



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 27, 2015

To:

Hon. Gerald P. Ptacek
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Michael J. Cerjak
John M. Swietlik Jr.
Kasdorf, Lewis & Swietlik, S.C.
11270 W. Park Place, #500
Milwaukee, WI 53224-3639

Brian J. Frank
Allstate & Encompass Ins. Staff Counsel
555 S. Executive Drive, #130
Brookfield, WI 53005-4220

Donna L. Ginzl
Brent William Jacobson
Anderson, O'Brien, Bertz, Skrenes & Golla
P.O. Box 228
Stevens Point, WI 54481-0228

Grace Marie Kulkoski
Peterson, Johnson & Murray, S.C.
3 S. Pinckney St., Ste. 900
Madison, WI 53703

Douglas W. Lehrer
Matthiesen, Wickert & Lehrer SC
P.O. Box 270670
Hartford, WI 53027-0670

Lisa T. Warwick
U.S. Attorney's Office
Rm. 530, Fed. Bldg.
517 E. Wisconsin Ave.
Milwaukee, WI 53202-4509

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

2014AP1173

Karen J. Wilks v. WEA Property & Casualty Insurance Company
(L.C. # 2012CV2768)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Karen J. Wilks appeals from a circuit court order granting summary and declaratory judgment in favor of Allstate Insurance Company. Wilks contends that the circuit court erred when it determined she was not entitled to underinsured motorist (UIM) coverage under her Allstate policy. 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 (2013-14).¹ We affirm the order of the circuit court.

This case arises out of a December 31, 2009 automobile accident. Wilks claimed injuries as a result of the accident and brought suit against the other driver. The other driver was insured by a liability policy that provided bodily injury coverage of \$250,000 per person.

At the time of the accident, Wilks was insured by Allstate in a policy that ran from September 15, 2009, to March 15, 2010. The policy included UIM coverage in the amount of \$100,000. It defined an “underinsured auto” as a motor vehicle “with a bodily injury liability limit (regardless of the amount **you** might actually recover) less than **your** Underinsured Motorists Coverage limit” (emphasis in original).

Wilks’ policy also included a reducing clause. That clause stated in relevant part:

The limit of this Underinsured Motorists Coverage shall be reduced by:

1. all amounts paid by or on behalf of any person or organization that may be legally responsible for the **bodily injury** for which the payment is made, including, but not limited to, any amounts paid under the **bodily injury** liability coverage of this or any other insurance policy.

(Emphasis in original).

Finally, Wilks’ policy also included a coverage changes clause. That clause provided:

When **we** broaden a coverage during the policy period without additional charge, **you** have the new feature if **you** have the coverage to which it applies. The new features applies [sic] on the date the coverage change is effective in **your** state. Otherwise, the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

policy can be changed only be endorsement. Any change in **your** coverage will [sic] made using the rules, rates and forms in effect, and on file if required, for **our** use in **your** state.

(Emphasis in original).

Wilks made a claim for UIM coverage under her Allstate policy. Allstate denied the claim due to the policy's definition of "underinsured auto" and reducing clause. It then moved for summary and declaratory judgment.

In opposing Allstate's motion, Wilks argued that her policy's UIM coverage was broadened in light of 2009 Wis. Act 28. Act 28 amended WIS. STAT. § 632.32 (2009-10) to adopt a more expansive definition of underinsured motor vehicles. *See* 2009 Wis. Act 28, § 3153. It also amended the statute to prohibit reducing clauses. *See* 2009 Wis. Act 28, § 3171. Although these changes related only to policies of insurance issued or renewed after the effective date of the Act (November 1, 2009), 2009 Wis. Act 28, §§ 9326(6) and 9426(2), Wilks argued that they applied to her on the Act's effective date by virtue of her policy's coverage changes clause.

The circuit court initially accepted Wilks' argument and denied Allstates' motion. However, it subsequently reversed itself and granted Allstate relief. This appeal follows.

In this case, we are asked to determine whether the circuit court properly granted summary and declaratory judgment. Whether summary judgment is properly granted presents a question of law, which we review independently. *Olson v. Farrar*, 2012 WI 3, ¶¶23-24, 338 Wis. 2d 215, 809 N.W.2d 1. The grant or denial of a declaratory judgment, meanwhile, is left to the circuit court's discretion. *Id.*, ¶24. However, when the exercise of that discretion turns upon a question of law, we review the question independently. *Id.* Here, the circuit court's grant of

declaratory judgment turned upon the interpretation of an insurance policy, which presents a question of law. *Id.*

On appeal, Wilks contends that the circuit court erred in granting summary and declaratory judgment to Allstate. She renews her claim that her policy's coverage changes clause mandated the application of 2009 Wis. Act 28 on its effective date of November 1, 2009, thereby broadening her policy's UIM coverage. We disagree.

We conclude that this case is analogous to the recently published decision of *Wolf v. American Family Mut. Ins. Co.*, 2015 WI App 36, __ Wis. 2d __, __ N.W.2d __. In that case, Wolf sustained injuries as a result of a December 8, 2009 car accident in which she was a passenger. *Id.*, ¶2. The driver's insurer paid Wolf its \$250,000 policy limit. *Id.* Wolf then made a claim for UIM coverage with her insurer, American Family, which had issued a policy on June 19, 2009, providing UIM coverage in the amount of \$250,000. *See id.*, ¶¶2-4. Wolf acknowledged that, under the terms of her policy, she was not entitled to receive UIM coverage for two reasons: (1) the driver was not an underinsured motorist as defined by the policy; and (2) the reducing clause would draw Wolf's coverage down to \$0, as she had already received \$250,000. *Id.*, ¶5. However, she cited her policy's elasticity clause² and argued that it required the application of 2009 Wis. Act 28 on November 1, 2009, thereby voiding her policy's definition of underinsured motorist and reducing clause. *Id.*, ¶7. The circuit court rejected Wolf's argument and granted judgment to American Family. *Id.* Wolf appealed. *Id.*

² The elasticity clause stated, "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." *Wolf v. American Family Mut. Ins. Co.*, 2015 WI App 36, ¶4, __ Wis. 2d __, __ N.W.2d __.

This court affirmed the circuit court's judgment. *Id.*, ¶15. In doing so, we noted that the changes in 2009 Wis. Act 28 simply did not exist for policies that were renewed or issued before November 1, 2009. *See id.*, ¶1. Accordingly, we concluded that there was no conflict requiring the application of the policy's elasticity clause. *Id.*

Applying the reasoning of *Wolf* to the present case, we reach a similar result. As noted, Wilks' policy was issued on September 15, 2009. Thus, at the time of her accident, the changes in 2009 Wis. Act 28 did not exist for policies like hers. We do not read the coverage changes clause as requiring Allstate to change its policy and broaden its coverage before the law required the change. Because the policy, as written, precluded Wilks from asserting a UIM claim under the circumstances, we affirm the order of the circuit court.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals