IN THE SUPREME COURT OF MISSOURI

No. SC 92408

NATHANIEL MANNER

Plaintiff-Appellant

v.

NICHOLAS SCHIERMEIER, AMERICAN FAMILY MUTUAL INSURANCE COMPANY and AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN

Defendants-Respondents

On Appeal from the Circuit Court of St. Charles County, Missouri

Case No. 0711-CV07158

Honorable Nancy L. Schneider

SUBSTITUTE BRIEF OF APPELLANT

GRAY, RITTER & GRAHAM, P.C.
Maurice B. Graham
Gretchen Garrison
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vii

JURISDICTIONAL STATEMENT 1

STATEMENT OF FACTS 2

POINTS RELIED ON 10

ARGUMENT 17

Standard of Review 17

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR 19

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE WORD "OWNED" IN THE OWNED-VEHICLE EXCLUSION MUST BE STRICTLY INTERPRETED TO MEAN TITLE 29

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING PLAINTIFF'S OWNERSHIP OF THE YAMAHA UNDER THE OWNED-VEHICLE EXCLUSION IN THAT EVIDENCE THAT PLAINTIFF DID NOT HOLD TITLE WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION 34

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION IN JAMES MANNER'S POLICY DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR 38

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING WHETHER PLAINTIFF WAS A RESIDENT OF JAMES MANNER'S HOUSEHOLD UNDER THE OWNED-

VEHICLE EXCLUSION IN THAT PLAINTIFF'S EVIDENCE THAT HE WAS NOT SUCH A RESIDENT WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION 40

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK HIS POLICIES NOTWITHSTANDING THE LIMITS OF LIABILITY PROVISION UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR 47

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK JAMES MANNER'S POLICY UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR 49

VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN PLAINTIFF'S POLICIES DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR 50

A. General Provision No. 3 In The Yamaha Policy Does Not Preclude Stacking 50

B. General Provision No. 3 Is Ambiguous And Does Not Preclude Stacking 51

IX. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN JAMES MANNER'S POLICY DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR 53

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT

PLAINTIFF MAY STACK POLICIES TO MEET THE DEFINITION OF UNDERINSURED MOTOR VEHICLE AND THE STACKING OF ANY TWO POLICIES AT ISSUE RENDERS THE TORTFEASOR'S VEHICLE UNDERINSURED 54

XI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE THE COURT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE LIMITS OF LIABILITY PROVISION REGARDING SET-OFF CONFLICTS WITH OTHER PROVISIONS RENDERING IT AMBIGUOUS AND REQUIRING INTERPRETATION IN PLAINTIFF'S FAVOR 55

A. The Set-Off Provision Conflicts With The Other Insurance Provision In Plaintiff's Policies 55

B. The Set-Off Provision Conflicts With The Other Insurance Provision In James Manner's Policy 57

C. The Set-Off Provision Conflicts With The Limits Of Liability Language 57

XII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT SET-

OFF IS FOR AMOUNTS PAID FOR LOSS CAUSED BY AN ACCIDENT WITH AN UNDERINSURED MOTOR VEHICLE WHICH DOES NOT INCLUDE AMOUNTS PAID THROUGH ANOTHER SOURCE 59

XIII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT MISAPPLIED THE LAW IN THAT APPROVAL OF DEFENDANTS' POLICIES BY THE DIRECTOR OF INSURANCE DOES NOT PRECLUDE A JUDICIAL FINDING OF AMBIGUITY 62

CONCLUSION 63

CERTIFICATE OF COMPLIANCE 64

CERTIFICATE OF SERVICE 65

TABLE OF AUTHORITIES

Cases **Page**

American Family Mut. Ins. Co. v. Automobile Club Inter-Insurance Exchange,
757 S.W.2d 304 (Mo. App. 1988) 41

American Family Mut. Ins. Co. v. Brown,
657 S.W.2d 273 (Mo. App. 1983) 12, 41, 42, 45

American Family Mut. Ins. Co. v. Hoffman ex rel. Schmutzler,
46 S.W.3d 631 (Mo. App. 2001) 46

American Family Mut. Ins. Co. v. Lacy,
825 S.W.2d 306 (Mo. App. 1991) 35, 42

American Family Mut. Ins. Co. v. Ragsdale,
213 S.W.3d 51 (Mo. App. 2007) ..... *passim*

Burns v. Smith,
303 S.W.3d 505 (Mo. banc 2010) ..... *passim*

Chamness v. American Family Mutual Insurance Co.,
226 S.W.3d 199 (Mo. App. 2007) ..... *passim*

Chase Resorts, Inc. v. Safety Mut. Cas. Corp.,
869 S.W.2d 145 (Mo. App. 1993) 20

Clark v. American Family Insurance Co.,
92 S.W.3d 198 (Mo. App. 1992) ..... *passim*

Columbia Mut. Ins. Co. v. Neal,
992 S.W.2d 204 (Mo. App. 1999) 46

Columbia Mutual Ins. Co. v. Schauf,

967 S.W.2d 74 (Mo. banc 1998) 63

Country Mutual Ins. Co. v. Matney,

25 S.W.3d 651 (Mo. App. 2000) 33, 37

Dodson Intern. Parts, Inc. v. National Union Fire Ins. Co. of Pittsburg Pennsylvania,

332 S.W.3d 139 (Mo . App. 2010) 19, 29

Durbin v. Deitrick,

323 S.W.3d 122 (Mo. App. 2010) 14, 52, 54

Farmers Ins. Co., Inc. v. Morris,

541 S.W.2d 66 (Mo. App. 1976) 31

Fennell v. New York Cent. Mut. Fire Ins. Co.,

305 A.D.2d 452 (N.Y.A.D. 2 Dept. 2003) 41

Gould v. Gould,

280 S.W.3d 137 (Mo. App 2009) 30, 44

Halpin v. American Family Mut. Ins. Co.,

823 S.W.2d 479 (Mo. banc 1992) 16, 62

Haulers Ins. Co., Inc. v. Pounds,

272 S.W.3d 902 (Mo. App. 2008) 20, 29

In the Matter of State Farm Mut. Auto Ins. Co. v. Nicoletti,

11 A.D.3d 702 (N.Y.A.D. 2 Dept. 2004) 41

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993) 17, 35, 40

Jensen v. Allstate,

349 S.W.3d 369 (Mo. App. 2011) 24, 25, 26, 39

Jones v. Mid-Century Ins. Co.,

287 S.W.3d 687 (Mo. banc 2009) 30, 58

Jones v. Mid-Century Ins. Co., Nos. 28757, 28758,

2008 WL 5006564 (Mo. App. S.D. Nov. 26, 2008) 30

Karscig v. McConville,

303 S.W.3d 499 (Mo. banc 2010) 37, 63

Kearbey v. Kinder,

972 S.W.2d 575 (Mo. App. 1998) 24, 25

Kinney v. Schneider Nat'l Carriers, Inc.,

213 S.W.3d 179 (Mo. App. 2007) 15, 61

Krombach v. Mayflower Ins. Co,

827 S.W.2d 208 (Mo. banc 1992) 13, 52

Lightner v. Farmers Ins. Co., Inc.,

789 S.W.2d 487 (Mo. banc 1990) ..... *passim*

Manner v. Schiermeier, et al.,

Slip Op. No. 96143 (Mo. App. E.D. Dec. 27, 2011) ..... *passim*

Mansion Hills Condo Ass'n v. American Family Ins. Co.,

62 S.W.3d 633 (Mo. App. 2001) 45

McCormack Baron Mng't Services, Inc. v. American Guar. & Liab. Ins. Co.,

989 S.W.2d 168 (Mo. banc 1999) 63

McDonnell v. Economy Fire & Cas. Co.,

936 S.W.2d 598 (Mo. App. 1996) 31

Miller v. Secure Ins. and Mut. Co. of Wis.,

53 S.W.3d 152 (Mo. App. 2001) 45

Miller's Classified Ins. Co. v. French,

295 S.W.3d 524 (Mo. App. 2009) 24, 25

Niswonger v. Farm Bureau Town & Country Ins. Co.,

992 S.W.2d 308 (Mo. App. 1999) ..... *passim*

Penn-Star Ins. Co. v. Griffey,

306 S.W.3d 591 (Mo. App. 2010) 20

Redpath v. Missouri Highway and Transp. Comm'n,

14 S.W.3d 34 (Mo. App. 1999) 18, 45

Reed v. American Standard Ins. Co. of Wisconsin,

231 S.W.3d 851 (Mo. App. 2007) 41

Rice v. Shelter Mut. Ins. Co.,

301 S.W.3d 43 (Mo. banc 2009) 28

Ritchie v. Allied Prop. & Cas. Ins. Co.,

307 S.W.3d 132 (Mo. banc 2009) ..... *passim*

Safeco Ins. Co. of America v. Smith,

318 S.W.3d 196 (Mo. App. 2010) 17, 20, 35

Seeck v. Geico General Ins. Co.,

212 S.W.3d 129 (Mo. banc 2007) 20, 28, 39, 49

Southern General Ins. Co. v. Foy,

631 S.E.2d 419 (Ga. App 2006) 12, 42, 45

Stark Liquidation Co. v. Florists' Mut. Ins. Co.,

243 S.W.3d 385 (Mo. App. 2007) 20, 29

State Farm Mutual Automobile Insurance Co v. Motley,

909 So.2d 806 (Ala. 2005) 15, 60

Stone v. Crown Diversified Industries Corp.,

9 S.W.3d 659 (Mo. App. 1999) 17, 18, 35, 45

Tonkovich v. Crown Life Ins. Co.,

165 S.W.3d 210 (Mo. App. 2005) 34

U.S. Fidelity & Guaranty Co. v. Safeco Ins. Co. of America,

522 S.W.2d 809 (Mo. banc 1975) 10, 30

Versaw v. Versaw,

202 S.W.3d 638 (Mo. App. 2006) 10, 11, 23, 25

Vogler v. Grier Group Management Co.,

309 S.W.3d 328 (Mo. App. 2010) 11, 12, 30, 44

Wasson v. Shelter Mut. Ins. Co.,

358 S.W.3d 113 (Mo. App. 2011) 23, 32, 33, 60

Constitutional Provisions and Statutes

Mo. Const. art. V, § 3 1

Mo. Const. art. V, § 10 1

Mo. Const. art. II, § 1 ..... 16, 63

Mo. Const. art. V, § 1 ..... 16, 63

Mo. Rev. Stat. §303.190 33

Court Rules

Mo. R. Civ. P. 74.04 ..... *passim*

Mo. R. Civ. P. 84.14 ..... 18, 45

Other

Black's Law Dictionary (8th ed. 2004) 15, 56

American Heritage Dictionary (3d ed. 1996)..... 38, 49

JURISDICTIONAL STATEMENT

This appeal is from the order of the Circuit Court of St. Charles County denying summary judgment for Plaintiff and granting summary judgment for Defendants in regard to underinsured motorist coverage under four policies of insurance issued by Defendants. The appeal originally was within the general jurisdiction of the court of appeals. Mo. Const. art. V, §3. This Court granted Appellant's transfer application and now has jurisdiction. Mo. Const. art. V, §10.

