

No. 93904

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**SUPREME COURT OF MISSOURI**

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**REBECCA FLOYD-TUNNELL  
DORIS FLOYD**

Appellants

v.

**SHELTER MUTUAL INSURANCE COMPANY**

Respondent

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Appeal from the Circuit Court of Jackson County, Missouri  
No. 1116-CV34635

Transfer from the Missouri Court of Appeals, Western District  
No. WD75725

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**SUBSTITUTE BRIEF OF RESPONDENT**

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## STATEMENT OF FACTS

An automobile accident occurred in Dallas County, Missouri on October 8, 2011. [L.F., at 405, 759] The two vehicles involved were a 2000 Dodge Ram 3500 driven by Eric Krugler and a 1996 Chevrolet Cavalier driven by Jerry Floyd. [L.F., at 405, 759] The accident happened when Krugler drove his Ram across the highway centerline and the Ram collided with Mr. Floyd's Cavalier, and the parties agree it was caused by negligence on the part of Krugler. [L.F., at 406, 759] The injuries Mr. Floyd sustained in the accident ultimately proved fatal. [L.F., at 406, 759] Unfortunately, Krugler did not have liability insurance for his operation of the Ram in order to cover his liability for Mr. Floyd's death. [L.F., at 409, 411, 413, 764, 766-767, 769]

At the time of the accident, Mr. Floyd was insured by three policies of automobile insurance issued by respondent Shelter Mutual Insurance Company. [L.F., at 407, 761]. Among them, the declarations of policy 24-5033006-5 described the Cavalier driven by Mr. Floyd and no other vehicles; the declarations of policy 24-1-5033006-3 described only a 2011 Chevrolet Silverado; and the only vehicle described in the declarations of policy 24-1-5033006-6 was a 2000 Toyota Camry. [L.F., at 407, 409, 411, 761, 764, 767] Mr. Floyd owned the Cavalier he was driving when the accident happened. [L.F., at 407, 761] He also owned the Silverado and Camry but, obviously, was not occupying either at the time of the accident. [L.F., at 409, 411, 764, 767]

All three of the Shelter policies identified Mr. Floyd and his wife, appellant Doris Floyd, as the named insured, and the declarations of each listed uninsured motorist

coverage and stated a limit for that coverage of \$100,000 per person. [*L.F., at 406-407, 409, 411-412, 760-762, 764, 767*] Additionally, each of the three policies issued by Shelter to Mr. and Mrs. Floyd contained the following pertinent terms:

## AUTOMOBILE INSURANCE POLICY

### DEFINITIONS

In this policy, the words shown in bold type have the meanings stated below unless a different meaning is stated in a particular coverage or endorsement.

- (10) **Declarations** means the part of this policy titled “Auto Policy Declarations and Policy Schedule”. It sets out many of the individual facts related to **your** policy including the dates, types, and dollar limit of the various coverages.
- (12) **Described auto** means the vehicle described in the **Declarations**, but only if a **named insured owns** that vehicle.
- (15) **Financial responsibility law** means a law that requires a certain level of financial responsibility, or certain level of insurance coverage, in order to **own, use**, or allow others to **use** a **motor vehicle** in the state or country in which coverage under this policy is sought. It includes motor vehicle financial responsibility laws, compulsory insurance laws, and all other laws with similar purposes.

(52) **Uninsured motorist insurance law** means any law that applies to a **claim** under Coverage E or governs the terms of that coverage.

PART IV – COVERAGE E – **UNINSURED MOTOR VEHICLE**  
LIABILITY COVERAGE

The following coverage is provided under this policy only if it is shown in the **Declarations** and is subject to all conditions, exclusions, and limitations of **our** liability, stated in this policy.

INSURING AGREEMENT FOR COVERAGE E

If the **owner** or **operator** of an **uninsured motor vehicle** is legally obligated to pay **damages**, we will pay the **uncompensated damages**; but this agreement is subject to all conditions, exclusions, and limitations of **our** liability, stated in this policy.

ADDITIONAL DEFINITIONS USED IN COVERAGE E

In Coverage E:

(1) **Damages** means money owed to an **insured** for **bodily injuries**, sickness, or disease, sustained by that **insured** and caused, in whole or in part, by the **ownership** or **use** of an **uninsured motor vehicle**.

- (3) **Uncompensated damages** means that part of the **damages** that exceeds the sum of:
- (a) The total amount paid to the **insured** by all **persons** obligated to pay those **damages**; plus
  - (b) The total amount paid, or payable, to the **insured** by the liability insurers of all **persons** obligated to pay those **damages**.

#### PARTIAL EXCLUSIONS FROM COVERAGE E

In **claims** involving the situations listed below, **our** limit of liability under Coverage E is the minimum dollar amount required by the **uninsured motorist insurance law** and **financial responsibility law** of the state of Missouri:

- (3) If any part of the **damages** are sustained while the **insured** is **occupying a motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household; unless it is the **described auto**.

#### LIMITS OF **OUR** LIABILITY UNDER COVERAGE E

The limits of **our** liability under Coverage E are stated in the **Declarations** and are subject to the following limitations:

- (2) The limit shown in the **Declarations** for “each **person**” is the limit of **our** liability for all **uncompensated damages** of one

**insured.** This limit applies to all **claims** made by others resulting from that **insured's bodily injury**, whether direct or derivative in nature.

#### PAYMENTS UNDER COVERAGE E

**We** will pay any amount due under Coverage E to:

- (3) Any **person** legally authorized to maintain and settle a **claim** for the **insured's** death, if **our** payment is for **damages** resulting from the **insured's** death;

[*L.F.*, at 407-413, 455, 498, 541, 762-769]

Mrs. Floyd and appellant Rebecca Floyd-Tunnell filed this action against Shelter seeking UM coverage for the injuries to and death of Mr. Floyd under the three policies described. [*L.F.*, at 11-16] Ms. Floyd-Tunnell is Mr. Floyd's sole surviving child, and she and Mrs. Floyd are members of the class of persons entitled to sue for his wrongful death. [*L.F.*, at 406, 760] Mr. Floyd was also survived by his mother, Rose Ann "Geraldine" Floyd, but she elected to waive her right to recover UM benefits from Shelter. [*L.F.*, at 406, 760-761] There are no other members of the wrongful death class. [*L.F.*, at 406, 760]

The parties agreed that the damages sustained as a result of the accident and the injuries to and death of Mr. Floyd were at least \$400,000 and that those damages were caused by Krugler's negligence. [*L.F.*, at 407, 761] The parties also agreed that Krugler's Ram, the one he was driving at the time of the accident, was an "uninsured

motor vehicle” as defined in each of the three Shelter policies. [*L.F.*, at 409, 411, 413, 764, 766-767, 769] Because those facts were not disputed, Shelter agreed to pay and did pay \$150,000 to the appellants for UM coverage on account of the injuries to and death of Mr. Floyd. [*L.F.*, at 414, 769] Of that total payment, \$100,000 was paid under the Cavalier policy and \$25,000 was paid under each of the Silverado and Camry policies. [*L.F.*, at 414, 769-770] The parties’ dispute concerned whether any additional coverage was owed by Shelter. Specifically, the appellants alleged Shelter owed \$150,000 more in UM coverage, that amount representing an additional \$75,000 under each of the Silverado and Camry policies. [*L.F.*, at 14, 719]

