



Missouri Court of Appeals
Southern District

Division Two

STEVE RITCHIE and ANITA RITCHIE,)
)
 Plaintiffs-Respondents,)
)
 v.)
)
 ALLIED PROPERTY & CASUALTY)
 INSURANCE COMPANY,)
)
 Defendant-Appellant.)

No. SD28902

Filed March 10, 2009

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David B. Mouton, Circuit Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Steve Ritchie and Anita Ritchie ("Respondents") are the parents of Kelsey Ritchie. Kelsey Ritchie was a passenger in a vehicle driven by Noah Heath; she was tragically killed when Heath's vehicle collided with a vehicle driven by Adam Tomblin. Both Heath and Tomblin were at fault for the accident. A judgment was entered against Heath and Tomblin for the wrongful death of Kelsey Ritchie. The judgment ordered Heath and Tomblin to pay \$1,800,000. Both Heath's and Tomblin's vehicles were insured. Heath's insurance had liability limits of \$25,000 per person and \$50,000 per accident. Tomblin's insurance had liability limits of \$50,000 per person and \$100,000

per accident. The accident resulted in multiple injured parties; therefore, Respondents received only \$20,000 from Heath's insurer and \$40,000 from Tomblin's insurer. These payments totaled \$60,000, and did not cover the total amount of damages.

Kelsey Ritchie was insured under a personal auto policy purchased by Respondents from Allied Property and Casualty Insurance ("Allied"), Appellant. The Allied policy insured three vehicles. Each of the three vehicles had underinsured motorist ("UIM") coverage in the amount of \$100,000 per person and \$300,000 per accident. Respondents paid three separate premiums for the UIM coverage. Respondents sued Allied to collect under their own insurance policy. Allied tendered to Respondents \$40,000, which they calculated by subtracting the \$60,000 paid by the tortfeasors from what it considered to be "the maximum per-person recovery under the [UIM] coverage policy [of] \$100,000."

The trial court ruled that the anti-stacking and set-off provisions in the policy, relied upon by Allied in its calculation of the maximum per-person recovery, were "confusing, duplicitous, vague, ambiguous, and inconsistent" and were unenforceable. Therefore, Allied was ordered to pay \$260,000, which represents the difference between \$100,000 for the coverage on each of the three vehicles minus the \$40,000 that Allied had paid to Respondents before this lawsuit. Allied contends the trial court erred because "it was required to enforce the unambiguous anti-stacking and set[-]off language in the subject policy's [UIM] endorsement."¹

¹ Allied brings one point on appeal, which challenges the judgment on both stacking and set-off, although, clearly, these are separate rulings with separate law. We have attempted to address both claims as they relate to these policies.

Standard of Review

Because this judgment was entered by the trial court on stipulated facts, we review the judgment to determine whether the trial court drew the proper legal conclusions. *Citizens For Preservation of Buehler Park v. City of Rolla*, 230 S.W.3d 635, 637 (Mo. App. S.D. 2007). Insurance policy ambiguity is a question of law. *Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308, 316 (Mo. App. E.D. 1999). If an insurance contract is ambiguous, it must be construed against the insurer; otherwise, it must be enforced according to its terms. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). "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." *Id.* (quoting *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997)). "Ambiguous language is viewed in the meaning that would ordinarily be understood by the layperson that bought and paid for the policy." *American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51, 55 (Mo. App. W.D. 2006).

Discussion

Our discussion commences with the policy language, which states in three relevant sections:

INSURING AGREEMENT

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury:"

1. Sustained by an "insured;" and
2. Caused by an accident.

....

We will pay under this coverage only if the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

....

LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for "bodily injury" resulting from any one accident. This is the most we will pay regardless of the number of:
1. "Insureds;"
 2. Claims made;
 3. Vehicles or premiums shown in the Declarations; or
 4. Vehicles involved in the accident.
- B. The limit of liability shall be reduced by all sums:
1. Paid because of "bodily injury" by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy;
 2. Paid or payable because of "bodily injury" under any workers' compensation act or similar act;
 3. Paid or payable because of "bodily injury" under any disability benefits law; and
 4. Paid or payable under any auto medical payments, no-fault or personal injury protection insurance.
- C. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.
- D. Any payment under this coverage will reduce any amount that person is entitled to recover under Part A of this policy.

....

