

**IN THE SUPREME COURT OF MISSOURI**

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**Appeal No. SC89844**

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**MORRIS JONES and PAMELA BROWN,**

**Plaintiffs/Appellants**

**vs.**

**MID-CENTURY INSURANCE COMPANY,**

**Defendant/Respondent**

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**Appeal from the Circuit Court of Scott County, Missouri**

**Case No : 05 SO-CV00320**

**Honorable David A. Dolan, Circuit Judge**

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**SUBSTITUTE BRIEF OF APPELLANTS  
MORRIS JONES AND PAMELA BROWN**

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**On transfer from the Southern District of  
the Missouri Court of Appeals**

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## **JURISDICTIONAL STATEMENT**

This case is before the Court on transfer after an opinion of the Missouri Court of Appeals, Southern District. This Court has jurisdiction to finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal pursuant to Mo. Const. article V, section 10.

## STATEMENT OF FACTS

This case arises from an automobile crash which occurred on December 7, 2004, in which Plaintiff/Appellant Morris Jones (Jones) was operating a 2001 Dodge Ram pick-up truck and was struck by another vehicle driven by Sarah McGee. Plaintiff/Appellant Pamela Brown (Brown) was a passenger in the Jones vehicle when the collision occurred. (LF 10-17)

Sarah McGee was insured by a policy of insurance issued by American Family Insurance with limits of liability of \$50,000.00 per person and \$100,000.00 per occurrence. (LF 354) American Family paid the policy limits of \$50,000.00 to Jones and \$50,000 to Brown. (LF 354) Both Jones and Brown were insured under a policy of insurance for a 1992 Lincoln Town Car, issued by Mid-Century Insurance Company (Mid-Century).<sup>1</sup> (LF 65-77) This policy of insurance was in full force and effect on the date of the collision (LF 65, 353) and provided for underinsured motorist coverage (UIM) in the amount of \$100,000.00 per person and \$300,000.00 per occurrence subject to certain policy limitations. (LF 65-70)

Both Jones and Brown asserted claims under the UIM provisions found in Endorsement E1179j of the policy. The endorsement states as follows:

### **Limits of Liability**

- a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of UNDERinsured Motorist Coverage stated in this policy, and the most *we will pay* will be the lesser of:

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<sup>1</sup> Policy No: 14-16175-32-25 hereinafter referred to as “the policy.”

1. The difference between the amount of an insured person's damages for bodily injury, and the amount paid to that insured person *by or for any person or organization who is or may be held legally liable for the bodily injury*; or
  2. The limits of liability of this coverage.
- b. Subject to subsections a. and c. - h. in this Limits of Liability section, ***we will pay*** up to the limits of liability shown in the schedule below as shown in the Declarations.

<b>Coverage Designation</b>	<b>Limits</b> (each person/each occurrence)
U9	100/300

- f. The amount of UNDERinsured Motorist Coverage ***we will pay*** shall be reduced by any amount paid or payable to or for an insured person;
- i. *by or for any person or organization who is or may be held legally liable for the bodily injury* to an insured person; or
  - ii. for bodily injury under the liability coverage of this policy.
- (LF368-69) (Emphasis ours)

On June 18, 2007, the parties filed a joint stipulation of facts for use at trial. (LF 352-355) Among other things, the parties stipulated that Jones and Brown had each suffered damages in excess of \$150,000.00 as a result of the automobile accident. (LF 352)

On the date the stipulation was filed, the trial court entered an Order that the parties should file trial briefs on the remaining issues as framed by the stipulated facts submitted for

trial, to wit: how to interpret and reconcile a set-off provision in the UIM coverage of the policy with a separate limitation clause in the same section of the policy. (LF 356) Pursuant to the Order the parties filed their trial briefs. (LF 357-378)

Mid-Century had already tendered \$50,000.00 to Pamela Brown allowing her to reserve her right to seek an additional \$50,000.00 in UIM benefits. (LF 354) Mid-Century argued that it was entitled to a set-off and a credit in the total amount of \$100,000.00, based on a single \$50,000.00 payment by Sarah McGee's insurance carrier, American Family. Because Mid-Century had already paid Brown \$50,000.00 under the UIM provisions of its policy, (LF 365) Mid-Century contended that it owed Brown no additional sums of money. (LF 366) Mid-Century also argued that it was entitled to a set-off against damages of \$50,000.00 and a credit in the amount of \$50,000.00 on Morris Jones' UIM claim as a result of a single payment of \$50,000.00 by Sarah McGee's insurance carrier. Thus, Mid-Century contended that it owed Jones no more than \$50,000.00 of UIM coverage under the policy. (LF 366) Jones and Brown argued that they are each entitled to \$100,000.00 of UIM coverage based upon the language of the policy as it would reasonably be understood by a layperson purchasing the coverage.

On July 24, 2007, the matter came before the trial court for a hearing. (LF 8) Arguments were presented to the court on behalf of each party, and on August 31, 2007, the trial court entered its, "Findings of Fact, Conclusions of Law, Order and Judgment." (LF 379-381) On each of the claims the trial court ruled that Mid-Century could apply the single

\$50,000.00 payment by the tortfeasor's insurance company under two separate provisions of the policy to reduce the coverage available to Jones and Brown by \$100,000.00-- twice the amount of the payment made. Specifically, the trial court held that Mid-Century was entitled to a \$50,000.00 set-off against damages under subparagraph (a)(1) **AND** a \$50,000 set-off under subparagraph (f)(i). The trial court's ruling resulted in dismissal of Brown's UIM claim against Mid-Century<sup>2</sup> and a judgment limiting Jones' UIM recovery under the policy to \$50,000. On October 4, 2007, Jones and Brown filed a timely Notice of Appeal. (LF 384)

On November 26, 2008 the Missouri Court of Appeals for the Southern District ("Southern District") issued an opinion in which it affirmed the trial court's finding that Jones and Brown were each entitled to be paid no more than \$50,000 in UIM benefits under the Mid-Century policy. (Appendix 1)

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<sup>2</sup> Mid-Century had previously paid Ms. Brown \$50,000 allowing her to reserve the right to seek an additional \$50,000.00 in UIM coverage. Subsequent to the issuance of the Opinion of the Southern District, Mid-Century has also paid Mr. Jones the sum of \$50,000.00 allowing him to reserve his right to seek an additional \$50,000.00 in UIM coverage pursuant to this Request for Transfer.

Jones and Brown timely filed a Motion for Rehearing and an Application for Transfer to the Supreme Court both of which were denied by the Southern District on December 17, 2008.<sup>3</sup>

On December 24, 2008 Jones and Brown filed an Application for Transfer in this Court and this Honorable Court accepted transfer on January 27, 2009.

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<sup>3</sup> Mid- Century filed a cross appeal in the Southern District on an issue which was ruled in favor of Appellants. Thereafter Mid-Century failed to seek a rehearing or transfer from the Southern District and has not sought transfer in this Court. As a result, Plaintiffs/Appellants' claim is the only claim pending before this Court.

