STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1138

Gregory Latterell, as trustee for the heirs
of Jared Travis Boom, decedent,
Appellant,

vs.

Progressive Northern Insurance Company,
Respondent,

and

AIG Insurance Company,
Respondent.

Filed March 2, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-08-18173

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Curtis D. Ruwe, Michelle M. Carter-Seurer, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent Progressive Northern Insurance Company)

Matthew M. Johnson, Michael M. Skram, Johnson & Condon, P.A., Minneapolis, Minnesota (for respondent AIG Insurance Company)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Randall, Judge.*

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

HALBROOKS, Judge

Appellant challenges the district court's entry of summary judgment in favor of respondent insurance companies. Because the district court did not err, we affirm.

FACTS

The facts in this case are undisputed. Tragically, Jared Boom died in a car accident while delivering books to a library. He was paid $148 per day to complete this delivery route. Boom used his own car for his delivery job, and he insured his vehicle with respondent Progressive Northern Insurance Company. Boom was living with his mother and stepfather, appellant Gregory Latterell, at the time of the accident. Appellant had a car insurance policy from respondent AIG Insurance Company that covered household relatives.

Following the accident, appellant, as trustee for Boom's estate, settled with the other driver's insurance company for the liability limit of that policy—$100,000. Appellant then sought to recover underinsured motorist (UIM) coverage from Progressive up to Progressive's policy limit for UIM coverage—$100,000. Progressive denied coverage based on a policy exclusion for claims incurred while carrying property for "compensation or a fee." After Progressive denied coverage, appellant sought coverage

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

from AIG. AIG also denied coverage on the basis that because Boom was the named insured on the Progressive policy that insured the car involved in the accident, he could not seek excess UIM coverage from AIG.

Appellant sued respondents and moved for summary judgment, claiming that Progressive's exclusion violates the Minnesota No-Fault Automobile Insurance Act or, alternatively, that the exclusion is ambiguous and therefore unenforceable. Appellant further argued that if Boom is excluded from coverage under Progressive's policy, that he would be covered under AIG's policy. Respondents brought cross-motions for summary judgment, and the district court granted summary judgment in favor of respondents.

D E C I S I O N

I.

Appellant contends that the exclusion relied on by Progressive violates the Minnesota No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41–.71 (2008). Specifically, appellant argues that because the no-fault act mandates UIM coverage, an insurance policy containing an exclusion that ultimately works to deny UIM coverage violates the act. The district court rejected this argument. "When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo." *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

The no-fault act states in pertinent part:

> (1) No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with

> respect to any motor vehicle . . . unless separate . . . underinsured motorist coverage[] [is] provided therein. . . .
>
> (2) Every owner of a motor vehicle . . . shall maintain . . . underinsured motorist coverage[] as provided in this subdivision.

Minn. Stat. § 65B.49, subd. 3a. The no-fault act is silent as to whether exclusions can operate to deny UIM coverage.

The question of whether an exclusion that operated to deny mandated-UIM coverage violated the no-fault act was addressed by this court in *Smith v. Ill. Farmers Ins. Co.*, 455 N.W.2d 499 (Minn. App. 1990), *review denied* (Minn. July 13, 1990). After suffering injuries in a taxicab accident in Mexico, the injured plaintiffs in *Smith* attempted to recover UIM coverage from their personal car-insurance policies. *Smith*, 455 N.W.2d at 500 (involving two sets of plaintiffs and two insurance policies). The insurers denied UIM coverage based on territorial exclusions in the policies. *Id.* The insureds argued that because the exclusions were not expressly permitted under the no-fault act, they were void as against public policy. *Id.* at 501. This court rejected that reasoning in a divided decision and stated that "[c]lauses purporting to exclude certain types of coverage have been uniformly upheld, provided they are unambiguous and do not conflict with statutory provisions." *Id.* We went on to analyze the no-fault act and ultimately concluded that, "[f]inding no express or implied statutory prohibition on a territorial exclusion clause for accidents occurring in Mexico, our task is to enforce the contract according to its terms. The territorial restrictions contained in the two policies at issue thus are valid and enforceable." *Id.* at 502. The exclusion at issue here is not a

territorial exclusion, but the reasoning used in *Smith* is applicable. As in *Smith*, there is no statutory prohibition on the type of exclusion relied on by Progressive.

In addition, this court has upheld a business-use exclusion, similar to the one here, in the context of liability coverage. In *Ill. Farmers Ins. Co. v. Eull*, 594 N.W.2d 559, 562 (Minn. App. 1999), we determined that a business-use exclusion did not violate the no-fault act, in part, because "the exclusion at issue here is not so broad as to practically foreclose [the mandated] coverage." Because there is no statutory prohibition on business-use exclusion, and because the exclusion at issue is not so broad as to foreclose UIM coverage, we conclude that the exclusion relied on by Progressive to deny Boom UIM coverage does not violate the no-fault act.

II.

Appellant next argues that the exclusion relied on by Progressive is ambiguous and therefore unenforceable. Coverage issues and the interpretation of policy language are questions of law, which are reviewed de novo. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). The construction of a written contract is a question of law, unless there is ambiguity. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Otherwise, unambiguous language is given its plain and ordinary meaning, *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006), and any ambiguity is resolved in favor of the insured.