Shelter filed its summary judgment motion and supporting memorandum, first arguing the applicable limit of UM coverage under the Cavalier policy was \$100,000 and that it had already paid that coverage in full. [*L.F.*, at 401-403, 566-567] That point was conceded.<sup>1</sup> Shelter next argued its payments of \$25,000 under each of the other two policies, issued on the Silverado and the Camry, fulfilled the remainder of its coverage obligation as set forth in the insurance contracts. [*L.F.*, at 402, 567-573] In particular, the Silverado policy and Camry policy each contains a partial exclusion applicable when the insured is injured while occupying a vehicle he owns but which is not the “described

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<sup>1</sup> Specifically, the appellants stated in suggestions they filed in support of their own summary judgment motion, “Defendant Shelter has already paid \$100,000 under [the Cavalier] policy, which Plaintiffs agree is the full limit thereunder, so that policy is no longer at issue.” [*L.F.*, at 719]

auto” under that policy. [*L.F.*, at 402, 567-573] Mr. Floyd owned the Cavalier he was in when the accident happened and the Cavalier is not the “described auto” under either the Silverado policy or the Camry policy, Shelter argued, so the partial exclusion applies. [*L.F.*, at 402, 567-573] The exclusion is “partial” in the sense that it precludes coverage only above the statutory minimum of \$25,000 rather than barring coverage completely. [*L.F.*, at 402, 567-573] Thus, Shelter argued the total UM coverage owed under each of the Silverado and Camry policies was \$25,000, which had been paid. [*L.F.*, at 402, 567-573]

The circuit court agreed with Shelter. [*L.F.*, at 788-790; *App’x*, at A1-A3] It concluded the partial exclusions in the Silverado and Camry policies were unambiguous, enforceable, and compliant with Missouri’s statute on UM coverage. [*L.F.*, at 789; *App’x*, at A2] Therefore, the court entered summary judgment in favor of Shelter on the appellants’ claim for UM coverage. [*L.F.*, at 790; *App’x*, at A3] The appellants had also asserted a claim of “vexatious refusal to pay,” on which the circuit court entered judgment for Shelter because Shelter had already satisfied its full coverage obligation. [*L.F.*, at 789-790; *App’x*, at A2-A3]

The appellants challenge the entry of summary judgment in favor of Shelter. [*L.F.*, at 791-792] Before transfer, the Western District of the Missouri Court of Appeals determined Shelter’s position was correct. It found that, “[w]hen the Silverado and Camry policies are read as a whole, the partial exclusion to UM coverage is not susceptible to different interpretations and does not cause the meaning of the policies to be uncertain. The policies are not ambiguous and, therefore, the partial exclusion is

enforceable.” [App’x, at A17] It also found that the partial exclusions applied to the appellants’ claim to exclude UM coverage above \$25,000 under each of the Silverado and Camry policies. [App’x, at A15-A16]

## ARGUMENT

### STANDARD OF REVIEW & GOVERNING INSURANCE LAW

The standard of review is the same for all issues in this appeal. The appellants challenge the entry of summary judgment, and the material facts upon which the circuit court entered judgment in favor of Shelter are undisputed. [*L.F.*, at 405-414, 759-770] Additionally, all of the questions in the case involve the interpretation of insurance policy terms, which is an issue of law. *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 109 (Mo.App.2009). Thus, appellate review is *de novo*. *In re Estate of Blodgett v. Mitchell*, 95 S.W.3d 79, 81 (Mo.banc 2003) (citing *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993)); *State Farm Mut. Auto. Ins. Co. v. Esswein*, 43 S.W.3d 833, 838 (Mo.App.1999).

Well-established rules of insurance law will govern the determination of the issues. An insurance policy is a contract, and the rules of construction determine the meaning of a contract's language. *Central Surety & Ins. Corp. v. New Amsterdam Cas. Co.*, 222 S.W.2d 76, 78 (Mo.banc 1949); *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 516 (Mo.App.1999). There are a number of provisions that are essential to an insurance policy. *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160 (Mo.banc 2007). The policy must identify the individual or entity with the interest at risk, the subject matter and the contingency insured against, the dates prescribing the duration of the risk or contingency insured against, and the amount the insurer is liable to pay for any given risk up to a specified amount. *Id.* Additionally,

definitions, exclusions, and endorsements are necessary provisions in insurance policies. Grable, 280 S.W.3d at 109.

As mentioned above, the meaning of an insurance policy is an issue of law, Id, and the policy should be construed as a whole. Dieckman v. Moran, 414 S.W.2d 320, 321 (Mo.1967). To determine the intention of the parties to an insurance contract, the entire policy and not detached provisions or clauses must be considered. Doty v. American Nat'l Ins. Co., 165 S.W.2d 862, 869 (Mo.1942). If the language of an insurance contract is clear and unambiguous, courts do not have the power to rewrite the contract for the parties and must construe the contract as written. Madison Block Pharmacy, Inc. v. United States Fidelity & Guar. Co., 620 S.W.2d 343, 346 (Mo.banc 1981). The courts' function is to construe, not make, insurance contracts. Central Surety, 222 S.W.2d at 80.

Courts should “refuse to create an ambiguity under the policy language where none exists so as to construe the imaginary ambiguity in such a way to reach a result which some [*i.e.*, the appellants] might consider desirable but which is not otherwise permissible under the policy or the law.” Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137, 142 (Mo.banc 1980). Similarly, courts “may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists.” Todd, 223 S.W.3d at 163. It is the duty of the courts to reconcile conflicting clauses in a policy so far as their language reasonably permits, Id, and seeming contradictions in an insurance policy must be harmonized if reasonably possible. Haggard Hauling & Rigging Co. v. Stonewall Ins. Co., 852 S.W.2d 396, 401 (Mo.App.1993).

**THE PARTIAL EXCLUSION & ENFORCEABILITY**

Both the Silverado policy and the Camry policy, each covering a vehicle owned by Mr. Floyd but not occupied by him at the time of the accident, contain several partial exclusions. Among them is an exclusion that applies if Mr. Floyd is injured while occupying a vehicle owned by him and which is not the “described auto” under the policy in question:

PARTIAL EXCLUSIONS FROM COVERAGE E

In **claims** involving the situations listed below, **our** limit of liability under Coverage E is the minimum dollar amount required by the **uninsured motorist insurance law** and **financial responsibility law** of the state of Missouri:

- (3) If any part of the **damages** are sustained while the **insured** is **occupying a motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured’s** household; unless it is the **described auto**.

[*L.F., at 409-413, 764-769*] This partial exclusion in the Silverado policy and the Camry policy applies to limit the UM coverage available under each to \$25,000, which Shelter has already paid.

**A. THE PARTIAL EXCLUSION APPLIES.**

Mr. Floyd was occupying the Cavalier at the time of the accident, and he owned that vehicle. [*L.F., at 407, 761*] Accordingly, the damages claimed by the appellants

were sustained while the insured, Mr. Floyd, was occupying a vehicle owned by the insured. Because this is true, the partial exclusion applies unless the Cavalier was the “described auto” on the Silverado and Camry policies. It was not.

“Described auto” is defined by the Silverado policy as the vehicle described in the “Declarations.” [L.F., at 409-410, 764-766] In turn, “Declarations” is defined as “the part of this policy titled ‘Auto Policy Declarations and Policy Schedule’.” [L.F., at 409-410, 764-766 (*underline added*)] Thus, the “described auto” under the Silverado policy is the vehicle described in the declarations of the Silverado policy. That vehicle is the Silverado. [L.F., at 409, 764] The definitions in the Camry policy are identical, meaning the “described auto” under that policy is the Camry. [L.F., at 411-412, 767-769] Mr. Floyd’s Cavalier is not described in the declarations of either of these two policies and, therefore, is not the “described auto” under either policy. Because the damages were sustained while Mr. Floyd was occupying a vehicle he owned but which was not the “described auto,” the partial exclusion in the Silverado and Camry policies applies.

