



Missouri Court of Appeals
Southern District

Division One

MORRIS JONES and)	
PAMELA BROWN,)	
)	
Appellants-Respondents,)	
)	
v.)	Nos. SD28757 & SD28758
)	
MID-CENTURY INSURANCE)	Opinion Filed:
COMPANY,)	November 26, 2008
)	
Respondent-Cross-Appellant.)	

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY

Honorable David A. Dolan, Circuit Judge

AFFIRMED

This case involves a dispute about the existence and amount of underinsured motorist (UIM) coverage afforded by an automobile insurance policy issued by Mid-Century Insurance Company (Mid-Century) for an accident in which Morris Jones (Jones) and Pamela Brown (Brown) were seriously injured. The trial court decided that Jones and Brown each were entitled to be paid \$50,000 in UIM benefits by Mid-Century. All parties appealed. In the appeal by Jones and Brown, they contend the insurance policy actually provides each of them with \$100,000 in UIM benefits. In Mid-Century's

cross-appeal, the insurer contends its policy provides no UIM benefits to Jones. Finding no merit in either of these contentions, this Court affirms.

I. Standards of Review

One coverage issue was whether an exclusion in the UIM coverage applied to Jones. The court ruled that issue in Jones' favor via a partial summary judgment. On appeal, this ruling is reviewed *de novo*. *Friends of Agriculture for the Reform of Missouri Environmental Regulations v. Zimmerman*, 51 S.W.3d 64, 74 (Mo. App. 2001); *Rasse v. City of Marshall*, 18 S.W.3d 486, 489 (Mo. App. 2000).

Thereafter, the remaining coverage issues were decided by the judge after a bench trial on stipulated facts. On appeal, the judgment in a court-tried case must be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. Rule 84.13(d); *Strader v. Progressive Ins.*, 230 S.W.3d 621, 622 (Mo. App. 2007).¹

Because none of the facts are in dispute, the real issue presented by these cross-appeals is whether the trial court properly interpreted and applied the provisions of the Mid-Century insurance policy. See *Strader*, 230 S.W.3d at 622-23. That is a question of law subject to a *de novo* review by this Court. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007); *Bickerton, Inc. v. Am. States Ins. Co.*, 898 S.W.2d 595, 601 (Mo. App. 1995).

II. Factual and Procedural Background

Jones and Brown resided together and had two automobiles available for their use. In February 2001, Jones leased a 2001 Dodge Ram (the pickup) from Firststar Bank

¹ All references to rules are to Missouri Court Rules (2008).

(Firststar) for 63 months. The lease agreement gave Jones a conditional right to purchase the pickup at the end of the lease. The title listed the owner of the pickup as “Firststar Bank NA LSR % Jones Morris D L[,]” and the Department of Revenue mailed the title to Firststar. Brown was the sole owner of a 1992 Lincoln Town Car (Town Car).

Mid-Century issued an automobile insurance policy on each vehicle. The policy covering the pickup did not include UIM coverage. The policy covering the Town Car, which was in effect between September 2004 and March 2005, did contain UIM coverage of \$100,000 per person and \$300,000 per occurrence.

On December 7, 2004, Jones was driving the pickup, and Brown was a passenger in that vehicle. Another vehicle driven by Sara McGee (McGee) collided with the pickup, causing serious injuries to Jones and Brown. Each one of them sustained damages of at least \$150,000 as a result of the collision. The parties agree that McGee is legally liable for these damages. American Standard had issued an automobile insurance policy to McGee with liability limits of \$50,000 per person and \$100,000 per occurrence. Jones and Brown each received \$50,000 from American Standard, which exhausted the limits of McGee’s liability insurance.

