COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP483 **Cir. Ct. No. 2004CV252**

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

DENNIS ANDERSON, KATHLEEN ANDERSON AND HANNAH ANDERSON, A MINOR,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

CINCINNATI CASUALTY COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. Cincinnati Casualty Company appeals from a summary judgment order declaring that the policy it issued to Dennis, Kathleen,

and Hannah Anderson provided coverage for an accident in which the Andersons were injured. The Andersons cross-appeal from the order which also enforced a reducing clause in their policy, thus limiting their recovery from Cincinnati to $200,000. We conclude that the Andersons' Cincinnati insurance policy unambiguously provides coverage in this case and also unambiguously reduces the amount the Andersons may recover by the amount the Andersons received from the tort-feasor's insurance policy, resulting in $200,000 of coverage. Accordingly, we affirm.

Background

¶2 The material facts are undisputed. In December 2001, Dennis, Kathleen, Sarah, Emma, and Hannah Anderson were involved in a car accident in which Sarah and Emma were killed and Dennis, Kathleen, and Hannah were injured. The driver of the other vehicle involved in the accident, Richard Loewenhagen, carried a $300,000 single limit liability policy through Wilson Mutual Insurance Company. Wilson Mutual paid its limit to the Andersons.

¶3 The Andersons sought additional coverage under the "uninsured motorists" provision in a policy issued to them by Cincinnati Casualty Company, alleging the $300,000 received from Wilson Mutual was insufficient to compensate them for their injuries. Cincinnati denied coverage because Loewenhagen's vehicle was not an "uninsured" vehicle under their policy. The Andersons sued Cincinnati, seeking a declaratory judgment that there was coverage for the accident under their policy. Cincinnati moved for summary judgment, arguing that there was no coverage and that if there was, it was reduced by the amount the Andersons received from Wilson Mutual. The circuit court concluded that the Andersons' insurance policy provided coverage for the

December 2001 accident and that the coverage was reduced by the amount the Andersons received from Wilson Mutual. Cincinnati appeals from the order declaring there was coverage and the Andersons cross-appeal from the part of the order limiting Cincinnati's liability by the amount the Andersons received from Wilson Mutual.

Standard of Review

¶4 A circuit court's ruling on a motion for declaratory judgment is within its discretion. ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. However, when the resolution of a motion for declaratory judgment turns on a question of law, such as the interpretation of an insurance contract, our review is de novo. ***Id.*** Similarly, we independently review a circuit court's summary judgment ruling. ***Id.*** Summary judgment methodology is well established and need not be repeated here. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2003-04).[1]

[1] The Andersons argue that the circuit court improperly granted summary judgment to Cincinnati because the Andersons had asked for a declaratory judgment, not summary judgment, to establish there was coverage under their policy. The Andersons acknowledge that Cincinnati then moved for summary judgment, but contend summary judgment was inappropriate at this stage because there were not enough evidentiary materials submitted to allow the court to make a summary judgment ruling. We disagree. First, we note that both declaratory judgments and summary judgments are proper procedural devices for resolving insurance disputes. *See, e.g.*, ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. We also note that, in this case, our review is limited to questions of law centering on the interpretation of the Andersons' insurance policy. *See* ***id.*** Finally, the parties submitted the insurance policy and documentation of the settlement the Andersons reached with Wilson Mutual along with their motions, supported by affidavits. We conclude that the circuit court properly interpreted the Andersons' policy and that the issue of whether it did so through a declaratory judgment or a summary judgment order is irrelevant.

(continued)

Discussion

¶5 Cincinnati argues that the policy it issued to the Andersons does not provide coverage for the December 2001 accident. The provision in dispute states:

> **UNINSURED MOTORISTS COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE SINGLE LIMIT -WISCONSIN-**
>
> ….
>
> **INSURING AGREEMENT**
>
> We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. **Bodily injury**:
>
> a. Sustained by a **covered person**; and
>
> b. Caused by an accident..
>
> ….
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the **uninsured motor vehicle**.
>
> ….
>
> "**Uninsured motor vehicle**" means a land motor vehicle or trailer or any type:
>
> 1. To which no liability bond or policy applies at the time of the accident.
>
> 2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be:

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> a. Less than the limit of liability for this coverage specified by the Wisconsin financial responsibility law; or
>
> b. Reduced by payments to others injured in the accident to less than the limit of liability for this coverage.

