COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0777

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

JENNIFER B. COLEMAN,

PLAINTIFF-APPELLANT,

v.

FARMERS INSURANCE EXCHANGE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jennifer B. Coleman appeals from a grant of summary judgment to her insurer, Farmers Insurance Exchange. The trial court concluded that, under the terms of Farmers' automobile liability insurance policy,

Coleman's underinsured motorist claim was barred for failure to give timely and proper notice and for reasons related to other policy violations.

¶2 Coleman claims the trial court erred as a matter of law because there existed "triable" issues of fact as to whether: (1) timely notice was given; (2) Farmers' policy barred her UIM claim on the grounds of untimely notice; and (3) Farmers was prejudiced by any alleged untimely notice. Because, as a matter of law, Coleman failed to satisfy the applicable notice provisions of her policy with Farmers, and such failure was prejudicial to Farmers, we affirm.

BACKGROUND

¶3 On January 22, 1993, Coleman, a minor, was a passenger in an auto driven by her friend, Lynn Sarasin, also a minor. Because of Sarasin's negligence, a collision occurred with another auto and Coleman was injured. Coleman was not wearing a seat belt at the time of the accident. American Family insured the Sarasin car. Although Coleman's mother had an auto insurance policy with Farmers, which included an underinsured motorist ("UIM") provision, no notice was given to Farmers regarding the accident.

¶4 In May 1995, Coleman filed a negligence action against Sarasin and American Family. It is undisputed that she did not name Farmers in the complaint nor did she send a copy of the pleadings to Farmers. Sometime in 1995 or 1996, Coleman's mother advised her Farmers' agent that her daughter was injured while riding as a passenger in a car and was pursuing a claim against the driver's insurer, American Family.

¶5 On January 18, 1999, Coleman learned that Sarasin's American Family policy only provided $25,000 in liability coverage to Sarasin. Coleman's

attorney immediately informed Coleman's insurance agent, and then Farmers directly, that they intended to pursue a claim for UIM under the Coleman policy. On January 21, 1999, Coleman filed the instant action against American Family and Farmers seeking UIM coverage for any damages in excess of American Family's liability limits. It is undisputed that this was the first written notice given to Farmers. American Family eventually settled with Coleman. Farmers waived its subrogation rights against Sarasin, and American Family was dismissed from the action.

¶6 Farmers filed a motion for summary judgment relating to the UIM claim contending that Coleman failed to give it timely notice as required by its policy. It argued that Coleman's tardy notice of the accident prevented it from investigating a potential seat-belt defense and from preserving a potential subrogation claim against Sarasin's parents as sponsors under WIS. STAT. § 343.15(2)(b) (1999-2000),[1] thereby prejudicing its rights.

¶7 Coleman replied that there were "triable" issues as to whether her mother gave timely notice to Farmers through its agent; whether the policy barred the UIM claim even if her notice to Farmers was untimely; and whether Farmers was prejudiced by the delay. The trial court granted Farmers' motion for summary judgment on the following bases: (1) that Coleman had not given timely notice to Farmers under the terms of the policy; (2) that Coleman had not forwarded to Farmers a copy of the summons and complaint in the underlying action; and (3) that these failures caused prejudice to Farmers. Coleman now appeals.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

ANALYSIS

¶8 Coleman claims the trial court erred in granting summary judgment because there existed "triable" issues of fact as to whether untimely notice was provided to Farmers; whether the Farmers' policy barred her UIM claim; and whether Farmers was prejudiced by any alleged untimely notice. For the reasons that follow, we reject Coleman's claims of error.

¶9 The interpretation of an insurance policy is a question of law this court reviews independently. We apply the same rules of construction that we apply to contracts generally. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 810, 456 N.W.2d 597 (1990). In interpreting the policy, our objective is to determine the parties' true intentions. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). When no ambiguities exist and the policy's terms are plain on their face, we will not rewrite the policy by construction. ***Limpert v. Smith***, 56 Wis. 2d 632, 640, 203 N.W.2d 29 (1973).

¶10 As a general rule, each sentence, phrase, or word used in a contract will have some meaning, and none of the language will be discarded as superfluous or meaningless. ***Rabinovitz v. Travelers Ins. Co.***, 11 Wis. 2d 545, 552, 105 N.W.2d 807 (1960). No policy should be interpreted so as to render part of it useless or meaningless or to lead to an absurd result. ***Chalk v. Trans Power Mfg., Inc.***, 153 Wis. 2d 621, 633, 451 N.W.2d 770 (Ct. App. 1989).