STATEMENT OF FACTS

On September 25, 2004, Nathaniel Manner was operating a Yamaha motorcycle when he was struck by a vehicle operated by Nicholas Schiermeier, resulting in extensive bodily injury to Nathaniel. LF0016; LF0238. At the time of the accident, Nathaniel had three insurance policies from American Family Mutual Insurance Company ("American Family") or American Standard Insurance Company of Wisconsin ("American Standard"), each identifying a separate vehicle on the declarations page: American Standard Policy No. 0457-9072-07-81-SCYC-MO ("Yamaha Policy"); American Family Policy No. 0457-9072-05-75-FPPA-MO ("Ford Ranger Policy"); and American Family Policy No. 0457-9072-03-69-FPPA-MO ("Ford F150 Policy"). LF0246-285. Each contains an endorsement for $100,000 per person ($300,000 per accident) in underinsured motorist ("UIM") coverage. LF0256; LF0270; LF0283. James Manner is Nathaniel's biological father. LF0241, LF0299. James also had an insurance policy from American Standard, Policy No. 0457-9072-06-78-SCYC-MO ("Suzuki Policy"). LF0286-298. That policy also contains an endorsement for $100,000 per person ($300,000 per accident) in UIM coverage. LF0296-297. James' policy defines "insured person" to include "you" (the policyholder) "or a relative." LF0296.

Nathaniel sued Schiermeier for negligent operation of his vehicle as well as Helmet City, Inc. and Jafrum International, Inc., the seller and manufacturer of Nathaniel's motorcycle helmet, alleging product defect and failure-to-warn. *See* LF0157-172. Schiermeier had insurance with a liability limit of $100,000 per person. LF0239. This was tendered and accepted by Nathaniel with American Family's and American

Standard's permission. *Id.* Nathaniel settled his claims with the other defendants and then, by agreement, amended his petition to name both insurance companies, who consented to suit seeking UIM coverage under Nathaniel's and James' policies. LF0010-11; LF0014; LF0015-0021; LF0174. The parties stipulated that Nathaniel suffered damages of $1,500,000.00. LF0238; LF0016 (¶5); LF0022 (¶5); LF0544 (¶53).

All of the insurance policies provide in the UIM endorsement:

> **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**.

LF0239-240; LF0256; LF0270; LF0283; LF0296.[1] Each contains a "Limits of Liability" provision stating:

> The limits of liability of this coverage as shown in the declarations apply, subject to the following:
>
> 1. The limit for each person is the maximum for all damages sustained by all persons as the result of **bodily injury** to one person in any one accident.
>
> . . .

[1] All bold-facing in policy provisions quoted herein appears in the original.

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

LF0256-257; LF0270-271; LF0283-284; LF0296-297.

Nathaniel filed his original summary judgment motion on March 26, 2009, along with a supporting memorandum and statement of undisputed material facts. LF0027-100. Nathaniel asserted that he is an insured person under his own three policies, all of which can be stacked, without set-off, under the Other Insurance Provision for a total of $300,000. LF0093-95, LF0099. Nathaniel also asserted that as James' "relative," he is

an insured person under James' policy, which also can be stacked under the Other Insurance provision for another $100,000 in UIM coverage. LF0097-98; LF0033 (¶14).

Defendants admitted all of Nathaniel's facts. LF0101-102. They filed their own summary judgment motion, memorandum, and statement of additional facts. LF0103-122. Defendants asserted an "owned-vehicle" exclusion in the UIM Endorsement, which states:

> **EXCLUSIONS**
>
> 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.

LF0109. Defendants argued that this exclusion applies to Nathaniel's two Ford policies, arguing that Nathaniel "owned" the Yamaha he was occupying. LF0112. They also asserted that it applies to James' policy, arguing that Nathaniel "owned" the Yamaha and also was a "resident of [James'] household" at 18xx Westmoor Drive in Foristell, Missouri ("Westmoor Drive"). *Id.* Defendants provided no facts supporting these assertions. *See* LF0103-104. In regard to Nathaniel's policies, Defendants disputed stacking under the second, but not the first, sentence of the Other Insurance provision (LF0115), did not dispute stacking under either sentence as to James' policy (*id.*), but did assert paragraph 3 of the policies' General Provisions (Part IV), which provides:

> 3. **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** . . . .

LF0119-121; LF0043.[2] Defendants also asserted that the policy limits of Nathaniel's Yamaha Policy should be reduced by the $100,000 paid by Schiermeier's insurer and by amounts paid by the manufacturer of the defective motorcycle helmet. LF0117-118.

On June 9, 2009, Nathaniel opposed Defendants' motion, asserting *inter alia* that Defendants failed to plead an exclusion as required by Rule 55.08 and failed to provide facts in support of their assertions that Nathaniel "owned" the Yamaha and was a resident of James' household as required by Rule 74.04(c). *See* LF0123-172. Nathaniel included the legal standards for determining whether someone is a resident of the same household in his opposition. *See* LF0140-142 (citing cases).

Defendants were granted leave to amend their answer to plead the "owned vehicle" exclusion. LF0173-176, LF0183-213, LF0214. The parties attempted to arrive at stipulations on subjects including whether Nathaniel owned the Yamaha and resided in James' household. *See* LF0186. When that failed, Defendants took Nathaniel's deposition. *See* LF0215-216.

On July 8, 2010, Nathaniel filed an amended summary judgment motion, memorandum, and statement of undisputed material facts. LF0217-302. Nathaniel again asserted stacking. LF0222-226. In regard to the "owned vehicle" exclusion, Nathaniel

---

[2] The word "cars" as opposed to "motorcycle" appears in Nathaniel's Ford policies. LF0057; LF0070.

urged that the exclusion does not apply or is ambiguous (LF0226-230; LF0232), that the word "owned" should be construed to mean title to the Yamaha, which Nathaniel did not have, and in further regard to James' policy, that Nathaniel was not a resident of James' household. LF0231; LF0233-235.

Nathaniel submitted an affidavit to support the facts on which he relied. *See* LF0238-302. He established that at the time of the accident, title to the Yamaha was still in the name of his Uncle, from whom Nathaniel was purchasing the motorcycle. LF0242 (¶23); LF0299 (¶4). He also provided detailed facts pertaining to his living arrangements, establishing that while he sometimes stayed with James, he also regularly and continuously stayed with his girlfriend and did not consider, or use, Westmoor Drive as a permanent dwelling. *See* LF0243 (¶¶27-31); LF0300-301 (¶¶8, 9, 10(a), 10(b)); LF0243 (¶32); LF0301 (¶10(c)). Nathaniel also established that he and James went about their lives separately with little interaction and did not function as a family unit. *See* LF0243 (¶33); LF0301 (¶10(d)); LF0244 (¶¶34-37); LF0301 (¶¶10(e), (f), (h)).

On July 8, 2010, Defendants filed another summary judgment motion, memorandum, and statement of facts. LF0303-353. Defendants asserted that Nathaniel is not an underinsured motorist because the limits of his Yamaha Policy are the same as the limits of Schiermeier's policy. LF0313-314. Defendants again disputed stacking of Nathaniel's policies based on the second, but not the first, sentence of the Other Insurance provision (LF0310-312) and did not dispute applicability of the second sentence as to James' policy. *Id.* Defendants asserted General Provision No. 3 as an additional basis to avoid stacking (LF0316-319), asserted set-off (LF0313-316), and that

their policies were approved by the Missouri Department of Insurance. LF0319-320.[3] Defendants asserted the "owned vehicle" exclusion based on arguments previously advanced. LF0308-309. Regarding Nathaniel's "ownership" of the Yamaha, Defendants relied on deposition testimony that Nathaniel was in the process of purchasing the motorcycle from his Uncle, and the fact that he obtained a policy of insurance. *See* LF0326 (¶¶37, 38). Regarding Nathaniel's residency, Defendants relied on deposition testimony and documents on which Nathaniel's address was stated as Westmoor Drive. *See* LF0322-326 (¶¶3, 12-35).

On August 5, 2010, Nathaniel opposed Defendants' motion (LF0504-526) and responded to Defendants' statement of facts (LF0527-594). Nathaniel again demonstrated ambiguity of the "owned vehicle" exclusion, (LF0506-511), as well as its factual inapplicability. *See* LF0509-510; LF0511-513. Nathaniel disputed Defendants' argument that Schiermeier is not an underinsured motorist (LF0521), demonstrated ambiguity of General Provision No. 3 based on its language and placement within the policies and conflict with the Other Insurance provision (LF0516-521), disputed Defendants' arguments based on the second sentence of the Other Insurance provision (LF0515), disputed set-off (LF0521-525), and addressed why approval of Defendants' policies by the Department of Insurance is legally immaterial. LF0524-525.

---

[3] Defendants conceded this argument on appeal. *See* Brief of Defendants/Respondents, Appeal No. 96143, at 48-49 (Defendants "concede [Point XIII] raised in Appellant's Brief" that interpretation of insurance policies is a judicial determination).

On August 6, 2010, Defendants opposed Nathaniel's motion (LF0598-604) and responded to Nathaniel's statement of facts (LF0595-597). Defendants did not dispute the ambiguities raised by Nathaniel regarding the "owned vehicle" exclusion. *See* LF0227-230; *compare* LF0598-601. In regard to the facts presented by Nathaniel that he did not have title to the Yamaha and was not a resident of James' household, Defendants responded "Denied" without reference to any discovery, exhibit or affidavits. *See* LF0242 (¶23); LF0242-244 (¶¶24-41); LF0596 (¶¶23-41). Defendants disputed applicability of the second (but not the first) sentence of the Other Insurance provision as to Nathaniel's policies, and did not dispute applicability of the second sentence as to James' policy. *See* LF0603 (addressing only Nathaniel's policies).

On August 19, 2010, Nathaniel filed his reply. LF0605-615. Although entitled to do so under Rule 74.04(c)(3), Defendants did not file a reply addressing the arguments in Nathaniel's August 6 opposition. On September 24, 2010, Nathaniel filed supplemental authority against set-off and the parties thereafter appeared for oral argument. LF0616-630. On December 1, 2010, the trial court denied summary judgment to Nathaniel and granted it for Defendants without explanation. LF0631. Nathaniel timely appealed to the Eastern District on January 6, 2011 (LF0632-634), which issued its decision on December 27, 2011. This Court granted Nathaniel's application for transfer on May 1, 2012.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR

Burns v. Smith, 303 S.W.3d 505 (Mo. banc 2010); *Versaw v. Versaw*, 202 S.W.3d 638 (Mo. App. 2006); *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308 (Mo. App. 1999).

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE WORD "OWNED" IN THE OWNED-VEHICLE EXCLUSION MUST BE STRICTLY INTERPRETED TO MEAN TITLE

Lightner v. Farmers Ins. Co., Inc., 789 S.W.2d 487 (Mo. banc 1990); *U.S. Fidelity & Guaranty Co. v. Safeco, Ins. Co. of America*, 522 S.W.2d 809 (Mo. banc 1975).

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING PLAINTIFF'S OWNERSHIP OF THE YAMAHA UNDER THE OWNED-VEHICLE EXCLUSION IN THAT

EVIDENCE THAT PLAINTIFF DID NOT HOLD TITLE WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION

Lightner v. Farmers Ins. Co., Inc., 789 S.W.2d 487 (Mo. banc 1990); *American Family Mut. Ins. Co. v. Lacy*, 825 S.W.3d 306 (Mo. App. 1991); *Vogler v. Grier Group Management Co.*, 309 S.W.3d 328, 331 (Mo. App. 2010); Mo. R. Civ. P. 74.04(c)(2).

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION IN JAMES MANNER'S POLICY DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR

Chamness v. American Family Mut. Ins. Co., 226 S.W.3d 199 (Mo. App. 2007); *American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51 (Mo. App. 2007); *Versaw v. Versaw*, 202 S.W.3d 638 (Mo. App. 2006).

