COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3153 **Cir. Ct. No. 2009CV630**

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

LYNN BETHKE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHRYN A. BETHKE AND ANDREW BETHKE,

PLAINTIFFS-APPELLANTS,

V.

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. Lynn Bethke, individually and as personal representative of the Estate of Kathryn A. Bethke, and Andrew Bethke appeal from a declaratory judgment granted in favor of Auto-Owners Insurance

Company. Kathryn Bethke's vehicle was insured by Owners when she was involved in an accident with a self-insured rental vehicle. Owners denied coverage to the Bethkes based on its policy definition of "underinsured motor vehicle," which excludes coverage for a vehicle that is owned or operated by a self-insurer under any automobile law. We conclude that Owners' definitional exclusion of vehicles that are owned or operated by a self-insurer is permitted under Wisconsin law and, contrary to the Bethkes' contention, does not result in an impermissible reducing clause. We affirm the judgment.

BACKGROUND

¶2 The relevant facts underlying the Bethkes' claim are undisputed and are set forth in the circuit court's written decision. On July 19, 2007, Kathryn Bethke, Andrew Bethke and Frederick Goddard were involved in a traffic accident in Sheboygan Falls, Wisconsin. Both Kathryn and Goddard died as a result of their injuries. Andrew, a passenger in Kathryn's car, was injured in the collision. The Bethkes allege that Goddard was negligent in the operation of his vehicle.

¶3 Goddard did not have automobile insurance in the United States at the time of the collision. The automobile that Goddard was driving was owned by AVIS Rent-a-Car. AVIS had obtained a Wisconsin safety responsibility self-insurance certificate as permitted by WIS. STAT. § 344.16 (2005-06).[1] Pursuant to

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WISCONSIN STAT. § 344.16 provided in relevant part:

> (1) Any person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the secretary as provided in sub. (2).

(continued)

WIS. STAT. § 344.01(2)(am)1. (2009-10)[2], under its self-insurance certificate, AVIS is liable for damages in the amount of $25,000 per claim and $50,000 per accident. AVIS tendered $25,000 each to Andrew and the estate of Kathryn Bethke.

¶4 At the time of the accident, Kathryn had an automobile insurance policy through Owners. The policy included underinsured motorist coverage in the amount of $500,000 per occurrence. After receiving $50,000 from AVIS pursuant to the statutory minimums under the self-insurance statute, the Bethkes made a demand under the provisions of Kathryn's policy with Owners for $450,000. The Bethkes asserted that the coverage was available under the UIM provisions of the policy. Owners denied the claim, contending that AVIS' automobile was a self-insured automobile excluded from coverage under the policy provisions.

¶5 The Bethkes filed suit against Owners for a survivor's action, wrongful death, bad faith, and personal injuries to Andrew. Both parties then

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> (2) The secretary may, upon the application of such a person, issue a certificate of self-insurance when satisfied that such person is possessed and will continue to be possessed of ability to pay judgments obtained against such person.

[2] WISCONSIN STAT. § 344.01(2)(am)1. (2009-10) provides:

> (am) "Minimum liability limits" means, with respect to a motor vehicle policy of liability insurance, liability limits, exclusive of interest and costs, in the following amounts:
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> 1. *Before January 1, 2010*, $25,000 because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, $50,000 because of bodily injury to or death of 2 or more persons in any one accident, and $10,000 because of injury to or destruction of property of others in any one accident. (Emphasis added.)

brought motions for declaratory relief under the terms of the policy. Following briefing and oral argument, the circuit court issued a written decision and order on September 15, 2010, granting declaratory relief to Owners. The Bethkes appeal.

DISCUSSION

¶6 The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. ***Bellile v. American Family Mut. Ins. Co.***, 2004 WI App 72, ¶6, 272 Wis. 2d 324, 679 N.W.2d 827. However, when the exercise of such discretion turns upon a question of law, we review the question de novo, benefiting from the circuit court's analysis. ***Id.*** Here, the issue turns upon the interpretation of Owners' insurance contract and the application of relevant statutes; both exercises present questions of law we review independently. *See* ***id.***

¶7 The goal in interpreting insurance contracts is to give effect to the parties' intent. ***Id.*** We construe ambiguities in favor of coverage, while exclusions are narrowly construed against the insurer. ***Link v. General Cas. Co.***, 185 Wis. 2d 394, 399, 518 N.W.2d 261 (Ct. App. 1994). "Words and phrases are ambiguous when they are susceptible to more than one reasonable construction. However, when an insurance policy's terms are plain on their face, the policy must not be rewritten by construction." ***Id.*** Bearing this in mind, we turn first to the language of the Owners policy.

