STATE OF MICHIGAN

COURT OF APPEALS

JOANNE LONG,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

WILLIAM LOWRY,

Defendant.

UNPUBLISHED
November 30, 2010

No. 293556
Montcalm Circuit Court
LC No. 06-008233-NI

PATRICK MALONEY,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

WILLIAM LOWRY,

Defendant.

No. 293569
Montcalm Circuit Court
LC No. 06-008234-NI

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this insurance coverage dispute, defendant Pioneer State Mutual Insurance Company appeals as of right circuit court orders denying summary disposition in its favor. We affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

On September 23, 2003, defendant William Lowry's car pulled out onto a highway in front of a pickup truck driven by plaintiff Patrick Maloney, and the vehicles collided. Maloney and plaintiff Joanne Long, a passenger in Maloney's truck, sustained personal injuries in the accident. Auto-Owners Insurance Company insured Lowry's vehicle. The Auto-Owners policy set forth a single limit for accidental bodily injury liability insurance of $100,000. Maloney maintained a no-fault insurance policy issued by Pioneer, which included an endorsement for underinsured motorist (UM) benefits in the amounts of $100,000 per person and $300,000 per occurrence.

In 2006, Maloney and Long filed separate lawsuits against Lowry and Pioneer in the Montcalm Circuit Court, which consolidated the actions. Plaintiffs' complaints asserted third-party no-fault claims against Lowry and averred that Maloney's Pioneer policy entitled them to UM benefits. In 2007, Lowry and Pioneer moved for summary disposition of Maloney's case, contending that his injuries fell short of the statutory threshold described in MCL 500.3135(7). The circuit court denied defendants' motion. Pioneer then filed a second motion for summary disposition, asserting that under the terms of its policy it bore no responsibility to pay any UM benefits to Maloney and Long as a matter of law. In a 2008 bench opinion, the circuit court denied Pioneer's summary disposition motion concerning UM benefits.

Maloney and Long settled with Lowry for $100,000, the full amount of Lowry's policy limit, and agreed to share this amount equally. Pioneer approved this settlement. After dismissing Lowry from the case, the parties stipulated that Pioneer would pay Maloney and Long UM benefits of $45,000 each while preserving its right to appeal the circuit court's denial of both summary disposition motions.

II. ANALYSIS

Pioneer now challenges the circuit court's summary disposition rulings, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Both of Pioneer's motions invoked MCR 2.116(C)(10). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.*

Pioneer initially submits that Lowry's vehicle does not qualify as "underinsured" according to the language of Maloney's policy, and that Pioneer thus has no liability to pay any UM benefits to Maloney and Long. When reviewing an insurance coverage dispute, well-established principles of contract construction guide this Court's interpretation of policy terms. *Besic v Citizens Ins Co of the Midwest*, ____ Mich App ____; ____ NW2d ____ (Docket No. 291051, issued 9/14/10), slip op at 3.

> "First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not

> assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity." [*Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007), quoting *Henderson v State Farm Firm & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).]

In *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005), the Supreme Court provided further guidance concerning the interpretation of UM provisions:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act. [Footnotes omitted.]

The Pioneer UM endorsement defines an "underinsured motor vehicle" as a vehicle "to which a bodily injury liability … policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." According to Pioneer, Lowry's no-fault policy's accidental bodily injury liability single limit of $100,000 is not less than Maloney's accidental bodily injury liability policy limits of $100,000 per person and $300,000 per occurrence. Pioneer theorizes that the policies are "equal" because both "provide $100,000 coverage per person."

Pioneer's argument ignores the $300,000 per occurrence limit of Maloney's accidental bodily injury liability policy. As Pioneer acknowledges, Long qualified as an insured under Maloney's policy, and "could potentially receive coverage." Consequently, Maloney's policy afforded Maloney and Long each $100,000 in UM coverage for their bodily injuries, totaling $200,000, while Lowry's policy allowed them to jointly recover no more than $100,000. Because Maloney's coverage plainly exceeded that available under Lowry's policy, the circuit court correctly denied Pioneer's motion for summary disposition on this ground.

Pioneer next asserts that any UM coverage potentially available to plaintiffs must be reduced by $100,000, the total amount of their settlement with Lowry. Pioneer calculates that, after reducing its policy's $100,000 limit on UM coverage for each person by the $100,000 Maloney and Long obtained from Lowry, no UM benefits remain owing under the policy. In support of this argument, Pioneer relies on the "Limit of Liability" provision of its UM endorsement, which states:

> 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 Motorists Coverage is our maximum limit of liability for all damages for "bodily injury" resulting from any one accident.

* * *

> B. The limit of liability shall be reduced by all sums paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy.

Pioneer insists that this limiting policy language is directly analogous to the UM policy interpreted in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664, NW2d 776 (2003), which governs the outcome of this case.

