IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GERALD A. SMITH,

Appellant,

v.

NEW HAMPSHIRE INDEMNITY COMPANY, a foreign insurance corporation, KRISTI LEIGH DEVENS, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, a/s/o Kelly Harnage and Richard Provencher, and KELLY HARNAGE, individually,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-3423

Opinion filed March 16, 2011.

An appeal from the Circuit Court for Duval County.
James H. Daniel, Judge.

Ty Tyler of Tyler & Hamilton, P.A., Jacksonville, for Appellant.

Jane Anderson and Kansas R. Gooden of Boyd & Jenerette, PA, Jacksonville, for Appellee New Hampshire Indemnity Company.

THOMAS, J.

Appellant appeals the trial court's entry of a summary judgment stemming from his complaint for declaratory action and breach of contract. Appellant

contends the trial court erred by finding that section 627.7282, Florida Statutes, does not invalidate the cancellation of his automobile insurance policy with Appellee New Hampshire Indemnity Company (NHIC).[1] For the reasons explained below, we affirm.

Factual Background

Appellant's father gave his son a Ford F-150 truck and in August 2007 set up an automobile insurance policy in his son's name. The six-month premium on the policy at that time was $926.14. In January 2008, the father informed the agent at the local insurance office that his son's residence had changed from Gainesville to Jacksonville. The father testified that the agent confirmed the change of address, effective January 28, 2008, and told him to wait until the premium's due date to return to the office to pay the full premium, in the event the premium changed as a result of the new address. The father returned to the office on February 6, 2008, and, upon being told the premium amount had not changed, paid the six-month premium of $926.14.

Appellant's change of address resulted in a $321.18 premium increase, and an amended declaration page was sent to Appellant at his new address on the same day. A bill for this additional amount was mailed to Appellant on February 7, 2008. This bill went unpaid and was followed by two more bills in March and

[1] Appellees Devens, State Farm, and Harnage are not involved in this appeal.

April 2008. In May 2008, a notice of cancellation was sent to Appellant informing him that he had until June 13, 2008, to pay the amount owed or the policy would be cancelled. The bill remained unpaid, and the policy was cancelled on that date. Appellant testified he recalled receiving mail from the insurance company at his Jacksonville address, but he did not open it because he assumed his father had paid the premium and everything was in order.

Two days after the policy cancellation, Appellant was involved in an automobile accident with another vehicle, resulting in injury to Appellant and damage to the Ford. NHIC denied coverage for the accident, and Appellant filed the instant action. In his complaint, Appellant acknowledged the June 13, 2008, cancellation, but alleged the cancellation is void because it violates section 627.7282, Florida Statutes. NHIC's affirmative defenses included: (1) section 627.7282 does not apply to the subject policy; (2) Appellant waived his right to dispute the policy cancellation by failing to respond to several cancellation notices; and (3) NHIC complied with all of Florida's statutes regarding cancellation.

At the hearing on NHIC's motion for summary judgment, NHIC argued that section 627.7282, which requires certain notification procedures in the event an insurer charges an incorrect premium, does not apply because the increased premium was not "incorrect." In addition, it asserted the statute only applies to

incorrectly calculated premiums based on an insurance application when a policy is initiated, not to policy renewals.

In response, Appellant conceded that pursuant to Florida law, all required cancellation notices had been sent and that the premium did not violate the rate filing with the Office of Insurance Regulation. Appellant alleged, however, that when his father went into the independent agent's office, the agent looked up the premium on her computer and stated that the premium was $926, not the increased premium later requested. Appellant asserted the incorrectly charged premium required NHIC to send a "three option letter" pursuant to section 627.7282(1), and that its failure to do so rendered the cancellation ineffective.

The trial court entered an order granting summary judgment in favor of Appellees, finding section 627.7282 did not invalidate the cancellation notice because the increased premium for the change of address occurred during the prior policy period; thus, the trial court opined that because an amended declaration page was sent to Appellant on January 28, 2008, prior to the renewal policy period beginning, the premium charged was not "incorrect" under the statute.

