COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1022 **Cir. Ct. No. 2010CV88**

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

AUTO-OWNERS INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

SHARON BREVIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Sharon Brevik appeals a judgment declaring that Auto-Owners Insurance Company is not bound by a default judgment obtained in an Idaho action against an uninsured motorist. We conclude the insurance policy

is unambiguous and requires Auto-Owners' written consent to be bound by the judgment. Because Auto-Owners did not consent to be so bound, we affirm.

BACKGROUND

¶2 On March 8, 2006, Brevik was involved in an auto accident in Idaho with David Winegar, an uninsured driver. Brevik filed an uninsured motorist (UM) claim against Auto-Owners, her insurance carrier. Brevik retained her own counsel, attorney Scott Lundgreen.

¶3 Auto-Owners retained the Idaho firm Quane Smith to pursue its subrogation claim against Winegar. Because he did not wish to prejudice Brevik, Quane Smith attorney David Knotts requested Lundgreen's input in filing the suit. The action was ultimately filed on February 27, 2008 as ***Brevik v. Winegar***, No. CV PI 0803939 (4th Dist. Idaho) (***Idaho I***). Brevik was the sole named plaintiff, and the suit included her personal injury claim against Winegar.

¶4 Days after ***Idaho I*** was filed, Brevik filed an action against Auto-Owners in Idaho, ***Brevik v. Auto-Owners Insurance Company***, No. CV PI 0804398 (4th Dist. Idaho) (***Idaho II***). In ***Idaho II***, Brevik sought the coverage limit of $500,000 under her UM policy, as well as damages for an alleged breach of the duty of good faith and fair dealing. ***Idaho II*** was voluntarily dismissed after Lundgreen and Knotts agreed to further negotiate a settlement. In January 2009, Knotts pointed out that Lundgreen had mistakenly had the suit dismissed with prejudice. Lundgreen sought to amend the dismissal order to preserve his right to refile the suit if Brevik and Auto-Owners could not reach an agreement.

¶5 Meanwhile, the litigation in ***Idaho I*** continued. Winegar failed to answer the complaint, and the court found Winegar in default on May 5, 2008.

The court required Brevik to prove her damages at a hearing on March 16, 2010. Lundgreen was present at the hearing, but it was a Quane Smith attorney who questioned Brevik in an effort to prove her damages. Brevik was not cross-examined. On June 7, 2010, the court entered a judgment against Winegar for $710,043.80. On June 15, 2010, Lundgreen notified Auto-Owners that Brevik expected to be paid the policy limit of $500,000 pursuant to the June 7 judgment.

¶6 Following the damages hearing, but before the court entered judgment in ***Idaho I***, Brevik filed another action in Idaho, ***Brevik v. Auto-Owners Insurance Company***, No. CV OC 1007129 (4th Dist. Idaho) (***Idaho III***). That action has been stayed pending resolution of this appeal.

¶7 Auto-Owners commenced the present action in Wisconsin on August 20, 2010, seeking a declaratory judgment that it was not bound by Brevik's default judgment against Winegar. Both parties moved for summary judgment. Auto-Owners relied on a "consent to be bound" clause in the UM coverage that required Auto-Owners' written consent to be bound to a judgment. The circuit court rejected Brevik's argument that this clause was unenforceable. It concluded the parties intended to determine the amount of Auto-Owners liability independently of ***Idaho I*** and held that Auto-Owners was not bound by the default judgment.

DISCUSSION

¶8 The proper interpretation of an insurance agreement is a question of law that we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "Our goal in interpreting insurance contracts is to discern and give effect to the intent of the parties." ***Id.***, ¶16. The first task when construing an insurance policy is to ascertain whether an ambiguity exists

regarding the disputed coverage issue. ***Id.***, ¶13. If the language is unambiguous, it is enforced as written. ***Id.***

¶9 The UM language in this case is straightforward. Auto-Owners agreed to pay "compensatory damages any person is legally entitled to recover from the owner or operator of an uninsured automobile …." (Bolding omitted). The "consent to be bound" clause states:

> Whether an injured person is legally entitled to recover damages and the amount of the damages shall be determined by agreement between the injured person and us. We will not be bound by any judgments for damages obtained or settlements made without our written consent. (Bolding omitted).