In *Wilkie*, a car driven by Stephen Ward crossed the center line of a roadway and collided with a vehicle occupied by Janna Frank and Paul Wilkie. 469 Mich at 43-44. Wilkie died in the accident, and Frank sustained injuries. Ward's insurance company paid his bodily injury liability insurance limit of $50,000, which Frank and Wilkie's estate shared equally. *Id*. at 44. Wilkie's estate then sought UM benefits from Auto-Owners, which had issued him UM coverage with limits of "$100,000 for each person to a total of $300,000 for each occurrence." *Id*. The relevant portion of Wilkie's UM policy read:

> 4. LIMIT OF LIABILITY
>
> a. Our Limit of Liability for Underinsured Motorists Coverage shall not exceed the lowest of:
>
> (1) The amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile; or
>
> (2) the amount by which compensatory damages for bodily injury exceed the total limits of those bodily injury liability bonds and policies.
>
> b. The Limit of Liability is not increased because of the number of:
>
> (1) automobiles shown or premiums charged in the Declarations;
>
> (2) claims made or suits brought;
>
> (3) persons injured; or
>
> (4) automobiles involved in the occurrence. [*Id*. at 44-45 n 3.]

Auto-Owners argued that because its policy limited UM benefits to an amount in excess of coverage "available" to the underinsured vehicle and Ward's policy made available $50,000 in coverage, the plaintiffs could recover $50,000 each. 469 Mich at 45. Wilkie and Frank contended that Auto-Owners owed them each $75,000, reasoning that "having equally split the Ward policy limits of $50,000, only the $25,000 they received should have been subtracted from the $100,000 policy limit to determine the amount each was due." *Id*. The Supreme Court held that under the plain language of the Auto-Owners policy, the amount of coverage "available to the owner or operator of the underinsured automobile" dictated the extent of the reduction. *Id*. at

49-51. In light of Ward's $50,000 policy limits, the Supreme Court concluded that Wilkie and Frank were each entitled to UM benefits of $50,000, rather than $75,000, explaining in pertinent part as follows:

> Paragraph 4(a)(1) states that the limit of liability for underinsured-motorist coverage shall not exceed "the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceeds the *total limits* of all bodily injury liability bonds and policies *available to the owner* or operator of the underinsured automobile . . . ." In this case, the underinsured-motorist coverage limit stated in Auto-Owner's declaration is $100,000. The *total limit* of all bodily-injury liability policies *available to the owner* of the underinsured automobile, i.e., Ward, is $50,000. Therefore, the amount by which the underinsured-motorist-coverage limits stated in the declarations exceeds the total limits of all bodily-injury policies available to the owner of the underinsured automobile is clearly $50,000, not $75,000. Contrary to the contention of the Court of Appeals, this provision cannot be "reasonably understood" to be referring to the amount actually received by the claimant because the provision specifically refers to the *total* available to the *owner*. . . . [*Id*. at 49-50 (emphasis in original).]

To be sure, the instant case and *Wilkie* share factual similarities. The applicable policies afforded UM coverage with limits of $100,000 for each person and $300,000 for each occurrence. Both cases involve two injured claimants who shared equally in the negligent driver's bodily injury liability policy limit. However, the instant UM policy limitation language differs significantly from that of the policy in *Wilkie*. Furthermore, to the extent that *Wilkie* applies, it supports the circuit court's denial of Pioneer's summary disposition motion.

The Supreme Court emphasized in *Wilkie* that the operative language of the Auto-Owners policy capped UM coverage at "the lowest of" two alternatives: (1) "the amount by which the" UM coverage limits "exceed[] the *total limits* of all bodily injury" policies "*available to the owner* . . . of the underinsured automobile," or (2) "the amount by which" the claimant's bodily injury damages "exceed the total limits of" all available bodily injury liability policies. *Id*. at 49 n 9, 50 (emphasis in original). The total limit of the defendant's policy in *Wilkie* was $50,000. Therefore, $50,000 represented the amount to be subtracted from any third-party no-fault recovery, given that this $50,000 policy limit was "available" to the plaintiffs.

Here, Pioneer's policy describes a two-step process for ascertaining the limit of available UM coverage. First, ¶ A of the limitation of liability portion of the Pioneer policy's UM endorsement establishes the frame of reference for calculating UM benefits. Paragraph A specifically identifies as the relevant guidepost for further calculations the policy limit available "for each person" making a UM claim: "*Subject to this limit for each person*, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for 'bodily injury' resulting from any one accident." (Emphasis added). Next, ¶ B of the UM endorsement limitation instructs that the "limit of liability shall be reduced by all sums paid" by the legally responsible person. This language notably differs from that of the Auto-Owners policy interpreted in *Wilkie*, which contained no specific reference to per person coverage limits, but instead reduced the

insurer's UM liability according to the total limit of coverage "available" to the owner of the underinsured vehicle.[1] Accordingly, the Supreme Court's analysis of the contested policy language in *Wilkie* does not direct the outcome of this case.

