COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0348

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

ROBERT D. PFLUGHOEFT, A MINOR BY HIS GUARDIAN AD LITEM, MICHAEL L. BERTLING, AND CLAUDIA PFLUGHOEFT AND MICHAEL PFLUGHOEFT, HIS PARENTS,

PLAINTIFFS-RESPONDENTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

AURORA HEALTHCARE, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Judgment reversed and cause remanded to the trial court for further proceedings consistent with this opinion.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. American Family Mutual Insurance Co.appeals from the declaratory judgment awarding Claudia and Michael Pflughoeft stacked underinsured motorist coverage on two automobile insurance policies. American Family argues that the trial court erred by: (1) finding that the anti-stacking clauses in the Pflughoefts' policies were invalid because they did not parrot the 1995 legislation that permits anti-stacking clauses; and (2) finding that the reducing clauses in the policies were invalid because they rendered coverage illusory and unconstitutionally impaired the Pflughoefts' right to contract. We reverse and remand.

I. Background

¶2 The facts are undisputed. On June 12, 1996, Robert Pflughoeft, then three years old, was hit by an underinsured motor vehicle backing out of a driveway. He suffered damages stipulated to be $225,000. Robert's parents had two cars insured with American Family. Each policy was identical and included underinsured motorist coverage in the amount of $100,000 per person for bodily injury. Each policy's underinsured motorist coverage had a reducing clause providing that coverage would be reduced by any amount paid for bodily injury from an underinsured motorist's liability insurance. The Pflughoefts received $50,000 from the underinsured driver's insurance company.

¶3 Each policy also included a provision precluding the stacking of coverage.[1] Prior to 1995, WIS. STAT. § 631.43(1) invalidated any clause that precluded the stacking of insurance coverage.[2] 1995 Wis. Act 21, however, changed the law regarding the prohibition of anti-stacking clauses and carved an exception. This law created, inter alia, §§ 631.43(3) and 632.32(5)(f):

> **631.43 Other insurance provisions. (3)** EXCEPTION. Subsection (1) does not affect the rights of insurers to exclude, limit, or reduce coverage under s. 632.32(5)(b), (c) or (f) to (j).
>
> **632.32 Provisions of motor vehicle insurance policies. (5)** PERMISSIBLE PROVISIONS. (f) A policy may provide that regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid the limits for any coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident.

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[1] "'Stacking' is a term used in insurance cases 'when the same insurer issues multiple policies and the insured seeks to aggregate the coverage from each of the policies.'" ***Allstate Ins. Co. v. Gifford***, 178 Wis. 2d 341, 348 n.3, 504 N.W.2d 370, 373 n.3 (Ct. App. 1993) (quoted source omitted).

The anti-stacking clauses in the Pflughoefts' policies provided:

> PART IV – GENERAL PROVISIONS
>
> 1. **Two or More Cars Insured.** The total limit of our liability under all policies issued to you by us shall not exceed the highest limit of liability under any one policy.
> 2.

[2] WISCONSIN STAT. § 631.43(1) provides in relevant part:

> GENERAL. 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….

All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

Although American Family modified the terms of its policies after 1995 to more closely conform to the language of the new legislation, its revised policies were not in effect at the time of Robert's accident. The Pflughoefts' policies did, however, contain an elasticity clause that conformed the policies to statutory law in the event of a conflict between the policy and state law.

¶4 Both parties moved for declaratory judgment. American Family took the position that the Pflughoefts could not stack their underinsured motorist coverage, and that the $100,000 underinsured motorist limit of liability available should be reduced by the $50,000 payment received from the driver's insurance company. The Pflughoefts argued that the limits could be stacked because, although WIS. STAT. § 631.43(3) had validated anti-stacking provisions, "American Family did not take advantage of the exception until after the accident in this case." In addition, the Pflughoefts contended that the reducing clause could not be applied because WIS. STAT. § 632.32(5)(i) unconstitutionally interfered with the contract rights of the parties and violated due process. The trial court granted declaratory judgment in favor of the Pflughoefts, holding that the anti-stacking clauses in the policies were prohibited by § 631.43(1) despite the legislature's attempt to make such clauses valid pursuant to § 632.32(5)(f). The trial court further held that the reducing clauses were void as against public policy because they made insurance coverage illusory. The trial court also concluded that the legislative enactment attempting to revive the reducing clauses was an unconstitutional impairment of the right to contract.

II. Discussion

¶5 "The grant or denial of relief in a declaratory judgment action is a matter within the discretion of the trial court." ***Allstate Ins. Co. v. Gifford***, 178

Wis. 2d 341, 346, 504 N.W.2d 370, 372 (Ct. App. 1993). A trial court acts outside the ambit of its discretion when it bases its discretionary decision on an error of law. *See* ***id***.