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING WHETHER PLAINTIFF WAS A RESIDENT OF JAMES MANNER'S HOUSEHOLD UNDER THE OWNED-VEHICLE EXCLUSION IN THAT PLAINTIFF'S EVIDENCE THAT HE WAS NOT

SUCH A RESIDENT WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION.

American Family Mut. Ins. Co. v. Brown, 657 S.W.2d 273 (Mo. App. 1983); *Southern General Ins. Co. v. Foy*, 631 S.E.2d 419 (Ga. App. 2006); *Vogler v. Grier Group Management Co.*, 309 S.W.3d 328, 331 (Mo. App. 2010); Mo. R. Civ. P. 74.04(c)(2)

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK HIS POLICIES NOTWITHSTANDING THE LIMITS OF LIABILITY PROVISION UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR.

Clark v. American Family Ins. Co., 92 S.W.3d 198 (Mo. App. 1992); *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308 (Mo. App. 1999).

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK JAMES MANNER'S POLICY UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR.

Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. banc 2009); *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199 (Mo. App. 2007); *American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51 (Mo. App. 2007).

VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN PLAINTIFF'S POLICIES DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

A. General Provision No. 3 In The Yamaha Policy Does Not Preclude Stacking.

B. General Provision No. 3 Is Ambiguous And Does Not Preclude Stacking.

Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. banc 2009); *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208 (Mo. banc 1992); *Durbin v. Deitrick*, 323 S.W.3d 122 (Mo. App. 2010); *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308 (Mo. App. 1999).

IX. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN JAMES MANNER'S POLICY

DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

Durbin v. Deitrick, 323 S.W.3d 122 (Mo. App. 2010); *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199 (Mo. App. 2007).

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF MAY STACK POLICIES TO MEET THE DEFINITION OF UNDERINSURED MOTOR VEHICLE AND THE STACKING OF ANY TWO POLICIES AT ISSUE RENDERS THE TORTFEASOR'S VEHICLE UNDERINSURED

Chamness v. American Family Mut. Ins. Co., 226 S.W.3d 199 (Mo. App. 2007); *American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51 (Mo. App. 2007).

XI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE THE COURT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE LIMITS OF LIABILITY PROVISION REGARDING SET-OFF CONFLICTS WITH OTHER PROVISIONS RENDERING IT AMBIGUOUS AND REQUIRING INTERPRETATION IN PLAINTIFF'S FAVOR.

A. The Set-Off Provision Conflicts With The Other Insurance Provision in Plaintiffs' Policies.

B. The Set-Off Provision Conflicts With The Other Insurance Provision in James Manner's Policy.

C. The Set-Off Provision Conflicts With The Limits of Liability Language.

Lightner v. Farmers Ins. Co., Inc., 789 S.W.2d 487 (Mo. banc 1990); Black's Law Dictionary (8th ed. 2004); *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199 (Mo. App. 2007); *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009).

XII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT SET-OFF IS FOR AMOUNTS PAID FOR LOSS CAUSED BY AN ACCIDENT WITH AN UNDERINSURED MOTOR VEHICLE WHICH DOES NOT INCLUDE AMOUNTS PAID THROUGH ANOTHER SOURCE

Niswonger v. Farm Bureau Town & Country Ins. Co., 992 S.W.2d 308 (Mo. App. 1999); *Kinney v. Schneider Nat'l Carriers, Inc.*, 213 S.W.3d 179 (Mo. App. 2007); *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005).

XIII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF

BECAUSE IT MISAPPLIED THE LAW IN THAT APPROVAL OF DEFENDANTS' POLICIES BY THE DIRECTOR OF INSURANCE DOES NOT PRECLUDE A JUDICIAL FINDING OF AMBIGUITY.

Halpin v. American Family Mut. Ins. Co., 823 S.W.2d 479 (Mo. banc 1992); Mo. Const. art. II, §1; Mo. Const. art. V, §1.

ARGUMENT

Standard of Review

The propriety of summary judgment is reviewed *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993); *Safeco Ins. Co. of America v. Smith*, 318 S.W.3d 196, 199 (Mo. App. 2010); *Stone v. Crown Diversified Industries Corp.*, 9 S.W.3d 659, 663-64 (Mo. App. 1999). The court applies "the same criteria as the trial court to determine whether summary judgment was properly entered." *Safeco*, 318 S.W.3d at 199. Summary judgment "is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law." *Id.* "[A] 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *ITT,* 854 S.W.2d at 382. The record is viewed "in the light most favorable to the party against whom summary judgment was entered," affording that party "the benefit of all reasonable inferences from the record." *Safeco*, 318 S.W.3d at 199; *Stone,* 9 S.W.3d at 664. Interpretation of an insurance policy also is a legal question reviewed *de novo*. *Burns v. Smith,* 303 S.W.3d 505, 509 (Mo. banc 2010).

While generally, an order denying summary judgment is not a final judgment and not appealable, there is a well-recognized exception when "the merits of that motion are intertwined with the propriety of an appealable order granting summary judgment to another party." *Stone,* 9 S.W.3d at 664 (citing *Kaufman v. Bormaster,* 599 S.W.2d 35, 38 (Mo. App. 1980)). In that circumstance, the Court can and should reverse summary

judgment in favor of the respondent and grant summary judgment in favor of the appellant. *See* Rule 84.14 (appellate court authorized to "give such judgment as the court ought to give" and "dispose finally of the case."); *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199, 208 (Mo. App. 2007) (reversing summary judgment for defendant with direction to enter judgment for plaintiff); *Redpath v. Missouri Highway and Transp. Comm'n,* 14 S.W.3d 34, 41 (Mo. App. 1999) (reversing summary judgment for respondents and granting summary judgment for appellant). Here, interpretation of the policies is either dispositive or becomes the standard against which the summary judgment evidence is applied. The evidence submitted by Nathaniel to support his motion under the correct standard was not contravened by Defendants. Issues of interpretation as well as the outcome on summary judgment are intertwined and review of the trial court's denial of Nathaniel's motion is proper. *E.g., Stone*, 9 S.W.3d at 664.

Because the trial court did not provide any reasons for its decision, Nathaniel addresses each basis for summary judgment asserted by the Defendants.

It should be noted at this juncture that the meaning of the word "own" is significant in this case. *See Manner v. Schiermeier, et al.*, No. ED96143, Slip Opinion dated 12/27/11 ("Slip. Op.") at 1, 16. That word is found in the owned-vehicle exclusion and the second sentence of the Other Insurance clause. Nathaniel contends that it must be interpreted in his favor to mean title to the Yamaha, which it is undisputed Nathaniel did not have. If Nathaniel's interpretation prevails, the owned-vehicle exclusion does not apply, and the second "excess coverage" sentence of the Other Insurance clause does apply to permit stacking and to preclude set-off as held in numerous Missouri cases.

While Nathaniel has presented a number of alternative reasons to support stacking and preclude exclusion and set-off, interpretation of "own" in accordance with well-recognized tenets of construction resolves the issues in Nathaniel's favor.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

Defendants asserted that coverage is excluded under Nathaniel's two Ford policies under an "owned vehicle" exclusion, stating:

> 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 . . . .

LF0270; LF0283 (emphasis added). Interpretation is reviewed *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

Exclusionary clauses are construed strictly against the drafter. An insurer "has the duty to define limitations to coverage in clear and explicit terms." *Dodson Intern. Parts, Inc. v. National Union Fire Ins. Co. of Pittsburg Pennsylvania*, 332 S.W.3d 139, 146 (Mo. App. 2010). "[I]f reasonably possible [an exclusionary] clause will be construed so as to afford coverage." *Id.* at 145 (quoting *Am. Family Mut. Ins. Co. v.*

Brown, 657 S.W.2d 273, 275 (Mo. App. 1983)); *accord Safeco*, 318 S.W.3d at 199; *Haulers Ins. Co., Inc. v. Pounds,* 272 S.W.3d 902, 905 (Mo. App. 2008). *See also Penn-Star Ins. Co. v. Griffey*, 306 S.W.3d 591, 596 (Mo. App. 2010) ("[b]ecause an insured purchases coverage for protection, the policy will be interpreted to grant coverage rather than defeat it" and "[c]onsequently," exclusionary clauses are construed against the insurer and in favor of the insured). This tenet has been expressed as an independent basis for interpretation favoring the insured. *E.g.*, *Burns*, 303 S.W.3d at 509-510 (*contra proferentem* applies "more rigorously in insurance contracts" and exclusionary clauses "also" are strictly construed against drafter); *Chase Resorts, Inc. v. Safety Mut. Cas. Corp.*, 869 S.W.2d 145, 150 (Mo. App. 1993) (ambiguity resolved in favor of insured and "[in] addition," exclusions strictly construed). At minimum, the exclusionary nature of a provision gives extra strength to interpretive tenets, including ambiguity. *E.g., Stark Liquidation Co. v. Florist's Mut. Ins. Comm.*, 243 S.W.3d 385, 393 (Mo. App. 2007) (ambiguity "acutely applicable" to exclusions). Ambiguous provisions are construed in favor of the insured. *American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51, 55 (Mo. App. 2007). Ambiguities exist when there is "duplicity, indistinctness, or uncertainty in the meaning of the language in the policy." *Burns*, 303 S.W.3d at 509; *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009); *Ragsdale*, 213 S.W.3d at 55. Language is ambiguous if open to differing interpretations or if one provision conflicts with another. *Ritchie*, 307 S.W.3d at 135; *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007); *Chamness*, 226 S.W.3d at 202.

Defendants asserted that the exclusion applies if Nathaniel was "occupying a motor vehicle that is not insured under the policy but . . . owned by Nathaniel." LF0309. In other words, Defendants contend that if Nathaniel "owned" the vehicle he was occupying (he did not as discussed *infra*), he has no UIM coverage unless that vehicle is the same vehicle insured under the policy. That interpretation, however, conflicts with the insuring clause, the definitions, and the nature of UIM coverage.

The two Ford policies provide:

> 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**.

LF0270; LF0283. Each endorsement contains definitions particular to the UIM coverage:

> As used in this endorsement:
>
> 1. **Insured person** means:
>
> a. **You** or a **relative**
>
> b. Anyone else occupying **your insured car**.
>
> c. Anyone, other than a person or organization claiming by right of assignment or subrogation, entitled to recover damages due to bodily injury

to **you**, a **relative**, or another occupant of **your insured car**.

Id. "You" means the policyholder. LF0263 (Definitions ¶13); LF0276 (same). The policyholder of the Ford policies is Nathaniel. The endorsement also defines who is not an "insured person":

> But the following are not **insured persons**:
>
> a. Any person, other than a **relative**, using your **insured car** without your permission.
>
> b. Any person, other than a **relative**, using your **insured car** with your permission, but who exceeds the scope of that permission.
>
> c. Any person using a vehicle without the permission of the person having lawful possession.
>
> d. Any person using a vehicle with the permission of the person having lawful possession, but who exceeds the scope of that permission.

LF0270; LF0283. According to the definitions, there are two distinct classes of "insured persons": (1) "you," *i.e.,* the policyholder (or relative); and (2) other persons, but only if occupying the insured car (with permission). Under the insuring clause and definitions, the policyholder (or relative) has coverage whether he is occupying the insured vehicle or not. This is consistent with the rule in Missouri that UIM coverage is personal to the policyholder, rather than tied to the vehicle. *Niswonger v. Farm Bureau Town & Country*

Ins. Co., 992 S.W.2d 308, 313 (Mo. App. 1999). It is "in the nature of floating, *personal* accident insurance rather than insurance on a particular *vehicle,* and thus follow[s] the insured individual wherever he goes." *Id.* (emphasis original); *accord Wasson v. Shelter Mut. Ins. Co.*, 358 S.W.3d 113, 117-18 (Mo. App. 2011). A reasonable layperson in Nathaniel's position certainly would understand that as the policyholder, his UIM coverage does not depend on occupancy of the insured vehicle because that is what the insuring clause and definitions say. If the exclusion is interpreted to deny coverage unless Nathaniel was occupying the vehicle insured under the policy, it directly conflicts with and nullifies the insuring clause and definitions.

