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Details: Complaints.
(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2009-10
(session year)

Joint
(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
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- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | BROWN COUNTY

MICHELLE B. WADZINSKI, individually and as personal representative of the ESTATE OF STEVEN M. WADZINSKI,

Plaintiff,

vs.

AUTO-OWNERS INSURANCE COMPANY

Defendant.

Case No. 07 CV 1827

Case Code: 30303

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, Auto-Owners Insurance Company ("Auto-Owners"), by its attorneys Axley Brynelson, LLP, by Arthur E. Kurtz and Daniel P. McAlvanah, hereby files its response to Plaintiff's Motion for Summary Judgment in the above-captioned matter. This response is based on Wis. Stat. § 802.08(2), the accompanying Affidavit of Daniel P. McAlvanah, the file and record of these proceedings, and the following grounds:

INTRODUCTION

The dispute in this case is whether Steven W. Wadzinski, who died in a motorcycle accident on August 3, 2006, is entitled to uninsured motorist ("UM") coverage under either of two separate umbrella policies issued by Auto-Owners. At the time of his death, Wadzinski was the CEO of Pecard Chemical Company, Inc. ("Pecard"). During this time period, Auto-Owners insured Pecard under a Commercial Auto Insurance Policy (the "underlying policy"). There is no dispute that Wadzinski was entitled to UM coverage pursuant to the underlying policy. Auto-

Owners accordingly paid the full $150,000 policy limits of UM coverage to Plaintiff under the underlying policy.

On July 16, 2009, Auto-Owners filed its own motion for summary judgment in the instant case, arguing that Wadzinski was not entitled to UM coverage under a Commercial Umbrella Policy issued to Pecard. Auto-Owners' motion relied upon clear policy language which specifically excluded coverage for bodily injury resulting from an uninsured motorist. Auto-Owners argued that this specific exclusion was permissible under Wis. Admin. Code § Ins. 6.77(4)(a), which permits insurers to exclude UM coverage from umbrella policies.

Plaintiff's motion, by contrast, argues that Auto-Owners conferred UM coverage to Wadzinski pursuant to a separate Executive Umbrella Policy. Plaintiff's principal argument is that Executive Umbrella Policy confers coverage because it fails to track the language of a particular exclusion as to UM coverage contained in the Commercial Umbrella Policy. (Plaintiff's Motion, at 2-5). For the reasons set forth below, Plaintiff's argument should be summarily rejected. Under the plain and unambiguous language of the Executive Umbrella Policy, UM coverage was not conferred to Wadzinski at the time of the accident because the Executive Umbrella Policy restricted its coverage to liability for personal injury for which Wadzinski, as the insured, was himself liable. Moreover, to the extent that Plaintiff seeks to argue that Wis. Admin. Code § Ins. 6.77(4)(a) is inconsistent with Wis. Stat. § 632.32(4)(a), this argument should be rejected in light of Wis. Stat. § 631.01(5), which permits the insurance commissioner to specifically exempt UM policies from the requirements of Wis. Stat. § 632.32(4)(a). The Court should accordingly deny Plaintiff's motion.

ARGUMENT

I. THE CLEAR LANGUAGE OF THE EXECUTIVE UMBRELLA POLICY EXCLUDES COVERAGE FOR PERSONAL INJURY SUSTAINED BY WADZINSKI.

The threshold consideration in determining whether the Executive Umbrella Policy confers UM coverage is to identify the insured. Unlike the underlying policy and the Commercial Umbrella Policy, both of which identify the insured as Pecard, the Executive Umbrella Policy identifies Wadzinski as the insured. (McAlvanah Aff., **Exh. "A"**). This distinction is important when considered in conjunction with the definition of coverage under the Executive Umbrella Policy:

> **Personal Liability**
>
> We will pay on behalf of the insured the ultimate net loss in excess of the retained limit ***which the insured becomes legally obligated to pay as damages*** because of personal injury or property damage which occurs anywhere in the world.

(McAlvanah Aff., **Exh. "B"**) (emphasis added).

Thus, coverage under the Executive Umbrella Policy is restricted to personal liability for personal injury or property damage for which the insured – i.e., Wadzinski – becomes legally obligated to pay damages suffered by others. The motorcycle accident which occurred on August 3, 2006 injured – and ultimately killed – Wadzinski himself. This tragic event did not make Wadzinski, as the insured, liable to himself. Thus, the Executive Umbrella Policy simply does not confer UM coverage. Rather, the Executive Umbrella Policy functions solely as a "liability policy", which protects Wadzinski for liability for personal injury to third parties. The important distinction between a liability policy and a UM policy was articulated by the Wisconsin Court of Appeals in Etter v. State Farm Mut. Auto. Ins. Co.: "[L]iability coverage and UM coverage are not the same. Liability insurance covers the insured's obligations to others,

and UM coverage pays damages that the insured is entitled to collect from others. Thus, there should be no confusion about what the policy meant when it stated it provided personal liability coverage." 2008 WI App 168, ¶ 14, 314 Wis. 2d 678, 761 N.W.2d 26. The exact same analysis applies to the Executive Umbrella Policy in the case at bar, which insures against Wadzinski's obligations to others. To read the policy in the manner suggested by Plaintiff would transform a liability policy into a UM policy, an interpretation which is unsupported by the plain language of the policy and improper as a matter of law.

The Executive Umbrella Policy's bar of UM coverage is consistent with its exclusions. The first relevant exclusion addresses personal injury to insureds:

> **EXCLUSION OF PERSONAL INJURY TO INSUREDS**
>
> ***We do not cover personal injury to you or a relative.*** We will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A.

(McAlvanah Aff., **Exh. "C"**) (emphasis added).

Both the title of this exclusion and the language of the exclusion itself plainly bar coverage for the incident in question. The title of the exclusion bars coverage related to "personal injury to insureds". The "insured", as identified on the Declarations page of the Executive Umbrella Policy, is "Steven W. Wadzinski". Thus, coverage for personal injury to Wadzinski as pled in the Complaint is explicitly barred. The language of the exclusion itself – which bars coverage for personal injury "to you or a relative" – is entirely consistent with this result. The term "you" is defined in the Executive Umbrella Policy to mean "the person named in the Declarations and his or her spouse if living in the same household." (McAlvanah Aff., **Exh. "D"**). Because the Declarations page names Wadzinski as the insured, the only possible interpretation of this exclusion is that it excludes coverage to Wadzinski for any personal injury.

In response to this argument, Defendant relies upon the second sentence of the exclusion to argue that the Executive Umbrella Policy is ambiguous as to whether UM coverage is conferred. However, it is well-established that an "exception to an exclusion does not, standing alone, create coverage unless the claim is cognizable under the general grant of coverage." Silverton Enters. v. General Cas. Co., 143 Wis. 2d 661, 671, 422 N.W.2d 154 (Ct. App. 1988); *see also* Jaderborg v. American Family Mut. Ins. Co., 2001 WI App 246, ¶ 17, 239 Wis. 2d 533, 620 N.W.2d 468; Broder v. Acuity, 2009 WL 1920955 (Ct. App. July 7, 2009) (slip copy). In other words, because the Executive Umbrella Policy's general grant of coverage does not extend coverage to Wadzinski to personal injury that he himself sustained, it follows that an exception to an otherwise crystal clear exclusion does not automatically invalidate the general grant of coverage, and create an additional form of coverage that otherwise plainly does not exist. The Plaintiff has chosen to ignore this rule of construction of an insurance policy.

Nor is the personal injury exclusion ambiguous. As a matter of law, ambiguity exists in an insurance policy only if the *policy as a whole* is reasonably susceptible to more than one interpretation as to the question of coverage, rather than if an isolated term or phrase is ambiguous. *See* State Farm Mut. Auto. Ins. Co. v. Langridge, 2004 WI 113, ¶¶ 41-48, 275 Wis. 2d 35, 683 N.W.2d 75. "The meaning of a particular provision in [an insurance] contract is to be ascertained with reference to the contract as a whole." Folkman v. Quamme, 2003 WI 116, ¶ 24, 264 Wis. 2d at 634-35, 665 N.W.2d at 866. "If an insured advances a grammatically plausible interpretation, but that interpretation does not square with what the insured would have understood the policy to mean . . . then that reading should be rejected as unreasonable. The tenets of insurance policy construction provide that there is ambiguity where a policy is susceptible to more than one *reasonable* interpretation." Langridge, 2004 WI at ¶ 48 (emphasis

in original). Here, because it is unreasonable to suggest that an isolated exemption to the personal injury exclusion confers coverage that is explicitly barred by the policy's coverage definition, the Executive Umbrella Policy is unambiguous.

