

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2004

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. 03-2253
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000016

**IN COURT OF APPEALS
DISTRICT II**

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SUSAN COLLINS AND RYAN COLLINS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
DONALD J. HASSIN, Judge. *Reversed and cause remanded with directions.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Susan and Ryan Collins appeal from a judgment giving effect to a reducing clause in an endorsement for underinsured motorist (UIM) coverage in a commercial automobile policy issued by General Casualty Company of Wisconsin to the Collinses. The Collinses argue that the reducing clause is contextually ambiguous and, therefore, they are entitled to the maximum

UIM benefit of \$100,000. We agree and reverse the judgment and remand the matter for entry of a judgment consistent with this opinion.

¶2 Susan and Ryan Collins sustained damages as a result of a multi-car accident caused by Leah Verstegen. Verstegen's insurer paid its \$100,000 limit to injured parties, including \$43,000 to Susan Collins and \$1,000 to Ryan Collins. The Collinses claimed entitlement to UIM benefits under General Casualty's policy. The policy includes a UIM limit of \$100,000 and a reducing clause which states that the limit "shall be reduced by ... [a]ll sums paid by or for anyone who is legally responsible." General Casualty tendered \$56,000 to the Collinses, representing the \$100,000 limit reduced by the \$44,000 paid by Verstegen's insurer. General Casualty filed this action for declaratory judgment regarding its obligation under the policy. The circuit court determined that the UIM's reducing clause is unambiguous and enforceable and that General Casualty does not owe the Collinses any additional sum.

¶3 The interpretation of an insurance contract presents a question of law which we review de novo. *Folkman v. Quamme*, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. Here the parties agree that the reducing clause itself is not ambiguous. *Folkman* recognized the concept of contextual ambiguity, indicating that a clear phrase within a policy can be rendered ambiguous by contradictory language elsewhere in the policy. See *Commercial Union Midwest Ins. Co. v. Vorbeck*, 2004 WI App 11, ¶11, 269 Wis. 2d 204, 674 N.W.2d 665 (Ct. App. 2003), *review denied*, 2004 WI 20, 269 Wis. 2d 200, 675 N.W.2d 806 (No. 03-0100). The test for contextual ambiguity is whether the words or phrases at issue, when read in the context of the policy's other language, are reasonably or fairly susceptible to more than one construction. *Id.*, ¶12 (quoting *Folkman*). Thus, ambiguity may be created by the organization, labeling, explanation,

inconsistency, omission, or text of other provisions in the policy. *See Folkman*, 264 Wis. 2d 617, ¶19. A policy will not be enforced when it is so ambiguous or obscure as to create false expectations. *Id.*, ¶¶20, 31. *See also Vorbeck*, 269 Wis. 2d 204, ¶13. The inquiry is “measured by the objective understanding of an ordinary insured.” *Folkman*, 264 Wis. 2d 617, ¶29.

¶4 We first address the Collinses’ claim that a detailed examination of their policy is not required because the issue has already been decided against General Casualty in *General Casualty Co. v. Nicholas*, No. 03-1616, unpublished slip op. (WI App Apr. 6, 2004). In *Nicholas*, the Milwaukee County Circuit Court ruled that General Casualty’s UIM reducing clause was contextually ambiguous and that ruling was affirmed on appeal. *Id.*, ¶¶3, 19-20. Issue preclusion bars relitigation of issues of law or fact that have been litigated in a previous action. *Reuter v. Murphy*, 2000 WI App 276, ¶7, 240 Wis. 2d 110, 622 N.W.2d 464. “The rule is designed to further the interest in judicial economy by limiting the relitigation of issues that have been tried and decided in a previous action.” *Id.* However, courts may consider equitable factors in deciding whether to apply the rule, and application of the rule must comport with principles of fundamental fairness. *Id.* We decline to apply the doctrine of issue preclusion because the General Casualty policies at issue are different. This case involves a commercial automobile policy and *Nicholas* involved a personal automobile policy. Additionally, the language in the UIM endorsement, including the reducing clause, definition of an underinsured motor vehicle, and limitation on duplicate payments, is different. We cannot rely on *Nicholas* to determine whether the policy issued to the Collinses is contextually ambiguous.

¶5 We turn to the required examination of the General Casualty policy starting with its organization and structure. *See Dowhower v. Marquez*, 2004 WI

App 3, ¶19, 268 Wis. 2d 823, 674 N.W.2d 906 (Ct. App. 2003) (*Dowhower III*) (“[T]he court should trace the route the insured would have to take from the declarations page to the reducing clause.”), *review denied*, 2004 WI 20, 269 Wis. 2d 198, 675 N.W.2d 804 (No. 01-1347). The policy is lengthy, at least forty-two pages long. The UIM coverage is provided in a four-page endorsement, beginning at page thirty-nine. It is captioned in bold: “WISCONSIN UNDERINSURED MOTORISTS COVERAGE.” Just above this large text caption is the statement in smaller text: “THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY.” Although the endorsement is clearly labeled, nothing in the early pages of the policy gives the insured a clue as to where the UIM coverage can be found. There is no table of contents to the lengthy policy.

