MISSOURI SUPREME COURT

Appeal No.: SC 92408

NATHANIEL MANNER,
Plaintiff/Appellant,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY and AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,
Defendants/Respondents.

SUBSTITUTE BRIEF OF DEFENDANTS/RESPONDENTS AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN

TRANSFER FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
APPEAL NO.: ED 96143

APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
11TH JUDICIAL CIRCUIT
THE HON. NANCY L. SCHNEIDER
CASE NUMBER 0711-CV07158

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JURISDICTIONAL STATEMENT

Defendants American Family Mutual Insurance Company (hereinafter "American Family") and American Standard Insurance Company of Wisconsin (hereinafter "American Standard") concur with Plaintiff Manner's Jurisdictional Statement and herein incorporate that Jurisdictional Statement.

STATEMENT OF FACTS

Defendants American Family and American Standard do not take issue with the Statement of Facts set forth on pages 2 through 9 of Plaintiff Manner's Substitute Brief except to the extent Plaintiff Manner makes representations as to what Defendants did not contest before the trial court. Mo. S. Ct. Rule 84.04(c) mandates that the Statement of Facts in an appellate brief "be a fair and concise statement of the facts relevant to the questions presented for determination *without argument*." [emphasis added].

Specifically, Defendants American Family and American Standard take issue with the assertions made by Plaintiff Manner arguing that Defendants failed to contest certain issues below. Defendants disputed that the first sentence of the "**Other Insurance**" provision applied to the policies issued by American Family and American Standard to Nathaniel Manner and that both the first and second sentence of the "**Other Insurance**" provision applied to the American Standard policy issued to James Manner. (L.F. 1118). Moreover, Defendants did dispute whether the "**Limits of Liability**" provision was ambiguous based on the second sentence of the "**Other Insurance**" provision in the American Family and American Standard policies. (L.F. 316). Defendants take exception to assertions to the contrary.

STANDARD OF REVIEW

Plaintiff Nathaniel Manner appeals from the trial court's December 1, 2010, Judgment granting [1] summary judgment in favor of Defendants American Family and American Standard. [2] When considering appeals from summary judgment the Court reviews the record in the light most favorable to the party against whom judgment was entered. ***ITT Commercial Finance v. Mid-America Marine Supply Corporation***, 854 S.W.2d 371, 376 (Mo. banc 1993); ***James v. Paul***, 49 S.W.3d 678, 682 (Mo. banc 2001). The non-movant is accorded the benefit of all reasonable inferences from the record. ***Id.***

The Court's review of summary judgment is *de novo*. ***Id.***; ***Vandervort Investments LLC v. Essex Insurance***, 309 S.W.3d 333, 336 (Mo. Ct. App. 2010). The criteria on appeal for determining the propriety of summary judgment are no different from those that should be used by the trial court to determine the propriety of sustaining the motion initially. ***ITT***, 854 S.W.2d at 376. The propriety of summary judgment is

[1] Plaintiff Manner also claims error in the denial of his Motion for Summary Judgment, however, the denial of a motion for summary judgment is not a final and appealable order even when the denial occurs at the same time the trial court grants summary judgment to the opposing party. ***Vandervort Investments LLC v. Essex Insurance***, 309 S.W.3d 333, 335 n.1 (Mo. Ct. App. 2010); ***Grable v. Atlantic Casualty Insurance***, 280 S.W.3d 104, 106 n.1 (Mo. Ct. App. 2009).

[2] Both American Family and American Standard are members of the "American Family Insurance Group."

purely an issue of law. ***Id.***; ***James***, 49 S.W.3d at 682. Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. ***James***, 49 S.W.3d at 682. An order of summary judgment may be affirmed under any theory that is supported by the record. ***Burns v. Smith***, 303 S.W.3d 505, 509 (Mo. banc 2010). Where the underlying facts are not in question disputes arising from the interpretation and application of insurance contracts are matters of law for the Court. ***Vandervort Investments***, 309 S.W.3d at 336; ***Grable v. Atlantic Casualty Insurance***, 280 S.W.3d 104, 106 (Mo. Ct. App.2009).

POINTS RELIED ON

I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE MR. SCHIERMEIER'S MOTOR VEHICLE DID NOT MEET THE DEFINITION OF AN UNDERINSURED MOTOR VEHICLE UNDER THE POLICIES IN THAT MR. SCHIERMEIER MAINTAINED $100,000 LIABILITY LIMITS AND THE POLICIES AT ISSUE ALL CONTAINED $100,000 EACH OF UNDERINSURED MOTORIST LIMITS.

Rodriguez v. General Accident Insurance Company of America, 808 S.W.2d 379 (Mo. banc 1991)

II

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE AMERICAN FAMILY AND AMERICAN STANDARD HAD NO OBLIGATION TO PAY UNDERINSURED MOTORIST BENEFITS TO PLAINTIFF MANNER IN THAT PLAINTIFF MANNER FAILED TO SATISFY THE PRECONDITION TO UNDERINSURED MOTORIST COVERAGE THAT HE EXHAUST THE LIMITS OF LIABILITY OF ANY BODILY INJURY LIABILITY POLICIES APPLICABLE TO THE ACCIDENT AND THE SETOFF PROVISION CONTAINED IN THE LIMITS OF LIABILITY SECTION OF THE UIM ENDORSEMENT ALLOWED AMERICAN FAMILY AND AMERICAN

STANDARD TO SETOFF AGAINST THE $100,000 LIMIT OF LIABILITY OF UNDERINSURED MOTORIST COVERAGE THE $100,000 PAID BY MR. SCHIERMEIER'S INSURER AND THE $750,000 PAYMENT MADE BY HELMET CITY AND JAFRUM INTERNATIONAL AND THOSE PAYMENTS REDUCED THE LIMIT OF LIABILITY OF UNDERINSURED MOTORIST COVERAGE TO ZERO.

Rodriguez v. General Accident Insurance Company of America, 808 S.W.2d 379 (Mo. banc 1991)

Lewis v. State Farm Mutual Automobile Insurance, 857 S.W.2d 465 (Mo. Ct. App. 1993)

III

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE OWNED VEHICLE EXCLUSION CONTAINED IN THE FORD RANGER, FORD F150, AND SUZUKI POLICIES APPLIED SO AS TO PRECLUDE PLAINTIFF MANNER FROM RECOVERING UNDERINSURED MOTORIST BENEFITS UNDER THOSE POLICIES IN THAT PLAINTIFF MANNER WAS OCCUPYING A 1983 YAMAHA MOTORCYCLE WHICH WAS NOT INSURED UNDER THE FORD RANGER, FORD F150 OR SUZUKI POLICIES AND THE YAMAHA MOTORCYCLE WAS OWNED BY PLAINTIFF MANNER.

Jensen v. Allstate Insurance, 349 S.W.3d 369 (Mo. Ct. App. 2011)

Lightner v. Farmers Insurance, 789 S.W.2d 487 (Mo. banc 1990)

USF&G v. Safeco Insurance Company of America, 522 S.W.2d 809 (Mo. banc 1975)

McDonnell v. Economy Fire & Casualty Company, 936 S.W.2d 598 (Mo. Ct. App. 1996)

IV

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American Family Insurance Company v. Brown, 657 S.W.2d 273 (Mo. Ct. App. 1983)

V

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE UIM ENDORSEMENT CONTAINED IN THE POLICIES ISSUED BY AMERICAN FAMILY AND AMERICAN STANDARD WAS NOT AMBIGUOUS AND DID NOT PERMIT STACKING OF THE UNDERINSURED MOTORIST COVERAGE IN THE MULTIPLE POLICIES

ISSUED BY DEFENDANTS IN THAT PLAINTIFF MANNER WAS NOT OCCUPYING A NON-OWNED VEHICLE AT THE TIME OF HIS ACCIDENT.

Kyte v. American Family Mutual Insurance Company, 92 S.W.3d 295 (Mo. Ct. App. 2002)

O'Driscoll v. Mutapcic, 210 S.W.3d 368 (Mo. Ct. App. 2006)

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Murray v. American Family Mutual Insurance Company, 429 F.3d 757 (8th Cir. 2005)

American Family Mutual Insurance Company v. Martin, 312 Ill. App. 3d 829, 245 Ill. Dec. 384, 728 N.E.2d 115 (2000)

Grzeszczak v. Illinois Farmers, 168 Ill. 2d 216, 659 N.E.2d 952 (1995)

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THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN

STANDARD BECAUSE THE UIM ENDORSEMENT SETOFF LANGUAGE IS CLEAR AND UNAMBIGUOUS IN THAT THE SETOFF LANGUAGE ALLOWS FOR A SETOFF FROM THE LIMITS OF LIABILITY OF THE UIM COVERAGE RATHER THAN THE DAMAGES INCURRED BY THE INSURED.

Jones vs. Mid-Century Insurance Company, 287 S.W.3d 687 (Mo. banc 2009)

Ritchie vs. Allied Property & Casualty Insurance Company, 307 S.W.3d 132 (Mo. banc 2009)

Graham v. State Farm Mutual Automobile Insurance Company, 2012 Mo. App. LEXIS 590, ED97421 (May 1, 2012)

ARGUMENT

INTRODUCTION—FACTUAL ARGUMENT

Despite the best intentions of in-house counsel for American Family/American Standard and plaintiff's counsel to simply have the issue of the applicability of UIM coverage put before the Trial Court by way of stipulated facts the best of intentions have seemingly gone awry. American Family/American Standard accepted plaintiff's offer for American Family and American Standard to be added as additional defendants to this long-standing litigation once the issues of liability of the underlying tortfeasor and the helmet manufacturers had been resolved. (L.F. 12-12, 14, 173-81, 183-90). American Family and American Standard agreed to waive service of process of the Fourth Amended Petition. American Family and American Standard agreed to waive the necessity of filing a new lawsuit. American Family and American Standard American Family agreed to waive the issue of damages and consented to plaintiff's request that the value of Mr. Manner's claim is $1.5 million dollars. American Family American Standard did all of this because the issues of UIM coverage seemed simple at the time: Did the American Family/American Standard policies provide coverage to Nathaniel Manner when he owned his motorcycle that he was driving? Did American Family/American Standard provide coverage when he was living with his Dad? Going into this agreement those issues seemed simple and uncontroverted. Nathaniel Manner had purchased his own policy for the motorcycle so the logical assumption was he "owned" it. Nathaniel Manner had always told American Family/American Standard in their previous business dealings that he lived at the Westmoor address—the same as his

Dad's address. Unfortunately, for whatever reason, after the parties had entered into the mechanics of this proposal; after American Family and American Standard had been added to the litigation and waived service, retained counsel and counsel entered his appearance; and after American Family and American Standard agreed to the stipulation of damages a good faith dispute arose between the parties over residency and ownership of the motorcycle. (L.F. 30-90, 101-04, 123-27). As conceded by American Family/American Standard by way of the undersigned at oral argument before the Court of Appeals the just result over the issue of residence probably is to remand to the Trial Court for a factual determination as to the residence of Nathaniel Manner although American Family/American Standard do present their argument on this issue following.

With regard to the "ownership" of the motorcycle, the facts are what the facts are: Nathaniel bought the motorcycle from his uncle and at least paid some money towards the purchase price. Nathaniel Manner took possession of the motorcycle. Nathaniel bought an insurance policy on the motorcycle. Twenty-one days after he took ownership of the motorcycle he had his unfortunate accident. He had not yet had the opportunity to go to the Department of Motor Vehicles to have the title put in his name. The question then becomes for this Court whether the fact that Nathaniel Manner did not yet go to the Department of Motor Vehicles to have title perfected in his name defeats the "ownership clause" of the UIM policies. If this Court holds that ***actual title*** is necessary in order to invoke the ownership clause of the UIM policy then American Family/American Standard loses on that ownership issue. If this Court determines that title is not necessary and that Nathaniel's possession of the motorcycle, buying an insurance policy on the

motorcycle, and "treating it as own" is sufficient then American Family/American Standard wins on that ownership issue.

I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE MR. SCHIERMEIER'S MOTOR VEHICLE DID NOT MEET THE DEFINITION OF AN UNDERINSURED MOTOR VEHICLE UNDER THE POLICIES IN THAT MR. SCHIERMEIER MAINTAINED $100,000 LIABILITY LIMITS AND THE POLICIES AT ISSUE ALL CONTAINED $100,000 EACH OF UNDERINSURED MOTORIST LIMITS.

RESPONSE TO PLAINTIFF'S POINT XII

Insurance Policy Interpretation

The interpretation of an insurance policy and the determination of whether coverage and exclusion provisions are ambiguous are questions of law. ***Jensen v. Allstate Insurance***, 349 S.W.3d 369, 374 (Mo. Ct. App. 2011); ***Burns***, 303 S.W.3d at 509. The Court interprets insurance policies by applying general rules of contract construction. ***Todd v. MUSIC***, 223 S.W.3d 156, 160 (Mo. banc 2007); ***Blair by Snyder v. Perry County Mutual Insurance***, 118 S.W.3d 605, 606 (Mo. banc 2003). As such, when analyzing an insurance contract, the entire policy, and not just isolated provisions or clauses, must be considered. ***Columbia Mutual Insurance v. Schauf***, 967 S.W.2d 74, 77 (Mo. banc 1998); ***Todd***, 223 S.W.3d at 163-164 (insurance policies are to be read as a whole).

The risk insured against is made up of both the general insuring agreement and the policy exclusions and definitions. ***Todd***, 223 S.W.3d at 163-164. Provisions of an insurance policy are to be read in the context of the policy as a whole. ***Columbia Mutual***, 967 S.W.2d at 77. Proper interpretation requires the Court seek to harmonize all provisions of the insurance policy to avoid leaving some provisions without function or meaning. ***Porter v. Shelter Mutual Insurance***, 242 S.W.3d 385, 392 (Mo. Ct. App. 2007). When interpreting the terms of an insurance policy the Court applies the meaning that would be understood by an ordinary person of average understanding purchasing the insurance contract. ***Martin v. USF&G***, 996 S.W.2d 506, 508 (Mo. banc 1999).

In interpreting an insurance policy the key is whether the contract language is ambiguous. ***Todd***, 223 S.W.3d at 160. An ambiguity exists where 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. ***Burns***, 303 S.W.3d at 509. If the policy is ambiguous the Court must construe the policy in favor of the insured. ***Burns***, 303 S.W.3d at 511, however, where an insurance policy is unambiguous the policy will be enforced as written. ***Rodriguez v. General Accident Insurance Company of America***, 808 S.W.2d 379, 382 (Mo. banc 1991). Where an insurance policy is unambiguous the rules of construction are inapplicable. ***Krombach v. The Mayflower Insurance Company***, 827 S.W.2d 208, 210 (Mo. banc 1992).

An insurance policy is not ambiguous merely because the parties disagree over its meaning. ***Gateway Hotel Holdings v. Lexington Insurance***, 275 S.W.3d 268, 275 (Mo.

Ct. App. 2008). A court may not create an ambiguity where none exists or rewrite an insurance policy to provide coverage for which the parties never contracted. ***Id.***

If a term is defined in an insurance policy courts normally look to that definition to determine the term's meaning. ***Ulsas v. Progressive Northwestern Insurance***, 275 S.W.3d 366, 369 (Mo. Ct. App. 2009). The parties will be bound by the terms and definitions they choose to use in the policy. ***Id.***

Language in an insurance policy is to be given its plain meaning. ***Ware v. GEICO***, 84 S.W.3d 99, 102 (Mo. Ct. App. 2002). This is true even when the language appears in restrictive provisions of the policy. ***Eaton v. State Farm Mutual Automobile Insurance***, 849 S.W.2d 189, 193-194 (Mo. Ct. App. 1993).

Definitions, exclusions, conditions and endorsements are necessary provisions in an insurance policy. If they are clear and unambiguous within the context of the policy as a whole they are enforceable. ***Todd***, 223 S.W.3d at 163. An endorsement is designed to amend the policy form to meet the needs of the insured or insurer or satisfy particular state requirements. ***Grable***, 280 S.W.3d at 108. The terms and conditions of an insurance policy are modified and altered to the extent called for by policy endorsements. ***Id.***

Underinsured Motorist Coverage

In the absence of public policy considerations an insured and insurer are free to define and limit coverage by their agreement. ***Noll v. Shelter Insurance***, 774 S.W.2d 147, 151 (Mo. banc 1989); ***Rodriguez***, 808 S.W.2d at 383. Underinsured motorist coverage establishes a total amount of protection which assures the insured of receiving

coverage for the contracted amount to the extent the tortfeasor's coverage is less than the contracted amount. ***Rodriguez***, 808 S.W.2d at 382-383, *fn*.1; ***Lang v. Nationwide Mutual Fire Ins. Co.,*** 970 S.W.2d 828, 832 (Mo. Ct. App. 1998). Missouri statutes do not mandate underinsured motorist coverage. ***Ritchie v. Allied Property & Casualty Insurance***, 307 S.W.3d 132, 135 (Mo. banc 2009); ***Rodriguez***, 808 S.W.2d at 383 ("There are no statutory requirements in Missouri for underinsured motorist coverage."). Underinsured motorist coverage is optional coverage. ***Id.*** Thus, the unambiguous contractual terms and conditions of the policy control the benefits to which the insured is entitled. ***Id.***

The existence of underinsured motorist coverage in the first instance, and its ability to be stacked, are determined by the contract entered into between the insured and insurer. ***Rodriguez***, 808 S.W.2d at 383; ***Krombach***, 827 S.W.2d at 212. This means if the policy language is unambiguous in disallowing stacking then the anti-stacking provisions are enforceable. ***Ritchie***, 307 S.W.3d at 135. If, however, the policy language regarding stacking is ambiguous it must be construed against the insurer and stacking will be allowed. ***Id.***

The American Family And American Standard Policies

To assist the Court in resolving the coverage issues before it Defendants will present their arguments by examining the policy language in its proper order and context. To properly address the coverage questions before the Court it must examine the policies in question and the relevant policy language.

