COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2464 **Cir. Ct. No. 02CV001991**

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

MICHAEL J. KAUFMAN AND MICHELLE KAUFMAN,

PLAINTIFFS-APPELLANTS,

V.

BITUMINOUS CASUALTY CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Michael and Michelle Kaufman appeal a summary judgment granted in favor of Bituminous Casualty Corporation. The Kaufmans contend the trial court erred when it concluded a nonduplication clause in Bituminous's underinsured motorist (UIM) insurance was unambiguous and operated to deny them $206,757.31 in UIM coverage. Alternatively, the

Kaufmans claim that even if the clause is unambiguous, they are still entitled to $95,114.82 in nonduplicative payments. We reject these arguments and affirm the judgment.[1]

DISCUSSION

¶2 On May 6, 1998, Michael Kaufman, an employee of Thomas Wiedemeier Sawmill, Inc., sustained injuries when a vehicle driven by Ernest Guth collided with his truck. At the time of the collision, Kaufman was driving Wiedemeier Sawmill's vehicle and acting in the course of his employment.

¶3 Wiedemeier Sawmill has worker's compensation coverage through Bituminous, which paid Kaufman $144,332.64 in worker's compensation. Guth was insured by an automobile liability insurance policy issued by Rural Mutual Insurance Company for $100,000. Rural paid the Kaufmans that limit, of which Michelle received $15,000 and Michael received $47,424.67 after deductions made pursuant to WIS. STAT. § 102.29.[2]

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[1] The Kaufmans also argued, and the trial court agreed, that the UIM policy's reducing clause was ambiguous. However, we need not discuss that issue here because our conclusion that the nonduplication clause is unambiguous and operates to deny the Kaufmans additional damages is dispositive of the appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

[2] JOHN D. NEAL & JOSEPH DANAS, JR., WORKER'S COMPENSATION HANDBOOK § 8.45 (5th ed. 2003), points out that WIS. STAT. § 102.29 governs all third-party settlements in worker's compensation cases:

> After deducting attorney's fees and costs, one-third of the balance must go to the injured employee. Next, the worker's compensation insurance carrier is reimbursed for all benefits that it has paid, or is required to pay. Any residue goes to the employee, subject to the insurance carrier's right to a set-off against further liability.

(continued)

¶4 In addition to being the worker's compensation insurer, Bituminous is also Wiedemeier Sawmill's commercial motor vehicle insurer and had issued a commercial automobile liability policy that contains $500,000 of UIM coverage. It is undisputed that the Kaufmans were insureds under this policy and that their damages resulted from the use of the Wiedemeier Sawmill's underinsured motor vehicle.

¶5 The Kaufmans sought damages under the UIM coverage, and the claim was arbitrated. The arbitrator found Michael sustained the following damages:

> Past medical and health care expenses: $83,504
>
> Future medical and health care expenses: $29,070
>
> Past loss of earning capacity: $107,923
>
> Future loss of earning capacity: $5,000
>
> Past pain, suffering, disability and disfigurement: $120,000
>
> Future pain, suffering, disability and disfigurement: $100,000

The arbitrator also found Michelle was entitled to $10,000 for loss of society and companionship. Thus, the Kaufmans' damages totaled $455,497. However, the arbitrator also found Michael was 10% contributorily negligent and reduced this amount by $45,549.70, resulting in net damages of $409,947.30. The Kaufmans moved for an order to confirm the arbitration award.

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

¶6 Relying on either a reducing clause or a nonduplication clause, Bituminous paid the Kaufmans $203,189.99, the difference between the net damages of $409,947.30 and the $206,757.31 payments the Kaufmans already received from Bituminous for worker's compensation and Rural. The Kaufmans moved for declaratory judgment requiring Bituminous to pay the full $409,947.30, arguing that the reducing clause either did not conform to WIS. STAT. § 632.32(5)(i) or was contextually ambiguous, and that the nonduplication clause was ambiguous and unenforceable. Bituminous filed a cross-motion for summary judgment, claiming both clauses were enforceable and denied the Kaufmans additional payments.

¶7 The trial court found the reducing clause contextually ambiguous, but concluded the nonduplication provision was unambiguous and applied the provision to prevent the Kaufmans from receiving a windfall; that is, anything beyond the total of $409,947.30. The Kaufmans appeal.

DISCUSSION

¶8 The Kaufmans argue that the trial court erred by concluding the UIM policy's nonduplication clause was unambiguous. The nonduplication clause states:

> In no event will an "insured" be entitled to receive duplicate payments for the same elements of "loss."

The Kaufmans first object to the placement of the clause in the UIM coverage's "LIMIT OF INSURANCE" section. Because the limit of insurance section focuses on the limit of UIM coverage, they claim a reasonable insured might believe that the nonduplication clause only concerns the amount the UIM insurer

must pay, and that whatever payment is made by the UIM insurer the UIM insurer will not duplicate it. We disagree.