A. Timely Notice.

¶11 Coleman first contends that the notice to the insurance agent two-and-a-half years after the accident constitutes timely notice. The trial court

disagreed. Relying on the policy provision requiring notice within "20 days of the accident" or "as soon as possible" if notice cannot be given within twenty days, the trial court ruled as a matter of law that notice was not timely. We agree.

¶12 Coleman contends that her mother's contact with the Farmers' agent was adequate notification. We cannot agree. The policy clearly states that Coleman was required to notify Farmers within twenty days of the accident. The policy further provides that if the policyholder is unable to notify within the twenty-day notice period, the policyholder "must" do so "as soon as possible."[2]

¶13 Here, it is uncontroverted that no notice was given within the required twenty-day period, nor was any excuse proffered for failure to give the required notice. It is further undisputed that Coleman's mother, the policyholder, in a conversation with her Farmers' agent in 1995 or 1996, at least two and one-half years after the accident, mentioned the fact of the accident and that her daughter had filed a claim against American Family. However, even at that time, no specific information was given to the agent or directly to Farmers as to the time, place or circumstances of the accident.

¶14 Coleman suggests that our decision in ***Berna-Mork v. Jones***, 173 Wis. 2d 733, 738-39, 496 N.W.2d 637 (Ct. App. 1992) supports her position. We

---

[2] The policy states:

> **WHAT TO DO IN CASE OF ACCIDENT**
>
> **Notice**
>
> In the event of an **accident**, or loss, notice must be given to us within 20 days. However, if you are unable to do so, then notice must be given as soon as possible. The notice must give the time, place and circumstances of the **accident**, or loss, including the names and addresses of injured persons and witnesses.

disagree. In ***Berna-Mork***, the policy required that notice be provided within one year of the date of accident. ***Id.*** at 736. In that case, we addressed whether verbal notice was sufficient or whether notice had to be provided in writing. The actual verbal notice in ***Berna-Mork*** occurred seven-to-ten days after the date of the accident, well within the maximum one-year requirement. We ruled that WIS. STAT. § 632.26(1)(a) did not require written notice, and that the plaintiffs had substantially complied with the notification requirements of the policy. Here, there is no dispute that Coleman failed to give either verbal or written notice within the twenty-day reporting requirement. Accordingly, ***Berna-Mork*** is inapposite.

B. Argument That Policy Does Not Bar Claim Regardless of Untimely Notice.

¶15 Coleman next asserts that there are "triable" issues regarding whether the language of the policy permits the UIM claim, despite the untimely notice. This argument rests solely on the policy provision, which provides:

> **3. Legal Action Against Us**
>
> We may not be sued unless there is full compliance with all the terms of this policy. We are not relieved of obligation under this policy because you fail to comply with its terms and conditions unless such failure increases the risk or contributes to the **damages** incurred, or exists at the time the **damages** are sustained.

Coleman argues that because the untimely notice did not "increase the risk" or "contribute to the damages incurred," Farmers should not be relieved of its obligations under the policy. We are not persuaded.

¶16 As noted, insurance policies must be read as a whole, and all parts given meaning. ***Rabinovitz***, 11 Wis. 2d at 552. To interpret the provision cited by

Coleman in the way she suggests, would render the notice provisions superfluous. We generally reject such a construction. ***Id.***

¶17 The general provision Coleman relies on provides that failure to comply with the terms of the policy will not relieve Farmers of its policy obligations unless such failure "increases the risk" or "contributes to the damages." "Damages" is defined in the policy as "the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**." The trial court ruled that the untimely notice did increase Farmers' risk that the amount it would have to pay, if obligated to do so, would be greater because the late notice prevented it from investigating a potential seat-belt defense, which could reduce "the cost of compensating," and prevented it from seeking subrogation from the driver's parents, which would reduce its cost. The court explained:

> First of all, I have some serious questions whether that term applies to the facts here; but even if it did, it seems to me that failure to notify Farmers for six years, even for two and a half years, but failure to notify of the details certainly contributed to the damages in this case that are being faced by Farmers, contributed to the amount that they may have to incur because it took away defenses; and we're back to the seat belt and the parental responsibility.
>
> To read the policy as the plaintiff does, I agree with the defense that no notice would ever be required to be given and I don't think that is a reasonable reading.