At issue are four insurance policies each of which contains an identical Underinsured Motorists ("UIM") Coverage endorsement. Two of those policies were issued by American Family. The other two policies were issued by American Standard.

The four policies are as follows:

Exhibit A: American Standard Motorcycle Policy issued to Nathaniel Manner of 18xx[3] Westmoor Drive, effective for the policy period from 9-4-04 to 9-26-04, insuring a 1983 Yamaha motorcycle (hereinafter "Yamaha policy") (L.F. 36-48);

Exhibit B: American Family Car Policy issued to Nathaniel Manner of 18xx Westmoor Drive, effective for the policy period from 9-24-04 to 3-24-05, covering a 2002 Ford Ranger (hereinafter "Ford Ranger policy") (L.F. 49-62);

Exhibit C: American Family Car Policy issued to Nathaniel Manner of 18xx Westmoor Drive, effective for the policy period from 9-24-04 to 3-24-05, covering a 1992 Ford F150 (hereinafter "Ford F150 policy") (L.F. 63-75); and

Exhibit D: American Standard Motorcycle Policy issued to James Manner of 18xx Westmoor Drive, effective for the policy period from 12-13-03 to 12-13-04, covering a 1999 Suzuki motorcycle (hereinafter "Suzuki policy"). (L.F. 76-88).

The Yamaha policy, Ford Ranger policy, Ford F150 policy and Suzuki policy each provided UIM coverage limits for bodily injury liability in the amount of $100,000 each person. (L.F. 37, 50, 64, 77).

[3] While Plaintiff Manner's address has been redacted to protect his privacy there is no factual dispute between the parties as to the address on Westmoor Drive.

The UIM Coverage Endorsement

Each of the four policies contained identical language regarding underinsured motorists coverage. Specifically, each of the policies contained American Family endorsement 55-2 (Ed.7/91)—"Underinsured Motorists Coverage Endorsement (hereinafter "UIM endorsement"). [4] The UIM endorsement states:

> **We** will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the **use** of the **underinsured motor vehicle**.
>
> **…..**
>
> **We** will pay under this coverage only after the limits of liability under any **bodily injury** liability bonds or policies have been exhausted by payment of judgements or settlements. (L.F. 46, 60, 73, 86).

As defined in the UIM endorsement, the term "**insured person**" means, in relevant part, "**you** or a **relative**." The UIM endorsement defines an "**underinsured motor vehicle**" as "a **motor vehicle** which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the limits of liability of this Underinsured Motorists coverage." (L.F. 46, 60, 73, 86).

The UIM endorsement contains "**Exclusions:**"

[4] A copy of the UIM endorsement is set forth in the Appendix, *infra*.

UIM coverage does not apply for **bodily injury** to a person:

> 1. While **occupying**, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household. (L.F. 46, 60, 73, 86).

As to "**Limits Of Liability**" the UIM endorsement states:

> 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 a 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.
>
> The limits of liability of this coverage will 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**.

(L.F. 46-47, 60-61, 73-74, 86-87).

Finally, as to "**Other Insurance**" the UIM endorsement states:

> 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.

(L.F. 47, 61, 74, 87).

The Yamaha and the Suzuki policies are Motorcycle Policies. (L.F. 37, 77). Part V of the Motorcycle Policies set forth the **General Provisions**. **General Provisions** state as follows:

> **Two or More Motorcycles Insured**. 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. When this policy insures two or more **motorcycles**, the coverages apply separately to each **motorcycle**.

(L.F. 43, 84).

The Ford Ranger and Ford F150 policies are Family Car Policies. (L.F. 50, 64). Section VI sets forth the **General Provisions** of those Family Car Policies. **General Provisions** states as follows:

> **Two or More Cars Insured**. 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. When this policy insures two or more **cars**, the coverages apply separately to each **car**.

(L.F. 57, 70).

As is apparent, the **General Provisions** in the Motorcycle and Family Car Policies as to one or more motorcycles or cars insured are identical except for the terms "**motorcycles**" and "**cars**" depending upon whether the policy in question provides coverage for a motorcycle or car. (L.F. 43, 57, 70, 84).

Under the terms of the UIM endorsement in the American Family and American Standard policies Plaintiff Manner had to satisfy three conditions before the insurers were required to pay underinsured motorist benefits. These conditions were: 1) the insured incurred bodily injury; 2) the injury occurred as a result of an accident with an underinsured motor vehicle; and 3) the insured was legally entitled to collect from the operator of the underinsured vehicle. ***State ex rel Sago v. O'Brien***, 827 S.W.2d 754, 755 (Mo. Ct. App.1992); ***State ex rel Shelton v. Mummert***, 879 S.W.2d 525, 528 (Mo. banc 1994). A fourth requirement, which arises from the policy language, necessitates that the limits of all applicable policies be exhausted by payment or settlement before liability exists under the terms of the UIM endorsement. ***Id.*** Plaintiff Manner failed to satisfy these conditions. Accordingly, he could not recover underinsured motorist coverage and the trial court properly granted summary judgment in favor of American Family and American Standard. ***Shelton***, 879 S.W.2d at 528.

Schiermeier's Motor Vehicle Was Not An Underinsured Motor Vehicle

The first question [5] which must be addressed is whether the car which struck Plaintiff Manner was an "**underinsured motor vehicle**" as contemplated by the endorsement. The answer to that question is no. Thus, the trial court did not err in granting Defendants' Motion for Summary Judgment. (L.F. 631).

The undisputed facts and the clear and unambiguous provisions of the American Family and American Standard policies demonstrate the vehicle Nicholas Schiermeier was operating when he struck Plaintiff Manner was not an "**underinsured motor vehicle**" within the meaning of the UIM endorsement. Under the endorsement, the insurer will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. As defined by the endorsement, an "**underinsured motor vehicle**" is a motor vehicle which is insured by a liability policy at the time of the accident which provides bodily injury liability limits less than the limits of the underinsured motorist coverage. (L.F. 46, 60, 73, 86).

It is undisputed that at the time of the September 25, 2004 accident Schiermeier had an auto policy with a liability limit of $100,000 per person. (L.F. 5, 31, 45, 101). The UIM coverage limits under the Motorcycle and Family Car Policies issued by American Family and American Standard are $100,000 each person. (L.F. 37, 50, 64, 77). Since the amount of Schiermeier's auto liability coverage was equal to the per-person limit of liability of UIM coverage under the American Family and American

[5] It is undisputed Plaintiff Manner sustained bodily injury as a result of the September 25, 2004 accident. (L.F. 328, 544).

Standard Policies Schiermeier was not driving an **underinsured motor vehicle** as defined by those policies. ***Rodriguez***, 808 S.W.2d at 382-383.

Rodriguez, 808 S.W.2d at 382-383 illustrates this fact. In ***Rodriguez,*** this Court held underinsured policy language substantially identical to that in the American Family and American Standard policies was clear and unambiguous and precluded recovery of underinsured motorist benefits. ***Id.*** Gail Rodriguez was injured when the vehicle she was driving collided with a vehicle operated **by** Fruehwirth. Fruehwirth's insurer paid Rodriguez $50,000 the limits of liability of Fruehwirth's auto policy. Rodriguez sought the balance of her damages from her insurance carrier, General Accident, under the policy's underinsured motorist coverage. ***Rodriguez***, 808 S.W.2d at 380.

The face sheet of the Rodriguez policy showed underinsured motorist coverage with a limit of $50,000 on each vehicle. The underinsured motorist coverage endorsement stated General Accident would pay damages which an insured was legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury. ***Id.*** The General Accident policy defined an "underinsured motor vehicle" as a motor vehicle to which a bodily injury liability policy applied at the time of the accident but its limit for bodily injury liability was less than the limit of liability for underinsured motorist coverage. ***Rodriguez***, 808 S.W.2d at 380-381.

When General Accident declined to pay underinsured motorist benefits, Rodriguez brought an action seeking to recover underinsured motorist coverage and to have that coverage stacked. The trial court granted General Accident's motion for summary judgment holding Fruehwirth was not an underinsured motorist within the meaning of the

General Accident policy. This Court affirmed and rejected Rodriguez' argument that the policy language was ambiguous. ***Rodriguez***, 808 S.W.2d at 382.

As this Court noted, the General Accident policy clearly stated an underinsured motor vehicle was a vehicle whose limits for bodily injury liability were less than the limit of liability for underinsured motorist coverage. ***Id.*** Rodriguez acknowledged Fruewirth's liability coverage was $50,000. Since Fruehwirth's liability coverage was equal to the limit of liability of UIM coverage under the General Accident policy Fruehwirth was not an "underinsured motorist" as defined by that policy. ***Id.*** Given the clarity with which the underinsured motorist coverage was defined in the General Accident policy this Court held the underinsured motorist coverage was neither ambiguous nor misleading and Rodriguez could not recover UIM benefits. ***Id.***

The reasoning and analysis of ***Rodriguez*** applies with equal force in the instant case. The bodily injury liability limits of Mr. Schiermeier's policy were the same as the limits of applicable UIM coverage afforded to Plaintiff Manner by the American Family and American Standard policies. Thus, the vehicle Schiermeier was driving at the time of the accident cannot be an "**underinsured motor vehicle**" within contemplation of the UIM endorsement.

The UIM endorsement in the Family Car Policies and Motorcycle Policies defines an "**underinsured motor vehicle**" as a motor vehicle which is insured by a liability policy "at the time of the accident which provides bodily injury liability limits less than the limits of liability of this underinsured motorists coverage." (L.F. 46). In other words, an "**underinsured motor vehicle**" within the meaning of the UIM endorsement is a

vehicle with a liability limit less than the limit of liability of the policy's underinsured motorist coverage. ***Rodriguez***, 808 S.W.2d at 382. Where, as here, the other motorist pays as much or more to the insured for bodily injury as the insured has in underinsured motorist coverage the insured is not permitted to recover underinsured motorist benefits. ***Id.***; ***Melton v. Country Mutual Insurance***, 75 S.W.3d 321, 325 (Mo. Ct. App. 2002). Schiermeier was not an "**underinsured motorist**" within the meaning of the UIM endorsement since Schiermeier's liability limit of $100,000 was not less than the $100,000 limit for underinsured motorist coverage. ***Id.*** Since the vehicle Schiermeier was operating did not constitute an "**underinsured motor vehicle**" as defined by the American Family and American Standard policies Plaintiff Manner could not recover underinsured motorist benefits under those policies. Therefore, Defendants had a right to judgment in their favor as a matter of law. ***Id.***; ***ITT***, 854 S.W.2d at 376.

II

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE AMERICAN FAMILY AND AMERICAN STANDARD HAD NO OBLIGATION TO PAY UNDERINSURED MOTORIST BENEFITS TO PLAINTIFF MANNER IN THAT PLAINTIFF MANNER FAILED TO SATISFY THE PRECONDITION TO UNDERINSURED MOTORIST COVERAGE THAT HE EXHAUST THE LIMITS OF LIABILITY OF ANY BODILY INJURY LIABILITY POLICIES APPLICABLE TO THE ACCIDENT AND THE SETOFF PROVISION CONTAINED IN THE LIMITS OF LIABILITY SECTION OF THE

UIM ENDORSEMENT ALLOWED AMERICAN FAMILY AND AMERICAN STANDARD TO SETOFF AGAINST THE $100,000 LIMIT OF LIABILITY OF UNDERINSURED MOTORIST COVERAGE THE $100,000 PAID BY MR. SCHIERMEIER'S INSURER AND THE $750,000 PAYMENT MADE BY HELMET CITY AND JAFRUM INTERNATIONAL AND THOSE PAYMENTS REDUCED THE LIMIT OF LIABILITY OF UNDERINSURED MOTORIST COVERAGE TO ZERO.

RESPONSE TO PLAINTIFF'S POINT XII

Even if this Court would find Schiermeier's vehicle to meet the definition of an underinsured motor vehicle, the **Limits Of Liability** provision in the UIM endorsement serves to reduce any recovery by Plaintiff Manner to zero. The UIM endorsement states:

> **We** will pay under this coverage only after the limits of liability under any **bodily injury** liability bonds or policies have been exhausted by payment of judgements or settlements.

Under "**Limits Of Liability**" the endorsement expressly states the limits of liability of UIM coverage (note, not the insured's *damages*) [6] will be reduced by a "payment made or amount payable by or on behalf of any person or organization which may be legally

[6] Compare ***Jones vs. Mid-Century Insurance Company,*** 287 S.W.3d 687 (Mo. banc 2009) and ***Ritchie vs. Allied Property & Casualty Insurance Company***, 307 S.W.3d 132 (Mo. banc 2009) which did involve polices which called for a reduction from the insured's *damages. See* Topic VII, *supra.*

liable, or under any collectible auto liability insurance, for loss caused by an accident with an **underinsured motor vehicle**." (L.F. 46-47, 60-61, 73-74, 86-87).

The declarations page for the Yamaha and Suzuki Motorcycle Policies issued by American Standard and the Ford Ranger and Ford F150 Family Car Policies issued by American Family state the limits provided for underinsured motorists coverage – bodily injury are $100,000 each person. (L.F. 37, 50, 64, 77). It is undisputed the liability limits of Schiermeier's policy were $100,000 per person. Those policy limits were tendered to and accepted by Plaintiff Manner. (L.F. 31, 101, 545). The setoff provision in the Limits Of Liability section serves not only to reinforce the definition of "**underinsured motorist**" contained in the UIM endorsement but it also precludes recovery under the endorsement. ***Rodriguez***, 808 S.W.2d at 381-382.

Again, ***Rodriguez*** is controlling. Therein, this Court interpreted substantially identical setoff and limit of liability provisions in a UIM endorsement. The set-off provision stated the limit of liability shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible. ***Rodriguez***, 808 S.W.2d at 381. The driver who struck the Rodriguez vehicle, Fruehwirth, had an auto liability policy which provided $50,000 in bodily injury coverage. The General Accident policy issued to Rodriguez provided $50,000 in underinsured motorist coverage. ***Rodriguez***, 808 S.W.2d at 381-382. The Court found the effect of the limit of liability provision was to set off the $50,000 paid by Fruehwirth's insurer against the $50,000 in UIM coverage provided by General Accident. ***Id.***

In finding the limit of liability provision barred recovery of underinsured motorist benefits this Court rejected Rodriguez' argument that underinsured motorist coverage was meant to act as excess coverage. It reasoned UIM coverage provided a minimum amount of protection to be paid by the Rodriguez' insurer if other persons legally responsible for Gail Rodriguez' injuries had lesser liability limits than those provided under the General Accident underinsured motorist coverage. ***Rodriguez***, 808 S.W.2d at 382. The language of the underinsured motorist provision in the General Accident policy was neither ambiguous nor misleading and barred Rodriguez from recovering. ***Rodriguez***, 808 S.W.2d at 382-383.

Plaintiff Manner Has Failed To Exhaust Other Applicable Coverage

In addition to recovering against the tortfeasor driver, Plaintiff Manner recovered from Helmet City, Inc. and Jafrum International in respect to claims arising from alleged product defect and failure to warn in regard to the helmet Plaintiff was wearing at the time of the accident. (L.F. 327, 542). Plaintiff collected $750,000 from these joint tortfeasors. (L.F. 327, 542). There is no evidence Plaintiff Manner obtained and received the policy limits from the insurers of Helmet City and Jafrum International in his settlement with those joint tortfeasors.

Missouri courts hold an insured must recover policy limits from all tortfeasors before making a claim for underinsured motorist benefits. The failure to do so defeats a claim for underinsured motorist coverage. *See*, ***Lewis v. State Farm Mutual Automobile Insurance***, 857 S.W.2d 465, 467 (Mo. Ct. App. 1993). An insured's recovery of underinsured motorist coverage is conditioned on the exhaustion of the limits of ***all***

bodily injury policies in existence at the time of the accident. ***Lewis***, 857 S.W.2d at 466. Plaintiff has cited no case law precedent limiting the exhaustion of bodily injury policies to ***auto*** liability payments from the underinsured tortfeasor motorist rather than requiring exhaustion from *any and all* policies providing coverage for bodily injury and applicable to the accident in question. Nor are Defendants aware of any such Missouri authority.