The lack of ambiguity in the Executive Umbrella Policy is further reflected in an exclusion that specifically addresses bodily injury in the context of motorcycle injuries:

> **BODILY INJURY**
>
> We agree the following exclusion is added:
>
> We do not cover bodily injury to passengers while occupying or getting on or off a motorcycle, moped or recreational vehicle which an insured owns, hires or borrows.
>
> We will cover such injury:
>
> 1. To the extent that insurance is provided by an underlying policy as listed in Schedule A; and
>
> 2. subject to the Maintenance of Underlying Insurance Condition.

(McAlvanah Aff., **Exh. "E"**).

In its brief, Plaintiff relies upon the first of the two numbered exemptions to this exclusion to argue that UM coverage is conferred for bodily injury sustained in a motorcycle accident. This is a fundamentally misguided interpretation. The bodily injury exclusion must be read in conjunction with the policy's general grant of coverage, and the fact that the policy is a liability policy rather than a UM policy. As a liability policy, Auto-Owners is obligated to "pay on behalf of the insured the ultimate net loss in excess of the retained limit ***which the insured becomes legally obligated to pay as damages*** because of personal injury or property damage." (McAlvanah Aff., **Exh. "B"**) (definition of "Personal Liability"). Thus, the bodily injury exclusion excludes coverage in the event that Wadzinski had become liable for damages related to a motorcycle accident. For example, if during the period of coverage Wadzinksi had caused

an accident while operating a motorcycle, and a passenger on the motorcycle had been injured, Wadzinski could not make a claim under the Executive Umbrella Policy as to his liability to the injured passenger. The first exemption to this exclusion – which states that Auto-Owners "will cover such injury . . . to the extent that insurance is provided by an underlying policy as listed in Schedule A" – does absolutely nothing to benefit Plaintiff's position. The only reasonable interpretation of this provision is that *if* the underlying policy extended coverage to Wadzinski for his liability to a passenger in a motorcycle accident, the Executive Umbrella Policy would similarly confer an extra umbrella of liability coverage to Wadzinksi. However, the accident that occurred on August 3, 2006 simply does not trigger this form of coverage. Wadzinksi was in a tragic motorcycle accident through no fault of his own. He bears no liability to himself. The plain terms of the Executive Umbrella Policy, and the lower premiums paid by Wadzinski to obtain the benefits of the Executive Umbrella Policy, reflect a mutual meeting of the minds to exclude certain forms of coverage, including coverage for personal injury sustained by the insured. The simple fact is that this is a liability policy rather than a UM policy. Accordingly, because the Executive Umbrella Policy does not confer UM coverage to Wadzinski, Plaintiff's motion for summary judgment should be denied.

II. WIS. ADMIN. CODE § INS. 6.77(4)(a) IS VALID.

Plaintiff also argues that the Commercial and Executive Umbrella Policies confer UM coverage because such coverage is mandated under Wis. Stat. § 632.32(4)(a). Section 632.32(4)(a) requires that motor vehicle liability policies include UM coverage:

> Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall contain . . . the following provisions:

> (a) *Uninsured motorist.* 1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom.

Wis. Stat. § 632.32(4)(a)

Section 632.32(4), however, is limited by Wis. Stat. § 631.01(5), which permits the insurance commissioner to "by rule exempt any class of insurance contract or insurer from any or all of the provisions of this chapter and ch. 632 if the interests of Wisconsin insureds or creditors or of the public of this state do not require such regulation." In 1987, the Wisconsin Commissioner of Insurance exercised the authority under this statute to exempt umbrella policies from the requirements of Wis. Stat. § 632.32(4). *See* Rebernick v. Wausau Gen. Ins. Co., 2006 WI 27, ¶ 27, 289 Wis. 2d 324, 711 N.W.2d 621. This exemption was codified in Wis. Admin. Code § Ins. 6.77(4)(a), which provides that "any umbrella or excess liability insurance policy is exempt from the requirements of . . . § 632.32(4)."

In its brief, Plaintiff makes an undeveloped, half-hearted argument that Wis. Admin. Code § Ins. 6.77(4)(a) conflicts with Wis. Stat. § 632.32(4). It is well-established that "[n]o agency may promulgate a rule which conflicts with state law", and that "a rule is not valid if it exceeds the bounds of correct interpretation." Wis. Stat. §§ 227.10(2), 227.11(2)(a). However, it is clear that any apparent inconsistency between Wis. Admin. Code § Ins. 6.77(4)(a) and Wis. Stat. § 632.32(4) is resolved by Wis. Stat. § 631.01(5), which permits the insurance commissioner to by rule exempt "any *class of insurance contract* . . . from any or all of the provisions of . . . chapter 632." Wis. Admin. Code § Ins. 6.77(4)(a) is perfectly consistent with this statutory mandate in that it exempts umbrella policies – a particular class of insurance contracts – from the requirements of Wis. Stat. § 632.32(4). Because there is no

inconsistency between Wis. Admin. Code § Ins. 6.77(4)(a) and its enabling statute, the administrative rule is valid.

This conclusion is well supported by case law that addresses the validity of administrative regulations. For example, in Wisconsin Builders Association v. State Department of Commerce, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845, plaintiff filed an action seeking a declaratory judgment that an administrative rule promulgated by the Department of Commerce (the "Department") addressing fire sprinkler systems in multifamily dwellings conflicted with a statute that addressed the same topic. The statute at issue, Wis. Stat. § 101.14(4m)(b), requires automatic fire sprinkler systems in every multifamily dwelling containing more than 20 dwelling units. By contrast, the relevant administrative rule, Wis. Admin. Code § Comm. 62.0903(6), requires sprinkler systems in multifamily dwellings that contain more than 8 dwelling units. Plaintiff argued that the administrative rule conflicted with the statute because the administrative rule set a lower threshold number of dwelling units than the statute. 2009 WI App 20, ¶ 6.

The Court of Appeals began its analysis by examining Wis. Stat. § 101.14(4)(a), which directs the Department to "make rules, pursuant to ch. 227, requiring owners of . . . public buildings to install such fire detection, prevention, or suppression devices as will protect the health, welfare, and safety of all . . . frequenters of . . . public buildings." Id. ¶ 10. On the basis of this statute, the court held that the Department "plainly had the authority" to promulgate Wis. Admin. Code § Comm. 62.0903(6). Despite this statute, Plaintiff argued that Wis. Stat. § 101.14(4m)(b) nevertheless restricted the Department from promulgating regulations requiring sprinkler systems in buildings containing fewer than 20 units. The court rejected this argument, holding that if the legislature had indeed intended to restrict the ability

of the Department to require sprinklers in buildings containing fewer than 20 units, it would have expressly stated such a limitation in the enabling statute. Because the enabling statute lacked such a restriction and the administrative provision was consistent with the statute, the court held that administrative code provision was valid.

The same analysis should control the present case. As stated above, Wis. Stat. § 631.01(5) enables the insurance commissioner to exempt "any class of insurance contract" from the requirements of Wis. Stat. § 632.32(4). Wis. Admin. Code § Ins. 6.77(4)(a) accomplishes this objective by exempting UM policies. Had the legislature intended to carve out UM insurance policies from the reach of Wis. Stat. § 631.01(5), it would have expressly stated such an exception in the statute. Because no such exception exists, and for the reasons set forth above, there is no conflict between Wis. Admin. Code § Ins. 6.77(4)(a) and Wis. Stat. § 632.32(4). Plaintiff's motion should accordingly be denied.

III. EVEN IF UM COVERAGE EXISTS IN THE UMBRELLA POLICIES, ONLY THE REQUIRED MINIMUM LIMITS UNDER WIS. STAT. § 632.32(4)(a) APPLY.

