COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP247

Cir. Ct. No. 2010CV350

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

SHELBY LYNNE HUTCHISON,

PLAINTIFF,

V.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Acuity, A Mutual Insurance Company, appeals a summary judgment determining that its insured, Shelby Hutchison, was not entitled to underinsured motorist coverage under a policy issued by Liberty Mutual Fire Insurance Company. Acuity argues Liberty Mutual's policy exclusion is prohibited by various provisions of the omnibus statute, WIS. STAT. § 632.32.[1] We reject Acuity's arguments and affirm.

BACKGROUND

¶2 Hutchison alleged she was riding in a pickup truck driven by Andrew Burrows when Burrows negligently crashed the truck and injured her. Burrows' parents owned the truck and insured it with Liberty Mutual. Hutchison had underinsured motorist coverage through her parents' policy with Acuity. There was no dispute that Hutchison was entitled to recover benefits under Liberty Mutual's liability coverage for Burrows,[2] and Acuity's underinsured motorist coverage for Hutchison. However, Acuity and Hutchison[3] claimed that Burrows' Liberty Mutual policy was required to provide Hutchison underinsured motorist benefits in addition to liability benefits.

¶3 Liberty Mutual moved for summary judgment, arguing there was no underinsured motorist coverage because Burrows' truck was not an "underinsured motor vehicle" as defined in its policy. The policy provided: "'underinsured

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Burrows resided with his parents and was a named driver on the Liberty Mutual policy.

[3] Hutchison has not appealed. We therefore refer only to Acuity for the remainder of the opinion.

motor vehicle' does not include any vehicle …. Owned by or furnished or available for the regular use of you or any 'family member.'" Acuity responded that the policy exclusion ran afoul of multiple provisions of the omnibus statute. The circuit court rejected Acuity's arguments, primarily reasoning that WIS. STAT. § 632.32(5)(e) permitted the exclusion. That subsection provides: "A policy may provide for exclusions not prohibited by sub. (6) or other applicable law. Such exclusions are effective even if incidentally to their main purpose they exclude persons, uses or coverages that could not be directly excluded under sub. (6)(b)." The court determined that the main purpose of Liberty Mutual's exclusion was to prevent the conversion of underinsured motorist coverage into liability coverage, and any prohibited coverage exclusion was merely incidental to that purpose. Acuity now appeals.

DISCUSSION

¶4 At the outset of its decision, the circuit court explained: "The issue has been concisely set forth by the Plaintiff [in] her brief indicating the issue before the … court … is whether the exclusion [Liberty Mutual] relies upon is allowed by [WIS. STAT. §] 632.32(5)(e) or prohibited by [WIS. STAT. §] 632.32(6)." On appeal, Acuity fails to adequately address this core question or the circuit court's reasoning.

¶5 Rather, Acuity avoids the core question altogether, by repeatedly omitting much of WIS. STAT. § 632.32(5)(e)'s language. As set forth above, the statute is comprised of two sentences. Acuity, however, *twice* sets it forth as follows: "A policy may provide for exclusions not prohibited by sub. (6) or other applicable law …." Acuity fails to recite or address the second sentence of the statute, which allows otherwise prohibited exclusions if they are merely incidental

to the provision's main purpose. In its reply brief, Acuity takes its misdirection even further. It states:

> Citing [WIS. STAT. § 632.32(6)(b)2.a.], Liberty Mutual reasons that "if the *primary* purpose of this exclusion is to exclude coverage for passengers, the exclusion[] is invalid." … Liberty Mutual then concludes that because it is not the *primary* purpose of Liberty Mutual's clause to exclude passenger[s], it is valid. However, Liberty Mutual fails to cite any authority to support such a statutory interpretation.
>
> Contrary to Liberty Mutual's position, neither the statute nor case law requires the exclusion to have a "primary purpose" of excluding passengers in order to be invalid.

¶6 Acuity's position is unavailing. Ignoring or denying the existence of statutory language is not reasonable appellate advocacy. Rather, it serves to undermine the credibility of Acuity's entire appeal. Moreover, by failing to address the circuit court's primary rationale, Acuity has conceded the validity of the court's decision. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). We may affirm on this basis alone. Nonetheless, we will address Acuity's various arguments.