Lewis, ***id***. at 467, illustrates the effect of an insured's failure to exhaust the limits of all bodily injury policies applicable to their injuries on their ability to recover underinsured motorist benefits. Nancy Lewis was a passenger in a vehicle driven by Guy Lewis. The Lewis vehicle was involved in an accident with a vehicle driven by Webber. Nancy Lewis was injured in the collision. At the time of the accident, Guy Lewis had an insurance policy with a liability limit of $50,000 per person for personal injury. Nancy Lewis settled with Guy Lewis' liability carrier for the full $50,000 policy limits. Weber had an insurance policy with a liability limit of $100,000 per person for personal injury at the time of the accident. Nancy Lewis settled with Weber's insurer for $50,000. ***Lewis***, ***id.*** at 466.

At the time of the accident, Nancy Lewis had an insurance policy with State Farm which provided underinsured motorist benefits, with limits of $25,000 each person and $50,000 each accident. ***Id.*** The State Farm policy stated the insurer would pay damages for bodily injury an insured was legally entitled to collect from the owner or driver of an underinsured motor vehicle. There was no coverage until the limits of liability of all bodily injury liability bonds and policies that applied had been used up by payment of judgments or settlements. ***Id.***

After settling with Guy Lewis' and Weber's liability carriers, Nancy Lewis brought suit against State Farm for underinsured motorist benefits. State Farm raised the exhaustion clause as the basis for summary judgment. It asserted Lewis was not entitled to underinsured motorist benefits because she had not used up all bodily injury liability policies that applied to the accident and had settled with one of the tortfeasors, Weber, for less than the tortfeasor's insurance limits. ***Id.*** The trial court granted State Farm's motion for summary judgment. Nancy Lewis appealed. ***Id.*** The Eastern District affirmed. ***Id.***

On appeal, Nancy Lewis asserted she had fulfilled the exhaustion requirement of the State Farm policy by recovering the liability limits of the only bodily injury policy that "applied," the policy of Guy Lewis, since she was proceeding only against him. Nancy Lewis asserted that if there was other applicable insurance it had been used up by settlement of her claim against Weber even though the settlement amount was less than Weber's policy limit. ***Id.***

The court rejected this argument. It found that under the terms of the State Farm policy the insurer was obligated to pay damages only after the insured demonstrated: she had received bodily injury; the injuries occurred as a result of an incident involving an underinsured vehicle; and she was legally entitled to collect from the underinsured vehicle. ***Lewis***, 857 S.W.2d at 466-467. For an insured to be legally entitled to collect, there had to be a prior, judicially-enforceable determination of liability and damages. Further, the conditions for underinsured motorist coverage were only met if such damages exceeded the limits of the existing liability coverages. ***Lewis***, ***id*** .

The court read the State Farm policy to condition an insured's recovery on the exhaustion of the limits of all bodily injury policies in existence at the time of the collision. ***Id.*** It found that by its plain language the State Farm policy conditioned underinsured motorist coverage on the exhaustion of the limits of liability of *all* bodily injury liability policies that applied by payment of judgments or settlements. Nothing in the policy language supported Lewis' contention that the exhaustion provision applied only to one tortfeasor against whom the insured might choose to proceed. ***Id.***

As the court noted, there was no statutory requirement in Missouri for underinsured motorist coverage and no public policy mandating such coverage. ***Id.*** Absent a statute or public policy requiring coverage the State Farm policy would be enforced as written since it was unambiguous. An insured had to exhaust the limits of all bodily injury policies before she was entitled to proceed against the underinsured motorist carrier. Since the parties stipulated Nancy Lewis agreed to settle her claim against Weber for $50,000, even though the liability limits on Weber's policy were $100,000, Lewis had not met the policy requirement that the limits of liability of all bodily injury policies that applied had been used up by payment of judgments or settlements, and, therefore, could not recover underinsured motorist benefits. ***Id.***

Lewis applies and bars Plaintiff Manner from recovering underinsured motorist benefits. ***Id.*** The UIM Endorsement at issue herein contains exhaustion language substantially identical to that in ***Lewis***. The UIM endorsement states the insurer will pay "under this coverage only after the limits of liability under any **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements." (L.F.

46, 60, 73, 86). Relatedly, the endorsement provides the limits of liability of underinsured motorist coverage will be reduced by 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**. [emphasis added] (L.F. 46-47, 60-61, 73-74, 86-87).

Like the exhaustion clause in ***Lewis***, the UIM endorsement here conditions recovery of underinsured motorist benefits on the exhaustion of the limits of all bodily injury policies in existence at the time of the accident ***on behalf of any person or organization which may be legally liable OR under any collectible auto liability insurance***. ***Lewis***, 857 S.W.2d at 467. Plaintiff Manner has failed to satisfy this condition for recovering underinsured motorist benefits. While Plaintiff Manner clearly exhausted the coverage available under the policy of the tortfeasor driver – Schiermeier – by accepting payment of the $100,000 policy limits from Schiermeier's insurer that alone is not sufficient to trigger application of UIM coverage. As the Eastern District recognized in ***Lewis***, an insured is not entitled to pick and choose which tortfeasors he proceeds against for the purpose of the exhaustion requirement. Rather, the plain and unambiguous language of the exhaustion provision necessitates an insured exhaust *all* bodily injury coverage and not simply the coverage of one particular tortfeasor. ***Lewis***, 857 S.W.2d at 466-467.

By its terms, the exhaustion provision in the UIM endorsement is not limited to auto liability policies such as the policy issued to Schiermeier. Rather, the plain language of the exhaustion provision references any bodily injury liability bond or policy. Given

this clear and unambiguous policy language, Plaintiff Manner was required to exhaust both the coverage provided under the auto liability policy issued to the tortfeasor driver, Schiermeier, and the coverage provided under any bodily injury liability policies issued to Helmet City, Inc. and Jafrum International. ***Id.***

Plaintiff Manner failed to demonstrate the limits of all bodily injury liability policies available to Defendants Helmet City and Jafrum International and that those bodily injury policies were "exhausted" or that the limits of coverage available were paid to him. ***Lewis***, 857 S.W.2d at 467; ***Sago***, 827 S.W.2d at 755-756. Since Plaintiff Manner failed to prove the exhaustion of the limits of liability of *all* bodily injury policies issued to Helmet City and Jafrum International he failed to satisfy all the conditions for underinsured motorist coverage and thus he may not recover UIM benefits from American family and American Standard. ***Id.***

Unambiguous Setoff Provisions are Valid Absent the Effect of the Second Sentence of "Other Insurance" Clause

This Court will likewise note that even the ***Clark*** Court, upon which case Plaintiff attempts to rely, upheld the set-off provisions of American Family's policy even after finding ambiguity in the ***first*** sentence of the "Other Insurance" clause so set-off is seemingly allowed from the limits of liability by all authority not addressing the ***second*** sentence of the "Other Insurance" clause. ***Clark v. American Family Mutual Insurance***

Company, 92 S.W. 3d 198, 204 (Mo. Ct. App 2002). [7] In ***Clark,*** Mr. and Mrs. Clark sought underinsured motorist coverage under two insurance policies issued by American Family for two different vehicles. Mr. Clark was a police officer who was assisting with an automobile accident and had been a passenger in a patrol car when it arrived at the scene. He was outside of the car setting out flares when he was injured when an automobile struck him. The driver of the vehicle was insured by Farmers Insurance Company who paid its $25,000 policy limits to extinguish the claims of the Clarks against the tortfeasor. As mentioned, the Clarks had two policies with American Family on Mr. Clark's Plymouth and also Mrs. Clark's Toyota. Each of the policies had underinsured motorist coverage of $50,000/person/$100,000/accident. The Clarks sought the total recovery of $100,000. American Family paid the Clarks $25,000 which was the $50,000 policy limit under the UIM coverage of one of the policies less the $25,000 paid by Farmers. ***Id.*** at 200. American Family took the position that there would be no further recovery under the UIM provisons of either policy because each contained anti-stacking language. The language is the same as that in this case. ***Id.*** at 201. The Clarks argued that the anti-stacking language was ambiguous due to the "Other Insurance" provision as Plaintiff does here. The Clarks first argued that the second sentence of the "Other Insurance" clause created an ambiguity which would allow them to recover the

[7] The "second sentence" is another argument—see Point V *supra.* So, too, is another argument that other carriers' poorly drafted language sets off from the insured's ***damages*** as opposed to the ***limits of liability***—see Point VII *supra*.

UIM benefits as excess. ***Id.*** at 202. The Court rejected this argument in that Mr. Clark was not "occupying a non-owned vehicle" at the time of the accident as he was outside of the non-owned police vehicle. Thus, because Mr. Clark was not occupying a non-owned vehicle, the second sentence of the "Other Insurance" clause did not apply and could not be used to create an ambiguity allowing stacking. ***Id.*** at 202-03. That position is similarly true here because Nathaniel Manner was not occupying a non-owned vehicle at the time of his unfortunate accident.

The Clarks further argued that the ***first*** sentence of the "Other Insurance" clause also created an ambiguity allowing them to stack policies as Mr. Manner does here. The Clarks argued that the ***first*** sentence is not limited to situations where the insured is occupying a non-owned vehicle. ***Id.*** at 203. The distinction between ***Clark*** and the case at issue here, however, is that, in ***Clark***, the tortfeasor only carried $25,000 of liability coverage whereas the two UIM policies issued by American Family to the Clarks each contained $50,000 of UIM coverage. Hence, the tortfeasor's vehicle met the definition of "underinsured motor vehicle" in that the policy limits for the Farmers tortfeasor were less than ***one*** UIM policy issued by American Family. [8] Such is not the case here as Mr. Schiermeier possessed $100,000 of liability coverage which equates to Mr. Manner's one UIM policy limit and therefore Mr. Schermeier's vehicle does not meet the definition of "underinsured motor vehicle." Accordingly, ***Clark*** is of no assistance as authority in favor of Plaintiff's argument here. ***Clark*** only allowed stacking of the two UIM policies because Mr. Clark was injured by an underinsured tortfeasor in comparison to the one

[8] See Point I *infra*.

UIM limit. The policies issued to the Clarks defined an "**underinsured motor vehicle**" in the same manner as the American Family and American Standard policies here. ***Clark***, 92 S.W.3d at 201. Those policies contained limit of liability and other insurance language identical to that in the UIM endorsement in the American Family and American Standard policies. ***Clark***, 92 S.W.3d at 201-202. (L.F. 46-47, 60-61, 73-74, 86-87).

III

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE OWNED VEHICLE EXCLUSION CONTAINED IN THE FORD RANGER, FORD F150, AND SUZUKI POLICIES APPLIED SO AS TO PRECLUDE PLAINTIFF MANNER FROM RECOVERING UNDERINSURED MOTORIST BENEFITS UNDER THOSE POLICIES IN THAT PLAINTIFF MANNER WAS OCCUPYING A 1983 YAMAHA MOTORCYCLE WHICH WAS NOT INSURED UNDER THE FORD RANGER, FORD F150 OR SUZUKI POLICIES AND THE YAMAHA MOTORCYCLE WAS OWNED BY PLAINTIFF MANNER.

RESPONSE TO PLAINTIFF'S POINTS I-IV

Factually, this is a unique case that chances are will not be seen again. Nathaniel Manner bought a motorcycle from his uncle, paid money for the motorcycle, took possession of the motorcycle, treated the motorcycle as his own, but had not yet made it to the Department of Motor Vehicles for purposes of transferring the title in his own name. Upon purchase of the motorcycle he goes to his American Family agent with

whom he has previously done business and buys a policy for the motorcycle, again, treating it as his own. Before he has an opportunity to make it to the Department of Motor Vehicles he has an accident. The issue of UIM coverage comes about, here, over the use of the term "own." If Nathaniel Manner had made it to the Department of Motor Vehicles this case never arises because Mr. Manner would then have title and "own" the motorcycle even under Plaintiff's argument. The question comes down to whether Nathaniel Manner should have UIM coverage simply because of his delay in perfecting title.

Owned Vehicle Exclusion

Neither the Ford Ranger policy nor the Ford F150 policy provides underinsured motorist coverage for the September 2004 accident. Exclusion 1 in the UIM endorsement states:

> This coverage ***does not apply*** for **bodily injury** to a person:
>
> 1. While **occupying**, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household.

[emphasis added by the undersigned by ***bold italics and underline***—**bold print** alone is within the policy as a defined term] (L.F. 46, 60, 73, 86). The owned vehicle exclusion precludes Plaintiff Manner from recovering underinsured motorists benefits under the Ford 150 policy and the Ford Ranger policy issued to Plaintiff Manner as well as the Suzuki policy issued to James Manner. Missouri courts have found an owned vehicle exclusion of the nature contained in the UIM

endorsement is valid and enforceable in that there are no statutory or public policy requirements as to underinsured motorist coverage and that the terms of the owned vehicle exclusion are clear and unambiguous. *See*, ***Lang***, 970 S.W.2d at 832.

When he was injured Plaintiff Manner was operating the Yamaha motorcycle covered by the American Standard Motorcycle Policy. (L.F. 326, 539-540). At that time Plaintiff Manner was the owner of a 2002 Ford Ranger and a 1992 Ford F150. (L.F. 327, 540-541). In operating the Yamaha motorcycle Plaintiff Manner was "**occupying**" the motorcycle as that Yamaha policy defined "**occupying**" as "in, on, getting into, out or off of, and in physical contact with." (L.F. 39). Relatedly, the owned vehicle exclusion precludes Plaintiff Manner from recovering under the American Standard Motorcycle Policy covering the 1999 Suzuki. The 1999 Suzuki motorcycle was owned by Nathaniel's father James Manner. (L.F. 327, 541). That motorcycle was insured by an American Standard under the Suzuki policy issued to James Manner as policyholder/named insured. (L.F. 327, 541-542). Plaintiff Manner was a "**relative**" of James Manner within the meaning of the Suzuki policy. (L.F. 542).

To understand the application of the owned vehicle exclusion the exclusion should be read substituting the applicable names and identity of vehicles for the exclusion language. Using the proper substitutions the owned vehicle exclusion will read as follows:

<u>As to the Ford Ranger policy</u>: This coverage does not apply for **bodily injury** to Nathaniel Manner while **occupying** the 1983 Yamaha motorcycle that is not insured

under this Ford Ranger policy, if the 1983 Yamaha motorcycle is owned by Nathaniel Manner.

As to the Ford F150 policy: This coverage does not apply for **bodily injury** to Nathaniel Manner while **occupying** the 1983 Yamaha motorcycle that is not insured under this Ford F150 policy, if the 1983 Yamaha motorcycle is owned by Nathaniel Manner. (L.F. 46-47, 60-61, 73-74).

As to the Suzuki policy: This coverage does not apply for **bodily injury** to Nathaniel Manner while **occupying** the 1983 Yamaha motorcycle that is not insured under this Suzuki policy, if the 1983 Yamaha motorcycle is owned by James Manner or any resident of James Manner's household [which includes Nathaniel Manner who is a resident of James Manner's household]. (L.F. 86-87).

The owned vehicle exclusion contained in the Ford Ranger and Ford F150 Family Car Policies and the Suzuki Motorcycle Policy is unambiguous and precludes Plaintiff Manner from recovering underinsured motorist benefits under those policies for injuries he sustained in the September 25, 2004 accident.

The owned vehicle exclusion in the UIM endorsement precludes coverage under the Ford Ranger, Ford F150 and Suzuki policies since the Yamaha motorcycle Plaintiff Manner was operating at the time of the accident was "**owned**" by him within the meaning of the endorsement. Plaintiff Manner owned the Yamaha motorcycle when he was injured on September 25, 2004 since he had that motorcycle in his possession, dominion and control; possessed insurable interest in the motorcycle and obtained a policy from American Standard covering that motorcycle; had paid for the motorcycle, in

whole or in part; and was in the process of having title to the motorcycle transferred to him when he was injured. Plaintiff Manner contends he did not own the 1983 Yamaha motorcycle since he did not possess legal title to the motorcycle, however, the term "**owned**" is to be given its plain and ordinary meaning not the technical meaning Plaintiff seeks to ascribe to that term.

