COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 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. 97-0381

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

MICHELLE MCCANN, BY HER GUARDIAN AD LITEM, ARDELL W. SKOW, CYNTHIA MCCANN AND BRYAN MCCANN,

PLAINTIFFS-APPELLANTS,

V.

METROPOLITAN PROPERTY & CASUALTY INS. CO.,

DEFENDANT-RESPONDENT,

WISCONSIN MUTUAL INS. CO.,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

LaROCQUE, J. Michelle McCann appeals a summary judgment finding that an automobile policy issued by Metropolitan Property & Casualty Insurance Co. provides no underinsured motorist (UIM) coverage. McCann argues that Wisconsin case law establishes that the policy is ambiguous and therefore should be construed in favor of coverage. Because we conclude that the policy language unambiguously denies coverage, we affirm.

The relevant facts are undisputed. McCann, a minor, was injured while a passenger in a vehicle driven by Rosann Buck, also a minor. The vehicle was insured by Buck's father under a policy issued by American Family Insurance Company, with liability limits of $50,000 per person and $100,000 per accident. McCann settled her claim with American Family for the $50,000 policy limits.

This amount, however, was inadequate to fully compensate McCann for her injuries. McCann therefore submitted a claim for UIM coverage against a policy issued to her mother from Metropolitan. That policy included an "Underinsured Motorists Coverage Endorsement," which stated that "[**w**]**e** agree with **you** that Section IV, Protection Against Uninsured Motorists Coverage is amended to include Protection Against Underinsured Motorists Coverage." The UIM endorsement also included the following provisions:

> **We** will pay **bodily injury damages**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured highway vehicle**, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **underinsured highway vehicle**. Any other **person occupying** a **covered automobile** has the same rights as **you**.
>
> ….
>
> Section VI, General Definitions, is amended as follows:

> (1) Item (b) of the definition of "covered automobile" is amended to add "Protection Against Underinsured Motorists Coverage."
>
> (2) "**underinsured highway vehicle**" means a motor vehicle with respect to which insurance or other financial security covering **bodily injury** is in effect at the time of the accident, in at least the minimum amount specified in the applicable motor vehicle financial responsibility law, compulsory insurance law, or other applicable law, but as to which the sum of the applicable limits of liability of such insurance and other financial security is less than the applicable limits of liability stated for Protection Against Underinsured Motorists Coverage in the Declarations. For purposes of Protection Against Underinsured Motorists Coverage, the applicable motor vehicle financial responsibility law, compulsory insurance law, or other similar applicable law shall be the law of the state in which the **covered automobile** is principally garaged.

This policy listed UM liability limits of $50,000 per person and $100,000 per accident, but does not list any limits for UIM coverage.

Metropolitan denied UIM coverage for McCann's injuries. McCann, by her guardian ad litem, filed a claim in circuit court demanding coverage. Metropolitan moved the court for summary judgment, which the court granted. McCann now appeals.

We review a motion for summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc***., 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App.1995); *see also* § 802.08(2), STATS. That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Although summary judgment presents a question of law that we review

de novo, we still value a trial court's decision on such a question. *See* ***id.*** at 497, 536 N.W.2d at 182.

The interpretation of an insurance policy is a question of law that this court decides independently of the trial court. ***Lambert v. Wrensch***, 135 Wis.2d 105, 115, 399 N.W.2d 369, 373-74 (1987). The policy language, as the agreed upon articulation of the bargain reached between the parties, is dispositive to the extent it is plain and unambiguous. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 599 (1990).

McCann's first argument seems to contend that because the UIM endorsement explicitly states that the UM section of the policy "is amended to include" UIM coverage, UIM coverage is provided by the policy in this case. We see no merit in this argument. McCann does not, and cannot, argue that she would be entitled to UM coverage in this case. It is undisputed that the Buck vehicle was insured for $50,000 per person and $100,000 per accident. Because Wisconsin merely requires a policy with limits of "$25,000 because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, $50,000 because of bodily injury to or death of 2 or more persons in any one accident," the Buck vehicle could not be an uninsured vehicle under the Metropolitan policy.[1] *See* § 344.33, STATS. Thus, the mere inclusion of UIM coverage within UM coverage in this case is not helpful to McCann.