OTHER INSURANCE

If there is other applicable underinsured motorists coverage available under one or more policies or provisions of coverage:

1. Any recovery for damages may equal but not exceed the highest applicable limit for any one vehicle under this insurance or other insurance providing coverage on either a primary or excess basis. In addition, if any such coverage is provided on the same basis, either primary or excess, as the coverage we provide under this endorsement, we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits for coverage provided on the same basis.
2. Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage.

There is no dispute that Respondents are entitled to UIM coverage benefits under the **INSURING AGREEMENT** section of the policy. There were damages that the insured was legally entitled to recover because of bodily injury caused by an accident. The limits of liability under "any" applicable bodily injury liability bonds or policies had been exhausted. The issues in this appeal concern the interplay between the provisions in the **LIMITS OF LIABILITY** section and the **OTHER INSURANCE** section as they relate to the stacking, if any, of coverage and the set-off, if any, for payments made to Respondents on behalf of the tortfeasors. Because these two issues involve different policy provisions, they are discussed separately.

I. Stacking

Although each party directs us to cases where stacking was or was not allowed, we find *Niswonger* to be persuasive. In *Niswonger*, the court invalidated the anti-stacking clause in the UIM coverage because it conflicted with the "other insurance" clause. *Niswonger*, 992 S.W.2d at 315-316. In *Niswonger*, a police officer was driving a

police motorcycle while escorting a group of runners participating in a race on the city streets. *Id.* at 310. He was struck by a van and suffered serious injuries. *Id.* The officer had three separate auto insurance policies, each on a separate vehicle he owned. *Id.* Each policy contained a separate endorsement for UIM coverage, with liability limits of \$100,000 per person and \$300,000 per occurrence. *Id.* The van's driver had a policy limit of \$50,000. *Id.* The police officer suffered damages exceeding \$350,000. *Id.* After exhausting the policy limit of the van's driver, the police officer demanded his own insurance company pay him \$300,000, the aggregate individual limits of the UIM coverage in his three auto insurance policies. *Id.*

The policy in *Niswonger* had a provision that stated the following:

5. OTHER AUTOMOBILE INSURANCE IN THE COMPANY - With respect to any occurrence, accident, death or loss to which this or any other automobile insurance policy issued to the named insured or spouse by the company also applies, the total limit of the company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit under any one such policy.

Id. at 314-15. The policy also contained an "Other Insurance" provision, which read as follows:

In the event there is other like or similar insurance applicable to a loss covered by this endorsement, this company shall not be liable for more than the proportion which this endorsement bears to the total of all applicable limits. **However, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance.**

Id. at 315.

The *Niswonger* court ruled the "Other Insurance" provision made the anti-stacking provision ambiguous because "a reasonable [layperson] could interpret the sentence to specifically *allow* stacking of UIM coverages provided in their separate vehicle policies, for which separate UIM premiums have been paid, *in the special situation where an accident occurs while the insured is occupying a non-owned vehicle.*"

Id. The court distinguished *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379 (Mo. banc 1991), which is relied upon by Appellant here, because the *Niswonger* policy contained the "Other Insurance" provision, which was not present in *Rodriguez*. *Niswonger*, 992 S.W.2d at 321.

Ragsdale, supra, is also instructive. In *Ragsdale*, the relevant provisions in the insurance policy stated in part:

LIMITS OF LIABILITY

The limits of liability of this coverage as shown in the declarations apply, subject to the following:

1. The limit for each person is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one accident.
2. Subject to the limit for each person, the limit for each accident is the maximum for bodily injury sustained by two or more persons in any one accident.

We will pay no more than these maximums no matter how many vehicles are described in the declarations, insured persons, claims, claimants or policies or vehicles are involved in the accident.

The limits of liability of this coverage shall be reduced by:

1. A payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle.
2. A payment under the Liability coverage of this policy.

3. A payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law or any similar law.

OTHER INSURANCE

If there is other similar insurance on a loss covered by this endorsement, we will pay our share according to this policy's proportion of the total limits of all similar insurance. *But, any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is excess over any other similar insurance.*

Ragsdale, 213 S.W.3d at 53-54 (emphasis added). The court found the second sentence of the "Other Insurance" provision was ambiguous. *Id.* at 56. The court stated that there were two possible constructions of the second sentence. *Id.* "One construction would indicate that the [UIM] coverage provided by the endorsement is excess over *any other applicable* coverage." *Id.* A second construction "would indicate that the [UIM] coverage provided by the endorsement is excess over other [UIM] coverage, and, therefore, because no such coverage exists in this case,² the excess clause does not apply." *Id.* If the second construction was adopted, then the clause would not apply, and "the unambiguous anti-stacking clause and the set-off clause take effect." *Id.*