The exclusion itself uses the word "person" to describe who is not covered unless occupying the insured vehicle. The exclusion does not refer to the "insured person," to "you," to "your," or any other word that connotes the policyholder. "Person" is not defined, but as used in the UIM endorsement, clearly indicates someone *other* than the policyholder. At best, it is ambiguous.

In *Versaw v. Versaw*, 202 S.W.3d 638 (Mo. App. 2006), the word "person" in a household exclusion was found ambiguous. It provided: "This [liability] coverage does not apply to . . . Bodily injury . . . to any person related to and residing in the same household with the operator." The trial court found the exclusion inapplicable because it did not refer to "you" or "your" (defined as the policyholder and spouse). In other words, it found that the word "person" was distinct from the defined words "you" and "your." *Id.* at 642. The Southern District agreed, finding that the policy "had two contractually defined terms available for use when referencing [the insureds] in the exclusions . . .

specifically, 'you/your' or 'insured person.' However, the household exclusion clause used neither of the defined terms." *Id.* at 644. "Where a term is used in one clause of a policy, its absence in another clause is significant." *Id.* at 645. This rule "carries extra weight" when construing an exclusion. *Id.* "[A]n ordinary lay person who bought this policy, if confronted with a claim . . . of non-coverage because of the household exclusion, could . . . reasonably find two different answers, one being coverage and the other for exclusion. By definition, that is ambiguity." *Id.* "Such ambiguity causes us to interpret the policy, and specifically, [the exclusion], in a light most favorable to [the insured]." *Id.* Hence, the exclusion did not apply. *Id.* at 644.[4] *Accord Miller's Classified Ins. Co. v. French*, 295 S.W.3d 524, 527 (Mo. App. 2009) (finding "person" ambiguous).

Nathaniel presented all these ambiguities to the trial court, which were not disputed by Defendants. *See* LF0226-230; *compare* LF0598-601. The Eastern District, however, found that "person" unambiguously includes the policyholder in reliance on *Jensen v. Allstate*, 349 S.W.3d 369 (Mo. App. 2011) (uncited by Defendants). Slip. Op. at 6-9. In *Jensen,* the exclusion was for "damages an insured person is legally obligated to pay because of . . . bodily injury to any person related to an insured person by blood, marriage or adoption." *Id.* at 371. At issue was the phrase "any person." The Court sought to reconcile *Versaw* with *Kearbey v. Kinder,* 972 S.W.2d 575 (Mo. App. 1998),

[4] The Court also found no stacking (*id.* at 647-48) but was not confronted with an Other Insurance provision like the one here.

another Southern District opinion finding the exclusion not ambiguous. *Jensen*, 349 S.W.3d at 377.[5] Among other things, the *Jensen* Court assumed that in *Versaw*, the phrase "'any person' apparently did not show up anywhere else in the policy to give it greater context." *Id.* at 378. In *Versaw*, however, the Court found context from the insuring clause, as well as other contiguous exclusions based on the fact that all of them addressing a class of persons used "you," "your," or "insured person" whereas the one at issue did not, giving rise to the tenet *expressio unius*. 202 S.W.3d at 645. *Jensen* looked for the phrase "any person" in other provisions within the policy's liability section and, similar to *Versaw*, other contiguous exclusions immediately preceding the one at issue. These exclusions established a pattern whereby those not applying to the policyholder explicitly said so (*e.g.*, "this exclusion does not apply to **you**"). 349 S.W.3d at 378-79. The phrase "any person" was also in the liability coverage insuring clause, under which Mrs. Jensen sought coverage in the first place. *Id.* at 378. *Versaw* (and *Miller's Classified*) involved claims by the policyholder for liability coverage respecting injuries to another, and found the lack of terms connoting the policyholder in the exclusion significant. *Versaw*, 202 S.W.3d at 644; *accord Miller's Classified*, 295 S.W.3d at 527. In *Jensen*, the claimant also was seeking liability coverage, but in respect to her own

[5] In *Kearbey*, the ambiguity asserted was that the exclusion did not appear in the limits of liability clause in Part I of the policy. 972 S.W.2d at 577-79. It does not appear that the Court was actually confronted with, or analyzed whether, the phrase "any person" within the exclusion was ambiguous. *Id.* at 579.

injuries caused by the negligence of her husband. She asserted coverage not by virtue of her status as the policyholder but because she fell within the phrase "any person" in the liability insuring clause. *Jensen*, 349 S.W.3d at 378.

Here, unlike *Jensen*, Nathaniel falls within the UIM insuring clause of the Ford policies not as a "person" but as the policyholder, and regardless of whether he was occupying the insured vehicle. And there are no provisions preceding the exclusion to establish the kind of pattern as found in *Jensen*. *See* Slip. Op. at 7-8.

The Eastern District went beyond *Jensen* to conduct a wide-ranging search for provisions containing the word "person" in order to determine whether it includes an "insured person." Slip Op. at 8.[6] It did so without "pattern," context, or layperson perspective. For example, the Court looked at the first section of the policy containing duties that a "person" must undertake in the case of an accident. Slip. Op. at 8. This section, however, is entitled "IF ***YOU*** HAVE AN ACCIDENT OR LOSS," which itself alerts the reader that the body of that section applies to him. *See* LF0263 (emphasis added). The same might be said of the Limits of Liability provisions, which use the word "person" (Slip. Op. at 8) and also the phrase "**insured persons**." *See* LF0250; LF0251; LF0252; LF0256. The Court also looked to the definition of "relative," concluding that

---

[6] From the outset, the Court defines the issue too broadly, as "insured person" includes distinct classes—those entitled to coverage by reason of their status ("you" or a "relative"), and those entitled to coverage only if occupying the insured vehicle. The Court ignores this issue.

since a "relative" is an "insured person" in the UIM endorsements, "person" as used in the definition of "relative" also must include an "insured person." Slip Op. at 8. This is both circular and incorrect. As defined in the Ford policies, not *every* person is a "**relative**," and correspondingly an "**insured person**," but only those "living in **your** household [and] related to **you** by blood, marriage or adoption." LF0263; LF0276. These additional components are definitional of "relative" whereas the word "person" alone is not. Even if the word "relative" had interpretive significance, it is defined only in the Ford policies (*id.*) under which Nathaniel is insured because he is the *policyholder* (*i.e.*, "**you**"). As to these policies, the word "relative" has nothing to do with Nathaniel, who would have little reason to consult its definition. The only policy that might prompt such a search is James' Suzuki policy, in which "relative" is *not* defined generally or in the endorsement but only in Part III, which expressly applies *only* to uninsured motorist coverage. *See* LF0292 (definitions "USED IN THIS PART ONLY"). The Court also ignores the classes of insured persons set up by the endorsements and the unmistakable message to any average reader that the policyholder has UIM coverage regardless of whether he is occupying the insured vehicle, an important factor absent in *Jensen*.

The Court's conclusion that "person" must include the policyholder under the exclusion's second and third paragraphs also stretches too far for the insurers. Slip Op. at 9. The second paragraph states that coverage does not apply to a person "[w]ho makes or whose legal representative makes a settlement without our written consent." *Id.* The Court found that not requiring such consent from every insured person (including the policyholder) would be an "absurd result." *Id.* To the contrary, the endorsement

elsewhere expressly states that "**You**" (the policyholder and spouse) must "notify **us** of any suit brought to determine legal liability or damages" and "[w]ithout **our** written consent, **we** are not bound by any resulting judgment." LF0270; LF0283; LF0296. This provision includes only the policyholder or spouse ("**you**"). It is no more "absurd" to require this consent from less than all possible insured persons than consent regarding settlement. The third paragraph excludes bodily injury to a person "[w]hile occupying your insured car when used to carry persons for a charge." *Id.* This easily applies to persons, other than the policyholder, covered by reason of their permissive use of the vehicle unless doing so for pay.

In sum, the word "person" is at best ambiguous. And there is a clear conflict between the insuring clause and definitions, under which the policyholder is covered *regardless* of whether he is occupying the insured vehicle, and an exclusion purporting to deny that coverage *unless* he is occupying the insured vehicle. "[I]f a contract promises something at one point and takes it away at another, there is an ambiguity." *Seeck*, 212 S.W.3d at 133; *accord Burns,* 303 S.W.3d at 512; *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009). Such ambiguities are resolved in the insured's favor. *Ritchie*, 307 S.W.3d at 135.

Defendants' and the Eastern District's version of the exclusion also means that it restricts coverage to a single policy contrary to the Other Insurance provision permitting stacking of multiple policies to the same insured covering different vehicles. *See infra,* Points II, VI-VII; *Chamness,* 226 S.W.3d at 208; *Clark v. American Family Ins. Co.*, 92

S.W.3d 198 (Mo. App. 1992).[7] To the extent the trial court relied on the exclusion to grant Defendants summary judgment, or deny it to Nathaniel, the court erred as Defendants did not demonstrate that they were entitled to judgment as a matter of law and Nathaniel did.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE WORD "OWNED" IN THE OWNED-VEHICLE EXCLUSION MUST BE STRICTLY INTERPRETED TO MEAN TITLE.

Even if the exclusion survives the first interpretive hurdle, Defendants have the additional burden to demonstrate that it applies under the circumstances. *Dodson*, 332 S.W.3d at 143; *Haulers,* 272 S.W.3d at 905; *Stark*, 243 S.W.3d at 394. Thus, Defendants must show that Nathaniel was occupying a vehicle he "owned." The first issue is the meaning of that word. Review is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

Again, coverage restrictions are strictly construed. *Burns,* 303 S.W.3d at 510; *Dodson*, 332 S.W.3d at 146; *Haulers,* 272 S.W.3d at 905; *Stark*, 243 S.W.3d at 394. And the word "owned" is not defined in the policy. In *Lightner v. Farmers Ins. Co., Inc.*,

[7] The Eastern District's analysis of the word "owned" makes this result categorical to all policies containing a similar owned-vehicle exclusion. *See* Point II.

789 S.W.2d 487, 490 (Mo. banc 1990), this Court found that the word "owner" is a word of "rather broad meaning" and that in construing that term, "courts must take the meaning most favorable to the insured." *Id.* at 490 (quoting *U.S. Fidelity & Guaranty Co. v. Safeco Ins. Co. of America*, 522 S.W.2d 809, 817-818 (Mo. banc 1975). The Eastern District acknowledged that both *Lightner* and *Safeco* "stand for the proposition that the words 'own' and 'owner' are capable of different meanings" (Slip Op. at 12), yet did not apply a construction favoring Nathaniel as required. The most favorable meaning to Nathaniel is title ownership of the Yamaha, which, undisputedly, he did not have.[8] *See, e.g., Jones v. Mid-Century Ins. Co.*, Nos. 28757, 28758, 2008 WL 5006564 at *6 (Mo. App. S.D. Nov. 26, 2008) (construing ownership to mean title for purposes of exclusion; plaintiff did not own vehicle he could not legally convey to another).[9] That fact is dispositive, militating judgment for Nathaniel. To the extent the trial court construed the word otherwise, it erred.