Policy Language

¶8 The Owners policy issued to Kathryn provided up to $500,000 in coverage under both the uninsured motorist (UM) and underinsured (UIM) provisions. However, both the UM and UIM endorsements in the policy contain

language specifically excluding cars owned or operated by self-insurers under any automobile law. The Owners policy defines an underinsured vehicle as follows:

> **Underinsured automobile** means an **automobile** to which a **bodily injury** liability bond or liability insurance policy applies at the time of the **occurrence**:
>
> (1) in at least the minimum amounts required by the Financial Responsibility Law in the state where **your automobile** is normally garaged; and
>
> (2) the limits of liability provided are less than the amount of compensatory damages the injured person is legally entitled to recover for **bodily injury**.
>
> **Underinsured automobile** does not include an **automobile**:
>
> ….
>
> (2) *owned or operated by a self-insurer under any* ***automobile*** *law*. (Italics added.)

Owners denied coverage on grounds that the AVIS vehicle was owned by a self-insurer. The Bethkes contend that the policy definitions (1) are ambiguous, (2) function as an impermissible reducing clause in violation of WIS. STAT. § 632.32(4m) and (5)(i), and (3) are contrary to public policy. We reject each of the Bethkes' arguments.

The Owners Policy Definition of Underinsured Motor Vehicle Is Not Ambiguous.

¶9 The Bethkes contend that the Owners policy definition of an underinsured motor vehicle is ambiguous because the AVIS rental vehicle met both the description of a vehicle that is underinsured and the description of a

vehicle that is not underinsured.[3] In determining whether an insurance policy is ambiguous, case law instructs that we must read the policy as a whole: "There is a complementary principle to contextual ambiguity. Sometimes it is necessary to look beyond a single clause or sentence to capture the essence of an insurance agreement." ***Gohde v. MSI Ins. Co.***, 2004 WI App 69, ¶8, 272 Wis. 2d 313, 679 N.W.2d 835 (citing ***Folkman v. Quamme***, 2003 WI 116, ¶21, 264 Wis. 2d 617, 665 N.W.2d 857). "The language of a policy should not be made ambiguous by isolating a small part from the context of the whole." ***Gohde***, 272 Wis. 2d 313, ¶8.

¶10 Looking to the Owners policy definition of underinsured automobile as a whole, we agree that the vehicle that was driven by Goddard met the first part of the definition. However, after setting forth the general definition of "underinsured automobile," the policy then narrows the definition to exclude certain types of automobiles, including those that are "owned by any governmental unit or agency," "located for use as a residence or premises," and those that are

[3] In support, the Bethkes rely on an Eighth Circuit decision, ***Murray v. American Family Mutual Insurance Co.***, 429 F.3d 757 (8th Cir. 2005). As here, the insureds in ***Murray*** were involved in a collision with a rental car owned by a self-insured rental car company. ***Id.*** at 764. However, the court noted that the vehicle in ***Murray*** "was underinsured by [the tortfeasor's] personal insurance company in addition to being owned by a self-insurer, a situation not contemplated by the policies' definitions." ***Id.*** In examining a policy definition of an underinsured automobile similar to that in this case, the ***Murray*** court agreed with the lower court's finding that "it simply makes no sense to sell insureds insurance that provides protection in the event they are involved in an accident with an individual with less than $100,000 insurance and then turn around and nullify that underinsurance protection simply because the other individual is a qualified self-insurer." ***Id.*** at 764-65. The court held that "interpreting the contract to nullify coverage in this situation would be an unreasonable interpretation." ***Id.*** at 765. Owners counters with citation to a Connecticut case, ***Orkney v. Hanover Insurance Co.***, 727 A.2d 700 (Conn. 1999). The ***Orkney*** court held that state regulations authorized the exclusion of vehicles owned by self-insurers from the scope of the underinsured motorist coverage provided by an automobile liability insurance policy. ***Id.*** at 703-04.

We agree with the circuit court that these cases are not persuasive. The issue presented in this case turns on the policy at issue, as well as the application of Wisconsin law and statutes.

"owned or operated by a self-insurer under any automobile law." Evaluating the definition as a whole, we conclude that the policy is unambiguous as to coverage for self-insured automobiles. The entire definition is on one page and in a logical sequence, with the general definition flowing directly into its limitations.[4] The policy does not provide coverage in one part of the policy and deny it in another. We conclude that a reasonable person in the position of the insured would have understood that the definition of "underinsured automobile" did not include the listed categories of automobiles that were excluded. *See* ***Folkman***, 264 Wis. 2d 617, ¶29 & n.13.

¶11 The Bethkes additionally suggest that the policy definition is ambiguous because there is more than one type of self-insured vehicle and the policy fails to define which type is excluded under the policy. Owners counters that the policy excludes a self-insured vehicle as defined under *any* automobile law. And, because Wisconsin has a law which specifically permits an automobile rental company with twenty-five automobiles operating under its business to be a self-insurer, Goddard's rental vehicle was unambiguously covered by the exclusion in Kathryn's policy. We agree that the policy unambiguously excluded the self-insured vehicles owned by AVIS.

