COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 03-0262

Cir. Ct. No. 02CV000744

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

EDWARD W. POPE AND JOAN POPE,

PLAINTIFFS-APPELLANTS,

V.

KENNETH A. BRUCE AND
AMERICAN FAMILY MUTUAL INSURANCE GROUP,

DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward W. and Joan Pope appeal from an order dismissing their claim against Acuity,[1] a mutual insurance company, and from a finding that Acuity has paid the full amount of underinsured motorist coverage available to the Popes under their insurance policy. Specifically, the Popes contend that the "reducing clause" contained within the Acuity policy is ambiguous and therefore unenforceable. Because we conclude that the reducing clause is unambiguous, we affirm.

I. BACKGROUND.

¶2 On March 22, 2000, the vehicles driven by Kenneth A. Bruce and Edward Pope collided, and Edward Pope suffered serious injuries as a result of the accident. Bruce was insured through American Family Insurance Group, and the policy carried a $25,000 per person limit on liability for bodily injuries. The Popes were insured through Acuity, and the policy had a $300,000 limit on underinsured motorist (UIM) coverage.

¶3 In order to preserve its right to seek reimbursement from American Family and Bruce, Acuity paid the Popes the $25,000 allowed by the American Family policy limits. In addition, Acuity paid the Popes $275,000 pursuant to the UIM coverage purchased by the Popes and the reducing clause contained within the policy. The relevant policy language reads as follows:

---

[1] Acuity was formerly named Heritage Mutual Insurance Company. The Popes apparently purchased the insurance policy while the company was known as Heritage. However, for clarity, we will refer to the company only as Acuity.

> **PART I – UNDERINSURED MOTORISTS**
>
> **We** will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. **Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **underinsured motor vehicle**.
>
> **We** will pay under this coverage only after the limits of liability under any applicable **bodily injury** liability policies or bonds have been exhausted by payment of judgment or settlements.
>
> **Limits of Liability**
>
> The limit shown in the Declarations for this coverage is the maximum **we** will pay regardless of the number of vehicles or premiums described in the Declarations, premiums paid, **insured persons**, claims, claimants, policies or vehicles involved in the accident. The limit shown is subject to the following:
>
> **1.** When **bodily injury** is sustained by an **insured person** while **occupying your insured car**, the Underinsured Motorists limit of that vehicle only will apply.
>
> **2.** The maximum limit available for **bodily injury** sustained by **you** or a **relative**, if not **occupying your insured car** at the time of the accident, is the highest limit of Underinsured Motorists coverage on any one motor vehicle **we** insure for **you**.
>
> **3.** The Underinsured Motorists limit will be reduced by any of the following that apply:
>
> a. Amounts paid by or on behalf of any person or organization that may be legally responsible for the **bodily injury** for which the payment is made.
>
> b. Amounts paid or payable under any Workers' Compensation law.
>
> c. Amounts paid or payable under any disability benefits laws.

¶4 On January 22, 2002, the Popes filed the lawsuit underlying this appeal, claiming that Acuity owed them the remaining $25,000 of their UIM

coverage, and requesting the trial court to declare, pursuant to WIS. STAT. § 806.04 (2001-02),[2] that: (1) "the UIM insurance policy issued by [Acuity] is ambiguous"; (2) "a reasonable person in the position of the [Popes] would not have understood the [Acuity] policy to mean that the $300,000.00 limit in UIM coverage was to be a maximum recovery from all sources"; and (3) "the reducing clause contained in the [Acuity] policy is unenforceable pursuant to … ***Dowhower v. West Bend Mutual Insurance Co.***, 2000 WI 73, 236 Wis.[]2d 113, 613 N.W.2d 557 (2000)." Acuity filed a motion for declaratory judgment requesting that the trial court find that the reducing clause is valid and enforceable and, as such, that Acuity had fully satisfied all of its obligations to the Popes. The trial court granted that motion, and the Popes appeal therefrom.

II. ANALYSIS.

¶5 The Popes contend that, under the standard articulated in ***Badger Mutual Insurance Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, Acuity "needs to inform its insured, with language that is crystal clear, that the UIM limit of liability set forth in the Declarations page is derived based upon payments from all sources or else it cannot enforce a 'reducing clause' against the insured." (Emphasis in brief omitted.) Further, the Popes argue that, while the Acuity policy is not as "organizationally complex" as the American Merchants policy in ***Schmitz***, "the fact remains that even if an insured could locate those sections of the Acuity policy that identify available UIM coverage and the applicable 'reducing clause,' the insured would still encounter contradictory

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

language." They contend that the policy fails to adequately inform the insured of the liability limit, is thus not "crystal clear," and accordingly, is ambiguous and unenforceable.