In the unlikely event that the court determines that UM coverage exists in either of the umbrella policies described above and that Wadzinski was entitled to such coverage, Auto-Owners requests that the court schedule further briefing as to the issue of the amount of UM coverage conferred. Plaintiff's motion does not specifically address the issue of the amount of any such coverage, assuming it exists. If the court disagrees that further briefing is appropriate, Auto-Owners submits that only the required minimum limits under Wis. Stat. § 632.32(4)(a) apply. *See* Stone v. Acuity, 2008 WI 30, ¶ 61, 308 Wis. 2d 558, 747 N.W.2d 149 (when an insurer fails to provide adequate notice as to the availability of UIM coverage, proper remedy is to apply minimum levels of required UIM coverage under Wis. Stat.

§ 632.32(4m)(d)). In the UM context, under section 632.32(4)(a), the required minimum limits of UM coverage are $25,000 per person and $50,000 per accident. Thus, assuming that coverage exists and is conferred to Wadzinksi, Plaintiff is entitled to $25,000.

CONCLUSION

For the reasons set forth above, Auto-Owners respectfully requests that the Court deny Plaintiff's motion and enter an order declaring, as a matter of law, that Plaintiff is not entitled to uninsured motorist coverage under the Commercial and Executive Umbrella Policies referenced in Plaintiff's motion.

Respectfully submitted this 18th day of August, 2009.

AXLEY BRYNELSON, LLP

Arthur E. Kurtz, SBN: 1003525
Daniel P. McAlvanah, SBN: 1060064
Attorneys for Defendant, Auto-Owners Insurance Company
2 East Mifflin Street/P.O. Box 1767
Madison, WI 53703/53701-1767
608/257-5661

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI
1036 South Webster Street
Green Bay, Wisconsin 54301,

Plaintiff,

-vs-

AUTO-OWNERS INSURANCE COMPANY
c/o David L. Zumwalt, Registered Agent
4330 Golf Terrace Boulevard, Suite 205
Eau Claire, Wisconsin 54701,

Defendant.

Classification Code: 30303

Case No.: 07-CV-1827

AUTHENTICATED COPY
FILED

AUG 21 2007

LISA M. WILSON
CLERK OF COURTS
BROWN COUNTY, WI

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski, has filed a lawsuit or other legal action against you. The attached Complaint states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Brown County Courthouse, 100 South Jefferson Street, Green Bay, Wisconsin, 54301, and to Plaintiff's attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., 231 South Adams Street, P.O. Box 23200, Green Bay, Wisconsin, 54305-3200. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 30 day of August, 2007.

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff, Michael B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski

By: _____
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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI
1036 South Webster Street
Green Bay, Wisconsin 54301,

Classification Code: 30303

Plaintiff,

Case No.: 07-CV-1827

-vs-

AUTO-OWNERS INSURANCE COMPANY
c/o David L. Zumwalt, Registered Agent
4330 Golf Terrace Boulevard, Suite 205
Eau Claire, Wisconsin 54701,

AUTHENTICATED COPY
FILED

Defendant.

AUG 21 2007

LISA M. WILSON
CLERK OF COURTS
BROWN COUNTY, WI

COMPLAINT

NOW COMES the Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski, by and through her attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., and as for her Complaint against Defendant, Auto-Owners Insurance Company, alleges and shows to the Court as follows:

1. Plaintiff, Michelle B. Wadzinski ("Ms. Wadzinski"), is an adult residing at 1036 South Webster Street, Green Bay, Wisconsin 54301, and is the surviving spouse of Steven W. Wadzinski and the personal representative of the Estate of Steven W. Wadzinski ("Estate").

2. Defendant, Auto-Owners Insurance Company ("Auto-Owners"), is a foreign insurance corporation licensed to do business in the State of Wisconsin, with its Registered Agent, David L. Zumwalt, located at 4330 Golf Terrace Boulevard., Suite 205, Eau Claire, Wisconsin 54701.

3. At all times material hereto, Auto-Owners carried a policy of commercial auto insurance, Policy Number 41-321-013-00 ("Auto Policy"), for Pecard Chemical Company, Inc. ("Pecard"), covering motor vehicles owned by Pecard, including a 2004 Ducati 749R motorcycle ("Motorcycle"). The coverage on the Motorcycle included bodily injury, property damage, uninsured motorist, underinsured motorist, medical payment, comprehensive, and collision.

4. At all times material hereto, Auto-Owners carried a policy of commercial and executive umbrella insurance, Policy Number 96-886-558-00 ("Umbrella Policy"), for Pecard and Steven W. Wadzinski ("Mr. Wadzinski"), respectively, with underlying insurance including the Auto Policy.

5. On or about August 3, 2006, Mr. Wadzinski was operating the Motorcycle with the consent of Pecard near Maple Grove Road and Gibraltar Road in Fish Creek, Door County, Wisconsin.

6. On said date and at such location, Laura J. Beck-Nielsen, an uninsured motorist, negligently operated a motor vehicle owned by David J. Nielsen, causing a collision between her vehicle and the Motorcycle being operated by Mr. Wadzinski.

7. As a result of the collision, Mr. Wadzinski sustained severe injuries and died shortly thereafter as a result of said injuries.

8. On or about February 19, 2007, Mrs. Wadzinski, individually and as personal representative of the Estate, submitted a claim to Auto-Owners, Claim Number 23-2460-06, requesting payment under the property damage, medical payment, and uninsured motorist coverage provisions of the Auto Policy, and also requesting payment under the Umbrella Policy.

9. On or about March 5, 2007, Auto-Owners issued a payment to Mrs. Wadzinski in the amount of $16,841.85 under the property damage and medical payment coverage provisions of the Auto Policy.

10. On or about March 30, 2007, Auto-Owners issued a payment to Mrs. Wadzinski in the amount of $150,000.00 under the uninsured motorist coverage provision of the Auto Policy.

11. Auto-Owners refused to issue payment to Mrs. Wadzinski under the Umbrella Policy, which is due to Mrs. Wadzinski under the provisions of said policy.

WHEREFORE Plaintiff demands judgment against Defendant as follows:

A. For payment of all amounts due to Plaintiff under the coverage provisions of the Umbrella Policy;

B. For the costs of suit incurred herein, including reasonable attorneys' fees;

C. For such other and further relief as the Court may deem appropriate.

DEMAND FOR JURY TRIAL

The Plaintiff, by her attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., hereby demands trial of the above-entitled action by a twelve (12) member jury.

Dated this 20 day of August, 2007.

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH VIII | BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI

Plaintiff,

Case No.: 07-CV-1827

-vs-

AUTO-OWNERS INSURANCE COMPANY

Defendant.

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski, by and through her attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., and submits this brief in opposition to Defendant's Motion for Summary Judgment.

INTRODUCTION

Auto-Owners' motion for summary judgment relies on an insurance policy that is materially different from the policy it sold to the insured. Therefore its motion should be rejected out of hand because Auto-Owners has relied on inaccurate evidence. In addition, Auto-Owners' three substantive arguments are inapplicable and insufficient to support summary judgment. The policy is also ambiguous and confusing and read as a whole, leads a reasonable insured to expect that he has purchased umbrella coverage for UM losses (the same UM coverage contained in the umbrella's required underlying auto policy). Therefore summary judgment for Auto-Owners should be denied and Plaintiff's motion should be granted.

ARGUMENT

I. AUTO-OWNERS SUMMARY JUDGMENT ARGUMENTS SHOULD BE DISREGARDED BECAUSE IT HAS NOT SUPPLIED A TRUE AND CORRECT COPY OF THE POLICY IT SOLD TO THE INSURED.

A. Policy Discrepancies.

The policy attached to Auto-Owners summary judgment brief is not a true and correct copy of the policy in possession of the insured.[1]

The confusion begins with a misnomer when Auto Owners refers to Policy 96-886-558-00 as a "Commercial Umbrella" policy. This label conveniently ignores that the policy contains two umbrellas, a Commercial Umbrella and Executive Umbrella, and creates a false impression that any policy exclusions under the one also apply to the other.