Notably, the exclusion does not bar UM coverage completely. Rather, by its terms, it merely limits Shelter’s liability to the minimum dollar amount required by Missouri’s “uninsured motorist insurance law” and “financial responsibility law.” Stated differently, it excludes UM coverage for amounts exceeding the minimums required by those laws. Section 379.203 of the Revised Statutes of Missouri is the state’s UM statute, or “uninsured motorist insurance law.” It requires automobile policies to include UM coverage with limits not less than the limits for bodily injury or death set forth in Section 303.030. See R.S.Mo. § 379.203.1. Section 303.030 is a part of Missouri’s Motor

Vehicle Financial Responsibility Law, or “financial responsibility law” as defined in the Silverado and Camry policies. It requires liability coverage with a limit of not less than \$25,000 for bodily injury to or death of one person. *See R.S.Mo. § 303.030.5.* Accordingly, the minimum dollar amount of coverage required by the “uninsured motorist insurance law” and “financial responsibility law” of the State of Missouri, as contemplated by the partial exclusion, is \$25,000 per person. *See State Farm Mut. Auto. Ins. Co. v. Ardrey*, 353 S.W.3d 437, 439 (Mo.App.2011). The partial exclusion applies to eliminate UM coverage under the Silverado and Camry policies above that amount. It plainly precludes coverage under each policy for amounts exceeding \$25,000.

In addition to paying them its limit of \$100,000 under the Cavalier policy,<sup>2</sup> Shelter paid \$50,000 to the appellants for the UM coverages of the Silverado and Camry policies. [L.F., at 414, 769-770] Shelter has satisfied its coverage obligation, and the circuit court correctly entered summary judgment.

**B. THE PARTIAL EXCLUSION IS ENFORCEABLE.**

Missouri law requires all automobile policies to include UM coverage in the minimum amount of \$25,000 per person but allows citizens to purchase coverage above that minimum. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 46 (Mo.banc 2009) (citing

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<sup>2</sup> The partial exclusion is found in the Cavalier policy just as it is in the policies covering the Silverado and the Camry. With respect to the Cavalier policy, however, the Cavalier is the “described auto.” Thus, the partial exclusion does not apply to reduce the coverage from \$100,000 to \$25,000 under that policy.

R.S.Mo. § 379.203.1). Applying the partial exclusion, the Silverado and Camry policies each provide coverage in the amount of \$25,000, which is the full amount required by law. Mr. Floyd was allowed to purchase additional coverage, and Shelter contracted to provide more coverage under certain circumstances. However, the additional coverage purchased by Mr. Floyd does not apply to damages sustained while he is occupying a vehicle he owns but which is not the “described auto” on a given policy. Because the additional coverage was optional and not mandated by Missouri’s UM coverage statute, it is subject to the provisions and limitations of the insurance contracts, including the partial exclusion. See *Automobile Club Inter-Ins. Exch. v. Diebold*, 511 S.W.2d 135, 138 (Mo.App.1974) (an insurance policy “is a voluntary contract and as long as the terms and conditions are not ... in violation of legal rules and requirements, the parties may incorporate such provisions and conditions as they see fit to adopt”). Accordingly, the partial exclusion is enforceable under the statute and the cases interpreting it.

In *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151 (Mo.App.2000), the named insured allowed her boyfriend to drive her car. While the boyfriend was driving the car with the named insured’s permission, he was involved in an accident. The owner and her vehicle were insured under a policy with a stated limit of \$100,000 per person. However, the policy contained a so-called “step-down” provision<sup>3</sup> limiting coverage to

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<sup>3</sup> We refer to the pertinent provision of the Shelter policies as a “partial exclusion”

because that is what it is called in the policies. However, it could just as easily be called

\$25,000 per person, the minimum coverage required in Missouri, in the event of injury caused by a driver who was permitted by the named insured to drive her vehicle and who was not related to her. The insurer argued the step-down provision applied such that its coverage limit was just \$25,000.

The court framed the issue as “whether an insurer must provide a permissive user with the same liability limits as the named insured or whether an insurer can provide greater coverage to the named insured so long as a permissive user’s limits comply with the minimum limits stipulated” by the MVFRL. *See Id* at 154. The court held that Missouri public policy flowing from the mandatory coverage statutes “does not preclude ‘step down’ provisions in insurance policies ... so long as the lesser limits comply with the minimum limits provided” in the statutes mandating coverage. *See Id; see also Shelter Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 210 S.W.3d 338, 344 (Mo.App.2006) (finding Shelter’s step-down provision compliant with the MVFRL).

Even in cases involving exclusions that seek to eliminate coverage completely, unlike the partial exclusion here, the MVFRL effects only a partial invalidation of the exclusions such that coverage is required only up to \$25,000 per person. *See American Std. Ins. Co. of Wisc. v. Bracht*, 103 S.W.3d 281, 288 (Mo.App.2003) (citing *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479, 480-482 (Mo.banc 1992)). This “partial invalidity” concept has been applied often in the case of automobile liability

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a “step-down” provision given that it does essentially the same thing as did the provision in *Lucas*.

coverage, and the rule is equally applicable with regard to UM coverage. In Ezell v. Columbia Ins. Co., 942 S.W.2d 913 (Mo.App.1996), the court first contrasted the statutes applicable to liability coverage and UM coverage but then held, “Conceptually, it is a distinction without a difference.” See Id at 918. So long as policy provisions meet the minimum requirements of the UM coverage statute and do not conflict with it, the parties remain free to create the insurance contract of their choice. Id at 919. Based on this, the court held invalid the exclusionary provision relied upon by the insurer but only to the extent of the \$25,000 minimum limit for UM coverage; beyond that, the provision was valid and enforceable to bar coverage. See Id.

A limiting clause restricting coverage to the statutory minimum does not undermine the purposes of Missouri’s UM coverage statute. Diebold, 511 S.W.2d at 138. Both the Silverado policy and the Camry policy comply with the requirements of the statute and related public policy in that they provide UM coverage of \$25,000 per person, which is the mandatory minimum. The partial exclusion limits coverage to \$25,000 under each policy, but it does not attempt to defeat or have the effect of defeating the minimum coverage required by the UM coverage statute. It is enforceable, and Shelter has fulfilled its coverage obligations.

#### **APPELLANTS’ POINT RELIED ON – NO. I**

The appellants say the problem with Shelter’s position is that the word “insured” in the partial exclusion cannot possibly refer to the decedent, Mr. Floyd, and must refer, instead, to Mrs. Floyd because she is the one making a claim for damages for Mr. Floyd’s

wrongful death. They make this argument not because their interpretation would be a reasonable one or because it would make any sense in the context of the exclusion or the policy as a whole but, rather, because they assume “insured” as used in the UM coverage cannot mean Mr. Floyd because Mr. Floyd has no claim for damages for his own wrongful death. This assumption by the appellants, in turn, is based on the coverage’s definitions of “damages,” which means “money owed to an **insured** for **bodily injuries** ... sustained by that insured,” and “uncompensated damages,” which means “damages” that have not been paid by the tortfeasor. [*L.F.*, at 409-410, 412-413, 764-769 (*underline added*)] Thus, they conclude, Mrs. Floyd must be the “insured.” Otherwise, they argue, there would never be any “damages” sustained or “uncompensated damages” payable in a wrongful death case.<sup>4</sup> The appellants’ argument is unpersuasive.

