

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2004

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. 03-1095
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000190

**IN COURT OF APPEALS
DISTRICT III**

ALBERT C. KOLTUNSKI AND KAREN M. KOLTUNSKI,

PLAINTIFFS-RESPONDENTS,

v.

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Western National Mutual Insurance Company appeals a summary judgment concluding that its automobile policy is ambiguous. The trial court reformed the policy and concluded that Albert and Karen Koltunski are entitled to underinsured motorist coverage (UIM) under the policy. Because

we conclude that the policy is not ambiguous and does not provide UIM coverage for this accident, we reverse the judgment.

¶2 The Koltunskis' car was involved in a one car accident that resulted in the deaths of two occupants and injury to other passengers. The Koltunskis' were insured by Western National under a liability policy that provided \$250,000 per person/\$500,000 per accident. Western National paid \$500,000 to the victims in proportion to their injuries. The Koltunskis then sought a declaration that an additional \$250,000/\$500,000 was available based on the UIM coverage of the same policy. They also claim misrepresentation of the UIM coverage and requested reformation of the policy based on mutual or unilateral mistake. Specifically, they alleged that the "Wisconsin Automobile Supplement, Underinsured Motorist Coverage—Notice of Availability" provided a definition of UIM coverage that differed from the policy definition, creating an ambiguity or misrepresentation.

¶3 Whether a contract is ambiguous is a question of law that we decide without deference to the trial court. *Wausau Underwriters v. Dane County*, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. *See Wilke v. First Fed. S&L Ass'n*, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982). An otherwise unambiguous provision may become ambiguous when read in the context of the entire policy. *See Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, ¶42, 255 Wis. 2d 61, 647 N.W.2d 223.

¶4 Western National's unambiguous policy precludes utilizing the UIM coverage for this accident. The policy defines an underinsured motor vehicle as one "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.” Because the UIM coverage purchased by the Koltunskis was not less than the liability limits in their policy (it was the same), their vehicle does not meet the definition of “underinsured motor vehicle.” This policy language has been found unambiguous in *Taylor v. Greatway Ins. Co.*, 2001 WI 93, ¶¶12-13, 245 Wis. 2d 134, 628 N.W.2d 916 and *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 880, 456 N.W.2d 597 (1990).

¶5 The description of UIM coverage in the “Wisconsin Automobile Supplement” is not inconsistent with the policy definition of an underinsured motor vehicle. The supplement merely informs an insured of the availability of UIM coverage as required by WIS. STAT. § 632.32(4m)(a).¹ It states that “Underinsured Motorist Coverage is available for an additional premium payment to protect an insured who has suffered bodily injury and who is legally entitled to recover damages *from another motorist* who is insured but whose limits are not adequate to pay all damages.” (Emphasis added). This description of the UIM coverage available is not inconsistent with the policy definition that defines an underinsured motor vehicle as one that has less liability insurance than the amount of UIM coverage purchased by the insured. In addition, the description in the notice of availability makes clear that UIM coverage applies when “another

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

motorist” is underinsured.² It does not suggest that the insured’s vehicle can be the underinsured vehicle. That would effectively raise the liability limit without a corresponding increase in the premium.

¶6 Because we conclude that there is no inconsistency between the policy and the notice of availability of underinsured motorist coverage, there is also no basis for finding mutual mistake or for the Koltunskis’ misrepresentation claim.

By the Court.—Judgment reversed.

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

² Although it is not necessary to our resolution of this appeal, we also conclude that the policy definitions unambiguously exclude a vehicle owned by the insured from the definition of an underinsured motor vehicle. We also conclude that defining an underinsured vehicle as one that belongs to someone other than the named insured does not violate WIS. STAT. § 632.32(5)(j) or WIS. STAT. § 632.32(6)(b)2a. No law requires a provider of underinsured motorist coverage to define an underinsured vehicle in a manner that includes the insured’s own vehicle, effectively raising liability coverage without an appropriate adjustment of the premium.

