COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1679 **Cir. Ct. No. 2015CV31**

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

CURTIS L. LOVELIEN AND TIMOTHY D. KROENING,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN - DEPARTMENT OF HEALTH SERVICES,
CANDI L. LEWALLEN AND ARTISAN AND TRUCKERS CASUALTY COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

AUSTIN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

DEFENDANT,

GREG ROSKOS AND ESTATE OF PATRICIA HAMERSKI,

JOINDER-DEFENDANTS.

APPEAL from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Curtis Lovelien and Timothy Kroening (collectively, Lovelien)[1] appeal an order dismissing Austin Mutual Insurance Company and the other claimants from this personal injury action after Austin Mutual settled with some of the claimants and forwarded its remaining policy limits to the circuit court for allocation between Curtis Lovelien and Timothy Kroening. Lovelien argues Austin Mutual's payment of the remaining policy limits after the partial settlement violates Wisconsin's direct action statute, WIS. STAT. § 632.24 (2015-16),[2] because the funds were not distributed on a pro rata basis according to the damages each claimant sustained. Austin Mutual contends this appeal is moot based upon a claimed accord and satisfaction between Austin Mutual and Lovelien.

¶2 We conclude Austin Mutual's payment of its remaining policy limits to the circuit court does not constitute an accord and satisfaction between Austin Mutual and Lovelien and, therefore, this appeal is not moot. We also conclude the direct action statute does not require distribution of an insurer's funds to claimants on a pro rata basis. We therefore affirm the circuit court's order of dismissal.

[1] Where necessary, we refer to Curtis Lovelien and Timothy Kroening by their full names.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise stated.

BACKGROUND

¶3 Curtis Lovelien and Timothy Kroening were injured in an automobile accident on Highway 95 outside of Arcadia, Wisconsin. At the time, they were employed by Donald Lewallen's (Donald) drywall installation business, D. Lewallen Construction, Inc. On the morning of the accident, Donald was driving his work van on the way to a job site. Curtis Lovelien, Timothy Kroening, and Donald's fourteen-year-old stepson, Austin LeMon, were passengers in the van. Before reaching the work site, Donald's van collided with a vehicle driven by Patricia Hamerski. Donald, LeMon and Patricia Hamerski died at the scene of the collision, and Curtis Lovelien and Timothy Kroening sustained injuries.

¶4 Lovelien filed a negligence suit against Austin Mutual, the commercial automobile insurance carrier for Donald and D. Lewallen Construction. Candi Lewallen (Lewallen), Donald's wife and LeMon's mother, intervened to bring a claim for the wrongful death of her son. Patricia Hamerski's estate, her adult son, Greg Roskos (collectively, Hamerski), and her underinsured motorist carrier, Artisan and Truckers Casualty Company (Artisan), were joined as defendants.

¶5 Austin Mutual represented on various occasions to the circuit court that it was ready and willing to pay the full policy limits of $500,000 to the claimants.[3] Thereafter, Hamerski settled with Artisan and assigned their claims to Artisan. After attempting to reach a global settlement, Austin Mutual settled with

[3] Lovelien represents—and the record at times suggests—that Austin Mutual conceded liability. Austin Mutual disputes that it conceded liability, asserts that it only stated it was willing to pay out the policy limits, and that any reference to an admission of liability by Austin Mutual is incorrect.

Lewallen for $185,000 and Artisan for $60,000. Austin Mutual then moved for the court to approve the settlements, for payment of the remainder of the policy limits into the court, and for its dismissal from the case. Curtis Lovelien and Timothy Kroening objected to the settlements and dismissal of Austin Mutual on the basis that they would be deprived of their pro rata shares of the policy limits. The court approved the settlements and denied Lovelien's subsequent motion for reconsideration.

¶6 Austin Mutual deposited the remaining $255,000 in policy limits with the clerk of circuit court to be distributed between Curtis Lovelien and Timothy Kroening. The circuit court then dismissed Austin Mutual, Artisan, Hamerski and Lewallen from the lawsuit. The court ordered Lovelien's attorney to file a proposed distribution of the remaining funds. Ultimately, the court ordered that $225,000 of the deposited policy limits be distributed to Curtis Lovelien and the remaining $30,000 paid to Timothy Kroening. The remaining parties, Curtis Lovelien and Timothy Kroening, now appeal the circuit court's dismissal of the settling parties.