Thereafter, Jones and Brown each made a claim to recover UIM benefits pursuant to the Mid-Century policy insuring the Town Car. Each of them were named insureds in the policy declarations. The Town Car was the only vehicle described in the Declarations. In relevant part, the Town Car policy contained the following provisions that are germane to the issues presented by these cross-appeals:

DEFINITIONS

Throughout this policy, “you” and “your” mean the “named insured” shown in the Declarations “We,” “us” and “our” mean the Company

named in the Declarations which provides this insurance. In addition, certain words appear in bold type. They are defined as follows:

Private Passenger Car means a four wheel land motor vehicle of the private passenger or station wagon type actually licensed for use upon public highways. It includes any motor home with no more than six wheels and not used for business purposes

Utility car means a land motor vehicle having at least four wheels actually licensed for use upon public highways, with a rated load capacity of not more than 2,000 pounds, of the pickup, panel or van type. This does not mean a vehicle used in any business or occupation other than farming or ranching

Your insured car means:

1. The vehicle described in the Declarations of this policy or any **private passenger car** or **utility car** with which you replace it. You must advise us within 30 days of any change of **private passenger car** or **utility car**. If your policy term ends more than 30 days after the change, you can advise us anytime before the end of that term.
2. Any additional **private passenger car** or **utility car** of which you acquire ownership during the policy period. Provided that:
 - a. You notify us within 30 days of its acquisition, and
 - b. As of the date of acquisition, all **private passenger** and **utility cars** you own are insured with a member company of the Farmers Insurance Group of Companies.

Ownership shall include the written leasing of a **private passenger** or **utility car** for a continuous period of at least six months.

3. Any **utility trailer**:
 - a. That you own, or
 - b. While attached to **your insured car**.
4. Any **private passenger car**, **utility car** or **utility trailer** not owned by you or a **family member** while being temporarily used as a substitute for any other vehicle described in this definition because of its withdrawal from normal use due to breakdown, repair, servicing, loss or destruction.

Endorsement Adding UNDERinsured Motorist Coverage

For an additional premium, it is agreed that UNDERinsured Motorist Coverage is added to your policy.

We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **UNDERinsured motor vehicle** because of **bodily injury** sustained by an **insured person**. The **bodily injury** must be caused by an **accident** and arise out of the ownership, maintenance or use of the **UNDERinsured motor vehicle**. We will pay under this coverage only after the limits of liability under any applicable **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements

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.

Coverage Designation	Limits
...	...
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

Additional Definitions Used for UNDERinsured Motorist Coverage Only

a. **Insured Person** means:

1. You or a **family member**.
2. Any other person while **occupying your insured car or your insured motorcycle**

But, no person shall be considered an **insured person** if the person uses a vehicle without having sufficient reason to believe that the use is with permission of the owner

c. **Underinsured Motor Vehicle** – means a land motor vehicle to which a **bodily injury** liability bond or policy applies at the time of the **accident** but its limits for **bodily injury** liability are less than the limits of liability for this coverage

Exclusions

... Coverage does not apply to **bodily injury** sustained by a person while **occupying** any vehicle owned by you or a **family member** for which insurance is not afforded under this policy or through being struck by that vehicle.

(Bold emphasis in original.)

The bold type words in the above quotation all had specific definitions supplied by the policy. Some phrases like “insured person” and “underinsured motor vehicle” had specific definitions provided by the UIM coverage endorsement itself. It is undisputed that: (1) Jones and Brown were insured persons because each was a named insured in the policy Declarations; and (2) McGee was driving an underinsured motor vehicle because the limits of her liability coverage were less than the limits of UIM coverage provided by the Town Car policy. The “**DEFINITIONS**” section of the Town Car policy contained specific, policy-wide definitions for “**damages[.]**” “**bodily injury**” and “**accident[.]**” It

is undisputed that Jones and Brown sustained damages because of bodily injury caused by an accident, as defined by the Town Car policy.

In July 2005, Jones and Brown filed suit against Mid-Century to recover UIM benefits provided by the Town Car policy. Mid-Century tendered \$50,000 in UIM benefits to Brown, which the insurer contended was the maximum amount Brown was entitled to receive. With the insurer's agreement, Brown accepted this sum and reserved her right to seek an additional \$50,000 in UIM benefits. Relying on the above-quoted exclusion in the UIM coverage, Mid-Century denied that Jones was entitled to any UIM benefits. Mid-Century claimed that: (1) Jones was occupying the pickup; (2) he owned that vehicle; and (3) the pickup was not insured by the Town Car policy.

In August 2006, the trial court decided that McGee's vehicle was an underinsured motor vehicle as defined by the UIM coverage in the Town Car policy. The court also ruled that the exclusion did not apply to Jones because he did not own the pickup. Therefore, the court granted a partial summary judgment in Jones' favor on that coverage issue.

The only remaining issue was whether Mid-Century was entitled to reduce the amount payable to Jones and Brown by the \$50,000 payment each had received from McGee's liability insurer pursuant to subsection f. of the Limits of Liability section of the UIM coverage. That issue was tried on stipulated facts supplied by the parties, and the court ruled that Mid-Century was entitled to the reduction. Accordingly, both Jones and Brown were entitled to \$50,000 in UIM benefits from Mid-Century. The court entered a judgment in Jones' favor for \$50,000. Because Brown had already been paid that sum by the insurer, her UIM claim was dismissed with prejudice.

All parties appealed. As noted above, Jones and Brown jointly contend the trial court erred in allowing the \$50,000 payment each claimant received to reduce the amount of UIM benefits to which they were entitled from the Town Car policy. Mid-Century has appealed from the ruling that Jones was not excluded from UIM coverage. The appeals have been consolidated. For ease of analysis, Mid-Century's arguments will be addressed first.

Mid-Century's Cross-Appeal

As noted above, the UIM endorsement in the Town Car policy contained an exclusion which stated that “[c]overage does not apply to **bodily injury** sustained by a person while **occupying** any vehicle owned by you or a **family member** for which insurance is not afforded under this policy or through being struck by that vehicle.” (Bold in original.) Because Mid-Century was relying upon an exclusion in the policy to deny UIM coverage, it bore the burden of proving the exclusion's applicability. *Strader v. Progressive Ins.*, 230 S.W.3d 621, 624 (Mo. App. 2007).

In Mid-Century's single point, it contends the trial court erred in granting a partial summary judgment in Jones' favor on the issue of whether the foregoing exclusion applied to him. That contention is based upon the premise that Jones “owned” the pickup, even though he was merely leasing the vehicle when the accident occurred. Mid-Century argues that Jones was excluded from UIM coverage because: (1) he had leased the pickup for more than six months, which fell within the definition of “ownership” in the Town Car policy; (2) the plain and ordinary meaning of the word “owned” includes the lessee of an automobile; and (3) Jones met the definition of “owner” in RSMo

Chapters 301 and 303, which regulate motor vehicles in Missouri.² We will address each argument in turn.

The Town Car policy contains a “**DEFINITIONS**” section near the beginning of the policy. This section contains a number of bold type words and phrases that are given definitions which apply throughout the policy whenever that bold type word or phrase is used. Mid-Century’s first argument is based upon the following definition:

Your insured car means:

1. The vehicle described in the Declarations of this policy or any **private passenger car** or **utility car** with which you replace it. You must advise us within 30 days of any change of **private passenger car** or **utility car**. If your policy term ends more than 30 days after the change, you can advise us anytime before the end of that term.
2. Any additional **private passenger car** or **utility car** of which you acquire ownership during the policy period. Provided that:
 - a. You notify us within 30 days of its acquisition, and
 - b. As of the date of acquisition, all **private passenger** and **utility cars** you own are insured with a member company of the Farmers Insurance Group of Companies.