The court refused to apply the second construction, stating, "[i]f American Family intended *similar* to mean *other [UIM] insurance*, it simply could have stated *other similar [UIM] insurance.*" *Id.* Because the second sentence of the "Other Insurance"

² American Family argued that the tortfeasor was not underinsured as defined by the policy. *Ragsdale*, 213 S.W.3d at 54. If the tortfeasor was not underinsured, under the second construction, the other insurance clause would not apply because it deals strictly with underinsured motorists. If the other insurance clause does not apply, it could not be used to find ambiguity with other provisions of the policy.

clause, when compared to the anti-stacking provision, rendered the policy ambiguous, the insured was allowed to stack the policies. *Id.* at 57.

In *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199 (Mo. App. E.D. 2007), the "other insurance" provision was identical to the provision in *Ragsdale*.³ *Id.* at 205-06. The policy also contained two anti-stacking provisions. *Id.* at 207. The first anti-stacking language states, in pertinent part:

The limits of liability of this coverage as shown in the declarations apply, subject to the following:

1. The limit for each person is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one accident.

....

We will pay no more than these maximums no matter how many vehicles are described in the declarations, insured persons, claims, claimants or policies or vehicles are involved in the accident.

Id. The second anti-stacking provision was in the "Two or More Cars Insured" provision and stated: "The total limit of our liability under all policies issued to you by us shall not exceed the highest limit of liability under any one policy." *Id.* The court, following the reasoning of *Ragsdale*, held that "[b]ecause the second sentence of the other insurance clause appears to provide coverage over and above any other applicable coverage but the anti-stacking language indicates that such coverage is not provided, the insurance policies' language is ambiguous. We resolve this ambiguity in favor of coverage for Plaintiff." *Id.*

³ The second sentence reads: "[b]ut, any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is excess over any other similar insurance." *Chamness*, 226 S.W.3d at 205-06 (quoting *Ragsdale*, 213 S.W.3d at 54).

In this case, the provisions within the **OTHER INSURANCE** section are ambiguous as to whether the coverage is stackable. Sub-paragraph one of that section states that any recovery for damages may not exceed the highest applicable limit for any one vehicle. Allied argues that this sub-paragraph indicates that coverage for multiple vehicles cannot be stacked because any recovery cannot exceed the highest limit for any one vehicle. Sub-paragraph two, however, states that "[a]ny coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible [UIM] coverage." Sub-paragraph two can reasonably be read to provide that UIM coverage on one vehicle which is afforded "with respect to a vehicle you do not own" is "excess over any other collectible" UIM coverage, with the latter referencing coverage which is provided by the declarations and the policy for the other two vehicles. Nothing in this section or anywhere else in the policy directs that either sub-paragraph within this section takes any precedence over the other. Therefore, the two sub-paragraphs, which standing alone may not individually be ambiguous, when read together create an ambiguity within the **OTHER INSURANCE** section itself. This ambiguity, although involving different policy language, creates the same situation as to stacking as in *Niswonger*: "[A] a reasonable [layperson] could interpret the sentence to specifically *allow* stacking of UIM coverages provided in their separate vehicle policies, for which separate UIM premiums have been paid, *in the special situation where an accident occurs while the insured is occupying a non-owned vehicle.*" *Niswonger*, 992 S.W.2d at 315.

Sub-paragraph two of the **OTHER INSURANCE** section in the policy also creates an ambiguity with sub-paragraph A of the **LIMITS OF LIABILITY** section of the policy. Again, "[w]here, as here, another insurance clause appears to provide

coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured." *Seeck*, 212 S.W.3d at 134. Sub-paragraph A of the **LIMITS OF LIABILITY** section by its specific language purports to limit Allied's liability to the amount shown in the declarations for each person regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or vehicles involved in the accident. Assuming, without deciding, that this anti-stacking provision is clear and unambiguous when considered in isolation, it is still inconsistent with sub-paragraph two of the **OTHER INSURANCE** section in the situation where coverage is provided, as here, with respect to a vehicle not owned by the insured. The latter section, as previously discussed, provides that any UIM coverage under that circumstance is excess over any other collectible UIM coverage. Thus, the former purports to deny coverage, and the latter purports to provide coverage. Nothing in the policy provides that one provision takes priority over the other and, therefore, an ambiguity exists between these two sections within the policy. As the trial court did, we resolve this ambiguity in favor of the insured.