That Plaintiff Manner did not possess certificate of title to the 1983 Yamaha motorcycle did not preclude him from being the "**owner**" of that motorcycle within the meaning of the UIM endorsement, in general, and the owned vehicle exclusion in particular. The UIM endorsement does not define the term "**owned.**" (L.F. 46, 60, 73, 86). That term is not defined elsewhere in the policies. Since the term is not defined the Court must give the word its plain and ordinary meaning. ***Ware***, 84 S.W.3d at 102; ***Shahan v. Shahan***, 988 S.W.2d 529, 535 (Mo. banc 1999). In determining the plain and ordinary meaning of policy language Missouri courts consult English language dictionaries. ***Id.*** In his Substitute Plaintiff's Brief, Plaintiff Manner fails to cite or reference any English language dictionary defining the term "own." Rather, he chooses to interpret the word "own" in a technical manner.[9]

[9] Plaintiff Manner relies on ***Jones v. Mid-Century Insurance Company***, 2008 WL 5006564, 2008 Mo. App. LEXIS 1655 (Mo. Ct. App. 2008) (Plaintiff's Substitute Brief, 30). As Plaintiff Manner admits, this Court accepted transfer in ***Jones*** and, thereafter, decided the case on different grounds. ***Jones***, 287 S.W.3d 687 (Mo. banc 2009). Despite this fact, Plaintiff suggests the Court of Appeals' decision in ***Jones*** still has precedential

Merriam-Webster's Dictionary defines the verb "**own**" as "to have or hold as property: possess; to have power or mastery over; to acknowledge to be true, valid, or as claimed." This dictionary definition does not include the technical meaning ascribed to the word by Plaintiff Manner. As defined by the dictionary, the term "**own**" does not require an individual to have certificate of title for the property in question. The undisputed facts show Plaintiff Manner "**owned**" the Yamaha motorcycle, within the plain and ordinary meaning of the term, as derived from the dictionary. It is undisputed Plaintiff Manner purchased the motorcycle and paid for it—at least in part. Plaintiff Manner purchased a Motorcycle Policy from American Standard to provide coverage for the 1983 Yamaha motorcycle. (L.F. 36-48). On the Yamaha Motorcycle Policy Plaintiff Manner is listed as the policyholder/named insured. (L.F. 37). Plaintiff Manner treated the Yamaha motorcycle as his own. (L.F. 574). In his deposition, Plaintiff Manner testified that before the accident he had paid his uncle for the motorcycle and his uncle had given him possession of the motorcycle. Upon paying for the motorcycle, Plaintiff

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effect. (Substitute Brief, 30). When this Court transfers a case from the Court of Appeals, the Court of Appeals' decision is vacated and set aside and possesses no precedential effect. ***State v. Norman***, 380 S.W.2d 406, 407 (Mo. banc 1964); ***Benton House v. Cook & Younts***, 249 S.W.3d 878,883 (Mo. Ct. App. 2008). This Court having accepted transfer in ***Jones***, the Southern District's Opinion is entirely without effect and Plaintiff errs in relying on that decision. ***Id.***

Manner took possession of the motorcycle and kept it where he was living. When he was injured, Plaintiff Manner was in the process of getting title to the motorcycle transferred from his uncle's name to his name. (Tr. 573-574).

While Plaintiff contends he was not the owner of the motorcycle because he did not possess title to the vehicle his actions and testimonial admissions demonstrate his belief he was the owner of the 1983 Yamaha motorcycle even though he did not possess legal title to the same. Plaintiff Manner's conduct in regard to the 1983 Yamaha motorcycle and his concessions are in keeping with the plain and ordinary meaning of the term "**own**" as defined by the dictionary—that is Plaintiff Manner had possession, dominion and control over the motorcycle.

In support of his argument that to be owner of the Yamaha motorcycle he must possess a certificate of title Plaintiff Manner relies on ***Lightner v. Farmers Insurance***, 789 S.W.2d 487 (Mo. banc 1990) and ***USF&G v. Safeco***, 522 S.W.2d 809 (Mo. banc 1975), however, both reject the proposition that certificate of title is determinative of ownership of a vehicle for purposes of insurance coverage.

In ***Lightner***, this Court found the presence of a son's name on the certificate of title for a truck did not make the son the owner of that vehicle and was not the controlling factor in determining the vehicle's ownership. ***Lightner***, 789 S.W.2d at 489-490. While standing on a sidewalk, Tim Lightner was struck and injured by an automobile driven by Gaba. Gaba's vehicle was insured by a liability policy affording only $25,000 in bodily injury coverage. Gaba's insurer paid the full coverage amount to Tim Lightner. ***Lightner***, 789 S.W.2d at 488. Thereafter, Tim Lightner filed underinsured motorist

claims against Farmers under three policies of insurance owned by and in the name of his father, Jim Lightner. Each policy defined the term "insured" to include, with respect to the described automobile, the named insured. ***Id.*** The uninsured motorist coverage in the Farmers' policies defined the term "insured" as the named insured or a relative. The uninsured motorist coverage in each policy was, by endorsement, extended to underinsured motorists. ***Lightner***, 789 S.W.2d at 488. Tim Lightner was an unemancipated minor living at home with his parents at the time of the accident. The Additional Definition section of the policies defined the term "relative" to mean a "relative of the named insured who is a resident of the same household, provided neither such relative nor his spouse owns an automobile." ***Id.*** The coverage question centered on the meaning of the term "own" in the definition of relative. ***Id.***

The trial court held Tim Lightner was not an owner of the 1979 Chevrolet truck at issue within the meaning of the policy definition of "relative." ***Id.*** Three vehicles owned by Jim Lightner were used by the Lightner family during the time the accident occurred. Even though Jim Lightner added the name of his minor son, Tim, to the certificate of title for the truck the trial court found Jim Lightner, not Tim, was the owner of the truck, within the meaning of the policies. ***Lightner***, 789 S.W.2d at 488-489.

Jim Lightner testified he was looking for a vehicle his son could use for his purposes and on finding the Chevrolet truck, which he and his son liked, he promptly bought it. ***Lightner***, 789 S.W.2d at 489. Jim Lightner called the Farmers agent who sold the policies on the other Lightner vehicles and told him he had bought a Chevy pickup and needed insurance for it. He explained to the agent that Tim Lightner would be the

primary driver of the vehicle and pursuant to that conversation the policy was issued to Jim as the named insured. ***Id.*** Even though he added Tim's name to the certificate of title Jim Lightner testified he did so because he wanted the truck to go to Tim if "something happened" to him. ***Id.*** Clearly, even though Jim Lightner intended in the event of his death or other misadventure that the truck would become Tim's, Jim Lightner felt he owned the truck. ***Id.*** Further, Jim Lightner had agreed his son could buy the truck at a later time when Tim was able to pay for it. Following Jim's purchase of the truck nothing in the record demonstrated Tim thereafter bought the truck or made an effort to change the title or convert the insurance to his name alone. ***Id.*** Sometime after Tim was injured the truck was damaged so extensively that it was declared a total loss and insurance proceeds were paid to Jim Lightner. ***Lightner***, 789 S.W.2d at 489.

The term "**owns**" was not defined by the policy. ***Id.*** Tim Lightner argued the court had to take the meaning most favorable to the insured and the risk insured by Farmers was not increased by affirming the trial court's finding that Tim was not the owner of the truck for coverage purposes because Farmers issued the insurance believing Jim Lightner was owner of the truck and only after the accident did it complain Tim Lightner's name had been added to the certificate of title. ***Id.***

In deciding the question before it the Court consulted Black's Law Dictionary. The Fifth Edition of Black's Law Dictionary defined the term "**owner**" as:

> the person in whom is vested the ownership, dominion, or title of property, who has dominion of a thing which . . . he has the right to enjoy and do with as he pleases, even to spoil or destroy it so far as the law

> permits….The term is, however, a *nomen generalissimum*, and its meaning is to be gathered from the connection in which it is used and from the subject matter to which it is applied.

Lightner, 789 S.W.2d at 489. Additionally, the court consulted the definition of "**own**" set forth in C.J.S. C.J.S. stated the word "**own**" was;

> (A) general term which varied in its significance according to its use. "It has been said that the words indicating qualified or actual ownership, depends on the subject matter and the circumstances surrounding the subject matter and the parties.

Lightner, 789 S.W.2d at 489-490.

While Farmers made much of the fact that Jim Lightner added his son's name to the certificate of title, Missouri courts had held a certificate of title was only *prima facie* evidence of ownership which could be rebutted. ***Lightner***, 789 S.W.2d at 490. As the court noted, ***USF&G v. Safeco*** observed that "**owner**" was a word of rather broad meaning. ***Id.*** The presence of Tim Lightner's name on the certificate of title was not the single controlling factor as Farmers insisted. ***Id.*** Though Tim Lightner was permitted to drive the truck and have its general use with little or no controls nothing in the evidence indicated this was done other than with the permission of his father. It could not seriously be suggested that Tim Lightner was free to voluntarily destroy, encumber, sell, or otherwise dispose of the truck. ***Id.*** Rather, the truck was not to be Tim Lightner's until he bought it or until something happened to his father. From these facts, it could reasonably be inferred Jim Lightner could, at his pleasure, withdraw permission to drive

the truck which did little to demonstrate ownership of the truck in Tim. ***Lightner***, 789 S.W.2d at 490.

The evidence justified the conclusion that when Jim Lightner paid premiums on the policies for the three vehicles he could reasonably expect his children living at home to be protected by those policies and the language "owns an automobile" which narrowed the scope of the term "relative" would not mean an automobile owned by him, even though jointly titled with his son, would bar such coverage. There was no uncertainty of risk. Farmers was aware Jim Lightner had purchased the truck and his son would be the primary driver. ***Lightner***, 789 S.W.2d at 490-491.

Farmers sought to escape its contractual responsibility having discovered after the fact Jim Lightner added his son's name to the certificate of title. Rejecting this result, the Court held the trial court properly concluded Tim Lightner was entitled to the underinsured motorist coverage provided in all three policies since he was not the "owner" of the truck. ***Lightner***, 789 S.W.2d at 491. Upon reading ***Lightner***, it becomes apparent this Court did not define "own" as holding certificate of title to the property in question.

As it did in ***Lightner***, in ***Safeco***, the instant Court referenced C.J.S. and Black's Law Dictionary in determining whether Roy Chapman, a teenage driver, who had an accident in a car belonging to his friend's mother which he was driving with his friend's permission, was covered under the non-owned automobile provision of a Safeco policy issued to Chapman's father. Mrs. Kloepper purchased the car when her daughter was 13 years old. ***Safeco***, 522 S.W.2d at 813. Mrs. Kloepper had full legal title to the vehicle

under the Missouri statutes. The question was the meaning of "**owner**" as used in the non-owned automobile clause of the Safeco policy. Specifically, did "**owner**" mean no one other than the person who was named in the Missouri certificate of title? ***Safeco***, 522 S.W.2d at 817. If Jane Kloepper was the "**owner**" of the Dodge Dart, within the meaning of the Safeco policy, Roy Chapman had her permission to drive the car. ***Id.***

While Jane Kloepper was not the "**owner**" of the Dodge Dart, in the sense of having Missouri certificate of title in her name, she was the "**owner**" of the vehicle insofar as she had possession, control and dominion over the automobile most of the time and was capable of transferring lawful possession of the car to Roy Chapman. ***Id.*** Mrs. Kloepper would not be able to successfully contend Roy Chapman was guilty of conversion of the automobile, or some sort of trespass, by virtue of the fact he was driving the automobile on the occasion in question. ***Id.***

The word "**owner**" was not defined in the Safeco policy. The Court noted the word was one of broad meaning. In ***Powell v. Home Indemnity***, 343 F.2d 856 (8th Cir. 1965), the Eighth Circuit considered the meaning of the word "**owner**" in an automobile liability policy. ***Safeco***, 522 S.W.2d at 817-818. Applying Missouri law, the Eighth Circuit found the plain and reasonable meaning of the word, as applied to motor vehicles, included not only absolute estates but also estates less than absolute. ***Safeco***, 522 S.W.2d at 818. ***Powell*** also referred to C.J.S., which stated the word "**owner**" was:

> (A) general term having a wide variety of meanings depending on the context and circumstances in which it was used. Broadly, an "**owner**" is one who had dominion over property, which is the subject of ownership. .

. The term "**owner**" may also be synonymous with "holder" or "possessor."

Id.

The Court also relied on ***State ex rel Thompson-Stearns-Rogers v. Schaffner***, 489 S.W.2d 207 (Mo. 1973) which addressed the meaning of "ownership" and "title" and found the term "ownership" could not be said to have a fixed, definite meaning. ***Id.*** According to Black's Law Dictionary, the word "**owner**" was not infrequently used to describe one who had dominion or control over a thing, the title to which was in another. ***Id.***

The use Roy Chapman was making of Mrs. Kloepper's car was not the type of unauthorized use, such as stealing or trespassing, which the insurer was seeking to eliminate from its coverage when it modified the non-owned auto clause to add the requirement of permission from the owner. Thus, Roy Chapman was also covered under the non-owned automobile portion of the Safeco policy. ***Id.***

As ***Lightner*** and ***Safeco*** show, the concept of ownership is not restricted to having certificate of title to the property in question. Rather, ownership has a broader meaning and encompasses having dominion or control over the property even though title to the property resides in another. ***Safeco***, 522 S.W.2d at 818; ***Lightner***, 789 S.W.2d at 490-491.

American Economy Insurance Company v. Paul, 872 S.W.2d 496, 498-499 (Mo. Ct. App. 1994) rejected a technical definition of "ownership" dependent on possession of legal title and satisfaction of all steps necessary for such title. Mrs. Paul brought suit for the wrongful death of her daughter, Tina, who was a passenger in a vehicle involved in an

accident. Economy and American States brought a declaratory judgment action with regard to whether or not a liability and umbrella policy provided coverage to the driver of the vehicle. ***Paul***, 872 S.W.2d at 496. The trial court entered judgment in favor of the insurers finding there was no obligation under the policies to provide coverage to the driver. ***Paul***, 872 S.W.2d at 497. The Eastern District reversed. ***Id.***

At issue was a policy provision defining a "covered auto" as "any vehicle of which you acquire ownership during the policy period." ***Paul***, 872 S.W.2d at 497. The vehicle involved in the accident was not listed on the insurance policy at the time the accident occurred. ***Id.*** The trial court had entered judgment in favor of the insurers finding the insurance policies did not provide coverage because the mother did not acquire ownership of the vehicle, and thus, did not have an insurable interest therein. ***Id.***

The issue on appeal was whether the trial court erred in finding that, as a result of the seller's failure to sign the title before a notary public in conformity with Section 301.210, title did not pass to the mother and she could not acquire an insurable interest in the vehicle in question. ***Id.*** The mother contended the phrase "to acquire ownership" should not be given a technical definition, based on strict compliance with Section 301.210, but rather, should be afforded the meaning which would reasonably be understood by the average lay person. ***Paul***, 872 S.W.2d at 498. Since the policy did not define the phrase "acquire ownership" the court applied the ordinary meaning to that phrase. Despite the seller's failure to notarize her signature when assigning the title, the mother did acquire ownership of the vehicle as well as an insurable interest therein. The

insurance policies which covered the mother were in effect at the time of the accident, and provided coverage to the driver of the vehicle. ***Paul***, 872 S.W.2d at 499.

Also illustrative is ***Shelter Mutual Insurance v. Ballew***, 203 S.W.3d 789, 794-795 (Mo. Ct. App. 2006). At issue therein was whether a liability policy exclusion was ambiguous. A homeowners' policy provided that under personal liability the insurer did not cover "property damage to property owned by an insured." ***Ballew***, 203 S.W.3d at 793. The Ballews argued the owned property exclusion should not apply because it was ambiguous. ***Ballew***, 203 S.W.3d at 794. In determining whether the language was ambiguous, the court was to give the words the meaning that would normally be understood by the average lay person unless it plainly appeared a technical meaning was intended. To determine the common meaning of a term a court should look to a dictionary definition. ***Ballew***, 203 S.W.3d at 794.

The Western District found the policy language was unambiguous. ***Id.*** It rejected the Ballews' contention that the phrase "owned property" was ambiguous because it did not specify the time at which the property must be damaged to be excluded from coverage. Rather, the court found the word "owned" itself unambiguously delineated when the property damage was excluded. ***Id.*** Consulting Webster's Third New International Dictionary, the court noted its definition of "owned" as an adjective meaning "held as one's own possession." ***Ballew***, 203 S.W.3d at 795. In order for there to be a claim for negligent misrepresentation the damage complained of had to have existed at the time of the sale. Thus, the property would have been in the Ballews' possession and covered by the "property-owned exclusion." ***Id.***

McDonnell v. Economy Fire & Casualty Company, 936 S.W.2d 598, 600 (Mo. Ct. App.1996) likewise recognized that the concept of ownership is not strictly limited to having certificate of title. At issue therein was an owned vehicle exclusion that precluded medical payments coverage. [10] Judith McDonnell purchased an auto liability policy from Economy for her 1981 GMC pickup truck. The policy defined "covered autos" as those described on the declarations page. The pickup truck owned by Judith McDonnell was the only covered auto. Under the policy, an insured was defined as any person occupying a covered auto or a temporary substitute for a covered auto. ***McDonnell***, 936 S.W.2d at 599. At the time of the accident, the covered auto, the pickup truck, was out of service because of repairs. Judith McDonnell, the named insured under the Economy policy, was injured in an accident while operating a Chevrolet Camaro Z-28 owned by her and which she claimed was a temporary substitute for the covered pickup. Economy refused to honor McDonnell's claim relying on an exclusion for medical payment coverage which stated the insurance did not apply to: "bodily injury sustained by you or any family member while occupying or struck by any vehicle (other than a covered auto) owned by you or furnished or available for your regular use." ***Id.***

The court found the unambiguous meaning of the exclusion to be there was no medical payment coverage for bodily injury for an insured while occupying an owned vehicle which was not a covered auto. ***Id.*** The trial court held, on undisputed facts, that

[10] Like underinsured motorist coverage, medical payments coverage is optional and is not mandated by statute or public policy.