Analysis

Our review of the trial court's summary judgment is de novo. See Futch v. Wal-Mart Stores, Inc., 988 So. 2d 687, 690 (Fla. 1st DCA 2008) ("In reviewing an order granting final summary judgment by the trial court, this court applies the

de novo standard of review to determine whether there are genuine issues of material fact and whether the trial court properly applied the correct rule of law." (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

This case requires us to determine whether section 627.7282, Florida Statutes, applies only to situations involving incorrectly charged premiums pursuant to an application for insurance, or whether it also applies to incorrectly charged premiums when a policy is renewed. This statute provides, in pertinent part:

> (1) Upon a determination by an insurer that, in accordance with its rate filings and the applicable laws of this state relating to private passenger motor vehicle insurance, a policyholder has been charged a premium that is incorrect for the coverage set forth in the insurance ***application***, the insurer shall immediately provide notice to the policyholder of the amount of additional premium due to the insurer and that the policyholder has the following options:
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> (a) The policyholder has a period of 10 days, or a longer period if specified by the insurer, from receipt of the notice within which to pay the additional amount of premium due and thereby maintain the policy in full force under its original terms.
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> (b) The policyholder has a period of 10 days, or a longer period if specified by the insurer, from receipt of the notice within which to cancel the policy and demand a refund of any unearned premiums.
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> (c) If the policyholder fails to timely respond to the notice, the insurer shall cancel the policy and return any unearned premium to the insured. The date on which the policy will be canceled shall be stated in the notice and shall in no case be less than 14 days after the date of the notice.

. . . .

> (4) This section shall not be construed to limit insurers' rights to cancel in accordance with applicable provisions of the insurance code.

§ 627.7282, Fla. Stat. (emphasis added).

As he did in the proceedings below, Appellant concedes that if this statute does not apply to the renewal of his policy, NHIC is entitled to summary judgment. Appellant also concedes that NHIC did not fail in its obligations pursuant to section 627.728 relating to notices of cancellation; rather, he argues that NHIC failed to provide the "three option letter" required by section 627.7282(1)(a)-(c) when an insured has been charged an improper premium pursuant to the insurer's rate filings and Florida law. In so arguing, Appellant relies on Sotomayor v. Seminole Casualty Insurance Company, 650 So. 2d 663, 664 (Fla. 5th DCA 1995), in which the court held that an insurer's right to cancel a policy does not void its obligation to comply with the notice provision in section 627.7282(2).

To determine whether section 627.7282 applies to insurance policy renewals or amendments, and not just applications for coverage, "[t]he plain meaning of the statute is . . . the starting point." GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007). "Thus, if the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute." Id.

Here, section 627.7282(1) plainly and unambiguously states that it is applied when an insured has been charged an incorrect premium "that is incorrect for the coverage set forth in the insurance *application* . . . ." § 627.7282(1), Fla. Stat. (emphasis added). We think the term "application" is unambiguous. An application in the context of insurance is, by definition, a request for coverage; although the terms of coverage may change, along with the premium, it does not negate this fact. Had the Legislature intended for this statute to also apply to policy renewals or amendments, it could easily have stated as much. Indeed, the Legislature has enacted two statutes that specifically address renewals. See § 627.7277; § 627.728 (defining "renewal" as "the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term"). Thus, it is clear that there is no application process contemplated when a policy is renewed.

Further support for our analysis is found in Florida Administrative Code Rule 69O-167.002, which provides guidelines for insurers with respect to sections 627.728 and 627.7281. Rule 69O-167.002(1) provides, in pertinent part:

> Pursuant to the provisions of Section 627.728, F.S., any insurer which issues a policy of private passenger motor vehicle insurance in this state shall be required to complete the underwriting of the policy and make a final determination of the correct premium for the coverage

> set forth in the insurance *application* within 60 days after the effectuation of coverage.

