COURT OF APPEALS
DECISION
DATED AND RELEASED

October 8, 1996

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.

NOTICE

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

No. 95-2922

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

Allison Markunas,

Plaintiff-Appellant,

v.

West Bend Mutual Insurance Company,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Allison Markunas appeals from a judgment entered against her in a declaratory judgment action. The judgment was granted in favor of West Bend Mutual Insurance Company after the trial court concluded that West Bend was not liable to pay Markunas under the underinsured clause of an automobile insurance policy. Markunas claims the trial court erred in granting judgment to West Bend claiming: (1) she had a

reasonable expectation that the UIM coverage would pay for the losses she sustained in this case; (2) that if she is denied recovery, West Bend's UIM coverage is illusory; and (3) public policy supports finding West Bend liable. Because ***Smith v. Atlantic Mutual Ins. Co.***, 155 Wis.2d 808, 456 N.W.2d 597 (1990), and ***Krech v. Hanson***, 164 Wis.2d 170, 473 N.W.2d 600 (Ct. App. 1991) resolve this case against Markunas, we affirm.

I. BACKGROUND

On April 12, 1989, Markunas was a guest passenger in a vehicle driven by Mark Kapocius. The Kapocius vehicle collided with a vehicle driven by Sylvester Ripinski. Markunas suffered serious injuries as a result of the collision.

The Kapocius vehicle was insured by State Farm Fire & Casualty Co., with liability limits of $100,000. The Ripinski vehicle was insured by American Family Mutual Insurance Co., with liability limits of $100,000. Both State Farm and American Family paid Markunas their respective liability limits of $100,000, but this amount did not sufficiently cover Markunas's damages.

In seeking additional coverage, Markunas turned to West Bend, who had issued an automobile insurance policy to her father, Edward Markunas. The policy provided UIM coverage limits of $100,000, per person, per accident. The policy listed three vehicles that were owned by Edward for which separate premiums were paid. The UIM coverage provision defined an underinsured motor vehicle as "a land motor vehicle or trailer of any type to which a bodily injury liability or bond or policy applies at the time of the accident or incident, but its limit for bodily injury is less than the limit for this coverage."

West Bend denied Markunas's claim on the grounds that neither the Kapocius nor Ripinski vehicle constituted an "underinsured" vehicle as that term is defined under the policy.

Both sides sought declaratory judgment. The trial court granted judgment in favor of West Bend ruling in pertinent part:

> In order to determine whether a vehicle is underinsured, the court must first look at the policy limits without considering stacking; stacking may not be used to determine if coverage exists.... Moreover, a UIM endorsement defining "underinsured motor vehicle" as one whose policy limits were less than the UIM coverage is unambiguous....
>
> In applying the above rules to the current situation, neither the Ripinski or Kapocius vehicle is underinsured under the terms of the policy issued by West Bend Mutual because they both have liability limits of $100,000 and the plaintiff's policy only allows for underinsured coverage if a motor vehicle's limit for bodily injury is less than the $100,000 limit provided under the policy. Moreover, the UIM endorsement is also unambiguous because it defines an "underinsured motor vehicle" as one whose policy limit for bodily injury is less than the limit of the UIM coverage.

Markunas now appeals.

II. DISCUSSION

Our review of this case is *de novo* because this appeal involves the interpretation of an insurance policy in conjunction with undisputed facts, which is a question of law. ***Lambert v. Wrensch***, 135 Wis.2d 105, 115, 399 N.W.2d 369, 373-74 (1987).

We conclude that this case is controlled by ***Smith*** and ***Krech***. In ***Smith***, our supreme court held that a substantially similar definition of

underinsured motor vehicle in an insurance policy was clear and unambiguous. ***Smith***, 155 Wis.2d at 811, 456 N.W.2d at 599. Accordingly, we must hold that West Bend's definition of underinsured motor vehicle is clear and unambiguous. In applying the unambiguous definition provided in West Bend's policy, we conclude that this case does not involve an underinsured motor vehicle. Both vehicles involved in the accident had liability limits *equal to*, not less than the UIM limit provided by the West Bend policy.

Further, we cannot accept Markunas's argument that because there were three vehicles insured that the UIM limit of $300,000, ($100,000 on each vehicle), rather than the single $100,000 is the coverage limit used to determine whether the other vehicles are underinsured vehicles. Using the $300,000, Markunas claims that the vehicles are underinsured because the $100,000 available on the Kapocius and Ripinski vehicles is less than the $300,000 UIM limit. Based on ***Krech***, we must reject this argument. In ***Krech***, this court held that coverage must be determined prior to any stacking of the insurance limits. ***Krech***, 164 Wis.2d at 173, 473 N.W.2d at 601.

Accordingly, the UIM coverage limit used for coverage determinations is the $100,000 UIM limit listed on the declarations page and not the $300,000 amount available when the three vehicle limits are stacked.

Finally, we also reject Markunas's remaining arguments. Markunas makes a compelling argument that an insured would "reasonably expect" coverage under the West Bend policy in the present circumstances. Nevertheless, we reject this argument because West Bend's UIM provision is unambiguous. Accordingly, we need not engage in rules of construction, one of which is looking to what an insured would reasonably expect the provision to mean. ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis.2d 17, 38, 284 N.W.2d 692, 703 (Ct. App. 1979), *aff'd*, 100 Wis.2d 120, 301 N.W.2d 201 (1981).

We reject as well Markunas's argument that the West Bend coverage is illusory if stacking is not permitted. The coverage is clearly not illusory. If the Kapocius vehicle and/or the Ripinski vehicle had carried less than $100,000 liability limits, Markunas would be entitled to the UIM benefits provided by the West Bend policy. We cannot rewrite an unambiguous insurance policy. ***Id.***, 92 Wis.2d at 38, 284 N.W.2d at 702-03. Wisconsin

currently does not have statutorily mandated UIM coverage. Accordingly, what UIM coverage is available is determined by the terms of the insurance policy as interpreted by the prevailing case law.

Under West Bend's insurance policy definition, as interpreted by ***Smith*** and ***Krech,*** the policy at issue does not provide UIM benefits.

By the Court. – Judgment affirmed.

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