McDonnell was an insured and the Camaro was a temporary substitute for a covered auto at the time of the accident. It concluded the exclusion relied on by Economy did not apply to the Camaro because it would render the temporary substitute coverage non-existent. ***McDonnell***, 936 S.W.2d at 599-600. The trial court then found a temporary substitute for a covered auto was a "covered auto" for purposes of medical payment coverage and the owned auto exclusion did not apply. ***McDonnell***, 936 S.W.2d at 600. In the alternative, the trial court found the exclusion was ambiguous. ***Id.***

The Eastern District found the trial court erred in refusing to apply the exclusion. The exclusion withdrew coverage for medical expense during the time when the insured was operating a vehicle owned by the insured but which was not a covered vehicle as defined by the policy. ***Id.*** Therein, the parties agreed no vehicle could be a "covered auto" unless it was described in the declarations. There would be coverage for an insured operating a temporary substitute providing the temporary substitute was not an owned vehicle. ***Id.*** There was nothing vague, uncertain or ambiguous about the exclusion. The named insured was informed by the policy provisions of the exclusion before she elected to use an owned, but uninsured, vehicle as a substitute automobile for a covered automobile. ***Id.***

Owned vehicle exclusions had been recognized and enforced. ***McDonnell***, 936 S.W.2d at 600. There was nothing unclear or ambiguous about the exclusion of medical payment coverage on an auto which the insured could have, but chose not to, insure. ***Id.*** For optional medical payment coverage, there was no legal reason to find coverage where the insured could have covered the vehicle which she owned and used as a temporary

substitute but elected not to purchase insurance. The insured was bound by the exclusion. ***Id.***

The reasoning of ***McDonnell*** applies with equal force in the instant case. As the Eastern District observed the owned vehicle exclusion was designed to bar coverage for bodily injury suffered when occupying a vehicle that was owned but was not insured under the policy in question because that vehicle would or should be covered by a different policy for which optional UIM coverage could be purchased. ***Id.*** Plaintiff Manner possessed an insurable interest in the 1983 Yamaha and represented to American Standard that he owned the motorcycle at the time of purchasing the Yamaha policy. He exercised dominion and control over the Yamaha motorcycle, retained the motorcycle in his possession, and admittedly used the motorcycle as if it were his own. Given these undisputed facts, Plaintiff Manner was the "**owner**" of the Yamaha motorcycle within the meaning of the owned vehicle exclusion in the Ford Ranger and Ford F150 policies. ***McDonnell***, 936 S.W.2d at 600; ***Lightner***, 789 S.W.2d at 490-491; ***Safeco***, 522 S.W.2d at 818.

Contrary to Plaintiff Manner's contention, the word "**owned**" in the owned-vehicle exclusion of the UIM endorsement does not require a technical definition and is not limited strictly to having proper certificate of title to the property in question. (Plaintiff Substitute Brief, 29-39). Plaintiff has failed to demonstrate the term "**owned**" as used within the exclusion is ambiguous and must be construed in favor of the insured. Rather, as ***Lightner, Safeco, Paul*** and ***Ballew*** show, an individual is the owner of a vehicle, for purposes of the owned-vehicle exclusion, if that individual has possession of

the vehicle and exercises dominion and control over it. ***Ballew***, 203 S.W.3d at 795; ***Paul***, 872 S.W.2d at 498-499; ***Safeco***, 522 S.W.2d at 818.

The undisputed facts demonstrate Plaintiff Manner was the "**owner**" of the 1983 Yamaha motorcycle for purposes of the owned-vehicle exclusion in the Ford Ranger and Ford F150 policies. Plaintiff Manner had possession of the Yamaha motorcycle, had paid his uncle, either in whole or in part, for the motorcycle; had dominion and control over the motorcycle and drove it; and was in the process of having title to the Yamaha motorcycle transferred from his uncle to himself. He had purchased a Motorcycle Policy from American Standard to cover the motorcycle. (L.F. 573-574).

These undisputed facts show Plaintiff Manner owned the Yamaha motorcycle as that term was used in the owned-vehicle exclusion in the Ford Ranger and Ford F150 policies. ***Id.*** There does not exist any question of material fact as to whether Plaintiff Manner owned the Yamaha motorcycle within the meaning of the exclusion. The owned-vehicle exclusion in the Ford F150 and Ford Ranger policies were triggered and precludes coverage for the injuries Plaintiff Manner sustained in the September 25, 2004 accident. ***Id.*** For this additional reason, the trial court did not err in granting summary judgment in favor of Respondent American Family on the F150 and Ford Ranger policies. ***Id.***; ***Foster v. St. Louis County,*** 239 S.W.3d 599, 601 (Mo. banc 2007).

"Person" is Not Ambiguous

As he did before the Court of Appeals and trial court, Plaintiff Manner contends the word "**person**" as used in the owned vehicle exclusion is ambiguous and must be construed in his favor of providing coverage. Specifically, Plaintiff Manner argues a

conflict exists between the insuring clause of the UIM endorsement and the owned vehicle exclusion. Plaintiff Manner posits the term "**person**" is ambiguous because it is not defined in the policies and because the policies fail to indicate whether the term "**person**" includes an "**insured person**" as expressly defined in the UIM endorsement. (Plaintiff's Substitute Brief, 19-29). These arguments are without merit and must be rejected.

In arguing the term "**person**" as contained in the UIM endorsement is ambiguous Plaintiff Manner relies on ***Versaw v. Versaw***, 202 S.W.3d 638, 644-645 (Mo. Ct. App. 2006). ***Versaw*** found the word "**person**" in a household exclusion of an auto liability policy to be ambiguous. ***Id.*** Larry and Judy Versaw, husband and wife, bought three liability policies from American Family for vehicles owned by them – a 1972 Volkswagen, a 1974 Chevrolet Nova and a 1973 Chevrolet Vega. The policies contained a household exclusion. ***Versaw***, 202 S.W.3d at 641. The exclusion stated liability coverage did not apply to "bodily injury to any person related to and residing in the same household with the operator." ***Versaw***, 202 S.W.3d at 642. While the policies were in effect, Judy Versaw collided with an oncoming vehicle killing her husband Larry Versaw who was a passenger in the Volkswagen. Larry Versaw's parents sued Judy Versaw and the other driver for the wrongful death of Larry Versaw. American Family denied coverage relying on the household exclusion. ***Versaw***, 202 S.W.3d at 642. The trial court ruled the household exclusion did not serve to bar coverage and Judy Versaw was insured under all three policies for the full amount of policy coverage. ***Id.*** The policies defined the terms "you" and "your," as used in the household exclusion, as "the

policyholder named in the declarations and spouse, if living in the same household." ***Versaw***, 202 S.W.3d at 642. The policies did not define the phrase "any person" as contained in the household exclusion. ***Id.***

The court observed that if it could analyze the household exclusion in isolation from the remainder of the policy language it would find the plain meaning of the phrase "any person" excluded Larry and Judy Versaw from coverage. When "any person" was read without considering its context in relationship to other contact provisions resorting to standard English language dictionaries could lead the average lay person to understand the household exclusion encompassed all persons (meaning there would be no coverage for Judy Versaw for Larry Versaw's death); however, the household exclusion had to be read in context. ***Versaw***, 202 S.W.3d at 643-644. When that was done, the meaning of "any person" in the household exclusion became ambiguous. This occurred because, with one exception, the defined terms "**you**" or "**your**" or "**insured person**" were used throughout policy exclusions to explain when Larry and Judy Versaw (as a class of persons) were excluded from the previously-promised coverage. The single exception was the household exclusion where the undefined phrase "any person" was used. The selective use of defined terms to exclude coverage, except for the household exclusion, could reasonably create the impression to the lay person who bought the policy that the defined phrases ("**you,**" "**your,**" and "**insured person**") referred to a mutually-exclusive classes separate and different from the "any person" class. ***Versaw***, 202 S.W.3d at 644.

As the court observed, the household exclusion did not use the terms "you," "your," or "insured person." The significance of this was not apparent until the

household exclusion was read in conjunction with the adjacent liability exclusion clauses. ***Id.*** Four of the exclusions related to exclusionary events rather than the class of persons being excluded from coverage. Of the eight remaining exclusion clauses, seven used contractually-defined terms to designate the class of persons that were excluded from coverage. Those clauses either contained the phrase "you/your" or "insured person." In contrast, the household exclusion made no reference to either "you," "your," or "insured person." Where a term was used in one clause of a policy its absence in another clause was significant. ***Versaw***, 202 S.W.3d at 645. The Southern District found an ordinary lay person who bought the policy, if confronted with a claim of non-coverage by the insurer because of the household exclusion, could, upon reading all relevant provisions, find two different answers, one being coverage and the other exclusion of coverage. ***Id.*** At the very least, the policy was ambiguous as to whether Judy Versaw was barred from coverage under the household exclusion. This ambiguity required the court to interpret the policy, and specifically the household exclusion, in a light most favorable to Judy Versaw. Thus, Judy Versaw was covered under the policy which insured the Volkswagen being driven at the time of the accident. ***Id.***

Versaw was later distinguished by ***Jensen v. Allstate Ins. Co.***, 349 S.W.3d 369, 380 (Mo. Ct. App. 2011). Like ***Versaw***, ***Jensen*** involved a household exclusion in an auto liability policy. The household exclusion stated Allstate would not pay any damages an insured person was legally obligated to pay because of "bodily injury to any person related to an insured person by blood, marriage, or adoption and residing in that person's household." ***Jensen***, 349 S.W.3d at 371-372. ***Jensen*** held the phrase "any person," as

used in the household exclusion, was unambiguous. ***Jensen***, 349 S.W.3d at 380. As the Western District observed, a significant factor in ***Versaw*** was that the phrase "any person" did not appear elsewhere in the policy to give that term greater context. Conversely, in ***Jensen***, the phrase "any person" appeared not only in the household exclusion but also in the policy's insuring clause for liability coverage and multiple other places in the policy. ***Jensen***, 349 S.W.3d at 378. For example, the insuring clause stated Allstate would pay for damages which an insured person was legally obligated to pay because of "bodily injury sustained by any person." The phrase "any person" appeared at other places of the Allstate policy. ***Id.*** Identical use of the phrase "any person" appeared in exclusions applicable to medical payment coverage, uninsured motorist coverage, and underinsured motorist coverage. ***Id.*** Another factor which distinguished ***Jensen*** from ***Versaw*** was the fact that when an exclusion intended to exempt policyholders from the scope of the exclusion it clearly said so. For example, certain exclusions in the liability section all stated "this exclusion does not apply to you." ***Id.*** The clear pattern established by the policy language was that exclusions that did not apply to the policyholders said they did not. Accordingly, exclusions that made no mention of exempting the policyholders did not exempt those individuals. Other portions of the policy contained the same language pattern. ***Jensen***, 349 S.W.3d at 378-379.

On examining the Allstate policy, the Western District found use of "you" and "any person" separately and together established a pattern that would indicate to the ordinary person reading the policy that when "any person" appeared by itself, without any qualifier, it meant "any person" and was not ambiguous in the context of the pattern

established in the drafting and setting forth of exclusions because those exclusions would say: "you" when referring to the policyholder; "insured person" when referring to the policyholder plus any others who qualify within the definitions; and "any person" when referring to any person. ***Jensen***, 349 S.W.3d at 379. The trial court ended up with a strained interpretation of the policy because it failed to note the pattern established in the exclusions in the liability section and carried through in the remainder of the policy and failed to note the phrase "any person" appeared multiple other places and meant exactly *any person* without limitation except when it expressed a limitation. Thus, the term "any person," as used in the household exclusion of the Allstate policy, was unambiguous. ***Jensen***, 349 S.W.3d at 380.

As in ***Jensen***, the word "**person**" is used both in the UIM endorsement and other provisions in the policies here at issue thereby giving the word context and from that context a clear meaning. ***Id.*** When construing the American Family and American Standard policies as a whole, and looking at usage of the term "**person**" in various provisions therein, the meaning of the term is unambiguous. ***Id.*** As a review of the policy terms demonstrate, the word "**person**" is used in the section of the policy setting forth the duties of "each person" claiming coverage under the policy. Those duties only apply to someone who is an insured person under the policy in question. The definition of "**bodily injury**" as injury or sickness, disease or death of any person necessarily applies only to persons insured under the policies in terms of an UIM claim for personal injury. ***Id.*** To read the policies otherwise would attempt to impose duties and obligations on ***uninsured*** "persons" which is nonsensical. The limits of liability section

of Part I of the policy refers to bodily injury to persons and limits of liability for each person. Clearly, use of the term "**person**" in those provisions applies to insured persons. ***Id.***[11]

Use of the term "**person**" in the UIM endorsement reinforces this meaning. Under the endorsement, coverage is provided for bodily injury which an insured person is legally entitled to recover. (L.F. 46). The endorsement defines an insured person to include "you or a relative." (L.F. 46). This definition goes on to list four subsections, each of which identify a "person," none of whom is meant to be an insured person under the policies or UIM endorsement. (L.F. 46). Additionally, the UIM endorsement sets forth three exclusions which state underinsured motorist coverage does not apply for bodily injury to a person. (L.F. 46). If the term "**person**" as used in the bodily injury exclusions did not encompass an "insured person" the exclusions would be meaningless since they would only exclude individuals who were not entitled to UIM coverage in the first instance. [12]

Reading the policies in context and as a whole it becomes apparent the word "**person**" as used both in the UIM endorsement and other provisions throughout the policies includes "**insured persons.**" As such, the term does not have multiple meanings

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[11] "We do not permit "a strained interpretation of the policy in order to create an ambiguity where none exists." ***Haggard Hauling & Rigging Co., Inc. v. Stonewall Insurance Company***, 852 SW2d 396, 401 (Mo. Ct. App. 1993).

[12] ***Close v. Ebertz***, 583 N.W.2d 794, 797 (N.D. 1998).

and is not ambiguous. ***Id.*** It necessarily follows the term "**person,**" as used within the non-owned vehicle exclusion of the UIM endorsement, unambiguously refers to Nathaniel Manner, the insured under the Ford F150 policy, the Ford Ranger policy, and the Suzuki policy. ***Id.*** As succinctly stated by Western District in ***Jensen***:

> Because the trial court, in trying to apply the principle of considering the particular language in light the whole policy, failed to note the **pattern** [emphasis in opinion] established in the exclusions in the liability section and carried through in the reminder of the policy, and failed to note that the phrase "any person" appears multiple other places and means exactly *any person* [emphasis in opinion] without limitation except when it expresses a limitation, the court ended up with a strained interpretation. We seek to avoid an interpretation that is strained or inconsistent.

Id. at 380. Such is true here as well and when American Family's and American Standard's policies are reviewed in total no ambiguity lies.

IV

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANT AMERICAN STANDARD BECAUSE THE OWNED VEHICLE EXCLUSION CONTAINED IN THE UIM ENDORSEMENT OF THE SUZUKI MOTORCYCLE POLICY APPLIED SO AS TO PRECLUDE PLAINTIFF MANNER FROM RECOVERING UNDERINSURED MOTORIST BENEFITS

UNDER THAT POLICY IN THAT PLAINTIFF MANNER WAS A RESIDENT IN THE HOUSEHOLD OF JAMES MANNER WHO OWNED THE SUZUKI MOTORCYCLE INSURED UNDER THE AMERICAN STANDARD MOTORCYCLE POLICY.

RESPONSE TO PLAINTIFF'S POINT V

Plaintiff Manner may not recover under the UIM endorsement in the Suzuki policy. The owned vehicle exclusion in the endorsement is triggered since Nathaniel Manner was a "**resident**" of his father's household within the meaning of the exclusion.[13]

[13] In its Opinion, the Eastern District found whether Plaintiff Manner was a resident of his father's household was a disputed question of material fact, which depended on credibility determinations, and thus, there existed a factual dispute which precluded summary judgment on that issue. The Eastern District reversed and remanded the summary judgment entered on the Suzuki policy. (Opinion, 14-15). Since the instant court granted transfer, the Court of Appeals' Opinion was vacated and set aside and has no precedential effect. ***Benton House***, 249 S.W.3d at 883.