Due to the ambiguity between sub-paragraph two of the **OTHER INSURANCE** section and both sub-paragraph one of that section and sub-paragraph A of the **LIMITS OF LIABILITY** section, the trial court did not err in determining that the \$100,000 UIM coverage on each of the three vehicles should be stacked. Allied's point on this issue is denied.

II. Set-off

The discussion of whether Allied is entitled to a set-off for amounts paid Respondents on behalf of the tortfeasors involves an analysis of the interplay between

different provisions of the policy than those involved in the preceding stacking discussion. Sub-paragraph B of the **LIMITS OF LIABILITY** section of the policy provides: "The limit of liability shall be reduced by all sums . . . [p]aid because of "bodily injury" by or on behalf of persons or organizations who may be legally responsible." This language, when viewed in isolation, clearly provides for a set-off for amounts paid on behalf of the tortfeasors against the amount paid by Allied under the policy. See *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991). Respondents do not argue otherwise.

Rather, in support of the trial court's judgment, Respondents argue that this set-off language, when coupled with the language of sub-paragraph two of the **OTHER INSURANCE** section of the policy, makes the policy ambiguous as to whether or not Allied is entitled to a set-off for amounts paid on behalf of the tortfeasors. After making this argument, however, Respondents fail to articulate or describe the specific manner in which these two provisions of the policy are inconsistent, indistinct, or give rise to any uncertainty or ambiguity. Respondents, in support of their conclusory argument, simply cite this court to and discuss the policy provisions in *Zelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673 (Mo. App. W.D. 1996); *Goza v. Hartford Underwriters Ins. Co.*, 972 S.W.2d 371 (Mo. App. E.D.); *Ware v. Geico Gen. Ins. Co.*, 84 S.W.3d 99 (Mo. App. E.D. 2002); and *Seeck*, 212 S.W.3d at 129, where each court identified, described, and found a specific ambiguity between the set-off provision in the policy and the excess coverage provision of the "other insurance" section in the policy. Allied, on the other hand, argues that these two provisions in the instant policy are not inconsistent with each other and do not generate any ambiguity in the policy as to whether it provides for a set-

off or not. In support of this argument, Allied cites to *Green v. Federated Mut. Ins. Co.*, 13 S.W.3d 647, 648-49 (Mo.App. E.D. 1999), where the court found no ambiguity between these two policy provisions.⁴

In all of these cases, the set-off policy language is identical or substantially similar to the set-off language in the case at bar. *Zelman*, 935 S.W.2d at 675 ("However, the limit of liability shall be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible."); *Goza*, 972 S.W.2d at 373 ("However, the limit of liability shall be reduced by all sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible."); *Ware*, 84 S.W.3d at 101 ("However, the limit of liability shall be reduced by all sums . . . paid because of the bodily injury by or on behalf of the persons or organizations who may be legally responsible."); *Seeck*, 212 S.W.3d at 133 n.2 ("However, the limit of liability shall be reduced by all sums: . . . paid because of the bodily injury by or on behalf of the persons or organizations who may be legally responsible[.]"); *Green*, 13 S.W.3d at 647-48 ("The Limit of Insurance under this section shall be reduced by . . . [a]ll sums paid by or for anyone who is legally responsible[.]")

The excess coverage provisions in the "other insurance" section in the policies in *Zelman*, *Goza*, *Ware*, and *Seeck*, are substantially similar, but the policy language in those cases vary significantly from that in *Green*. *Zelman*, 935 S.W.2d at 675 ("However, any insurance we provide with respect to a vehicle you do not own shall be *excess over any other collectible insurance.*") (emphasis added); *Goza*, 972 S.W.2d at

⁴ Allied also relies extensively upon *Rodriguez*, but it is not of any assistance in this ambiguity analysis because it did not involve, as here, an alleged ambiguity involving any excess coverage provisions in the "other insurance" section of the policy. *Seeck*, 212 S.W.3d at 133; *Zelman*, 935 S.W.2d at 678.

373 ("However, any insurance we provide with respect to a vehicle you do not own shall be *excess over any other collectible insurance.*") (emphasis added); **Ware**, 84 S.W.3d at 101 ("When an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy, this insurance is *excess over any other insurance available to the insured* and the insurance which applies to the occupied motor vehicle is primary.") (emphasis added); **Seeck**, 212 S.W.3d at 132 ("When an insured is occupying a motor vehicle not owned by the insured . . . this insurance is *excess over any other insurance available to the insured* and the insurance which applies to the occupied motor vehicle is primary.") (emphasis added); **Green**, 13 S.W.3d at 647 ("Any insurance we provide with respect to a vehicle you do not own shall be *excess over any other collectible underinsured motorist insurance* providing coverage on a primary basis.") (emphasis added).

