COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2045 **Cir. Ct. No. 2012CV781**

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

TIMOTHY D. MYERS,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 STARK, J. Timothy Myers appeals an order for summary judgment granted in favor of his car insurer, American Family Mutual Insurance Company. The circuit court concluded Myers was not entitled to underinsured motorist

(UIM) coverage under the American Family policy, by virtue of the policy's reducing clause and its definition of the term "underinsured motor vehicle."

¶2 Myers argues the circuit court erred because the underlying accident took place after the effective date of 2009 Wis. Act 28. Act 28 amended WIS. STAT. § 632.32 to prohibit reducing clauses and to adopt a more expansive definition of "underinsured motor vehicle" than the one used in Myers' policy.[1] Pursuant to his policy's elasticity clause, Myers argues the policy must be conformed to the changes imposed by Act 28.

¶3 We disagree. The elasticity clause in Myers' policy states that any policy term that conflicts with a state statute is changed to conform to the statute. However, Myers' policy did not conflict with WIS. STAT. § 632.32, as amended by Act 28, on the date of the accident because the relevant changes to § 632.32 did not apply to Myers' policy on that date. As a result, the policy's elasticity clause does not require that the policy be conformed to the amended version of § 632.32. We therefore affirm the order granting American Family summary judgment.

BACKGROUND

¶4 This case arises out of a December 11, 2009 car accident between Myers and Todd Laughlin. It is undisputed that Laughlin's negligence caused the accident. Laughlin's car insurer paid Myers its $100,000 policy limit.

¶5 At the time of the accident, Myers was insured under an American Family car insurance policy that was issued September 10, 2009. The policy

[1] All references to WIS. STAT. § 632.32 are to the 2009-10 version. All other references to the Wisconsin Statutes are to the 2011-12 version.

included a UIM coverage endorsement, which stated, in relevant part, "We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle." The policy defined "underinsured motor vehicle" as "a motor vehicle which is insured by a liability bond or policy at the time of the accident which provides bodily injury liability limits less than the limits of liability of this Underinsured Motorists coverage." The limits of Myers' UIM coverage were $100,000 per person and $300,000 per accident. The policy also included a reducing clause, which stated the UIM liability limits would be reduced by "[a] payment made … under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle."

¶6 Following the accident, Myers made a claim for UIM coverage under the American Family policy. American Family denied Myers' claim, asserting his $100,000-per-person UIM limit was reduced to zero by the payment from Laughlin's insurer. American Family also contended Laughlin's vehicle was not an "underinsured motor vehicle," as the policy defined that term, because Laughlin's liability limit was equal to Myers' UIM limit.

¶7 Myers then filed the instant lawsuit against American Family, seeking UIM coverage. He did not dispute that, if enforceable, the reducing clause and definition of "underinsured motor vehicle" in his policy would preclude UIM coverage. However, Myers argued the policy's reducing clause and definition of "underinsured motor vehicle" were void, in light of 2009 Wis. Act 28. Act 28 amended WIS. STAT. § 632.32 to prohibit reducing clauses. *See* 2009 Wis. Act 28, § 3171; WIS. STAT. § 632.32(6)(g). It also defined the term "underinsured motor vehicle" as a vehicle insured by a policy whose bodily injury liability limits are

"less than the amount needed to fully compensate the insured for his or her damages." *See* 2009 Wis. Act 28, § 3153; WIS. STAT. § 632.32(2)(e)3.

¶8 American Family moved for summary judgment, arguing Act 28's prohibition of reducing clauses and its new definition of "underinsured motor vehicle" did not apply to Myers' policy on the date of the accident. American Family conceded the effective date for Act 28's changes to WIS. STAT. § 632.32 was November 1, 2009, which was more than one month before the accident. *See* 2009 Wis. Act 28, § 9426(2). However, American Family noted that Act 28 specifically stated its prohibition of reducing clauses and its new definition of "underinsured motor vehicle" would first apply to "motor vehicle insurance policies issued or renewed on the effective date of this subsection." *See* 2009 Wis. Act 28, § 9326(6). Because Myers' policy was issued before Act 28's effective date, American Family asserted the relevant changes imposed by Act 28 did not apply to Myers' policy at the time of the accident.

¶9 In response, Myers cited the policy's elasticity clause, which states, "Terms of this policy which are in conflict with the statutes of the state in which this policy is issued are changed to conform to those statutes." Because Act 28 took effect November 1, 2009, Myers argued the policy "ceased to conform to [WIS. STAT. § 632.32] on that date." He therefore asserted, "[O]n November 1, 2009 the elasticity clause … had the effect of incorporating the changes [imposed by Act 28] into the policy, even if the Act did not require that result."