DISCUSSION

A. Accord and satisfaction

¶7 Austin Mutual argues this appeal is moot because Lovelien accepted the funds it offered, establishing an accord and satisfaction. An accord and satisfaction is an agreement to discharge an existing disputed claim and constitutes a defense to an action to enforce the claim. ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis. 2d 95, 112, 341 N.W.2d 655 (1984). "The interests of fairness dictate that a creditor who cashes a check offered in full payment should be bound by the terms of the offer." ***Id.*** After receiving an offer, the creditor's

cashing of the full payment check constitutes an accord and satisfaction which discharges the entire debt. ***Id.*** at 101. Like other contracts, an accord and satisfaction requires an offer, an acceptance, and consideration. ***Id.***

¶8 Here, Austin Mutual moved the circuit court for an order allowing it to deposit its remaining policy limits with the court, and for dismissal. Curtis Lovelien and Timothy Kroening opposed Austin Mutual's motion, arguing that this payment would deprive them of their respective pro rata shares of the policy limits. The court granted Austin Mutual's motion, and Austin Mutual deposited its remaining policy limits pursuant to the court's order along with a letter to the clerk of court stating the following: "Pursuant to the Court's Order dated May 31, 2016, enclosed please find The Main Street America Group's check no. [] payable to Clerk of Courts in the amount of $255,000.00 presenting the settlement being paid out in the above-noted matter. Please distribute accordingly." Austin Mutual contends its letter, coupled with the payment, constitutes a legally binding offer to settle Lovelien's claims, and that by proposing a distribution and then accepting distribution of those funds, Lovelien has discharged Austin Mutual's liability for his claims. We disagree for several reasons.

¶9 First, Austin Mutual made its payment pursuant to a circuit court order, not as an independent offer to settle Lovelien's claims. Second, even if we were somehow to conclude Austin Mutual's letter and check constituted an offer to settle Lovelien's claims, Lovelien could not have done more to manifest his rejection of such offer. In fact, the record demonstrates that Lovelien opposed the "offer" at every opportunity. Lovelien not only opposed Austin Mutual's initial motion, he moved for reconsideration of the circuit court's order approving the payment of the funds to the court, and, having failed in that effort, he now appeals.

¶10 Third, we reject Austin Mutual's argument that Lovelien's acceptance of the funds in settlement is obvious because he submitted a proposed distribution of the funds and accepted payment of the funds from the circuit court. The court ordered Lovelien to submit a proposed distribution of the funds and further ordered the resulting payment. Austin Mutual provides no factual support in the record for its contentions that Lovelien "requested the funds," "actively sought out the settlement proceeds," or "received said funds in voluntary settlement of [his] claims."[4]

¶11 Finally, ***Flambeau*** requires that the creditor manifest acceptance by cashing the check. *See* ***Flambeau***, 116 Wis. 2d at 112. There is no indication in the record as to whether Lovelien actually cashed the checks. Thus, Austin Mutual has not established that Lovelien manifested his acceptance of its alleged offer. Because we conclude there was no accord and satisfaction under the facts of this case, the appeal is not moot.

B. The direct action statute

¶12 Lovelien argues an insurer's obligation under the direct action statute mandates that each person entitled to recover against that insured is entitled to their pro rata share of the applicable policy limit, based on the amount of damages each person sustained. Lovelien contends this obligation arises because the "plain language" of the direct action statute "mandates an insurer's liability, up

[4] Austin Mutual's brief fails to conform to the requirements of the rules of appellate procedure as its brief contains no indication of which parts of the record it relies on to establish Lovelien's supposed "acceptance." *See* WIS. STAT. RULE 809.19(e). We remind Austin Mutual that the rules of appellate practice are designed in part to facilitate the work of the court, not hinder it, and further violations may result in sanctions.

to the policy limits, *based on the amount [o]f damages that injured persons are entitled to recover against the insured*."