Mitsch v. Am. Nat'l Prop. & Cas. Co., 736 N.W.2d 355, 358 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007).

The exclusion in the Progressive policy states:

> [UIM coverage] will not apply: 1. to bodily injury sustained by any person while using or occupying: a. a covered auto while being used to carry persons or property for compensation or a fee, including, but not limited to, pickup or delivery of magazines, newspapers, food, or any other products.

Appellant relies primarily on *Progressive Cas. Ins. Co. v. Metcalf*, 501 N.W.2d 690 (Minn. App. 1993), to support his contention that the exclusionary clause at issue here is ambiguous. In *Metcalf*, this court found an exclusionary clause to be ambiguous. 501 N.W.2d at 692. The exclusion in *Metcalf* stated that coverage would not apply to "liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee." *Id.* at 691. The insurer denied coverage based on the fact that the driver was delivering a pizza as part of his job at the time of the accident. *Id.* On appeal, this court reasoned that the term "fee" could refer to a per-trip charge or could include hourly wages paid to an employee such as the driver in *Metcalf*. *Id.* at 692. Because the term "fee" was susceptible to more than one meaning, we concluded that it was ambiguous. *Id.* Because the driver in *Metcalf* did not receive a per-trip charge, this court construed the policy in favor of the insured and required the insurer to provide coverage. *Id.* at 692–93.

We find this case distinguishable from *Metcalf* because the language in Boom's Progressive policy is broader. The exclusion in the Progressive policy precludes

coverage when the insured is carrying property for "compensation or a fee." The inclusion of the term "compensation" removes the ambiguity found in *Metcalf*. The clause encompasses both situations where a driver is receiving a per-trip charge for delivering property or persons or an hourly wage for such deliveries. Because we do not find this phrase susceptible to more than one meaning, we conclude that the exclusion is unambiguous. Boom's use of his car to deliver books in exchange for a daily fee falls squarely within this exclusion.

This outcome follows the logic behind this type of exclusion: that commercial use of a vehicle goes beyond the intended scope of a personal auto policy. *See Eull*, 594 N.W.2d at 561–62 (analyzing a business-use exclusion and concluding that "[t]he use of a car for commercial activities . . . increases the risk of an accident beyond that usually anticipated in the private use of a passenger car"); *see also Simon v. Milwaukee Auto. Mut. Ins. Co.*, 262 Minn. 378, 391, 115 N.W.2d 40, 49 (1962) ("Much as we might dislike exclusionary clauses which may mislead the insured, an insurance policy is still a contract, and where its provisions are unambiguous the courts have no right to thrust upon the insurer a risk that it did not accept and for which it was not paid a premium."). Because the Progressive policy unambiguously excluded UIM coverage when the covered auto was being used for business purposes and because Boom was using his car for business purposes, Boom must be held to the terms of the insurance contract. We conclude that the district court properly granted Progressive's motion for summary judgment.

III.

Appellant argues that if Progressive denies coverage to Boom based on the business-use exclusion, "Boom would no longer qualify for UIM coverage from Progressive, [and] he would not be considered an insured according to that policy." Appellant then concludes that if Boom is no longer "an insured" on the Progressive policy, he qualifies for UIM coverage under appellant's AIG policy. Appellant offers no support for this argument. AIG argues that the no-fault act precludes Boom from seeking any coverage under the AIG policy. The district court agreed with AIG and granted its motion for summary judgment. On appeal, the grant of summary judgment based on statutory interpretation is reviewed de novo. *See Weston*, 716 N.W.2d at 638.

The no-fault act contains a priority scheme for insureds seeking UIM coverage. Minn. Stat. § 65B.49, subd. 3a(5). Under this scheme, an insured must first seek UIM coverage from any policy covering the vehicle involved in the accident. *Id.* "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." *Id.* Coverage on the occupied car is known as "primary" coverage. *W. Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 698 (Minn. 2009). Subdivision 3a(5) of the no-fault act goes on to define when "excess" UIM coverage might be available. "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." Minn. Stat. § 65B.49, subd. 3a(5) (emphasis added).

According to this priority scheme, an injured person might receive benefits from more than one policy, but the statute is designed to "tie uninsured motorist and other coverage to the particular vehicle involved in the accident" rather than to a particular person. *W. Bend Mut. Ins. Co.*, 776 N.W.2d at 699 (quotation omitted). Therefore, an injured person is only entitled to excess coverage if, at the time of the accident, he occupied a motor vehicle of which he was not "an insured."

Appellant contends that because Progressive denied Boom UIM coverage, he was no longer "an insured" under that policy and was therefore entitled to seek excess coverage from AIG. The term "an insured" as used in section 65B.49, subdivision 3a(5), is defined by statute as "an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71, *including the named insured* and [certain] persons not identified by name as an insured." Minn. Stat. § 65B.43, subd. 5 (emphasis added). This definition includes the "named insured" on a policy. It is undisputed that Boom was the only named insured on the Progressive policy.

We agree with AIG that the language of the statute is unambiguous and, under the plain language of the statute, Boom is not entitled to seek excess UIM coverage because at the time of the accident he occupied a motor vehicle of which he was "an insured." The denial of coverage under that policy, based on a valid application of an exclusion, does not mean that Boom is no longer "an insured" according to the statute. We therefore conclude that the district court properly granted AIG's motion for summary judgment.

Affirmed.