---

[8] Nathaniel's evidence established that he did not have title to the Yamaha. LF0242 (¶23); LF0299 (¶4). Defendants responded only "Denied" (LF0596 (¶23)), and accordingly, this fact was admitted. Rule 74.04(c)(2); *Vogler v. Grier Group Management Co.*, 309 S.W.3d 328, 331 (Mo. App. 2010); *Gould v. Gould*, 280 S.W.3d 137, 142-43 (Mo. App. 2009).

[9] This Court accepted transfer in *Jones* and decided it on other grounds. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009). Whether the intermediate opinion has "precedential effect" (Slip. Op. at 10 n.3), it still provides a pertinent analysis.

Contrary to established tenets of construction and this Court's decisions in *Lightner* and *Safeco*, the Eastern District construed the word "owned" most favorably to the insurance companies. It did so in reliance on *McDonnell v. Economy Fire & Cas. Co.*, 936 S.W.2d 598 (Mo. App. 1996) (uncited by Defendants), which did not interpret "owned," did not involve UIM coverage, and did not involve multiple policies. Nevertheless, the Court used *McDonnell* as the "context" in aid of interpretation. Slip Op. at 13; *contra Lightner*, 789 S.W.2d at 490 (looking to context of case presented); *Chamness*, 226 S.W.3d at 203-204 (same). In so doing, it interpreted "owned" in such a way – and as a matter of law – that ties UIM coverage to the insured vehicle contrary to the insuring clause, and the nature and purpose of UIM coverage.

At issue in *McDonnell* was a liability policy containing medical coverage with an exclusion for injury "while occupying any vehicle . . . owned by you or furnished for your regular use." *Id.* at 599. The plaintiff was driving a temporary vehicle she did not insure. The Court concluded that 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." *Id.* at 600. This might make sense in the context of a substitute vehicle provision, which allows "limited additional coverage for a single premium." *Farmers Ins. Co., Inc. v. Morris*, 541 S.W.2d 66, 68 (Mo. App. 1976). The purpose of such provisions is to cover "occasional or incidental use of other cars" without paying an additional premium, while excluding "habitual use of other cars" that would increase the insurer's risk "without a corresponding increase in the premium." *Id.* To apply the *McDonnell* analysis here, however, punishes the insured who *has*

obtained insurance on the vehicle he is operating at an *additional premium* to the insurance company.

Applying *McDonnell* outside its context also ignores the policy, alters the nature of UIM coverage and defeats its purpose, which is to protect an insured injured by a negligent motorist "whose own liability insurance coverage is insufficient to pay for injured person's actual damages." *Wasson,* 358 S.W.3d at 117. The plain language, and purpose, of the endorsement makes the UIM coverage personal to the insured, following him wherever he goes. *Id.*; *Niswonger,* 992 S.W.2d at 313. Relying on *McDonnell*, however, the Eastern District held that "in the context of the owned-vehicle exclusion in a liability policy, if one's possession of a vehicle is sufficient to constitute an insurable interest for which optional UIM coverage could be purchased, the vehicle is an 'owned' vehicle." Slip Op. at 13. For purposes of UIM coverage, the risk insured is not loss of property or loss arising from the insured's use of a vehicle but rather, injury to the insured's person arising from another (underinsured) motorist's negligence. The endorsement relates *not* to the vehicle, but to the bodily injury of the insured. By equating "owned" in the exclusion with mere possession or use, however, the Eastern District's opinion means that an "owned-vehicle" exclusion will always apply to the vehicle being occupied, tying coverage to the vehicle rather than the person.[10] And the

[10] The opinion equates "owned" in the exclusion with whatever "insurable interest" is sufficient for the liability policy. *See* Slip Op. at 13. The nature and purposes of liability and UIM coverage, however, are different. Liability coverage protects another person

exclusion will always limit coverage, now tied to the vehicle, to *the single policy* insuring that vehicle, investing it with anti-stacking effect. By misapplying *McDonnell* and giving it categorical "contextual" significance, the opinion fundamentally alters the nature of UIM coverage and destroys the protection it is designed to provide.

---

injured through the insured's use of a vehicle and in this respect, "[t]here need not be an insurable interest in property covered by liability insurance where the risk insured against is based not on the ownership of property but on loss and injury caused by its use for which the insured might be liable." *Country Mut. Ins. Co. v. Matney*, 25 S.W.3d 651, 655 (Mo. App. 2000)(citing *Hall v. Weston*, 323 S.W.2d 675, 680 (Mo. 1959). Since the enactment of the Motor Vehicle Responsibility Law, a liability policy will be either an "owner's" or an "operators" policy. Mo. Rev. Stat. §303.190. These principles operate to preserve the protection of others injured by the insured. UIM coverage, by contrast, protects the insured himself. It is not contingent on the insured's use of a vehicle but rather, someone else's use of a vehicle who causes injury to the insured and has insufficient liability coverage. *Niswonger*, 992 S.W.2d at 313; *Wasson*, 358 S.W.3d at 117. Equating "insurable interest" for liability coverage with "ownership" in the exclusion is destructive to, rather than protective of, the purpose of UIM coverage.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING PLAINTIFF'S OWNERSHIP OF THE YAMAHA UNDER THE OWNED-VEHICLE EXCLUSION IN THAT EVIDENCE THAT PLAINTIFF DID NOT HOLD TITLE WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION.

If ownership is interpreted to mean title to the Yamaha, the undisputed fact that Nathaniel did not have title is dispositive and judgment should have been entered for Nathaniel. If ownership means something less than title but more than mere possession, the lack of title is still evidence of non-ownership which, together with other evidence, defeated summary judgment for Defendants.

Before the trial court, Defendants seemed to disagree that "owned" should be interpreted to mean title, but offered no *other* interpretation against which to view the facts or judge their materiality.[11] *See* LF0598-600. As summary judgment movants,

---

[11] Only those facts affecting the outcome are "material" for purposes of summary judgment. *Tonkovich v. Crown Life Ins. Co.*, 165 S.W.3d 210, 214 (Mo. App. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "It is the substantive law . . . that identifies which facts are material to a claim, and thereby determine[] which

Defendants had the burden of demonstrating undisputed material facts entitling them to judgment. The record is viewed "in the light most favorable to" Nathaniel, affording him "all reasonable inferences." *Safeco,* 318 S.W.3d at 199; *Stone,* 9 S.W.3d at 644. Review is *de novo*. *ITT,* 854 S.W.2d at 376.

For their factual support of "ownership," Defendants stated that: (1) the Yamaha "was purchased by Nathaniel Manner from his uncle;" (2) Nathaniel "was in the process of transferring title;" and (3) Nathaniel requested liability insurance from American Standard. LF0326 (¶¶37, 38). As to purchase, Defendants represented that Nathaniel "admit[ted] that he purchased the motorcycle" (LF0599) when in truth, Nathaniel admitted only that he was *in the process of* doing so. *See* LF0540 (¶37). Nathaniel testified by affidavit that he had paid "some money" to his Uncle. LF0242 (¶23); LF0299 (¶4). Defendants responded by unsupported denial. (LF0956 (¶23)), conceding the truth of this testimony under Rule 74.04(c)(2). Nathaniel also testified by deposition that he had been in possession of the Yamaha only weeks before the accident and did not know whether he had taken any steps to have title transferred. *See* LF0326 (¶37), LF0339; LF0510 (n.3). It was uncontroverted that Nathanial did not actually have title at the time of the accident. *See* LF0242 (¶23); LF0299 (¶4); LF0596 (¶23). Defendants also represented that Nathaniel "took possession of the motorcycle" and "treated the motorcycle as his own." LF0599. These statements were not included in Defendants'

---

facts are critical and which are not relevant to the summary judgment inquiry." *American Family Mut. Ins. Co. v. Lacy*, 825 S.W.2d 306, 313 (Mo. App. 1991).

statement of facts as required by Rule 74.04(c)(1) or in response to Nathaniel's statement of facts as required by Rule 74.04(c)(2). *See* LF0610. In any event, they do not support Defendants' entitlement to judgment.

In *Lightner*, a father purchased an automobile for his son, later adding his name to the title. When the son was injured, he sought coverage under his father's policy, which covered a "relative of the named insured . . . provided neither such relative nor his spouse owns an automobile." 789 S.W.2d at 488. The insurer argued that because plaintiff's name was on the title he owned the vehicle. *Id.* at 490. This Court held that while title is prima facie evidence of ownership, plaintiff was not the "owner" under the facts:

> Though [the son] was permitted to drive the car and have its general use with little or no controls, nothing in the evidence indicates this was done other than with the permission of his father, and it cannot seriously be suggested he was free to voluntarily destroy, encumber, sell, or otherwise dispose of the truck.

Id. at 490. Similarly, even if Nathaniel was allowed to use the Yamaha "with little or no controls," Defendants offered no evidence of any kind that such use was other than at his Uncle's permission. And without title, Nathaniel could not voluntarily "encumber, sell or otherwise dispose of" it. *Id.* All of this raises at least the reasonable inference that Nathaniel did not own the Yamaha. This conclusion is even stronger here than in *Lightner* where the vehicle was a gift to a son whose name was on the title. By contrast,

Nathaniel's Uncle clearly expected payment (not yet complete) and Nathaniel's name was not on the title.

Defendants also stated that Nathaniel "represented to American Standard that the 1983 motorcycle was [his]" (LF0598), but offered no basis for this statement save one – that Nathaniel obtained the Yamaha Policy. LF0598-601; *see also* LF0326 (¶38). The policy does not require title or any other attribute of ownership to obtain liability coverage. To the contrary, it describes "[y]our covered vehicle" as merely the vehicle "described in the declarations." *See* LF0249 (Definitions ¶11(a)). Nathaniel may have thought it prudent to obtain liability coverage because he was in the process of purchasing the motorcycle and would be operating it, but this says nothing about whether he "owned" it under any interpretation of that word.[12] And as discussed, *infra*, the UIM coverage is personal to the insured and unconnected to the vehicle. Defendants had the burden to prove Nathaniel's ownership, which they did not. Accordingly, it was error to grant their summary judgment motion.

[12] *E.g., Karsciq v. McConville*, 303 S.W.3d 499, 503-504 (Mo. banc 2010) (liability coverage to non-owner as operator of vehicle); *Country Mut. Ins. Co.*, 25 S.W.3d at 656 (liability coverage not dependent upon ownership but use of vehicle); *accord* LF0249 (liability coverage applicable to "use" of motorcycle).

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE OWNED-VEHICLE EXCLUSION IN JAMES MANNER'S POLICY DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

James' policy promises that: "**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**." LF0296. Again, the policy defines "insured person" as "**You** or a **relative**." *Id.* The word "relative" is not defined in the general definitions or in the endorsement. *See* LF0290; LF0296.[13] Thus, the plain meaning applies. *Clark*, 92 S.W.3d at 200. The plain meaning of "relative" is one "related by kinship, common origin, or marriage." American Heritage Dictionary (3d ed. 1996) 1523. Nathaniel is James' biological son. LF0241 (¶14), LF0299 (¶2), LF0596 (¶14) (admitted). He is related by kinship and thus, an insured person under James' policy.

---

[13] As noted, the word "relative" is defined in Part III of the Suzuki policy, but is expressly applicable *only* to uninsured motorist coverage (LF0292) (definitions "USED IN THIS PART ONLY") and cannot be transported to the UIM endorsement. Defendants did not dispute that Nathaniel was insured under James' policy as a relative. *See* LF0603 ("Clearly, Nathaniel, as the natural son of James, is a relative of James.").

