

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2007

A. John Voelker
Acting 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. 2006AP1635

Cir. Ct. No. 2004CV895

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**CAROL NESST, MICHAEL DIETSCHKE, CAROL NESST, AND
MICHAEL DIETSCHKE,**

PLAINTIFFS-APPELLANTS,

DOUGLAS F. MANN,

TRUSTEE,

v.

ALLSTATE INDEMNITY COMPANY,

DEFENDANT-RESPONDENT,

**ALLSTATE INSURANCE COMPANY, RYAN T. MOYER,
JEFFREY L. MOYER, AND KANDACE K. MOYER,**

DEFENDANTS.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Carol Nesst and Michael Dietsche, individually and as the special administrators of Estate of Matthew Dietsche (collectively Nesst), appeal an order declaring that Allstate Indemnity Company does not provide underinsured motorist coverage for an automobile accident that caused the death of Matthew Dietsche, their son. Nesst argues that the policy is ambiguous because the definition of an underinsured motor vehicle is nonexistent and that the reducing clause is contextually ambiguous. We affirm the circuit court’s order declaring there is no coverage.

¶2 Matthew was killed as a passenger in a one-car accident. The car was insured by a policy with liability limits of \$100,000 person and \$300,000 per accident. Matthew, a minor at the time of his death, lived with Carol. Carol and her husband carried an insurance policy with Allstate which provided underinsured motorist (UIM) coverage with limits of \$100,000/\$300,000. The circuit court concluded that because the liability limits of the driver’s policy were identical to the UIM limits in Nesst’s policy, no UIM coverage exists.

¶3 Although a claim for declaratory judgment is addressed to the circuit court’s discretion, the interpretation of an insurance contract is a question of law. *Praefke v. Sentry Ins. Co.*, 2005 WI App 50, ¶5, 279 Wis. 2d 325, 694 N.W.2d 442. “If an insurance policy is ambiguous as to coverage, it will be construed in favor of the insured. Provisions in an insurance policy are ambiguous if the language is ‘susceptible to more than one reasonable interpretation.’” *Id.* (citations omitted).

¶4 *Praefke* teaches that the first step in determining UIM coverage is to look at the definition of “underinsured motor vehicle” and determine whether the coverage is based on the damages sustained by the insured or on the underinsured motorist’s policy limits. *Id.*, ¶9. Nesst correctly points out that the Allstate policy does not separately define “underinsured motor vehicle.” However, we reject Nesst’s contention that the circuit court erred as a matter of law because it failed to consider the absence of a definition of “underinsured motor vehicle” or that as a matter of law the absence of a separate definition renders the coverage ambiguous.

¶5 The circuit court applied the *Praefke* procedure by first determining whether the UIM coverage was damage-based or limits-based. There is no separate insuring agreement for UIM coverage in the Allstate policy. UIM coverage arises under the policy’s uninsured motorist (UM) coverage which provides that Allstate “will pay those damages which an insured person is legally entitled to recover from the owner or operator of an uninsured **auto** because of **bodily injury** sustained by an insured person.” The policy lists five categories of uninsured autos including: “An underinsured motor vehicle which has bodily injury liability protection in effect and applicable at the time of the accident, but less than the applicable limit of Uninsured Motorists Coverage shown in the declarations.” This language serves to define an underinsured vehicle as a vehicle with liability protection but with protection less than the amount of UM limits on the insured’s declaration page. The Allstate policy provides limits-based UIM coverage because it compares the tortfeasor’s limits of liability to the insured’s limits of coverage. *See id.*, ¶10. Comparing the limits of Nesst’s UIM coverage to limits on the policy covering the car involved in the accident, there is no UIM coverage. *See id.*, ¶13.

¶6 *Praefke* also teaches that once it is determined that the vehicle involved does not constitute an underinsured vehicle, it is not necessary to address claims that the UIM endorsement is contextually ambiguous. *Id.*, ¶18. It is sufficient to note that Nesst’s claim that placement of the UIM coverage within UM coverage is misleading and unclear ignores that an underinsured vehicle is also an uninsured vehicle to the extent of the uncovered amount of the loss. Including an underinsured vehicle as a subset of an uninsured vehicle is not misleading.

¶7 Nesst also argues that the reducing clause in the Allstate policy is buried and therefore unenforceable as contextually ambiguous. The reducing clause does not come into play since there is no UIM coverage. We need not address the claim of contextual ambiguity. *See id.*

By the Court.—Order affirmed.

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