**POINT RELIED ON**

I. THE SOUTHERN DISTRICT ERRED IN AFFIRMING THE TRIAL COURT'S INTERPRETATION OF THE LANGUAGE OF THE MID-CENTURY POLICY AND ALLOWING MID-CENTURY TO CLAIM BOTH A SET-OFF OF \$50,000.00 AGAINST DAMAGES AND A CREDIT OF \$50,000.00 AGAINST THE \$100,000.00 UIM COVERAGE AVAILABLE TO EACH OF THE PLAINTIFFS BECAUSE SUCH INTERPRETATION WAS CONTRARY TO MISSOURI LAW IN THAT THE POLICY LANGUAGE RELATING TO THE UNDERINSURED MOTORIST COVERAGE IS AMBIGUOUS AND IS REASONABLY OPEN TO DIFFERENT CONSTRUCTIONS AND SHOULD, THEREFORE, BE CONSTRUED AGAINST THE INSURER AND IN FAVOR OF THE INSUREDS. IN ADDITION, THE SOUTHERN DISTRICT ERRED IN ITS APPLICATION OF THIS COURT'S HOLDING IN RODRIGUEZ V. GENERAL ACCIDENT INSURANCE COMPANY, A CASE WHICH IS DISTINGUISHABLE BECAUSE, UNLIKE THE SITUATION IN THE INSTANT CASE WHERE THE POLICY SEEKS A SET OFF AGAINST DAMAGES FOR PAYMENTS MADE BY THE TORTFEASOR'S INSURER AND A SEPARATE CREDIT FOR THE SAME PAYMENT TO REDUCE THE PURCHASED COVERAGE, RODRIGUEZ CONCERNED THE APPLICATION OF

**ONLY ONE SET-OFF PROVISION AGAINST DAMAGES AND, THEREFORE, DID NOT SUFFER FROM THE TYPE OF AMBIGUITY AT ISSUE IN THIS CASE.**

*Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129 (Mo. banc 2007).

*Krombach vs. Mayflower Insurance Company, Ltd.*, 827 S.W.2d 208, 210-211 (Mo. banc 1992).

*Lutsky vs. Blue Cross Hosp. Serv., Inc.*, 695 S.W.2d 870, 875 (Mo. banc 1985).

*Rodriguez vs. General Accident Insurance Company*, 808 S.W.2d 379 (Mo. banc. 1991).

## **STANDARD OF REVIEW**

This Court recently reiterated the appropriate standard of review in a court tried case when the case is tried on stipulated facts. In *Board of Education of City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1 (Mo. banc 2008), this Court held that in a court-tried case the standard of review is that of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). This court went on to note that it will affirm a judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Id.* at 32.

If the facts of a case are contested, then this Court defers to the trial court's determinations regarding those facts. *See, Fick v. Director of Revenue*, 240 S.W.3d 688, 690 (Mo. banc 2007) and *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). However, if, as in this case, the facts are not contested, then the issue is legal and there are no findings of fact to which this Court must defer. *Id.*

## **ARGUMENT**

**I. THE SOUTHERN DISTRICT ERRED IN AFFIRMING THE TRIAL COURT'S INTERPRETATION OF THE LANGUAGE OF THE MID-CENTURY POLICY AND ALLOWING MID-CENTURY TO CLAIM BOTH A SET-OFF OF \$50,000.00 AGAINST DAMAGES AND A CREDIT OF \$50,000.00 AGAINST THE \$100,000.00 UIM COVERAGE AVAILABLE TO EACH OF THE PLAINTIFFS BECAUSE SUCH INTERPRETATION WAS CONTRARY TO MISSOURI LAW IN THAT THE POLICY LANGUAGE RELATING TO THE UNDERINSURED MOTORIST COVERAGE IS AMBIGUOUS AND IS REASONABLY OPEN TO DIFFERENT CONSTRUCTIONS AND SHOULD, THEREFORE, BE CONSTRUED AGAINST THE INSURER AND IN FAVOR OF THE INSURED. IN ADDITION, THE SOUTHERN DISTRICT ERRED IN ITS APPLICATION OF THIS COURT'S HOLDING IN RODRIGUEZ V. GENERAL ACCIDENT INSURANCE COMPANY, A CASE WHICH IS DISTINGUISHABLE BECAUSE, UNLIKE THE SITUATION IN THE INSTANT CASE WHERE THE POLICY SEEKS A SET OFF AGAINST DAMAGES FOR PAYMENTS MADE BY THE TORTFEASOR'S INSURER AND A SEPARATE CREDIT FOR THE SAME PAYMENT TO REDUCE THE PURCHASED COVERAGE, RODRIGUEZ CONCERNED THE APPLICATION OF ONLY ONE SET-OFF PROVISION**