¶9 The interpretation of an insurance policy presents a question of law we independently review. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We construe insurance policies "to give effect to the intent of the parties, expressed in the language of the policy itself." ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. We give meaning to the terms of the policy "in accordance with the principle that the test is not what the insurer intended the words to mean but what a reasonable person in the position of an insured would have understood the words to mean." ***Kennedy v. Washington Nat'l Ins. Co.***, 136 Wis. 2d 425, 428-29, 401 N.W.2d 842 (Ct. App. 1987) (citation omitted). However, "the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." ***Tempelis v. Aetna Cas. & Surety Co.***, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992). "Courts must read contracts to give a reasonable meaning to each provision and avoid a construction that renders portions of a contract meaningless." ***Isermann v. MBL Life Assur. Corp.***, 231 Wis. 2d 136, 153, 605 N.W.2d 210 (Ct. App. 1999).

¶10 The Kaufmans' interpretation of the nonduplication clause is unreasonable. It supposes that in the absence of the nonduplication clause, a reasonable insured would expect the UIM insurer to pay for something it had already paid for; in other words, to duplicate payments, and presumably to continue to do so until the limits of liability was reached. A reasonable insured would not expect this. Because a reasonable insured would not expect this, the Kaufmans' interpretation does not give the nonduplication clause any meaning; therefore, we must reject it. *See* ***id.*** at 153-55.

¶11 The Kaufmans next object to the nonduplication clause language. They note that the exclusion speaks in terms of "elements of loss," but this phrase is not defined in the policy. In view of this deficiency, the Kaufmans argue the exclusion is ambiguous because a reasonable insured would not know what the provision means and would not know how to apply it in a situation where the insured received either worker's compensation payments or payments from a tortfeasor's insurer. We are not persuaded.[3]

¶12 Turning first to what the clause means, the Kaufmans are correct that the policy does not define "elements of loss." However, the policy defines "loss" as "direct and accidental loss or damage." Looking to the ordinary dictionary definition of "elements," *see* ***Just v. Land Reclamation, Ltd.***, 155 Wis. 2d 737, 745, 456 N.W.2d 570 (1990), we are directed to "element." WEBSTER'S THIRD NEW INT'L DICTIONARY 735 (unabr. 1993). Element means "one of a number of distinct or disparate units, parts, traits or characteristics of which something tangible or intangible is composed," or "one of the necessary data or values upon which a system of calculations depends or general conclusions are based." ***Id.*** at 734. Synthesizing these definitions, it is clear that an element of loss refers to one

[3] The Kaufmans do not indicate how the nonduplication clause language is reasonably susceptible to alternative meanings. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶29, 264 Wis. 2d 617, 665 N.W.2d 857. Instead, they simply assert a reasonable insured would not know what it means and then gives us several examples of how Bituminous could have made the nonduplication clause clearer for an insured in these circumstances. The Kaufmans note that because Bituminous was the drafter of the policy, the policy language was under its control. Thus, goes the Kaufmans' argument, Bituminous could have written a provision to clearly indicate that its payments under UIM coverage would not duplicate payments the insured received under worker's compensation or payments the insured received from the tortfeasor's insurer.

However, pointing out alternative options for what could or even should have been written is not proof that what is written is ambiguous. *See* ***id.*** Instead, ambiguity will only exist when the terms of a policy are reasonably susceptible to more than one construction. ***Id.***

distinct part or value of damages. But the nonduplication clause speaks of *elements* of loss. This distinction appears subtle, but its consequence is not.

¶13 Since element means one of a number of distinct parts or values, elements refers to all of the parts or the value; that is, the whole or total value. Thus, by the nonduplication clause's plain language it is evident that it does not contemplate examining each individual part or value of damages (as, for example, itemized damages listed in a special verdict), but instead looks to all the values that comprise the insured's damages. In other words, a reasonable insured would understand the nonduplication clause's "elements of loss" phrase as referring to the sum of the insured's damages. The nonduplication clause is not ambiguous.

¶14 We now turn to how the nonduplication clause works. Again, the clause states:

> In no event will an "insured" be entitled to receive duplicate payments for the same elements of "loss."

The Kaufmans argue that even if the clause is unambiguous, Bituminous is not entitled to a dollar-for-dollar setoff for the payments they already received. Instead, they propose that these payments must be allocated and then offset by the specific damages found by the arbitrator. Their methodology is as follows.

¶15 After reducing the award by Michael's 10% contributory negligence, the arbitrator found the Kaufmans sustained $409,947.30 in damages. The arbitrator completed a special verdict form itemizing the individual components of these damages. After allocating and offsetting the damages found by the arbitrator with the payments the Kaufmans already received, the Kaufmans give us the following numbers (the first number is the arbitrator's finding, the payments

Michael already received appear in brackets, and, what the Kaufmans claim are the nonduplicative payments, are in parenthesis):

> Past medical and health care expenses: $83,504.00, [$72,202.38], ($11, 301.62)
>
> Future medical and health care expenses: $29,070.00, [$0], ($29,070.00)
>
> Past loss of earning capacity: $107,923.00, [$46,055.94], ($61,867.06)
>
> Future loss of earning capacity: $5,000.00, [$26,074.32], ($0)
>
> Past pain, suffering and disability: $120,000.00, [$0], ($120,000)
>
> Future pain, suffering and disability: $100,000.00, [$0], ($100,000)
>
> Loss of society and companionship: $10,000.00, [$0], ($10,000)

According to the Kaufmans, the nonduplicative payments total $332,238.68. The Kaufmans then deduct 10% for contributory negligence ($33,223.87) and the UIM coverage Bituminous already paid ($203,899.99) and conclude they are owed $95,114.82. We are not persuaded.

