COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1798 **Cir. Ct. No. 2012CV331**

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

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

PETITIONER-RESPONDENT,

V.

JAMES L. NERO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. James Nero appeals an order of the circuit court: (1) compelling Nero to arbitrate an insurance coverage dispute with American Family Mutual Insurance Company before a panel of three arbitrators in Sauk County; (2) ordering the appointment of a third arbitrator; and (3) enjoining Nero

and American Family from participating in arbitration in Illinois solely before Nero's designated Illinois arbitrator. For the reasons discussed below, we affirm.

BACKGROUND

¶2 On October 5, 2002, Nero, who resided at the time in Colorado, purchased an automobile policy from American Family, which was effective from that date until January 5, 2003. The policy included uninsured and underinsured motorist coverage, and contained an arbitration clause in the event the parties did not agree on an insured's entitlement to payment under the uninsured/underinsured motor vehicle coverage. The arbitration clause provided:

> We or an Insured person may demand arbitration if we do not agree:
>
> 1. That the person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle.
>
> 2. On the amount of payment under this Part.
>
> If so, you and we will each select one arbitrator. The two arbitrators will choose a third. If they cannot do so within 30 days, the judge of a court of record in the county in which arbitration is pending will appoint the third arbitrator. The Insured person will pay the arbitrator he or she selects. We will pay our arbitrator. The expense of the third arbitrator and other related expenses will be shared equally. Arbitration will take place in the county where the Insured person lives. Local court rules governing procedures and evidence will apply. The decision in writing of any two arbitrators will be binding subject to the terms of this insurance.

¶3 The following are undisputed facts. On October 12, 2002, Nero was involved in a motor vehicle accident in Illinois. American Family paid "personal injury protection" benefits to Nero for the care he received following the accident. In September 2003, Nero moved to Wisconsin. Sometime after 2006, Nero made an additional claim under the policy's personal injury protection and

uninsured/underinsured motorist coverage, which American Family denied on the basis that any injuries Nero was suffering at that time were related to intervening work place accidents.

¶4 On March 1, 2012, Nero notified American Family that an arbitration hearing on his claim was scheduled for March 5, 2012, before his appointed arbitrator, Joseph Casciato, in Illinois.[1] In a letter dated March 13, 2012, American Family notified Nero and Casciato that it had appointed Angela Bartell as a second arbitrator pursuant to the arbitration provision of the policy.

¶5 On April 4, 2012, Casciato and Bartell conferred by telephone. In a memorandum prepared on that date by Bartell regarding her conversation with Casciato, Bartell wrote that Casciato did not intend to participate with Bartell in appointing a third arbitrator and that he intended on determining unilaterally whether American Family had "waived its right to appoint an arbitrator and waived its right to a three-arbitrator panel and should be compelled to proceed with arbitration with a sole arbitrator appointed by [] Nero."

¶6 In April 2012, American Family commenced the present action in the Sauk County Circuit Court to compel Nero to participate in a three-arbitrator panel arbitration in Sauk County, and for the appointment of a third arbitrator by the court. In May 2012, the circuit court granted American Family's petition. The court ordered that the arbitration would take place in Sauk County unless

[1] Prior to scheduling arbitration before Joseph Casciato in Illinois, Nero brought suit against American Family in the United States District Court for the Northern District of Illinois. That case, which was later transferred to the United States District Court for the District of Colorado, is not at issue here.

otherwise agreed to by all three arbitrators. The court further ordered that on or before June 1, 2012, Nero would advise American Family and the court whether Casciato would continue as his designated arbitrator for arbitration in Sauk County and if Casciato would not, Nero was ordered to advise American Family and the court of his new designate arbitrator. The court also appointed Mark Frankel as the third arbitrator in the event that American Family's and Nero's appointed arbitrators could not agree on the designation of the third arbitrator.