A. *The Anti-Stacking Clauses*

¶6 American Family argues that its use of anti-stacking language, both in the general provisions and in its underinsured motorist coverage, precluded the stacking of the Pflughoefts' underinsured motorist limits and was, therefore, valid under WIS. STAT. § 632.32(5)(f) even though it did not parrot the exact language contained in § 632.32(5)(f). The application of a statute to an undisputed set of facts presents a legal question that we review *de novo*. *See* ***Bufkin v. Milwaukee Bd. of School Directors***, 179 Wis. 2d 228, 233, 507 N.W.2d 571, 573–574 (Ct. App. 1993). We agree with American Family and conclude that the trial court incorrectly applied the law to the facts of this case.

¶7 As noted, prior to the enactment of 1995 Wis. Act 21, WIS. STAT. § 631.43(1) invalidated any clause that precluded the stacking of insurance coverage. Pursuant to this legislation, however, the Wisconsin Legislature changed the law regarding the prohibition of anti-stacking clauses and, with the creation of WIS. STAT. § 631.43(3), carved an exception that allowed for anti-stacking provisions. For the sake of clarity, we reprint § 631.43(3) here:

> EXCEPTION**.** Subsection (1) does not affect the rights of insurers to exclude, limit, or reduce coverage under s. 632.32(5)(b), (c) or (f) to (j).

As also noted, WIS. STAT. § 632.32(5)(f) reads:

> A policy may provide that regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid the limits for any coverage under the policy

> may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident.

¶8 ***Hanson v. Prudential Property & Casualty Insurance Co.***, 224 Wis. 2d 356, 591 N.W.2d 619 (Ct. App. 1999), controls the issue presented by this appeal. Hanson, like the Pflughoefts, contended that his insurance policy's anti-stacking language was invalid because it failed to conform to the language set forth in WIS. STAT. § 632.32(5)(f). *See* ***Hanson***, 224 Wis. 2d at 370, 591 N.W.2d at 626. ***Hanson*** rejected this argument, holding that § 632.32(5)(f) "contains no indication that magic language is required or that a policy must parrot the statute." ***Id.*** As ***Hanson*** instructs, American Family was not required to parrot, word for word, the language contained in statute. Indeed, the policy language that was in effect at the time of the accident accomplished what 1995 Wis. Act 21 validated and should have been enforced to prohibit the stacking of the Pflughoefts' policies. Thus, the trial court here erred by holding that the Pflughoefts' policies could be stacked because the policy language did not parrot WIS. STAT. § 632.32(5)(f). Moreover, the Pflughoefts' policies also included an all-encompassing elasticity clause that provided that any policy language that was contrary to state law would be unenforceable.[3] The anti-stacking legislation validated these clauses, effective on July 15, 1995, see 1995 Wis. Act 21, § 6, which was before Robert's accident.

[3] The general provisions of the Pflughoefts' policies provided:

> 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.
> 12.

¶9 The Pflughoefts attempt to avoid the mandate of ***Hanson*** by arguing on appeal that the language of the policy "was of the vague and ambiguous type invalidated by 631.43(1)," and therefore does not fall "within the exception set forth within § 631.43(3)." Although this argument was not made to the trial court, we consider it because we may affirm the trial court on any ground, whether or not that ground was presented to the trial court. *See* ***State v. Holt***, 128 Wis. 2d 110, 124–125, 382 N.W.2d 679, 687 (Ct. App. 1985). We conclude that the policy language clearly, without ambiguity, prohibited stacking.[4]

B. *The Reducing Clauses*

¶10 American Family next argues that, due to the operation of the policies' reducing clauses and the fact that the Pflughoefts received $50,000 from the underinsured motorist's insurance company, the Pflughoefts are entitled to only $50,000 from American Family. The Pflughoefts, on the other hand, contend that the reducing clauses should not be applied because applying them renders the coverage illusory, and that the legislation validating these clauses is an unconstitutional impairment on the right to contract.[5] Whether an insurance

[4] In their brief to this court, the Pflughoefts represent that this argument–that the anti-stacking clauses used in the Pflughoefts' policies were "vague and ambiguous"–was made to the trial court. We disagree. The record reflects that the Pflughoefts' argument to the trial court on this issue consisted of the following: "The legislature chose to allow the use of this unambiguous language [contained in WIS STAT. 632.32(5)(f)] to prohibit stacking. However, if an insurer wished to prohibit stacking, it must use this language." Based on this premise, the Pflughoefts then argued that because American Family had not used the § 632.32(5)(f) language at the time of the accident, the policies could be stacked. In addition, the Pflughoefts contended that the statutory language contained in § 632.32(5)(f) was "unambiguous enough to provide notice to an insured that they cannot add the two limits together." The Pflughoefts did not argue that the policy language used at the time of the accident was ambiguous, however, much less explain this alleged ambiguity to the trial court. Instead, they merely asserted that the language contained in § 632.32(5)(f) was *unambiguous*. Accordingly, we agree with American Family's assertion that "it was undisputed in the trial court that American Family's policy language was unambiguous and capable of being reasonably understood to preclude stacking."

