COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0598

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

SCOTT R. NASGOVITZ, A MINOR, BY HIS GUARDIAN AD LITEM, RALPH J. TEASE, JR., CHARLENE NASGOVITZ AND JERRY NASGOVITZ,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott Nasgovitz appeals from a judgment and an order dismissing his complaint on its merits. Nasgovitz's complaint sought a declaration that he was allowed to "stack" uninsured motorist and medical expense coverage from three insurance policies. Nasgovitz argues that the circuit court erred by applying the "anti-stacking" provisions to the motor vehicle insurance policies at issue. We affirm the judgment and order.

¶2 On December 2, 1995, Scott Nasgovitz was injured as a passenger in a vehicle insured by First Auto & Casualty Company. Although First Auto denied liability coverage to the driver for operating the vehicle without the owner's permission, it extended its $100,000 uninsured motorist coverage to Nasgovitz.

¶3 Nasgovitz was concurrently insured under three motor vehicle insurance policies that had been issued to his father, Jerry Nasgovitz, by American Family Mutual Insurance Company. All three policies included uninsured motorist coverage limits of $100,000 for each person and medical expense coverage limits of $10,000 for each person. In addition, all three policies contained the following language:

> **PART VI – GENERAL PROVISIONS**
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> ….
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> **3. Two or More Cars Insured**. The total of **our** liability under all policies issued to **you** by **us** shall not exceed the highest limit of liability under any one policy.
>
> ….
>
> **11. Terms of Policy Conform to Statute**. 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.[1]

[1] The "two or more cars" provision is commonly referred to as an "anti-stacking" clause and the "conformity to statute" provision is commonly known as an "elasticity" clause.

Two of the three policies were in effect from July 2, 1995, to January 2, 1996. The third policy became effective on December 1, 1995.

¶4 American Family paid Nasgovitz $10,000 in medical expense benefits and $100,000 in uninsured motorist benefits under the policy that went into effect on December 1, 1995; however, relying on the policies' anti-stacking provisions, American Family argued that Nasgovitz was not entitled to the uninsured motorist and medical expense benefits under the other two policies.[2]

¶5 Nasgovitz consequently brought suit against American Family alleging that he was entitled to receive an additional $220,000 in uninsured motorist and medical expense benefits under the two policies that became effective on July 2, 1995. American Family, relying on the anti-stacking provisions of the policies, moved the court for both summary and declaratory judgment.

¶6 At the time the July 2 policies became effective, § 631.43(1), STATS.,[3] prohibited insurers from refusing to stack an insured's policy benefits.

[2] The parties also disputed which policy actually paid out the uninsured motorist benefits. The circuit court subsequently found that the $100,000 uninsured motorist benefits were paid to Nasgovitz under the policy that became effective December 1, 1995.

[3] Section 631.43(1), STATS., which was enacted in 1975, provides the following:

> When 2 or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions. The policies may by their terms define the extent to which each is primary in each excess, but if the policies contain inconsistent terms on that point, the insurers shall be jointly and severally liable to the insured on any coverage where the terms are inconsistent, each to the full

(continued)

See ***Welch v. State Farm Mut. Auto. Ins. Co.***, 122 Wis.2d 172, 178, 361 N.W.2d 680, 683 (1985). However, 1995 Wis. Act 21 changed the law against anti-stacking provisions, effectively validating such provisions. *See* §§ 632.32(5) and 631.43(3), STATS. The effective date of 1995 Wis. Act 21 was July 15, 1995, although the Act addressed policies in existence on the effective date.[4]

¶7 Nasgovitz argued that because the July 2 policies were in effect before the law changed, principles of contract law did not allow the validation of a policy's anti-stacking provision in the middle of the policy term, especially absent consent of the insured. Nasgovitz further argued that § 632.32(5)(f), (g) and (h), STATS., unconstitutionally impaired his contract rights. The circuit court granted American Family's motion for declaratory judgment and further ordered that judgment be entered dismissing Nasgovitz's complaint. Judgment was thereafter entered dismissing Nasgovitz's complaint on the merits and with prejudice including all claims and causes of action. This appeal followed.

¶8 Nasgovitz contends that the circuit court's application of ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis.2d 136, 585 N.W.2d 893 (Ct. App. 1998), to the facts of this case was misplaced and, further, that this court's

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> amount of coverage it provided. Settlement among the insurers shall not alter any rights of the insured.

[4] Section 5, subsec. (2) of 1995 Wis. Act 21 provided:

> If a motor vehicle insurance policy in existence on the effective date of this subsection contains a provision authorized under section 632.32(5) (f) to (j) of the statutes, 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.

decision in ***Hanson v. Prudential Prop. & Cas. Ins. Co.***, 224 Wis.2d 356, 591 N.W.2d 619 (Ct. App. 1999), is not controlling. We disagree.