Zelman, Goza, Ware, and Seeck all premised their set-off/excess coverage ambiguity determination upon the fact that the excess coverage provision in the "other insurance" section of the policy purported to provide UIM coverage in excess to "any other collectible insurance" or "any other insurance available to the insured," yet the set-off provision in each policy purported to deny UIM coverage for insurance paid on behalf of the tortfeasor. The ambiguity arises because the "other insurance" provisions in each case referenced "any other . . . insurance[.]" and such reference reasonably includes the tortfeasor's insurance. As stated in **Zelman**:

Where there is an "excess" or "other insurance" clause that provides the underinsured coverage is excess over all other collectible insurance at the time of the accident, a court may find that language is ambiguous when read with the limit of liability or the definition of underinsured motorist coverage *if the other insurance clause may reasonably be understood to provide coverage over and above that collected from the tortfeasor.*

Zelman, 935 S.W.2d at 677 -678 (emphasis added). See also *Goza*, 972 S.W.2d at 375; *Ware*, 84 S.W.3d at 102 -103; *Seeck*, 212 S.W.3d at 133.

Green, on the other hand, did not find any ambiguity arising from these two policy provisions and recognized that the "other insurance" provision there limited its excess coverage to that over other *underinsured motorist insurance*. Referring to the set-off ambiguity found in *Zelman* and *Goza*, the *Green* court observed: "Insurer has eliminated any such ambiguity here, because its language clearly states that the UIM coverage it provides is excess over *only other UIM insurance*, not excess over other collectible insurance of any kind." *Green*, 13 S.W.3d at 648.

The analysis employed in *Green* applies here.⁵ Sub-paragraph two of the **OTHER INSURANCE** section of the policy here provides: "Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible *underinsured motorist coverage*[" (Emphasis added). The insurance received by the Respondents from the tortfeasors was not from other UIM coverage. As such, the language in this provision related to other UIM coverage can not be construed in any manner to reference or include the non-underinsured motorist insurance received from the tortfeasors in this case. In the absence of such reference or inclusion, as found in *Zelman*, *Goza*, *Ware*, and *Seeck*, no ambiguity exists between the set-off provisions in sub-paragraph B of the **LIMITS OF LIABILITY** section of the policy and the excess coverage provisions of sub-paragraph two of the **OTHER INSURANCE** section of the policy. Allied's point on this issue is granted.

⁵ Respondents correctly observe in their brief that "*Green* did not involve stacking of multiple coverages[" and "[t]he facts in *Green* did not give rise to a possible ambiguity based upon stacking issues." The Respondents failed, however, to offer any explanation as to why *Green* is not applicable to the set-off analysis in this case.

Upon remand, the set-off provided for by sub-paragraph B of the **LIMITS OF LIABILITY** section of the policy should be applied to Allied's limit of liability, which, in accordance with section I of this discussion concerning the stacking of coverage, is \$300,000.

Decision

The trial court's judgment is reversed as to its denial of a set-off to Allied for amounts paid on behalf of the tortfeasors, and the case is remanded to the trial court with directions to enter a judgment not inconsistent with this opinion. In all other respects, the trial court's judgment is affirmed.

Gary W. Lynch, Chief Judge

Burrell, P.J., concurs.

Rahmeyer, J., concurs in part and dissents in part in separate opinion.

Filed March 10, 2009

Division II

Attorneys for Appellants: Brian D. Malkmus and Jared Robertson, Springfield, Mo.

Attorneys for Respondent: Glenn R. Gulick, Jr., Joplin, Mo.

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| INSURANCE COMPANY, |) | |
| |) | |
| Defendant-Appellant. |) | |

CONCURS IN PART; DISSENTS IN PART

I concur with the well-reasoned decision regarding the stacking of the policies; however, I respectfully dissent regarding the set-off provision. I believe the policy is also ambiguous in its set-off provisions and would find no trial court error in determining that the policy language in the forty-one page insurance policy was ambiguous and reasonably open to different constructions as understood by the layperson who bought and paid for the policy. I would affirm the judgment *in toto*.