[5] WISCONSIN CONST. art. I, § 12 provides:

(continued)

contract is illusory is a question of law that we review *de novo*. *See* ***Hoglund v. Secura Ins.***, 176 Wis. 2d 265, 268, 500 N.W.2d 354, 355 (Ct. App. 1993). "All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law if at all possible." ***State ex rel. Bldg Owners v. Adamany***, 64 Wis. 2d 280, 285, 219 N.W.2d 274, 277 (1974). We agree with American Family that the trial court erred by determining that the reducing clauses rendered coverage illusory and that WIS. STAT. § 632.32(5)(i) unconstitutionally impaired the right to contract.

¶11 The Wisconsin Legislature amended WIS. STAT. § 631.43(3) to allow insurers to "exclude, limit or reduce coverage under s. 632.32(5)(b), (c), or (f) to (j)" despite the provisions of § 631.43(1), which were left unchanged. This upheld the right of an insurer to contract with its insured rather than impaired that right. Section 632.32(5)(i) provides:

> A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily

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> **Attainder; ex post facto; contracts.** No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.

U.S. CONST. art I, § 10 provides, as material here:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder; ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

A party challenging the constitutionality of a statute bears a heavy burden "to show beyond a reasonable doubt that the challenged statute is unconstitutional." ***Reserve Life Ins. Co. v. La Follette***, 108 Wis. 2d 637, 644, 323, N.W.2d 173, 176 (Ct. App. 1982).

> injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.

¶12 Whether WIS. STAT. § 632.32(5)(i) unconstitutionally impairs the right to contract was recently addressed by the Wisconsin Supreme Court in ***Dowhower v. West Bend Mutual Insurance Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557. ***Dowhower*** answered this question in the negative, holding that § 632.32(5)(i) does not deprive an insured "of any state or federal constitutional right to enter into insurance contracts." ***Dowhower***, 2000 WI 73 at ¶36, 236 Wis. 2d at 130, 613 N.W.2d at 565. Additionally, when an insurance contract includes an elasticity clause that conforms the policy to the prevailing statutory law, "the parties anticipated possible legislative adjustment to their agreement." ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893, 898 (Ct. App. 1998). The elasticity clause in ***Roehl*** was substantively identical to the clauses contained within the Pflughoefts' policies. The Pflughoefts' constitutional right to contract was not impermissibly impaired by § 632.32(5)(i).

¶13 The Pflughoefts also argue that WIS. STAT. § 632.32(5)(i) unconstitutionally violated their substantive due process rights, although recognizing that the then-pending supreme court decision in ***Dowhower*** would govern. ***Dowhower*** controls, holding that § 632.32(5)(i) does not deprive policyholders of substantive due process. *See* ***Dowhower***, 2000 WI 73 at ¶36, 236 Wis. 2d at 130, 613 N.W.2d at 565 (WIS. STAT. § 632.32(5)(i) "does not present a substantive due process violation").

¶14 The Pflughoefts also argue that the reducing clauses make their coverage illusory.[6] We disagree. Whether an underinsured motorist provision renders coverage illusory is a question that is related to the determination that such a provision violates public policy. *See* ***Hoglund***, 176 Wis. 2d at 271, 500 N.W.2d at 357. "It is for the legislature to make policy choices." ***Flynn v. Dept. of Administration***, 216 Wis. 2d 521, 529, 576 N.W.2d 245, 248 (1998). "[P]ublic policy is regularly adopted and promulgated in the form of legislation." ***Brockmeyer v. Dun & Bradstreet***, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983). "[T]he purpose of underinsured motorist coverage is solely to put the insured in the same position he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured." ***Dowhower***, 2000 WI 73 at ¶ 18, 236 Wis. 2d at 122, 613 N.W.2d at 562 (citation omitted); ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 456 N.W.2d 597 (1990). Since the underinsured driver in this case carried only $50,000 of liability coverage, the Pflughoefts' underinsured motorist coverage should put them in the same position as they would have been had the driver purchased $100,000 of coverage. The legislature, by enacting § 632.32(5)(i), "established that this type of reduction coverage is a permissible provision in an automobile insurance policy," rather than "an endorsement of illusory contracts." ***Dowhower***, 2000 WI 73 at ¶¶ 17, 18, 236 Wis. 2d at 122, 613 N.W.2d at 561–562.

[6] The Pflughoeft's Underinsured Motorist Endorsement contained the following terms:

> LIMITS OF LIABILITY
> The limits of liability of this coverage will be reduced by:
> 1. A payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under collectible auto liability insurance, for loss caused by an accident with an **underinsured motor vehicle**.

Accordingly, the Pflughoefts' coverage was not rendered illusory by the reducing clauses.

By the Court.—Judgment reversed and cause remanded to the trial court for further proceedings consistent with this opinion.

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