¶7 On June 20, 2012, Nero's attorney emailed arbitrator Casciato "to inquire as to the status of [Casciato's] ruling on the issues pending before [him]" with respect to the arbitration between Nero and American Family. In mid-July 2012, Casciato issued an "order" finding in part that: Illinois was a proper venue for arbitration of the dispute; American Family waived its right to appoint a second arbitrator; and American Family's petition to the circuit court in this case was void because it violated the terms of the policy and the Sauk County Circuit Court has no jurisdiction over the arbitration. Based upon his findings, Casciato set a hearing date for August.

¶8 After the issuance of arbitrator Casciato's July "order," American Family moved the circuit court for an order holding Nero in contempt of the court's May 2012 order compelling arbitration in Sauk County. American Family also moved the court for a temporary restraining order and permanent injunction prohibiting Nero from participating in arbitration proceedings in Illinois. The court denied American Family's contempt motion and motion for a temporary restraining order, but granted American Family's motion for an injunction. In a July 2012 order, the court "re-adopt[ed] and reaffirm[ed] its May 8, 2012 Order" and "enjoined and prohibited" the parties from arbitrating Nero's coverage dispute before Casciato sitting alone as the sole arbitrator. The court ordered Nero to

advise it, American Family, and arbitrators Bartell and Frankel of the name of the arbitrator he designated for the three-arbitrator panel, which could be Casciato only if Casciato was willing to participate as part of the three-arbitrator panel. Nero Appeals.

DISCUSSION

¶9 Nero challenges the circuit court's July 2012 order compelling him to arbitrate the coverage dispute in Sauk County before a three-arbitrator panel and enjoining him from participating in arbitration before Judge Casciato in Illinois.[2] Nero's arguments fit into three categories: (1) arguments pertaining to where arbitration must be held and the circuit court's jurisdiction over the proceeding; (2) arguments pertaining to the makeup of the arbitration panel; and (3) arguments pertaining to the court's order of injunctive relief.

A. Arbitration Location and Jurisdictional Arguments

¶10 The circuit court determined that under the terms of the policy, arbitration must be held in Sauk County. Nero contends that the court's interpretation of the contract was wrong and that arbitration could be held in any number of locations, including where he lived at the time the policy was issued, where he lived at the time of the accident giving rise to the coverage dispute, or

[2] American Family contends that Nero's appeal should be dismissed because it is taken from an order compelling arbitration, which is a nonfinal, nonappealable order. An order compelling arbitration that is entered in an action in which other claims remaining pending is nonfinal. *See* ***Leavitt v. Beverly Enters., Inc.***, 2010 WI 71, 326 Wis. 2d 421, 784 N.W.2d 683. However, in this case, no other claims for relief remained pending once the court ordered arbitration, and the action was terminated. *See, e.g.,* ***Pilgrim Inv. Corp. v. Reed***, 156 Wis. 2d 677, 684, 457 N.W.2d 544 (Ct. App. 1990). Thus, the July 31, 2012 order was the final order terminating the litigation over the claim for arbitration.

where he presently lives. He claims that because he lived in Illinois at the time of the accident giving rise to the coverage dispute, arbitration in Illinois was authorized under the policy and thus, arbitration is properly pending before arbitrator Casciato in that state and the Sauk County Circuit Court lacks jurisdiction over the arbitration.

¶11 To determine where the agreed-upon location or locations where the arbitration could take place requires that we interpret the parties' insurance agreement. Insurance policy interpretation presents a question of law, which we review de novo. ***Frank v. Wisconsin Mut. Ins. Co.***, 198 Wis. 2d 689, 693-94, 543 N.W.2d 535 (Ct. App. 1995).

¶12 Our goal in interpreting an insurance policy is to give effect to the intentions of the parties; however, "'subjective intent is not the be-all and end-all.'" ***Tufail v. Midwest Hospitality, LLC***, 2013 WI 62, ¶25, ___ Wis. 2d ___, ___ N.W.2d ___ (2013) (quoted source omitted). Where the language of the contract is clear and unambiguous, we construe the contract as it stands. ***Id.*** In doing so, we give the policy terms their plain meaning—the meaning a reasonable person in the position of the insured would give them. *See* ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis. 2d 437, 447, 492 N.W.2d 131 (1992). We will not rewrite unambiguous policy terms to bind an insurer to a risk it never contemplated and for which it was never paid. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 122, 403 N.W.2d 747 (1987). However, if contract language is ambiguous, meaning it is susceptible to more than one reasonable interpretation, we will construe the policy language in favor of the insured. ***Folkman v. Quamme***, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857.

