts of this case. *Norton* involved two policies that specifically identified the vehicle involved in the accident as an insured vehicle. *Id.* at 651. Here, although the West Bend policy issued to "North End 66, Inc." provides $500,000 UIM coverage that generally extends to customer vehicles left with North End 66 for repair, the contractual language did not specifically identify the Kelly vehicle as an insured vehicle.

In *Davis v. Am. Fam. Mut. Ins Co.*, this court noted that the first sentence of Minn. Stat. § 65B.49, subd. 3a(5), requires "an injured party who was a passenger in a vehicle owned by another to look first to the UIM coverage afforded *by the vehicle driver's or owner's policy*." 521 N.W.2d 366, 368-69 (Minn. App. 1994) (emphasis added). This construction stems from the 1985 amendments to the No-Fault Act, which evinced a "broad policy decision to tie uninsured motorist and other coverage to the particular vehicle involved in an accident." *Thommen v. Ill. Farmer's Ins. Co.*, 437 N.W.2d 651, 653 (Minn. 1989) (quotation and footnote omitted). Here, the West Bend insurance is not tied to the driver (Oczak) or owner (Kelly) of the vehicle, but instead names "North End 66, Inc." as the insured party. Thus, we hold that West Bend is not a primary-UIM provider under the statute.

B. Excess-UIM Coverage

An injured person may also obtain excess-UIM benefits "afforded by a policy in which the injured person is otherwise insured." Minn. Stat. § 65B.49, subd. 3a(5). But the excess-UIM protection is only available to the extent that the UIM "coverage applicable to any one motor vehicle listed on the automobile insurance policy *of which the injured person is an insured* exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle." *Id.* (emphasis added).

West Bend contends that the meaning of "otherwise insured" is controlled by the supreme court's decision in *Becker*. There, the supreme court considered whether an injured person was "an insured" of the vehicle which the person was occupying at the time of the accident. 611 N.W.2d at 12-13. The supreme court held that "the correct

interpretation of 'insured' as used in Minn. Stat. § 65B.49, subd. 3a(5), is limited to those persons specifically listed in [the definition of "insured" provided by the No-Fault Act]; that is, the named insured, or spouse, minor, or resident relative of the named insured, in the policy of the occupied vehicle." *Id.* at 13.

Here, the circumstances are somewhat different. West Bend and Allstate have conceded that Oczak was not occupying a motor vehicle of which he was an insured. But West Bend argues that the *Becker* definition of "insured" should nonetheless be applied to determine whether the Oczaks were "otherwise insured" for purposes of the second prong of the test to establish which, if any, excess-UIM benefits are available. Conversely, the Oczaks and Allstate argue that the supreme court intended that the definition in *Becker* only be applied when determining the initial question of whether an injured person can claim excess-UIM benefits. In other words, they contend that the *Becker* definition of "insured" only pertains to the term "insured" as used in the first part of the second sentence of subdivision 3a(5). Under their interpretation, the phrase "otherwise insured" within the same sentence should be more expansively defined to encompass any insurance that might be available, regardless of whether they are named insureds under the policy.

While it is true that *Becker* addressed the narrow issue of whether a person occupying a vehicle involved in an accident was insured under a policy written on the vehicle that did not explicitly include the person as a named insured, the language contained in the third sentence of the statute convinces us that the *Becker* definition is nonetheless controlling here. It limits excess-UIM coverage to "the extent by which the

limit of liability for *like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured* exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle." Minn. Stat. § 65B.49, subd. 3a(5) (emphasis added). This language is significant here for two reasons. First, it limits recovery to coverage applicable to a motor vehicle listed on the insurance policy, and the Kelly vehicle was not listed on the West Bend policy. And second, the language limiting liability to a policy "of which the injured person is an insured" is nearly identical to the language construed in *Becker*. *See Becker*, 611 N.W.2d at 13 (construing the phrase "of which the injured person is not an insured").

Therefore, under the supreme court's construction of the term "insured" in *Becker*, which limits its meaning to the definition provided in the No-Fault Act, we conclude that the Oczaks are precluded from recovering excess-UIM benefits under the West Bend policy. The named insured on the policy is "North End 66, Inc." and obviously the Oczaks are not the spouses, relatives, or minors in the custody of the named insured.