This issue has arisen because after Plaintiff's counsel and in-house staff counsel for American Family and American Standard had agreed to present this UIM coverage matter on stipulated facts to the Court and with American Family and American Standard entering into the process with the understanding that Nathaniel Manner was living with his father as represented in his interrogatory answers previously filed in this case, it came to light that Nathaniel Manner was taking the position that he was not a relative resident

American Standard issued a Motorcycle Policy to James Manner, as policy-holder/named insured, covering a 1999 Suzuki motorcycle. (L.F. 77). As stated on the Declarations Page of the Motorcycle Policy, James Manner's address was 18xx Westmoor Drive, Foristell, Missouri. (L.F. 77). This is the same address as that of Plaintiff Nathaniel Manner, as set forth on the Declarations Page of the Yamaha policy, Ford F150 policy, and Ford Ranger policy. (L.F. 37, 50, 64).

The owned vehicle exclusion in the Suzuki policy precludes Plaintiff Manner from recovering underinsured motorist benefits thereunder. When he was injured, Nathaniel Manner was operating a vehicle (1983 Yamaha motorcycle) which was not insured under the Suzuki policy issued to James Manner and Plaintiff Manner, the owner of the Yamaha motorcycle, was a resident of James Manner's household. (L.F. 46). In other words, the owned vehicle exclusion provides no UIM coverage is afforded to Plaintiff Manner for bodily injury to him while he is occupying a motor vehicle, which is not

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of his father's household. Accordingly, as conceded by the undersigned in oral argument before the Court of Appeals, remand to the trial court may be proper for purposes of making the factual determination as to the residency of Nathaniel Manner. Evidence does exist by way of Nathaniel Manner's affidavit that he takes the position that he is not a resident of his father's household while an abundance of written evidence and testimony under oath, by way of interrogatory answers, exist that Nathaniel Manner was living with his father at the Westmoor address.

insured under the Suzuki policy, but which is owned by a resident of James Manner's household.

At the time he was injured on September 25, 2004, Nathaniel Manner was a "**resident**" of James Manner's household in that he lived with his father at 18xx Westmoor Drive in Foristell, Missouri. In arguing he was not a resident of his father's household as of September 25, 2004 Plaintiff Manner relies on his Affidavit.[14] As a review of Plaintiff's Affidavit shows, it states legal conclusions, not facts. (L.F. 299-302).

The authorities cited by Plaintiff Manner in his Substitute Brief demonstrate he was a "**resident**" of his father's household. As ***American Family Mutual Insurance Company v. Brown***, 657 S.W.2d 273, 275 (Mo. Ct. App.1983) observed, Missouri courts have developed twin tests in determining an insured's residence or whether an individual is a resident of the same household within the meaning of a policy provision. One criterion looks at the length of time the parties intended to remain together – whether the arrangement was permanent or temporary. The other criterion focuses on the functional character of the arrangement – whether the parties functioned as a family unit under one management. ***American Family***, 657 S.W.2d at 275. That Plaintiff had a joint bank account with his girlfriend and his own cellular phone number are not material facts, given these criteria, and are not determinative of whether Plaintiff Nathaniel Manner was a "**resident**" of his father's household at the time of the accident. ***Id.***

[14] Nathaniel Manner's Affidavit is set forth at L.F. 299-302.

In the Affidavit, Plaintiff Manner indicates he bought a house with his fiancée, Stacy, in 2006, and moved in with her that year. (L.F. 302). That Plaintiff Manner bought a house with his fiancée and moved into that house in 2006 is irrelevant to the issue of coverage for an accident in 2004. What Plaintiff Manner did and his living arrangements subsequent to the accident are irrelevant to a determination of whether he was a "**resident**" of his father's household on September 25, 2004. Plaintiff Manner's Affidavit contains numerous legal conclusions as well as representations that are immaterial and irrelevant to the issue of whether he was a "**resident**" of his father's household at the time of the accident. ***Id.***

Apart from his self-serving Affidavit, Plaintiff Manner provided no evidence showing he was a "**resident**" anywhere other than 18xx Westmoor Drive where he was living with his father. Specifically, Plaintiff Manner provided no evidence to rebut facts proffered by Defendants which demonstrated Nathaniel Manner was residing at 18xx Westmoor Drive at the time he was injured.

That evidence included the following:

The Wentzville Police Department report regarding the September 25, 2004 accident which listed Plaintiff Manner's address as Westmoor Drive, Foristell, Missouri (L.F. 394-402);

A bill from St. Charles County Ambulance District to Nathaniel Manner listing his address as Westmoor Drive in Foristell, Missouri (L.F. 403);

Medical bills from Western Anesthesiologist Associates, Arch Air Medical Service, and Healthlink, all of which listed Plaintiff Manner's address as Westmoor Drive in Foristell, Missouri. (L.F. 404-406);

Plaintiff Manner's answers to Defendant Schiermeier's Interrogatories, Plaintiff Manner's answers to Defendant Helmut City's First Interrogatories, Plaintiff Manner's answers to Defendant Con-Tech Building Component's First Interrogatories, and Plaintiff Manner's answers to Defendant Jafrum International's Interrogatories all which listed his address as Westmoor Drive in Foristell, Missouri. (L.F. 407-08, 425-426, 438-439, 452);

Plaintiff Manner's tax returns for the years 2000, 2002, 2003, 2004 and 2005 all stated his address to be Westmoor Drive, Foristell, Missouri. (L.F. 470, 472-474, 476, 479, 481, 482-483);

Medical bills from St. John's Mercy Medical Center, SSM Healthcare, and Family Medical Group all listed Plaintiff Manner's address as Westmoor Drive in Foristell, Missouri. (L.F. 484-501);

Plaintiff Manner admitted in his deposition he used 18xx Westmoor Drive as his address for his W-2 forms, driver's license, bank accounts, and as his mailing address. (L.F. 560, 562, 567, 568, 570-571).

Contrary to Plaintiff Manner's contention, the facts relied on by American Family and American Standard, as contained in numerous medical bills, Missouri Department of Revenue records, sworn answers to interrogatories, tax returns, and Plaintiff Manner's deposition show the arrangement whereunder Plaintiff Manner lived in his father's house was permanent in nature, and extended over a period of several years, both before and

after the accident in which Plaintiff Manner was injured. ***American Family***, 657 S.W.2d at 275.

Significantly, Plaintiff Manner claimed the 18xx Westmoor address as his residence for legal purposes. That is the address given in the Yamaha, Ford Ranger, and Ford F150 policies, as well as Nathaniel Manner's W-2 forms, driver's license, Missouri Department of Revenue records, and tax returns. Having used this address for multiple years as his legal or official residence Plaintiff Manner cannot disavow his residency in his father's household solely to defeat the owned vehicle exclusion in the Suzuki policy. ***Id.***

V

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE UIM ENDORSEMENT CONTAINED IN THE POLICIES ISSUED BY AMERICAN FAMILY AND AMERICAN STANDARD WAS NOT AMBIGUOUS AND DID NOT PERMIT STACKING OF THE UNDERINSURED MOTORIST COVERAGE IN THE MULTIPLE POLICIES ISSUED BY DEFENDANTS IN THAT PLAINTIFF MANNER WAS NOT OCCUPYING A NON-OWNED VEHICLE AT THE TIME OF HIS ACCIDENT.

RESPONSE TO PLAINTIFF'S POINTS VI-X

Contrary to Plaintiff Manner's contention, the "**Other Insurance**" provision in the UIM endorsement is not ambiguous and does not require construction of that provision in

his favor. (Plaintiff's Substitute Brief, 47-48). The "**Other Insurance**" provision states as follows:

> If there is other similar insurance on the 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.

(L.F. 47).

Five of the six cases referenced by Plaintiff are not applicable to our factual situation with Nathaniel Manner as those five cases address the ***second sentence*** of the "Other Insurance" clause which only deals with when ***the named insured was not occupying an owned vehicle***. Accordingly, Plaintiff's reliance on ***Chamness v. American Family Mutual Insurance Company***, 226 S.W.3d 199 (Mo. Ct. App. 2007); ***Niswonger v. Farm Bureau Town & Country Insurance Company of Missouri***, 992 S.W.2d 308 (Mo. Ct. App. 1999); ***Seeck v. GEICO General Insurance Company***, 212 S.W.3d 129 (Mo. banc 2007); and ***American Family Mutual Insurance Company v. Ragsdale***, 213 S.W. 3d 51 (Mo. Ct. App. 2006) and ***Ritchie v. Allied Property & Casualty Insurance Company***, 307 S.W.3d 132 (Mo. banc 2009) are all misplaced. Each

of those cases deals with Plaintiff operating a ***non-owned*** car. Such a distinction is crucial to the analysis herein. [15]

The "Other Insurance" clause upon which Plaintiff puts great emphasis and specifically the second sentence of that paragraph reads:

> But, any insurance provided under this endorsement for an **insured person** while ***occupying*** *a vehicle* ***you*** *do not own* is excess over any similar insurance.

(*Italicized language*, for emphasis, added by the undersigned; **bold print** in original policy language).

In the above cases, the Courts have held that the "Other Insurance" ambiguity arises ***solely when dealing with a factual situation where the named insured is occupying a vehicle the insured does not own***. In ***Niswonger***, Mr. Niswonger was a police officer who was providing a police motorcycle escort ***while operating his police motorcycle*** (non-owned vehicle). In ***Seeck***, Ms. Seeck sought UIM benefits while ***a passenger in a non-owned automobile***. In ***Ragsdale***, Mr. Ragsdale was injured while ***driving a vehicle owned by his employer*** (a non-owned vehicle). In ***Chamness***, Mrs.

[15] Even the sixth case cited by Plaintiff, ***Clark v. American Family Mutual Insurance Company***, 92 S.W.3d 198 (Mo. Ct. App. 2002), is of no assistance to Plaintiff's position as addressed previously in this brief as ***Clark*** is authority for a complete set-off of the UIM limits by the tortfeasor's liability limits. *See* Topic II *infra*. ***Rodriguez*** then mandates that not an UIM situation.

Chamness, separated and not residing with her husband, ***was driving a vehicle owned by her estranged husband*** (which the Court found to be non-owned by her). Lastly, in ***Ritchie***, Mr. and Mrs. Ritchie were seeking damages for the death of their daughter when she was killed in an accident while riding in a non-owned vehicle—owned and operated by one Noah Heath. In each of these cases the Courts held that the "Other Insurance" clause created an ambiguity which was resolved in favor of the insured. This ambiguity, however, was created because of the ***second sentence*** of the "Other Insurance" clause which provided that any insurance provided by the UIM coverage ***while occupying a non-owned vehicle*** is excess over any other similar insurance.

That second sentence has no application here. Here, the facts are different than each of the cases cited above as Nathaniel Manner was operating his 1983 Yamaha ATV at the time of his accident which was ***owned by him***. Accordingly, the ambiguity found by the Courts in the above cases is not present. Plaintiff's reliance on those cases for authority is hence misplaced. (Plaintiff's Substitute Brief, 47-48). His arguments rely on ***Clark***, 92 S.W.3d at 203; and ***Niswonger v. Farm Bureau Town & Country Insurance Company of Missouri***, 992 S.W.2d 308 (Mo. Ct. App.1999). (Plaintiff's Substitute Brief, 48). Plaintiff's reliance on these decisions is misplaced. [16]

[16] As stated earlier, if this Court holds that Nathaniel Manner must have title to be found to be the "owner" of his motorcycle and rejects American Family's and American Standard's arguments presented in Topic III then American Family/American Standard concede, as they did at both the arguments before the trial court and the Court of Appeals,

Niswonger addressed the second sentence in the other insurance provision which only applied when the named insured was not occupying an owned vehicle. (L.F. 47). Such is not the factual situation before the Court. At the time of the September 25, 2004 accident, Plaintiff Manner was operating, and thus occupying, the 1983 Yamaha motorcycle, which he owned. This factual distinction is crucial to the Court's coverage analysis and application of the "**Other Insurance**" provision. Given this distinction, ***Niswonger***, 992 S.W.2d at 308, lends no support to Plaintiff's arguments.

At issue in ***Niswonger*** was another insurance clause in a UIM endorsement. That clause stated in the event there was other like or similar insurance applicable to a loss covered by the endorsement, the 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." ***Niswonger***, 992 S.W.2d at 315. The terms of the other insurance provision at issue in ***Niswonger*** are substantially identical to the "**Other Insurance**" provision contained in the American Family and American Standard policies. ***Id.***

In ***Niswonger***, the insured argued the second sentence of the "**Other Insurance**" provision created an ambiguity. At the time of the accident, Mr. Niswonger, who was a police officer, was operating his police motorcycle, which was a non-owned vehicle, to

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that Mr. Manner is entitled to his UIM limits on his Suzuki policy over the $850,000 he has already collected. ***Chamness***, 226 S.W.3d at 199.

escort a group of runners engaged in a race on city streets. ***Niswonger***, 992 S.W.2d at 310. Drawing from the second sentence in the other insurance provision, Niswonger asserted that a reasonable lay person could interpret the sentence to specifically allow stacking of UIM coverages provided in separate vehicle policies, for which separate UIM premiums had been paid, in the special situation where an accident occurred while the insured was occupying a non-owned vehicle. He contended a reasonable lay person could look at the second sentence and think the policy's anti-stacking provisions, which might normally and otherwise apply, did not apply in the situation where the insured was injured while occupying a non-owned vehicle. This sentence created an ambiguity in the policy, Niswonger argued, because it conflicted with other anti-stacking language in the policy. ***Niswonger***, 992 S.W.2d at 315.

The court agreed. ***Id.*** It reasoned that while the anti-stacking provisions in the UIM endorsement might perhaps be deemed unambiguous in nearly any other factual situation, this did not mean they were unambiguous in the particular factual situation before the court – where the accident occurred while the insured was occupying a non-owned vehicle. ***Id.*** That the second sentence in the other insurance provision began with the word "however" suggested, and could be interpreted by a lay person to mean, it prevailed and took precedence over the policy's prior anti-stacking language, whenever the accident was one where the insured was occupying a non-owned vehicle. Thus, to the extent the second sentence in the other insurance provision seemed to conflict with the policy's prior anti-stacking language, it created an ambiguity. ***Niswonger***, 992 S.W.2d at 316. Finding the other insurance provision to be ambiguous, the court held the insureds

were entitled to stack the UIM coverage under their three separate vehicle policies. ***Niswonger***, 992 S.W.2d at 319.

Chamness, 226 S.W.3d at 207-208 (Mo. Ct. App.2007) found an other insurance provision substantially identical to that contained in the UIM endorsement herein was ambiguous where Mrs. Chamness was injured while driving a vehicle owned by her estranged husband, with whom she was separated and not residing at the time of the accident, and which the court found to be a non-owned vehicle within the meaning of the second sentence of the other insurance provision. ***Chamness***, 226 S.W.3d at 203-204.

In finding the second sentence of the other insurance provision to be ambiguous, the court relied on ***Niswonger***, which it found to hold that an ambiguity only arose in the special factual situation where the accident occurred while the insured was occupying a non-owned vehicle. ***Chamness***, 226 S.W.3d at 203. Because the second sentence of the other insurance clause appeared to provide coverage over and above any other applicable coverage, but the anti-stacking and setoff language indicated such coverage was not provided, the policy language was ambiguous. Thus, Mrs. Chamness was allowed to stack the $100,000 of underinsured motorist coverage provided by each policy. ***Chamness***, 226 S.W.3d at 207-208.

The "special situation" which existed in ***Niswonger*** and ***Chamness*** and to which application of the second sentence of the other insurance provision rendered policy language ambiguous – where the named insured is injured while occupying or driving a vehicle they do not own – is not present herein. Unlike the insureds in ***Chamness*** and ***Niswonger***, Plaintiff Manner was operating a motorcycle owned by him at the time of the

September 25, 2004 accident. These facts distinguish the instant case from the facts in ***Niswonger*** and ***Chamness***. Since the motorcycle Plaintiff Manner was operating when he was injured was owned by him the second sentence in the "**Other Insurance**" provision has no application, and therefore, the ambiguity arising from the second sentence found in ***Niswonger*** and ***Chamness*** is not present. *Compare* ***Chamness***, 226 S.W.3d at 207-208; ***Niswonger***, 992 S.W.2d at 316-317.

While Plaintiff Manner relies on ***Clark***, 92 S.W.3d at 203, ***Clark*** does not support his ambiguity argument. At the time he was injured, Mr. Clark was not occupying a non-owned vehicle. Rather, he was outside of the non-owned police car, standing on the shoulder of the road, when he was hit by another car. ***Clark***, 92 S.W.3d at 202. Since Mr. Clark was not in, on, getting into or out of or in physical contact with the patrol car, he was not within the class of persons for whom ***Niswonger*** recognized an ambiguity was created by the second sentence in the other insurance provision. ***Clark***, 92 S.W.3d at 202-203. Because Mr. Clark was not occupying a non-owned vehicle when he was injured, the second sentence of the other insurance provision did not apply, and therefore, could not be used to create an ambiguity and thereby allow stacking. ***Clark***, 92 S.W.3d at 203.