**AGAINST DAMAGES AND, THEREFORE, DID NOT SUFFER FROM THE TYPE OF AMBIGUITY AT ISSUE IN THIS CASE.**

Jones and Brown requested transfer of this case to the Missouri Supreme Court because the Southern District's affirmation of the trial court's determination that an insurance company may apply a single payment made on behalf of a tortfeasor *both* as a set-off against damages and as a credit against available coverage, essentially allows UIM carriers to promise a quantifiable amount of coverage in one paragraph and then to reduce it by allowing deduction of the very the same payment a second time. Such "double dipping" is against public policy and creates an ambiguity in that it promises in subparagraph (a)(1) payment of \$100,000.00 if the policy owner's damages, after payment by the tortfeasor, equal or exceed \$100,000.00. Then, in subparagraph (f)(i) Mid-Century seeks to reduce coverage further by using the same payment by the tortfeasor to reduce the value of the policy such that the insured is not getting the amount of coverage which he reasonably expected to receive. This practice raises a question of widespread interest and importance to Missouri citizens who purchase UIM coverage and should be decided by the Missouri Supreme Court.

Transfer of this matter also allows this Court to clarify the application of its holding in *Rodriguez v. General Accident Ins. Co. of America*, 808 S.W.2d 370 (Mo. banc 1991), a case which Jones and Brown believe was inappropriately relied on by the Southern District in reaching its decision to affirm the trial court's rulings with respect to limitations on UIM coverage.

This appeal involves the affirmation by the Southern District of a trial court's interpretation of an automobile insurance policy, specifically, an UNDERINSURED MOTORIST (UIM) provision. The critical portion of the Mid-Century Insurance Company Policy No: 14-16175-32-25 at issue can be found under Endorsement E1179j, which states as follows:

**Limits of Liability**

- a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of UNDERinsured Motorist Coverage stated in this policy, and the most *we will pay* will be the lesser of:
  - 1. The difference between the amount of an insured person's damages for bodily injury, and the amount paid to that insured person *by or for any person or organization who is or may be held legally liable for the bodily injury*; or
  - 2. The limits of liability of this coverage.
- b. Subject to subsections a. and c. - h. in this Limits of Liability section, *we will pay* up to the limits of liability shown in the schedule below as shown in the Declarations.

<b>Coverage Designation</b>	<b>Limits</b>
	(each person/each occurrence)
U9	100/300

- f. The amount of UNDERinsured Motorist Coverage *we will pay* shall be reduced by any amount paid or payable to or for an insured person;
  - i. *by or for any person or organization who is or may be held legally liable for the bodily injury* to an insured person; or
  - ii. for bodily injury under the liability coverage of this policy.

(Emphasis ours)

Construction of the above language is the central issue in this appeal. The Mid-Century policy language under “Limits of Liability,” paragraph (a) states that Mid-Century will never pay more than \$100,000.00, which are the UIM policy limits. Sub-paragraph (a)(1) allows for a reduction in coverage by way of a set-off if a third party, such as a tortfeasor, makes a payment to the injured insureds. Then, under sub-paragraph (f)(i), Mid-Century asserts that it is entitled to a second credit for a payment by the tortfeasor, employing language identical to that in subparagraph (a)(1). Mid-Century claims this language permits it to take a *damages* set-off under sub-paragraph (a)(1), and a *coverage* credit under sub-paragraph (f)(i), creating an ambiguity which, under Missouri law must be construed against Mid-Century. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). Further, this policy language, as interpreted by the trial court and affirmed by the Southern District, allows Mid-Century to reduce the coverage available to Jones and Brown by twice the amount they were paid by the

tortfeasor. This construction is inconsistent with Missouri public policy and Missouri law.