Alternatively, the Oczaks call our attention to cases holding that an individual who obtains insurance under the trade name of the individual's sole proprietorship is still considered a named insured for purposes of the policy. *See, e.g.*, *General Cas. Co. of Wis. v. Outdoor Concepts*, 667 N.W.2d 441, 444-45 (Minn. App. 2003) (holding that a sole proprietor of a business is a named insured under a policy that provides coverage under the trade name of the business). But "North End 66, Inc." is not a sole

proprietorship and such an argument would have us ignore the fact that a corporation is a distinct legal entity.

The Oczaks also point out the policy language identifying the insured parties under the policy. It states:

> **B. Who Is An Insured**
>
> 1. You.
> 2. If you are an individual, any "family member"
> 3. Anyone else "occupying" a covered "auto" or temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
> 4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

Under this language it is clear that the Oczaks are insureds. Thomas Oczak was occupying a covered auto at the time of the accident, and Connie Oczak's claims for damages derive from bodily injuries sustained by her husband. But the dispositive question here is not whether the Oczaks are insureds under the policy, but whether they are *named* insureds. Accordingly, we hold that the Oczaks are not entitled to excess-UIM coverage under the West Bend policy.

II.

The Oczaks contend that the reasonable-expectations doctrine entitles them to recover under the West Bend policy. The doctrine of reasonable expectations protects the objectively reasonable expectations of the insured even if close study of the insurance policy would negate those expectations. *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). In determining the

reasonable expectations of the insured, a court considers (1) ambiguity in the language of the contract; (2) whether the insured was told of important, but obscure, conditions and exclusions or the placement of major exclusions is misleading; and (3) whether the particular provision is one known by the public generally. *Frey v. United Servs. Auto Ass'n*, 743 N.W.2d 337, 342-43 (Minn. App. 2008).

The doctrine is generally applied when an insurance policy has been misrepresented or misunderstood, or when a legal technicality would defeat the insured's objectively reasonable expectations. *Reinsurance Ass'n of Minn. v. Johannessen*, 516 N.W.2d 562, 565-66 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). Importantly, the doctrine of reasonable expectations does not obviate the insured's obligation to read the policy, but only holds an insured to a reasonable understanding of that policy. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 311 (Minn. 1989).

The reasonable-expectations doctrine is only applicable to insurance contracts with ambiguous language or contracts with hidden exclusions. *Merseth by Merseth v. State Farm Fire & Cas. Co.*, 390 N.W.2d 16, 18 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). When there is no ambiguity or hidden exclusion, the doctrine of reasonable expectations cannot be applied to modify the plain language of an insurance policy. *Levin v. Aetna Cas. & Surety Co.*, 465 N.W.2d 99, 102 (Minn. App. 1991), *review denied* (Minn. Mar. 27, 1991).

The Oczaks are not contending that the West Bend policy is ambiguous or contains hidden exclusions. In fact, there is no dispute as to whether they are insureds under the policy language and, but for Minn. Stat. § 65B.49, subd. 3a(5), the policy

unambiguously provides coverage in this situation. Therefore, we hold that the reasonable-expectations doctrine has no application here.

III.

Finally, Allstate argues that we are not constrained by the statute because West Bend chose to provide broader coverage than is required by the No-Fault Act. As support, Allstate cites Minn. Stat. § 65B.49, subd. 7 (2006), which provides that "[n]othing in [the No-Fault Act] shall be construed as preventing the insurer from offering other benefits or coverages in addition to those required to be offered under this section."

But in making this argument, Allstate would have us ignore the plain language of the statute. By its express terms, Minn. Stat. § 65B.49, subd. 3a(5), unambiguously places limitations on the scope and amount of UIM benefits available to an injured party. Unless the West Bend policy qualifies as primary- or excess-UIM coverage under the language of the statute, which we have already concluded is not the case, Allstate is not entitled to relief from summary judgment.

Had we not felt constrained by subdivision 3a(5), we agree that the Ozcaks would have been entitled to claim UIM benefits under the West Bend policy. After all, were it not for the statute, West Bend has conceded that the underwriting intent of the garage-business policy was to provide coverage in situations such as this, when a North End 66 employee is injured while operating a customer's vehicle left for repair. But our review

of the statutory language and the *Becker* decision convinces us that West Bend is not obligated to extend UIM coverage to the Ozcaks in this instance.

Affirmed.