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May 13, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1934

David A. Zien, Kathleen Sebelius , US Secretary of the Dept. of Health & Human Services v. Wadena Insurance Company, United Health Care of Wisconsin, Inc. (L.C. #2011CV16402)

Before Curley, P.J., Fine and Brennan, JJ.

David A. Zien appeals a summary judgment in favor of Wadena Insurance Company. The circuit court held that car insurance policies Wadena Insurance issued to Zien did not provide uninsured motorist coverage for an accident he had while driving his motorcycle. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reverse.

Zien, a Wisconsin resident, was driving one of his two motorcycles in Florida on March 13, 2011, when he was injured in an accident with a motorist whose \$12,500 liability insurance limit was concededly less than the amount necessary to compensate Zien for all of his injuries. Zien collected underinsured motorist coverage pursuant to his motorcycle insurance policies with Progressive Northern Insurance Company. He next filed suit in Wisconsin to recover additional benefits under his car insurance policy with Wadena Insurance.¹ The parties agreed that, under the terms of the Wadena Insurance policy, his claim was for uninsured motorist coverage.² Wadena Insurance then moved for summary judgment, relying on an exclusion in the car insurance policy that barred coverage for an accident involving a vehicle that the insured owned, that was not newly acquired, and that was not listed on the policy. The circuit court agreed with Wadena Insurance, granted it summary judgment, and dismissed Zien's complaint. He appeals.

A few weeks before Zien filed his opening appellate brief, this court ordered publication of our decision in *Belding v. Demoulin*, 2013 WI App 26, 346 Wis. 2d 160, 828 N.W.2d 890 (*Belding I*), *aff'd*, 2014 WI 8, 352 Wis. 2d 359, 843 N.W.2d 373 (*Belding II*). In *Belding I*, we

¹ The parties do not dispute that the insurance contract between Zien and Wadena Insurance is governed by Wisconsin law or that Zien properly filed his action in this state.

² The Wadena Insurance policy at issue here defines "uninsured motor vehicle" as a vehicle covered by a bodily injury insurance policy with limits less than the applicable minimum limits for bodily injury liability required by the Wisconsin financial responsibility law. The parties do not dispute that \$12,500 is less than the minimum required under that law.

concluded that, under the law in place from November 1, 2009, until November 1, 2011, insurers could not prevent insureds from adding together their uninsured motorist coverage limits “for up to three vehicles owned and insured by the same insured.” *Id.*, 2013 WI App 26, ¶21, 346 Wis. 2d at 172, 828 N.W.2d at 896.

We held Zien’s appeal in abeyance when the supreme court accepted review of our decision in *Belding I*. The supreme court affirmed. *See Belding II*, 2014 WI 8, ¶5, 352 Wis. 2d at 363, 843 N.W.2d at 375. *Belding II* controls the outcome here.

Summary judgment is appropriate only when no genuine dispute exists as to any material fact, and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Whether the circuit court properly granted summary judgment is a question of law for our *de novo* review. *Belding II*, 2014 WI 8, ¶13, 352 Wis. 2d at 366, 843 N.W.2d at 376.

The material facts here are undisputed. On March 13, 2011, Zien had a car insurance policy in effect from Wadena Insurance. Language in that policy excludes coverage for an accident arising out of Zien’s use of a vehicle that Zien owned, that was not newly acquired, and that was not described on the declarations page of his policy. On March 13, 2011, Zien was injured in an accident with a motorist who was uninsured (as that term was defined by the Wadena Insurance policy) while Zien was driving a motorcycle that he owned, that he had not newly acquired, and that was not described on the declarations page of his car insurance policy. The only question is whether these facts entitle Wadena Insurance to summary judgment on the ground that its car insurance policy does not provide Zien with uninsured motorist coverage for damages resulting from the accident.

The undisputed facts do not earn Wadena Insurance summary judgment because, at the time of the accident in this case, Wisconsin law provided:

[n]o 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 uninsured motorist coverage or underinsured motorist 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, except that a policy may limit the number of motor vehicles for which the limits for coverage may be added to 3 vehicles.

WIS. STAT. § 632.32(6)(d) (2009–10).³

In *Belding II*, the supreme court considered WIS. STAT. § 632.32(6)(d) (2009–10), in relation to facts markedly similar to those here. The insured parties in *Belding II* had two insurance policies, each providing coverage for one of the insureds' cars.⁴ See *id.*, 2014 WI 8, ¶¶41, 352 Wis. 2d at 377, 843 N.W.2d at 381. After the insureds suffered damages arising out of a car accident with an uninsured motorist, the insurance company paid the insureds the maximum amount permitted under the policy covering the car used in the accident. *Id.*, 2014 WI 8, ¶¶6–7, 352 Wis. 2d at 363–364, 843 N.W.2d at 375. The insureds then sought to collect their excess damages through the uninsured motorist coverage provided in the policy covering the

³ Although the parties dispute the effect of WIS. STAT. § 632.32(6)(d) (2009–10), the parties do not dispute that the statute governs here. The statute went into effect on November 1, 2009. See 2009 Wis. Act 28, §§ 3168, 9426(2). Wadena Insurance issued its policy to Zien on October 14, 2010. Zien had his accident on March 13, 2011, while his Wadena Insurance car insurance policy and § 632.32(6)(d) were both in effect. The legislature has amended and renumbered § 632.32(6)(d), effective November 1, 2011. See 2011 Wis. Act 14, §§ 23, 29.