*Ownership shall include the written leasing of a **private passenger** or **utility car** for a continuous period of at least six months.*
3. Any **utility trailer**:
 - a. That you own, or
 - b. While attached to **your insured car**.
4. Any **private passenger car**, **utility car** or **utility trailer** not owned by you or a **family member** while being temporarily used as a substitute for any other vehicle described in this definition because of its withdrawal from normal use due to breakdown, repair, servicing, loss or destruction.

² All references to statutes are to RSMo (2000) unless otherwise indicated.

(Bold in original; italics added.) Mid-Century argues that the italicized language in the second definition of “**your insured car**” must be used to interpret the meaning of the word “owned” in the UIM exclusion. This Court disagrees.

If a term in an insurance policy is clearly defined, that definition is controlling. *Vega v. Shelter Mut. Ins. Co.*, 162 S.W.3d 144, 147 (Mo. App. 2005). A necessary corollary to this general rule, however, is that the defined term must actually be used in the part of the policy at issue in order for that definition to apply. Thus, the italicized language cited by Mid-Century does not come into play unless and until the phrase “**your insured car**” is used in the policy. The UIM exclusion at issue here does not use that phrase. Instead, the undefined word “owned” is used to describe the vehicle which invokes the exclusion. We reject Mid-Century’s spurious argument that the written lease language constitutes its own, stand-alone definition of “ownership” that has policy-wide applicability. In addition, we note that the placement of the italicized language within the “**your insured car**” definition makes it clear that the reference to leased vehicles only applies to the determination of what constitutes a newly-acquired vehicle that is subject to the 30-day reporting requirement. As Jones had leased the pickup long before the effective date of the Town Car policy, this definition would have no application even if the phrase “**your insured car**” had been used in the exclusion. Mid-Century’s first argument has no merit.

Mid-Century’s second argument is that Jones “owned” the pickup within the plain and ordinary meaning of that word, even though he was only leasing the vehicle at the time of the accident. When a term used in an insurance policy is construed, a court should apply the meaning which would be attached to that term by an ordinary person of

average understanding who purchased the insurance. *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199, 202 (Mo. App. 2007). “To ascertain the common meaning of a term, a court may look to a dictionary definition.” *Strader v. Progressive Ins.*, 230 S.W.3d 621, 624 (Mo. App. 2007); *Risher v. Farmers Ins. Co.*, 200 S.W.3d 84, 88 (Mo. App. 2006). The word “owned” is the past tense of “own,” which means “[t]o have a good legal title; to hold as property; to have a legal or rightful title to; to have; to possess.” BLACK’S LAW DICTIONARY 996 (5th ed. 1979).³ Mid-Century emphasizes the latter portion of that definition by arguing that Jones certainly had and possessed the pickup at the time of the accident. Because the pickup had a title and could only be legally bought and sold by complying with Missouri’s statutory titling requirements, however, this Court concludes that an ordinary person of average understanding who bought Mid-Century’s policy would use the first part of the definition to decide who “owned” the pickup.⁴ It is undisputed that Firststar held title to the pickup and was the lessor of that vehicle. Jones’ lease only authorized his possession and use of the vehicle, provided he submitted timely payments during the lease period. Because Firststar held the

³ In contrast, BLACK’S defines a lease of tangible personal property to mean “a contract by which one owning such property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payment of a stipulated price, referred to as rent.” BLACK’S LAW DICTIONARY 889 (6th ed. 1990).

⁴ We have examined the cases Mid-Century relies on in support of its argument for a more flexible definition of “owned” in this case, but we find the cases cited inapposite because none of them involve a lessor/lessee relationship. See *Lair v. American Family Mut. Ins. Co.*, 789 S.W.2d 30, 32-33 (Mo. banc 1990) (involving a vehicle jointly titled between father and son); *Lightner v. Farmers Ins. Co., Inc.*, 789 S.W.2d 487, 490 (Mo. banc 1990) (also involving joint title between father and son); *U.S. Fidelity & Guaranty Co. v. Safeco Ins. Co. of America*, 522 S.W.2d 809, 818 (Mo. banc 1975) (involving a non-owner driver with permission to drive the vehicle from its owner or a person reasonably believed to be the owner).