(Emphasis added.) Subsection (2) of the rule provides, in relevant part:

> In the event that an insurer issues a policy of private passenger motor vehicle insurance and timely determines that the policyholder has been charged an incorrect premium, the insurer shall provide notice to the policyholder as provided in Section 627.7282, F.S.

It is clear from reading these provisions that section 627.7282 applies to situations when an insurer sets an incorrect premium at the time an insured applies for insurance coverage. It is at this time that an insurer is provided with all of the pertinent information it needs to make its premium calculation, whereas a renewal is little more than an extension of the original contract via payment of the premium. Furthermore, as illustrated in this case, an insured does not complete another application when amending the policy information to reflect, as here, a change of address. That the premium may rise or fall while the coverage is in effect due to changes in circumstances does not mean that there has been a new *application* for insurance.

Nor does Appellant's reliance on Sotomayor offer him any assistance. That case arose out of an insurer's cancellation of a policy due to Sotomayor's failure to pay an additional premium. Sotomayor, 650 So. 2d at 664. The insurer moved for summary judgment, stating that it received Sotomayor's premium payment from an independent agent but that, "[u]pon review of Sotomayor's insurance *application*,

[the insurer] found there had been a mistake in the calculation of the premium." Id. (emphasis added). The issue was whether the insurer complied with the cancellation requirements set forth in section 627.7282. The insurer argued that the statute did not apply because it had "an *absolute right* to cancel the policy for *any* reason within sixty days after issuance pursuant to section 627.728(2)(c), Florida Statutes." Id. The Fifth District disagreed, holding "Even if this unfettered right to cancel exists, it does not avoid the obligation on [the insurer's] part to comply with the appropriate notice provision, which in this case is section 627.7282(1), and its own insurance contract." Id. (citation omitted). Significantly, the situation in Sotomayor involved an initial application for insurance, not a policy renewal.

As noted, Appellant concedes, and we agree, that NHIC's cancellation was otherwise effective, pursuant to section 627.728. Furthermore, subsection (4) of section 627.7282 provides that subsection (1) does not limit an insurer's right to cancel a policy in accordance with other provisions of the insurance code. Thus, because we are constrained by the statute's plain language, NHIC was entitled to summary judgment on the issue of whether it properly and effectively cancelled the subject insurance policy.

We note that although the trial court did not use this rationale in granting summary judgment, this does not affect our decision. See D.R. Horton, Inc. –

Jacksonville v. Peyton, 959 So. 2d 390, 397-98 (Fla. 1st DCA 2007) (holding under "tipsy coachman" rule, when trial court reaches right result, but for wrong reasons, that decision will be upheld on appeal if there is any basis in the record which would support judgment).

Conclusion

For the foregoing reasons, we AFFIRM the trial court's entry of summary judgment.

HAWKES, J., CONCURS; WOLF, J., DISSENTS WITH WRITTEN OPINION.

WOLF, J., Dissenting.

The trial court incorrectly entered a summary judgment in favor of appellee NHIC because (1) issues of genuine material fact exist concerning whether NHIC charged an incorrect premium, thereby requiring NHIC to follow the procedures outlined in section 627.7282, Florida Statutes ("the incorrect premium statute"); and (2) the "incorrect premium statute" is applicable in all situations where an incorrect premium is charged based on an amendment to material information in the original insurance application, thereby necessitating a premium be readjusted in accordance with the insurer's rate filing.

Thus, it is unnecessary for this court to reach the broader issue determined by the majority to be dispositive: whether the "incorrect premium statute" applies to renewals. The vast majority of renewals do not require amending material information in the original insurance application.