We agree with the trial court that Farmers presents the more reasonable interpretation of the policy.

¶18 Moreover, the notice provision clearly and unambiguously states when notice must be given, and what must be contained in the notice. A reasonable person in the position of the insured would understand that such notice must be complied with in order to secure coverage under the policy.

¶19 Coleman also contends that her failure to comply with the policy's notice provision does not violate the statutory notice-prejudice requirements of WIS. STAT. § 632.26 because that statute does not apply to UIM claims. We disagree.

¶20 WISCONSIN STAT. § 632.26, the notice provisions required to be in every liability insurance policy, reads:

> (1) … (a) That notice given by or on behalf of the insured to any authorized agent of the insurer within this state, with particulars sufficient to identify the insured, is notice to the insurer.
>
> (b) That failure to give any notice required by the policy within the time specified does not invalidate a claim made by the insured if the insured shows that it was not reasonably possible to give the notice within the prescribed time and that notice was given as soon as reasonably possible.
>
> (2) EFFECT OF FAILURE TO GIVE NOTICE. Failure to give notice as required by the policy as modified by sub (1) (b) does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice.

Coleman cites ***Ranes v. American Family Insurance Co.***, 219 Wis. 2d 49, 580 N.W.2d 197 (1998) as authority for her contention that this statute does not apply to UIM claims. We reject this assertion for three reasons. First, ***Ranes*** did not declare that providing notice of an accident in an UIM claim is not necessary. Second, ***Ranes*** did not declare that § 632.26 does not apply to a UIM claim. Third, "every liability insurance policy in Wisconsin contains as a matter of law a notice-prejudice provision as stated above in § 632.26(1)(b)." ***Lexington Ins. Co. v. Rugg & Knopp, Inc.***, 165 F.3d 1087, 1094-95 (7th Cir. 1999). Thus, regardless of whether the claim is a liability, UM claim, or UIM claim, providing

notice of the accident is required and § 632.26 applies. The trial court did not err in concluding that § 632.26 is applicable in this case.

C. Prejudice.

¶21 Next, Coleman claims that whether Farmers was prejudiced by any untimely notice is a "triable" issue of fact. We disagree.

¶22 The obvious purpose of any statutory or policy timely notice requirement is to afford an insurer an opportunity to timely investigate the circumstances of an accident while witnesses are available, property extant, and memories fresh. The failure to give timely notice may be "ameliorated by giving the insured an opportunity to rebut the presumption of prejudice and to retain coverage" under a UIM claim. ***Ranes***, 219 Wis. 2d at 62. Demonstrating the existence of the opportunity to investigate could serve to rebut the presumption. Rebutting the presumption, however, presents a question of the sufficiency of proof, which is a question of law. ***Allen v. Ross***, 38 Wis. 2d 209, 215-16, 156 N.W.2d 434 (1968).

¶23 As we have already decided, notice was not timely provided to Farmers. Thus, a rebuttable presumption came into play. As this case developed, it was learned that Coleman was not wearing a seat belt. She claims this was so because the seat belt did not function. She argues that this issue creates a "triable" issue of fact as to whether a seat-belt defense was even a possibility. To the contrary! Because of the untimely notice, the seat belt is no longer available for inspection to determine whether it was broken. As a result, Farmers cannot investigate Coleman's claim that the seat belt did not work. The prejudice is the inability to investigate a seat belt or any other defense. Therefore, we agree with

the trial court that the untimely notice created prejudice as a matter of law for Farmers based on the undisputed facts and circumstances presented here.[3]

By the Court.—Judgment affirmed.

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

[3] The trial court also granted the summary judgment on the basis that Coleman failed to comply with another provision of the policy which provided:

> **5. Our Right to Recover Payment**
>
> In the event of any payment under this policy, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to the recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to prejudice our rights.

The trial court ruled that Coleman's failure to provide Farmers with the legal papers relating to this case also constituted a policy violation, which precluded coverage. Coleman contends that this provision applies only "after payment" is made. We need not resolve this dispute because we have already affirmed the trial court on the untimely notice ground, which was sufficient for granting summary judgment. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

Farmers also contends that it was prejudiced as a result of the late notice because it foreclosed a subrogation claim against the negligent driver's parents under the sponsorship statute. We need not address whether this constituted a separate ground of prejudice because we have concluded that the inability to inspect the seat belt and investigate that defense sufficiently prejudiced Farmers. *See* ***id***.