COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2004AP2386 **Cir. Ct. No. 2003CV424**

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

ALISON M. WELIN,

PLAINTIFF,

V.

ELIZABETH A. PRYZYNSKI, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, HONEYWELL INTERNATIONAL AND ACUITY,

DEFENDANTS,

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

WAUSAU BENEFITS,

THIRD-PARTY DEFENDANT,

JOSHUA J. OPICHKA,

THIRD-PARTY DEFENDANT-CROSS CLAIMANT-APPELLANT,

v.

HASTINGS MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Chippewa County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. The issue on this appeal is whether this policy definition of "underinsured motor vehicle" may validly preclude all underinsured motorist (UIM) coverage for this UIM insured, Joshua Opichka. The definition, in essence, compares the UIM limits of Opichka's policy to the limits of the tortfeasor's liability policy without regard to whether the tortfeasor is liable to another person injured in the accident, as is the case here. We conclude that ***Praefke v. Sentry Ins. Co.***, 2005 WI App 50, ____Wis. 2d ___, 694 N.W. 2d 442, is controlling and compels the conclusion that Opichka's vehicle is not an underinsured motor vehicle within the policy definition, even if the amount he receives under the tortfeasor's liability policy is less than the UIM limits and does not fully compensate him for his damages. We therefore affirm the circuit court's order dismissing Opichka's third-party complaint against his UIM insurer.

BACKGROUND

¶2 Opichka was a passenger in a car operated by Elizabeth Pryzynski. Pryzynski fell asleep at the wheel and her car crossed the centerline, striking a car driven by Alison Welin. There is no dispute that the accident was caused solely

by Pryzynski's negligence. Opichka sustained serious injuries, some of them permanent, and Welin was also seriously and permanently injured.

¶3 Pryzynski was insured at the time by Secura Insurance under a liability policy with a single combined limit of $300,000 ($300,000 per person and $300,000 per accident). Opichka was insured by Hastings Mutual Insurance Company under a policy providing UIM coverage with limits of $150,000 per person and $300,000 per accident.

¶4 Welin sued Pryzynski and Secura. Secura, in turn, filed a third-party complaint, asking for a declaratory ruling that the damages claimed by Opichka and Welin exceeded Pryzynski's $300,000 policy and no other liability coverage was available to her. Secura paid its policy limits to the court and asked the court to determine the allocation between Pryzynski and Opichka.

¶5 Opichka filed a third-party complaint against Hastings Mutual, claiming UIM coverage. Hastings Mutual filed a motion for a declaratory ruling that there was no UIM coverage for Opichka because Pryzynski's car did not meet the definition of an underinsured motor vehicle in the policy: "a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage." Relying on ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 456 N.W.2d 597 (1990), and ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, 245 Wis. 2d 134, 628 N.W.2d 916, Hasting Mutual argued that this definition was unambiguous. According to Hastings Mutual, because the limits of Pryzynski's liability policy were greater than those of Opichka's UIM policy—$300,000 per person as compared to $150,000 per person—the requirements of the definition were not met.

¶6 The circuit court agreed with Hastings Mutual and granted its motion. Accordingly, it entered an order dismissing Opichka's third-party complaint against Hastings.

¶7 All parties have since stipulated that Welin's injuries and damages exceed $250,000[1] and Opichka's injuries and damages exceed $50,000; the exact damages sustained by each remain to be litigated. In that same stipulation, Welin and Opichka agreed to a $250,000/$50,000 split of the $300,000 from Pryzynski's liability policy.

DISCUSSION

¶8 On appeal, Opichka challenges the circuit court's decision on a number of grounds. He contends the definition of underinsured motor vehicle, when applied to deny him all UIM coverage regardless of what he has recovered from Pryzynski, (1) is in effect a reducing clause that is prohibited by WIS. STAT. § 632.32(4m)(d) and 5(i);[2] (2) is an impermissible "other insurance" provision in violation of WIS. STAT. § 631.43(1); and (3) violates public policy. He also contends the definition is contextually ambiguous and therefore must be construed in his favor. Opichka's position is that the amount of UIM coverage available to him is the difference between what he has received from Pryzynski's liability policy and the $150,000 limit of his UIM policy.

[1] We note that the stipulation states that "Welin's injuries and damages exceed $250,000,000." However, Opichka states in his reply brief that all parties stipulated that "Welin's damages exceed the $250,000 she received from said coverage." We therefore assume the $250,000,000 amount stated in the stipulation was a typographical error.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶9 Resolution of these issues requires the application of case law, statutes, and insurance policy provisions to undisputed facts, all questions of law, which we review de novo. ***Van Erden v. Sobczak***, 2004 WI App 40, ¶¶11, 22, 271 Wis. 2d 163, 677 N.W.2d 718 (statutes and insurance policy provisions); ***Brown v. State***, 230 Wis. 2d 355, 363-64, 602 N.W.2d 79 (Ct. App. 1999) (statutes and case law).