¶6 "A decision to grant or deny declaratory relief falls within the discretion of the circuit court." ***Milwaukee Dist. Council 48 v. Milwaukee County***, 2001 WI 65, ¶36, 244 Wis. 2d 333, 627 N.W.2d 866. However, "[t]he construction or interpretation of an insurance policy presents a question of law to which we apply *de novo* review." ***Schmitz***, 255 Wis. 2d 61, ¶50 (emphasis added). "[T]he first issue in construing an insurance policy is to determine whether an ambiguity exists regarding the disputed coverage issue." ***Folkman v. Quamme***, 2003 WI 116, ¶13, __ Wis. 2d __ , 665 N.W.2d 857. "Words or phrases of an insurance contract are ambiguous if they are susceptible to more than one reasonable construction." ***Schmitz***, 225 Wis. 2d 61, ¶51. Further, "[t]he test for determining whether contextual ambiguity exists is the same as the test for ambiguity in any disputed term of a policy." ***Folkman***, 2003 WI 116, ¶29.

¶7 "If there is no ambiguity in the language of an insurance policy, it is enforced as written[,] [and i]f there is an ambiguous clause … we will construe that clause in favor of the insured." ***Id.***, ¶13 (citations omitted). Finally, "[t]he court must interpret the policy language to mean what a reasonable person in the insured's position would understand it to mean." ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 636-37, 586 N.W.2d 863 (1998).

¶8 Pursuant to WIS. STAT. § 632.32(5)(i),

> [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.

In ***Dowhower v. West Bend Mutual Insurance Co.***, 2000 WI 73, ¶36, 236 Wis. 2d 113, 613 N.W.2d 557, the supreme court rejected a challenge to the constitutionality of the statute, concluding that "Wis. Stat. § 632.32(5)(i)1 on its own terms does not deprive [insureds] of any state or federal constitutional right to enter into insurance contracts without fraud, and, as a result, it does not present a substantive due process violation."

¶9 In terms of ambiguity, however, the supreme court later stated that, "[w]hen the policy as a whole fails to set forth a clear, understandable description of the underinsured motorist coverage being purchased, a reducing clause may be ambiguous within the context of the insurance contract." ***Schmitz***, 255 Wis. 2d 61, ¶73 (citation omitted). It is from this case that the Popes glean the "crystal clarity" standard, as a result of the following language: "Although Justice Bradley's statement was not part of the majority opinion, it reflects the reasoning in ***Dowhower*** that reducing clauses must be crystal clear in the context of the whole policy." ***Schmitz***, 255 Wis. 2d 61, ¶46. Thus, under ***Schmitz***, even if the clause was written in conformity with WIS. STAT. § 632.32(5)(i), it could still be deemed ambiguous if not "crystal clear" within the context of the whole policy.

¶10 Shortly after the filing of this appeal, the supreme court revisited the issue:

> The issue then is, what degree of contextual ambiguity is sufficient to engender an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language? On this matter we acknowledge an unintended effect of some language we used in ***Schmitz***. In that decision, we summed up ***Dowhower*** as saying "that reducing clauses must be crystal clear in the context of the whole policy" for insureds to understand what they are purchasing. A series of court of appeals decisions decided post-***Schmitz*** reveals that our admonition of "crystal clarity" has been used to alter the analytical focus. Rather than assessing whether a policy, as written, is ambiguous in context, insurers are being required to undertake affirmative, explanatory responsibilities in drafting policies. Aspirational goals and admonitions on how to avoid ambiguity are admittedly different from minimum legal standards.
>
> ***Schmitz*** and its predecessors do not demand perfection in policy draftsmanship. These decisions advise insurers to draft policies in a clear manner if they upset the reasonable expectations of insureds. To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings. These standards for clarity are consonant with Wisconsin law on ambiguity in insurance contracts.

Folkman, 2003 WI 116, ¶¶30-31 (citations and footnote omitted). Shortly thereafter, on September 12, 2003, the supreme court summarily vacated several court of appeals decisions finding policies ambiguous under ***Schmitz***, in light of the court's decision in ***Folkman***. *See, e.g.*, **Gohde v. MSI Ins. Co.**, 2003 WI 128, No. 01-2121, *vacating* **Gohde v. MSI Ins. Co.**, 2003 WI App 69, 261 Wis. 2d 710, 661 N.W.2d 470; ***Dowhower v. Marquez***, 2003 WI 127, No. 01-1347, *vacating* ***Dowhower v. Marquez***, 2003 WI App 23, 260 Wis. 2d 192, 659 N.W.2d 57 [hereinafter ***Dowhower II***].

¶11 Accordingly, ***Folkman*** presumably provides the prevailing approach to determining ambiguity. In that case, the supreme court recognized that the "principle of contextual ambiguity is established precedent[,]" ***Folkman***, 2003 WI

116, ¶24, and noted that "[o]ccassionally a clear and unambiguous provision may be found ambiguous in the context of the entire policy." ***Id.***, ¶19. Thus, as noted above, the issue became: "what degree of contextual ambiguity is sufficient to engender an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language?" ***Id.***, ¶30. The court concluded that the preceding case law does not demand perfection in policy drafting. Instead, the court stated that "[t]hese decisions advise insurers to draft policies in a clear manner if they upset the reasonable expectations of insureds." ***Id.***, ¶31. Further,

> [t]o prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings….
>
> … [I]nconsistencies in the context of a policy must be material to the issue in dispute and be of such a nature that a reasonable insured would find an alternative meaning.