¶13 Wisconsin allows direct actions against insurers. The pertinent statute provides:

> Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, *up to the amounts stated in the bond or policy*, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

WIS. STAT. § 632.24 (emphasis added). "The direct action statute provides that any liability policy covering negligence makes the insurance company liable to the person entitled to recover against the insured up to the policy limits." ***Estate of Otto v. Physicians Ins. Co.***, 2008 WI 78, ¶32, 311 Wis. 2d 84, 751 N.W.2d 805. "The statute renders the insurer 'directly liable' for the conduct of its insured," and the insurer must make payment directly to the injured party. ***Id.*** In addition, the insured is not a necessary party to the action brought against its insurer. ***Id.***

¶14 Statutory interpretation presents a question of law that we review de novo. ***Grosse v. Protective Life Ins. Co.***, 182 Wis. 2d 97, 105, 513 N.W.2d 592 (1994). "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute. ***Id.***, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** Because context is important

to meaning, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶15 In construing or interpreting a statute, we are not at liberty to disregard the plain, clear words of the statute. ***Id.*** Further, courts avoid interpretations that require inserting words into statutes. *See* ***id.***, ¶39 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting ***Connecticut Nat'l Bank v. Germain***, 503 U.S. 249, 253-54 (1992)); *see also* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14, 316 Wis. 2d 47, 762 N.W.2d 652; ***C. Coakley Relocation Sys., Inc. v. City of Milwaukee***, 2008 WI 68, ¶24, 310 Wis. 2d 456, 750 N.W.2d 900. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." ***Kalal***, 271 Wis. 2d 633, ¶46 (quotation omitted). Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. ***Id.***

¶16 We are not persuaded that the plain language of WIS. STAT. § 632.24 mandates a pro rata distribution of the policy limits among all claimants. Nothing in the language of the statute mandates that a distribution be "pro rata" or "based on the amount of damages that injured persons are entitled to recover against the insured" when the policy limits are insufficient to satisfy all claimants. The only mention of any amount in the statute concerns the insurer's policy limit. WIS. STAT. § 632.24 ("Any bond or policy of insurance covering liability to others for negligence makes the insurer *liable, up to the amounts stated in the bond or policy* ...." (Emphasis added)). The statute is silent as to how the policy limit is to

be distributed. ***Id.*** We avoid interpretations that require inserting words into statutes, ***Kalal***, 271 Wis. 2d 633, ¶39, as Lovelien would have us do.

¶17 Lovelien argues his "plain language" interpretation is based upon legislative intent and a dissenting opinion in a Wisconsin Supreme Court case. He argues the legislative purpose of the direct action statute "include[s] the desire[] to save litigation and reduce the expense by determining the rights of all parties in a single action which is usually defended by the insurance carrier." ***Decade's Monthly Income & Appreciation Fund by Keierleber v. Whyte & Hirschboeck, S.C.***, 173 Wis. 2d 665, 675, 495 N.W.2d 335 (1993) (internal quotation omitted). However, there is no need to consider legislative intent when a statute is clear and unambiguous. ***Kalal***, 271 Wis. 2d 633, ¶46.

¶18 Without any explanation as to why a dissenting opinion is of import to our analysis, Lovelien also cites the following language from Chief Justice Abrahamson's dissent in ***Otto*** to support his "plain language" argument: "an insurer [is] liable up to policy limits to '*the persons entitled to recover against the insured.*'" ***Otto***, 311 Wis. 2d 84, ¶147 (Abrahamson, C.J., dissenting) (alteration and emphasis in original) (quoted source omitted). As best we can discern, Lovelien claims the limit of the insurer's liability is conditioned upon the claimant having a right to recover against the insurer for the insured's conduct, a principle that has always been part of the direct action statute. *See* ***Decade's Monthly Income***, 173 Wis. 2d at 675. Of course, dissents are not controlling; however, the dissent's language in ***Otto*** did not imply the type of pro rata distribution Lovelien seeks. Rather, the dissent explains that the claimant's right to recover against the insurer is conditioned upon his or her entitlement to recover against the insured. ***Otto***, 311 Wis. 2d 84, ¶147 n.7 (Abrahamson, C.J., dissenting) ("This condition on the insurer's liability, i.e., it rests upon the claimant having a right to recover

against the *insurer* for the insured's conduct, has been in the direct action statute since 1925 when it was first enacted.").

¶19 WISCONSIN STAT. § 632.24 provides that the insurer is liable to those entitled to recover against the insured. Lovelien relies on the statute's final, subordinate clause: "irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured." Lovelien contends this language fixes the insurer's liability to the claimants prior to judgment. However, our supreme court has determined that this particular language merely affords claimants the right to a direct action against the insurer without having to first establish the insured's liability. *See* ***Frye v. Angst***, 28 Wis. 2d 575, 579, 137 N.W.2d 430 (1965). It does not mean that the insurer is liable to such claimants prior to judgment or speak to any allocation of the insurer's liability among claimants.