Looking at the first page of the policy provided by Auto-Owners (Korver Aff., ¶ 3, Ex. B, Auto-Owners bates number 01), it reads "UMBRELLA POLICY DECLARATIONS", and it is divided into two separate portions, the "Commercial Umbrella" and "Executive Umbrella". This page describes the limits of liability for the Commercial Umbrella but notes that there is one Executive Umbrella Policy attached. (Id.)

The policy limits and applicable forms for the Executive Umbrella are found on a separate Executive Umbrella declaration page. (Korver Aff., ¶¶ 2-3, Ex. A, Wadzinski bates number 36; Ex. B, Auto-Owners bates number 05). Thus, it is clear from the face of the policy that there are two umbrellas, rather than just a commercial umbrella housing executive umbrella provisions.

---

[1] For ease of reference, because insurance policy pages are not usually consecutively numbered from beginning to end, Plaintiff has bates stamped each policy in sequential order. The policy provided to the Wadzinskis by Auto Owners, through its agent, is referred to as "Wadzinski" while the policy provided by Auto-Owners is "Auto-Owners". (See Affidavit of Dawn M. Korver, ¶¶2-3, Exs. A and B).

Even more confusing than the name Auto Owners uses is the fact that the Auto Owner policy materially differs from the one supplied to the insured. It is out of order--the declaration pages for both umbrellas follow one another, while in the policy sold to the insured, the declarations are located after each umbrella's respective cover pages. (See Korver Aff., ¶ 2, Ex. A, Wadzinski bates number 02 and 39). This order makes sense given the typical organization of insurance policies.

The Auto-Owners policy also has some endorsements that only apply to the Commercial Umbrella inserted at the end of the Executive policy but before the first pages of the Commercial Umbrella to which they belong. (See Id., Ex. B, Auto-Owners, Bates numbers 22-25). It also contains some endorsements that are not as they appear in the Wadzinski policy. (Compare Ex. B, Auto-Owners, bates numbers 15-21 with Ex. A, Wadzinski, bates numbers 49-51). For unknown reasons, Auto-Owners has verified its copy as "true and correct" when it is not. [2] Any arguments in reliance on the Auto-Owners version should be disregarded as unsupported.

B. The Discrepancies Are Significant.

The discrepancies in the Auto-Owners' version of the policy are not mere nit-picking, especially because Auto-Owners argues that the policy is one continuous "commercial umbrella". How a policy is organized impacts how an insured reads and interprets the policy. The policy provided to the insured contains two discrete components, the Commercial and Executive umbrella. Auto-Owners' presentation of the policy in mixed-up fashion makes it appear that all the exclusions and endorsements contained in policy 96-886-558-00 apply to

[2] The Auto-Owners' policy contains a stamped notation signed by Daniel A. Sills, certifying that "this policy was assembled from available records ***as a representation*** of coverage that was in effect for the policy period shown.", yet Mr. Vandyk swore in his affidavit that the policy "is a true and correct, ***verified copy*** of the Commercial Umbrella Policy issued by Auto-Owners Insurance Company to Pecard Chemical Company, Inc. (Policy Number 96-886-558-00) from April 1, 2006 go April 1, 2007." The policy is either just a "representation of coverage" or a true and correct (i.e. exact) copy. In any case, the policy supplied by Auto-Owners in its brief does not match the policy it provided to the insured.

uniformly. Indeed, Auto-Owners has argued that the Commercial Umbrella's Exclusion P, the UM Exclusion, is dispositive that there is no UM coverage. This ignores the fact that the Executive Umbrella has its own exclusion section which, significantly, lacks any UM exclusion. Thus the Court should not rely on the inaccurate Auto-Owners version of the policy and no inferences should be drawn from that policy.[3]

II. THE EXECUTIVE UMBRELLA CONTAINS NO UM EXCLUSION, THEREFORE MUEHLENBEIN AND JADERBORG DO NOT APPLY.

Auto-Owners relies heavily on Muehlenbein v. West Bend Mutual Ins. Co., 175 Wis. 2d 259 (Ct. App. 1993), and Jaderborg v. American Family Mutual Insurance Co., 200 WI App. 246, 239 Wis.2d 533. Both of these cases are inapplicable.

The policies at issue in Muehlenbein and Jaderborg both contained explicit exclusions for Underinsured Motorists coverage. In contrast, the Executive umbrella which applied to Steve Wadzinski has no UM exclusion. Therefore contrary to Defendant's arguments, the policy at issue here does not "specifically and unambiguously" exclude coverage for injuries arising out of uninsured motorist law. Auto-Owners brief does not even address the fact that there are two separate umbrella policies within Policy 96-886-558-00, arguing that Exclusion P in the Commercial Umbrella policy bars UM coverage. However, the "Exclusions" section in the Executive Umbrella contains exclusions (a) through (g), has no "Exclusion P", and has no UM exclusion. (See Korver Aff., ¶ 2, Ex. A, Wadzinski Policy, and compare Wadzinski 13-20 (Commercial Umbrella Exclusions) with Wadzinski 43-44 (Executive Umbrella Exclusions). Auto-Owners must be held to the policy it, through its agent, provided to its insured. In any

[3] Auto-Owners might argue that even though its version of the policy differs from the insureds, such differences are not substantively dispositive. Yet even if each discrepancy viewed in isolation would not alter coverage, it is the totality of the differences together that make an impact. A page by page comparison of the two versions illustrates just how different the Auto-Owner's version is.

case, the argument that UM coverage is explicitly excluded based on Exclusion P must be rejected.

III. UM COVERAGE AFFORDED BECAUSE POLICY NUMBER 96-886-558-00 IS AMBIGUOUS.

When construing an insurance policy, courts consider the policy as a whole and will give reasonable meaning to every provision. Kraemer Bros. v. United States Fire Ins. Co., 89 Wis.2d 555, 562, 278 N.W.2d 857, 860 (1979). "An insured attempting to make a reasonable interpretation of his or her policy may not ignore language that is seemingly relevant to a provision whose meaning is to be ascertained." Folkman v. Quamme, 2003 WI 116, ¶34, 264 Wis.2d at 642, 665 N.W.2d at 869-70.

Courts will construe an insurance contract in favor of the insured "when a policy is so ambiguous or obscure, or deceptive that it befuddles the understanding and expectations of a reasonable insured". Commercial Union Midwest Ins. Co. v. Vorbeck, 2004 WI App 11, ¶10, 269 Wis.2d 204, 214, 674 N.W.2d 665, 670 (internal cites omitted). Policy language is ambiguous "if it is susceptible to more than one reasonable interpretation". Folkman, 2003 WI 116, ¶24, 264 Wis.2d at 634-35, 665 N.W.2d at 866. Ambiguous clauses are interpreted in favor of the insured as the insurers have an advantage over the insured as they are the drafters. Id., 2003 WI 116, ¶¶13, 15, 264 Wis.2d at 631, 665 N.W.2d at 864-65.

The Wisconsin Supreme Court has stated that "[s]ometimes it is necessary to look beyond a single clause or sentence to capture the essence of an insurance agreement". Id., 2003 WI 116, ¶21, 264 Wis.2d at 633-34, 665 N.W.2d at 866. In other words, the policy must be viewed in context. A contextual ambiguity in an insurance policy exists when "a provision is reasonably susceptible to more than one construction when read in the context of the policy's other language". Marotz v. Hallman, 2007 WI 89, ¶39, 302 Wis.2d 428, 451-52, 734 N.W.2d

411, 422. The test for determining if there is a contextual ambiguity is the same as the test for an ambiguity in any disputed term of a policy. Folkman, 2003 WI 116, ¶29, 264 Wis.2d at 638, 665 N.W.2d at 868.

Thus, a clear phrase within a policy can be rendered ambiguous by contradictory language elsewhere in the policy. Commercial Union Midwest Ins. Co., 2004 WI App 11, ¶11, 269 Wis.2d at 214, 674 N.W.2d at 670.

The Wisconsin Supreme Court has stated

> [t]o prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings. These standards for clarity are consonant with Wisconsin law on ambiguity in insurance contracts.