Id., ¶¶31-32. With these guidelines, we now turn to the Acuity policy.

¶12 Both parties agree that the language of the reducing clause comports with WIS. STAT. § 632.32(5)(i). As the clause is, therefore, not ambiguous on its face, it is necessary to evaluate the clause in the context of the entire policy. It is important to note, however, that the Popes rely heavily upon the holdings in ***Dowhower II*** and ***Gohde*** in support of their contention that the Acuity reducing clause is ambiguous in the context of the entire policy. Both cases have been recently summarily vacated. Thus, those cases can no longer be proper guides for our evaluation. As such, we will make no reference to the analyses in those decisions.

¶13 The Acuity policy is not organizationally complex; all of the relevant language is contained in two pages of the policy. Yet, there are several

aspects of the Acuity policy worth evaluating in light of an allegation of ambiguity: (1) the Declarations; (2) the Table of Contents; and (3) the UIM Coverage portion of the policy.

¶14 The Declarations page of the Acuity policy lists the UIM limit as $300,000. While it does not include an explanation of the limits of liability, or the reducing clause, that lack of immediate explanation is not dispositive. As the supreme court has warned, "[t]he language of a policy should not be made ambiguous by isolating a small part from the context of the whole." ***Folkman***, 2003 WI 116, ¶21. Although the Declarations page "is generally the portion of an insurance policy to which the insured looks first, and is the most crucial section of the policy for the typical insured[,]" ***id.***, ¶37 (citations omitted), "[a] declarations page is intended to provide a summary of coverage and cannot provide a complete picture of coverage under a policy." ***Sukala v. Heritage Mut. Ins. Co.***, 2000 WI App 266, ¶11, 240 Wis. 2d 65, 622 N.W.2d 457, *overruled on other grounds by* ***Schmitz***, 255 Wis. 2d 61. Thus, we must look to the rest of the policy.

¶15 The Table of Contents points the insured to the UIM coverage on Page 17 of the policy. On Page 17, and as duplicated above, the UIM coverage is explained and immediately followed by the reducing clause, in the clearly labeled portion entitled "Limits of Liability." The Popes argue, however, that the "the maximum we will pay" language renders the coverage illusory and is in direct contradiction to the limit set forth in the Declarations page as a result of the operation of the reducing clause. The Popes cite ***Schmitz*** in support of this contention. In ***Schmitz***, the supreme court stated:

> The "Schedule" on the twenty-third page fails to inform that these dollar limits represent combined payments from all sources and will never be paid by the insurer because of the policy's reducing clause. Because the "maximum"

> limits of liability are described as the "most" American Merchants will pay, they imply that these limits are attainable.

255 Wis. 2d 61, ¶65. It is important to note, however, that in ***Schmitz***, the supreme court was evaluating an organizationally complex policy with split UIM limits and did not base its determination of ambiguity on this factor alone; there were four factors that contributed to the determination. Further, the UIM coverage and the reducing clause were contained in completely separate portions of the American Merchants policy. Here, the reducing clause directly followed the paragraph containing the "maximum we will pay language."

¶16 The "maximum we will pay" language is qualified by the following: "regardless of the number of vehicles or premiums described in the Declarations, premiums paid, insured persons, claims, claimants, policies or vehicles involved in the accident." That language is immediately followed by: "The limit shown is subject to the following: … The Underinsured limit will be reduced by any of the following that apply: a. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury for which the payment is made…." Reading all of the language together, a reasonable insured would understand the UIM coverage to be limited by the reducing clause. The "maximum we will pay" is, perhaps, a more efficient way of saying: "If the amount paid by or on behalf of any person or organization that may be legally responsible for the bodily injury for which payment is made is $5000, we will pay $295,000. If the amount paid by or on behalf of any person or organization that may be legally responsible for the bodily injury for which payment is made is $25,000, we will pay $275,000. If the amount paid by or on behalf of any person or organization that may be legally responsible for the bodily injury for which payment is made is $125,000, we will pay $175,000," and so forth. While that

would be inefficient, and the language chosen by Acuity may not be *perfect*, the Acuity reducing clause is clear, unambiguous, and understandable in the context of the whole policy.

¶17 Unlike the American Merchants policy in ***Schmitz***, the Acuity policy is not organizationally complex or confusing. Also unlike the American Merchants policy, the UIM coverage is listed in both the Declarations and the Table of Contents. Further, unlike the American Merchants policy, the relevant portions of the Acuity policy are clearly labeled. And finally, all of the relevant information is contained in two pages of the Acuity policy, unlike the six fairly scattered pages of the American Merchants policy.

¶18 ***Folkman*** advises us that "a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings." 2003 WI 116, ¶31. This court cannot conclude that the provisions build up false expectations or are inconsistent, or that there is a reasonable alternative meaning for the reducing clause in the context of the entire policy. As such, this court affirms.

By the Court.—Order affirmed.

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