¶6 Cincinnati argues that there was no coverage in this case because Loewenhagen's vehicle is not an "uninsured vehicle" under provision 2.b. Specifically, Cincinnati contends that provision 2.b unambiguously requires the tort-feasor's policy be reduced by payments to others from an amount greater than the coverage in the Cincinnati policy to an amount less than the coverage in the Cincinnati policy. The Andersons also contend the policy is unambiguous, but assert that provision 2.b requires only that the tort-feasor's policy is reduced through payments to others to less than the Cincinnati policy, whether or not it began with a higher limit. We agree with the Andersons.

¶7 We construe insurance policies to give effect to the intent of the parties, employing the same rules of construction that we use for contracts generally. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We begin our analysis of an insurance policy provision by determining whether it is ambiguous. ***Id.***, ¶13.

¶8 An insurance provision is ambiguous "if it is susceptible to more than one reasonable interpretation." ***Id.*** (citation omitted). We begin with the language of the provision, which "is given its common, ordinary meaning, that is, what the reasonable person in the position of the insured would have understood the words to mean." ***Id.***, ¶17 (citation omitted). Even if the provision itself is clear and unambiguous, we must view it in the context of the entire policy to determine if it is rendered ambiguous "by the organization, labeling, explanation,

inconsistency, omission, and text of other provisions." ***Id.***, ¶19. Likewise, "[s]ometimes it is necessary to look beyond a single clause or sentence to capture the essence of an insurance agreement. The language of a policy should not be made ambiguous by isolating a small part from the context of the whole." ***Id.***, ¶21 (citation omitted).

¶9 Turning to the language of the policy Cincinnati issued to the Andersons, we conclude that the "Uninsured Motorists"[2] provision is not ambiguous.[3] The requirement that the liability policy issued to the tort-feasor must be "[r]educed by payments to others injured in the accident to less than the limit of liability for this coverage" is not susceptible to more than one reasonable interpretation. We read this provision as the circuit court did: as requiring that the tort-feasor's policy be reduced below the limit of Cincinnati's policy by payments to others, regardless of its original starting point.

¶10 Cincinnati relies on ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, 275 Wis. 2d 35, 683 N.W.2d 75, as illustrating that the phrase "reduced by … to less than" in the uninsured motorists provision requires the tort-

[2] The "Uninsured Motorists" heading in the Cincinnati policy is counterintuitive because it provides coverage for vehicles covered by another liability policy. A provision's title, however, is not controlling. *See* ***Progressive N. Ins. Co. v. Hall***, 2006 WI 13, ¶31, 288 Wis. 2d 282, 709 N.W.2d 46. Instead, we construe the language of the provision as written in the policy. ***Folkman v. Quamme***, 2003 WI 116, ¶33, 264 Wis. 2d 617, 665 N.W.2d 857. Thus, we need not address the parties' arguments over whether Cincinnati's uninsured motorists provision is "typical" or "atypical" of underinsured or uninsured motorists coverage under the Wisconsin statutes.

[3] The circuit court did not state whether it found the provision ambiguous or unambiguous, saying: "And first of all, I find it—I find—I don't know if I want to call it an ambiguity. I just didn't understand it." However, neither party argues that the uninsured motorists provision is ambiguous. Instead, both argue that the provision's meaning is clear from its language, although they disagree on that meaning. In any event, we conclude upon our independent review that the provision is unambiguous both standing alone and contextually.

feasor's policy to begin with a greater limit of liability than provided under the insured's policy. Cincinnati's reliance is misplaced.

¶11 In ***Langridge***, an insurance policy defined "underinsured motor vehicle" as one whose limits of liability "a. are less than the limits of liability of this coverage; or b. have been reduced by payments to ***persons*** other than the ***insured*** to less than the limits of liability of this coverage." ***Id.***, ¶8. The plaintiff sought coverage under section b. because the tort-feasor's limit of liability, which was originally greater than the limit of the policy at issue, was reduced to less than the limit of the policy after payments to the deceased's estate. ***Id.***, ¶28-31. If the tort-feasor's policy had begun with a limit less than the insured's, coverage would have been provided under section a. ***Id.***, ¶39. Thus, the ***Langridge*** policy provided coverage under two scenarios: if the tort-feasor's policy limit began as less than the insured's policy limit (section a.), and when the tort-feasor's policy limit was reduced to less than the insured's limit by payments to other parties (section b.).[4]