The following excerpt of an affidavit of Gerald Allen Smith, appellant's father, contains critical information pertinent to the issue before this court:

> 2. In or about August 2007, I obtained insurance on behalf of my son, Gerald Austin Smith, on a Ford F-150 truck. I obtained this insurance with New Hampshire Indemnity Company, through the A+ American Casualty Insurance Company, Inc. agency.
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> . . . .
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> 4. The policy obtained in August 2007 was valid for six months. Prior to the expiration of that policy, I notified Holly Markey that the named insured, my son, Gerald Austin Smith, had moved to

> Jacksonville, Florida from Gainesville (where the policy had originally been written). I was advised by Ms. Markey that this might impact the premium for the new policy and that I should wait until the change took effect before paying the premium. I notified Ms. Markey of the address change on January 25, 2008. She confirmed the change January 28, 2008. Attached hereto as Exhibit A is a notice from New Hampshire indicating the change was effective January 29, 2008.
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> 5. On February 6, 2008, I visited the offices of A+ American Casualty Insurance, Inc., in Clermont, Florida and personally spoke with Holly P. Markey. Ms. Markey logged on to a computer system and verified the amount of premium, as well as the address change. The address change was in the computer and the premium due was indicated as $926.14. I paid the full amount of the premium based upon Ms. Markey's representations that was the correct premium.
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> 6. At all times during the life of this policy, I paid the premium and dealt with Ms. Markey.
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> 7. I had no notice that there was purportedly additional premium due and, had I known of the substantial increase of the premium, I would have sought other insurance.
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> . . . .
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> 9. At all material times while I dealt with Holly Markey, it was my understanding that she was an authorized representative of New Hampshire Indemnity Company and/or its parent company, American Insurance Group, due to the fact that she had in her possession applications for insurance bearing the name of AIG and/or New Hampshire Indemnity; she bound coverage on the part of New Hampshire Indemnity and she collected premiums on behalf of New Hampshire Indemnity.

The above facts, if true, demonstrate that a representative of NHIC charged and accepted insufficient funds from appellant's father as full payment of the premium for the coverage appellant was seeking. Thus, contrary to the trial court's

ruling, genuine issues of material fact exist as to whether "a policyholder has been charged a premium that is incorrect . . . ." § 627.7282(1), Fla. Stat.

Instead of reaching the factual issues, the majority would affirm as a matter of law based on its determination that section 627.7282 only applies to situations in which an insurer initially sets an incorrect premium at the time an insured makes his initial application for insurance coverage, and thus, does not apply to renewals or amendments. This analysis is incorrect for several reasons.

First, the majority bases their opinion on a purported plain reading of the statute, yet they effectively rewrite the statute to bolster their conclusion that section 627.7282 does not apply. Specifically, they impliedly insert the word "initial" before the word "application," assuming the statute reads, "charged a premium that is incorrect for the coverage set forth in the **initial** insurance application." The statute itself does not contain the term, and its lack of the use of the term renders the statute ambiguous as to its application to requests for amended coverage beyond the initial period.

Second, the ambiguity of the statute requires this court to consider the legislative purpose behind its enactment, and that purpose is not furthered by the majority's interpretation. See Samples v. Fla. Birth-Related Neurological, 40 So. 3d 18, 22 (Fla. 5th DCA 2010) (reiterating when a statute is ambiguous, a court should look to legislative intent). In enacting section 627.7282, the Legislature

was attempting to protect consumers from a growing practice among insurance companies of misquoting a premium and later cancelling the policy after the premium was exhausted prior to the policy's end date. Ch. 86-252, Laws of Fla. (1986). In cancelling this way, insurers were keeping all premiums paid and not offering consumers a refund or a chance to seek coverage from another insurer. Id. The Legislature was concerned consumers were agreeing to coverage based on misquoted premiums and were then left without the option to shop around in light of the new quote and seek return of the premium.[2] As illustrated by the underlying

[2] The chapter law enacting section 627.7282 titled the statute as follows:

> An act relating to insurance; . . . , providing for a procedure with respect to private passenger motor vehicle insurance policyholders who have been charged an incorrect premium relating to the assessment of additional premiums; providing an effective date.

