

No. 45640-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

TONYA HEDGES,
Plaintiff-Respondent,

v.

AMERICAN FAMILY INSURANCE,
Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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2014 JUL 18 PM 1:05
STATE OF WASHINGTON
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JULY 16 2014
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COURT OF APPEALS
DIVISION TWO

pm 7/16/14

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A. Plaintiff is not entitled to recover underinsured motorist benefits under her American Family policy because she has already recovered the maximum amount of underinsured motorist benefits allowed by the policy.

1. Plaintiff contends that the policy's underinsured motorist endorsement implausibly includes an anti-stacking provision wholly unrelated to underinsured motorist coverage.

Plaintiff's overarching argument is that the underinsured motorist endorsement's anti-stacking provision¹ applies solely to an insured's liability coverage for causing bodily injury or property damage, and that the anti-stacking provision has nothing at all to do with underinsured motorist coverage. If the policy as a whole is examined, it becomes clear that Plaintiff's interpretation is not plausible.

To determine the meaning of a specific policy provision, an insurance policy must be considered as a whole. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). This means the anti-stacking provision in section F.1.b. of the underinsured motorist endorsement must not be read in isolation; instead, it should be interpreted within the context of the entire policy.

The anti-stacking provision appears within a three-page endorsement entitled "Underinsured Motorist Coverage—Washington." (CP 52.) Plaintiff's appeal brief devotes considerable attention to the role

¹ Although Plaintiff castigates American Family for characterizing section F.1.b. as an "anti-stacking provision," Plaintiff agrees it *is* an anti-stacking provision; Plaintiff simply argues it does not apply to underinsured motorist coverage.

of headings and captions in insurance contracts. *Greer v. Northwestern National Life Ins. Co.*, 36 Wn. App. 330, 336, 674 P.2d 1257 (1984) (“Captions are part of an insurance contract and should be construed with the detailed provision”), *reversed on other grounds*, 109 Wn.2d 191, 743 P.2d 1244 (1987). Consequently, Plaintiff would agree that this court should accord significant weight to the heading that precedes and introduces every other provision within the endorsement for “Underinsured Motorist Coverage – Washington.”

The heading unambiguously signals that everything that follows within the endorsement pertains to underinsured motorist coverage. Plaintiff’s interpretation is implausible because it proposes that American Family incongruously inserted in the underinsured motorist endorsement an anti-stacking provision having nothing at all to do with underinsured motorist coverage. The “average person purchasing insurance,” *Quadrant*, 154 Wn.2d at 171, would not expect to find that the underinsured motorist endorsement has an anti-stacking provision concerned solely with an entirely different type of coverage. Therefore, this court should not give the anti-stacking provision such an implausible interpretation.

The implausibility of Plaintiff’s argument comes into high relief after considering the rest of the insurance policy. Liability coverage for causing bodily injury or property damage is addressed in the policy at “PART I – LIABILITY COVERAGE.” (CP 44.) That part contains an anti-stacking provision at section F.2.b. (CP 46.) By its terms, that anti-stacking provision is expressly concerned with “other auto liability

insurance[.]” (CP 46.) Therefore, the insurance policy has an anti-stacking provision directed specifically at auto liability insurance. And it is located where the average purchaser of insurance would expect to find it: in PART I – LIABILITY COVERAGE.

If Plaintiff were correct about the meaning of the underinsured motorist endorsement’s anti-stacking provision, the policy would have *two* anti-stacking provisions pertaining to liability coverage for bodily injury and property damage. It is implausible that the policy would include such redundant provisions. Also, Plaintiff never attempts to reconcile her interpretation of the underinsured motorist endorsement’s anti-stacking provision with the fact that PART I – LIABILITY COVERAGE has its own anti-stacking provision that specifically addresses liability coverage for bodily injury or property damage. For example, Plaintiff makes no attempt to explain which of the two anti-stacking provisions actually applies to liability coverage if there are, in fact, two such provisions.