actual title, Jones could not sell the vehicle or convey title. *See, e.g., Jackson v. Cannon*, 147 S.W.3d 168, 173 (Mo. App. 2004) (without proper assignment of title from the named title holder to Jackson, she “lacked the power to sell the vehicle”); *Allstate Ins. Co. v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 581 S.W.2d 596, 602 (Mo. App. 1979) (“the fact of ownership is created by the delivery of a properly assigned certificate of title”); § 301.210 (detailing statutory requirements for the sale or transfer of ownership of a motor vehicle). In short, an ordinary person of average understanding would not believe Jones “owned” the pickup because he lacked the ability to convey legal title to that vehicle to another. Therefore, applying the plain and ordinary meaning of the word “owned” as used in the UIM exclusion, Jones was not the owner of the pickup. *See Green v. Farmers Ins. Co., Inc.*, 57 F. Supp. 2d 729, 733-34 (W.D. Ark. 1999) (using the ordinary definition of the word “owned,” a vehicle titled in the name of a partnership was not “owned” by one of the individual partners so as to invoke an uninsured motorist exclusion); *Mid-Century Ins. Co. v. Gardner*, 11 Cal. Rptr. 2d 918, 921-22 (Cal. Ct. App. 1992) (using the ordinary definition of the word “owned,” a truck titled in the name of a corporation was not “owned” by the principal shareholder who used the vehicle so as to invoke an uninsured motorist exclusion).

Mid-Century’s final argument is that this Court should look to RSMo Chapter 301 (governing the registration and licensing of vehicles) and RSMo Chapter 303 (governing motor vehicle financial responsibility) to ascertain the proper meaning of the word “owned” in the UIM exclusion. The word “Owner” is defined in Chapter 301 to mean:

any person, firm, corporation or association, who holds the legal title to a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an

immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law[.]

§ 301.010(43) RSMo Cum. Supp. (2007). The word “Owner” is defined in Chapter 303 to mean:

a person who holds the legal title to a motor vehicle; or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a motor vehicle is entitled to possession thereof, then such conditional vendee or lessee or mortgagor[.]

§ 303.020(9). Mid-Century’s reliance on the statutory definitions contained in these chapters is misplaced, however, because “[t]here are no statutory requirements in Missouri for underinsured motorist coverage.” *Buehne v. State Farm Mut. Auto. Ins. Co.*, 232 S.W.3d 603, 606 (Mo. App. 2007). “Therefore, the existence of coverage and its limits are determined by the contract entered between the insured and the insurer.” *Id.* at 606-07; see *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 383 (Mo. banc 1991) (absent public policy considerations, an insured and an insurer are free to define and limit coverage by their agreement). As previously discussed, the plain and ordinary meaning of the word “owned” in the UIM exclusion would not include the lessee of a titled motor vehicle who lacked the ability to legally sell the vehicle. Mid-Century’s third argument has no merit.

In conclusion, the trial court properly granted a partial summary judgment in Jones’ favor on the issue of whether he was excluded from UIM coverage. Mid-Century failed to meet its burden of proving that the exclusion applies to Jones, so he was entitled to UIM benefits under the Town Car policy. Mid-Century’s point on appeal is denied.

Jones' and Brown's Appeal

In Jones' and Brown's single point, they contend the trial court erred in interpreting the language of the UIM endorsement in the Town Car policy. The claimants argue that the provisions of the Limits of Liability section are ambiguous and should be construed against Mid-Century so as to provide each claimant with \$100,000 in UIM benefits.

“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. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). In making that determination, a court applies the meaning which would be attached to those terms by an ordinary person of average understanding who purchased the insurance. *McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171 (Mo. banc 1999). “A court is not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate.” *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991); *Strader v. Progressive Ins.*, 230 S.W.3d 621, 624 (Mo. App. 2007). If an ambiguity exists, it must be construed against the insurer. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). “Absent an ambiguity, an insurance policy must be enforced according to its terms.” *Id.*; see *Strader*, 230 S.W.3d at 624.