[4] We note that this format of providing a broader definition which then narrows is not uncommon. *See,* e.g., ***Frank v. Wisconsin Mut. Ins. Co.***, 198 Wis. 2d 689, 693, 543 N.W.2d 535 (Ct. App. 1995) (providing in its definition of "uninsured motor vehicle" that a "motor vehicle" means "a land motor vehicle or a trailer" but does not mean a vehicle "operated on rails or crawler treads" or a vehicle "which is a farm-type tractor or equipment designed for use principally off public roads, while not on public roads").

Self-Insured Vehicle Exclusion Is Not Prohibited by WIS. STAT. § 632.32.

¶12 WISCONSIN STAT. § 632.32 governs motor vehicle insurance policy provisions.[5] Unlike UM coverage, the statutes do not require or define UIM coverage. However, under § 632.32(4m), an insurer must inform an insured of the availability of UIM coverage. If an insured elects UIM coverage, § 632.32(4m)(d) sets forth the minimum statutory limits.

¶13 The Bethkes contend that "nothing in WIS. STAT. § 632.32 authorizes the exclusion of coverage of UIM insurance as to vehicles operated by a self-insurer." However, the Bethkes have not provided, and we have not uncovered, any legal authority or legislative history to suggest that there cannot be a limit on the scope of UIM coverage. Given the statutory framework governing UIM coverage, the appropriate inquiry is whether the statute or other applicable law prohibits the exclusion of vehicles owned by self-insurers, and the answer is no. Section 632.32(5)(e) sets forth the parameters for permissible provisions in insurance policies. It provides: "A policy may provide for exclusions not prohibited by sub. (6) or other applicable law." Here, the definitional exclusion of self-insured vehicles is not prohibited under § 632.32(6)(b).[6] Thus, unless prohibited by other applicable law, the exclusion is permitted.

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[5] We note that since the accident at issue, WIS. STAT. § 632.32 has undergone several revisions, most recently under 2011 Wis. Act 14, effective November 1, 2011. *See* 1 ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW, ch. 4 (6th ed. 2011) (discussing the 1995, 2009 and 2011 legislative changes to UIM insurance). Naturally, our decision is limited to the application of the 2005-06 provisions.

[6] WISCONSIN STAT. § 632.32(6)(b) provides:

> **(6)** PROHIBITED PROVISIONS….

(continued)

¶14 Presumably in search of "other applicable law," the Bethkes point us to WIS. STAT. § 632.32(5)(i), which governs permissible reductions of UIM limits for amounts paid to the insured from other sources.[7] Relying on the court's

> (b) No policy may exclude from the coverage afforded or benefits provided:
>
> 1. Persons related by blood, marriage or adoption to the insured.
>
> 2. a. Any person who is a named insured or passenger in or on the insured vehicle, with respect to bodily injury, sickness or disease, including death resulting therefrom, to that person.
>
> b. This subdivision, as it relates to passengers, does not apply to a policy of insurance for a motorcycle as defined in s. 340.01(32) or a moped as defined in s. 340.01(29m) if the motorcycle or moped is designed to carry only one person and does not have a seat for any passenger.
>
> 3. Any person while using the motor vehicle, solely for reasons of age, if the person is of an age authorized to drive a motor vehicle.
>
> 4. Any use of the motor vehicle for unlawful purposes, or for transportation of liquor in violation of law, or while the driver is under the influence of an intoxicant or a controlled substance or controlled substance analog under ch. 961 or a combination thereof, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or any use of the motor vehicle in a reckless manner. In this subdivision, "drug" has the meaning specified in s. 450.01(10).

[7] WISCONSIN STAT. § 632.32(5)(i) provides:

> (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:
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> 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.

(continued)

holding in ***Welin v. American Family Mutual Insurance Co.***, 2006 WI 81, 292 Wis. 2d 73, 717 N.W.2d 690, the Bethkes contend that the definition of "underinsured motor vehicle" in the Owners policy "functions as an impermissible reducing clause." The Bethkes reliance on ***Welin*** is misplaced.

¶15 In ***Welin***, the court held that a definition of an underinsured motor vehicle that compares the injured person's UIM limits to the limits of a tortfeasor's liability policy without regard to the amount the injured person actually receives from the tortfeasor's insurer is invalid under WIS. STAT. § 632.32(4m) and (5)(i). ***Welin***, 292 Wis. 2d 73, ¶8. The court concluded that "the limits-to-limits definition of an underinsured motor vehicle functions as an impermissible reducing clause when applied to multiple claimants covered under different UIM policies." ***Id.***, ¶28.