Adding to the implausibility of Plaintiff’s interpretation is the fact that under her view, the policy would have two anti-stacking provisions related to liability coverage for bodily injury and property damage, but no anti-stacking provision related to underinsured motorist coverage. Again Plaintiff makes no attempt to explain or defend such an unlikely interpretation of the policy. The more plausible interpretation is that the policy has an anti-stacking provision for liability coverage for bodily injury and property damage (located in PART I – LIABILITY COVERAGE), and a separate anti-stacking provision for underinsured

motorist coverage (located in the endorsement entitled UNDERINSURED MOTORIST COVERAGE – WASHINGTON).

2. Section F.1.b. applies to underinsured motorist coverage because it expressly states that it applies where there is “a loss covered by this endorsement,” i.e., the endorsement for underinsured motorist coverage, of which it is a part.

Plaintiff’s primary argument is that the UIM endorsement’s anti-stacking provision applies solely to liability coverage for bodily injury or property damage because the heading to section F.1.b. refers to “liability coverage.” American Family acknowledges that “[c]aptions are part of an insurance contract and should be construed with the detailed provision.” *Greer*, 36 Wn. App. at 336. But it is also true—and Plaintiff fails to acknowledge—that “[a] heading is not a grant of coverage.” *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 841, 734 P.2d 17 (1987). Plaintiff further fails to acknowledge that she “is not entitled to read only the heading . . . and disregard the rest of the contract.” *Id.* at 842. Thus, it is essential to “read further for information of the actual coverage specifications and applicable limitations.” *Id.*

Section F.1.b. begins as follows: “If there is other similar insurance for a loss covered by this endorsement” (CP 54.) The crucial words are “a loss covered by this endorsement.” The only type of “loss covered by this endorsement” is bodily injury and property damage caused by an accident with an underinsured motor vehicle, as explained in the endorsement’s section C.1:

C. INSURING AGREEMENT

1. **We will pay compensatory damages an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of:**
 - a. **bodily injury** sustained by an **insured person** and caused by an accident; and
 - b. **property damage** caused by an accident and Underinsured Motorist – Property Damage is shown in the Declarations.

The anti-stacking provision in section F.1.b. is expressly linked with, and is triggered by, a “loss covered by this endorsement.” The only type of “loss covered by this endorsement” is a loss fitting within the endorsement’s coverage for bodily injury and property damage caused by an accident with an underinsured motor vehicle. Therefore, by its express terms, section F.1.b. applies to underinsured motorist coverage. Plaintiff’s argument to the contrary conflicts with the policy’s plain wording.

3. The phrase “liability limits” does not necessarily connote liability coverage for bodily injury and property damage.

Plaintiff’s secondary argument focuses on the anti-stacking clause’s use of the phrase “liability limits.” According to Plaintiff, “liability limits” is a term of art that refers exclusively to the limits of liability for liability coverage for bodily injury and property damage. Plaintiff further contends that “liability limits” is never used in the context of describing the limits of liability for underinsured motorist coverage.

On its face, Plaintiff’s argument is puzzling as it purports to find an important—indeed crucial—difference between “limits of liability” and “liability limits.” Each phrase expresses the identical information and

concept. No one would suggest “Fourth of July” and “July 4th” have distinct meanings, or that one is a subset of the other.

Furthermore, courts interpreting underinsured motorist policies use the phrases interchangeably. *See, e.g., Sutherland v. Allstate Ins. Co.*, 464 N.W.2d 150, 151 (Minn. App. 1990) (“tortfeasor’s liability insurance was equal to the UIM liability limits in appellant’s policy.”); *Klinger v. Prudential Property and Cas. Ins. Co.*, 700 N.W.2d 290 (Wisc. App.), *rev. den.*, 285 Wis.2d 629 (2005) (“the UIM liability limits may be reduced by the amount paid by, or on behalf of, the responsible party.”); *DeCoteau v. Nodak Mut. Ins. Co.*, 603 N.W.2d 906, 912 (N.D. 2000) (“the insurer’s maximum liability under N.D.C.C. § 26.1-40-15.3(2) is the lowest of (1) the compensatory damages established but not recovered from the tortfeasor, or (2) the insured’s liability limits for underinsured coverage.”).