**A. THE PROBLEM HYPOTHESIZED BY THE APPELLANTS HAS ALREADY BEEN SOLVED BY MISSOURI COURTS.**

The primary and dispositive mistake in the appellants’ argument is that it was rejected almost fifty years ago. They say the “insured” must be the person making the

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<sup>4</sup> Of course, the appellants’ theory would solve nothing. If it was Mrs. Floyd who was to be considered the “insured,” there would be no “damages” or “uncompensated damages” because Mrs. Floyd did not sustain any “bodily injury” and, therefore, any money owed to her would not be “money owed to an **insured** for **bodily injuries** ... sustained by that **insured**.” It is the appellants’ argument that would eliminate UM coverage in wrongful death claims.

claim for UM coverage because a decedent “insured” would have no claim for his own wrongful death, but Missouri courts have consistently held that UM coverage provides “indemnity for damages resulting from an insured’s wrongful death caused by an uninsured motorist, payable to whatever person or persons may be entitled to bring an action under provisions of” Missouri’s wrongful death statutes. See Sterns v. M.F.A. Mut. Ins. Co., 401 S.W.2d 510, 517 (Mo.App.1966) (underline added); also Cobb v. State Sec. Ins. Co., 576 S.W.2d 726, 736 (Mo.banc 1979) (same); Livingston v. Omaha Prop. & Cas. Ins. Co., 927 S.W.2d 444, 446 (1996) (same, emphasizing coverage applies to “damages resulting from *an insured’s* wrongful death”); Stewart v. Royal, 343 S.W.3d 736, 742 (Mo.App.2011) (same).

The person making the claim for UM coverage need not be an “insured” at all, as UM coverages “include indemnification of survivors and dependents of insureds who suffer bodily injury resulting in death by the fault of uninsured motorists.” Sterns, 401 S.W.2d at 519; also Cobb, 576 S.W.2d at 736-737 (“[Claimant] need not be an insured under the policy, if [decedent] is within the definition of an insured”); Ashcraft v. Ashcraft, 689 S.W.2d 693, 695 (Mo.App.1985) (“The fact that the [claimant] is not a party to the contract does not preclude his recovery because the policy bases recovery on the wrongful death statute”); Arnold v. American Family Mut. Ins. Co., 987 S.W.2d 537, 541-542 (Mo.App.1999) (affirming denial of insurer’s motion to dismiss arguing non-“insured” plaintiff had no standing to claim UM coverage for death of decedent “insured” under decedent’s policy). In fact, regardless of whether a wrongful death beneficiary is or is not an “insured,” it is only if the decedent was an “insured” that the beneficiary may

be entitled to UM coverage. *Livingston*, 927 S.W.2d at 446; *Lavender v. State Auto. Mut. Ins. Co.*, 933 S.W.2d 888, 891 (Mo.App.1996); *Stewart*, 343 S.W.3d at 743-744.

The appellants' right to recover UM coverage under Shelter's policies simply is not a function of Mrs. Floyd's status as a named insured. It is solely a function of Mr. Floyd's status as an "insured" who suffered "bodily injury" and death. It is his "bodily injury" for which damages are sought. The "insured" is Mr. Floyd, and the appellants' suggestion that this would result in Shelter's policies not covering any wrongful death claims is plainly contrary to Missouri law. The cases hold that UM coverage applies to damages for the "insured's" death that may be awardable to persons other than the "insured." The scenario envisioned by the appellants, whereby Shelter might start denying coverage for all wrongful death UM coverage claims if its position is sustained, has already been addressed and rejected by Missouri courts. The problem hypothesized by the appellants has been solved as a matter of law and public policy. The "insured" is the decedent who actually sustained "bodily injury," and the definition of "damages" combined with the fact that a decedent has no claim for his own wrongful death does not mean there would be no UM coverage for death claims because UM coverage provides "indemnity for damages resulting from *an insured's* wrongful death payable to whatever person or persons may be entitled to bring an action" under the wrongful death statutes. See *Livingston*, 927 S.W.2d at 446 (italics original). That she is in the class of persons authorized by statute to assert a claim for Mr. Floyd's wrongful death does not transform Mrs. Floyd into the "insured" for purposes of evaluating the partial exclusion and determining the availability and extent of UM coverage.

**B. THE PROBLEM ALSO HAS BEEN SOLVED (OR ELIMINATED) BY THE SHELTER POLICIES.**

Putting aside the foregoing legal authority, it is clear from the policies themselves that Shelter's interpretation would not eliminate UM coverage for wrongful death claims as suggested by the appellants, which is the only reason they give to consider Mrs. Floyd the "insured" referenced in the partial exclusion. Specifically, Shelter's policies plainly contemplate payments to persons such as the appellants upon the death of the "insured." Each of Shelter's policies provides:

**PAYMENTS UNDER COVERAGE E**

**We will pay any amount due under Coverage E to:**

- (3) Any **person** legally authorized to maintain and settle a **claim** for the **insured's** death, if **our** payment is for **damages** resulting from the **insured's** death;

[*L.F., at 455, 498, 541*] This contractual provision expressly states what Missouri law already requires, in particular that payment of UM coverage in the event of an "insured's" death will be made to persons, such as the appellants here, in the class entitled to sue for the wrongful death. Not only does it provide for payment to persons other than the "insured," it specifically provides for payment in the event of the "insured's" death. The appellants' suggestion that Mrs. Floyd must be the "insured" because Mr. Floyd has no claim for his own wrongful death is incorrect under established Missouri law and under the policies.

**C. THE APPELLANTS' INTERPRETATION OF THE POLICIES IS UNREASONABLE.**

The appellants' proposed interpretation of Shelter's policies and the reasons therefor are inconsistent with Missouri law. They are inconsistent with the policies themselves. They also are simply unreasonable. First, the appellants' reading, whereby Mrs. Floyd would be considered the "insured" simply because she is the person who can and is making the claim, would allow Mrs. Floyd to collect UM coverage for the death of anyone, regardless of whether the decedent was an "insured" or had any other connection to the policy, so long as Mrs. Floyd was in the class of persons entitled to sue for the wrongful death. That is not how Shelter's coverage or any other UM coverage works, as explained, and the appellants' proposed interpretation has been rejected in Missouri as unreasonable and illogical.

In *Livingston*, 927 S.W.2d 444, the plaintiff was a named insured on a policy providing UM coverage. Her daughter, who was not a named insured and did not otherwise fit any definition of "insured," was killed in an accident caused by an uninsured motorist. The plaintiff made a claim for UM coverage under her policy for the death of her daughter. She argued an "insured," as she was, is entitled to coverage "whenever an insured has damages that he or she is legally entitled to recover, even if the bodily injury is sustained by an uninsured." The court disagreed:

To accept plaintiff's interpretation, would permit plaintiff to recover under her uninsured motorist policy for the death of any person from whom she is legally entitled to bring a claim under the wrongful

death statute, such as the death of her children, any lineal decedents, her brothers and sisters, her parents, or any other descendant. It would provide coverage by plaintiff's insurance company for hazards associated with the operation of the vehicles of all of these individuals, none of whom are insured under her policy. While uninsured motorist coverage is to be given a liberal interpretation, coverage should not be created where there is none.

