COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2282 **Cir. Ct. No. 2004CV3275**

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

MARC WILKINSON, A MINOR,
BY HIS GUARDIAN AD LITEM,
MICHAEL L. BERTLING,

PLAINTIFF-APPELLANT,

V.

SAFECO INSURANCE COMPANY OF ILLINOIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

¶1 CURLEY, J. Marc Wilkinson, by his guardian ad litem, appeals the grant of summary judgment to Safeco Insurance Company of Illinois (Safeco) in his declaratory judgment action seeking underinsured motorist benefits (UIM)

from his parents' Safeco automobile liability insurance policy for injuries he received in an accident in which his grandmother was driving her car. Wilkinson argues that the trial court erred: (1) in determining that the doctrine of issue preclusion bars him from now questioning whether his grandmother's car was an underinsured motor vehicle under his parents' Safeco insurance policy; and (2) in declaring that under his parents' policy's definition of underinsured motor vehicle, his grandmother's automobile was not an underinsured motor vehicle. We have chosen to address the merits of his argument because it resolves the matter. This case is controlled by the holding in the recent case of ***Praefke v. Sentry Ins. Co.***, 2005 WI App 50, 279 Wis. 2d 325, 694 N.W.2d 442. ***Praefke*** instructs that, when multiple claims against a tortfeasor's insurance policy have reduced the amount an injured party receives from the tortfeasor's insurance below the amount of the injured party's UIM insurance, in determining whether a car qualifies as an underinsured motor vehicle, the correct comparison is to compare the limits of liability of the two policies. ***Id.***, ¶¶8-10. The Wilkinsons' automobile insurance policy defines an underinsured motor vehicle as one that has policy "limits … less than the limits of liability for this coverage." Since Marc's grandmother's policy limits were identical to those of the Safeco policy, the policy limits were not less than those found in his parents' policy, and Marc's grandmother's automobile was not an underinsured motor vehicle. Thus, we affirm.

I. BACKGROUND.

¶2 Marc Wilkinson, his two siblings, and his grandfather were passengers in a car being driven in Nebraska by his grandmother, Carol Geithman, when, while passing a truck in heavy rain, she lost control of her car, entered the lanes of oncoming traffic and was hit from behind by a semi-trailer. Marc's two

siblings were killed, while his grandfather and Marc were injured, Marc seriously. Also injured was the semi-trailer driver.

¶3 The Geithmans had automobile liability insurance with State Farm Mutual Automobile Insurance Company of Bloomington, Illinois (State Farm), providing insurance coverage liability limits of $100,000 per person and $300,000 for each accident. The accident produced five claims against the insurance policy. Two of the claims were for the wrongful deaths of Marc's siblings, another of the claims was for his grandfather's injuries, the fourth was the claim of the driver of the semi-trailer truck involved in the accident, and Marc's claim was the fifth.

¶4 Before this action was filed, Marc's parents commenced a legal action seeking payment for the wrongful deaths of their children and seeking to stack the UIM limits for their two insured vehicles in order to obtain insurance coverage from their Safeco policy. The wrongful death actions resulted in the trial court ruling against the Wilkinsons in their effort to stack their policies to obtain UIM insurance, but they did receive payments of $200,000 ($100,000 for each child) from Geithman's insurance company, leaving $100,000 to be distributed among the three remaining claims. The Wilkinsons appealed the ruling regarding the stacking of insurance policies and this court affirmed. *See* ***Wilkinson v. Safeco Ins. Co. of Ill.***, No. 02-0579, unpublished slip op. (WI App Oct. 29, 2002). Eventually, the remaining $100,000 bodily injury liability limit available under the Geithman policy was divided among the remaining claimants. Lowell Geithman, Carol's husband and Marc's grandfather, received $20,000; the driver of the semi-trailer received $2,500; and Marc received $77,500.

¶5 Because Marc received only $77,500 and his injuries exceeded that amount, he sued Safeco seeking to obtain UIM coverage from his parents' policy.

He argued that since the amount he actually recovered from his grandmother's State Farm policy was less than the limits of his parents' UIM insurance, he was entitled to payment under the Safeco UIM policy provision.

¶6 The trial court in this case determined that the current litigation was barred under the doctrine of issue preclusion, reasoning that Marc should have raised the issue of whether his reduced award from the State Farm policy triggered UIM coverage in his parents' policy in the earlier wrongful death lawsuits. However, the trial court went on to determine that the Geithman vehicle did not meet the definition of an underinsured motor vehicle under the Wilkinsons' policy definition.

