COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1509 **Cir. Ct. No. 2013CV217**

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

TIMOTHY GIRARD,

PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

WADENA INSURANCE COMPANY,

DEFENDANT-APPELLANT,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Reversed and cause remanded with directions*.

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. This dispute concerns the priority of uninsured motorist coverage provided by two insurance companies, Wadena Insurance Company and American Family Insurance Company. This case arose from an auto accident during which Timothy Girard, an insured of Wadena's, was driving a vehicle owned by Jonathan Cattau and insured by American Family. An uninsured motorist caused a collision with the vehicle driven by Girard. Cattau was not in the vehicle at the time of the collision. Both insurance policies provide uninsured motorist coverage and include "other insurance" provisions that limit the circumstances under which coverage will be provided. Applying the pertinent terms in the respective "other insurance" provisions to the facts of this case, the circuit court ruled that Wadena and American Family are required to provide pro rata uninsured motorist coverage for Girard's injuries and other damages caused by the uninsured motorist. Wadena appeals.

¶2 On appeal, Wadena argues that applying a plain language interpretation of the "other insurance" provisions in the two policies to the undisputed facts of this case leads to one conclusion: that Wadena's uninsured motorist coverage is excess to American Family's uninsured motorist coverage. We agree. Applying a plain language interpretation of the pertinent provisions of the insurance policies to the undisputed facts, we conclude that Wadena provides excess uninsured motorist coverage and that American Family provides pro rata uninsured motorist coverage. Consequently, American Family is the primary uninsured motorist coverage insurer. Accordingly, we reverse.

Standard of Review and Legal Principles

¶3 The Wisconsin Supreme Court has stated that:

> The interpretation of an insurance contract is a question of law subject to de novo review. An insurance policy is construed to give effect to the intent of the parties, expressed in the language of the policy itself, which we interpret as a reasonable person in the position of the insured would understand it. The words of an insurance policy are given their common and ordinary meaning. Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law. This is to avoid rewriting the contract by construction and imposing contract obligations that the parties did not undertake.

Danbeck v. American Family Mut. Ins. Co., 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150 (citations omitted).

¶4 In Wisconsin, "when insurance contract clauses are directly conflicting and cannot be read to give effect to each of the contracts involved," the clauses are repugnant, and as a result "none of the clauses will be given effect." ***Oelhafen v. Tower Ins. Co.,*** 171 Wis. 2d 532, 536, 492 N.W.2d 321 (Ct. App. 1992). If it is impossible to effectuate competing insurance policies because they are "directly conflicting" then the loss will be shared by the insurers on a prorated basis. ***Schoenecker v. Haines***, 88 Wis. 2d 665, 672-73, 277 N.W.2d 782 (1979). In contrast, however, when two policies can be reconciled so that one policy provides excess coverage and the other provides pro rata coverage, Wisconsin follows the majority view that the pro rata policy provides primary coverage. *See* ***id.*** at 671; ***Duncan v. Ehrhard***, 158 Wis. 2d 252, 259, 461 N.W.2d 822 (Ct. App. 1990).

Discussion

¶5 The sole issue is whether, as American Family argues, the two excess clauses in the "other insurance" provisions contained in the two policies directly conflict, with the result that no effect may be given to either clause and the

loss will be shared by the insurers on a prorated basis, or instead, as Wadena argues, the two policies can be reconciled so that a pro rata policy provides primary coverage. To answer this question, we look to the language of the pertinent excess clauses in both policies.

¶6 We look first to American Family's "other insurance" provision, which includes a pro rata clause and an excess clause. The "other insurance provision" reads as follows:

> If there is other similar insurance on a loss covered by this Part, we will pay our share according to this policy's proportion of the total limits of all similar insurance. *But, any insurance provided under this Part for an insured person while occupying a vehicle you do not own is excess over any other similar insurance.*

(Emphasis added.) The emphasized sentence above is the excess clause in dispute. We focus on the meaning of the words "insured person" and "you" in the excess clause.