¶10 On April 21, 2005, we released a decision in this case in which we agreed with Opichka's first argument identified in paragraph 8 and reversed the circuit court's order. We first concluded that ***Smith*** and ***Taylor*** did not resolve the issue presented in this case. In those two cases the UIM insureds had available the full limits of the tortfeasor's liability policy; in fact, in each case the tortfeasor's insurer paid the $50,000 limits to the UIM insured. ***Smith***, 155 Wis. 2d at 809; ***Taylor***, 245 Wis. 2d 134, ¶¶11-13. Therefore, the question did not arise whether the definition of "underinsured motor vehicle" would violate any statutory provision if applied to preclude all UIM coverage to an insured in the position of Opichka.

¶11 We then examined WIS. STAT. § 632.32(4m) and (5)(i),[3] both enacted by 1995 Wis. Act 21, and the supreme court's discussion of those statutes

[3] WISCONSIN STAT. § 632.32(4m) provides in part:

….

(continued)

in ***Dowhower v. West Bend Mut. Ins. Co.***, 2000 WI 73, 236 Wis. 2d 113, 613 N.W.2d 557, and ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223. From these cases, as well as our decision in ***Teschendorf v. State Farm Ins. Cos.***, 2005 WI App 10, ¶13, 278 Wis. 2d 354, 691 N.W.2d 882, we concluded that the legislature has sanctioned the theory of UIM coverage under which the UIM limit may be reduced by other sources only if: (1) the sources are

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> **(4m) Underinsured motorist coverage**. (a) 1. An insurer writing policies that insure with respect to a motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by a person arising out of the ownership, maintenance or use of a motor vehicle shall provide to one insured under each such insurance policy that goes into effect after October 1, 1995, that is written by the insurer and that does not include underinsured motorist coverage written notice of the availability of underinsured motorist coverage, including a brief description of the coverage. …
>
> ….
>
> (d) If an insured who is notified under par. (a) 1. accepts underinsured motorist coverage, the insurer shall include the coverage under the policy just delivered to the insured in limits of at least $50,000 per person and $100,000 per accident. …
>
> **(5) Permissible provisions**.
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> ….
>
> (i) A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.
>
> 2. Amounts paid or payable under any worker's compensation law.
>
> 3. Amounts paid or payable under any disability benefits laws.

limited to those specified in WIS. STAT. § 632.32(5)(i), (2) those permissible sources are paid or payable to the insured or the insured's heirs or estate, and (3) the insurance policy clearly sets forth that the insured is purchasing a fixed level of UIM recovery that will be arrived at by combining the statutorily permissible sources and UIM payments to the extent necessary to reach that fixed level. We further concluded that this legislative intent is thwarted if, because there is another injured person to whom the tortfeasor is liable, Opichka does not get the fixed level of UIM coverage he purchased, even though the statutorily permissible other sources he receives are less than that amount and do not fully compensate him. We therefore decided that the definition of "underinsured motor vehicle" is invalid if it compares the UIM limits to the limits of Pryzynski's liability policy without taking into account the amount available to Opichka after payment to Welin; if that amount was taken into account, Pryzynski's vehicle was underinsured. The result of our analysis was that Opichka had UIM coverage available to him of $100,000—the UIM limits of $150,000 reduced, according to the valid reducing clause in his policy, by the $50,000 Opichka received from Pryzynski.

¶12 After we released our decision, Hastings Mutual moved for reconsideration on the ground that ***Praefke*** controlled the outcome in this case. ***Praefke***, a District I case, was issued on December 28, 2004, and was initially not recommended for publication. However, on March 24, 2005, ***Praefke*** was ordered published. Therefore, ***Praefke*** controls if it resolved the same issue. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court has the power to overrule, modify, or withdraw language from a published decision of the court of appeals). On May 17, 2005, we withdrew our decision to give us the opportunity to consider the effect of ***Praefke*** on this case.

¶13 In ***Praefke***, Praefke's UIM policy had essentially the same definition of underinsured motor vehicle as in Opichka's policy; the tortfeasor had liability limits equal to Praefke's UIM limits—$100,000; Praefke received only $75,000 from the tortfeasor under his liability policy because the tortfeasor paid $25,000 to the estate of the passenger in his vehicle, who was killed in the accident; Praefke's damages far exceeded $75,000. 694 N.W.2d 442, ¶¶2-3. The court concluded that the definition of underinsured motor vehicle was unambiguous and plainly required a comparison of the limits of the UIM policy without regard to the amount paid to the other injured passenger's estate. ***Id.***, ¶1. The court also stated: "The case law has consistently performed the UIM analysis by comparing the limit of the liability policy to the limit of the UIM coverage, assuming of course that the policy at issue uses limits language." ***Id.***, ¶14.

¶14 The ***Praefke*** court did not address the specific arguments that Opichka raises to challenge denying all UIM coverage based on the definition of underinsured motor vehicle without regard to the amount paid under the tortfeasor's liability policy to another injured person to whom the tortfeasor was liable. Nonetheless, the ***Praefke*** court did decide that the definition plainly and properly applied without regard to that amount. We conclude that we must follow ***Praefke***. Accordingly, we hold that Pryzynski's vehicle was not underinsured under the definition in Opichka's policy and no UIM coverage is available to Opichka.

¶15 Although we follow ***Praefke***, we are persuaded that the arguments Opichka raises on this appeal merit consideration by an appellate court. We believe courts and litigants would benefit by supreme court review.

By the Court.—Order affirmed

Not recommended for publication in the official reports.