Read as a whole, the "consent to be bound" clause requires an agreement between the insured and the insurer as to the insured's legal entitlement to damages and their amount, and the insurer's written consent to be bound by any judgment or settlement.

¶10 Brevik contends that no written agreement was necessary to bind Auto-Owners to the amount of damages awarded in ***Idaho I***. She argues that the "consent to be bound" clause is ambiguous because the second sentence requires written consent, while the first sentence requires only an "agreement." *See* ***Folkman***, 264 Wis. 2d 617, ¶13 (ambiguous insurance policies will be construed in favor of the insured). Brevik fails to appreciate that the first and second sentences concern different subjects. The first sentence requires an agreement with respect to the insured's legal entitlement to, and amount of, damages. The second sentence requires the insurer's written consent to be bound by a judgment or settlement. The clause is not ambiguous.

¶11 Brevik asserts that this interpretation of the clause violates public policy under ***D'Angelo v. Cornell Paperboard Products Co.***, 19 Wis. 2d 390, 120 N.W.2d 70 (1963). In that case, the injured party was paid $120,000 by one of the tortfeasor's insurers in exchange for an assignment of the claim rather than a release. ***Id.*** at 396-97. The insurer benefitting from the assignment then sought $300,000 from the tortfeasor's auto insurer. ***Id.*** at 398. Our supreme court held that any such claim would violate public policy to the extent it exceeded $120,000:

> It is against public policy for an insurer, of one who is liable, to pay out a sum for the personal-injury claim of another, and then, because of an assignment of the claim, attempt to recover from another responsible party a sum greater than that paid to the injured party.

Id. at 399.

¶12 ***D'Angelo*** does not stand for the proposition that an insurer is automatically bound to the amount of a default judgment obtained on the insured's behalf. ***D'Angelo*** was decided on the equitable principle that an insurer should not be permitted to speculate as to the value of the injured party's claim, and should instead be limited in recovery to what it has actually paid. Brevik's concern here appears to be that Auto-Owners *might* attempt to collect more from Winegar than it ultimately pays to Brevik. Not only is this argument entirely speculative, but ***D'Angelo*** precludes this result.

¶13 Brevik also insists we must construe the policy in accordance with ***Sahloff v. Western Casualty & Surety Co.***, 45 Wis. 2d 60, 171 N.W.2d 914 (1969). In discussing the ordinary process for adjustment of UM claims under the endorsement at issue in that case, the court stated the insured must make a UM claim against the insurer, after which the insurer may "negotiate a settlement,

require the insured to bring suit against the uninsured motorist in which event it would become bound by the judgment, or make a written demand for arbitration." ***Id.*** at 67 (emphasis added). However, the "sole issue" in that appeal was "whether a suit brought on the uninsured motorist coverage is governed by the three-year tort statute of limitations of sec. 893.205(1), Stats., or by the six-year statute of limitations prescribed for contracts in sec. 893.19(3), Stats." ***Id.*** at 64. ***Sahloff*** cannot be read to establish that, in all cases, an insurer is bound to a judgment obtained in a suit on the insured's behalf.

¶14 Brevik has not supplied any evidence that Auto-Owners provided written consent to be bound by the default judgment obtained in ***Idaho I***. In fact, she has repeatedly conceded that there was no agreement between the parties as to damages. Brevik's brief cites a "lack of a signed written agreement upon filing ***Idaho I***" as the primary reason for the present dispute. Her answer in the present action states that "Auto-Owners Insurance Company refuses to give written permission to be bound by the damage amount of $710,043.30, or any other amount in excess of $500,000." Her brief also faults Auto-Owners for proceeding with its subrogation action in ***Idaho I*** "without any written agreement filed with the court defining the relationship between the amount of the default judgment and the amount due for uninsured benefits."