### **A. Purpose of Underinsured Motorist Coverage**

As noted by the Southern District, “the purpose of UIM coverage is to compensate an insured for those damages which have not already been paid by a tortfeasor via liability insurance, self-insurance, or some other means.” *Citing, Zelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 679 (Mo. App. W.D. 1996) and *Wendt v. General Acc. Ins. Co.*, 895 S.W.2d 210, 217 (Mo. App. E.D. 1995). (Appendix A- 22) That purpose is met by allowing a set-off against the total damages sustained by the insured in the amount paid on behalf of the tortfeasor. It is not served by allowing an insurance company to reduce coverage by twice the amount paid on behalf of the tortfeasor which is exactly what will occur in the instant case if the Southern District’s opinion is not vacated and the judgment of the trial court reversed.

### **B. Ambiguity and the Expectations of the Policyholder**

When construing an insurance policy, ambiguous language is given the meaning that would ordinarily be understood by the layperson who bought and paid for the policy. *Goza v. Hartford Underwriters Ins. Co.*, 972 S.W.2d 371,374 (Mo. App. E.D. 1998). Certainly an “ordinary person of average understanding”<sup>4</sup> in buying and paying for UIM

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<sup>4</sup> This descriptive term has been used by Missouri courts as the standard by which the terms of insurance contracts are construed. *See, e.g. Martin v. United*

coverage would not expect a *single payment* received from the party responsible for his injuries to be *deducted twice* from the amount of his purchased coverage resulting in a reduction of his coverage by two times the amount he received from the driver of the underinsured vehicle. Plaintiffs contend that while subparagraph (a)(1) appears to be clear on its face when read alone, a problem with its application arises when one attempts to reconcile this “limit of liability” with subparagraph (f)(i) of the same “Limit of Liability” section of the Mid-Century policy. Language is ambiguous if it is reasonably open to different constructions. *Id.* Subparagraph (f)(i) can be construed *either* as reiterating the limit of liability set forth in subparagraph (a)(1) by stating again that the coverage is reduced by the amount paid “*by or for any person or organization who is or may be held legally liable for the bodily injury*”<sup>5</sup> to an insured person,” (which is a reasonable interpretation of the policy language by an ordinary person of average understanding in light of the fact that the language used is exactly the same in both provisions) *or* as an attempt to duplicate the reduction in coverage provided in subparagraph (a)(1) which creates an ambiguity under Missouri law in that, the policy promises coverage of \$100,000.00 per person in subparagraph (a)(1) (subject to reduction for money received

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*States Fidelity and Guar. Co.*, 996 S.W.2d 506, 508 (Mo. banc 1999).

<sup>5</sup> The language used in both subparagraph (a)(1) and subparagraph (f)(i) in Mid-Century’s attempt to reduce coverage is identical. An “ordinary person of average understanding” could easily construe subparagraph (f)(i) as a mere reiteration of subparagraph (a)(1).

from a third party who is legally responsible for the injuries) and then seeks to reduce the promised coverage again under subparagraph (f)(i) based on the same payment which had already reduced the coverage under subparagraph (a)(1). Such a construction does not give the language in question the meaning that a layperson purchasing the policy would understand.

As noted by this Honorable Court in the recent case of *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 133 (Mo. banc 2007) it is well-settled Missouri law that a court may not interpret policy provisions in isolation, but should evaluate the policy as a whole. Further, if a contract promises something at one point and takes it away at another, the policy language is ambiguous. *Id.*, citing, *Lutsky v. Blue Cross Hospital Serv., Inc.*, 695 S.W.2d 870, 875 (Mo. banc 1985).

When the language at issue in this case is interpreted in a manner consistent with these principles, this Court will reach the same “inescapable conclusion” that it reached in *Seeck*, to wit, that reading the policy as a whole creates an ambiguity which must be construed against Mid-Century.