Ch. 86-252, Laws of Fla. In addition, the House of Representative and Senate Committee on Health Care and Insurance Staff Analysis and Economic Impact Statements provided as a purpose for the statute:

> A. Present Situation:
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> As a result of insurers re-rating motor vehicle insurance policies and discovering inaccurate or incomplete information in an application for insurance, payment of additional premiums have been required by insurers for coverage for the period established in the insurance application. Currently, it is the practice of some insurers to shorten the policy period to correspond to the amount of the initial premium paid if the policyholder does not respond to a demand for additional premiums. This has created gaps in coverage for some policyholders who, for various reasons, were not aware of the request for addition[al] premiums.

case, the same evil sought to be remedied by the Legislature occurs in policy periods beyond the initial period. Here, appellant's father was charged a premium, paid it and left the office believing his son was covered. When NHIC determined a mistake had occurred, it kept the entire premium paid but cancelled the policy prior to the agreed-upon end date. This situation is the exact evil sought to be remedied by the statute and it applies equally to all periods of coverage, not just the initial period. Thus, the majority's implicit insertion of the word "initial" into the statute defeats the clear legislative intent.

Third, contrary to the majority's opinion, the triggering event under the incorrect premium statute is not connected to whether the policy is being renewed. Instead, the trigger for the requirement to send the incorrect premium letter is the

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B. Effect of Proposed Changes:

Senate Bill 768 requires that upon a determination by an insurer that a policyholder has been charged a premium that is inadequate for the coverage set forth in the insurance application, the insurer must immediately notify and inform the policyholder of the additional premium due to the insurer. The policyholder then has 10 days, or longer if specified by the insurer, in which to either pay the additional premium or cancel the policy and demand a refund of the unearned premium. If the policyholder fails to respond within the allotted time, the insurer must cancel the policy, effective no earlier than 14 days after the date of the notice, and return any unearned premium to the insured. The amount of the unearned premium shall be calculated on a pro rata basis. The bill thereby prohibits private passenger automobile insurers from unilaterally altering or modifying the expiration date of a policy due to non-payment of a demand for additional premium, except as provided above.

quoting of an incorrect premium based on a change or amendment to the information provided in the original application.

Specifically, the statute requires notification to a consumer when an incorrect premium is charged "for the coverage set forth in the insurance application." § 627.7282(1), Fla. Stat. Here, based on the policy in the record, appellant was under a continued duty to inform NHIC of any "material" changes to the information provided in the original application. Further, the policy specifically noted a change to an address constituted a material change that may affect premium costs. In fact, at oral argument, appellee acknowledged the change of address amounted to a change to the information contained in the original application which would necessitate an alteration in premium (effectively constituting a new or amended application for insurance coverage). Thus, in order for NHIC to enforce its continuing requirement for material disclosure, NHIC relies on the consumer's agreement to amend the information given in the original application when necessary. It seems unfair to place this continuing duty on the consumer to amend an application, yet forgive NHIC the continuing requirement to provide proper notice of changes to quoted premium based on those amendments.

Last, the term "renewal" has no bearing on the analysis of the statute. A renewal of an insurance policy is a contract based on the same conditions as were contained in the original policy. See U.S. Fire Ins. Co. v. S. Sec. Life Ins. Co., 710

So. 2d 130, 132 (Fla. 5th DCA 1998) (holding a "nonrenewal" is a policy with material changes in terms and conditions from the prior policy, and the insurer's decision to eliminate slander and libel coverage amounted to a nonrenewal) (citing Hartford Accident & Indemnity Co. v. Sheffield, 375 So. 2d 598 (Fla. 3d DCA 1979)). Because this case involves an amendment to a contract which changes a material condition of the original policy, it does not involve a renewal. For the foregoing reasons, the summary judgment was entered in error and the case should be remanded to the trial court for further proceedings.