COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 17, 1997

NOTICE

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

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No. 96-3368

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

PATRICIA AUGER AND THOMAS AUGER,

PLAINTIFFS-APPELLANTS,

BLUE CROSS & BLUE SHIELD UNITED OF WI,
A DOMESTIC CORPORATION,

PLAINTIFF,

V.

LOIS ROGERS, AND SECURA INSURANCE,
A MUTUAL COMPANY,

DEFENDANTS,

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, AND UNITED FIRE & CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order and an order and judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Patricia and Thomas Auger appeal a summary judgment that rejected their claims against United Fire & Casualty Co. for underinsured motorist coverage, and against State Farm Mutual Automobile Ins. Co. for Lois Rogers' liability coverage. Patricia Auger sustained injuries in a car accident with Rogers, an operator of an oversized vehicle road escort service known as Rogers Escort Service. Rogers was driving Kenneth Goetz's car at the time of the accident, after completing an escort of a mobile home for Goetz, one of her customers. The Augers' United Fire policy furnished them underinsured motorist coverage if the other motorist's liability coverage limits were less than United Fire's underinsured coverage limits. The trial court denied the Augers United Fire claim on the ground that their underinsured limits equaled Goetz's liability insurance limits under his policy with Secura Insurance. It rejected the Augers' claim against Rogers' liability insurer, State Farm, on the ground that Rogers had no liability coverage for driving employer owned vehicles.

The trial court correctly granted summary judgment if the record revealed no dispute of material fact and the two insurers deserved judgment as a matter of law. *See* ***Powalka v. State Mut. Life Assurance Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). On appeal, the Augers raise three arguments: (1) United Farm's underinsured motorist coverage limits are invalid for deviating from insureds' rational expectations; (2) the trial court should have stacked underinsured limits from the Augers' four United Fire policies before comparing

these limits to Goetz's Secura liability coverage; and (3) the trial court misapplied the State Farm liability provision on employer owned vehicles. The Augers also ask us to certify this appeal to the Wisconsin Supreme Court. We reject the Augers' arguments on underinsured motorist coverage. However, we agree that the trial court misapplied the State Farm liability provision on employer owned vehicles. We therefore affirm the summary judgment in part, reverse it in part, and remand the matter for further proceedings.

First, the Wisconsin Supreme Court has held that underinsured motorist provisions like United Fire's provide no coverage to those in the Augers' position. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 599 (1990). That decision binds this court, ***State v. Dowe***, 197 Wis.2d 848, 854, 541 N.W.2d 218, 220-21 (Ct. App. 1995), and modification of ***Smith*** must come from the Wisconsin Supreme Court. Second, we have already held that underinsured claimants may not stack the liability limits of multiple policies for multiple vehicles. *See* ***Krech v. Hanson***, 164 Wis.2d 170, 172-73, 473 N.W.2d 600, 601-02 (Ct. App. 1991). As a published decision, ***Krech*** has statewide precedential effect, *see* § 752.41(2), STATS., and is binding on future court of appeals cases. *See* ***State v. Solles***, 169 Wis.2d 566, 570, 485 N.W.2d 457, 459 (Ct. App. 1992). Modification of ***Krech*** must come from the Wisconsin Supreme Court. Inasmuch as these decisions definitively resolve these issues, we decline to certify this appeal to the Wisconsin Supreme Court.

Nonetheless, we agree with the Augers that the trial court misapplied Rogers' State Farm liability policy. Her State Farm policy denies coverage to insureds who are using an employer owned vehicle. At the time of the accident, Rogers was driving Goetz's vehicle, returning it after escorting an oversized load for Goetz. The trial court concluded that Goetz had "employed" Rogers and that

Rogers was thereby using an employer owned vehicle. The Augers state, however, that Goetz hired Rogers as an independent contractor, not as an employee in an employer-employee relationship. For example, Rogers stated via deposition that Goetz's work typically comprised only 10% of her road escort business; she drove for others more. She had occasionally hired other drivers and filed a Profit and Loss statement for her business with her income tax returns. In the trial court's view, however, Goetz had "employed" Rogers within the meaning of Rogers' State Farm liability policy, regardless of whether Rogers acted as an employee under an employer-employee relationship, or as an independent contractor with her own oversized vehicle escort business.

The term "employ" has more than one meaning. *See, e.g.,* **MERIAM-WEBSTER'S COLLEGIATE DICTIONARY** 379 (10th ed. 1994). This makes the State Farm employer owned vehicle clause ambiguous, as applied to the Auger-Rogers accident. *See* ***Garriguenc v. Love,*** 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975). The trial court defined the term "employ" in one of its broader senses—"to engage" someone's services, regardless of whether the engagement constituted an employer-employee relationship. *See* **MERIAM-WEBSTER'S COLLEGIATE DICTIONARY** 379 (10th ed. 1994); **WEBSTER'S DICTIONARY OF SYNONYMS** 291 (1942). The trial court gave no reason, however, for choosing this definition over other reasonable definitions. The trial court's choice of definitions was arbitrary and inappropriate on summary judgment. It also had the effect of applying an ambiguous coverage limiting provision in an expansive way. This violated the long-standing rule that courts must read such provisions in the insured's favor. *See* ***Patrick v. Head of the Lakes Coop. Elec. Ass'n***, 98 Wis.2d 66, 69, 295 N.W.2d 205, 207 (Ct. App. 1980). This error requires reversal, remand, and the issue's reexamination by the trial court.

On remand, the trial court must determine whether Rogers acted for Goetz pursuant to an employer-employee relationship or as an independent contractor. If she acted pursuant to an employer-employee relationship, then the State Farm policy furnished her no liability coverage. If she acted as an independent contractor, then the court must determine whether liability coverage was proved using the established rules of construction for ambiguous insurance policies. The trial court's determination may require it to resolve factual issues.

We will not consider, however, the Augers' supplemental argument that the State Farm employer owned vehicle clause amounts to an improper antistacking drive-other-car exclusion, in violation of § 631.43(1), STATS. The Augers did not raise this argument in the trial court, and we will not consider it on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Although we have no obligation to consider this previously unraised issue, the trial court may wish to consider it along with the other issues on remand.

By the Court—Order dismissing United Fire affirmed; order and judgment dismissing State Farm reversed; cause remanded for proceedings consistent with this opinion; the Augers to recover one-half their costs against State Farm; United Fire to recover all its costs against the Augers.

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