Folkman, 2003 WI 116, ¶31, 264 Wis.2d at 640, 665 N.W.2d at 869.

Here, policy 96-886-558-00 is ambiguous because it contains inconsistent provisions, builds up false expectations and produces reasonable alternative meanings. The very structure of the policy, with its two different umbrellas, one with a UM exclusion and the other without, under a single policy number, leads a reasonable insured to expect that UM coverage is afforded in the Executive umbrella but not the Commercial.

Reading the policy, an insured would read that both umbrellas required underlying auto insurance, both have personal injury exclusions except when such coverage is contained in a required underlying policy, but that only one umbrella contains a UM exclusion. Reading the Executive, he would see that the UM exclusion is absent. A very reasonable conclusion would be to expect that the Executive Umbrella affords UM coverage. At the very least, the policy viewed as a whole produces reasonable alternative meanings with its inconsistent provisions and must be construed in favor of the insured.

IV. AUTO-OWNERS IS REQUIRED TO PROVIDE UM COVERAGE PURSUANT TO §632.32(4) BECAUSE §6.77(4)(A) IS FACIALLY INVALID.

Defendants argue that it was not required to provide UM coverage in its umbrella policies despite Wis. Stats. §632.32(4), which states:

> Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall contain ... the following provisions:
>
> (a) *Uninsured motorist.* 1. For the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom....

Wis. Stats. §632.32(4)(a).

The crux of Auto-Owners' argument is that Wis. Stats. §631.01(5) "limits" the UM requirement of §632.32(4)(a) by permitting the insurance commissioner to "by rule exempt any class of insurance contract or insurer from any or all of the provisions of this chapter and ch. 632 if the interests of Wisconsin insureds or creditors or of the public of this state do not require such regulation". According to Auto-Owners, the insurance commissioner exercised its right under §631.01(5) by exempting umbrella policies from the UM mandate of §632.32(4)(a).

This argument must be rejected, because the insurance commissioner clearly exceeded its authority in issuing Wis. Admin. Code §6.77 (4)(a). Exempting umbrella policies from the requirement that all auto policies contain UM coverage *takes away* a consumer protection that was explicitly granted to Wisconsin insureds through the UM requirement in §632.32(4)(a), and this is invalid.

Wis. Stat. §631.01(5) provides no authority for §6.77 (4)(a), as the language makes clear that the insurance commissioner may only grant exemptions to 632 if such exemption does not

contravene the interests of insureds or the public. It defies logic to argue that exempting umbrella policies is valid because the "interests of Wisconsin insureds" and "the public of this state" do not require the UM mandate. The legislature clearly believed that the insureds of this state required the UM mandate in §632.32(4)(a). Wis. Admin. Code §6.77 (4)(a) is a flagrant attempt to protect insurers like Auto-Owners at the expense of the public. An administrative act cannot do an end run around a legislative mandate and §6.77 (4)(a) is therefore invalid.[4]

V. ETTERS IS DISTINGUISHABLE AND DOES NOT PRECLUDE SUMMARY JUDGMENT FOR PLAINTIFF.

The Etters case is factually distinguishable, and neither supports Defendant's motion nor precludes Plaintiff's. In Etters, there was only one policy at issue, a personal umbrella. The Etters were actually offered UM coverage at the inception of the policy but declined. The court's finding that the policy was unambiguous was based on the particular language of that policy. The facts are not analogous: Here, there are two umbrellas contained in one policy and the umbrellas have different and contradictory language, creating an ambiguity. The convoluted and confusing "policies within a policy" fits squarely into that class of "ambiguous policies" that Wisconsin courts consistently construe in favor of coverage.

In addition, the Court of Appeals in Etters acknowledged than an insured might challenge the validity of Wis. Admin. Code §6.77(4)(a), yet declined to consider this question because Etters failed to adequately brief the issue. The issue was not foreclosed by the Etters decision.

[4] Interestingly, the legislature recently nullified §6.77 with the passage of the 2009 State Budget Bill ("Act 28") which requires insurers to make a written offer of UM/UIM coverage in all umbrella policies. If an insurer fails to do so, the result will be a finding of UM/UIM coverage at the umbrella policy limits.

CONCLUSION

For the reasons set forth above and in Plaintiff's brief in support of its own motion for summary judgment, Defendant's motion for summary judgment should be denied and Plaintiff's granted.

Dated this 19th day of August, 2009.

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.
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The undersigned certifies that a true copy of the within was served by U.S. Mail upon all attorneys of record pursuant to Wis. Stat. Sec. 801.14, this 19 day of August, 2009.

Cara L. Lukasik 8/19/09
Cara L. Lukasik

(450605.178-#560164)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | BROWN COUNTY

MICHELLE B. WADZINSKI, individually and as personal representative of the ESTATE OF STEVEN M. WADZINSKI,

Plaintiff,

vs.

AUTO-OWNERS INSURANCE COMPANY

Defendant.

Case No. 07 CV 1827

Case Code: 30303

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Auto-Owners Insurance Company ("Auto-Owners"), by its attorneys Axley Brynelson, LLP, by Arthur Kurtz and Daniel P. McAlvanah, hereby files its reply brief in support of its Motion for Summary Judgment in the above-captioned matter. This reply is based on Wis. Stat. § 802.08(2), the file and record of these proceedings, and the following grounds:

ARGUMENT

I. THERE ARE NO MATERIAL DIFFERENCES BETWEEN THE VERSIONS OF THE UMBRELLA POLICIES PRESENTED BY THE PARTIES.

Plaintiff's response brief alleges that Auto-Owners' motion "relies on an insurance policy that is materially different from the policy it sold to the insured." (Plaintiff's Response, at 1). This is a completely absurd and disingenuous allegation. It is indisputable that neither the Commercial Umbrella Policy nor the Executive Umbrella Policy provide UM coverage.

In its motion for summary judgment, Auto-Owners sought a declaration that no UM coverage was conferred to Wadzinski under the Commercial Umbrella Policy at issue in this

case. Auto-Owners did not – as Plaintiff suggests – "conveniently ignore" the fact that Policy 96-886-558-00 also contains an Executive Umbrella Policy. To the contrary, Auto-Owners elected not to address the Executive Umbrella Policy because it is unfathomable that Plaintiff could possibly construe the Executive Umbrella Policy as conferring UM coverage to Wadzinski. (*See* Part II, *infra*). For this reason, Auto-Owners' motion relied upon the plain and unambiguous terms of the Commercial Umbrella Policy, which explicitly excludes UM coverage to Wadzinski. In response, Plaintiff has failed to offer a single argument as to why coverage is not excluded under the specific policy language of the Commercial Umbrella Policy cited in Auto-Owners' motion. Instead, in a straw-grasping argument, Plaintiff has now declared that Auto-Owners presented a differing and disorganized version of the Commercial Umbrella Policy in an attempt to mislead its insured and confuse the issues before the Court. (Plaintiff's Response, at 3). This is a ridiculous assertion. Expect for five immaterial differences that have absolutely no bearing on the case at hand,[1] the versions of the Commercial Umbrella Policy presented by Auto-Owners and by Plaintiff contain ***exactly the same policy language.*** (McAlvanah Aff. ¶ 6). Plaintiff has failed to address the specific exclusions barring UM coverage in the Commercial Umbrella Policy, and Auto-Owners' motion for summary judgment as to the Commercial Umbrella Policy should be granted.

---

[1] The Commercial Umbrella Policy presented by Plaintiff contains a summary of premiums and limits of liability page (Wadzinski – 01), a cover page (Wadzinski – 04), and a notice of membership and annual meeting (Wadzinski – 05) that are not contained in the Auto-Owners version. (McAlvanah Aff. ¶ 6). The Auto-Owners version of the Commercial Umbrella Policy contains an additional page from the policy declarations labeled "For Company/Agency Use Only" (Auto-Owners – 03) which is not contained in the Wadzinski version. (Id.). None of these pages have any relevance for determining whether the Commercial Umbrella Policy confers UM coverage. Moreover, none of these pages have any relevance as to whether a reasonable insured would have expected that UM coverage was conferred by the Commercial Umbrella Policy.