The following example illustrates how allowing both sub-paragraphs (a)(1) and (f)(i) to reduce the amount of coverage available to Jones and Brown by the \$50,000.00 received from the tortfeasor is contrary to the expectations of the insureds and violates public policy. Suppose that Jones and Brown each had \$125,000.00 in damages. Application of sub-paragraph (a)(1) would reduce the damages for which Mid-Century was required to pay to the difference between the damages actually sustained

(\$125,000.00) and the amount received from the tortfeasor (\$50,000.00) resulting in an amount payable to each of the injured insureds of \$75,000.00.<sup>6</sup>

According to the trial court and the Southern District, however, Mid-Century is then allowed to claim another credit for the *same payment* received from the tortfeasor under sub-paragraph (f)(i) . This would result in a further reduction of the already reduced coverage amount of \$75,000.00 by the very same \$50,000.00 payment, yielding an ultimate result of \$25,000.00 payable to each of the injured insureds.

In this example, and using Mid-Century's interpretation, the insured does not receive a total payment of \$100,000.00 even though her total damages are \$125,000.00. Rather, she receives a total of \$75,000.00, \$50,000.00 from the tortfeasor and \$25,000.00 from the UIM carrier despite the fact that her UIM policy says she has \$100,000.00 in coverage and she has more than \$100,000.00 in damages.

Such a construction runs afoul of the previously cited principles from the *Seeck* case, *supra*. Not only does the Mid-Century policy promise something in one place, subparagraph (a)(1), and then take it away in another, subparagraph (f)(i), it also purports to take it away twice by claiming the same payment as a set-off against damages and a credit against coverage by applying two confusing and conflicting provisions of the policy.

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<sup>6</sup> This is the type of reduction which was approved in *Rodriguez, supra*.

Sub-paragraph (a)(1) and sub-paragraph (f)(i) appear to an “ordinary person of average understanding” to say exactly the same thing, leaving the impression in this case that there will be *one \$50,000.00 reduction* applied for the payment made by the tortfeasor’s insurer. This Court should find that, read together, subparagraphs (a)(1) and (f)(i) are confusing and ambiguous. The average lay person could read sub-paragraph (f)(i) as a mere reiteration of Mid-Century’s right to reduce the amount of coverage available to an injured insured by the amount paid by the tortfeasor. The ordinary policy holder of average understanding could read sub-paragraph (f)(i) to be redundant of the language which had already been applied under sub-paragraph (a)(1) to reduce his coverage. “An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions.” *Gulf Ins. Co.*, supra at 814. Clearly the language in this case is open to two interpretations. As such it is ambiguous and must be construed against Mid-Century and in favor of maximum coverage for Jones and Brown. *Id.*

In affirming the trial court, the Southern District relied heavily on this Court’s opinion in *Rodriguez vs. General Accident Insurance Company*, supra. In its reliance, the Southern District focused on the similarities in some of the language used in both policies but failed to recognize the impact of the additional policy provision<sup>7</sup> in the instant case which creates the ambiguity.

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<sup>7</sup> Subparagraph (f)(i) of Endorsement E1179j.

In *Rodriguez*, Appellant, Gail Rodriguez, received injuries when her vehicle collided with a tortfeasor whose liability insurance carrier paid Rodriguez the \$50,000.00 limits of its liability policy. Rodriguez then sought recovery of her additional damages from her own insurance carrier, General Accident Insurance Company, under her policy's UIM provisions. The UIM provisions in the General Accident policy provided coverage in the amount of \$50,000.00 for UIM coverage for two separate automobiles. Thus, Rodriguez had available UIM coverage of \$50,000.00 and she had already received \$50,000.00 from the tortfeasor's insurance company. This Court held that General Accident did not owe Rodriguez any additional coverage.

An examination of the language of the Rodriguez policy reveals language similar to the language found in the Mid-Century policy:

### **Underinsured Motorist Coverage**

#### **INSURING AGREEMENT**

- A. We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury;"
  - 1. Sustained by an "insured;"
- C. "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 limit for bodily injury liability is less than the limit of liability for this coverage.