*See Id* at 446.

Another plaintiff made the same argument three years ago, and the court expanded on the absurdity of the proposed policy interpretation in rejecting her claim:

Under [the insured's] theory, she could utilize her UM coverage for the death of *any person* as to whom *she* is legally entitled to bring a claim under the wrongful death statute, whether that person is a relative residing with her (within the definition of **insured person**) or not. Thus, hypothetically, [the insured], a Jackson County resident, could recover under her UM coverage for the death by an uninsured driver of an unmarried sibling living in, say, Cape Girardeau and insured under another policy; or of a similarly deceased mother in St. Louis. The sibling or mother would be the deceased, but [the insured] (under her theory) would have "sustained" the death. This is the exact interpretation the courts in

*Lavendar* and *Livingston* refused to sanction. See *Livingston*, 927

S.W.2d at 446; *Lavendar*, 933 S.W.2d at 889-91.

See *Stewart*, 343 S.W.3d at 743-744 (italics, boldface original).

Along related lines, the appellants' theory would require a person to be the "insured" in order to collect UM coverage for the death of a family member. This also is not the law. It is irrelevant under Missouri law whether the person making the claim is or is not the "insured," as a non-"insured" may maintain and recover on a claim for UM coverage for the death of the "insured." *Sterns*, 401 S.W.2d at 519; *Cobb*, 576 S.W.2d at 736-737; *Ashcraft*, 689 S.W.2d at 695; *Arnold*, 987 S.W.2d at 541-542.

Second, as mentioned in footnote 4, the appellants' interpretation that Mrs. Floyd should be considered the "insured" for purposes of UM coverage, where it was Mr. Floyd who was actually injured, would result in an absence of UM coverage under any of the policies for a wrongful death. Shelter's interpretation of the policies, supported by plain reasonableness and the policies themselves, including the "Payments Under Coverage E" provision expressly contemplating payments to others in the event of the "insured's" death, does not have that effect. Shelter's reading of the policies allows UM coverage in death claims even though the decedent "insured" does not have a claim for his own wrongful death. It is the appellants' argument that would render the UM coverage inapplicable to wrongful deaths because, as a result of the "insured" not having sustained the "bodily injury," the "insured" would not have sustained any "damages."

Third, the appellants' proposed reading simply does not make sense in the context of the partial exclusion. Missouri courts consistently hold UM coverage for wrongful

death turns on whether the decedent, not the claimant, is an “insured.” Mr. Floyd is the “insured” in this case, not Mrs. Floyd. It is Mr. Floyd, not either of the appellants, who sustained the “bodily injury.” Mrs. Floyd sustained no “bodily injury” and was not involved in the accident. Yet, under the appellants’ theory, application of the partial exclusion would turn on what vehicle, if any, Mrs. Floyd happened to be occupying at the time of Mr. Floyd’s accident. Mr. Floyd and Mrs. Floyd could have been on separate transcontinental trips in different directions, but the appellants’ argument would have coverage for Mr. Floyd’s death determined by which vehicle Mrs. Floyd was driving, in Utah, for example, at the time of Mr. Floyd’s accident in Missouri. Such an interpretation would be nonsensical. The partial exclusion is tied to which vehicle Mr. Floyd, as the person actually involved in the accident and who sustained “bodily injury,” was occupying when his accident happened. No reasonable person reading the Shelter policies, whether an ordinary layperson or a trained lawyer, would think the partial exclusion has anything to do with what vehicle someone other than the “insured” who is involved in an accident and sustains “bodily injury” happens to be occupying at the time of the accident.

**D. THIS CASE IS NOT ABOUT STACKING.**

The appellants argue they are allowed to stack UM coverage because public policy flowing from Missouri’s UM coverage statute requires stacking. The point of their argument is not entirely clear, as Shelter does not dispute that the appellants are entitled to stack whatever UM coverages they have. In fact, Shelter has already paid stacked UM

coverages to the appellants, in particular \$100,000 under the Cavalier policy and \$25,000 each under the Silverado and Camry policies. This case is not about stacking.

To the extent the appellants are trying to argue the mandatory stacking of UM coverage prohibits enforcement of the partial exclusion, they are incorrect.<sup>5</sup> “Before stacking can be an issue, there must first be applicable coverages to stack.” *Bush v. Shelter Mut. Ins. Co.*, 412 S.W.3d 336, 341 (Mo.App.2013); also *Dutton v. American Family Mut. Ins. Co.*, --- S.W.3d ---, 2014 WL 211453, \*18 (Mo.App.2014) (same) (subject to transfer) (J. Ahuja, dissent); *Farmers Ins. Co., Inc. v. Wilson*, --- S.W.3d ---, 2014 WL 1133544, \*2 (Mo.App.2014) (same) (subject to transfer). “[I]n any case potentially involving stacked coverages, the initial step,” it has been correctly held, “should be an analysis of whether there are multiple applicable coverages applicable.”

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<sup>5</sup> The appellants seem to tacitly acknowledge this, as they say on page 25 of their brief (underline added), “With no exclusion applicable, the coverage available to Appellants is the full amount of \$100,000.00 as stated on the Declarations pages of each of the Policies, and Appellants can stack the coverage available under both policies.” They are correct in that they can only stack the coverage available under the policies. They also are correct that, if the partial exclusion did not apply, the available coverage under the Silverado and Camry policies would be \$100,000 as stated in the declarations. But, when the partial exclusion is applicable, as it is here, the coverage available under those policies is just \$25,000, which Shelter has already stacked and paid.

See Bush, 412 S.W.3d at 341; see also Wilson, 2014 WL 1133544 at \*2 (same). Where coverage is barred by an exclusion, there is no coverage to stack. Bush, 412 S.W.3d at 341 (“because of the owned-vehicle exclusion, no UIM coverage is available under Respondent’s three Shelter policies not pertaining to the Corvette. Because no coverage is available under those three policies, there are not multiple applicable coverages available for Respondent to stack”); Wilson, 2014 WL 1133544 at \*5 (“Because the Dodge is excluded from coverage under the Chevrolet and Ford policies, there is no coverage to stack”).<sup>6</sup> Here, the partial exclusion bars coverage in excess of \$25,000, so there is no coverage in excess of \$25,000 to stack.

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<sup>6</sup> Interestingly, Bush and Wilson both involved an exclusion that was basically the same as Shelter’s partial exclusion here. Coverage was excluded for the use of a vehicle owned by the insured but not listed in the declarations of the policy. It is also significant that the Bush court noted its ruling “does not mean the owned-vehicle exclusion is an anti-stacking provision. An anti-stacking provision prohibits the insured from collecting on multiple coverage items or policies from the same insurer for a single accident. In effect, it makes only one policy or coverage amount collectable. The owned-vehicle exclusion does not prohibit Respondent from collecting coverage on multiple policies from Shelter or make only one policy amount collectable. Rather, it merely functions as an exclusion precluding UIM coverage under the three policies, the result of which is that no UIM coverage is available under those policies for Respondent to stack.” 412 S.W.3d at 341 (internal quotation omitted).

That this case deals with UM coverage and not underinsured motorist coverage as in *Bush* or liability coverage as in *Wilson* does not change the result. It is true that stacking of UM coverage is mandated by statute, but that mandatory stacking only applies to coverage available under a policy's terms or required by the statute. When the amount of UM coverage provided by a policy is reduced by operation of an exclusion, it is the reduced amount that must be stacked. Here, that is exactly what Shelter has done in paying \$25,000 to the appellants under each of the Silverado and Camry policies.