¶7 The pertinent policy definition of an "insured person" is found in the uninsured motorist coverage section of American Family's policy, and states as follows:

> **PART III – UNINSURED MOTORIST COVERAGE**
>
> ….
>
> **ADDITIONAL DEFINITIONS USED IN THIS PART ONLY**
>
> 1. **Insured person** means:
>
> ….
>
> b. Anyone else **occupying your insured car**.

¶8 The meaning of the word "you" is applied throughout the policy and is defined as "the policyholder named in the declarations."

¶9 Applying these definitions to the undisputed facts, Girard is an "insured person" for purposes of uninsured motorist coverage under the auto insurance policy that American Family issued to Cattau. In addition, there is no dispute that Cattau is named as the policyholder in the declarations page of the policy. When we insert "Girard" in place of the phrase "insured person" and "Cattau" to replace the word "you," the excess clause reads as follows:

> But, any insurance provided under this Part for an insured person [Girard] while occupying a vehicle you [Cattau] do not own is excess over any other similar insurance.

Plainly read, American Family's excess clause does not apply to Girard. This provision is excess only if Girard was "occupying a vehicle" that Cattau *did not own*. The problem for American Family is that Girard was occupying a vehicle that Cattau *did* own. Thus, the pro rata sentence of the "other insurance" provision—that is, the first sentence of the "other insurance" provision—applies, with the result that Cattau's American Family policy provides primary uninsured motorist coverage to Girard.

¶10 We now turn to Wadena's policy issued to Girard. Like the American Family policy, the "other insurance" provision in Wadena's uninsured motorist coverage section provides pro rata coverage, except where the policy is excess. The pertinent part of Wadena's "other insurance" provision, which is the excess coverage clause, provides:

> However, any insurance we provide with respect to a vehicle *you do not own*, including any vehicle while used as a temporary substitute for "your covered auto", shall be excess over any other collectible insurance similar to the insurance provided by this endorsement.

(Emphasis added.)

¶11 Based on a plain language reading of the "excess clause" above, Wadena's uninsured motorist coverage is excess. First, as we stated, Girard was driving a vehicle he did not own. Second, American Family provides "other collectible insurance" that is similar to the uninsured motorist coverage provided by Wadena. The two key elements of the excess clause in Wadena's "other insurance" provision are met. Thus, Wadena's uninsured motorist coverage is excess.

¶12 American Family argues that Wadena's focus on the definition of "you" in the competing excess clauses is an irrelevant "word-parsing exercise," that there is nothing significant in the definitions of "you" in the policies, and that Wadena's construction of the competing excess clauses would lead to an absurd and arbitrary construction of American Family's policy. We reject these arguments, because they ignore well-established canons of contract interpretation. "Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law." ***Danbeck***, 245 Wis. 2d 186, ¶10. It appears that American Family is suggesting that we ignore the definition of "you" in Cattau's policy and not apply that definition to the "excess clause," which is contrary to the rules of contract interpretation.

¶13 American Family argues that a plain language interpretation leads to an absurd result because "if Girard was operating a vehicle Cattau did not own," then "there would be no coverage under American Family's policy." However,

Girard *was* operating a vehicle that Cattau *did* own, so there *is* coverage under American Family's policy. Therefore, each insurer would be liable in the absence of the other policy, which is what makes the excess coverage clauses relevant. *See* ***Schoenecker***, 88 Wis. 2d at 668 (excess coverage clauses "become relevant only after it is established that each insurer would be liable in the absence of the other policy"). This is not an absurdity. This is what the parties bargained for under the plain language of the contracts.

CONCLUSION

¶14 In sum, we conclude that, applying a plain reading interpretation of the competing excess clauses and pertinent definitions, American Family's uninsured motorist coverage is primary and Wadena's uninsured motorist coverage is excess. Accordingly, we reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded with directions.

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