Jones and Brown contend there is an ambiguity in the Limits of Liability provision of the Town Car policy. Specifically, Jones and Brown argue that the subsections a.1 and f. are confusing and ambiguous because, when read together, they

allow Mid-Century to receive a double credit for the payments made by McGee's liability carrier. This Court disagrees.

We begin by reproducing below, in relevant part, the section of the UIM endorsement at issue:

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.

Coverage Designation	Limits
...	...
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**

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. See *Zelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 679 (Mo. App. 1996); *Wendt v. General Acc. Ins. Co.*, 895 S.W.2d 210, 217 (Mo. App. 1995). Subsection a. of the Limits of Liability provision accomplishes that purpose by limiting the amount Mid-

Century will pay to the lesser of: (1) the amount of the insured's damages that have not already been paid; or (2) the UIM coverage's limit of liability. The first clause in subsection a.1 mathematically quantifies the amount by which the claimant is underinsured. To the extent the claimant has already been compensated for his or her damages, this prevents a double recovery for the same loss. For example, if a claimant has sustained damages of \$100,000 and has been paid \$25,000 by the tortfeasor's liability carrier, the most Mid-Century would pay is \$75,000 because the claimant is only underinsured by that amount. The second clause in subsection a.2 caps Mid-Century's liability at the UIM coverage's limits of liability. For example, if a claimant has sustained damages of \$250,000 and has been paid \$25,000 by the tortfeasor's liability carrier, the claimant would be underinsured by \$225,000. Nevertheless, the most Mid-Century would pay is the per person limit of \$100,000. Applying subsection a. to Jones and Brown, each of them sustained damages of at least \$150,000 due to McGee's negligence. Therefore, whether subsection a.1 or a.2 is used, each claimant is underinsured by \$100,000.

After a claimant's underinsured damages have been quantified pursuant to subsection a., subsections b. and f. determine the actual amount Mid-Century is required to pay. Subsection b. plainly states the amount the carrier will pay is "[s]ubject to subsections a. and c.-h. in this Limits of Liability section" Subsection f. plainly states that "[t]he amount of UNDERinsured Motorist Coverage we will pay shall be reduced by any amount paid or payable to or for an **insured person** ... by or for any person or organization who is or may be held legally liable for the **bodily injury** to an **insured person**" (Bold in original.) Mid-Century argues that these subsections are not

ambiguous and do not give the insurer an improper double credit for the claimants' recovery from McGee's liability carrier. This Court agrees.

The principal complaint advanced by Jones and Brown is that the set-off permitted by subsection f. would make it impossible for a claimant to ever recover the actual UIM limit of liability specified in the policy. In *Weber v. American Family Mutual Ins. Co.*, 868 F.2d 286 (8th Cir. 1989), two judges agreed with that assertion and found a similar set-off provision ambiguous under Missouri law because applying it as written would render the policy "meaningless or, at least, misleading." *Id.* at 288. One judge dissented from that holding because he believed the set-off provision was unambiguous and should be applied as written. *Id.* at 288-89.

In *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379 (Mo. banc 1991), Rodriguez was insured by General Accident. Rodriguez's policy included UIM coverage with a \$50,000 limit of liability. The policy also stated that the UIM "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." *Id.* at 380-81. After being injured by John Fruehwirth, Rodriguez received \$50,000 from Fruehwirth's insurance company. When Rodriguez sought UIM benefits, General Accident denied coverage based upon the set-off provision. *Id.* Rodriguez sued, and the trial court entered judgment for General Accident. On appeal, Rodriguez cited *Weber* for the proposition that applying the set-off provision as written would render the UIM coverage meaningless. *Id.* at 382. Our Supreme Court repudiated the reasoning of *Weber* as "an example of a court creating an ambiguity in order to distort the language of an unambiguous policy. *Weber* is not binding on this Court. Indeed, having considered the

issue, we reject the holding in *Weber* as inconsistent with Missouri law.” *Id.* at 383. Our Supreme Court also explained that it is permissible for an insurer to draft its policy so that the UIM limit of liability represents the total amount the insured will receive, including any contribution from the underinsured motorist:

