COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 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. 96-1935-FT

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

STEVEN J. GROSHEK,

Plaintiff-Appellant,

v.

RURAL MUTUAL INSURANCE CO.,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Steven J. Groshek appeals from an order on summary judgment dismissing his complaint against Rural Mutual Insurance Company (RMIC). Groshek's action for declaratory judgment sought a ruling that RMIC owed him $100,000 under his underinsured motorist (UIM) policy. The trial court held that under the plain terms of the reducing clause in the policy, Groshek was only entitled to the $75,000 that RMIC had already agreed

to pay him. We conclude that under controlling precedent the reducing clause in the policy is illusory and therefore void on public policy grounds. We therefore reverse.[1]

Groshek's UIM coverage provided a maximum policy limit of $100,000. A reducing clause in the policy provided that "the limit of liability [$100,000] shall be reduced by all sums paid because of the `bodily injury' by or on behalf of persons or organizations who may be legally responsible."

Groshek's wife was killed in an accident caused by a driver whose automobile insurance coverage contained a $25,000 limit on personal injury liability. The liable driver's insurance company subsequently tendered the $25,000 policy limit to Groshek, who then claimed $100,000 from RMIC under his UIM coverage. RMIC took the position that the reducing clause quoted above reduced its liability to $75,000, and Groshek commenced this declaratory judgment action to resolve the dispute.[2]

RMIC cannot use the reducing clause in Groshek's policy to reduce its liability to $75,000. If the reducing clause is valid, then RMIC will never have to pay the stated policy limits of its UIM coverage. The result is an illusory contract that defeats the reasonable expectation of the insured and is therefore contrary to public policy. ***Kuhn v. Allstate Ins. Co.***, 181 Wis.2d 453, 463-65, 510 N.W.2d 826, 830-31 (Ct. App. 1993), *aff'd on other grounds*, 193 Wis.2d 50, 532 N.W.2d 124 (1995). In a decision on related issues, the supreme court stated that "we do not overrule or limit language in previous holdings of this court and the court of appeals [including ***Kuhn***] that invalidated reducing clauses in UIM policies in part on the basis of the illusory nature of the coverage." ***Matthiesen v. Continental Casualty Co.***, 193 Wis.2d 192, 204, 532 N.W.2d 729, 733-34 (1995). The issue is therefore settled. We reverse and remand with instructions to enter judgment declaring that Groshek's claim against RMIC shall not be reduced by payments received from the tortfeasor's insurer.

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[1] This is an expedited appeal under RULE 809.17, STATS.

[2] It is stipulated that Groshek's damages for wrongful death exceeded the total insurance pool of $125,000.

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

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