Again, the exclusion states: "This coverage does not apply for bodily injury to a *person* . . . [w]hile **occupying** . . . a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household." *Id.* (emphasis added). Review is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

Again, the UIM insuring clause combined with the definitions make Nathaniel an "insured person" because he is James' relative and *without regard* to whether he was occupying the insured vehicle. And the exclusion itself does not refer to an "insured person" or to a relative. For all the reasons discussed *supra*, Point I, the exclusion is ambiguous and thus construed in Nathaniel's favor.

Defendants' interpretation also conflicts with the Other Insurance provision, which, under at least the second sentence, permits stacking of James' policy and precludes set-off (which Defendants did not dispute). *See infra*, Points VII, IX, XI(B); *Seeck*, 212 S.W.3d at 132; *Chamness*, 226 S.W.3d at 208; *Ragsdale*, 213 S.W.3d at 56-57; *Niswonder*, 992 S.W.2d at 315-16. Defendants' interpretation nullifies this provision and for this reason also, the exclusion does not apply.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE DEFENDANTS FAILED TO DEMONSTRATE THE ABSENCE OF MATERIAL FACT REGARDING WHETHER PLAINTIFF WAS A RESIDENT OF JAMES MANNER'S HOUSEHOLD UNDER THE OWNED-VEHICLE EXCLUSION IN THAT PLAINTIFF'S EVIDENCE THAT HE WAS NOT SUCH A RESIDENT WAS UNDISPUTED AND DEFENDANTS' EVIDENCE WAS NOT MATERIAL OR SUPPORTIVE OF ITS MOTION.

The exclusion in James' Suzuki Policy requires that Nathaniel be occupying a vehicle "owned by" James or "any resident of [James'] household." The Yamaha occupied by Nathaniel was not owned by James. LF0241 (¶14); LF0299 (¶3). Thus, it must have been "owned" by a "resident of [James'] household." Both elements must be present. For the reasons discussed, the term "owned" should be interpreted to mean title, which Nathaniel did not have, and Defendants otherwise failed to demonstrate the absence of a material fact issue under any interpretation of that word. Defendants also failed to establish the second element – that Nathaniel was a resident of James' household. By contrast, Nathaniel demonstrated by undisputed material facts that he was not. Review is *de novo*. *ITT,* 854 S.W.2d at 376.

Whether someone is a "resident" of the same "household" depends on whether the living arrangement is permanent or temporary and whether the "household functions as a family unit." Slip. Op. at 14-15. "Residence" depends upon "a person's physical

location coupled with his intent to remain there for an indefinite period of time." *American Family Mut. Ins. Co. v. Automobile Club Inter-Insurance Exchange*, 757 S.W.2d 304, 306 (Mo. App. 1988). This test "looks at the length of time the parties intended to remain together and whether the arrangement is permanent or temporary." *American Family Mut. Ins. Co. v. Brown*, 657 S.W.2d 273, 276 (Mo. App. 1983). Residence in a "household" does not mean merely living under the same roof, but "takes on a social meaning and it connotes living together as a family unit." *Id.* This test "focuses on the functional character of the arrangement or whether the parties function as a family unit under one management." *Id.* at 275. The claimant is not a resident of the policyholder's household when the living arrangement is not permanent and he does not function as part of a family unit. *Reed v. American Standard Ins. Co. of Wisconsin*, 231 S.W.3d 851, 854 (Mo. App. 2007) (citing *Giokaris v. Kincaid*, 331 S.W.2d 633, 638-40 (Mo. 1960)); *see also, e.g., In the Matter of State Farm Mut. Auto Ins. Co. v. Nicoletti*, 11 A.D.3d 702 (N.Y.A.D. 2 Dept. 2004) (although daughter "received mail at her parents' address, had the key to the house, and kept belongings there, these facts were insufficient to establish her residence at that address."); *Fennell v. New York Cent. Mut. Fire Ins. Co.*, 305 A.D.2d 452, 535 (N.Y.A.D. 2 Dept. 2003) (although policyholder's son "retained his parents' address on his driver's license and voter registration card, listed his parents' address on the police report following the accident, and continued to receive mail at his parents' house, these circumstances do not establish residency."). When the phrase "resident of the same household" appears in an exclusion, "the burden of proof is

on the insurer and if reasonably possible the clause will be construed so as to afford coverage." *Brown*, 657 S.W.2d at 275.

Nathaniel set out these legal standards in connection with the parties' original summary judgment briefing. LF0140-142. Although aware of them before Nathaniel's deposition, Defendants did not examine Nathaniel about the details of his living arrangements and offered nothing in that regard in support of, or in opposition to, summary judgment. Defendants relied on Nathaniel's deposition testimony that he lived with James part-time during high school and used Westmoor Drive as a mailing address. LF0322 (¶3); LF0323 (¶¶7-8). Defendants also presented a number of documents (medical bills, tax returns and the like), many of which were unauthenticated and/or hearsay not properly considered on summary judgment. Rule 74.04(e); *Lacy*, 825 S.W.2d at 311. *See* LF0324-326 (¶¶17-26), LF0533-0536 (Plaintiff's objections). In any event, none of Defendants' evidence demonstrated either the permanency or the functional components required under the applicable legal standards. Rather, Defendants "persisted in [the] mistaken assertion that [Nathaniel and James] are members of the same household merely because they [sometimes] share a roof." *Southern General Ins. Co. v. Foy*, 631 S.E.2d 419, 422 (Ga. App. 2006). Mere address is not the test and Defendants' evidence "does not bring the exclusion into effect." *Lacy*, 825 S.W.2d at 314. The material facts were presented only by Nathaniel and were unopposed.

Nathaniel presented numerous facts, supported by evidence, that the Westmoor address was not a permanent living location, and that he and James did not function as a family unit. *See* LF0233-235; LF0242-245 (¶¶24-42); LF0300-302; LF0527-547.

James has lived at Westmoor Drive since approximately 1985. LF0242 (¶24); LF0300 (¶5). Nathaniel lived at that address with both his parents until approximately 1992 when they divorced. *Id.* After the divorce, Nathaniel's mother moved to New Melle, Missouri. Nathaniel spent half his time with each parent during his school years. *Id.* Nathaniel attended school in the Francis Howell School District, the district of his father's residence, but both addresses were used for school purposes. School papers were sent to his father's address and also to his mother's address. *Id.* Nathaniel graduated from high school in 1999 and went to work. LF0242 (¶25); LF0300 (¶6). At that time, Nathaniel still lived with both his father and his mother, who by then had moved to O'Fallon, spending equal time with both. *Id.* Nathaniel's mother moved several times after she and James divorced. When Nathaniel started working, he used his father's address as his mailing address, for employment papers, tax returns and other documents because it was more likely to be consistent than his mother's address. LF0242-43 (¶26); LF0300 (¶7). As time went on, Nathaniel continued to use that address because it was the most convenient. *Id.*

At the time of the accident, Nathaniel was an emancipated adult. LF0243 (¶29); LF0300 (¶10(a)). Nathaniel was employed and self-sufficient. LF0242 (¶25); LF0244 (¶38); LF0300 (¶6); LF0302 (¶10(i), (j)). Nathaniel did not consider – or use – Westmoor Drive as a permanent dwelling place and did not intend to stay there indefinitely. LF0243 (¶31); LF0301 (¶10(b)). He sometimes stayed at Westmoor Drive, but also regulatory and continuously stayed with Stacy, his girlfriend of seven years. LF0243 (¶¶27-30); LF0300-301 (¶¶8, 9, 10(a), 10(b)). He kept clothing and personal

items at James' house but also at Stacy's house. LF0243 (¶32); LF0301 (¶10(c)). Most of the time, Stacy did Nathaniel's laundry at her house. *Id.* Nathaniel spent far more time with Stacy than with James. LF0244 (¶37); LF0301 (¶10(h)). Nathaniel and James also did not function as a unit under one management but went about their lives separately. LF0243 (¶33); LF0301 (¶10(d)). They were independent of each other, did not make decisions together, did not vacation together, did not spend regular time together or even interact frequently. *Id.* Nathaniel came and went as he pleased without telling James where he was going or checking in with him. LF0244 (¶34); LF0301 (¶10(e)). Nathaniel made his own decisions without consulting, or any expectation of consulting, with James. LF0244 (¶37); LF0301 (¶10(h)). They rarely, if ever, ate meals together. LF0244 (¶35); LF0301 (¶10(f)). Nathaniel also was financially independent. LF0244 (¶38). He and Stacy had a joint bank account. LF0244 (¶39); LF0302 (¶10(j)). Nathaniel used a cellular telephone number for contact by friends and others. The service was in Stacy's name and they paid for it jointly. LF0244 (¶40); LF0302 (¶10(k)).

In response to these facts, Defendants stated only "Denied." *See* LF0596 (¶¶23-41). As such, they were admitted. Rule 74.04(c)(2); *Vogler,* 309 S.W.3d at 331; *Gould*, 280 S.W.3d at 142-43. The fact that Nathaniel stayed part-time with James during high school (or even at the time of the accident), that he used Westmoor Drive to receive mail or as an address for documents are not material to the salient tests: whether Nathaniel dwelled at that location on a *permanent basis* and did so as part of *a family unit*. The facts presented by Nathaniel were the facts material to these questions. *See supra*, note 11. They were admitted by Defendants and entitled Nathaniel to summary judgment.

See Brown, 657 S.W.2d at 275-76 (judgment against American Family, which failed to prove that living arrangement between insured and girlfriend "was permanent in nature" and that they "were living together as a family unit under one management."); *Southern General*, 631 S.E.2d at 421-22 (summary judgment to policyholder based on facts that although policyholder and son lived under the same roof, they were not part of a household unit).

The Eastern District refused to review denial of summary judgment for Nathaniel (Slip. Op. at 3 n.1), although proper in this case where the merits of Nathaniel's motion are intertwined with the propriety of summary judgment for Defendants. *Stone*, 9 S.W.3d at 664. Disposition for Nathaniel also is authorized by Rule 84.14. *See Mansion Hills Condo Ass'n v. American Family Ins. Co.*, 62 S.W.3d 633, 640 (Mo. App. 2001); *Chamness*, 226 S.W.3d at 208; *Redpath,* 14 S.W.3d at 41. The Court also found Nathaniel's residency to be a fact question that "depends on credibility determinations." Slip. Op. at 15. To the contrary, Nathaniel *did not deny* that he used the Westmoor address to receive mail, for bank statements and other documents. *See* LF0528. And Defendants' evidence *does not conflict* with Nathaniel's account of his living arrangements, the details of which were supplied only by Nathaniel and were *admitted* by Defendants. There is no "credibility" issue. And only genuine disputes as to "material" facts preclude summary judgment. Rule 74.04(c)(6); *supra* note 11. In the cases cited by the Eastern District (Slip Op. at 15), there were credibility issues and/or conflicting evidence with decisive bearing on the legal standards for residency. *See Miller v. Secura Ins. and Mut. Co. of Wis.*, 53 S.W.3d 152, 157-59 (Mo. App. 2001) (witness testified that

he lied in affidavit and other evidence pertaining to living arrangements in conflict); *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204, 210-11 (Mo. App. 1999) (conflicting evidence pertaining to permanency of stay and integration into household). Here there was not. The evidence Defendants presented was simply not material to whether Nathaniel dwelled at Westmoor Drive on a permanent basis or whether he and James functioned as a family unit. The only evidence affecting the outcome on these issues was presented by Nathaniel and was unopposed. Rule 74.04(c) mandates judgment for Nathaniel.