Weber reasoned that if the insured is protected by \$50,000 in underinsured motorist coverage, and that coverage was not construed to be excess to amounts paid by the tortfeasor’s insurer, then the insured could never get the full \$50,000 worth of coverage. That is, if the tortfeasor’s insurer paid \$25,000, then the insured would be paid \$25,000 on her underinsured motorist coverage; and if the tortfeasor’s insurer paid one dollar then the insured would receive \$49,999 from her own coverage. Never could the insured recover the full \$50,000 in underinsured motorist benefits. If the tortfeasor had no coverage then the insured would recover under her uninsured motorist provision. Any construction of the provision which prevented recovery of the full \$50,000, declared *Weber*, rendered the coverage meaningless. It is difficult to understand why the mathematical inability to collect a full \$50,000 in underinsured motorist coverage renders the coverage meaningless. The effect of underinsured motorist coverage is to assure the appellant of receiving \$50,000, the contracted amount of protection.

Id. at 382 n.1. For these reasons, our Supreme Court held that the UIM coverage in General Accident’s policy, including the set-off provision, was defined with such clarity that the policy was “neither ambiguous nor misleading.” *Id.* at 383.⁵

This Court reaches the same conclusion here. The set-off provision in *Rodriguez* is nearly identical to the Mid-Century set-off clause contained in subsection f. above, except that it applies to the “amount of UNDERinsured Motorist Coverage” as compared to the “limits of liability” as specified in the set-off provision at issue in *Rodriguez*.

⁵ In *Wibbenmeyer v. American Family Mut. Ins. Co.*, 946 F.2d 569 (8th Cir. 1991), the Eighth Circuit reversed a district court judge who had relied on *Weber* in holding that an set-off provision in the UIM coverage of an insurance policy governed by Missouri law was ambiguous. Citing *Rodriguez*, the appellate court held that the set-off provision was not ambiguous and had to be enforced as written. *Wibbenmeyer*, 946 F.2d at 571.

Jones and Brown attempt to distinguish this case from *Rodriguez* by arguing the difference in language is somehow critical. We perceive no significant difference between those two phrases. After reading the various parts of the Limits of Liability section together, this Court discerns no “duplicity, indistinctness, or uncertainty in the meaning of the language in the policy.” *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). This Court will not create an ambiguity in order to distort the language of an unambiguous policy. *Rodriguez*, 808 S.W.2d at 383; *Strader v. Progressive Ins.*, 230 S.W.3d 621, 624 (Mo. App. 2007). Therefore, the language of the Limits of Liability section of Mid-Century’s UIM endorsement must be applied as written.

Applying subsections a., b. and f. of the Limits of Liability provision to Brown’s UIM claim, she sustained underinsured damages of \$100,000. Because she had been paid \$50,000 by McGee’s liability carrier, Brown was only entitled to an additional \$50,000 in UIM benefits. Having already received that sum from Mid-Century, Brown was not entitled to any additional UIM benefits. Therefore, the trial court properly dismissed her claim with prejudice. Applying these subsections to Jones’ claim, he also sustained underinsured damages of \$100,000. Because he had been paid \$50,000 by McGee’s liability carrier, Jones was only entitled to an additional \$50,000 in UIM benefits. Therefore, the court properly entered a judgment in Jones’ favor for that sum. Jones’ and Brown’s point on appeal is denied.

The judgment of the trial court is affirmed.

Jeffrey W. Bates, Judge

BARNEY, J. – Conkurs

SCOTT, P.J. – Conkurs

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Division I