Thus, the policy’s use of the phrase “liability limits” does not signal that it must be discussing liability coverage for bodily injury and property damage—particularly when the words “liability limits” appear in a provision located within an endorsement devoted exclusively to underinsured motorist coverage, and that provision explains that it applies where there is “a loss covered by this [*i.e.*, the underinsured motorist] endorsement.” Since the entire endorsement is concerned with underinsured motorist coverage, the more reasonable reading of the provision is that “liability limits” refers to the underinsured motorist liability limits.

4. American Family does not contend that the normal principles of insurance-contract interpretation do not apply because underinsured motorist coverage is governed by statute.

Plaintiff suggests that American Family is arguing that the normal rules of insurance-contract interpretation do not apply because its policy used statutorily mandated wording. Respondent's Brief at 37. Plaintiff is incorrect. American Family does not make that argument and, as Plaintiff notes, American Family's policy does not parrot the statute's wording. American Family's discussion of the underinsured motorist statute was for the purpose of explaining the statutory framework and, specifically, that anti-stacking provisions are expressly authorized.

5. Plaintiff failed to meaningfully distinguish *Greengo v. Public Employees Mut. Ins. Co.*

Section F.1.b. in the underinsured motorist endorsement's anti-stacking provision begins with the words "If there is other similar insurance for a loss covered by this endorsement" (CP 54.) The Washington legislature chose nearly identical wording when it enacted a statute authorizing anti-stacking provisions in underinsured motorist policies: "The policy may provide that if an injured person has other similar insurance available" RCW 48.22.030(6). In *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 806-07, 959 P.2d 657 (1998), in the context of interpreting RCW 48.22.030(6), the court explained that "[i]n the UIM context, '[t]he term "similar insurance" is appropriately understood to be other underinsured motorist insurance coverages.' 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1, at 238

(2d ed. 1995).” Thus, *Greengo* stands for the proposition that when an anti-stacking provision in an underinsured motorist policy refers to “similar insurance,” it is referring to other underinsured motorist coverage.

Plaintiff attempts to distinguish *Greengo* on the grounds that the anti-stacking provision in *Greengo* was worded differently from the anti-stacking provision in the present case. Plaintiff’s point is both true and irrelevant. The *Greengo* court’s statement was made in the context of discussing RCW 48.22.030(6) and not the specific anti-stacking provision at issue in *Greengo*. Therefore, American Family’s point remains valid: according to *Greengo*, where an anti-stacking provision in an underinsured motorist policy refers to “similar insurance,” it is referring to other underinsured motorist coverage. The anti-stacking provision at issue in this case should be accorded that meaning.

6. This court may consider *Frey v. Hartford Underwriters Ins. Co.*, 2005 WL 3143954 (E.D. Wisc. 2005).

American Family’s opening brief cited and discussed *Frey v. Hartford Underwriters Ins. Co.*, 2005 WL 3143954 (E.D. Wisc. 2005), an unpublished decision issued by the United States District Court for the Eastern District of Wisconsin. Plaintiff’s response contends that “consideration of *Frey* . . . as authority for any proposition would be improper” because, according to Plaintiff, citation to it is barred by the applicable court rules. Respondent’s Brief at 38 fn 8. Plaintiff’s argument is flawed for a simple reason: she has cited and relied on the wrong court rules.

In Washington, citation to unpublished opinions is governed by G.R. 14.1. Rule 14.1(b) says that a party may cite an unpublished decision from another jurisdiction “only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” *Frey* was issued by the United States District Court for the Eastern District of Wisconsin, so we turn our attention to that jurisdiction’s rules.