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[1] The Metropolitan policy defines "uninsured highway vehicle" as:

> (a) A motor vehicle to which no insurance policy or other financial security is applicable at the time of the accident;
>
> (b) A motor vehicle with respect to which insurance or other financial security covering **bodily injury** is in effect at the time of the accident, but the amount of **bodily injury** coverage under

(continued)

McCann next argues that the policy is ambiguous and therefore must be interpreted in favor of coverage. *See* ***Kuhn v. Allstate***, 193 Wis.2d 50, 53, 532 N.W.2d 124, 128 (1993). We disagree that the policy is ambiguous. The UIM endorsement explicitly states that it provides UIM coverage for "**bodily injury damages**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured highway vehicle** …." The term "underinsured highway vehicle" is explicitly defined, in relevant part, as

> a motor vehicle with respect to which insurance or other financial security covering **bodily injury** is in effect at the
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>
> such insurance and other financial security is less than the amounts specified by an applicable motor vehicle financial responsibility law, motor vehicle compulsory insurance law, or similar applicable law. For the purposes of Protection Against Uninsured Motorists Coverage, the applicable law shall be the law of the state in which the **covered automobile** is principally garaged;
>
> (c) A motor vehicle which has a **bodily injury** liability bond or insurance policy in effect at the time of the accident, but the company writing such bond or policy denies coverage, or is or becomes insolvent; or
>
> (d) A hit and run **highway vehicle** which causes bodily injury to an **insured** as the result of striking the insured or a motor vehicle which he is **occupying** at the time of the accident, if:
>
> i. The identity of either the driver or owner of the hit and run vehicle is unknown;
>
> ii. The accident is reported within 24 hours to a police officer, a peace or judicial officer, or the Commissioner or Director of Motor Vehicles;
>
> iii. The **insured** or someone on his behalf files with **us** within 30 days of the accident a statement under oath that the **insured** or his legal representative has a cause of action due to the accident for **damages** against a **person** or **persons** whose identity is unknown; and
>
> iv. The **insured** or his legal representative makes available for inspection by **us**, when requested, the motor vehicle **occupied** by the **insured** at the time of the accident.

> time of the accident, in at least the minimum amount specified in the applicable motor vehicle financial responsibility law … but as to which the sum of the applicable limits of liability of such insurance and other financial security is less than the applicable limits of liability stated for Protection Against Underinsured Motorists Coverage in the Declarations.

Initially, we note that the Buck vehicle is not an "underinsured highway vehicle" under the American Family policy definition if, under its "applicable limits of liability" that limit was not less than any applicable limits of liability found in the Metropolitan policy. Metropolitan contends that the limits of both policies were $50,000 per person and $100,000 per accident. We agree.

McCann, however, argues that in order to qualify as "underinsured" under the Metropolitan policy language, the tortfeasor's limits must be less than the "applicable limits of liability stated for Protection Against Underinsured Motorists Coverage in the Declarations." McCann then points out that the Metropolitan declarations page lists no limits for UIM coverage, thereby creating an ambiguity within the policy. It is true that the declarations page does not include a reference to UIM limits but only UM limits. McCann would end the inquiry here and have us conclude that the ambiguity must be construed in favor of coverage. However, in construing a written contract, the entire instrument must be considered as a whole in order to give each of its provisions the meaning intended by the parties. ***Ketay v. Gorenstein,*** 261 Wis. 332, 333-34, 53 N.W.2d 6, 7 (1952).

When read in context, we conclude that the reference to UIM limits must mean the UM limits of $50,000/$100,000. We believe this is the only reasonable reading for several reasons. First, the UIM endorsement is tied directly to the UM provisions. The policy states that the "Protection Against Uninsured

Motorists Coverage" section is amended to include "Protection Against Underinsured Motorists Coverage."

