COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2675 **Cir. Ct. No. 2012CV28**

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

TOM ROTERING AND BETTY ROTERING,

PLAINTIFFS-APPELLANTS,

V.

MCMILLAN-WARNER MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Buffalo County: JAMES J. DUVALL, Judge. *Judgment reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Tom and Betty Rotering appeal a judgment dismissing their insurance coverage action because the one-year statute of

limitations expired prior to filing. The Roterings argue their insurance policy provided for a two-year limitations period. We agree, and reverse.

BACKGROUND

¶2 The Roterings' barn roof collapsed in December 2010. They held a "farm owners" insurance policy issued by McMillan-Warner Mutual Insurance Company. McMillan-Warner ultimately agreed to provide coverage for the barn's contents. However, it refused to pay for any damage to the structure itself, asserting the roof had collapsed due to snow, which McMillan-Warner contended was not a covered risk.

¶3 The Roterings retained an attorney in April 2011. While counsel had several contacts with McMillan-Warner in the interim, the complaint was not filed until March 2012. McMillan-Warner moved to dismiss, arguing the one-year limitations period set forth in WIS. STAT. § 631.83(1)(a)[1] had expired before the Roterings filed suit. The circuit court agreed, and dismissed the action. The Roterings now appeal.

DISCUSSION

¶4 The Roterings contend the circuit court erroneously dismissed their action because their insurance policy extended the statutory limitations period. A motion to dismiss based on the statute of limitations may be treated as a motion for summary judgment. *See* ***Dakin v. Marciniak***, 2005 WI App 67, ¶4, 280 Wis. 2d 491, 695 N.W.2d 867 (citing WIS. STAT. § 802.06(2)(b)). We review

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motions for summary judgment independently, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Interpretation of an insurance contract presents a question of law subject to our independent review. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. When interpreting an insurance policy, we seek to determine and give effect to the intent of the contracting parties. ***Id.*** Policies are to be construed as they would be understood by a reasonable person in the position of the insured. ***Id.*** Further, we "must avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage." ***Goebel v. First Fed. Sav. & Loan Ass'n of Racine***, 83 Wis. 2d 668, 680, 266 N.W.2d 352 (1978).

¶5 The Roterings argue, as they did in circuit court, that their farm owners policy provided for a two-year limitations period.[2] The parties agree that WIS. STAT. § 631.83(1)(a)'s one-year limitations period would apply unless the policy extended the time for filing. *See* ***Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co.***, 2004 WI App 218, ¶9, 277 Wis. 2d 274, 690 N.W.2d 442; *see also* WIS. STAT. § 631.83(3)(a) (no insurance policy may *shorten* a

[2] The Roterings also renew their argument that McMillan-Warner should be estopped from asserting the one-year statute of limitations as a defense. Because we conclude the policy provided for a two-year limitations period, we need not reach the Roterings' alternative argument. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive). However, were we to reach the argument, we would likely reject it. It appears the Roterings failed to offer evidentiary support for each estoppel element.

statutory limitations period). The parties further agree that the policy initially provides for an extended two-year limitations period.

¶6 We are principally concerned with two portions of the policy: an eight-page primary coverage form, titled "ADDITIONAL POLICY CONDITIONS AND PROPERTY COVERAGE TERMS," and a four-page endorsement, titled "AMENDATORY ENDORSEMENT WISCONSIN." Under the caption "OTHER CONDITIONS," the primary coverage form provides:

> 13. **Suit Against Us** -- No suit may be brought against "us" unless all the "terms" of this policy have been complied with *and the suit is brought within two years after the loss.*

(Italics added.) However, the Wisconsin endorsement provides:

> 14. Under Conditions, Suit Against Us is deleted and replaced by the following:
>
> **Suit Against Us** -- No suit may be brought against "us" unless all the "terms" of this coverage have been complied with.

¶7 McMillan-Warner argues the "Suit Against Us" provision in the Wisconsin endorsement replaces the "Suit Against Us" provision in the primary coverage form, thereby removing the italicized language providing for a two-year limitations period. The Roterings, on the other hand, contend paragraph 14 of the endorsement cannot supplant paragraph 13 of the coverage form because the "Suit Against Us" provision was found under "Other Conditions" in the coverage form, whereas the endorsement refers to a provision under "Conditions." The Roterings further argue this inconsistency renders the policy ambiguous.