¶20 Lovelien concedes that Austin Mutual was entitled to settle at any time with various claimants. However, Lovelien argues that the only way to harmonize the injured persons' statutory rights to recover damages directly against the insurer, while at the same time limiting the insurer's obligation to the amount of its policy limits, is to require that the insurer pay each injured person their pro rata share of the policy limits based on the damages each person sustained. This argument is inconsistent because to require a pro rata distribution based on the damages sustained by each claimant would curtail the rights of insurers and claimants to settle. Insurers would be forced to try every case in order to determine each claimant's damages, or risk liability greater than the policy limits. Contrary to Lovelien's argument, nothing in the direct action statute precludes the insurer from depleting the policy limits by settlement, to the possible detriment of one or more claimants. While Lovelien argues that the fair distribution of

insufficient policy limits presents a valid public policy consideration, the determination of what public policy best serves the people of the state remains a legislative determination. We cannot ignore the plain language of the statute, which establishes the upper limit of the insurer's liability, in order to create a distribution requirement that is absent.

¶21 Finally, Lovelien argues that due to the particular facts of this case, Wisconsin case law, rather than the direct action statute, requires that the insurance proceeds be distributed on a pro rata basis. In ***Wondrowitz v. Swenson***, 132 Wis. 2d 251, 258, 392 N.W.2d 449 (Ct. App. 1986), a case of first impression, this court adopted holdings in other jurisdictions supporting pro rata distribution of insufficient insurance proceeds.[5] Specifically, we considered the issue of how to distribute insurance proceeds that are inadequate to fully compensate multiple claimants after a jury found negligence on the part of the insured and awarded damages to each claimant. ***Id.*** at 257-58. The court concluded:

> Where several claims arising from one accident are joined in one suit against the insurer whose maximum liability under the policy is inadequate to pay in full the amounts to which the claimants become entitled, it has generally been held that the proceeds are to be distributed on a pro rata basis in accordance with the amount of damage suffered by each claimant.

[5] ***Wondrowitz*** relied on cases from other jurisdictions for its reasoning, including ***State Farm Mutual Automobile Insurance Company v. Sampson***, 324 So. 2d 739 (Miss. 1975). ***Wondrowitz v. Swenson***, 132 Wis. 2d 251, 259, 392 N.W.2d 449 (Ct. App. 1986). In ***Sampson***, which this court cited with approval, the circuit court applied a pro rata distribution to the remaining funds after subtracting the amounts paid to settling parties prior to trial. ***Sampson***, 324 So. 2d at 741-42. That is what occurred in this case.

Id. at 258-59. Like in ***Wondrowitz***, Lovelien argues this case involves multiple claims that arose from a single accident, all the claimants were joined in a single lawsuit, and the policy limits were insufficient to pay full damages.

¶22 ***Wondrowitz*** is inapplicable because it involves postverdict pro rata distribution of insufficient policy limits.[6] The liability of the insured had been established, and the jury had determined the damages due to each claimant. ***Wondrowitz*** did not hold that settlements which were not based on a pro rata distribution of the damages as determined by a jury were invalid or violated the direct action statute. Nor did it allow a court to increase an insurer's liability in excess of the policy limits.

¶23 Lovelien's reliance on ***Wondrowitz*** is misplaced, and his arguments are unpersuasive. Until such time as there was a verdict in this case, Austin Mutual's policy limits were not subject to the circuit court's control and neither the direct action statute nor Wisconsin case law required Austin Mutual to distribute its policy limits in settlement on a pro rata basis. The circuit court properly dismissed Austin Mutual and the other settling parties.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

[6] In addition to ***Wondrowitz***, Lovelien also discusses ***Balz v. Heritage Mutual Insurance Company***, 2006 WI App 131, 294 Wis. 2d 700, 720 N.W.2d 704, ***Stahl v. Sentry Insurance***, 180 Wis. 2d 299, 509 N.W.2d 320 (Ct. App. 1993), and ***Brewer v. Auto-Owners Insurance Company***, 142 Wis. 2d 864, 418 N.W.2d 841 (Ct. App. 1987). All of these cases are inapplicable as they involve postverdict pro rata distribution of insufficient policy limits.