¶16 Because the elements of loss refer to all of the insured's damages, the nonduplication clause operates to preclude the insurer's obligation to pay damages for which an insured has already been compensated. Stated differently, the insurer is only obligated to pay for the insured's remaining damages. Whatever payments the insured already received constitutes the "same elements of 'loss'" for which the insured cannot receive duplicate payment from the insurer. And wherever the insured has previously received payments from is irrelevant

because the insurer is gauging its obligation to pay its insured based upon the insured's outstanding damages.

¶17 Therefore, we agree with the trial court's conclusion that the nonduplication clause is unambiguous and that Bituminous fulfilled its obligations under its policy. Before the matter went to arbitration, the Kaufmans had already received payments totaling $206,757.31. The arbitrator found the Kaufmans sustained $409,947.30 in damages. Bituminous, as UIM carrier, refused to pay the Kaufmans the full $409,947.30. Instead, it relied on the nonduplication and clause and paid $203,189.99, the difference between what Kaufman had already been paid and the arbitrator's damages finding. In light of the nonduplication clause, this calculation was correct. Therefore, the Kaufmans have been totally compensated and are not entitled to additional UIM payments.[4]

[4] Even if elements of loss did not refer to the total damages, the Kaufmans still would not be entitled to additional damages. The difficulty with their methodology is threefold.

First, the Kaufmans' worker's compensation allocation is suspect. Not only does it fail to credit the $21,074.32 Michael received in worker's compensation overpayments for future loss of earning capacity ($26,074.32 minus $5,000.00), *see* ***Calbow v. Midwest Sec. Ins. Co.***, 217 Wis. 2d 675, 682, 579 N.W.2d 264 (Ct. App. 1998) (insured not entitled to a windfall), it also separates the worker's compensation payments Michael received into past and future loss of earning capacities and pain and suffering and then offsets each individually. However, this court recently held that worker's compensation payments include past and future pain and suffering. ***St. Paul Fire & Marine Ins. Co. v. Keltgen***, 2003 WI App 53, ¶¶36-42, 260 Wis. 2d 523, 659 N.W.2d 906, *aff'd,* 2004 WI 37. While worker's compensation payments include pain and suffering damages, it is a practical impossibility, not to mention extremely unfair, for an injured employee to earmark specific portions of the payments already received as exclusively representing values for his or her loss of earning capacity and pain and suffering. Given this impossibility, what we call the "worker's compensation related damages" (all the damages except loss of society and companionship) must be combined in order to calculate nonduplicative payments.

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Second, the Kaufmans do not properly credit $62,424.67 compensation Michael received from Guth's automobile liability insurer, Rural. We make two points regarding this payment. First, in the Kaufmans' appellate brief, they concede $15,000 of this payment was allocated to Michelle. The record does not indicate Bituminous approved this distribution, but rather approved the distribution of the remaining $85,000 according to WIS. STAT. § 102.29. Because an insurer is not bound by an allocation agreement to which it was not a party, *see* ***Kappus v. United Fire & Cas. Co.***, 229 Wis. 2d 699, 706, 600 N.W.2d 274 (Ct. App. 1999), the loss of consortium claim must also be added to the worker's compensation related damages in order to calculate nonduplicative payments. *See* ***id.*** The second point we make regarding the remaining payment from Rural ($47,424.67) is that it constituted a lump sum payment. Thus, it cannot be allocated to any particular damages finding and, therefore, the remaining sum must be spread over the entirety of the worker's compensation related damages.

Third, the Kaufmans do not subtract from the arbitrator's total damages finding of $455,497 Michael's 10% contributory negligence ($45,549.70). Instead, they take 10% off the $332,238.68 they claim they are owed in nonduplicative payments (resulting in a $33,223.87 reduction). However, this erroneously requires Bituminous to pay for $12,325.83 of Michael's contributory negligence.

Integrating the foregoing corrections to the Kaufmans' methodology, we end up with virtually the same calculation we employed in our discussion:

> **Total damages**: $455,497
>
> **Payments received pre-arbitration**: $206,757.31 ($144,332.64 worker's compensation + $62,424.67 payment from Rural)
>
> **Nonduplicative payments calculation**:
>
> $455,497.00 (total damages)
>
> \- $206,757.31 (payments received pre-arbitration)
>
> \- $ 45,549.70 (Kaufman's 10% contributory negligence)
>
> = $203,189.99 in nonduplicative UIM payments.

This is precisely the amount Bituminous paid the Kaufmans after arbitration.

Therefore, even if "elements of 'loss'" does not refer to the total damages, the total damages must be considered here given that the worker's compensation related injuries must be combined with the loss of consortium claims and then offset by the payments received and Michael's contributory negligence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.