Since Plaintiff Manner was operating his own Yamaha motorcycle at the time he was injured, the question of whether the second sentence in the "**Other Insurance**" provision renders that provision ambiguous will be governed by ***Kyte v. American Family Mutual Insurance Company***, 92 S.W.3d 295, 300 (Mo. Ct. App. 2002) and ***O'Driscoll v. Mutapcic***, 210 S.W.3d 368, 372-373 (Mo. Ct. App. 2006). In ***Kyte***, the

insured was operating his own vehicle at the time of the accident. Kyte was injured in an auto accident for which Mirabile admitted fault. Mirabile entered into a settlement with Kyte and stipulated to damages of $250,000. Mirabile's liability insurer agreed to pay Kyte its policy limit of $100,000. ***Kyte***, 92 S.W.3d at 297.

Kyte was insured by American Family at the time of the accident. His policy included an UIM endorsement providing coverage up to $250,000. Based on Mirabile's stipulation to $250,000 in damages, Kyte demanded payment of the full UIM policy limit from American Family. American Family paid Kyte $150,000, claiming the UIM endorsement allowed a setoff for the $100,000 Kyte received from Mirabile's insurer. Kyte amended his settlement with Mirabile increasing the stipulated damages to $350,000. He again demanded American Family pay the UIM policy limit. American Family refused, stating it was not obligated to pay any more than the $150,000 it had already paid. ***Id.***

Kyte sued American Family. The parties filed cross motions for summary judgment on the sole issue of whether American Family was entitled to a setoff of $100,000 against the $200,000 UIM policy limit. Granting Kyte's motion for summary judgment, the trial court ordered American Family to pay Kyte $100,000. ***Id.***

The UIM coverage endorsement at issue was the same as here. ***Id.*** Based on this policy language, American Family argued Kyte's UIM claim was subject to the $250,000 policy limit and any payment under the policy had to be reduced by the $100,000 insurance payment Kyte received from Mirabile, as the person legally responsible for Kyte's injuries. ***Kyte***, 92 S.W.3d at 298. Applying this $100,000 setoff, American

Family contended Kyte was only entitled to receive the $150,000 it previously paid to him. The insurer asserted the trial court erred because it did not properly apply the setoff provision and because underinsured motorist coverage could not be considered to be excess insurance. ***Id.***

Kyte contended an ambiguity arose in the application of the setoff provision as a result of the **"Other Insurance"** clause in the UIM endorsement. The **"Other Insurance"** clause was identical to that contained in the American Family and American Standard policies. ***Id.***

In interpreting the policy language, the court relied on ***Rodriguez***. As the court noted, the setoff provision in the American Family policy was virtually indistinguishable from the contract language found to be unambiguous in ***Rodriguez***. ***Kyte***, 92 S.W.3d at 299. The court rejected Kyte's argument that ***Rodriguez*** was not dispositive because other provisions in the policy conflicted with the clear language of the setoff provision. It found the other policy provisions would create no conflict or ambiguity. ***Id.***

The court rejected Kyte's argument that underinsured motorist coverage was excess insurance based on policy language stating the insurer would pay under the underinsured motorist coverage only after the limits of liability under any bodily injury liability policies had been exhausted by payment of judgment or settlements. ***Id.*** This provision did not state American Family was obligated to pay the full policy limits after the insured received payments from other insurance policies. In fact, subsequent provisions in the UIM endorsement required the limits of liability for underinsured

motorist coverage to be reduced or setoff by the amounts paid under those other policies. ***Id.***

Read together these provisions could be reasonably interpreted to mean that underinsured motorist coverage would be paid after the limits of other liability policies had been paid but the limits of the UIM coverage would be decreased by the total amount of payments from those policies. ***Id.*** These two provisions were not inconsistent when read in the context of the endorsement as a whole. The court rejected Kyte's excess insurance argument because it rendered the setoff provision meaningless. ***Id.***

The Court also held the second sentence of the **"Other Insurance"** provision, the same as here, to be inapplicable because there was no evidence Kyte was in a vehicle he did not own at the time of the accident. Rather, the record reflected Kyte was driving his own vehicle, insured by American Family, when he sustained injuries in the accident with Mirabile. Thus, there was no ambiguity in the setoff provision or any conflict with other provisions of the UIM endorsement. ***Id.*** The trial court failed to properly apply the plain language of the setoff provision and reduce American Family's obligation to pay the $250,000 UIM policy limits by the $100,000 payment Kyte received from Mirabile's insurer. ***Id.***

In ***Kyte***, the Western District found the other insurance provision did not create an ambiguity which had to be resolved in the insured's favor. The **"Other Insurance"** was inapplicable because Kyte was operating a vehicle he owned at the time of the accident causing his injuries. The Western District rejected the same arguments Plaintiff Manner

raises in his Substitute Brief finding the provisions of the UIM endorsement to be unambiguous. ***Kyte***, 92 S.W.3d at 299-300.

O'Driscoll, 210 S.W.3d at 371-372 ruled that where an insured was operating one of his own vehicles when he was injured an owned vehicle provision precluded him from stacking underinsured motorist coverage. ***Id.*** O'Driscoll was injured when his motorcycle was struck by a motor vehicle driven by Mutapcic. He sought to recover underinsured motorist coverage from six policies issued to him by State Farm. ***O'Driscoll***, 210 S.W.3d at 369.

All the policies in effect at the time of the accident included underinsured motor vehicle coverage with limits of $100,000 per person and $300,000 per occurrence. All the policies contained identical provisions regarding underinsured motorist coverage. ***Id.*** State Farm argued its policies precluded O'Driscoll from recovering benefits under another policy when he was injured while occupying or operating a vehicle he owned that was insured under a separate policy even where the other policies were all issued by State Farm. ***O'Driscoll***, 210 S.W.3d at 369. The tortfeasor's coverage limits were $100,000. Those limits had been paid to O'Driscoll. The difference between the amount of O'Driscoll's damages and the amount paid by the tortfeasor's insurer equaled or exceeded $600,000. The trial court found O'Driscoll could only recover $100,000 under one State Farm policy. ***O'Driscoll***, 210 S.W.3d at 370.

O'Driscoll appealed. He asserted the State Farm policies did not unambiguously prohibit stacking of coverage and that the policies were ambiguous regarding stacking. ***Id.*** The policies provided there was no underinsured motorist coverage for bodily injury

to an insured while "occupying a motor vehicle owned or leased by you, your spouse, or any relative if it is not insured for this coverage under this policy." ***O'Driscoll***, 210 S.W.3d at 370. Each of the six policies stated the limits of liability for underinsured motor coverage was $100,000 per person. ***Id.***

State Farm asserted the owned vehicle exclusion in each of the policies was a valid anti-stacking provision which clearly and unambiguously precluded O'Driscoll from recovering under multiple policies. ***O'Driscoll***, 210 S.W.3d at 371. It argued that, due to this anti-stacking language, only the policy listing on its declarations page the motorcycle which the insured was driving when he was injured would provide underinsured motorist coverage. ***O'Driscoll***, 210 S.W.3d at 372.

Additionally, State Farm contended the other policies held by O'Driscoll would not provide underinsured motorist coverage for the insured's injuries because he was injured while driving a vehicle he owned but did not have listed as an insured vehicle under those policies. State Farm maintained O'Driscoll was only entitled to the $100,000 he had already received which was the limit of underinsured motorist coverage available under the policy listing the motorcycle. ***Id.*** The court held the owned vehicle exclusion applied and precluded O'Driscoll from recovering underinsured motorist benefits under the five policies which did not list on their declaration page the motorcycle O'Driscoll was riding when he was injured. ***O'Driscoll***, 210 S.W.3d at 373.

Since Plaintiff Manner was operating a vehicle owned by him – the Yamaha motorcycle – when he was injured, the second sentence of the "**Other Insurance**" provision does not apply and cannot be used to generate an ambiguity, requiring the

Court to construe the terms of the UIM endorsement in his favor, and in favor of coverage. ***O'Driscoll***, 210 S.W.3d at 372; ***Kyte***, 92 S.W.3d at 299-300. Plaintiff Manner's arguments to the contrary must be rejected. ***Id.***

Plaintiff Manner's coverage arguments rest on inconsistent theories. As to the American Standard Motorcycle Policy covering the 1983 Yamaha motorcycle Plaintiff Manner was operating at the time of the accident, Plaintiff Manner asserts the Yamaha motorcycle was his in that he purchased a Motorcycle Policy from American Standard. Plaintiff Manner's conduct reflects his understanding and belief that he was the owner of the Yamaha motorcycle; that he had an insurable interest in the motorcycle; that he was required to purchase insurance on any motor vehicle he owned, including the Yamaha motorcycle; and sought to satisfy this obligation by purchasing the American Standard Motorcycle Policy which covered the Yamaha motorcycle Plaintiff Manner was operating when he was injured. In his deposition, Plaintiff Manner admitted he purchased the motorcycle and paid his uncle for the same; that he took possession of the motorcycle; that he was in the process of getting the certificate of title for the motorcycle transferred from his uncle to himself; and treated the motorcycle as his own. (L.F. 573-574). Thus, in seeking to secure underinsured motorist benefits under the Motorcycle Policy issued by American Standard, covering the Yamaha motorcycle, Plaintiff Manner tacitly admits he owned the motorcycle he was operating when he was injured.

Plaintiff Manner, however, takes an inconsistent stance in seeking to recover under the Ford F150 and Ford Ranger policies issued by American Family and the Suzuki policy issued by American Standard to Plaintiff's father, James Manner. As to those

policies, Plaintiff Manner contends the 1983 Yamaha motorcycle he was operating at the time of the September 25, 2004 accident was not owned by him, in that the term "**owned**" had to be interpreted as having certificate of title to the vehicle, and in that Plaintiff Manner had not perfected title to the motorcycle when the accident occurred. Utilizing this technical definition of "**owned**" Plaintiff posits he did not own the Yamaha motorcycle, despite the fact he paid money for the motorcycle, took possession of the motorcycle, purchased a policy of insurance covering the motorcycle, had dominion and control over the motorcycle and treated the motorcycle as if it were his own.

In that Plaintiff Manner's coverage arguments regarding his ownership of the Yamaha motorcycle for purposes of the American Standard Motorcycle Policy covering the Yamaha motorcycle are at odds and inconsistent with his arguments regarding the American Family policies covering the Ford Ranger and Ford F150, as well as the American Standard Motorcycle Policy covering the Suzuki motorcycle, those arguments must be rejected. Either Plaintiff Manner owns the motorcycle he was operating at the time of the accident or he does not own that motorcycle. He may not have it both ways in order to stack the underinsured motorist coverage in all four policies.

VI

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE UNDERINSURED MOTORIST COVERAGE CONTAINED IN THE POLICIES AT ISSUE MAY NOT BE STACKED IN THAT THE LIMITS OF LIABILITY PROVISION IN THE UIM ENDORSEMENT TO

THOSE POLICIES AND THE TWO OR MORE CARS/MOTORCYCLES INSURED CLAUSE CONTAINED IN THE GENERAL PROVISIONS OF THE POLICIES LIMIT RECOVERY TO THE HIGHEST LIMIT OF LIABILITY UNDER ANY ONE POLICY.

RESPONSE TO PLAINTIFF'S POINTS VI-X

The anti-stacking provisions contained in the American Family and American Standard policies are valid and enforceable and apply to the UIM endorsement to preclude Plaintiff Manner from recovering underinsured motorist benefits in excess of $100,000, the UIM limit under any one policy. Accordingly, the trial court did not err in granting summary judgment in favor of Defendants American Family and American Standard. The UIM endorsement provided the following as to "**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 a 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." (L.F. 46, 60, 73, 86).

The Declarations page of each of the policies at issue stated as to "**Coverages And Limits Provided**": "Underinsured Motorists Coverage – Bodily Injury Only: $100,000 Each Person $300,000 Each Accident." (L.F. 37, 50, 64, 77). The "**General Provisions**"

contained in the Yamaha and Suzuki Motorcycle Policies issued by American Standard provided as follows:

> "**Two Or More Motorcycles Insured**. The total limits of **our** liability under all policies issued to **you** by **us** shall not exceed the highest limit of liability under any one policy.
>
> When this policy insures two or more **motorcycles**, the coverages apply separately to each **motorcycle**." (L.F. 43, 84).

Similarly, the "**General Provisions**" of the Family Car Policy covering the Ford Ranger and Ford F150 issued by American Family stated:

> "**Two Or More Cars Insured**. 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.
>
> When this policy insures two or more **cars**, the coverages apply separately to each **car**." (L.F. 57, 70).

The issue arising from these policy provisions is whether the underinsured motorist coverage, if any, available under the American Family and American Standard policies may be stacked. Stacking refers to an injured insured's ability to recover multiple insurance coverage benefits, either from more than one policy, as where the insured has two or more separate vehicles insured under separate policies, or from multiple coverages provided for within a single policy, as when an insured has one policy that covers multiple vehicles. ***O'Driscoll***, 210 S.W.3d at 371. The ability of underinsured motorists coverage to be stacked is determined by the terms of the

insurance policy. ***Id.***; ***Rodriguez***, 808 S.W.2d at 383. If policy language is unambiguous in disallowing stacking, the anti-stacking provision will be enforced. ***O'Driscoll***, 210 S.W.3d at 371 (if policy language unambiguously disallows stacking, courts will not create such extra coverage).

The provisions in the American Family and American Standard policies undertaking to limit the insurer's liability by precluding stacking are valid and enforceable. See, ***Murray v. American Family Mutual Insurance***, 429 F.3d 757, 766-767 (8th Cir. 2005) (applying Missouri law). The car in which the Murrays were riding collided with a car driven by Hohnbaum. Mr. Murray suffered serious injuries and Mrs. Murray suffered damages as a result of her husband's injuries. ***Murray***, 429 F.3d at 759. At the time of the accident, the Murrays were insured by American Family under six auto policies, one for each vehicle, including the vehicle involved in the collision. Four of the six policies included underinsured motorists coverage of $100,000 per person and $300,000 per accident. ***Id.***

The vehicle Hohnbaum was driving at the time of the accident was a rental car owned by National Car Rental. Hohnbaum was insured by Allstate with an automobile insurance policy issued in Florida. The Florida policy included $10,000 liability coverage that insured Hohnbaum regardless of whether she owned the vehicle she was driving. ***Murray***, 429 F.3d at 760.

The Murrays filed suit against Hohnbaum. After a bench trial, the court found Hohnbaum 100% liable and awarded damages of $1,606,000 to Mr. Murray and $160,690 to Mrs. Murray. Following the judgment, Allstate paid the Murrays $10,000.

Id. National Car Rental was self-insured at the time of the accident. The Murrays made a claim for $15,000 against National Car Rental. A claims adjuster authorized National Car Rental to pay the $15,000 demanded due to the fact that this amount, when added to the $10,000 to be paid by Allstate would satisfy the $25,000 minimum liability coverage limit required by the state of Missouri. ***Id.*** The Murrays never accepted the offer from National Car Rental to pay this amount. ***Murray***, 429 F.3d at 761.

Subsequently, the Murrays filed suit against American Family, seeking payment of underinsured motorists benefits. ***Id.*** The policy defined an underinsured motor vehicle as a motor vehicle which was insured by a liability bond or policy at the time of the accident which provided bodily injury liability limits less than the limits of liability of the underinsured motorists coverage. ***Murray***, 429 F.3d at 761. The court found the Murrays were entitled to coverage under their four policies containing underinsured motorist provisions. It then considered whether the Murrays were entitled to stack the $100,000 of coverage provided by each policy. ***Murray***, 429 F.3d at 765.

The limits of liability portion and **"Other Insurance"** clause at issue were the same as here. ***Murray***, 429 F.3d at 765. The court found these provisions in the UIM endorsement had to be construed together with a clause contained in the policy's General Provisions as to **"Two or More Cars Insured."** That clause 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." ***Murray***, 429 F.3d at 766. [17] The Eighth Circuit found the clause as to **"Two or More Cars Insured"** contained in the policies' General Provisions clarified American Family's total liability. ***Murray***, 429 F.3d at 765. Relying on the Illinois Court of Appeals decision in ***American Family Mutual Insurance Company v. Martin***, 312 Ill. App. 3d 829, 245 Ill. Dec. 384, 728 N.E.2d 115 (2000), the Eighth Circuit concluded that even if the **"Other Insurance"** provision could be deemed ambiguous on its own its meaning was clear when considered in combination with the sections entitled Limits Of Liability and the General Provisions describing the impact of having two or more cars covered by American Family policies. It held the limitation on liability was enforceable and the Murrays could not stack the underinsured motorists coverage contained in the multiple American Family policies. ***Murray***, 429 F.3d at 766.[18]

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[17] The three provisions construed by the Eighth Circuit in ***Murray*** are identical to the provisions contained in the American Family and American Standard policies before the Court.

