

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

March 19, 1997

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.

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

No. 96-0323

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHELLE KUKLA,

Plaintiff-Appellant,

**COMPCARE HEALTH SERVICES INSURANCE
CORPORATION, a Wisconsin corporation,**

Subrogated-Plaintiff,

v.

**FARMERS INSURANCE EXCHANGE,
a foreign corporation,**

Defendant-Respondent.

APPEAL from an order of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Michelle Kukla appeals from an order dismissing her declaratory judgment action seeking uninsured/underinsured motorist coverage under

policies issued by Farmers Insurance Exchange. Because we conclude that the trial court employed the correct analysis in finding no coverage under the Farmers' policies, we affirm.

The relevant facts are undisputed. Kukla was seriously injured in a one-car accident while a passenger in a family-owned vehicle driven by her mother, Barbara Kukla. At the time of the accident, Kukla's family had two insurance policies with Farmers covering the family's two automobiles. Each vehicle had bodily injury coverage of \$100,000 per person and \$300,000 per occurrence. Each vehicle also had uninsured/underinsured motorist coverage of \$100,000 per person and \$300,000 per occurrence. Farmers paid Kukla \$100,000 under the liability portion of the involved vehicle's policy, and Kukla then brought a declaratory judgment action to collect an additional \$200,000 under the uninsured/underinsured motorist coverage on both vehicles (hereafter underinsured motorist coverage).¹

The trial court analyzed whether the vehicle involved in the accident met the definition of an underinsured motor vehicle in the Farmers policy at Part II, Section 3(b), and concluded that it did not. The court ruled that before Kukla could stack the underinsured motorist coverages of the Farmers policies, she had to surmount the definitional hurdle. Kukla appeals.

Granting or denying relief in a declaratory judgment action is within the trial court's discretion. *See Allstate Ins. Co. v. Gifford*, 178 Wis.2d 341, 346, 504 N.W.2d 370, 372 (Ct. App. 1993). We will uphold the trial court's discretionary decision if it is founded on the proper legal standards. *See id.*

¹ Under the Farmers policy, uninsured motorist coverage includes underinsured motorist coverage.

We affirm because the trial court properly analyzed Kukla's coverage claim. Whether Farmers owes Kukla underinsured motorist coverage requires interpretation of the policy's language. This presents a question of law which we decide independently of the trial court. See *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990). To the extent the policy's language is plain and unambiguous, it is dispositive on the coverage question. See *Allstate Ins.*, 178 Wis.2d at 346, 504 N.W.2d at 372.

When assessing whether an insured is entitled to underinsured motorist coverage, we start with the policy's definition of such coverage. Only if the policy definition is satisfied is there coverage under the policy. See *id.*² Part II, Section 3(b), the only definitional section relevant to Kukla's claim, defines "uninsured motor vehicle" (which includes underinsured motor vehicle) as "Insured by a bodily injury liability bond or policy at the time of the accident which provides coverage in amounts less than the limits of Uninsured [or Underinsured] Motorists Coverage shown in the Declarations."

It is undisputed that the bodily injury limits on the Kukla policies on the accident vehicle and the other family-owned vehicle (\$100,000 per person and \$300,000 per occurrence) are the same as the underinsured motorist coverages. Under the Farmers definition, the Kukla accident vehicle is not subject to bodily injury coverage in an amount less than the underinsured motorist coverage. Therefore, Farmers is not liable to Kukla for underinsured motorist coverage. See *Smith*, 155 Wis.2d at 811, 456 N.W.2d at 599.

² Accordingly, we reject Kukla's contention that she may first stack the coverages available under her family's Farmers policies and thereby fall within the policy's definition of an "uninsured [or underinsured] motor vehicle" at Part II, Section 3(b) of the policy.

Kukla argues that requiring her to meet the underinsured motorist definition renders the coverage afforded by Part II, Section 3(b) illusory. This issue was not considered by the trial court because it was raised in Kukla's untimely trial court reply brief. We do not consider arguments raised for the first time on appeal. *See Segall v. Hurwitz*, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

Because Kukla has not surmounted the definitional hurdle, we need not address her other appellate arguments.³

By the Court.—Order affirmed.

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

³ We reject Kukla's argument that the policy's definition of underinsured motorist coverage as a type of uninsured motorist coverage translates into coverage for Kukla. As we have held, the accident vehicle does not fall within the policy's definition of a motor vehicle upon which additional coverage is available. Even where a similar argument has been addressed, the court has first determined that the vehicle falls within the policy definition of a vehicle with inadequate or no insurance. *See Kuhn v. Allstate Ins. Co.*, 193 Wis.2d 50, 57, 532 N.W.2d 124, 126-27 (1995).