COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP208 **Cir. Ct. No. 2014CV619**

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

JULIE A. TESKE, ELLE TESKE AND KATHERINE TESKE, MINORS, BY THEIR GUARDIAN AD LITEM, VICTOR C. HARDING,

PLAINTIFFS-APPELLANTS,

V.

WILSON MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. This is a dispute over the amount of underinsured motorist (UIM) benefits available to the insureds after a motor vehicle accident. Julie Teske and her minor daughters, Elle and Katherine, by the minors' guardian

ad litem (the Teskes), appeal a declaratory judgment in favor of Wilson Mutual Insurance Company, the Teskes' motor vehicle insurer. The Teskes contend Wilson is contractually bound to pay them the full per-accident liability limit. Wilson argues that it met its obligation by tendering an amount that, with what the Teskes recovered from the tortfeasor's insurer, equals the per-accident liability limit. The circuit court agreed with Wilson. We affirm.

¶2 The facts are undisputed. The Teske plaintiffs[1] were seriously injured when, while stopped to make a left turn, a vehicle driven by Sabrina Srock rear-ended their vehicle at high speed. The impact propelled the Teske vehicle into the opposite lane where it was struck broadside by an approaching car. The driver of that car also was injured.

¶3 Srock's State Farm policy had bodily injury liability coverage limits of $100,000 per person and $300,000 per accident. State Farm tendered its $300,000 per-accident limit. The other injured driver received $45,000; the $255,000 balance was apportioned among the Teskes.

¶4 Medical bills alone for the Teske plaintiffs amounted to $700,000. They looked to Wilson for additional coverage under their policy's $500,000 per-person/$500,000 per-accident UIM coverage. Pursuant to a reducing clause, Wilson paid the Teskes $245,000—the $500,000 per-accident limit reduced by the $255,000 that State Farm paid on Srock's behalf so that, altogether, the Teskes received the full $500,000 per-accident limit. The Teskes accepted the payment while reserving their right to seek an additional $255,000 from Wilson.

[1] A third Teske daughter was less seriously injured.

¶5 Julie filed suit against Srock and State Farm. Upon approval of the minor settlement, Srock was dismissed and the complaint was amended to add Elle and Katherine as plaintiffs and to join Wilson as a defendant. The Teskes alleged that Wilson breached its contract by refusing to pay the full $500,000 per-accident limit. Wilson contended its per-accident limit is $500,000 less payment from other sources. On cross-motions for declaratory judgment, the circuit court concluded that the Wilson policy and its reducing clause were unambiguous and comported with the requirements of WIS. STAT. § 632.32(5)(i)1. (2013-14)[2] and the holding in ***Welin v. American Family Mutual Insurance Co.***, 2006 WI 81, 292 Wis. 2d 73, 717 N.W.2d 690. The Teskes appeal.

¶6 The grant or denial of a declaratory judgment is a matter within the discretion of the circuit court. ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 635, 586 N.W.2d 863 (1998). A circuit court erroneously exercises its discretion if it bases its decision on an error of law or of fact. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶21, 324 Wis. 2d 325, 782 N.W.2d 682.

¶7 The construction of insurance policy language presents a question of law. ***Hull***, 222 Wis. 2d at 636. We interpret an insurance policy by the same rules that govern contract construction. ***Kuhn v. Allstate Ins. Co.***, 193 Wis. 2d 50, 60, 532 N.W.2d 124 (1995). Ambiguity is found where a contract "is fairly susceptible of more than one construction," ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996), not simply where different constructions are argued, *see* ***State ex rel. Siciliano v. Johnson***, 21 Wis. 2d 482, 487, 124 N.W.2d 624 (1963). Whether ambiguity

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

exists in an insurance policy is a question of law. *See* ***Acuity v. Bagadia***, 2008 WI 62, ¶13, 310 Wis. 2d 197, 750 N.W.2d 817.

¶8 UIM coverage is meant to compensate the victim of a UIM tortfeasor whose own liability limits are inadequate to fully compensate the victim for his or her injuries. ***State Farm Mut. Auto Ins. Co. v. Gillette***, 2002 WI 31, ¶45, 251 Wis. 2d 561, 641 N.W.2d 662. WISCONSIN STAT. § 632.32(5)(i)1. authorizes per-accident reducing clauses applicable to the limits in UIM policies.[3] In buying a UIM policy with a reducing clause, one "purchase[s] a predetermined, fixed level of UIM recovery that is arrived at by combining payments from all sources." *See* ***Welin***, 292 Wis. 2d 73, ¶49.