¶7 Acuity argues the exclusion is prohibited by WIS. STAT. § 632.32(6)(b)2.a., which prohibits excluding coverage for "[a]ny person who is a named insured or passenger in … the insured vehicle … with respect to bodily injury … to that person." Liberty Mutual acknowledges that this statute would prohibit applying its exclusion to Hutchison. However, we agree with it and the circuit court that the primary purpose of the exclusion is to prevent the conversion

of inexpensive underinsured motorist coverage into costlier liability coverage.[4] In effect, the exclusion prevents double-dipping; it prevents occupants of the insured's vehicles from receiving both liability and underinsured motorist benefits from Liberty Mutual when an operator's negligence results in bodily injury. Thus, the policy exclusion is permissible under § 632.32(5)(e) because the violation of (6)(b)2.a.—excluding coverage to passengers—is merely incidental to the exclusion's main purpose. Indeed, the policy still provides passengers with liability benefits for the driver's negligence, and provides underinsured motorist coverage to those occupants for injuries caused by *other* vehicles.

¶8 Acuity also argues the policy exclusion is unenforceable because, at the time of the accident, WIS. STAT. § 632.32(4) required that all automobile insurance policies must include underinsured motorist coverage, and because § 632.32(3)(a) and (2)(h) required the policy to provide anyone using the vehicle the same coverage provided to named insureds. The policy exclusion here did, however, provide uninsured motorist coverage to all vehicle occupants for injuries caused by other vehicles, and it treated all users the same regardless whether they were named insureds.

¶9 Next, Acuity argues the circuit court erred by relying on ***Vieau v. American Family Mut. Ins. Co.***, 2006 WI 31, 289 Wis. 2d 552, 712 N.W.2d 661. Acuity asserts ***Vieau*** held the exclusion there was permitted under WIS. STAT. § 632.32(5)(e) because at that time underinsured motorist coverage was not

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[4] Additionally, because Acuity has not specifically replied to Liberty Mutual's argument concerning the policy exclusion's main purpose, Acuity has conceded the matter. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

required by statute. Acuity is mistaken. ***Vieau*** addressed the second half of the statute—which Acuity ignores—and determined the exclusion was permissible because, while it violated the prohibition against excluding coverage for relatives, its main purpose—excluding coverage for persons who owned their own vehicles—was not prohibited. *See **id.***, ¶¶23, 28. Just as in ***Vieau***, here the party who was excluded from underinsured motorist coverage had the ability "to determine the extent to which they want[ed] to protect themselves against inadequately insured tortfeasors …." ***Id.***, ¶¶27-28. That is, Hutchison's parents could choose to purchase as much underinsured motorist coverage as they wanted. Hutchison did, in fact, receive underinsured motorist benefits from Acuity, and her parents could have opted to purchase more coverage.

¶10 Acuity next contends the policy exclusion was impermissible because it rendered the policy's "underinsured motor vehicle" definition more restrictive than the definition provided in WIS. STAT. § 632.32(2)(e). That statute, however, merely identifies what an underinsured motor vehicle is; it does not set forth any requirement that insurers must insert that language into their policies. Nor does the statute address coverage exclusions. Aside from the exclusion, the policy definition is consistent with the statutory definition.

¶11 Acuity also argues Liberty Mutual's policy exclusion violates WIS. STAT. § 632.32(5)(j). Subsection (5), however, titled "PERMISSIBLE PROVISIONS," merely sets forth various categories of *permissible* provisions. It does not set forth any prohibited provisions. Instead, those are found in subsection (6), titled "PROHIBITED PROVISIONS." Whether the policy provision is allowed under paragraph (5)(j) is irrelevant. We have already determined, as did the circuit court, that the provision was permitted by para. (5)(e).

¶12 Finally, Acuity argues the underinsured motor vehicle exclusion is an impermissible reducing clause prohibited by WIS. STAT. § 632.32(6)(g). Acuity contends the exclusion operated as a reducing clause because Liberty Mutual subtracted its $250,000 liability coverage from the $250,000 underinsured motorist coverage so as to reduce Hutchison's underinsured motorist coverage to zero.

¶13 Acuity's position is not grounded in reality. Just because the two coverage types had the same limits does not mean Liberty Mutual attempted to offset one against the other. Liberty Mutual did not start at $250,000 in available underinsured motorist coverage and then subtract the $250,000 in liability benefits paid. Rather, Liberty Mutual started and ended with zero underinsured motorist coverage because the policy excluded coverage under the circumstances. In any event, the exclusion's main purpose was not to act as a reducing clause. Thus, even if we pretended the exclusion did incidentally violate WIS. STAT. § 632.32(6)(g), it would still be permissible under para. (5)(e).

By the Court.—Judgment affirmed.

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