II. THE LACK OF AN EXCLUSION AS TO UM COVERAGE IN THE EXECUTIVE UMBRELLA POLICY IS INCONSEQUENTIAL BECAUSE THE EXECUTIVE UMBRELLA POLICY IS PURELY A LIABILITY POLICY.

In its response brief, Plaintiff reasserts an argument that it makes in its own summary judgment motion – namely, that the Executive Umbrella Policy confers UM coverage solely because it lacks a specific exclusion regarding UM coverage which is contained in the Commercial Umbrella Policy. (Plaintiff's Response, at 4). Notably, in making this argument, Plaintiff fails to pinpoint *a single specific provision* in the Executive Umbrella Policy which makes an affirmative grant of UM coverage. Plaintiff's failure on this front is unsurprising because there is no tenable argument that such coverage actually exists.

The Executive Umbrella Policy in this case is purely a "liability policy," which protects Wadzinski for liability for injuries to third parties. *See* Etter v. State Farm Mut. Auto. Ins. Co., 2008 WI App 168, ¶ 14, 314 Wis. 2d 678, 761 N.W.2d 26. ("[L]iability coverage and UM coverage are not the same. *Liability insurance covers the insured's obligations to others, and UM coverage pays damages that the insured is entitled to collect from others.*") (emphasis added). No reasonable insured could interpret the Executive Umbrella Policy as anything other than a liability policy. This interpretation begins with the Executive Umbrella Policy's definition of coverage:

> **Personal Liability**
>
> We will pay on behalf of the insured the ultimate net loss in excess of the retained limit ***which the insured becomes legally obligated to pay as damages*** because of personal injury or property damage which occurs anywhere in the world.

(Korver Aff., Auto-Owners – 09, Wadzinski – 43) (emphasis added).

The motorcycle accident at issue in this case killed Wadzinski, the insured. Wadzinski's own death did not make Wadzinski legally obligated to pay damages for property damage or

someone else's injury. Thus, under the Executive Umbrella Policy's definition of coverage, it is readily apparent that UM coverage is unavailable to Wadzinski.

The fact that the Executive Umbrella Policy bars UM coverage is further supported by the relevant policy exclusions, including an explicit exclusion regarding coverage for personal injury sustained by insureds such as Wadzinski:

> **EXCLUSION OF PERSONAL INJURY TO INSUREDS**
>
> ***We do not cover personal injury to you or a relative.*** We will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A.

(Korver Aff., Auto-Owners – 17, Wadzinski – 49) (emphasis added).

Both the title of this exclusion and the language of the exclusion itself plainly bar coverage for the incident in question. The title of the exclusion bars coverage related to "personal injury to insureds." The "insured," as identified on the Declarations page of the Executive Umbrella Policy, is "Steven W. Wadzinski." (Korver Aff., Auto-Owners – 05, Wadzinski – 39). Thus, coverage for personal injury to Wadzinski as pled in the Complaint is explicitly barred by this policy exclusion. The language of the exclusion itself – which bars coverage for personal injury "to you or a relative" – is entirely consistent with this conclusion. The term "you" is defined in the Executive Umbrella Policy to mean "the person named in the Declarations and his or her spouse if living in the same household." (Korver Aff., Auto-Owners – 07, Wadzinski – 41). Because the Declarations page names Wadzinski as the insured, the only possible interpretation of this exclusion is that it excludes coverage to Wadzinski for any personal injury.

Plaintiff's response brief fails to identify a single provision in the Executive Umbrella Policy which could possibly be construed as granting UM coverage. It is indisputable that no

such provisions exist – the Executive Umbrella Policy is purely a liability policy which explicitly excludes coverage for personal injury sustained by Wadzinski. Accordingly, the Court should grant Auto-Owners' motion.

III. THE UMBRELLA POLICIES ARE UNAMBIGUOUS.

Plaintiff next argues that the umbrella policies are ambiguous, and that on the basis of this alleged ambiguity alone, UM coverage is conferred. (Plaintiff's Response, at 6). This argument is easily refuted by the language of the policies themselves and by case law addressing ambiguity in insurance contracts.

It is well-established that the controlling guide in the interpretation of an insurance contract is the intent of the parties. *See* General Cas. Co. of Wis. v. Hills, 209 Wis. 2d 167, 175, 561 N.W.2d 718 (1997); Hull v. State Farm Mut. Auto Ins. Co., 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). Insurance policies are given a reasonable construction, not one that leads to an absurd result. RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 247 N.W.2d 171 (1976). Moreover, an insurer should not be bound to cover risks which it did not contemplate and for which it did not receive a premium. Id. In construing an insurance contract, the intent of the parties must be determined from within the four corners of the insurance contract itself. Stanhope v. Brown County, 90 Wis. 2d 823, 280 N.W.2d 711 (1979). The meaning of a particular provision must be determined with reference to the *entire* policy. State Farm Mut. Auto. Ins. Co. v. Langridge, 2004 WI 113, ¶ 41, 275 Wis. 2d 35, 683 N.W.2d 75.

A genuine ambiguity arises in an insurance contract only "when the policy language is so confusing that the average policyholder cannot make out the boundaries of the coverage." Bulen v. West Bend Mut. Ins. Co., 125 Wis. 2d 259, 371 N.W.2d 392 (Ct. App. 1985). Moreover, "[t]he language of a policy should not be made ambiguous by isolating a small part from the

context of the whole." Folkman v. Quamme, 2003 WI 116, ¶ 21, 264 Wis. 2d 617, 665 N.W.2d 857.

Here, Plaintiff has sought to isolate the lack of an exclusion regarding UM coverage in the Executive Umbrella Policy as conclusive proof that the Executive Umbrella Policy is ambiguous, and thus confers UM coverage. As stated by Plaintiff, "[r]eading the Executive Umbrella Policy, [a reasonable insured] would see that the UM exclusion is absent. A very reasonable conclusion would be to expect that the Executive Umbrella affords coverage." (Plaintiff's Response, at 6). But Plaintiff's hypothetical "reasonable insured" would only reach this conclusion if he or she – like Plaintiff – elected to entirely ignore the relevant coverage definitions and exclusions cited above, which plainly establish that the Executive Umbrella Policy bars UM coverage. Plaintiff's interpretive analysis seeks to inject ambiguity into a contract that is clear on its face, and in so doing creates the absurd result of transforming a liability policy into a UM policy. *See* Western States Insurance Co. v. Wisconsin Wholesale Tire, Inc., 184 F.3d 699, 702 (7th Cir. 1999) ("Wisconsin reads ambiguities favorably to the insured, but it does not torture ordinary words until they confess to ambiguity. Deconstruction is not part of Wisconsin's approach to insurance contracts.").

The lack of UM coverage in this case is confirmed by Broder v. Acuity, 2009 WL 1920955 (Ct. App. July 7, 2009).[2] In Broder, two plaintiffs injured in a head-on automobile collision sought a declaration that underinsured ("UIM") coverage was conferred to them under an umbrella policy issued to plaintiffs by Acuity. Id. ¶¶ 2-3. Like the Executive Umbrella Policy in the case at bar, the umbrella policy at issue in Broder was a liability policy. Id. ¶¶ 17-18. The umbrella policy's coverage grant stated as follows: "We will pay sums in excess of the

[2] A final publication decision as to the Broder decision is pending. *See* Wis. Stat. § 809.23. For the Court's convenience, a true and correct copy of Broder is attached to the McAlvanah affidavit as **Exhibit "C"**.

primary limit that an insured is legally obligated to pay as damages because of personal injury or property damage caused by an occurrence to which this insurance applies." Id. ¶ 17. The Court of Appeals concluded that this language was clear and unambiguous:

> [I]f we stop our analysis based on the clarity of the umbrella coverage grant, [Plaintiffs] would concede that there is no excess UIM coverage based on the plain language of the policy. This language does not mention UIM coverage and can be reasonably interpreted in only one way: Acuity will pay any sums above the primary limit to a third person when [Plaintiffs] are legally obligated to pay for damages as a result of personal injury or property damage. In other words, *the umbrella policy applies when the Broders are liable to pay damages to someone else.*

Id. (emphasis added).