The coverage at issue in *Blumer v. Automobile Club Inter-Ins. Exch.*, 340 S.W.3d 214 (Mo.App.2011), as here, was UM coverage. The insured had a policy covering two of his vehicles and including UM coverage with limits of \$100,000 for each vehicle. He was injured while driving a motorcycle he owned, but the motorcycle was covered by a different insurance company. The policy in question excluded UM coverage if the insured was operating a vehicle that was owned by him but not insured under the policy,<sup>7</sup> which described the circumstances of the insured's accident. Although the insurer contended UM coverage was barred by the exclusion, it acknowledged that the exclusion could be invalid and unenforceable up to the minimum amount of mandatory UM coverage. Thus, it paid the insured \$50,000, representing stacked limits of \$25,000 for each of the policy's covered vehicles. The insured argued he was entitled to stack the full declared limits, for a total of \$200,000, but the court disagreed.

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<sup>7</sup> Obviously, this, too, was essentially the same exclusion at issue here.

The court first found that the exclusion was in conflict with the UM coverage statute. *See Id* at 219. It noted that, although UM coverage under the statute “inures to an individual insured for bodily injury inflicted by the tortious act of an uninsured motorist, rather than to a particular vehicle,” parties to an insurance contract nonetheless “may limit the coverage afforded an insured under a policy so long as the exclusion does not violate § 379.203 or the public policy behind it.” *See Id*. Thus, the exclusion was invalid, but only to the extent of the limit required by statute of \$25,000 per person. *See Id* at 220. Ultimately, the court determined the stacking mandated by the statute only applied to those minimum limits and not to amounts otherwise excluded from coverage:

Because we have found the exclusion in the policy is invalid and against public policy, [the insured] is entitled to recover the statutory minimum of \$25,000 per vehicle. [The insured] may stack the coverage for each of the two vehicles insured by [the insurer]. *See Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 544-545 (Mo.banc 1976). Therefore, [the insured] is entitled to \$50,000 in uninsured motorist benefits from [the insurer], which [the insurer] has already paid. Thus, the circuit court did not err in entering its judgment in favor of [the insurer] and finding that [the insurer] owed [the insured] no further payment under the policy.

*See Id*. Thus, while it is true that stacking of UM coverage is mandatory in Missouri, that mandatory stacking does not trump an applicable exclusion. When an exclusion applies, it reduces the amount of UM coverage available. It is that reduced amount, not the

amount of coverage there would be if there were no exclusions, that must be stacked. Here, the appellants were entitled to stack only the \$25,000 available under each of the Silverado and Camry policies after applying the partial exclusion, and Shelter paid that stacked sum at the outset.

### **APPELLANTS' POINT RELIED ON – NO. II**

The appellants fall back on what could be called the “give-and-take rule” for their last argument that the circuit court erred in enforcing Shelter’s partial exclusion as written. Although they go to great lengths to try to explain how Shelter made a promise to give \$100,000 in UM coverage but then tried to take that coverage away, their argument is flawed in two key respects.

#### **A. THE GIVE-AND-TAKE RULE & WHY EXCLUSIONS DO NOT CREATE AMBIGUITIES**

Although the “give-and-take rule” has surfaced frequently in insurance cases recently, it found its place in the Missouri case books almost thirty years ago. In *Lutsky v. Blue Cross Hosp. Service, Inc., of Mo.*, 695 S.W.2d 870, 875 (Mo.banc 1985), the Court held, “If a contract promises something at one point and takes it away at another, there is an ambiguity.” That point in the *Lutsky* decision was cited one year later in *Behr v. Blue Cross Hosp. Service, Inc., of Mo.*, 715 S.W.2d 251, 256 (Mo.banc 1986). As the rule became a crutch for claimants and insured persons seeking to create an ambiguity in order to gain coverage, the Court decided in 2007 to rein it in.

In *Todd*, 223 S.W.3d 156, the Court addressed the exact argument made by the appellants here, specifically that an exclusion limiting coverage creates an ambiguity because it takes away coverage granted elsewhere in a policy. It first acknowledged the general principle that, “when a contract promises something at one point and takes it away at another there is an ambiguity.” See *Id* at 162 (citing *Behr*, 715 S.W.2d at 256). However, the Court then stated, “Taken out of context, the language used by the Court in *Behr* might be confusing.” See *Id*. “Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks.” *Id*. at 162-163. “While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent.”<sup>8</sup> *Id* at 163 (underline added). Indeed, exclusions are “necessary provisions in insurance policies.” *Id*.

The appellants say the Shelter policies are ambiguous because the partial exclusion eliminates some coverage that might be available in its absence. Their argument would render all exclusions, which are necessary parts of insurance policies according to the Court, unambiguous and unenforceable. This cannot be. Moreover, if a

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<sup>8</sup> As demonstrated by *Todd*'s explanation of when the give-and-take rule is meant to apply, the ambiguity arises when one grant of coverage is more limited than another. The rule deals with incompatible coverage grants, not exclusions and limiting provisions that reduce or eliminate coverage otherwise granted elsewhere.

complete coverage exclusion does not create an ambiguity, as declared in *Todd*, then only a partial exclusion certainly does not.

The principle set forth in *Todd* was followed with succinct reasoning in *Grable*, where the court stated:

Finally, the endorsement is not ambiguous on the theory that it takes away coverage that was promised in the form policy. The Missouri Supreme Court has addressed this argument and clarified that exclusions and definitions do not make an insurance policy ambiguous because they limit or exclude coverage given in the form policy. Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks. Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies.

280 S.W.3d at 108-109 (internal quotations omitted; underline added) (*citing Todd*, 223 S.W.3d at 162-163). The partial exclusion here does not create an ambiguity and must be enforced as written. See *Madison Block Pharmacy*, 620 S.W.2d at 346 (if the language of an insurance contract is clear and unambiguous, courts do not have the power to rewrite the contract for the parties and must construe the contract as written).

The appellants argue the declarations promise them \$100,000 in UM coverage under each of the Silverado and Camry policies and that the partial exclusion is an attempt by Shelter to take that coverage away. As the Court has made clear, however,

exclusions do not give rise to ambiguities under the give-and-take rule on which the appellants' argument relies. Thus, even if the declarations could be considered a promise of coverage, although in reality they contain no promises or grants of coverage and simply provide data referenced by the other parts of the policies that actually do make promises and set limits, there would be no ambiguity. That is the law as explained by the Court, and the circuit court was correct in following it.

Apparently expecting the Court to be swayed by emotion, the appellants make several inflammatory comments against Shelter. On page 26 of their brief, for example, they say this is "yet another ploy by an insurance company" to pay less than it contracted to pay. On page 30, they say Shelter is trying to "strip" Mrs. Floyd of "the coverage she paid for." On page 39, the appellants suggest Shelter "so willingly took" premium payments and now is refusing to do what it was paid to do. On page 42, they say "[t]he Floyds kept their promise and paid their premium for coverage" but that Shelter "failed to keep its promise." On page 48, they say Shelter sold a "bill of goods." On page 49, the appellants resort to colloquialism by claiming Shelter's position "is simply another version of the old 'pig-in-a-poke' fraudulent sales technique." Shelter will not resort to the equivalent of name-calling and responds only by explaining, correctly, that Shelter has given the appellants exactly what it contracted to provide. Mr. Floyd paid a premium for UM coverage subject to certain exclusions. He did not pay a premium for a declarations page without any limitations or restrictions. Shelter has done exactly what Mr. Floyd paid premiums for it to do.