¶9 Although the underlying facts of ***Roehl*** are distinguishable, the principles by which this court decided ***Roehl*** are nevertheless applicable here. In ***Roehl***, the insureds sought uninsured motorist coverage under two American Family policies that insured two of their vehicles, neither of which was involved in the accident. ***Id***. at 140, 585 N.W.2d at 894. American Family moved for summary judgment based on a "drive other car" exclusion in each policy, which "excluded coverage for 'bodily injury to a person while occupying, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by you or any resident of your household.'" ***Id***.

¶10 Similar to the anti-stacking provisions that were legislatively validated by § 632.32(5)(f), STATS., the "drive other car" exclusion in ***Roehl*** had been invalidated until its legislative resuscitation under § 632.32(5)(j). Additionally, the policy in ***Roehl*** included an elasticity clause which read that the "[t]erms of this policy which are in conflict with the statutes of the state in which the policy is issued are changed to conform to those statutes"—language identical to the elasticity clauses in Nasgovitz's policies. ***Id***. at 147, 585 N.W.2d at 897.

¶11 The parties in ***Roehl*** did not dispute that the vehicle involved in the accident was subject to the "drive other car" exclusion. *See* ***id***. at 144, 585 N.W.2d at 896. Rather, the insureds argued that the provision was unenforceable because American Family had failed to notify them of the less favorable change in their policies' terms, as was required under § 631.36(5), STATS. *See* ***id***. The ***Roehl*** court, in concluding that American Family had not violated the notice

statute, spoke to the issues raised in the instant case. *See* ***id***. at 146-49, 585 N.W.2d at 897-98.

¶12 The crux of Nasgovitz's argument is that the mid-term validation of the anti-stacking provisions conflicts with principles of contract law, because American Family's obligations under the policies were altered without Nasgovitz's consent. Nasgovitz additionally asserts that the retroactive application of § 632.32(5)(f), STATS., impairs his contractual rights in violation of WIS. CONST. art I, § 12, which provides that "[n]o bill of attainder, ex post facto law, nor any law impairing the obligation of contracts shall ever be passed."[5]

¶13 Although the insureds in ***Roehl*** argued lack of notice while Nasgovitz argues lack of consent, the elasticity clauses agreed to by the insureds in both cases contemplated that coverage under the policies would expand and contract "as the courts and the legislature issued their conflicting decrees …." ***Id***. at 147, 585 N.W.2d at 897. Nasgovitz, like the insureds in ***Roehl***, attempts to argue that because the statute allowing anti-stacking provisions is permissive rather than mandatory, American Family cannot choose to attempt to enforce the provision. Although § 632.32(5)(f), STATS., does not mandate that an insurance company use an anti-stacking provision, such provisions were, in fact, included in the policies at the time of their purchase and subsequently resuscitated by the legislature. *See* ***id***. at 146, 585 N.W.2d at 897.

[5] Nasgovitz argues, in the alternative, that even if the anti-stacking provision is valid, it cannot be applied here as it conflicts with other provisions of the policy. Nasgovitz, however, failed to raise this issue before the circuit court. An issue may not be raised for the first time on appeal. *See* ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968).

¶14 Nasgovitz asserts that the circuit court nevertheless erred by relying on ***Roehl*** to reject Nasgovitz's argument that the retroactive application of § 632.32(5)(f), STATS., would impair his contract rights in violation of the Wisconsin Constitution. Nasgovitz contends that ***Roehl's*** constitutional discussion was dicta. On the contrary, the ***Roehl*** court rejected the insureds' argument on its merits and held:

> The parties' insurance contracts included the elasticity clause which conformed the policies to the prevailing statutory law. Thus, the parties anticipated possible legislative adjustment to their agreement. With that understanding in place, it can hardly be said that the legislature's subsequent resuscitation of the "drive other car" exclusion impaired the parties' agreement. Therefore, the legislative enactment of § 632.32(5)(j), STATS., did not unconstitutionally impair the Roehls' insurance contracts with American Family.

Id. at 149, 585 N.W.2d at 898.

¶15 Nasgovitz's consent to the validity of the anti-stacking clause was unnecessary, as he had consented to the possibility of such a change when he consented to the elasticity clause. *See* ***id***.; s*ee also* ***Hanson***, 224 Wis.2d at 369, 591 N.W.2d at 626. As in ***Roehl***, Nasgovitz, by virtue of the elasticity clause, contracted for anticipated legislative or judicial changes during the life of the contract. Therefore, his arguments that the legislation conflicts with principles of contract law or is an otherwise unconstitutional impairment of his right to contract must fail. *See* ***id***. at 149, 585 N.W.2d at 898.

By the Court.—Judgment and order affirmed.

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