[18] In ***Murray***, the Eighth Circuit distinguished ***Clark***. It found the Murrays' policy contained an additional provision clarifying American Family's total liability which was not before the court in ***Clark***. ***Murray***, 429 F.3d at 765 *fn*.3. Since ***Clark*** failed to address an anti-stacking clause of the nature of that contained in the **General Provisions** of the American Family and American Standard policies it is not dispositive on the stacking issue.

Martin, on which the Eighth Circuit relied, addressed a two or more cars provision identical to that before the Eighth Circuit in ***Murray*** and to that contained in the **General Provisions** of the policies at issue herein. Timothy Martin was killed by a car driven by Theisman. Debbie Martin, his mother, was appointed special administrator of her son's estate. ***Martin***, 728 N.E.2d at 116. She settled with Theisman's insurer for $25,000, the limit of liability under Theisman's policy. ***Id.***

American Family issued two insurance policies to Timothy Martin, one covering a Dodge Spirit and another covering a Chrysler LeBaron. Each policy provided $100,000 per person of underinsured motorist coverage. ***Id.*** Both policies contained the two or more cars insured provision construed by the court in ***Murray***. ***Martin***, 728 N.E.2d at 117. The policies also provided that the limit of liability for each person is the maximum for all damages sustained by all persons as a result of bodily injury to one person in any one accident. American Family would not pay more than these maximums no matter how many vehicles were described in the declarations, insured persons, claims, claimants or policies or vehicles were involved in the accident. ***Id.*** The American Family policies contained another insurance provision stating if there was 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." ***Martin***, 728 N.E.2d at 117.

After deducting the $25,000 Martin received from Theisman's insurer, American Family paid Debbie Martin $75,000 pursuant to the underinsured motorist provisions of the Spirit policy. ***Id.*** Martin demanded an additional $100,000 of underinsured motorist coverage under the LeBaron policy claiming she was entitled to stack the coverage limits

of the two policies. American Family denied the claim and filed a declaratory judgment action seeking a declaration that Martin could not stack the policies' coverage and that its payment of $75,000 satisfied its obligations under both policies. ***Martin***, 728 N.E.2d at 117.

The trial court granted summary judgment for Martin finding the two or more cars insured provision conflicted with the other insurance provision and thereby created an ambiguity. It held that $75,000 (allowing an additional setoff for the $25,000 received from Theisman's insurer) under the LeBaron policy was subject to arbitration. American Family appealed. ***Martin***, 728 N.E.2d at 117.

American Family argued its anti-stacking provision was clear and unambiguous and the trial court erred in failing to enforce it. The Court of Appeals agreed. ***Martin***, 728 N.E.2d at 118-119. It observed that ***Grzeszczak v. Illinois Farmers Insurance,*** 168 Ill. 2d 216, 659 N.E.2d 952 (1995) held an anti-stacking clause nearly identical to the American Family provision at issue was unambiguous and did not violate public policy, and thus, precluded an insured from stacking underinsured motorist coverage contained in multiple policies. ***Martin***, 728 N.E.2d at 118. Further, the court found the two or more cars insured provision clearly covered situations where two or more cars belonging to the same insured were covered by policies issued by American Family. That clause unambiguously provided that, in that situation, American Family's total liability would not exceed the highest liability limit under any one policy. ***Martin***, 728 N.E.2d at 118.

Read in this context, the **"Other Insurance"** provision referred only to a situation where a different policy issued by a different insurer applied. ***Id.*** If the **"Other**

Insurance" provision were intended to refer to other policies issued by American Family there would be no need to refer to a proportionate share. American Family's proportionate share of liability would always be 100%. Moreover, reading the other insurance provision in this fashion would render the anti-stacking provision meaningless. ***Id.*** In other words, the **"Other Insurance"** provision would always trump the anti-stacking provision rendering it nugatory. Each provision applied to a different situation and the anti-stacking provision was not ambiguous. ***Id.*** Thus, the anti-stacking provision applied and precluded Martin from recovering multiple limits of underinsured coverage. ***Id.***

As ***Martin*** and ***Murray*** demonstrate, the two or more cars (motorcycles) insured provision, when construed together with the provisions in the UIM endorsement as to "**Limits Of Liability"** and "**Other Insurance**", bar Plaintiff Manner from recovering under multiple American Family policies. ***Id.***; ***Murray***, 429 F.3d at 766. Accordingly, the most Plaintiff Manner is entitled to recover in underinsured motorist benefits, if any, is $100,000. ***Id.***

VII

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AMERICAN FAMILY AND AMERICAN STANDARD BECAUSE THE UIM ENDORSEMENT SETOFF LANGUAGE IS CLEAR AND UNAMBIGUOUS IN THAT THE SETOFF LANGUAGE ALLOWS FOR A SETOFF FROM THE LIMITS OF LIABILITY OF THE UIM COVERAGE RATHER THAN THE DAMAGES INCURRED BY THE INSURED.

RESPONSE TO PLAINTIFF'S POINT XI

Plaintiff argues that Mr. Schiermeier's $100,000 liability payment and the helmet manufacturer's $750,000 payment to Plaintiff should be off set from Plaintiff's ***total damages***. American Family and American Standard argue that these payments should be reduced from Plaintiff's ***limits of liability of underinsured motorist coverage***. American Family's and American Standard's UIM policies do state that the liability payments shall be deducted from Mr. Manner's limits of liability of UIM coverage, however, Plaintiff argues that such language should be ignored arguing it is ambiguous and thus American Family's and American Standard's policies should be re-written to deduct the liability payments from Plaintiff's total damages. Plaintiff argues this Court's holdings in ***Jones vs. Mid-Century Insurance Company,*** 287 S.W.3d 687 (Mo. banc 2009) and ***Ritchie vs. Allied Property & Casualty Insurance Company***, 307 S.W.3d 132 (Mo. banc 2009) are controlling**.** It is respectfully submitted that Plaintiff's argument is misplaced.

Simply put, ***Jones*** dealt with policy language that was completely different than the American Family UM policy at issue here. In ***Jones***, the Mid-Century UIM language at issue stated:

> **Limit of Liability**
>
> a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of UNDERinsured Motorist Coverage stated in the 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.

This Court in ***Jones*** held that Mid-Century's UIM policy limits language was ambiguous because ¶1 set forth above said that the most that Mid-Century will pay will be the difference between the insured person's ***damages*** and the amount paid by the tortfeasor. That language causes the ambiguity. Under Mid-Century's language the Plaintiff's argument here would be correct. One would look to Plaintiff's ***total damages*** and then deduct Mr. Schiermeier's and the helmet manufacturer's payments. That would be true under a Mid-Century policy but not an American Family or American Standard policy.

Under ***Ritchie***, the matter was further complicated due to the "Other Insurance" clause policy provisions which provided that Allied Insurance Company's UIM limits were to be treated as ***excess*** over any other collectible underinsured motorist coverage when the insured was riding in a vehicle that the insured did not own. Such was the case in ***Ritchie*** when the decedent was riding in a vehicle which neither she nor her parents (the named insureds) owned. Accordingly, the Allied UIM coverage was deemed excess over any other collectible insurance. Such is not the case here as Plaintiff Manner was operating his own motorcycle at the time of the accident. Accordingly, the "Other Insurance" clause ambiguity does not come into play.

Further, in ***Ritchie***, there was testimony from Allied's corporate representative that Allied's coverage "typically pays the difference between the amount recovered from the

other driver and the amount of the ***damages,*** up to the limits of the policy." ***Ritchie***, 307 S.W.3d 132, 141 (Mo. banc 2009) (emphasis added). As set forth at footnote 10 on page 141, the majority opinion, in response to this Court's dissenting opinion, noted ***that a UIM policy that plainly sets forth that it will only pay the difference between the amount recovered from the uninsured motorist and the UIM limits is a valid and enforceable provision***.

Such a valid and enforceable provision is before the Court by way of American Family's and American Standard's policies here. American Family's and American Standard's UIM policies clearly, distinctly, and unambiguously state:

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 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 . . .

The ***limits of liability*** [emphasis added] of this coverage will be reduced by:

1. All payments made or amounts payable by or on behalf of all persons or organizations which may be legally liable, or under any

collectible auto liability insurance, for loss caused by an accident with an **underinsured motor vehicle**.

American Family's and American Standard's UIM limits of liability language comply with the directive of the ***Ritchie*** Court. There is no promise to pay the "total damages" incurred by Plaintiff with a reduction from those "total damages" by the amounts received from the tortfeasor – Mr. Schiermeier. American Family's and American Standard's policies clearly and unambiguously state that its UIM limit of liability ($100,000) will be reduced by amounts paid by the tortfeasor, here Mr. Schiermeier, in the amount of $100,000 thus triggering the ***Rodriguez*** complete offset situation. American Family and American Standard make no representation that the deduction is made from the insured's total damages but unambiguously state the deduction to be solely from the UIM limits of liability as authorized by this Court in ***Ritchie***.

The basis of Plaintiff's argument here is that American Family's and American Standard's UIM policies are ambiguous because American Family and American Standard would never would pay out the full amount of the stated UIM limits of liability and thus their statements that it would do so are misleading. This statement is factually incorrect as it has failed to consider factual scenarios where UIM limits can and are paid thus defeating the ambiguity argument basis.

It is not correct that American Family and American Standard would ***never*** be called upon to pay their full $100,000 in UIM limits under all scenarios. First, ***typically*** an insured would receive at least minimal compensation from a tortfeasor since Missouri

requires, pursuant to the Financial Responsibility Laws, at least $25,000 in liability coverage. Accordingly, the tortfeasor would pay an injured plaintiff $25,000 which would then be offset from the UIM limits, here, $100,000, resulting in a balance due and owing of $75,000. Such a scenario, however, may not ***always*** take place. For instance, a tortfeasor possessing the statutorily minimum limits of $25,000/$50,000 may be involved in an accident with several vehicles resulting in multiple claimants being injured. Say, for example, four individuals are injured in that multi-vehicle accident. The tortfeasor's liability carrier may then disburse that $50,000 limit to less than all of the four potential claimants. Let's say, for purposes of discussion, that the $50,000 is distributed and exhausted, by trial or by settlement, to two of those four claimants. Two of those claimants are then left uncompensated without any money whatsoever from the tortfeasor. Those two uncompensated claimants (let's assume they are American Family or American Standard insureds) would then have UIM claims available to them against American Family for the full $100,000 UIM limits with no offset since they did not receive any compensation from the tortfeasor. Under such a scenario, the claimants would ***not*** have an ***uninsured*** motorist claim available to them since the tortfeasor ***was insured***. The tortfeasor did have insurance and the insurance limits were exhausted by making the payments to the other two claimants leaving two claimants uncompensated. Those uncompensated plaintiffs would then have an ***underinsured*** motorist claim ***with the full limits available***.

Second, pursuant to American Family's and American Standard's **"Other Insurance"** clause, American Family and American Standard are obligated to pay, as

excess coverage, its full limits of liability when their insured is occupying an non-owned vehicle. American Family's and American Standard's policies read:

> **OTHER INSURANCE**
>
> . . . But, any remaining limits of insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own is excess over all other underinsured motorist insurance provided by all other insurance companies.

Accordingly, should Mr. Manner have been occupying a vehicle he did not own his UIM coverage with American Family and American Standard would be excess over the UIM coverage on the vehicle he was occupying and the full limits of liability would have been paid. *See*, ***Chamness***, 226 S.W.3d at 199; ***Niswonger***, 882 S.W.2d at 308; ***Seeck***, 212 S.W.3d at 129; ***Ragsdale***, 213 S.W.3d at 51; and ***Ritchie***, 307 S.W.3d at 132. Each of those cases dealt with a non-owned motor vehicle being operated by the injured plaintiff none of which is applicable here. *See also*, ***Graham v. State Farm Mutual Automobile Insurance Company***, 2012 Mo. App. LEXIS 590, ED97421 at p. 10 (May 1, 2012). [19]

[19] . . . "(T)he language concerning other underinsured coverage does not inevitably mean that State Farm would ***never*** have to pay its policy limits on the underinsured coverage as would result from the construction the insurer urged in ***Jones***. Had the vehicle in which Graham was a passenger not had any underinsured motorist coverage, State Farm would owe Graham the limits of State Farm's coverage. ***Id***.

Third, other state laws may mandate that American Family's and American Standard's UIM coverage be deemed excess as a matter of public policy. Missouri has no such public policy requirement for UIM coverage. ***See, for e.g.,* Ariz. Rev. Stat. Ann. § 20-259.01**.[20]

Accordingly, the assertion that American Family's and American Standard's UIM limits of liability would ***never*** be paid is simply not true and therefore cannot be the basis for a finding that its language is illusory or ambiguous. These scenarios were not addressed by this Court in ***Jones v. Mid-Century Insurance Company***, 287 S.W.3d 687

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[20] ***Ariz. Rev. Stat. § 20-259.01***. Motor vehicle liability policy; uninsured optional; underinsured optional; subrogation; medical payments liens; definitions. . . . B. Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder . . . underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. . . . G. "Underinsured motorist coverage" includes coverage for a person if the sum of the limits of liability under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the ***total damages*** for bodily injury or death resulting from the accident. ***To the extent that the total damages exceed the total applicable liability limits, the underinsured motorist coverage provided in subsection B of this section is applicable to the difference***. [emphasis added]

(Mo. banc. 2009). Accordingly, the basis of ***Jones*** for the alleged ambiguity of the policy language based upon the UIM limits ***never*** being paid out is respectfully suggested to be misplaced.

Regardless, American Family's and American Standard's policy language is not subject to the same criticisms as the policy language in ***Jones*** and in ***Ritchie*** which such policy language allowed a deduction from the ***total damages*** rather than the limits of liability. Further, both the policies in ***Ritchie*** and ***Jones*** stated, in various text:

1. The insurers would pay Plaintiff's ***damages***;
2. The insurers Limit of Liability is "the most it would pay"; and
3. The insurers stated "we will pay up to our Limit of Liability."

No such statements are made within American Family's and American Standard's policies. American Family and American Standard simply state its Limit of Liability will be reduced by the tortfeasor's liability payment. No promise is made by American Family or American Standard that either will pay its Limit of Liability or Plaintiff's ***total damages***. Thus, the ambiguity issue of ***Jones*** and ***Ritchie*** is simply not present.

Plaintiff urges this Court to adopt the rule of law that all underinsured motorist cases must now, under the authority of ***Ritchie*** and ***Jones***, be deemed excess and paid over and above any liability payments from the tortfeasor. Such is not the law and such is not what American Family's and American Standard's policies unambiguously state. "A policy that plainly states it will only pay the difference between the amount recovered from the underinsured motorist and [the limits of liability] is enforceable." ***Ritchie***, 307 S.W.3d at 141, *fn. 10*. American Family's and American Standard's policies comply

with this directive. The UIM limits of liability language is clear that American Family's and American Standard's limits of liability is the starting point from which the deduction is made by any amounts made by the tortfeasor.

CONCLUSION

For all the foregoing reasons, Defendants/Respondents American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin respectfully pray this Honorable Court affirm the Trial Court's Order and Judgment granting Summary Judgment in favor of Defendants/Respondents American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin along with any such further Orders as this Honorable Court deems just and proper under the circumstances.

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CERTIFICATE OF COMPLIANCE

Robert J. Wulff, the undersigned attorney for Defendants/Respondents American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin hereby certifies pursuant to Missouri Supreme Court Rule 84.06(c) that this Brief:

1. Complies with Missouri Supreme Court Rule 55.03;

2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);

3. Contains 25,418 words according to the word count toll contained in Microsoft Word software with which it was prepared;

4. Contains 0 lines of mono-spaced type in the brief including Points Relied On, footnotes, signature blocks, and cover page;

5. This Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned, it is virus-free.

/s/ Robert J. Wulff

CERTIFICATE OF SERVICE

COMES NOW Robert J. Wulff, Attorney for Defendants/Respondents American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin, and certifies that the foregoing brief on behalf of Defendants/Respondents American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin was served upon Ms. Gretchen Garrison, Attorney for Plaintiff/Appellant, at ggarrison@grgpc.com this 8th day of June, 2012, by sending a PDF copy of same by email to Ms. Garrison and likewise by using the Court's electronic filing system as dictated by Missouri Supreme Court Rule 103, Court Operating Rule 27, and Local Court Rule No. 1. A courtesy copy of this brief, pursuant to Rule 103.04(c), is likewise being mailed to the Court and Ms. Garrison this day.

/s/ Robert J. Wulff