**B. AN INSURANCE POLICY IS READ AS A WHOLE, NOT IN ISOLATED BITS AND PIECES.**

The appellants' ambiguity argument also fails in that it rests on the assumption that they should be allowed to read the policies' declarations, stop at the end of the declarations, form a conclusion as to the scope and amount of coverage based only on the declarations, and then claim the rest of each policy does no more than create ambiguities. Their theory suggests they should be allowed to read the declarations in total isolation from the remainder of the Silverado and Camry policies. This clearly is not the law in Missouri, as demonstrated by the established rules of construction.

An insurance contract "should be construed as a whole." *Dieckman*, 414 S.W.2d at 321. "The entire policy must be considered in determining the intention of the parties and not detached provisions or clauses." *Doty*, 165 S.W.2d at 169; also *Rice v. Fire Ins. Exch.*, 897 S.W.2d 635, 637 (Mo.App.1995). "[W]hen analyzing an insurance contract, the entire policy and not just isolated provisions or clauses must be considered." *Versaw v. Versaw*, 202 S.W.3d 638, 643 (Mo.App.2006) (citing *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 77 (Mo.banc 1998)). "Courts should not interpret policy provisions in isolation." *Ritchie v. Allied Prop. & Cas. Co.*, 307 S.W.3d 132, 135 (Mo.banc 2009) (citing *Seeck v. GEICO Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo.banc 2007)). "Proper interpretation requires that we seek to harmonize all provisions of the policy to avoid leaving some provisions without function or sense." *Kyte v. American Family Mut. Ins. Co.*, 92 S.W.3d 295, 299 (Mo.App.2002). "Further, we evaluate policies by reading the policy as a whole." *Hall v. Allstate Ins. Co.*, 407 S.W.3d 603, 607

(Mo.App.2012). “We do not evaluate policy provisions in isolation. *Id.* The list of cases reaffirming this principle goes on and on, yet the appellants ask the Court to do the exact opposite by allowing them to determine what coverage is afforded by looking solely at the declarations.

When a person reads beyond Shelter’s declarations,<sup>9</sup> he or she encounters the exclusions from coverage. The effect of the exclusions is to limit the amount of coverage. That limitation is clear by reading each policy as a whole, as opposed to reaching conclusions based solely on the declarations as the appellants suggest.<sup>10</sup> If the

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<sup>9</sup> The appellants try to create the impression that Shelter is attempting to impose some unreasonable burden on a person purchasing an insurance policy to actually read the whole contract. As shown, however, all coverages must be determined by reading the whole policy rather than by reading a declarations page in isolation. Furthermore, it is Missouri law that imposes a duty on a person to actually read his or her policy. *See Jenkad Enters., Inc. v. Transportation Ins. Co.*, 18 S.W.3d 34, 38 (Mo.App.2000) (“It has been the law in Missouri for over a century that an insured has a duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon, and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction therewith”).

<sup>10</sup> If a person stops reading at the end of the declarations, he or she will find no promise of coverage or agreement to pay whatsoever. There is no agreement to make UM coverage payments in the declarations of the Silverado and Camry policies. [*L.F.*, at 469,

appellants' reasoning was to be adopted, every limitation and exclusion applicable to a policy's coverage would have to be stated in the declarations to be effective.<sup>11</sup> Plainly, this is not the law in Missouri.

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511] The person must read further to find those agreements in the contracts, and when doing so he or she will find and easily understand the partial exclusion.

<sup>11</sup> Ironically, this would result in declarations that would perfectly resemble the whole policy as it currently exists. The declarations would be many pages long, as everything found in the policy forms would need to be stated in the declarations under the appellants' theory. The appellants complain on pages 40 and 42 of their brief that the partial exclusion is "buried" and "hidden" at page 26 of the policies. Using their own reasoning, however, where all limiting provisions must be found in the declarations to avoid ambiguity and to be enforceable, the partial exclusion would be found at page 26 of the declarations. It makes no difference what page number the partial exclusion is on, as all pages are part of the policy as a whole. The partial exclusion is not "buried" or "hidden." It is set forth as plainly as every other part of the policy. To accept the appellants' theory would automatically make a policy provision on page 12 less ambiguous and more enforceable than an equally clear provision on page 17, and a policy provision on page 4 would be even less ambiguous and even more enforceable. But, page numbers have nothing to do with the inquiry because a policy must be read in its entirety.

Significantly, an argument identical to the appellants' was rejected just one year ago. In Progressive Northwestern Ins. Co. v. Talbert, 407 S.W.3d 1 (Mo.App.2013), the policy's liability coverage contained an exclusion for injuries sustained by members of the insured's household. Due to partial invalidity in light of the MVFRL, the exclusion had the effect of reducing the \$100,000 declared coverage limit to the \$25,000 statutory minimum. Neither the exclusion nor any indication of its effect was stated in the policy's declarations, and the plaintiff "argue[d] the declarations page creates ambiguity because it indicates the insured will have liability coverage in the amount of \$100,000 each person, with no indication that liability coverage is in any way reduced or diminished due to family relationships." See Id at 12. The court firmly rejected the argument. After relying on this Court's analysis and holding in Todd to explain why the give-and-take rule does not result in ambiguity simply because an exclusion and its effects are not set forth in a policy's declarations, the court refused to find an ambiguity where none existed:

We recognize that public policy requires exclusions to be narrowly construed against exclusion. Shahan [v. Shahan, 988 S.W.2d 529, 539 (Mo.banc 1999)]. However, we are not free to create an ambiguity to give a construction that invalidates an exclusion. See Lynch [v. Shelter Mut. Ins. Co., 325 S.W.3d 531, 535 (Mo.App.2010)] (citing Rodriguez [v. General Acc. Ins. Co. of Am., 808 S.W.2d 379, 382 (Mo.banc 1991)]). We find the household exclusion clause was clear and unambiguous.

*See Id* at 12-13. An exclusion is not ambiguous simply because it takes away coverage granted elsewhere in a policy; after all, that is the entire point of an exclusion. An exclusion also is not ambiguous simply because it is not stated or explained in a policy's declarations. The appellants' argument has been soundly rejected, and it should be rejected here.

### C. RICE ERRONEOUS

Finally, the appellants cite *Rice*, 301 S.W.3d 43, for their contention that the partial exclusion in the Silverado and Camry policies is ambiguous. Any such reliance on *Rice* would be erroneous. It was based on completely different policy language and has no impact here.

That case involved UM coverage and an exclusion purportedly applicable if the insured was entitled to recover workers' compensation benefits for his injuries. Immediately following the exclusionary language, the policy stated the exclusion did not apply to coverage amounts mandated by statute but did apply to amounts exceeding the statutory mandates. It then said that, notwithstanding the exclusion, all provisions of the policy providing coverage in excess of the required minimums were "fully enforceable." That policy was ambiguous because it expressly promised the insured the coverage grant exceeding the statutory mandates was fully enforceable despite the partial exclusion. It was that express promise, which informed the insured without any doubt that he could enforce the promise to pay in excess of the \$25,000 minimum notwithstanding the partial

exclusion, that rendered the policy ambiguous. The policies here contain no such promise.