¶8 The circuit court agreed with McMillan-Warner, explaining:

> The court cannot interpret a contract to render portions mere surplusage. Construction should give reasonable

> meaning to each provision of an insurance contract, rather than an interpretation that renders part of the language useless or meaningless.
>
> ….
>
> I do not find the policy to be ambiguous. Despite the slight language variation between "Conditions, Suit Against Us" and "Other Conditions, Suit Against Us," there is no other section with which it could reasonably be confused. Further, the phrase "deleted and replaced" can only have one meaning, particularly when the language of the replacement clause is so similar to the clause being replaced.
>
> The slight variation in the heading does not lead an ordinary insured to a reasonable alternative meaning. Mere difficulty in reading an insurance policy does not make it contextually ambiguous.

Thus, the circuit court essentially determined that paragraph 14 of the endorsement had to replace paragraph 13 of the primary coverage form because failing to construe the policy in that manner would render paragraph 14 of the endorsement meaningless.

¶9 Given the parties' respective positions, the circuit court's analysis appears perfectly reasonable. However, a review of the policy reveals that the analysis is incorrect.

¶10 The Wisconsin endorsement contains modifications to numerous other provisions of the primary coverage form, in the same order as they appear in the coverage form. In each of these various instances, the endorsement accurately identifies the caption under which the provision appeared in the coverage form. In fact, paragraphs 7 and 8 of the endorsement modify provisions under the caption "Other Conditions." Thus, it appears curious that paragraphs 12, 13, and 14 of the endorsement then purport to modify policy provisions under the caption "Conditions." The primary coverage form does not include such a caption.

¶11 This apparent anomaly is not so curious, however, when one reviews the language inserted above paragraph 12 of the endorsement: "The following provisions amend the Liability Coverage "terms", if applicable." Thus, that language provides that paragraph 14, at issue here, applies only to the *liability* coverage, and only "if applicable." This language undermines McMillan-Warner's position because it specifically permits paragraph 14 to be meaningless if the policyholder did not purchase liability coverage to which the modification could apply. Moreover, the "suits against us" provision of the primary coverage form explicitly applies only to *property* coverage.[3] Thus, paragraph 14 of the endorsement—concerning liability coverage—cannot modify it.

¶12 Our analysis does not end there, however. The Roterings did purchase liability coverage. That coverage is set forth in a 12-page coverage form. The first page contains a table of contents, which identifies a section captioned "Conditions" at page 12. We turn to page 12. Under "Conditions," the following provision is set forth:[4]

> 6. **Suit Against Us** -- No suit may be brought against "us" unless:
>
> a. all the "terms of this Personal Liability Coverage have been complied with; and

[3] Page 1 of the primary coverage form indicates the following provisions are "APPLICABLE TO ALL COVERAGES." At page 2, the form indicates the following provisions are "APPLICABLE TO ALL *PROPERTY* COVERAGES." (Emphasis added.) The "Suit Against Us" provision containing the two-year limitations period is found on page 8.

[4] We find it inconceivable that the parties' attorneys, particularly that of the insurer, overlooked both the limiting language above paragraph 12 of the Wisconsin endorsement and the "Conditions" section of the liability coverage form. The entire policy was included in the Roterings' appellate brief appendix, and the "Conditions" section was clearly identified in the table of contents on the first page of the liability coverage form.

> b. the amount of an "insured's" liability has been fixed by:
>
> > 1) a final judgment against an "insured" as a result of a trial; or
> >
> > 2) a written agreement of the "insured", the claimant, and "us".
>
> No person has a right under this Personal Liability Coverage to join "us" or implead "us" in actions that are brought to fix the liability of an "insured".

¶13 It is evident from the face of the policy that paragraph 14 of the Wisconsin endorsement modifies paragraph 6 of the liability coverage form, and does not modify paragraph 13 of the primary coverage form.[5] Consequently, paragraph 13 of the primary coverage form provides the Roterings with a two-year limitations period for property coverage claims, with which they complied. Their action shall therefore be reinstated.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

[5] Ironically, it appears paragraph 14 of the Wisconsin endorsement expands, rather than diminishes, the Roterings' rights under the policy. The endorsement removes all of the limitations following paragraph 6.a. in the liability coverage's "Suit Against Us" provision.