¶15 The record supports Brevik's concession that Auto-Owners had not agreed to be bound by the amount of damages established in ***Idaho I***. Brevik, citing Auto-Owners' response to one of her interrogatories, complains that "Auto-Owners never had any intent to be bound by [the judgment in ***Idaho I***]." That interrogatory and response reads as follows:

> INTERROGATORY NO. 6: On December 22, 2006 did you intend to reserve your right to decide whether or not to

> be bound by the amount of the judgment in [***Idaho I***] … until you knew what the amount of the judgment was?
>
> RESPONSE NO. 6: [Objection omitted]. [N]o; Auto-Owners hired Quane Smith to pursue its subrogation rights and it did not intend [***Idaho I***] to affect its insured's or Auto-Owners' rights regarding the insured's [UM] claim in any way. Auto-Owners intended to have the issues of whether the insured was legally entitled to recover damages and the amount of those damages to be determined by agreement between the insured and Auto-Owners. ...
>
> The parties[']rights are determined by their contract. Auto-Owners' intent was for Ms. Brevik's uninsured motorist benefits against Auto-Owners to be governed by the terms of the insurance policy that had been issued to her … including but not limited to the "consent to be bound clause." … Additionally, Ms. Brevik's Idaho attorney, Scott Lundgre[e]n, filed a number of documents in the three Idaho actions, indicating that Ms. Brevik's damages would be determined in an action ***other than*** [***Idaho I***].

Among these documents is an affidavit by Lundgreen, filed to correct ***Idaho II***'s dismissal with prejudice, stating that the parties "wanted to evaluate and negotiate the case prior to litigation costs being expended" and "would dismiss [***Idaho II***] … and re-file if the parties could not later negotiate a settlement." Lundgreen's affidavit was filed nearly eleven months after ***Idaho I*** had been commenced, suggesting that neither party regarded ***Idaho I*** as controlling with respect to Auto-Owners' liability.

¶16 Brevik contends Auto-Owners is not entitled to summary judgment because it did not file an affidavit identifying which of Lundgreen's documents it was referring to in its response to interrogatory six.[1] Yet Brevik concedes that

[1] Given Brevik's multiple references to reliance, this argument appears to be a response to Auto-Owners' invocation of equitable estoppel in the lower court. Although we have no need to reach that issue—our decision is based on the plain meaning of the insurance policy—we nonetheless address Brevik's concerns regarding Auto-Owners' prima facie case for summary judgment.

(continued)

Lundgreen represented in his affidavit of January 2009, while ***Idaho I*** was pending, that negotiations regarding the amount of Auto-Owners' liability were ongoing. Brevik hedges this concession by trying to provide "context" for the negotiations, but her brief is mostly her subjective assessment of Auto-Owners' conduct. It is clear Auto-Owners regarded the extent of its liability as a matter to be decided independently of the damages determination in ***Idaho I***. Indeed, Brevik's brief states that as of February 8, 2010—just one month before Auto-Owners helped Brevik *prove up* her damages in ***Idaho I***—"negotiations continued with the differences in the value of the case that were wide and deep." The record and Brevik's concessions sufficiently support the circuit court's summary judgment decision.

¶17 Brevik considers it significant that the parties agreed to file ***Idaho I***. However, the question is not whether the parties agreed to file ***Idaho I***; it is whether Auto-Owners gave written consent to be bound by the judgment. Implicit in this agreement to file ***Idaho I***, Brevik argues, was Auto-Owners' consent to be bound by the result of the suit. However, Brevik concedes that any such agreement was silent as to how a judgment would affect Brevik's uninsured motorist claim. The policy clearly requires Auto-Owners' written consent. Silence does not equal written consent.

¶18 Brevik also complains that Auto-Owners failed to provide prejudgment notice that it was not bound by the default judgment in ***Idaho I***. This argument turns the "consent to be bound" clause on its head. The policy clearly

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We also note that much of Brevik's argument is incoherent and poorly organized. To the extent we have not addressed an argument raised in Brevik's brief, we deem it inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

states that Auto-Owners is not bound to a judgment unless it first provides written consent. Without such consent, no reasonable person could believe that the default judgment would bind the insurer.

By the Court.—Judgment affirmed.

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