¶12 Here, the Cincinnati policy does not offer both options presented in ***Langridge***. Rather, the Cincinnati policy provides coverage if the tort-feasor's policy limit is: "a. Less than the limit of liability for this coverage specified by the Wisconsin financial responsibility law; or b. Reduced by payments to others injured in the accident to less than the limit of liability for this coverage." Unlike the ***Langridge*** policy, the Cincinnati policy does not separate situations in which the tort-feasor's policy (1) began with a lower limit than the insured's, or (2) was

[4] The ***Langridge*** court denied coverage under section b. because the tort-feasor's policy limit was reduced by payments to the insured, not to persons other than the insured. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶55, 275 Wis. 2d 35, 683 N.W.2d 75.

reduced to an amount less than the insured's. The Cincinnati policy does not provide a corollary to its "reduced by … to less than" language as a defining contrast, as the ***Langridge*** policy did.[5] Thus, ***Langridge*** does not dictate that the Cincinnati policy only provides coverage if the tort-feasor's policy began with a limit higher than the insured's policy limit.

¶13 Cincinnati also argues that the definition of "uninsured motor vehicle" requires a tort-feasor's policy to have a policy limit higher than Cincinnati's limit because any other reading renders the phrase "reduced by … to less than" surplusage and is therefore an impermissible interpretation. *See* ***Hydrite Chem. Co. v. Aetna Cas. & Sur. Co***., 220 Wis. 2d 26, 41, 582 N.W.2d 423 (Ct. App. 1998). We disagree. Cincinnati's interpretation of its provision requires we add the phrase "*from more than the limit of liability for this coverage*," to its policy so that it reads: "Reduced by payments to others injured in the accident *from more than the limit of liability for this coverage* to less than the limit of liability for this coverage." We will not write in language to meet Cincinnati's interpretation; "[c]ourts interpret insurance policies that *do exist*, not those that could have or should have existed." ***Folkman***, 264 Wis. 2d 617, ¶34. Whatever

[5] Cincinnati argues that the notice it sent to the Andersons offering coverage when the tort-feasor's policy limit is originally lower than the insured's provides the contrast within the ***Langridge*** policy. The two situations, however, are inapposite. In ***Langridge***, the two provisions were within the same policy. Here, the notice sent to the Andersons is not part of the policy.

Cincinnati also argues that the circuit court erred in declining to consider the notice Cincinnati sent to the Andersons because such evidence is relevant to the intent of the parties in executing the insurance policy. Cincinnati argues that the fact that the Andersons declined the coverage offered in the notice indicates that a reasonable insured in the position of the Andersons would believe they did not have the coverage they now seek, which they argue is essentially the coverage offered in the notice. We disagree. We end our inquiry upon concluding that the policy is not ambiguous and strictly apply its terms. *See* ***Folkman***, 264 Wis. 2d 617, ¶13 ("If there is no ambiguity in the language of an insurance policy, it is enforced as written, without resort to rules of construction or applicable principles of case law.").

Cincinnati's intent in drafting the policy, the uninsured motorists provision's language is clear: it provides coverage when, as here, the tort-feasor's policy is reduced to less than the limits of Cincinnati's policy through its payments to others.

¶14 Next, we turn to the Andersons' cross-appeal from the circuit court's summary judgment order enforcing the reducing clause in the Andersons' policy. The Andersons argue that the reducing clause is ambiguous and therefore unenforceable, and, if it is enforceable, that the circuit court's ruling was premature because the reducing clause cannot be properly applied until damages have been apportioned. We disagree.

¶15 We begin our inquiry by determining whether the reducing clause is ambiguous, whether standing alone or in the context of the policy as a whole.[6] ***Folkman***, 264 Wis. 2d 617, ¶¶13-21. We begin with the language of the clause. ***Id.***, ¶17. The reducing clause in the uninsured motorists endorsement of the Andersons' Cincinnati policy states:

> **LIMIT OF LIABILITY**
>
> The limit of liability shown in the Declarations for Uninsured Motorists Coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:
>
> 1. Policies involved;
>
> 2. **Covered persons**;

[6] The Andersons contend that the circuit court erred by enforcing the reducing clause without conducting an analysis of whether the reducing clause is contextually ambiguous. Our review of this issue, however, is de novo. On our independent review of the record, we conclude that the reducing clause is unambiguous as read alone and contextually.

> 3. Vehicles or premiums shown in the Declarations; or
>
> 4. Vehicles involved in the accident.
>
> ….
>
> Additionally, the limits of liability shall be reduced by all sums:
>
> 1. Paid because of the **bodily injury** by or on behalf of persons or organizations, including but not limited to operators of uninsured motor vehicles, who may be legally responsible.