Pioneer maintains that because ¶ B limits its liability to the extent of "all sums paid" by the underinsured driver, it is entitled to reduce the UM coverage available to each claimant in this case by $100,000, the settlement amount paid by Lowry. In Pioneer's view, "the effect of this reduction is that Pioneer's per person limit is reduced to $0, which means that neither Plaintiff Maloney nor Plaintiff Long is entitled to any recovery under Pioneer's policy." Pioneer's argument depends on reading in isolation ¶ B's pronouncement that "[t]he limit of liability shall be reduced by all sums paid" on behalf of a legally responsible party. But "[w]e read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Id*. at 50 n 11. Consequently, we reject Pioneer's interpretation of the UM limitation of liability provision, for the simple reason that the policy's UM limitation of liability language as a whole clearly and unambiguously demands a reduction in the limits of Pioneer's UM liability "for each person" making a claim for UM benefits. Pioneer's interpretation of the policy terms would eliminate the meaning and effect of ¶ A, violating the cardinal rule that we must construe an insurance contract so as to give effect to every word, clause, and phrase, and should avoid a construction that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 468; 663 NW2d 447 (2003). Maloney's policy with Pioneer afforded $100,000 in UM coverage to each person. Paragraph A posits that UM coverage limitations must be calculated "[s]ubject to [the policy limit] for each person." Read in context, the policy's UM liability limitation terms required a reduction of the per person policy limit by the amount each person recovered from the underinsured motorist. Given that each plaintiff has received $50,000 from Lowry's insurer, Pioneer was entitled to deduct $50,000 from the $100,000 in UM benefits available to each claimant. We conclude that the circuit court correctly declined to accept Pioneer's proffered UM liability limitation position and appropriately denied Pioneer's motion for summary disposition on this basis.

Lastly, Pioneer challenges the circuit court's denial of its summary disposition motion premised on *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 611 (2004). Pioneer contended in the circuit court that Maloney had failed to establish that he suffered a serious impairment of body function, as required under MCL 500.3135(1). A "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Pioneer characterizes Maloney's injuries as "fall[ing] short on the life impact element" described as a prerequisite to third-party no-fault recovery in *Kreiner*.

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[1] Although the *Wilkie* policy made no mention of per person limits, the Supreme Court held that the policy "unambiguously limited Auto-Owners' liability to $50,000 *each* for Wilkie and Frank." *Id.* at 63 (emphasis added). This holding reinforces our conclusion that the setoff required under Maloney's policy with Pioneer applies on a per person, rather than a per occurrence, basis.

After the parties filed their appellate briefs, our Supreme Court decided *McCormick v Carrier*, 487 Mich 180; __ NW2d __ (2010), which overruled *Kreiner*. *McCormick* announced a new standard for evaluating whether the injuries sustained by a third-party no-fault claimant meet the statutory threshold of serious impairment. Here, no factual dispute exists regarding the nature and extent of Maloney's injuries. *McCormick* instructs that under this circumstance, "the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law." Slip op at 10, citing MCL 500.3135(2)(a)(*i*). A three-pronged analysis dictates whether a plaintiff has established a serious impairment. *Id*. at 12. A plaintiff must show "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *Id*.

Pioneer concedes that when viewed in the light most favorable to Maloney, the evidence supports that he has "arguably suffered objectively manifested injuries as a result of the accident, which included C6-7 central disc protrusion causing moderate narrowing of the spinal canal … and disc protrusions at T7 and T8 without high grade compromise of the spinal canal." Pioneer also has not challenged that the disc protrusions impair important body functions. Instead, Pioneer focuses its argument on the third prong, whether Maloney's injuries have affected his general ability to lead his normal life.

In *McCormick*, the Supreme Court explained that when evaluating whether a plaintiff's injuries have affected the person's general ability to lead his or her normal life, "courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected." Slip op at 20. The plaintiff need only produce evidence

> that some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. Thus, while the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected. *Id*. (emphasis in original).]

Pioneer asserts that Maloney has not established that his injuries affect his general ability to lead his normal life because (1) when the accident occurred, Maloney was unemployed and received disability benefits for a closed head injury, (2) Maloney remains able to perform routine housework and can ride his lawnmower "to cut his two acres of lawn" while seated on an extra cushion, and (3) no physician has placed any restrictions on Maloney's activities. However, Pioneer does acknowledge that Maloney testified at his deposition that he can no longer dance, "do sports," or ride his snowmobile, motorcycle, or dirt bikes. Maloney also expressed an inability to split the wood he used to heat his house and perform renovation work on his 100-year-old farm.

Applying the analysis set forth in *McCormick*, we conclude that Maloney has met the serious impairment threshold as a matter of law. Maloney has shown that his neck and back impairments have affected his general ability to lead his normal life because he now lacks the

capacity to perform some activities of normal living, including renovating the buildings on his property. And Maloney no longer participates in the recreational activities he previously enjoyed on a regular basis. Because the injuries have affected some of Maloney's capacity to live in his preaccident manner, the circuit court properly found that Maloney satisfied the serious impairment threshold in MCL 500.3135(1) and (7), and properly denied Pioneer's motion for summary disposition on this ground.[2]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

[2] During oral argument, counsel for Pioneer specifically declined to endorse a remand to the circuit court for reconsideration under *McCormick* concerning whether Maloney's injuries satisfied the serious impairment threshold. Pioneer's counsel conceded that the parties had settled Maloney's UM claim contingent on this Court's resolution of Pioneer's legal challenges to the circuit court's summary disposition rulings, and raised no objection to this Court's application of *McCormick* to the facts as presented on appeal.