⁴ The supreme court noted that the insureds had a third car with a separate insurance policy that the parties agreed was inapplicable to the damages sought. See *Belding v. Demoulin*, 2014 WI 8, ¶7 n.4, 352 Wis. 2d 359, 364 n.4, 843 N.W.2d. 373, 375 n.4 (*Belding II*).

insureds' other car. *Id.*, 2014 WI 8, ¶7, 352 Wis. 2d at 364, 843 N.W.2d at 375. The insurance company denied coverage under the second policy, relying on an exclusion for an accident arising out of an insured's use of a vehicle that the insureds owned, that was not newly acquired, and that was not described on the declarations page of that policy. *Id.*, 2014 WI 8, ¶9, 352 Wis. 2d at 364–365, 843 N.W.2d at 375. The supreme court rejected the insurance company's position.

To determine whether the insurer could enforce the policy exclusion at issue in *Belding II*, the supreme court applied the long-standing two-part test for determining the validity of insurance policy exclusions, a test set forth in WIS. STAT. § 632.32(5)(e). *See Belding II*, 2014 WI 8, ¶¶29, 42–43, 352 Wis. 2d at 372, 377–378, 843 N.W.2d at 379, 381–382. The court explained:

[f]irst, we look to see if the exclusion is prohibited under [WIS. STAT. § 632.32] subsection (6). If a prohibition applies, the exclusion is barred. Second, if no prohibition in subsection (6) applies, then we look to see if any other law bars the exclusion. If neither prevents the exclusion, it is permissible.

Belding II, 2014 WI 8, ¶42, 352 Wis. 2d at 377, 843 N.W.2d at 381–382. In light of WIS. STAT. § 632.32(6)(d) (2009–10), the supreme court concluded that it need not proceed past the first step of the test. *Belding II*, 2014 WI 8, ¶43, 352 Wis. 2d at 377, 843 N.W.2d at 382. The court determined that § 632.32(6)(d) “expressly prohibits insurers from using policy exclusions that would limit an insured’s ability to add the uninsured or underinsured motorist coverage of up to three vehicles.” *Belding II*, 2014 WI 8, ¶26, 352 Wis. 2d at 371, 843 N.W.2d at 379. Therefore, the insurer could not rely on an exclusion in its policy to prevent an insured from adding the uninsured motorist coverage provided under one of the insured’s policies to the uninsured

motorist coverage provided under another of the insured's policies. *Id.*, 2014 WI 8, ¶43, 352 Wis. 2d at 377–378, 843 N.W.2d at 382. That analysis governs here.

We add that we have considered the parties' discussion of a difference between the facts here and those underlying the *Belding* cases. In this case, Wadena Insurance insured only Zien's cars.⁵ It did not issue any policy identifying as an insured vehicle the motorcycle that Zien drove during the accident. In the *Belding* cases, by contrast, the same insurance company issued all of the policies under which the insureds sought to recover damages. We concluded that a similar factual distinction made no legal difference in *Saladin v. Progressive Northern Insurance Company*, No. 2012AP1649, unpublished slip op., ¶17 (WI App June 4, 2013). There, we determined that neither the language of the applicable statute nor the logic of our decision in *Belding I* suggested that the result in that case depended on the identity of the insurance company that issued any particular policy. *Saladin*, No. 2012AP1649, unpublished slip op., ¶17. The supreme court's decision in *Belding II*, like ours in *Belding I*, turned on the conclusion that an insurance company may not enforce an exclusion that the law forbids. *See Belding II*, 2014 WI 8, ¶43, 352 Wis. 2d at 377–378, 843 N.W.2d at 382; *see also Belding I*, 2013 WI App 26, ¶21, 346 Wis. 2d at 172, 828 N.W.2d at 896. The identity of the insurance company seeking to enforce the forbidden exclusion played no role in the supreme court's analysis. *Saladin* is therefore persuasive.

⁵ The Wadena Insurance policy covered Zien's two cars.

Because Wadena Insurance seeks to enforce an exclusion barred under governing Wisconsin law, we conclude that the circuit court improperly granted summary judgment to Wadena Insurance. Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and this matter is remanded for further proceedings consistent with this opinion and order.

Diane M. Fremgen
Clerk of Court of Appeals