¶13 The parties' insurance policy provided in relevant part that "[a]rbitration will take place in the county where the Insured person lives."

¶14 Nero asserts that the portion of the arbitration clause directing where arbitration is to take place is ambiguous because the word "lives" can be understood to have multiple meanings, including: "where the insured is dwelling for a time; [] where the insured has established a physical and/or legal residence; [] where the insured would be considered to be a domiciliary; or [] some other point in time." He also argues that the word "lives" is ambiguous because it is unclear what timeframe the term references. He argues that "lives" could refer to the location where the insured was living when the policy was issued; at any point during the duration of the policy, at the time when the insured's claim for coverage was denied, at the time the insured sought arbitration; or at the time the arbitration proceeding takes place. Nero argues that because the policy provision is ambiguous as to where arbitration must take place, the provision must be construed in his favor. Nero further argues that giving the policy this construction, arbitration was properly brought in Illinois because at the time of the accident giving rise to the coverage dispute, Nero was living in Illinois. We do not agree.

¶15 The key inquiry for determining whether contractual language is ambiguous is whether the language is susceptible to more than one *reasonable* interpretation. ***Hirschhorn v. Auto-Owners Ins. Co.***, 2012 WI 20, ¶23, 338 Wis. 2d 761, 809 N.W.2d 529. The fact that a word has more than one meaning, or that the parties disagree as to that meaning, does not make the word ambiguous if only one meaning comports with the parties' objectively reasonable expectations. ***Id.***; ***United States Fire Ins. Co. v. Ace Baking Co.,*** 164 Wis. 2d 499, 503, 476 N.W.2d 280 (Ct. App. 1991). We conclude that the term "lives" is

not ambiguous in this case because it is susceptible to only one *reasonable* meaning in this case.

¶16 "Live" is defined as "to occupy a home." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1323 (1993). The policy's use of the present tense form of the term plainly refers to location where the insured is presently occupying a house, not where the insured occupied a house at some point in the past. Giving the policy its plain meaning, we conclude that under the terms of the arbitration clause, arbitration is to take place in the county where the insured presently occupies a house.

¶17 The evidence before this court reflects that Nero moved to Sauk County in 2003, continued to reside there without interruption until the time the circuit court entered its July 2012 order, and Nero does not argue otherwise. Accordingly, under the terms of the policy, Sauk County, not Illinois, is the proper venue for arbitration.[3]

¶18 Nero argues that he initiated the arbitration proceeding in March 2009 in Illinois, and because the arbitration proceeding has been pending in Illinois since that time, the circuit court lacked subject matter jurisdiction to interfere with the pending arbitration. We are not persuaded. Nero presents no legal support for his view that an improper arbitration proceeding initiated elsewhere trumps an appropriate proceeding—one commenced in accordance with the policy—simply because the improper arbitration proceeding was initiated first.

[3] For the reasons discussed in ¶¶10-17, we reject Nero's argument that the circuit court lacked competency to "divest" him of his contractual right to arbitrate the coverage dispute in Illinois.

For this same reason, we reject Nero's argument that arbitrator Casciato's July 2012 "order" was binding on the circuit court.

B. Arbitration Panel

¶19 Nero contends that the circuit court erred in appointing arbitrator Frankel as the third arbitrator, and in allowing American Family the right to appoint a second arbitrator.

¶20 Nero argues that the appointment of the arbitrator Frankel by the court "defie[d] the clear intention of the parties as evinced by the language of the … [p]olicy" because Frankel was suggested to the court by American Family and thus American Family, not the court, appointed the third arbitrator. We do not agree.