II. ANALYSIS.

¶7 Marc argues that the trial court erred in determining that the Geithman motor vehicle is not an underinsured vehicle under his parents' Safeco policy. Marc acknowledges that ***Praefke***, published after the initial briefing in this case was completed, controls this appeal. However, Marc respectfully suggests in his supplemental brief that ***Praefke*** is a flawed decision. We disagree.

¶8 Our standard of review is outlined in ***Praefke***:

> This case arises from a declaratory judgment which is addressed to the discretion of the trial court. When the exercise of discretion depends upon a question of law, however, we review the question independently. In this case, the issue involves interpretation of an insurance contract, which is a question of law. If an insurance policy is ambiguous as to coverage, it will be construed in favor of the insured. Provisions in an insurance policy are ambiguous if the language is "susceptible to more than one reasonable interpretation."

Praefke, 279 Wis. 2d 325, ¶5 (citations omitted).

¶9 The facts in ***Praefke*** are almost identical to those here. Praefke was driving his car when an automobile driven by Thomas Grandstaff struck him. ***Id.***, ¶2. As a result of the accident, in which only Grandstaff was found negligent, Praefke was seriously injured, while a passenger in Grandstaff's car was killed. ***Id.*** Grandstaff's vehicle was insured by an automobile liability policy with a $100,000 combined single liability limit. ***Id.***, ¶3. The entire limit was paid out with $75,000 going to Praefke, and the remaining $25,000 going to the estate of the passenger. ***Id.*** Praefke also had an automobile insurance policy in effect at the time of the accident. ***Id.*** His policy provided underinsured motorist coverage in the amount of $100,000 per person; $300,000 per accident. ***Id.*** In ***Praefke***, this court discussed the evolution of UIM coverage from one where the focus was on damages, to the modern view focusing on liability limits, and ultimately concluded that the proper starting point for deciding whether an automobile is an underinsured automobile is to look to the policy definition to see whether the underinsured motor vehicle provision is written to: "compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver," ***id.***, ¶6 (citation omitted), or whether the underinsured motor vehicle coverage is an amount "to put the insured in the same position as he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured," ***id.***, ¶7 (citation omitted).

¶10 ***Praefke*** instructs that, "[t]he most crucial difference is whether the definition is based on the underinsured motorist motor vehicle policy *limits* or on the *damages* sustained by the insured." ***Id.***, ¶9 (citation omitted; emphasis in original). This is key because:

> If … the "UIM policy defines an 'underinsured motor vehicle' by comparing the tortfeasor's limits of liability to the insured's limits of UIM coverage, the

> insured ought reasonably to expect that the second, more common, view of UIM coverage is in effect." That is, this language clearly indicates to the insured that the UIM coverage will be "the difference between the insured's higher UIM limit and the tortfeasor's lower liability limit."

Id., ¶10 (citations omitted).

¶11 The Wilkinsons' Safeco policy reads:

> **D. "Underinsured motor vehicle"** means a land motor vehicle or **trailer** of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the limits of liability for this coverage.

(Bolding in original; underlining supplied.)

¶12 The State Farm policy provided that Geithman had limits of liability of $100,000 per person, per $300,000 accident. The coverage limits of the Safeco and State Farm policies are identical. Consequently, in comparing the two limits of liability, the Geithman automobile does not qualify as an underinsured motor vehicle.

¶13 ***Praefke*** acknowledged that the result was unfortunate, but declared that the logic was sound.

> Although this court can certainly understand the Praefkes' frustration with this result, our review is limited to interpreting the existing language; we do not have the authority to rewrite it. It is an often-used adage that tough facts make bad law. These are tough facts—but for the unfortunate fact that a second claimant also needed to be compensated, Praefke would have received the entire $100,000 liability limit. To accept the Praefkes' position, however, would result in bad law and create opportunity for manipulation and unpredictability. The case law has consistently performed the UIM analysis by comparing the limit of the liability policy to the limit of the UIM coverage, assuming of course that the policy at issue uses limits language.

Id., ¶14. So, too, is the result unfortunate for Marc. Nevertheless, we are obligated to follow precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997) (the court of appeals' primary function is error correcting).

¶14 For the reasons stated, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.