¶10 The circuit court rejected Myers' argument and granted American Family summary judgment. The court explained:

> The key in this case is whether the elasticity clause requires the policy to conform to the amended statute's requirements.

> The Court finds no such requirement. The elasticity clause requires the policy to conform to any statutory requirements that are contrary to any element of the policy. However, the elasticity clause cannot require conformation with a statute that does not apply to the policy. Because the amended version of WIS. STAT. § 632.32 did not go into effect until November 1, 2009 and the policy was renewed on September 10, 2009, the statute does not apply to the policy in question. As such, there is no UIM coverage under [the] policy.

Myers now appeals.

DISCUSSION

¶11 We review a grant of summary judgment independently, using the same standard applied by the circuit court. ***Stubbe v. Guidant Mut. Ins. Co.***, 2002 WI App 203, ¶6, 257 Wis. 2d 401, 651 N.W.2d 318. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 Here, the facts are undisputed, leaving only an issue of law for our review. Specifically, we must determine whether the elasticity clause in Myers' policy requires that the policy be conformed to WIS. STAT. § 632.32, as amended by Act 28. Interpretation of an insurance policy is a question of law that we review independently. ***Stubbe***, 257 Wis. 2d 401, ¶7. Our goal in interpreting an insurance policy is to give effect to the parties' intent. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. We construe a policy as it would be understood by a reasonable person in the position of the insured. ***Id.*** If policy language is unambiguous, we simply enforce it as written. ***Marnholtz v. Church Mut. Ins. Co.***, 2012 WI App 53, ¶10, 341 Wis. 2d 478, 815 N.W.2d 708.

¶13 The elasticity clause in Myers' policy clearly and unambiguously states that policy terms that are "in conflict with" the statutes of the state in which the policy is issued are changed to conform to those statutes. Thus, the dispositive issue is whether the reducing clause and definition of "underinsured motor vehicle" in Myers' policy were "in conflict with" WIS. STAT. § 632.32, as amended by Act 28, on the date of the accident. An insurance policy cannot conflict with a statute that does not apply to the policy. Act 28 specifically stated its prohibition of reducing clauses and its new definition of "underinsured motor vehicle" would first apply to policies issued or renewed on the Act's effective date—November 1, 2009. *See* 2009 Wis. Act 28, § 9326(6). Myers' policy was issued September 10, 2009. Thus, as of the accident date, the relevant amendments to § 632.32 did not apply to Myers' policy. As a result, Myers' policy did not conflict with the amended version of § 632.32, and the elasticity clause does not require that the policy be conformed to that statute.

¶14 Myers cites two cases for the proposition that "an elasticity clause will apply legislative changes to an insurance policy on the effective date of the legislation." *See* ***Hanson v. Prudential Prop. & Cas. Ins. Co.***, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999); ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 585 N.W.2d 893 (Ct. App. 1998). However, neither case stands for that broad proposition.

¶15 ***Roehl*** merely held that, because the parties' insurance contract contained an elasticity clause, a 1995 amendment to WIS. STAT. § 632.32 that "resuscitat[ed]" a drive other car exclusion in the policy did not unconstitutionally impair the parties' right to contract. *See* ***Roehl***, 222 Wis. 2d at 148-49. The court reasoned the inclusion of the elasticity clause showed that "the parties anticipated possible legislative adjustment to their agreement." ***Id.*** at 149.

¶16 In ***Hanson***, the plaintiff similarly asserted that a 1995 amendment to WIS. STAT. § 632.32, which resuscitated an anti-stacking provision in his car insurance policy, was an unconstitutional impairment of his right to contract. ***Hanson***, 224 Wis. 2d at 369. He also argued the 1995 amendment could not apply to his policy until the end of the policy period. ***Id.*** We rejected the plaintiff's arguments based on the policy's elasticity clause. ***Id.*** In so doing, we observed that "[t]he parties agreed to the elasticity clause in Hanson's policy when they entered into the contract, and under its provision the anti-stacking clause became effective as of the date of the new law." ***Id.*** However, the 1995 amendment to § 632.32 specifically provided,

> If a motor vehicle insurance policy in existence on the effective date of this subsection contains [an anti-stacking] provision authorized under section 632.32(5)(f) … as created by this act, the provision is first enforceable with respect to claims arising out of motor vehicle accidents occurring on the effective date of this subsection.

1995 Wis. Act 21, § 5(2). Thus, under the facts presented in ***Hanson***, the court correctly stated that the anti-stacking clause in the plaintiff's preexisting policy became effective on the new statute's effective date. The same is not true here, where Act 28 specifically stated the relevant changes would first apply to policies issued or renewed on November 1, 2009. 2009 Wis. Act 28, § 9326(6).

By the Court.—Order affirmed.

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