¶6 The second page of the policy is titled, “Commercial Automobile Policy Quick Reference.” It informs the insured that the policy consists of several items: the declarations pages, coverage forms, additional provisions or exclusions, and common policy conditions. Our first concern is that this quick reference guide does not even use the term “endorsement” in describing the parts of the policy. While a reasonable insured can be expected to know what an endorsement is, *see Van Erden v. Sobczak*, 2004 WI App 40, ¶18, 271 Wis. 2d 163, 677 N.W.2d 718, *review denied*, 2004 WI 114, 684 N.W.2d 136 (No. 02-1595), the quick reference page gives no clue that endorsements are part of the policy. The quick reference page explains: “This policy may be modified by additional provisions or exclusions. When this happens, the forms which contain those provisions or exclusions will be found after the Coverage Forms. The form numbers will also appear on the declarations.” Once an insured reaches the UIM endorsement it is

not immediately known whether the “endorsement” constitutes coverage forms or additional provisions or exclusions as defined on the quick reference page.

¶7 The schedule of coverages and covered autos appears on the declarations page. The limit is defined as “the most we will pay for any one accident or loss.” The page reflects that covered auto “07” has “UNDERINSURED MTRST” coverage with a \$100,000 limit. Immediately below the listing of coverage and limits, the declarations page lists the “FORMS AND ENDORSEMENTS CONTAINED IN THE POLICY AT ITS INCEPTION.” Below that heading are five columns with letter and number references such as: CA 9917 0797, CA 0001 0797, BA 7900 0400, CA 2145 1097. There are sixteen references in all. Although the quick reference page indicated the form numbers would be included on the declarations page, the cryptic form numbers mean nothing to a layperson and have no logical correlation to particular coverage.¹

¶8 At this point in perusing the policy, an insured has not been given any information on where to locate UIM coverage provisions or any clue that the UIM limit is subject to a reducing clause. Yet the failure of the endorsement page to explain the reducing clause is not dispositive. *Dowhower III*, 268 Wis. 2d 823, ¶20. The declarations page concludes with the statement that “THESE DECLARATIONS TOGETHER WITH THE BUSINESS AUTO POLICY PROVISIONS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.” Although this

¹ We note that the upper right corner of the first page of the UIM endorsement includes a reference number that can be found on the declarations page, but it does not even list the number in the same format as the declarations page. The UIM endorsement is form “CA 21 45 10 97.”

concluding statement on the declarations page informs the insured that endorsements are part of the policy, there is still no information to the insured that UIM coverage is provided in an endorsement. There is also nothing in the opening pages of the policy to suggest that the limits of liability are subject to conditions which reduce the amount of coverage.

¶9 Before reaching the UIM endorsement, the insured passes several other endorsements, each bearing the advisement that the endorsement changes the policy and to read it carefully. However, the repeated notices that endorsements change the policy do not include the suggestion that benefits are reduced. The ten-page “Business Auto Coverage Form” is also in place before the UIM endorsement. The coverage form does not mention UIM coverage. Since the insured was not given a clue about where to find UIM coverage, reading the ten-page coverage form is necessary to discover that UIM coverage is not found there. Sixteen pages later the UIM endorsement is found.

¶10 In addition to the advisement that the endorsement changes the policy, the UIM endorsement includes the following introductory statement: “With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.” The UIM coverage provision is on the first page of the endorsement as section “A.” While it simply provides that General Casualty will pay all sums the insured is entitled to recover from the owner or driver of an underinsured motor vehicle, the definition of an underinsured motor vehicle is not found until section “F” on the third and fourth pages of the endorsement. The reducing clause is on the second page under

“D. Limit of Insurance.”² While the reducing clause itself is not ambiguous, its placement three sections removed from the coverage section is not helpful to the insured.

¶11 The General Casualty policy is organizationally complex to a degree sufficient to trigger a conclusion of contextual ambiguity. In contrast to the policy reviewed and enforced in *Bellile v. American Family Mutual Insurance Co.*, 2004 WI App 72, ¶21, 272 Wis. 2d 324, 679 N.W.2d 827, finding the UIM endorsement is an arduous task. Nothing guides the insured to the location of

² Section “D” of the UIM endorsement provides:

1. Regardless of the number of covered “autos”, “insureds”, premiums paid, claims made or vehicles involved in the “accident”, the most we will pay for all damages resulting from any one “accident” is the Limit Of Insurance for Underinsured Motorists Coverage shown in the Schedule of Declarations.
2. The Limit of Insurance under this coverage shall be reduced by:
 - a. All sums paid or payable under any workers’ compensation, disability benefits or similar law; and
 - b. All sums paid by or for anyone who is legally responsible, including all sums paid under this Coverage Form’s Liability Coverage.
3. No one will be entitled to receive duplicate payments for the same elements of “loss” under this Coverage Form and any Liability Coverage Form, Underinsured Motorists Coverage Endorsement or Uninsured Motorists Coverage Endorsement.

We will not make a duplicate payment under this Coverage for any element of “loss” for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of “loss” if a person is entitled to receive payment for the same element of “loss” under any workers’ compensation, disability benefits or similar law.

UIM coverage, and consequently, the insured must traverse more than thirty pages of insurance speak to reach UIM coverage. The declarations page creates the expectation of \$100,000 in UIM coverage, which is not dispelled without an exhausting trek through the policy. Nothing along that path suggests that the maximum benefit listed on the declarations page is subject to conditions or provisions that will reduce the “most” to be paid. The UIM reducing clause is not logically located in proximity to the coverage provision, thus creating the potential for misunderstanding and confusion. We conclude that this is a *Dowhower III* type of case and that the UIM reducing clause is contextually ambiguous and must be construed against General Casualty in favor of coverage. *See Dowhower III*, 268 Wis. 2d 823, ¶29. The reducing clause is unenforceable. On remand judgment shall be entered consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