To the extent this Court believes otherwise, it is clear that Nathaniel's evidence at least raised a genuine issue of material fact precluding summary judgment for Defendants. *See American Family Mut. Ins. Co. v. Hoffman ex rel. Schmutzler*, 46 S.W.3d 631, 634-36 (Mo. App. 2001) (question of fact regarding residency precluded summary judgment for insurer).

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK HIS POLICIES NOTWITHSTANDING THE LIMITS OF LIABILITY PROVISION UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR.

Each UIM endorsement in Nathaniel's policies provides: "**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**." LF0256; LF0270; LF0283; LF0296. Defendants' reliance on the Limits of Liability provision to defeat stacking must fail because the Other Insurance provision permits it:

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

LF0257; LF0271; LF0274; LF0297. Review is *de novo*. *Burns,* 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

Identical language has been found to permit stacking. In *Clark v. American Family Ins. Co.*, 92 S.W.3d 198 (Mo. App. 1992), plaintiffs sued American Family for UIM coverage. Mr. Clark was injured when struck by a vehicle as he was standing on the shoulder of the highway. The driver had liability insurance with a limit of $25,000. The Clarks had two American Family policies listing a Plymouth and a Toyota. The UIM coverage limits under each policy was $50,000. The Limits Of Liability and Other Insurance language in the Clarks' policies was identical to the policies here. The Clarks cited the first sentence of the Other Insurance provision, which the Court found could be read to include all policies providing underinsured coverage and thus "overrides the anti-stacking clause in situations where there is more than one policy providing underinsured motorist coverage." *Id.* at 203. *See also Niswonger*, 992 S.W.2d at 315-16. Thus, plaintiffs could stack the insurance policies. The same is true here.

In support of their own motion and in opposition to Nathaniel's, Defendants argued that the second sentence of the Other Insurance provision does not apply because Nathaniel "owned" the Yamaha he was operating at the time of the accident. *See* LF0312; LF0603. Nathaniel disagrees. *See supra,* Points II, III; *infra*, Point XI(A). Nevertheless, Defendants did not dispute that the *first* sentence applies as in *Clark* to overcome the Limits of Liability and permit stacking. *See* LF0312; LF0603; *see also* LF0143; LF0222-224. This issue must be resolved in Nathaniel's favor.

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF IS ENTITLED TO STACK JAMES MANNER'S POLICY UNDER THE OTHER INSURANCE PROVISION WHICH CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN PLAINTIFF'S FAVOR.

Again, Nathaniel is an insured person under James' policy because he is James' biological son and thus James' "relative" entitled to UIM coverage. LF0296; LF0241 (¶14); LF0299 (¶2); LF0596 (¶14); American Heritage Dictionary (3d ed. 1996) 1523. James' policy contains the same "Other Insurance" provision as Nathaniel's policies. LF0297. Review is *de novo*. *Burns,* 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202. The first sentence of that provision overrides the Limits of Liability to permit stacking. *Clark*, 92 S.W.3d at 203. Assuming that the first sentence does not apply, the second plainly does. The word "you" is defined as the policyholder (James). LF0290 (¶10). It is undisputed that James did not own the Yamaha. *See* LF0241 (¶14); LF0596 (¶14). Hence, the second sentence applies and permits stacking. *Ritchie*, 307 S.W.3d at 137; *Chamness,* 226 S.W.3d at 208; *Seeck*, 212 S.W.3d at 132; *Ragsdale*, 213 S.W.3d at 55; *Niswonger,* 992 S.W.2d at 315-16. Defendants did not dispute that the second sentence applies to James' policy or creates an ambiguity permitting stacking under these authorities. *See* LF0312 (addressing only Nathaniel's policies); LF0603 (same). This issue also must be resolved in Nathaniel's favor.

VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN PLAINTIFF'S POLICIES DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

Defendants also asserted that a "two or more" vehicle provision in the General Provisions section precludes stacking. Review is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202. As to Nathaniel's Yamaha policy, this provision does not apply by its terms. It otherwise is ambiguous.

A. General Provision No. 3 In The Yamaha Policy Does Not Preclude Stacking.

Nathaniel's Yamaha Policy was issued by American Standard. The "two or more" provision, found in the General Provisions, states:

> 3. **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**.

LF0253. Nathaniel did not have two or more *motorcycles* insured. Moreover, the word "us" is defined as "the company providing this insurance." LF0249 (Definitions ¶9). The Yamaha Policy was issued by American Standard. Nathaniel's other policies were

issued by American Family. By its terms, the "two-or-more" provision in the Yamaha Policy does not apply. Even if so, it is ambiguous for the same reasons discussed below.

B. General Provision No. 3 Is Ambiguous And Does Not Preclude Stacking.

Like the provision in Nathaniel's Yamaha Policy, the "two-or-more" provision in Nathaniel's Ford policies states:

> 3. **Two or more cars 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 **cars**, the coverages apply separately to each **car**.

LF0267; LF0280. In all the policies, this provision is found in the General Provisions section, Part VI of the main policy. LF0253; LF0267; LF0280. It is preceded by Part I (Liability Coverage), Part II (Medical Expense Coverage), Part III (Uninsured Motorists Coverage), Part IV (Car Damage Coverages), and Part V (Emergency Road Service Coverage). LF0249-253; LF0263-267; LF0276-280. Parts I–IV each contain a Limits of Liability addressing limits of American Family's "liability" in regard to the particular coverage provided. There is no definition of "liability" as used in General Provision No. 3 (Part VI), and no indication of the coverage to which it refers. The UIM coverage is provided by endorsement, which is a separate attachment. The endorsement contains its own definitions, exclusions, and Limits of Liability provision. There is no "two-or-more" language in the endorsement. The endorsement states that it "forms a part of the

policy to which it is attached," but does *not* state that all provisions in the main policy are incorporated into the endorsement.

Ambiguity in an insurance contract "is not to be measured from the standpoint of one who has great expertise in the special terminology and intricacies of insurance law. Rather, the language is to be viewed in the light that would ordinarily be understood by the layman who bought and paid for the policy." *Niswonger*, 992 S.W.2d at 316; *accord Ritchie*, 307 S.W.3d at 135. Moreover, "as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract." *Krombach v. Mayflower Ins. Co*, 827 S.W.2d 208, 211 (Mo. banc 1992). The canon *contra proferentem* is "rigorously applied" in insurance contracts, "in recognition of the difference between the parties in their acquaintance with the subject matter." *Id.* at 211; *accord Burns*, 303 S.W.3d at 510; *Niswonger*, 992 S.W.2d at 317. "Insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion." *Krombach*, 827 S.W.2d at 211.

Based on the lack of any definition of "liability," and placement of General Provision No. 3 in the section immediately following various coverages, a reasonable layman would understand that provision to apply to those coverages, not additional coverage provided by attachment. American Family has itself urged that General Provision No. 3 applies to *liability* coverage. *Durbin v. Deitrick*, 323 S.W.3d 122 (Mo. App. 2010). Also, the UIM coverage applies to Nathaniel the person – it follows him, not the vehicle. *Niswonger,* 992 S.W.2d at 313. By contrast, General Provision No. 3 refers to "cars insured." Coverages preceding Part VI include liability (Part I), car damage (Part

IV) and emergency road service (Part V), pertaining to the insured car. Finally, the Other Insurance provision signifies that other similar UIM insurance can be combined. *Clark*, 92 S.W.2d at 203; *Chamness,* 226 S.W.3d at 208. Nathaniel raised these ambiguities below (*see* LF0517-521) to which Defendants did not reply. They must be resolved in Nathaniel's favor. *See Ritchie*, 307 S.W.3d at 135 (if ambiguous, policy "must be construed against the insurer and stacking will be allowed.").

IX. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPETED THE POLICIES IN THAT GENERAL PROVISION NO. 3 IN JAMES MANNER'S POLICY DOES NOT APPLY OR IS AMBIGUOUS AND MUST BE INTERPRETED IN PLAINTIFF'S FAVOR.

General Provision No. 3 in James' policy suffers from the same ambiguities discussed above. Again, review is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202. In addition, James' policy provides that when "Two or more Motorcycles [are] Insured[,] [t]he 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." LF0294. The word "**you**" means the policyholder, *i.e.*, James. LF0290 (Definitions ¶10). Nathaniel is covered under James' policy not as a policyholder but a relative. Moreover, there is only one policy issued to James. The provision does not apply for all these reasons.

Moreover, the same "two or more" provision as the one here was addressed in *Chamness*, 226 S.W.3d at 201-202, holding that it does not defeat stacking because of the

second sentence of the Other Insurance provision, which allows it. *Id.* at 207-08; *see also Durbin,* 323 S.W.3d at 125. That provision clearly applies to James' policy and defeats General Provision No. 3.

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT PLAINTIFF MAY STACK POLICIES TO MEET THE DEFINITION OF UNDERINSURED MOTOR VEHICLE AND THE STACKING OF ANY TWO POLICIES AT ISSUE RENDERS THE TORTFEASOR'S VEHICLE UNDERINSURED.

To the extent the trial court accepted Defendants' argument that Nathaniel is not entitled to UIM coverage because the limits of his Yamaha Policy were the same as the limits of Schiermeier's policy, it erred as a matter of law. Review is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness*, 226 S.W.3d at 202.

The underinsured definition is not viewed in isolation, but as part of the policy as a whole. *Ragsdale*, 213 S.W.3d at 54. If Nathaniel can stack any policy at issue, Schiermeier was underinsured. *See Chamness,* 226 S.W.3d at 205 (insured could stack policies and met the definition of underinsured motorist) (citing *Seeck,* 212 S.W.3d at 132-33; *Ragsdale,* 213 S.W.3d at 56); *see also* Slip. Op. at 16. Nathaniel can combine his own policies, and also James' policy. Even if General Provision No. 3 is found unambiguous and overcomes the Other Insurance provision, Nathaniel is entitled to stack at least three policies as it: (1) does not apply to Nathaniel's Yamaha Policy or James'

Suzuki Policy; and (2) caps American Family to the highest limit under one of the Ford policies. In that event, the combined UIM limit is $300,000 and Schiermeier was underinsured.

XI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE THE COURT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT THE LIMITS OF LIABILITY PROVISION REGARDING SET-OFF CONFLICTS WITH OTHER PROVISIONS RENDERING IT AMBIGUOUS AND REQUIRING INTERPRETATION IN PLAINTIFF'S FAVOR.

Defendants also asserted that no amount is due under Nathaniel's Yamaha Policy because they are entitled to set off the $100,000 Nathaniel received from Schiermeier's liability insurer as well as $750,000 received from the other tortfeasors. LF0314-315. There is no set-off under the Yamaha Policy, or any other policy, based on the Other Insurance and the Limits of Liability provisions. Interpretation is *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

A. The Set-Off Provision Conflicts With The Other Insurance Provision In Plaintiff's Policies.

In *Clark*, the Court found stacking appropriate under the first sentence of the Other Insurance provision but also found that American Family could set off the amount paid under the driver's liability insurance. 92 S.W.3d at 204. In *Chamness*, the Court looked to the plain language of the word "similar" in the second sentence of the Other Insurance

provision to find that it precluded set-off. 226 S.W.3d at 208; *see also Ragsdale*, 213 S.W.3d at 57. Respectfully, the same meaning applies to the first sentence as well. It provides that "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*." The word "similar" is not defined. The plain meaning of that word is "[r]esembling though not completely identical." *Chamness*, 226 S.W.3d at 206. Because "similar" insurance includes insurance provided under any other policy, an ordinary person would understand the policy to pay its share proportionate to all other insurance, including the other driver's liability insurance. Also, use of the word "pay" connotes *actual payment* by the insurer, not just coverage, and is inconsistent with a reduction under the Limits of Liability section. If one provision purports to give something, but another purports to take it away, there is an ambiguity that should be resolved in the insured's favor. *Chamness*, 266 S.W.3d at 204.