¶16 We conclude that the language of the reducing clause is clear and unambiguous. Indeed, neither party has argued otherwise. The Andersons contend, however, that the reducing clause is rendered ambiguous within the context of the entire policy. However, they do not point to a conflicting provision that would raise an alternative meaning; rather, they assert that the organization and length of the policy renders it a confusing maze, which a reasonable insured would be unable to understand. We are not persuaded that the Cincinnati policy is unintelligible.

¶17 While the policy is lengthy at forty-nine pages, it is not disorganized. The policy begins with a two-page endorsement,[7] which identifies the named insureds, the vehicles insured, and the types of coverage provided for each vehicle and their individual premiums. The vehicle involved in the accident at issue has a premium listed for "Uninsured Motorists Combined Single Limit BI Only $500,000 Each Accident." Following the declarations pages is a two-page

[7] The policy in the record contains fourteen pages of endorsements, including previous and subsequent versions. The declaration in effect on the date of the accident, dated November 12, 2001, is two pages in length.

endorsement titled "Miscellaneous Type Vehicle Endorsement." The second endorsement is titled "Uninsured Motorists Coverage For Bodily Injury And Property Damage Single Limit Wisconsin," and runs five pages in length. Next is the Table of Contents, followed by fourteen pages of "Family Auto Policy Provisions." Finally, the policy has three pages of "Amendment of Policy Provisions—Wisconsin," a page of contact information, two pages on "Additional insured—Living Trusts and Their Executors, Administrators or Trustees," two pages of the Cincinnati privacy policy, and a one-page "Loss Payable Clause."

¶18 The first problem identified by the Andersons is that the declarations page does not identify the reducing clause nor define "uninsured motorists combined single limit BI Only $500,000 Each Accident." We disagree that those omissions render the reducing clause contextually ambiguous. A declarations page need not identify the existence of a reducing clause to avoid ambiguity. *See* ***Dempich v. Pekin Ins. Co.***, 2006 WI App 24, ¶¶14-16, 289 Wis. 2d 477, 710 N.W.2d 691. Contrary to the Andersons' assertions, the declarations page clearly identifies uninsured motorists coverage as section C, and lists the "Forms and Endorsements" by number on the second page. Next, the Table of Contents lists "Part C" as "Uninsured Motorists Coverage," and lists its location as page 7. Under the same clear heading on page 7, the policy directs the insured to "refer to respective state Uninsured Motorist Coverage Endorsement." As noted, the Wisconsin uninsured motorist endorsement is the second endorsement to the policy, and lists the "Limit of Liability," quoted above, on page three. A reasonable insured would easily find the reducing clause in the uninsured motorist provision and understand it to limit Cincinnati's liability.

¶19 The Andersons also argue that Cincinnati's use of the heading "Uninsured Motorists," when in fact the provision provides coverage when the

motorist is either "uninsured" or "underinsured," renders the reducing clause ambiguous. We disagree. The language of the provision, not its heading, controls our analysis. ***Progressive N. Ins. Co. v. Hall***, 2006 WI 13, ¶31, 288 Wis. 2d 282, 709 N.W.2d 46. Further, we fail to see how a heading of "uninsured" rather than "underinsured" would mislead the Andersons into believing the reducing clause did not function by its clear terms. In sum, there are no provisions identified by the Andersons nor uncovered on our own review that contradict the reducing clause or lead a reasonable insured to believe it is no longer in effect.

¶20 Finally, the Andersons argue that even if the reducing clause is unambiguous and enforceable, the circuit court prematurely granted summary judgment to Cincinnati on this issue because the court did not yet know how much each plaintiff received from the $300,000 settlement from Wilson Mutual. The Andersons offer various hypothetical monetary divisions in which they believe they may recover more than the $200,000 awarded to them by the circuit court. The problem with the Andersons' argument, however, is that any payment to them above the $200,000 awarded by the circuit court contravenes the reducing clause in their policy. That clause provides that the maximum the policy will pay, regardless of the number of covered persons injured in an accident, is $500,000. The $500,000 limit is reduced by payments received from another policy, no matter which covered person receives those payments. Thus, the $500,000 is reduced by $300,000, regardless of how much each Anderson receives of that $300,000. Accordingly, there is $200,000 remaining in the Cincinnati policy. While this may not fully compensate the Andersons, it is the limit of their policy. We therefore affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official report.