### **LIMIT OF LIABILITY**

A. The limit of liability shown in the schedule for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. “Insureds”;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

However, the limit of liability 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. This included all sums paid under A of this policy. *Id.* at 382.

Because Rodriguez had received \$50,000.00 from the tortfeasor, and her own UIM policy only provided for \$50,000.00 of UIM coverage, it is apparent that the vehicle driven by the tortfeasor did not meet the definition of an underinsured motor vehicle as set forth in paragraph C above, thus this Court held that the tortfeasor’s vehicle was not an underinsured vehicle in the policy, and denied the benefits of the UIM coverage. *Id.* at 383.

Even though this Court found that the tortfeasor in *Rodriguez* was not operating an underinsured motor vehicle as defined in the policy, and, as a result did not need to

address the set-off question, the Court did go on to state that it is permissible for an insurer to draft its policy so that the UIM limits of liability are reduced by payments made on behalf of the underinsured tortfeasor<sup>8</sup>. *Id.* at 382.

In this present case, Plaintiffs are not claiming that Mid-Century is not entitled to a set-off for the \$50,000.00 paid by the tortfeasor's insurer. The Southern District, however, goes beyond the reasoning of *Rodriguez* by holding that Mid-Century is allowed credit for the same \$50,000.00 payment under two separate provisions of the policy. Thus, this case is distinguishable from the *Rodriguez* holding and an analysis of Appellants' claims must go further.

The instant case involves conflicts between two clauses in the same UIM policy. *Rodriguez* did not involve such a conflict, however, *Seeck*, *Zelman* and *Ware v. Geico General Ins. Co.*, 84 S.W.3d 99 (Mo. App. E.D. 2002) are instructive because each of these cases concerned ambiguities which were the result of conflicts between the underinsured motorist policy limits, policy definitions and excess or other insurance clauses. In each of these cases the policies were found to be ambiguous.

An important distinction between the instant case and *Weber* and *Rodriguez* is that the Mid-Century policy, in addition to the subparagraph (a)(1) set-off which is a provision

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<sup>8</sup> Repudiating *Weber v. American Family Mutual Ins. Co.*, 868 F.2d 286 (8<sup>th</sup> Cir. 1989) which held that applying the set-off provision as written would render the UIM coverage meaningless.

similar to the set-off provision at issue in *Rodriguez*, also contains subparagraph (f)(i) which further reduces the coverage available to the insureds and does so in such a way as to be confusing and misleading. Recognizing the holding in *Rodriguez*, Jones and Brown are not appealing the Southern District's application of subparagraph (a)(1) of the Limits of Liability; they are appealing the subsequent application of identical language in subparagraph (f)(i) which creates an ambiguity by seeking to double the credit allowed Mid-Century for a single payment made on behalf of the underinsured tortfeasor.

In the instant case, subparagraph (a)(1) sets the UIM coverage at the lesser of two amounts: *either* the limits of liability (here \$100,000.00/\$300,000.00) *or* the difference between the amount of damages for bodily injury (here, by stipulation of the parties, at least \$150,000.00 each for Jones and Brown) and the amount paid by or for "any person or organization who is or may be held legally liable for the bodily injury" (here \$50,000.00). Thus, under either option, the limits of liability would be \$100,000.00 for Jones and \$100,000.00 for Brown.

Another distinction between the language of the Mid-Century policy and that at issue in *Rodriguez* can be found by the actual set-off language of each policy which differs. In the Mid-Century policy at issue in this case, the set-off provision, subparagraph (f)(i), states that, "The amount of UNDERinsured motorist coverage we will pay shall be reduced by any amount paid or payable... ." (LF 230) While the language of the set-off provision in the *Rodriguez* policy that was upheld states, "However, the **limit of liability** (emphasis added) shall be reduced by all sums paid... ." *Id.* at 381.