The exact same analysis applies in the present case. Under the clear and unambiguous language of the Executive Umbrella Policy cited above, the policy only applies *when Wadzinski is liable to pay damages to someone else*. UM coverage is simply not available to Wadzinski on a first-party basis.

Faced with a similar hurdle in Broder, the Plaintiffs were forced to argue – just as Plaintiff is forced to argue here – that the lack of a specific exclusion in the umbrella policy as to UM/UIM coverage somehow overrides the fact that UM/UIM coverage is otherwise barred in the grant of coverage. As summarized by the Court of Appeals:

> There is no exclusion for UIM coverage. There is, however, an exclusion for personal injury to you or a relative, which should signal to a reasonable insured that Acuity is not going to pay out under the umbrella policy for injuries that the insured sustains. *This exclusion supports the clarity of the umbrella coverage grant.*

Id. ¶ 18 (emphasis added).

In the present case, the Executive Umbrella Policy's analogous exclusion for personal injury mandates the same conclusion – namely, that Auto-Owners does not pay out under the Executive Umbrella Policy for injuries that the insured – i.e., Wadzinski – sustained.

Finally, just as in the case at bar, the Broder court rejected the last-ditch argument that a stray exception to the personal injury exclusion conferred coverage, stating as follows:

> Plaintiffs argue that the exception [to the personal injury exclusion] creates ambiguity: 'This exclusion does not apply to damages arising out of the ownership, maintenance or use, loading or unloading of an auto.' It is well-established, however, that an exception to an exclusion cannot create coverage where the coverage grant did not extend coverage. Jaderborg v. American Family Mutual Ins. Co., 2000 WI App 246, ¶ 17, 239 Wis. 2d 533, 620 N.W.2d 468.

Broder, 2009 WL 1920955, ¶ 18.

Here, Plaintiff relies upon the second sentence of the applicable exclusion for personal injury to argue that the Executive Umbrella Policy is ambiguous as to whether UM coverage is conferred: "[w]e will cover such injury to the extent that insurance is provided by an underlying policy listed in Schedule A." Broder and Jaderborg, however, establish the rule that an exception to an exclusion does not, by itself, create coverage "*unless the claim is cognizable under the general grant of coverage.*" Jaderborg v. American Family Mutual Ins. Co., 2000 WI App 246, ¶ 17 (emphasis added); *see also* Silverton Enters. v. General Cas. Co., 143 Wis. 2d 661, 671, 422 N.W.2d 154 (Ct. App. 1988). It is indisputable that the Executive Umbrella Policy's general grant of coverage does not extend coverage to Wadzinski to personal injury that he himself sustained. The exception relied upon by Plaintiff does not unilaterally expand the general grant of coverage, and create UM coverage that otherwise plainly does not exist. Accordingly, because the umbrella policies unambiguously do not provide for UM coverage, Defendant's motion should be granted.

IV. WIS. ADMIN. CODE § INS. 6.77(4)(a) IS VALID.

Plaintiff also argues that the umbrella policies confer coverage because Wis. Admin. Code § 6.77(4)(a) is "facially invalid." (Plaintiff's Brief, at 7). In support of this position,

Plaintiff makes the conclusory allegation that the Wisconsin Commissioner of Insurance "clearly exceeded [his] authority in issuing" Section 6.77(4)(a). (Id.). Plaintiff's argument is as undeveloped and as unsupported as that which was disregarded by the Court of Appeals in Etter v. State Farm Mut. Auto. Ins. Co., and should similarly be rejected here. *See* 2008 WI App 168, ¶ 19, 314 Wis. 2d 678, 761 N.W.2d 26.

Wis. Stat. § 632.32(4) requires that every policy of Wisconsin automobile insurance that insures against liability for bodily injury or death include UM coverage. § 632.32(4)(a). However, the scope of Wis. Stat. § 632.32(4) is restricted by Wis. Stat. § 631.01(5), which expressly permits the Wisconsin Commissioner of Insurance to promulgate rules which exempt any "class of insurance contract" from Section 632.32(4), provided that "the interests of Wisconsin insureds or creditors or the public . . . do not require such regulation."

In 1987, the Insurance Commissioner issued Wis. Admin Code § 6.77(4)(a), which exempts umbrella policies from the requirements of Section 632.32(4). In promulgating this rule, the Commissioner noted that Wis. Admin Code § 6.77(4)(a) "will protect umbrella and excess carriers against financial jeopardy due to termination of reinsurance contracts." (McAlvanah Aff., **Exh. "A"**). In addition, the Commissioner made explicit findings that mandatory UM coverage in umbrella policies is unnecessary because it creates a risk of "possible duplicate coverage for underinsured motorists and medical payments." (Id.). In concluding that mandatory UM coverage in umbrella policies is unnecessary, the Insurance Commissioner concluded – as he was required to do pursuant to Wis. Stat. § 631.01(5) – that Wisconsin insureds did not require such coverage. *See* Wis. Stat. § 631.01(5). Because Wis. Admin Code § 6.77(4)(a) is consistent with Wis. Stat. § 631.01(5), Plaintiff's argument that Section § 6.77(4)(a) is invalid must be rejected.

Plaintiff also argues – entirely without citation – that the amendments to the insurance code contained within the 2009 State Budget Bill ("Act 28") "nullified" Section § 6.77(4)(a). (Plaintiff's Response, at 8 n.4). This is simply wrong. Act 28, which contains sweeping modifications to Wisconsin insurance law, requires only that insurers make an *offer* of UM coverage to any umbrella policy applicant. (McAlvanah Aff., **Exh "B"**). 2009 Wis. Act 28, § 3167. Nothing in Act 28 remotely suggests that an insurer is now *required* by law to provide UM coverage in umbrella policies. If anything, given the substantial scope of the changes brought about by Act 28, the fact that the legislature chose not to invalidate Section § 6.77(4)(a) should be read as an endorsement of its continuing validity. Had the legislature wanted to mandate UM coverage in umbrella policies, it certainly could have done so. The legislature declined to take such action, and Section § 6.77(4)(a) remains controlling law. Plaintiff's argument as to the invalidity of Section § 6.77(4)(a) should accordingly be dismissed out of hand.

V. ETTER SPECIFICALLY SUPPORTS DEFENDANT'S MOTION IN AT LEAST TWO RESPECTS.

Plaintiff's final argument is that the Court of Appeals' decision in Etter has no bearing on the present case. (Response, at 8). This argument fails in at least two respects. First, Etter specifically endorses the validity of Wis. Admin Code § 6.77(4)(a). As stated by the court, "Wisconsin Stat. § 631.01(5) is clear. It permits the Commissioner to exempt insurers from including UM coverage in umbrella policies. The Commissioner did just that with Wis. Admin. Code. § Ins. 6.77(4)(a)." Etter at 2008 WI App at ¶ 16. Thus, Etter endorses the validity of Wis. Admin. Code. § Ins. 6.77(4)(a). Second, as explained above, Etter helps reinforce the distinction between a liability policy and a UM policy, and in so doing provides important support to the fact that the Executive Umbrella Policy in this case does not confer UM coverage. In light of

Etter, Auto-Owners is not required to provide UM coverage to Plaintiff in the instant case. Accordingly, the court should grant summary judgment on Auto-Owners' behalf.

CONCLUSION

For the reasons set forth above, Auto-Owners respectfully requests that the Court dismiss plaintiff's complaint with prejudice, and enter an order declaring, as a matter of law, that Plaintiff is not entitled to uninsured motorist coverage under either the Commercial Umbrella Policy or the Executive Umbrella Policy referenced in the parties' submissions to the Court.

Respectfully submitted this 31st day of August, 2009.

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH VIII | BROWN COUNTY

MICHELLE B. WADZINSKI, individually
and as personal representative of the
ESTATE OF STEVEN W. WADZINSKI

Plaintiff,

Case No.: 07-CV-1827

-vs-

AUTO-OWNERS INSURANCE COMPANY

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT

NOW COMES Plaintiff, Michelle B. Wadzinski, individually and as personal representative of the Estate of Steven W. Wadzinski, by and through her attorneys, Liebmann, Conway, Olejniczak & Jerry, S.C., and submits this brief in reply in support of her Motion for Summary Judgment.