¶16 Notably, ***Welin*** involved the application of a policy definition that reduced coverage based on payments to the insured from other sources. A reducing clause subtracts or reduces from UIM policy limits payments to the insured from other sources. The issue in ***Welin*** was whether the UIM insurer impermissibly reduced the UIM coverage as applied—when the tortfeasor's insurance limits were reduced by payments to other injured parties. The supreme court concluded that the statutory reducing clause provisions and the policy

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3. Amounts paid or payable under any disability benefits law.

Section 632.32(5)(i) was renumbered and amended by 2009 Wis. Act 28, § 3171, and is now set forth at WIS. STAT. § 632.32(6)(g), under the section governing "prohibited provisions." However, effective November 1, 2011, § 632.32(5)(i) will revert to the 2005-06 language permitting a reduction of coverage. *See* 2011 Wis. Act 14, § 26.

permitted reductions for the amounts actually paid to the insured—not the limits before payment to another injured party.

¶17 The issue presented here is not whether the underinsured limits were improperly reduced by payments from other sources. Rather, the issue is whether the insurer was precluded from limiting the scope of UIM coverage for certain risks in the first instance. Here, because the policy definition excluded UIM coverage for self-insured autos, there was no coverage to impermissibly reduce. *See* ***Link***, 185 Wis. 2d at 400 (coverage is not illusory where the definition does not deny the insured from collecting the full amount of coverage purchased in all situations). While the Bethkes suggest that any definitional exclusion which limits the initial applicability of UIM coverage based on certain types of risk functions as a reducing clause, this ignores that WIS. STAT. § 632.32(5)(e) *permits exclusions* not expressly prohibited by (5)(e). The Owners policy exclusion of UIM coverage for self-insured vehicles is not prohibited under § 632.32(6) and the court's holding in ***Welin*** does not render it impermissible.

This Court May Not Rewrite an Insurance Contract for Public Policy Reasons.

¶18 The Bethkes next argue that "[e]xcluding coverage under the facts of this case based on the definition of underinsured motor vehicle is contrary to public policy." In support, the Bethkes argue that any other vehicle with the minimum limits of $25,000 per person and $50,000 per accident would be underinsured under the Owners policy, but simply because a rental car was involved in this case, Owners gets a "pass." The Bethkes contend that this is an absurd construction, contrary to public policy, and that self-insured rental vehicles are an anomaly not anticipated by the legislature. We must disagree. Both the policy and the governing statutes permit such an exclusion. Moreover, contrary to

the Bethkes' contention, the underinsured vehicle exclusion is not limited to self-insured rental vehicles. Also excluded are automobiles owned by any governmental unit or agency, automobiles located for use as a residence or premise, and those vehicles designed primarily for use off public roads except while actually on public roads. Thus, a self-insured rental vehicle is but one of several vehicle categories explicitly excluded from the Owners policy definition of "underinsured automobile."

¶19 When a policy contains explicit, unambiguous language, we are not at liberty to rewrite an insurance contract to achieve a certain public policy result. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶¶23-24, 245 Wis. 2d 186, 629 N.W.2d 150. This is especially true where the legislature can be presumed to be aware of the issue. As the circuit court noted in its 2010 decision, "the legislature recently enacted changes to the statutory scheme to maximize coverage of insurance benefits, and the amended legislation did not prohibit exclusions such as the one in Ms. Bethke's insurance policy."[8] The legislature is presumed to be aware of existing laws when it acts, ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶40, 316 Wis. 2d 47, 762 N.W.2d 652, yet the legislature did not prohibit definitional exclusion of self-insured automobiles from underinsured automobile coverage. *See* ***Return of Property in State v. Jones***, 226 Wis. 2d 565, 578-79, 594 N.W.2d 738 (1999) (when the legislature makes changes to a statutory scheme but does not modify, limit or eliminate a provision at issue, it is construed as an affirmation of that provision).

[8] The legislature made numerous changes to WIS. STAT. § 632.32 as part of 2009 Wis. Act 28, §§ 3148-3172, and again pursuant to 2011 Wis. Act 14, § 26. Section 632.32(5)(e) which permits exclusions not otherwise prohibited was not altered by these revisions.

¶20 Simply stated, it is for the legislature, not this court, to address the public policy concerns raised by the Bethkes. *See* ***Progressive N. Ins. Co. v. Romanshek***, 2005 WI 67, ¶65, 281 Wis. 2d 300, 697 N.W.2d 417 (policy arguments as to mandating UM coverage for an insured injured in a miss-and-run accident are best addressed to the body charged with developing this state's public policy).

CONCLUSION

¶21 We conclude that the exclusion of self-insured vehicles from the Owners policy definition of "underinsured automobiles" is permitted under WIS. STAT. § 632.32(6). Because it is a permitted exclusion and does not function as an impermissible reducing clause, it is not contrary to public policy. We therefore affirm the order of the circuit court granting a declaratory judgment in favor of Owners.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.