Eastern District of Wisconsin Civil Local Rule 7(j)(1) addresses citations to unpublished opinions. That rule says that “[w]ith the exception of the prohibitions in Seventh Circuit Rule 32.1, this Court does not prohibit the citation of unreported or non-precedential opinions, decisions, orders, judgments, or other written dispositions.” Civil L.R. 7(j)(1).² Therefore, the rules of *Frey*’s issuing court do not bar citing unpublished decisions, including its own, except as prohibited by Seventh Circuit Rule 32.1. So now we look to that rule.

Seventh Circuit Rule 32.1(d) bars citation to that court’s own unpublished orders issued before January 1, 2007, except in limited circumstances involving *res judicata*, collateral estoppel or law of the case:

CIRCUIT RULE 32.1. Publication of Opinions

(a) Policy. It is the policy of the circuit to avoid issuing unnecessary opinions.

(b) Publication. The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned,

² See App. 1.

are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: "Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1."

(c) Motion to change status. Any person may request by motion that an order be reissued as an opinion. The motion should state why this change would be appropriate.

(d) Citation of older orders. No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding.

Seventh Circuit Rule 32.1 (emphasis added).³

Seventh Circuit Rule 32.1(d) speaks to citation of the Seventh Circuit's own unpublished orders. Because the Seventh Circuit's rule says nothing about citing unpublished district court decisions, citation to such decisions is governed by Eastern District of Wisconsin Civil Local Rule 7(j)(1). That rule allows citations to unpublished decisions issued by the Eastern District of Wisconsin. Therefore, American Family properly cited and relied on *Frey*.

Plaintiff's argument to the contrary mistakenly relies on the circuit rules for the United States Court of Appeals for the Eighth Circuit. Those rules have no relevance here because *Frey* was not issued by the Eighth Circuit Court of Appeals. Furthermore, the Eastern District of Wisconsin is not within the Eighth Circuit. 28 U.S.C. § 41 (Eighth Circuit consists of

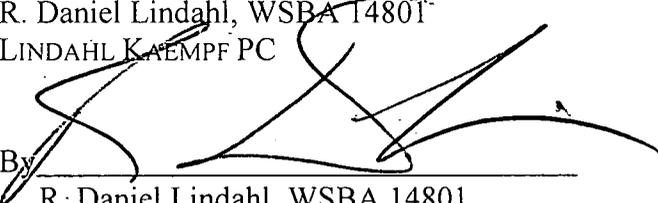
³ See App. 1.

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South
Dakota).

Dated: July 16, 2014.

Respectfully submitted,

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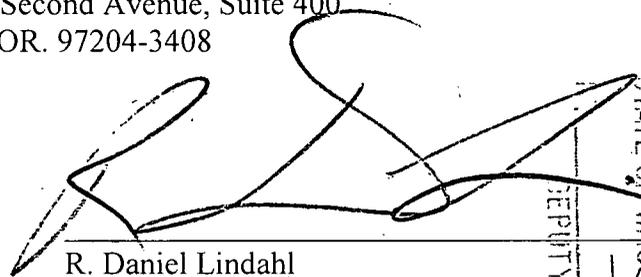
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CERTIFICATE OF SERVICE

I certify that on July 16, 2014, I mailed a copy of the foregoing Appellant's Brief to the persons listed below, at the addresses indicated, postage prepaid.

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN CIVIL LOCAL RULE 7(j)

(j) Citations.

(1) With the exception of the prohibitions in Seventh Circuit Rule 32.1, this Court does not prohibit the citation of unreported or non-precedential opinions, decisions, orders, judgments, or other written dispositions.

(2) If a party cites an unreported opinion, decision, order, judgment or other written disposition, the party must file and serve a copy of that opinion, decision, order, judgment, or other written disposition.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT RULE 32.1

CIRCUIT RULE 32.1. Publication of Opinions

(a) Policy. It is the policy of the circuit to avoid issuing unnecessary opinions.

(b) Publication. The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: "Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1."

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