In Rice, the Court reasoned, “[T]he uninsured motorist provision starts with a reference to providing coverage up to the limit of liability in the declaration provisions, followed by provisions to exclude coverage if any benefits are provided to an insured under any compensation law, followed by provisions that provide this exclusion does not apply to amounts of coverage mandated by any uninsured motorist law, followed by provisions that provide ‘the [uninsured motorist part] of the policy which exceed[s] the requirements of any applicable uninsured motorist insurance law or financial responsibility law, or are not governed by it, are fully enforceable.’” See Id at 48. If the Shelter policies in this case included all of the same provisions as in Rice, there might be an ambiguity problem, but they do not. Here, the court would have been required to stop after referencing the partial exclusions, as the Silverado and Camry policies contain no provision whatsoever indicating terms providing UM coverage in excess of the statutory minimums are fully enforceable despite the exclusions.

The insured in Rice arguably may have been confused, as the policy stated that the promise of coverage exceeding the statutory minimum was fully enforceable notwithstanding the step-down provision. There is no such guarantee in the policies at hand, however. They are free of any promise or indication that, notwithstanding the partial exclusion, a promise of coverage beyond the \$25,000 mandate is enforceable. Rice is distinguishable because the policies here do not contain the provisions that created

the ambiguity there. *Rice* does not apply, and the circuit court's ruling in favor of Shelter was correct.

### **VEXATIOUS REFUSAL TO PAY**

Because the circuit court was correct in determining Shelter has already paid all UM coverage available under the policies, it was also correct in entering summary judgment for Shelter on the appellants' statutory claim of "vexatious refusal to pay." The statute provides:

In any action against an insurance company to recover the amount of any loss under a policy of automobile ... or other insurance except automobile liability insurance, if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed [certain percentage-based limits], and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum in the verdict.

*See* R.S.Mo. § 375.420. Essentially, this statute creates a penalty that may be imposed upon an insurer in the event it denies coverage or otherwise refuses to pay a claim without reasonable cause or excuse.

Here, the appellants cannot recover on their claim of vexatious refusal to pay because they are not entitled to the additional coverage they are claiming. When an insurer has no liability under a policy, it may not be held liable for vexatious refusal to

pay. Valentine-Radford, Inc. v. American Motorists Ins. Co., 990 S.W.2d 47, 54 (Mo.App.1999); McDonough v. Liberty Mut. Ins. Co., 921 S.W.2d 90, 95 (Mo.App.1996). This is a sensible rule, as a finding that the coverage claimed is not owed necessarily means the insurer had reasonable cause and excuse to deny the claim for coverage. Shelter agreed to pay, and did pay, the \$150,000 of UM coverage it did not dispute owing. [L.F., at 414, 769] The appellants claimed an additional \$150,000 in UM coverage under the Silverado and Camry policies, but Shelter did not and does not owe any additional coverage. Shelter satisfied its obligations under the policies, and it has not refused to pay any amounts it owes. Accordingly, the claim of vexatious refusal to pay fails as a matter of law.

Even if the Court was to conclude the appellants are entitled to additional UM coverage notwithstanding the foregoing, summary judgment in favor of Shelter on the claim of vexatious refusal to pay still should be affirmed. The circuit court and the Missouri Court of Appeals agreed with Shelter's interpretation of its policies, and their holdings demonstrate conclusively that Shelter did have reasonable cause to refuse additional payment to the appellants. For a jury to conclude Shelter took an unreasonable position as to the question of law presented, it would have to conclude both the circuit court and the Court of Appeals were unreasonable in deciding that question of law. If its position had been in any way unreasonable, Shelter would not have prevailed before courts at two different levels. If nothing else, Shelter's reasonable cause was that it correctly believed a court would agree with its interpretation of the policies.

“The statute permitting penalties for an insurer’s refusal to pay without reasonable cause or excuse, is penal in nature and must be strictly construed.” Watters v. Travel Guard Intern., 136 S.W.3d 100, 108-109 (Mo.App.2004). Where two courts have agreed with Shelter’s interpretation of its policies in this case, even if was to be ultimately determined that those courts were incorrect, strict construction of the statute simply does not permit the assessment of a penalty. At best, the issue being decided is an open question of law.<sup>12</sup> “When there is an open question of law or fact, the insurance company may insist upon a judicial determination of those questions without being penalized.” Id.

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<sup>12</sup> Shelter does not believe the issue of coverage is an open question, of course. That is because the issues have already been decided in its favor, as explained in response to the appellants’ two points of error. In other words, it is not an open question of law because the question has already been decided as Shelter contends. It cannot be said, however, that the question is closed in the other direction. There is no case law interpreting Shelter’s policies or similar policies in the manner argued by the appellants.

## CONCLUSION

The appellants conclude their argument by suggesting the Court “has a responsibility to protect the insurance buying public.” Respectfully, this Court has a responsibility to protect all residents and citizens of Missouri from violations of contract. As a Missouri corporation, Shelter is entitled to all the same protections as is anyone else under the law. The function and responsibility of the Supreme Court of Missouri is to be the ultimate arbiter of the law, to uphold the law of Missouri, and, absent contrary public policy, to enforce contracts as they are written. Therein lies the appellants’ protection: their protection is the contract, but it is also Shelter’s. It is not the function of the Court to take from one and give to another where there exists no duty upon any contract or under the law for the former to give to the latter.

Shelter has fulfilled all of its obligations under the three policies it issued to Mr. and Mrs. Floyd. It has paid the applicable \$100,000 limit of UM coverage under the policy covering the Cavalier, which Mr. Floyd owned and was occupying at the time of the accident. Shelter’s limit of UM coverage under each of the Silverado and Camry policies is \$25,000 due to the partial exclusion limiting coverage to the statutory minimum in the event the “insured” is injured while occupying a vehicle he owns and which is not the “described auto” under those policies. Mr. Floyd’s injury occurred while he was occupying the Cavalier, which he owned. That car was not the “described auto” under the Silverado policy or the Camry policy. Shelter has paid \$25,000 under each of those policies, thereby exhausting the UM coverage.

The partial exclusion is clear, unambiguous, and enforceable. It plainly applies to the circumstances of this case. It limits coverage to the amount Shelter has already paid. Thus, the circuit court was correct in entering summary judgment in Shelter's favor.

Therefore, Shelter respectfully requests that the Court enter an Opinion and Order affirming the determinations and judgment of the circuit court; finding as a matter of law that (i) Shelter's UM coverage limit under the Cavalier policy is \$100,000, (ii) Shelter's UM coverage limit under the Silverado policy is \$25,000, (iii) Shelter's UM coverage limit under the Camry policy is \$25,000, (iv) Shelter has satisfied all of its obligations under the three policies by previously paying \$150,000 in UM coverage on account of the injuries to and death of Mr. Floyd, and (v) the claim of vexatious refusal to pay fails as a matter of law; taxing appellate costs in favor of Shelter pursuant to Missouri Supreme Court Rule 84.18; and granting to Shelter such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Missouri Supreme Court Rule 84.06(c) that:

(i) This brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b); and

(ii) Excluding the cover, this Certificate of Compliance, the Certificate of Service, and signature blocks, this brief contains 11,592 words, as determined by the “word count” tool included in the Microsoft Word software with which the brief was prepared.

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## CERTIFICATE OF SERVICE

The undersigned certifies that, pursuant to Missouri Supreme Court Rule 55.03(a), the original of this electronic filing was signed by the undersigned and will be maintained in the undersigned's file. The undersigned further certifies that on the 2<sup>nd</sup> day of April, 2014, this brief was filed electronically using the Missouri Courts eFiling System, which will send notice of electronic filing to all counsel for the appellants.

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