INTRODUCTION

Contrary to Auto-Owners response, Plaintiff is not trying to "create" coverage based solely on an exception to exclusion. The fact is that the policy issued by Auto-Owners is contextually ambiguous because of its organization, labeling, inconsistencies and omissions. The one policy contains two umbrellas, one of which excludes UM coverage, while the other does not. Read as a whole, a reasonable insured would believe that the policy purposefully omitted the UM exclusion from the Executive Umbrella portion of the policy, thereby indicating such coverage is afforded in the Executive. When taken with the other policy provisions, such as the required underlying auto insurance which must contain UM coverage as a matter of law, the

policy confers coverage. This interpretation does not require twisting or contorting the policy, but does require reading the policy in its entirety rather than selectively.

In addition, Auto-Owners was required to include UM coverage in its' umbrella policies pursuant to the requirement of Wis. Stat. §632.32 that all policies of insurance for automobiles contain UM coverage. Although Wisconsin Admin. Code § 6.77 exempts umbrella policies from the UM mandate, this rule is invalid. The Office of the Commissioner of Insurance exceeded the plain language of the authority granted by Wis. Stat. §631, and the rule improperly contradicts the legislative purpose of the UM requirement. Wisconsin Admin. Code § 6.77 is therefore invalid as a matter of law.

For these reasons, Plaintiff respectfully requests this Court grant her motion for summary judgment.

ARGUMENT

I. UM COVERAGE IS AFFORDED BECAUSE POLICY NUMBER 96-886-558-00 IS CONTEXTUALLY AMBIGUOUS.

Acuity argues that the clear language of the policy excludes UM coverage, and that coverage cannot be found based upon "an exception to exclusion". This mischaracterizes Plaintiff's position. Auto-Owners is correct that the grant of coverage and exception to personal injury to insureds, standing alone, would indicate UM coverage is not included under the policy. Yet Wisconsin courts recognize that "insurance policies are complicated" and that coverage cases must be decided on a policy-by-policy basis according to each policy's specific language. Broder v. Acuity, 2009 WL 1920955, ¶ 26-27 (slip op.). Recognizing that different policies lead to different coverage decisions, the Broder court stated: "In [one case], this court ruled that an endorsement did not expand coverage. ... In [another], this court determined that the policy was contextually ambiguous based on an endorsement. (citations omitted). Broder at ¶ 26). The

specific policy here, containing both commercial and executive umbrella coverage within a single policy with different exclusions under each, is materially different from the policies in any of the cases cited by Auto-Owners and it should be construed according to its own terms.

Contrary to Auto-Owner's position, the policy's grant of coverage and personal injury exclusion, even if clear, do not foreclose a finding of coverage if there is contextual ambiguity. Broder acknowledged this tenet, stating that a policy could be contextually ambiguous even if an individual provision is unambiguous, based on "the organization, labeling, explanation, inconsistency, omission, and text of the other provisions in the policy." 2009 WL 1920955, ¶ 6 (Wis. App.) A clear phrase within a policy can be rendered ambiguous by contradictory language elsewhere in the policy, Commercial Union Midwest Ins. Co., 2004 WI App 11, ¶11, 269 Wis.2d at 214, 674 N.W.2d at 670, and this is exactly Plaintiff's point.

Here, viewing the policy as a whole, an insured would see that both umbrellas require underlying auto insurance and both exclude personal injury of the insured, "except when such coverage is contained in a required underlying policy" (indicating that the umbrella provides coverage for losses insured in the underlying policy). The insured would then read that the Commercial umbrella has a section labeled "Exclusions" and that within this section is an exclusion of UM losses. The insured would also read that the Executive umbrella portion of the policy also has a section marked "Exclusions" and would see that the UM exclusion contained in the Commercial umbrella portion is absent.

It is entirely reasonable to conclude that the absence of the UM exclusion in the Executive umbrella portion, when the Commercial contains it, indicates that UM losses are not excluded and are therefore covered. The ambiguity here is akin to that in Stubbe v. Guidant Mutual Ins. Co., where the policy excluded UM coverage but contained an exception to the

exclusion that deleted the endorsement. 2002 WI App 203, 257 Wis.2d 401, 651 N.W.2d 318. The Stubbe court found that "[a]n insured may reasonably expect that when an insurance company deletes limiting language in the policy, the purported limitations no longer apply and therefore, there is coverage." Id. at ¶ 15.

Similarly, the Commercial and Executive's exclusion sections must be read in concert, with the absence of the UM exclusion in the Executive construed as indicative of UM coverage. Any other reading of the policy would render the Commercial Umbrella's UM exclusion superfluous.

Both the Commercial and Executive policies contain the same grant of coverage and the same exclusion for personal injury to the insured. Taking Auto-Owners at its word, these two provisions alone are sufficient to "restrict" coverage to personal liability as opposed to UM-type losses. If this were the case, however, the specific UM exclusion in the Commercial Umbrella would be completely unnecessary. Courts avoid contract construction that would render a provision superfluous, and instead give meaning to all provisions. Auto Owners interpretation, which ignores the contradiction between the two umbrellas, should therefore be rejected.

II. AUTO-OWNERS IS REQUIRED TO PROVIDE UM COVERAGE PURSUANT TO §632.32(4), AND §6.77(4)(A) IS INVALID.

Defendant appears to admit that Administrative regulation 6.77(4)(a) (which exempts umbrella policies from Wis. Stat. §632.32(4)) is inconsistent with Wis. Stat. §632.32(4), which requires UM coverage in all automobile insurance policies. However, it argues that any inconsistency is explained by Wis. Stats. §631.01(5), which permits the insurance commissioner to promulgate rules which exempt "any class of insurance contract ...from any or all of the provisions of ...chapter 632." (Def. Resp. Br., p. 8, citing a portion of Wis. Stats. §631.01(5)).

Defendant fails to quote the last clause of §631.01(5), which states that such exemptions are allowed only "if the interests of Wisconsin insureds or creditors or of the public of this state do not require such regulation." Wis. Stat. §631.01(5) (emphasis added). Auto-Owners does not (and cannot) explain how taking away a consumer protection granted by the legislature (the UM requirement of §632.32(4)) advances the interests of insureds or the public. The rule simply does not meet the plain language of §631.01(5).

Section 631.01(01) is the enabling statute that gives the insurance commissioner the authority to issue rules exempting certain types of policies form the requirements of chapter 632, but its' last clause, referencing the interests of Wisconsin insureds, clearly limits this grant of authority. Whether the rule is valid or not must be determined by comparing the enabling statute's grant of authority to the rule. Debeck v. Wisconsin Dept. of Natural Resources, 172 Wis.2d 382, 387, 493 N.W.2d 234, 236 (Wis.App.1992). If the rule exceeds the stated bounds of the enabling statute and conflicts with a legislative act, the rule will be deemed invalid. "[A]dministrative agencies do not have powers superior to those of the legislature. When a conflict occurs between a statute and a rule, the statute prevails." Id. at 387, 493 N.W.2d at 237. Further, an agency may not substitute its own policy for that of the legislature. Id.

Yet this is exactly what the insurance commissioner did in this instance. Wis. Admin. Code. § 6.77 negates the protection that Wisconsin insureds enjoyed under Wis. Stat. §632.32(4). It is impossible to see how exempting umbrella policies from the UM requirement of §632.32(4). is consistent with insureds' interests, especially where the umbrella requires underlying auto insurance and contains the exceptions to exclusions that specifically appear to grant coverage if the underlying insurance is maintained. The rule must be disregarded as invalid.

CONCLUSION

For the reasons set forth above and in Plaintiff's brief in support of its own motion for summary judgment, Defendant's motion for summary judgment should be denied and Plaintiff's granted.

Dated this 2nd day of September, 2009.

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The undersigned certifies that a true copy of the within was served by U.S. Mail upon all attorneys of record pursuant to Wis. Stat. Sec. 801.14, this 2nd day of September, 2009.

Cara L. Lukasik 9/2/09
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