As noted, we interpret the policy provisions, not in isolation, but rather to evaluate the policy as a whole. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo. banc 2007). Allied argues that the language of the policy limits its liability by reducing the payment for sums paid because payments on behalf of others who are legally responsible

mandates a set-off to Allied for payments made by the tortfeasors. Allied points to *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379 (Mo. banc 1991), for that proposition. *Rodriguez* does not assist Allied.

[I]n *Rodriguez*, "only the underinsured motor vehicle definition and the limit of liability language were held unambiguous and the court did not address the issue of an excess insurance clause." *Zelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 678 (Mo. App. W.D. 1996). *Rodriguez*, therefore is not determinative here, for Ms. Seeck's policy also contained the excess insurance clause set out above, and that clause, too, must be construed in determining whether the policy would be interpreted by a person of average understanding to provide coverage.

Seeck, 212 S.W.3d at 133.

Further, as the court noted:

"Where there is an 'excess' or 'other insurance' clause that provides the underinsured coverage is excess over all other collectible insurance at the time of the accident, a court may find that language is ambiguous when read with the limit of liability or the definition of [UIM] coverage if the other insurance clause may reasonably be understood to provide coverage over and above that collected from the tortfeasor."

Id. (quoting *Zelman*, 935 S.W.2d at 677-78).

The majority opinion relies upon the similarity between the language in the "other insurance" provision of the policy at issue and the language in *Green v. Federated Mut. Ins. Co.*, 13 S.W.3d 647, 648-49 (Mo. App. E.D. 1999), to support its conclusion that the policy is unambiguous. I disagree. I believe this policy can be read to provide coverage in excess of the damages incurred because of a bodily injury. Specifically, the first sentence of the Insuring Agreement declares Allied will pay "compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury.'" Allied appeared to understand why the layperson purchases UIM coverage as evidenced by the definition of UIM

coverage provided by Charles E. Hart, a commercial litigation specialist for Nationwide Mutual Insurance Company, the parent-company of Allied. Mr. Hart indicated that Allied defined UIM coverage on its website as:

[UIM] Coverage pays if you're in an accident and the negligent driver has liability limits at the time of the accident. Liability limits carried may be insufficient to pay for damages that the negligent driver is responsible for. The first number is the most the company will pay per person. The second is the maximum the company will pay per accident.

Thus, it is certainly a reasonable interpretation of the UIM coverage to find that the layperson who bought and paid for the UIM coverage believed that if the liability limits carried by a negligent driver were insufficient to pay for the damages incurred by the insured, the UIM coverage would assist in making up the difference between the total damages and the amount of liability insurance.

As to the amount that Allied would pay to make up that difference, the "Limit of Liability" section for UIM coverage states, "[t]hat the limit of liability shown in the Declarations" for each person for UIM Coverage "is our maximum limit of liability for all damages." Keeping in mind that this is UIM coverage and not uninsured motorist coverage, the limit of liability statement as construed by Allied is illusory if liability insurance is always deducted from the limit of liability under an UIM addendum. A person of average understanding would interpret this policy to provide at least \$100,000 (if there were only one policy) if the damages exceeded the payments made by the negligent driver by at least that much.

[A]n "ordinary person of average understanding" . . . would interpret the excess insurance clause to mean that since [the injured party] has obtained recovery under the primary [insurance policy] applicable to the occupied vehicle but has additional damages, [the injured party] is entitled to

coverage under the excess insurance clause of [his/her] own [insurance company's] policy.

Seeck, 212 S.W.3d at 132 (internal citations omitted).

The policy further provided that any coverage provided with respect to a vehicle which "you do not own shall be excess over any other collectible underinsured motorist coverage." Excess insurance is an indemnification against a loss that exceeds another policy. This section can be read to indicate that the coverage is classified as excess because it is indemnifying against a loss that exceeds the amount of coverage under the tortfeasors' policies. Second, the policy could provide UIM coverage for "a vehicle you do not own" on a primary basis. A reasonable interpretation of the provision could be read to mean that coverage provided with respect to "a vehicle you do not own" is only excess if there is other collectible UIM coverage. Therefore, if there is no other collectible UIM coverage the coverage provided is primary.

Keeping in mind that we have already found the provisions of the policy ambiguous when considering the stacking issue and when the policy is combined with the plain language of the definition given by the insurance company of UIM coverage, it is reasonable to conclude that in the specific circumstance where there is no other collectible UIM coverage and the damages exceed the sum paid by the tortfeasors, the policy would allow recovery up to the policy limit. I would reject Allied's contention that the trial court erred in disallowing any set-off.

Nancy Steffen Rahmeyer, Judge