¶9 The Teskes' UIM policy provides in relevant part:

> **A.** The Limit Of Liability shown in the Schedule or in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages … arising out of "bodily injury" sustained by any one person in any one accident. Subject to this limit for each person, the Limit Of Liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorist Coverage is our maximum limit of liability for all damages for "bodily injury" resulting from any one accident.
>
> This is the most we will pay regardless of the number of:
>
> **1.** "Insureds";

[3] WISCONSIN STAT. § 632.32(5)(i) provides in relevant part:

> (i) A policy may provide that the limits under the policy for … underinsured motorist coverage for bodily injury … resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury … for which the payment is made.

> **2.** Claims made;
>
> **3.** Vehicles or premiums shown in the Declarations; or
>
> **4.** Vehicles involved in the accident.
>
> **B.** The limit of liability shall be reduced by all sums:
>
> **1.** Paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible….

¶10 Despite the reducing clause, the Teskes assert that Wilson is contractually obligated to pay the full $500,000 per-accident limit. Their argument goes like this. The first sentence of the portion of the policy cited above directs one to look to the per-person limit recited on the declarations page, here, $500,000, which is Wilson's maximum liability for bodily injury damages "sustained by any one person in any one accident." The Teskes contend that the next sentence setting forth the per-accident limit, which begins with "[s]ubject to this limit for each person," means that the reducing clause applies only to the per-person limit. Because the per-accident limit is "subject to" the per-person limit, they reason, each $500,000 per-person limit first is reduced by the recovery each got from Srock/State Farm—Julie $100,000, Katherine $100,000, and Elle $55,000, bringing Julie's and Katherine's claims to $400,000 each and Elle's to $445,000—and then the per-accident limit applies, such that Wilson still is contractually obligated to pay its "most we will pay" per-accident limit of $500,000.

¶11 To adopt the Teskes' view would commit Wilson to pay the maximum limits of its per-accident liability to the exclusion of other relevant provisions of the policy—the reducing provision. This court rejected that very argument in ***Commercial Union Midwest Insurance Co. v. Vorbeck***, 2004 WI App 11, ¶39, 269 Wis. 2d 204, 674 N.W.2d 665. There, Vorbeck argued that the

reducing clause contradicted policy language that unequivocally obligated her insurer to pay the maximum limits of its UIM liability. ***Id.***, ¶37. We viewed the limits of liability language as stating "the obvious under … well-established precepts of insurance contract law," i.e., that the insurer "will pay the maximum of its limits of liability *in the appropriate case and under the appropriate circumstances subject to the terms of the insurance policy read as a whole*." ***Id.***, ¶39. We also said that the per-person/per-accident limit of liability language "simply accommodates the situation where … the insurance policy recites separate 'split limits' of liability for each person and each accident as opposed to a policy that recites a single limit of liability." ***Id.***, ¶40.

¶12 The Teskes focus on the language specifying that the per-accident limit is "[s]ubject to the 'per person' limit," a phrase ubiquitous in UIM policies. As ***Vorbeck*** suggests, the circumstances of the particular case dictate which "limit of liability," per-person or per-accident, applies, and in turn, which limit is reduced. The meaning of the "subject to" clause is more easily illustrated by examining a UIM policy with "split limits." A common example is one providing limits of $100,000 per person and $300,000 per accident. Assuming those limits in a UIM policy otherwise like the Teskes', if one or two insureds were injured, the applicable limit for each would be $100,000, not the per-accident $300,000 limit. In such a case, the per-accident limit would be "subject to the per-person limit." But if four were injured, the per-accident limit would apply because that is the most that Wilson contracted to pay regardless of the number of insureds. That said, no single person could recover more than the per-person limit: the per-accident limit is "subject to" the per-person limit on an individual basis. The same logic applies where, as in the Teskes' policy, the per-person and per-accident limits are the same.

¶13 The Teskes' policy unequivocally states that the limit of liability shown in the declarations is Wilson's "maximum limit of liability" for all bodily injury damages "resulting from any one accident," and that that is the most Wilson will pay regardless of the number of insureds. The reducing clause expressly provides that the "limit of liability" is to be reduced by all sums paid because of bodily injury by or on behalf of a legally responsible entity. There is no language in either the limit of liability provision or the reducing clause that limits application of the reducing clause to the per-person limit to the exclusion of the per-accident limit, or vice versa. The reducing clause applies to both and, ultimately, to the applicable limit, depending on the circumstances.