The critical distinction is that the *Rodriguez* policy *consistently used* the language, “limit of liability,” and for this reason, the court found it to be unambiguous. The language employed by Mid-Century in its policy is not only inconsistent, it includes an additional provision, subparagraph (f)(i), which really serves no purpose other than to confuse the issue of coverage. In other words, although the set-off language in subparagraph (a)(1) in the Mid-Century policy is similar to the set-off language in *Rodriguez*, the Mid-Century policy contains language that the *Rodriguez* policy does not, and it is that very language which is misleading to “an ordinary person of average understanding” and creates an ambiguity which was not present in the policy in *Rodriguez*. Mid-Century was in the best position to avoid the ambiguity because it drafted the policy language, and under Missouri law the terms of the policy should be strictly construed against Mid-Century for two reasons: First, insurance is designed to furnish protection to the insured, not defeat it, and second, as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract. *Krombach v. Mayflower Insurance Co., Ltd.*, 827 S.W.2d 208, 210-11. (Mo. banc 1992).

As previously noted, the facts in this case bear more similarity to *Seeck*, *Zemelman* and *Ware* than to *Rodriguez* and it is the principles from the former cases which should have been applied by the trial court and the Southern District in evaluating the amount of coverage available to Jones and Brown under the Mid-Century policy. Had those principles been applied by the trial court and the Southern District the result would

have been a finding that the policy was ambiguous and that Jones and Brown are entitled to the most favorable interpretation of the terms of the policy.

## CONCLUSION

The trial court erred in its “Findings of Fact, Conclusions of Law, Order and Judgment” and the Southern District erred in affirming the trial court. The damages of each of the plaintiffs was stipulated to be at least \$150,000.00. The trial court and the Southern District found that the Mid-Century policy provided \$100,000.00 of UIM coverage, but interpreted the policy to allow Mid-Century to claim a \$50,000.00 set-off against damages and an additional credit of the \$50,000.00 based on a single \$50,000.00 payment received from the tortfeasor’s insurer. Failure to follow the law set forth in *Seeck*, resulted in Mid-Century being allowed to reduce its total coverage for each plaintiff to \$50,000.00. The trial court should have found that sub-paragraphs (a)(1) and (f)(i), read in conjunction with each other, create an ambiguity such that Mid-Century is only entitled to set-off the \$50,000.00 payment from the tortfeasor against the total amount of damages for each insured of \$150,000.00 resulting in payment from Mid-Century to each of the injured insureds of \$100,000.00.

For any or all of the foregoing reasons, the decision of the Southern District must be vacated and the judgment of the trial court must be reversed with instructions to enter judgment for each of the injured insureds in the amount of \$100,000.00.<sup>9</sup>

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<sup>9</sup> This would result in an additional payment of \$50,000.00 to Jones and \$50,000.00 to Brown, each of whom have already received \$50,000.00 from Mid-Century.

Respectfully submitted,

COOK, BARKETT, MAGUIRE & PONDER, L.C.

By \_\_\_\_\_

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**RULE 84.06 CERTIFICATION**

The undersigned counsel for Plaintiffs/Appellants certifies that the foregoing Brief was prepared using Corel Word Perfect, Version 12.0 in Times New Roman 13 point font. This font contains serifs. Counsel further certifies that the foregoing brief contains 5811 words as computed by the aforementioned word processing program and that the accompanying diskette has been scanned for viruses and is virus free.

By \_\_\_\_\_  
Phillip J. Barkett, Jr. - #22958

**AFFIDAVIT CERTIFYING SERVICE**

The undersigned certifies that one (1) copy of the Substitute Brief of Appellants in paper form and one (1) copy of the Substitute Brief of Appellants on diskette were served upon:

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by depositing the same in the United States mail, with sufficient first class postage affixed, this 12<sup>th</sup> day of February 2009.

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Subscribed and sworn to before me, a Notary Public, this \_\_\_\_\_<sup>th</sup> day of February, 2009.

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Notary Public

My commission expires:

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