The second sentence of the Other Insurance provision also applies if Nathaniel was occupying a vehicle he did not own. For all the reasons addressed, Nathaniel did not "own" the Yamaha. "Ownership" is a "bundle of rights allowing one to use, manage and enjoy property, including the right to convey it to another." Black's Law Dictionary 1138 (8th ed. 2004); *accord Lightner*, 789 S.W.2d at 489 ("owner" means 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.") (quoting Black's Law Dictionary 996 (5th ed. 1979)). Because "owned" is not defined and means more than one thing, it is ambiguous

and must be construed in Nathaniel's favor to mean title, or at least more than mere possession. *Lightner*, 789 S.W.2d at 490. Nathaniel had not fully paid for the motorcycle, did not have title, and did not have the right to sell or dispose of it at will. He did not own the Yamaha. At minimum, Defendants failed to demonstrate the absence of a material fact issue on this subject, precluding summary judgment in their favor.

B. The Set-Off Provision Conflicts With The Other Insurance Provision In James Manner's Policy.

Set-off under James' policy is also precluded because of ambiguity created by the Other Insurance provision. Again, the phrase "similar insurance" is not limited to other UIM coverage but includes any other applicable coverage. *Chamness*, 226 S.W.3d at 206-207. The "excess" language in the second sentence indicates that the endorsement provides coverage over and above that furnished by the tortfeasor's insurance. *Id.* at 205, 208. The second sentence plainly applies to James' policy because Nathaniel is an "insured person" (James' relative), and it is undisputed that he was occupying a vehicle James did not own. Accordingly, there is no set-off under James' policy. *Id.* at 208; *accord Ragsdale,* 213 S.W.3d at 57. Defendants offered nothing to the contrary.

C. The Set-Off Provision Conflicts With The Limits Of Liability Language.

In addition, this Court found language very similar to the Limits of Liability here ambiguous in *Ritchie*, 307 S.W.3d 132. There, language that the limit of liability "is our maximum limit" was found to conflict with other language that the limit of liability "shall be reduced by all sums paid on behalf of persons [or] organizations who might be legally

responsible" since application of the latter would mean that the insurer would never actually pay the full amount of its stated limits, making the statement that it would do so misleading. *Id.* at 137, 140-141. This Court pointed to *Jones*, 287 S.W.3d 687, which resolved the conflict by providing an alternate interpretation, *i.e.*, that "in determining the total damages to which the [UIM] coverage will be applied, the amount of money already received from the tortfeasor must be deducted." *Ritchie*, 307 S.W.3d at 141.

Similarly, the policies here state that the liability limit "is the maximum for all damages" and that "**We** will pay no more than these maximums," while also stating that the liability limit "will be reduced by . . . [a] payment made or amounts payable by or on behalf of any person or organization which may be legally liable." LF0256; LF0270; LF0283; LF0296. The same conflict is present. Applying the meaning ascribed by *Ritchie* and *Jones*, the amount Nathaniel received from Scheirmeier's liability insurer ($100,000) would be deducted from Nathaniel's stipulated damages ($1,500,000), making Defendants "responsible for the difference." *Ritchie*, 307 S.W.3d at 141. Even if the $750,000 received from the helmet defendants is considered (which it should not be as discussed *infra*, Point XII), the difference ($1,500,000 - $850,000 = $650,000) would still be more than the policy limits (here, a combined $400,000) and Defendants must still pay the full amount. *Id.*

XII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT IGNORED THE LAW AND MISINTERPRETED THE POLICIES IN THAT SET-OFF IS FOR AMOUNTS PAID FOR LOSS CAUSED BY AN ACCIDENT WITH AN UNDERINSURED MOTOR VEHICLE WHICH DOES NOT INCLUDE AMOUNTS PAID THROUGH ANOTHER SOURCE.

Although unnecessary to reach the issue, Defendants are not entitled to set off amounts from the helmet manufacturer/seller for another reason based on the policy language, which is reviewed *de novo*. *Burns*, 303 S.W.3d at 509; *Chamness,* 226 S.W.3d at 202.

The set-off provision states: "The limits of liability of this 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*." LF0257; LF0271; LF0284; LF0297 (emphasis added). The italicized language modifies both preceding phrases. And "this coverage" plainly refers to the UIM coverage, applicable to "bodily injury which an insured person is legally entitled to recover *from the owner or operator of an underinsured motor* vehicle," caused by an accident and "*aris[ing] out of the use of the underinsured motor vehicle*." LF0256; LF0270; LF0283; LF0296 (emphasis added). The very purpose of UIM coverage is "to provide a source of recovery for insureds . . . who have been bodily injured by a negligent motorist whose own automobile liability

insurance coverage is insufficient to fully pay for the injured person's actual damages." *Niswonger*, 992 S.W.2d at 313; *Wasson*, 358 S.W.3d at 117. The language, structure and context of the endorsement ties the source of the set-off to the source of the coverage, *i.e.*, the underinsured motorist.

Helmet City and Jafrum International were the manufacturers/sellers of Nathaniel's motorcycle helmet. *See* LF0157-0172 (¶¶9-10, 12-15). Nathaniel alleged that the helmet was defective (LF0157-172 at ¶¶16, 17) and that defendants failed to adequately warn or instruct on its fit and use. LF0162 (¶18). *See also id.* (¶19); LF0164-0170 (¶¶25-36, ¶37-44, ¶¶45-50). These defendants were not owners or operators of an underinsured vehicle, their liability did not arise from their use of that vehicle, and they did not cause the accident. The set-off does not apply as to them. An instructive case is *State Farm Mutual Automobile Insurance Co v. Motley,* 909 So.2d 806 (Ala. 2005), holding that the insurer could set off only amounts received from the underinsured motorist, not other tortfeasors. At minimum, the coverage and set-off provisions are ambiguous as to the source of a reducing payment, which must be resolved in Nathaniel's favor. And again, even if the amount received from the helmet defendants is considered, the difference ($650,000) would still be "far more than the policy limits" ($400,000) and Defendants are still obliged to pay the full amount. *Ritchie*, 307 S.W.3d at 141.

In connection with their set-off argument, Defendants also cited a provision in the Yamaha Policy that 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 judgments or settlements." *See* LF0314 (emphasis added). This provision is

again inapplicable. Defendants did not demonstrate that the helmet defendants (sued for failure-to-warn and product defect) had a "bodily injury bond[] or polic[y]," *i.e.*, a "motor vehicle" bond or policy insuring against bodily injury with liability limits less than Nathaniel's UIM limits. LF0270 (Definitions ¶3); LF0283 (same). There is no dispute that Nathaniel exhausted the liability limits of the policy issued to Schiermeier, who was the only negligent motorist, and Defendants did not assert failure to exhaust some other policy to deny coverage but consented to suit. *See* LF0174; *Kinney v. Schneider Nat'l Carriers, Inc.*, 213 S.W.3d 179, 183-84 (Mo. App. 2007). Even if the provision can somehow include the product liability defendants, who somehow had a "bodily injury liability bond[] or polic[y]" capable of exhaustion, Defendants offered nothing else purporting to show that Nathaniel received payment under such a bond or policy, or even if so, collected less than the limits. And there is nothing in this provision that supports a set-off. To the extent the trial court found otherwise, it erred.

XIII. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DENYING SUMMARY JUDGMENT TO PLAINTIFF BECAUSE IT MISAPPLIED THE LAW IN THAT APPROVAL OF DEFENDANTS' POLICIES BY THE DIRECTOR OF INSURANCE DOES NOT PRECLUDE A JUDICIAL FINDING OF AMBIGUITY.

Before the trial court, Defendants asserted that because they submitted the form of insurance to the Director of Insurance for approval under Mo. Rev. Stat. §375.920, an ambiguity cannot be found. LF0319-320. Defendants relied on an incompetent affidavit,[14] and cited no legal authority for their argument. It is meritless.

In *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479 (Mo. banc 1992), this Court addressed Section 375.920 in connection with a household exclusion that plaintiffs asserted was contrary to the Motor Vehicle Financial Responsibility Law. American Family argued that the Division of Insurance "approved" the policy, insulating it from judicial scrutiny. This Court made short work of that argument, stating: "Section 375.920 . . . does not give the Director of Insurance a roving commission to determine the permissible provisions of insurance policies but simply authorizes that officer to litigate

[14] Defendants proffered an affidavit from James Helmueller which failed to demonstrate personal knowledge, failed to affirmatively show that he was competent to testify and contained inadmissible hearsay. *See* LF0545-546 (¶¶56-59). The affidavit was deficient under Mo. R. Civ. P. 74.04(e) and should not have been considered.

issues about policy language and provisions by petition to the Administrative Hearing Commission. This does not preclude parties to litigation from advancing public policy arguments regarding provisions of insurance contracts [which] . . . ultimately [are] for the courts. Section 375.920 does not legitimize all policy exclusions to which the director does not take explicit exception." *Id.* at 482. Just as matters of public policy are for the courts, so too is the interpretation of an insurance contract and the decision as to whether it is ambiguous. *Karscig,* 303 S.W.3d at 504; *McCormack Baron Management Services, Inc. v. American Guarantee & Liability Ins. Co.*, 989 S.W.2d 168, 171 (Mo. banc 1999); *Columbia Mutual Ins. Co. v. Schauf,* 967 S.W.2d 74, 76 (Mo. banc 1998). Defendants' argument does violence to the separation of powers. Mo. Const. art. II, § 1; art. V, § 1. It also would mean that an insured could never litigate policy interpretation or ambiguity. Clearly, that is not the law. Defendants conceded this Point on appeal. *Supra*, note 3. To the extent the trial court determined otherwise, it erred.

CONCLUSION

For all the reasons stated herein, Plaintiff-Appellant respectfully requests that this Court reverse summary judgment for Defendants and direct entry of judgment for Plaintiff as authorized by Missouri Supreme Court Rule 84.14. At minimum, judgment for Defendants should be reversed and the case remanded for disposition in accordance with this Court's decision.

CERTIFICATE OF COMPLIANCE

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned certifies that this brief: includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) pursuant thereto, contains 16,581 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Mo. R. Civ. P. 84.06. The undersigned further certifies that the diskette prepared pursuant to Rule 84.06 has been scanned for viruses and is virus-free.

/s/ Gretchen Garrison
Counsel for Appellant

Respectfully Submitted,

/s/ Gretchen Garrison
GRAY, RITTER & GRAHAM, P.C.
Maurice B. Graham #18029
Gretchen Garrison #33963
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)
mgraham@grgpc.com
ggarrison@grgpc.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 21 day of May, 2012 electronically filed a copy of the forgoing pursuant to the automated filing system established by Missouri Supreme Court Operating Rules 1.03 and 27, to be served upon counsel for the parties by operation thereof, and further that pursuant to Rules 84.05 and 84.06(g) one copy of the foregoing with a disk (scanned and virus-free) were on the same date served via deposit in the U.S. Mail, postage prepaid, to said counsel:

Mr. Robert J. Wulff, Jr.
Evans & Dixon LLC
515 Olive Street, Suite 1100
St. Louis, Missouri 63101-1836
Attorney for Defendants/Respondents

/s/ Gretchen Garrison
Counsel for Appellant