¶14 Reading the policy as a whole, a reasonable insured would not expect a maximum UIM payment after collecting from the tortfeasor. Rather, he or she would understand that the reducing clause modifies Wilson's obligation to pay the maximum limits of liability contained in the declarations. *See* ***Ruenger v. Soodsma***, 2005 WI App 79, ¶23, 281 Wis. 2d 228, 695 N.W.2d 840. The policy thus adequately sets forth that the insured is purchasing a fixed level of UIM coverage that will be arrived at by combining payments made from all sources. ***Welin***, 292 Wis. 2d 73, ¶49.

¶15 The Teskes also protest that the reduction runs afoul of ***Welin*** on grounds that Julie's recovery impermissibly was reduced by payments Srock made to the Teske daughters. This is not a ***Welin*** case.

¶16 In ***Welin*** the tortfeasor's insurance policy had a single $300,000 limit. ***Id.***, ¶2. Welin's UIM coverage had limits of $300,000 per person and per occurrence and defined an underinsured motor vehicle as one insured with bodily injury liability limits less than the UIM coverage limits of liability. ***Id.*** The

tortfeasor's $300,000 limits were shared $250,000/$50,000 between Welin and the tortfeasor's injured passenger, who had a different UIM policy than Welin. ***Id.***, ¶¶2, 4. Welin's damages exceeded $250,000 but her insurer claimed its UIM endorsement was not triggered because, since Welin and the tortfeasor had the same limits, the tortfeasor's vehicle did not meet the definition of an underinsured motor vehicle. ***Id.***, ¶¶6, 15.

¶17 The supreme court held that WIS. STAT. § 632.32(5)(i)1. permits a reduction only by amounts received from certain accepted sources such as a person "legally responsible for the bodily injury." *See* ***Welin***, 292 Wis. 2d 73, ¶¶43, 53. The purpose of the UIM statute is to guarantee that insureds receive "a predetermined, fixed level of coverage for an accident from a combination of the tortfeasor's insurance and the UIM insurance." ***Id.***, ¶52. Thus, when a tortfeasor injures more than one person in a single occurrence and the injured persons are not insured under the same UIM policy, 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, the reducing clause contravenes the statute's purpose and is invalid under § 632.32(4m) and (5)(i). ***Welin***, 292 Wis. 2d 73, ¶8.

¶18 The Teske underinsured motor vehicle description does not pose the problem identified in ***Welin***. First, Srock's $300,000 liability limit plainly was less than the Teskes' $500,000 UIM coverage limit. Second, Wilson did not claim that UIM coverage was inapplicable, but immediately tendered the $245,000 shortfall. Third, the Teskes' recovery of the $500,000 limit was not affected by State Farm's $45,000 payment to the other injured driver.

¶19 Here, there is a $500,000 per-accident limit, applicable when there are multiple injured insureds, and that limit is reduced by the $255,000 received from State Farm. Wilson has paid the Teskes the remaining $245,000 to provide them the $500,000 UIM coverage they purchased.

¶20 We next turn to the Teskes' claim that the circuit court erred in transferring venue of the action from Milwaukee county to Sheboygan county. Julie elected to file suit against Srock and State Farm in Milwaukee county where she received the majority of her medical care and where her attorneys and anticipated medical experts were located. *See* WIS. STAT. § 801.51. Upon approval of the minor settlement, Srock was dismissed and the complaint was amended to add Elle and Katherine as plaintiffs and to join Wilson as a defendant. The claim then became one of breach of the UIM contract. Wilson successfully moved for a change of venue to Sheboygan county.

¶21 "Change of venue in civil cases is governed by statute." ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶4, 250 Wis. 2d 740, 642 N.W.2d 233. The granting of a change of venue is within the circuit court's discretion to do in the interest of justice or for the convenience of the parties or witnesses. *See* WIS. STAT. § 801.52.

¶22 Wilson moved for a change of venue to Sheboygan county, the site of its principal place of business, where the contract was formed and the premiums were collected. The Teskes preferred either Fond du Lac county, where they reside, or to remain in Milwaukee county. They argued that the case was a first-party claim and that, as Wilson is a Sheboygan-area business and "[t]hat's where the judges are from," Sheboygan county was "the last county [we] wanted venue in."

¶23 The court granted the motion changing venue to Sheboygan county. Wilson is situated there, the contract was formed there, and the court believed the judges would be fair and not swayed by Wilson's local presence. *See* WIS. STAT. § 801.50(2)(a), (c) (venue in a civil action shall be in the county where the claim arose or where a defendant resides or does substantial business). The court also granted Wilson's request to order the change of venue on its own motion pursuant to WIS. STAT. § 801.52 and to waive the transfer fee. The court's actions reflect a proper exercise of discretion.

By the Court.—Order affirmed.

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