COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1587 **Cir. Ct. No. 2013CV652**

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

JAMES R. SMITH AND MARY VOLK-SMITH,

PLAINTIFF-APPELLANT,

V.

ACUITY, A MUTUAL INS. CO.,

DEFENDANT-RESPONDENT.

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

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

¶1 PER CURIAM. James R. Smith was injured when driving his motorcycle through an intersection and then colliding with another vehicle. The operator of the other car and her insurer paid the policy limits and Smith also was compensated under the policy covering his motorcycle. But Smith also sought

underinsurance from the policy that named his two automobiles and not his motorcycle. That insurer said "no" because his motorcycle was not listed on the declarations page and the policy specifically excepted coverage of motor vehicles owned but not listed in the written agreement. The circuit court held that the insurer had no duty to pay underinsurance and Smith appeals. We think the policy contains a clear, unambiguous drive other car exclusion. Affirmed.

Facts

¶2 The facts in this case are undisputed. On May 17, 2012, at about 4:20 p.m., Becky Grinnell failed to yield at an intersection while driving her mid-size SUV. As a result, Smith collided with her vehicle while riding his motorcycle through the intersection. Smith suffered injuries and damages as a result of the accident.

¶3 Grinnell had an auto liability policy with American Family Mutual Insurance Company. Smith had a liability policy for his motorcycle with American Standard Insurance Company of Wisconsin. He also had a separate liability policy with Acuity for two other vehicles he owned, which contained an underinsured motorist provision. Smith filed a lawsuit against Grinnell and American Family Mutual Insurance Company for his damages. He also named Acuity as a defendant in the lawsuit, seeking to recover through his underinsured motorist coverage.

¶4 Acuity filed a motion for summary judgment. The company argued that the "drive other car" exclusion in the insurance policy it issued to Smith barred his claim. The circuit court agreed, holding that the policy contained a "valid and enforceable" drive other car exclusion, which "preclude[d] the

[underinsured motorist] coverage for injuries sustained by a person using or operating a vehicle owned by the insured and not under the policy."

Analysis

¶5 This court reviews a grant of summary judgment de novo, using the same standard the circuit court used. ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 287, 531 N.W.2d 357 (Ct. App. 1995). We interpret insurance policies under the same rules that generally apply to contracts. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. Therefore, we determine and give effect to the intent of the insurer and the insured that formed the contract. ***Id.*** We interpret the words of the policy using their common, everyday meaning. ***Gillund v. Meridian Mut. Ins. Co.***, 2010 WI App 4, ¶18, 323 Wis. 2d 1, 778 N.W.2d 662. When we do not find any ambiguity in a policy, we interpret the terms of the contract as they are written. ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 736, 351 N.W.2d 156 (1984). This court "will interpret the words of an insurance contract against the insured when the interpretation conforms to what a reasonable person in the position of the insured would have understood the words to mean." ***Folkman v. Quamme***, 2003 WI 116, ¶20, 264 Wis. 2d 617, 665 N.W.2d 857. This requires us to look beyond individual clauses or sentences of the agreement. ***Id.***, ¶21. A party cannot isolate a small part from the rest of the contract to show ambiguity. ***Id.***

¶6 We begin by examining the policy language. Section III, Part I of the policy provides a general grant of underinsured motorist coverage: "We will pay damages for bodily injury which an insured person is legally entitled to

recover from the owner or operator of an underinsured motor vehicle." (Emphasis removed from original.) The subhead "Exclusions—Section III" states:

> 1. This section does not apply to bodily injury to a person:
>
> a. Occupying, or struck by, a land motor vehicle or trailer owned by you or a relative for which insurance is not afforded under this Section III of this policy.

(Emphasis removed from original.)

¶7 The policy's declarations page lists two vehicles that are covered: a 2007 Lincoln MKX and a 2000 Buick Century. Under each car's declaration is the statement, "Section II and Section III apply to this car." Smith did not declare his motorcycle in the policy and nothing indicates that it was protected under Section III.

¶8 We are satisfied the language of the policy is clear. It is not unreasonable to expect Smith to look at several different sections of the insurance policy to determine the scope of his coverage. The declarations page, "the most crucial section of the policy for the typical insured" that he or she generally looks to first, clearly shows Smith paid for underinsured motorist coverage as described in Section III. *See* ***Folkman***, 264 Wis. 2d 617, ¶37 (citation omitted). Acuity does not ask too much of Smith by requiring him to look at Section III to determine the scope of that coverage and the exclusions that apply. The description of those exclusions point Smith back to the declarations page, which says that there are only two vehicles covered by the underinsured motorist provision. The terms of his contract clearly barred Smith from recovering underinsured motorist coverage in this instance—while operating a vehicle he owned but did not pay a premium to insure with Acuity.

¶9 Smith also argues that Acuity did not properly create a drive other car exclusion because it failed to follow the requirements of WIS. STAT. § 632.32(5)(j) (2013-14).[1] This argument will not detain us long. Section 632.32(5)(j) allows drive other car exclusions for vehicles owned by the named insured that are not described in the policy and are not covered as a new or replacement vehicle. The law does not require an insurance policy to contain the language of § 632.32(5)(j) verbatim, as Smith tries to argue. What the law does say is that a drive other car exclusion is valid when it does not violate § 632.32(5)(j) given the facts of the accident at issue. ***Nischke v. Aetna Health Plans***, 2008 WI App 190, ¶16, 314 Wis. 2d 774, 763 N.W.2d 554. Here, the facts are clear that Smith was driving a vehicle he owned, which was not described in the policy and was not a new or replacement vehicle. Therefore, the drive other car exclusion did not violate § 632.32(5)(j) given the situation at hand. We affirm.

By the Court.—Judgment affirmed.

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

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