Second, if the UM declaration coverage is not what was intended, it would render the UIM reference to the declarations page meaningless. That construction of an insurance contract should be avoided which renders portions of the contract meaningless, inexplicable or mere surplusage. ***Rockline Inc. v. Wisconsin Physicians Serv. Ins.,*** 175 Wis.2d 583, 593, 499 N.W.2d 292, 297 (Ct. App. 1993). The UIM provisions of the policy endorsement, read in context of the entire policy, including the declarations page, leads us to one conclusion: The policy provides UM and UIM limits of $50,000 per person and $100,000 per accident.

We also point out that the definition of "underinsured highway vehicle" in the Metropolitan policy is substantially similar to the definitions discussed in a series of cases beginning with ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 456 N.W.2d 597 (1990). Our supreme court in ***Smith*** examined a policy, which defined "underinsured motor vehicle" as: "A land motor vehicle … to which a bodily injury liability bond or policy applies at the time of the accident, *but its liability for bodily injury liability is less than the limit of liability for this coverage."* ***Id.*** at 811, 456 N.W.2d at 599 (emphasis in original). This definition is similar to the definition in this case because both define an underinsured situation as one where the tortfeasor's liability limits are less than the victim's limits. The ***Smith*** court found the above definition unambiguous and denied coverage. ***Id.***

The same result was reached by this court in ***Link v. General Cas. Co.***, 185 Wis.2d 394, 518 N.W.2d 261 (Ct. App. 1994); ***Krech v. Hanson***, 164

Wis.2d 170, 473 N.W.2d 600 (1991); and ***Engstrom v. MSI Ins. Co.***, 198 Wis.2d 195, 542 N.W.2d 481 (Ct. App. 1995). In each case, this court found substantially similar definitions of underinsured motor vehicle to be unambiguous. We conclude that these cases govern the instant case.

Next, McCann attempts to apply the holdings of ***Allstate Ins. Co. v. Gifford***, 178 Wis.2d 341, 504 N.W.2d 370 (Ct. App. 1993), and ***Sobieski v. Farmers Ins. Exch.***, 181 Wis.2d 324, 510 N.W.2d 796 (Ct. App. 1993), to the facts of this case. We conclude that those cases are not applicable to the instant controversy.

Gifford rejected the insured's attempt to stack two UIM provisions so as to meet the definition of an underinsured motor vehicle. That court decided, however, that the policy was illusory because it defined coverage so that, in practice, it will never be triggered, citing ***Hoglund v. Secura Ins.,*** 176 Wis.2d 265, 271, 500 N.W.2d 354, 356-57 (Ct. App. 1993), as governing authority. ***Gifford,*** 178 Wis.2d at 349, 504 N.W.2d at 373. ***Sobieski*** refused to allow the insurer to rely upon a "drive other cars" exclusion because such exclusions were deemed valid only in UIM and not UM situations. Because the policy in question in that case stated that an uninsured (UM) motor vehicle means a vehicle which is underinsured (UIM), the policyholder was entitled to the benefits of Wisconsin UM law and the exclusion was invalid. ***Id.*** at 330, 510 N.W.2d at 798. Neither ***Gifford*** nor ***Sobieski*** compel a construction of the Metropolitan policy so as to provide UIM coverage under the present facts. The tortfeasor's policy was not "less than the applicable limits of liability stated" in the Metropolitan policy.

McCann next asks this court to find UIM coverage because a reasonable insured would expect UIM coverage under the facts of this case. It

cites our supreme court's statement in ***Matthiesen v. Continental Cas. Co.***, 193 Wis.2d 192, 204, 532 N.W.2d 729, 734 (1995), that the "underlying purpose" of UIM coverage "is to compensate the victim of an underinsured motorist's negligence where the third party's liability limits are not adequate to fully compensate the victim for his or her injuries." McCann asserts that Metropolitan's definition of "underinsured highway vehicle" is in conflict with this purpose and therefore with a reasonable insured's expectation of coverage. *See* ***Krech***, 164 Wis.2d at 175 n. 2, 473 N.W.2d at 602-03 n.2.

We reject this argument. When an insurance policy is unambiguous, this court cannot look beyond the language employed to the parties' expectations. ***Smith***, 155 Wis.2d at 811, 456 N.W.2d at 599. We therefore end our analysis of the Metropolitan policy with its unambiguous language.

By the Court.—Judgment and order affirmed.

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