¶21 The policy provided that if the arbitrators selected by American Family and Nero were not able to choose a third arbitrator within thirty days, "the judge of a court of record in the county in which arbitration is pending will appoint the third arbitrator." That is precisely what occurred here. Nothing in the policy suggests that the third arbitrator may not be recommended by a party. Furthermore, Nero has not presented this court with any evidence, or persuasive argument, that the court "rubber-stamped" the appointment of the arbitrator suggested by American Family. To the contrary, the record shows that the court asked each party for a suggestion as to who should be appointed as the third arbitrator. Each party suggested at least two arbitrators, the court asked Nero's counsel to send it a letter with the names with his suggestions as well as their contact information, and the court informed the parties it would pick the arbitrator.

¶22 Nero also argues that the circuit court lacked authority to appoint a third arbitrator because arbitration was pending in Illinois and thus only a court in Illinois had authority to appoint a third arbitrator. We reject this assertion for the reasons discussed above in ¶¶10-17.

¶23 With regard to American Family's appointment of the second arbitrator, Nero argues that American Family waived its right to appoint a second arbitrator. Whether a party's conduct constitutes waiver of a right presents a mixed question of fact and law. ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶41, 346 Wis. 2d 635, 829 N.W.2d 522. A circuit court's factual findings will be set aside only if those findings are clearly erroneous; however, the application of those facts to the legal standard, in this case waiver, is a question of law that we review de novo. ***Id.***

¶24 Waiver is the intentional relinquishment or abandonment of a known right. ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Nero argues that because American Family "did not attempt to appoint an arbitrator until March 13, 2012," despite having notice as early as December 2007 that Nero demanded arbitration and despite having received in March 2009 a letter from Nero's attorney demanding arbitration and requesting that American Family appoint its own arbitrator, American Family has "waived" its right to do so.

¶25 The only "evidence" to which Nero cites this court is the July 2012 "order" issued by arbitrator Casciato, wherein Casciato observed that Nero made demands for arbitration in 2007 and 2009, and found that Nero did not revoke his demand for arbitration. Arbitrator Casciato's July 2012 "order" does not support Nero's waiver argument because it does not demonstrate an intentional abandonment of a known right. Because Nero has failed to provide record cites

for purported evidence substantiating his claim that American Family waived its right to appoint an arbitrator, the argument will not be considered further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).[4]

C. Injunctive Relief

¶26 Nero contends the circuit court erroneously exercised its discretion by entering an injunction enjoining him from participating in arbitration before arbitrator Casciato in Illinois because the court failed to make a record of the factors relevant to its decision to enjoin Nero from participating in arbitration in Illinois.

¶27 Whether to grant injunctive relief is left to the discretion of the circuit court and the court's decision will be affirmed unless it is an erroneous exercise of discretion. ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 76, ¶126, 334 Wis. 2d 620, 800 N.W.2d 518. A circuit court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach. ***Id.***

¶28 Courts have inherent power to grant a remedy appropriate to the particular facts in the case. ***Gabe v. City of Cudahy***, 52 Wis. 2d 13, 19, 187 N.W.2d 874 (1971). The injunction in this case was an effective remedy against Nero's continued pursuit of arbitration in Illinois before arbitrator Casciato. In

[4] To the extent that Nero meant to argue that American Family *forfeited*, or failed to make the timely assertion of, its right to appoint an arbitrator, Nero has failed to cite any legal authority in support of that argument. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining the difference between forfeiture and waiver).

May 2012, the circuit court entered an order compelling arbitration of the coverage dispute in Sauk County before a three-arbitrator panel. Despite the court's order, Nero continued to pursue arbitration of the dispute in Illinois before Casciato, who entered an "order" setting an arbitration date before him in Illinois in August 2012. Absent the injunction, Nero would presumably have continued to pursue the Illinois arbitration, in contravention of the circuit court's jurisdiction and authority, necessitating additional litigation in this matter. Accordingly, we conclude that the injunction was not an erroneous exercise of the court's discretion.

CONCLUSION

¶29 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.