

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2007

David R. Schanker
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. 2005AP2574

Cir. Ct. No. 2003CV1379

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SHAYNA M. GRESENS,

PLAINTIFF-RESPONDENT,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-APPELLANT,

**JOSEPH WILLIAMS, AMERICAN STANDARD INSURANCE COMPANY,
MIDWEST COMMUNICATIONS, INC. AND IFC HOLDINGS, INC.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This is our second opinion in this dispute over underinsured motorist (UIM) coverage. In our first opinion, we affirmed a declaratory judgment holding Shayna Gresens was entitled to \$50,000 in coverage under her State Farm UIM policy. *Gresens v. State Farm Mut. Auto. Ins. Co.*, 2006 WI App 233, ¶1, 297 Wis. 2d 223, 724 N.W.2d 426 (*Gresens I*).

¶2 In September 2007, the supreme court granted review, vacated our decision, and remanded for reconsideration in view of *State Farm Mut. Auto. Ins. Co. v. Bailey*, 2007 WI 90, 734 N.W.2d 386, and *Marotz v. Hallman*, 2007 WI 89, 734 N.W.2d 411. Under *Bailey* and *Marotz*, Gresens has no available UIM coverage. We therefore reverse and remand with directions to grant declaratory judgment to State Farm.

BACKGROUND

¶3 Gresens was injured in an automobile accident caused by her husband and a third party. The third party had \$50,000 of liability coverage, and her husband had \$250,000. Gresens recovered the \$50,000 policy limit from the third party and \$105,240 under her husband's liability policy. *Gresens I*, 297 Wis. 2d 223, ¶¶2-4. Gresens' damages attributable to the third party exceeded \$150,000. *Id.*, ¶3.

¶4 Gresens also had a State Farm UIM policy with a \$100,000 limit. Gresens argued her UIM limit was reduced only by the \$50,000 she recovered from the third party, leaving \$50,000 in available UIM coverage. State Farm argued its UIM limit was also reduced by the \$105,240 Gresens recovered from her husband, leaving no available coverage. *Id.*, ¶4.

¶5 Gresens argued she was entitled to the \$50,000 because the State Farm policy was contextually ambiguous. *Id.*, ¶8. In the alternative, Gresens argued WIS. STAT. § 632.32(5)(i)¹ prohibited State Farm from reducing its policy limits based on payments from tortfeasors who are not underinsured motorists. *Id.*, ¶8 n.3. We concluded the policy was contextually ambiguous, and did not reach Gresens’ alternative argument. *Id.*, ¶¶1, 8 n.3.

DISCUSSION

¶6 After we released *Gresens I*, the supreme court decided *Bailey* and *Marotz*. In *Bailey*, the operative State Farm policy language in question was exactly the same as the language here. See *Bailey*, 734 N.W.2d 386, ¶¶8-9, *Gresens I*, 297 Wis. 2d 223, ¶12.² It also does not appear that there was any difference in the declarations page for the two policies.³ See *Bailey*, 734 N.W.2d 386, ¶30; *Gresens I*, 297 Wis. 2d 223, ¶¶16-17. The supreme court rejected Bailey’s argument that the policy language was contextually ambiguous. The court reasoned that while ambiguity could be created by reading the definition of coverage in isolation, when read as a whole the policy unambiguously allowed

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The *Bailey* opinion includes the full definition of “underinsured motorist” and the entire reducing clause, while our opinion excerpts only the relevant language. See *State Farm Mut. Auto. Ins. Co. v. Bailey*, 2007 WI 90, ¶¶8-9, 734 N.W.2d 386; *Gresens v. State Farm Mut. Auto. Ins. Co.*, 2006 WI App 233, 297 Wis. 2d 223, ¶12, 724 N.W.2d 426. However, both the definition of “underinsured motorist” and the reducing clause are exactly the same in both cases.

³ While the way the policies are described varies somewhat between the two opinions, it appears this is due to differences in the focus of the analysis rather than differences in the policies themselves. The only identifiable difference in the content of the two policies apparent from the *Bailey* opinion is that Bailey’s policy included an additional endorsement, while Gresens’s policy did not. See *Bailey*, 734 N.W.2d 386, ¶¶30-31, *Gresens I*, 297 Wis. 2d 223, ¶12.

State Farm to reduce its UIM limits by payments from all sources. *Bailey*, 734 N.W.2d 386, ¶¶31-32. The court therefore rejected the principal basis of our decision in *Gresens I*, that State Farm’s definition of coverage was misleading and conflicted with its reducing clause. *Gresens I*, 297 Wis. 2d 223, ¶¶12-13.

¶7 On the same day it released *Bailey*, the supreme court released its opinion in *Marotz*. In *Marotz*, the supreme court held WIS. STAT. § 632.32(5)(i) permits an insurer to write a policy that reduces its UIM limits by payments from tortfeasors other than underinsured motorists.⁴ *Marotz*, 734 N.W.2d 411, ¶2. The reducing clause in Gresens’ UIM policy does just that: it reduces Gresens’ UIM limit by “the amount paid to the **insured** by or on behalf of any **person** or organization that may be legally responsible for the **bodily injury**.” *Gresens I*, 297 Wis. 2d 223, ¶12 (emphasis in original). Under *Marotz*, State Farm is permitted to include this reducing clause in its policy. *Marotz*, 734 N.W.2d 411, ¶2.

¶8 Under *Bailey* and *Marotz*, then, Gresens’ \$100,000 UIM limits are reduced by the \$105,240 she recovered from her husband as well as the \$50,000 she recovered from the third party. Because the total amount received from those sources exceeds her \$100,000 UIM limit, she is not entitled to any recovery under

⁴ WISCONSIN STAT. § 632.32(5)(i) provides, as relevant here:

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....

... 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.

her UIM policy. On remand, the court shall enter declaratory judgment accordingly.

By the Court.—Judgment reversed and cause remanded with directions.

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

