**IN THE SUPREME COURT OF MISSOURI**

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**No. SC 92408**

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**NATHANIEL MANNER**

**Plaintiff-Appellant**

**v.**

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

**Defendants-Respondents**

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

**Case No. 0711-CV07158**

**Honorable Nancy L. Schneider**

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# SUBSTITUTE REPLY

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## ARGUMENT

### I. THE OWNED-VEHICLE EXCLUSION DOES NOT APPLY OR IS AMBIGUOUS BECAUSE IT APPLIES TO A "PERSON" OTHER THAN THE POLICYHOLDER OR RELATIVE.

Exclusions are strictly construed against the insurer. *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010). "[I]f reasonably possible, [an exclusionary] clause will be construed so as to afford coverage." *American Family Mut. Ins. Co. v. Brown*, 657 S.W.2d 273, 275 (Mo. App. 1983). Also, ambiguities are construed in favor of the insured. *Amercian Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51, 55 (Mo. App. 2007). Ambiguities exist if there is "duplicity, indistinctness, or uncertainly 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). Language is ambiguous if open to differing interpretations, or if one provision conflicts with another. *Ritchie*, 307 S.W.3d at 135.

Defendants, like the Eastern District, focus entirely on one of the two arguments raised by Nathaniel – that the word "person" in the owned-vehicle exclusion is undefined and does not refer to "you," "insured person" or other words connoting the policyholder or relative. Resp.Br.at 59-66. Like the Eastern District, Defendants advance a wide-ranging search through the policy for other provisions containing the word "person" based on *Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369 (Mo. App. 2011). Resp.Br.at 62-65. As already addressed, *Jensen* is distinguishable, and in any event far narrower than applied by the Eastern District and now Defendants. App.Br.at 25-26. Moreover, the

provisions on which they rely are unsupportive, do not consider a layperson's reading, and stretch too far in favor of the insurers. *Id.* at 26-28. In addition, both Defendants and the Eastern District ignore the conflict between the UIM insuring clause and the interpretation of the exclusion they advance.

The insuring clause 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." LF0270; LF0283; LF0296. The endorsement defines who is an "insured person" – pertinently, "a. **You** or a **relative**" and "b. anyone else" but only if "occupying **your insured car**." *Id.* Under the insuring clause and definitions, the policyholder ("you") or a relative is entitled to UIM coverage whether he is occupying the insured vehicle or not. The coverage 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." *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 313 (Mo. App. 1999) (emphasis original); *accord Wasson v. Shelter Mut Ins. Co.*, 358 S.W.3d 113, 117-18 (Mo. App. 2011). Nathaniel is the policyholder of the Ford policies; he is James' relative under the Suzuki policy. As such, the insuring clause and definitions promise coverage regardless of whether Nathaniel was occupying the insured vehicle. Interpreting the exclusion to deny coverage *unless* Nathaniel was occupying that vehicle directly conflicts with and nullifies the insuring clause and definitions. "[I]f a contract promises something at one point and takes it away at another, there is an ambiguity." *Seeck v. Geico Gen. Ins. Co.* 212 S.W.3d 129, 133 (Mo. banc 2007); *Burns*, 303 S.W.3d at 512. Defendants' version of the exclusion also

means that it restricts coverage to a single policy contrary to the Other Insurance provision. *Infra*, Point V. Such ambiguities are resolved in Nathaniel's favor. *Ritchie*, 307 S.W.3d at 135.

## II. THE OWNED-VEHICLE EXCLUSION IN THE FORD POLICIES DOES NOT APPLY UNDER THE CIRCUMSTANCES.

Beyond this lies the word "owned" in the exclusion itself. Defendants advocate that "owned" means mere possession based on Merriam-Webster's on-line dictionary. Resp.Br. at 46. Even if this source is appropriately consulted, rather than Black's Law Dictionary as in *Lightner v. Farmers Ins. Co., Inc.*, 789 S.W.2d 487, 490 (Mo. banc 1990) and *U.S. Fidelity & Guaranty Co. v. Safeco Ins. Co. of America*, 522 S.W.2d 809 817-18 (Mo. banc 1975), it does not aid Defendants. Merriam-Webster defines "own" to include: "**1a.** to have or hold as *property*." Merriam-Webster Dictionary on line (http://www.merriam-webster.com/dictionary/own) (emphasis added). It defines "property" as "**2a**. the exclusive right to possess, enjoy *and dispose of*;" "**2c**. something to which a person . . . *has legal title*." *Id.* (http://www.merriam-webster.com/dictionary/property) (emphasis added). In this state, it is unlawful to buy or sell a motor vehicle without title. Mo. Rev. Stat. §301.210. Nathaniel did not have title to the Yamaha and thus did not have or hold it as "property."

The key to resolution are three questions: is the word "own" ambiguous?; if so, how does that ambiguity effect interpretation?; and should the exclusion be interpreted to deny coverage? The answers are clear. This Court has unequivocally held that because it has more than one meaning, "owned" is ambiguous. *Lightner,* 789 S.W.2d at 490;

*Safeco*, 522 S.W.2d at 817-18. Accordingly, "courts *must* take the meaning most favorable to the insured." *Id.* (emphasis added). Moreover, exclusionary provisions are strictly construed against the drafter. *Burns*, 303 S.W.3d at 510. "Because an insured purchases coverage for protection, the policy will be interpreted to grant coverage rather than defeat it." *Penn-Star Ins. Co. v. Griffey*, 306 S.W.3d 591, 596 (Mo. App. 2010); *accord Safeco Ins. Co. of America v. Smith*, 318 S.W.3d 196, 199 (Mo. App. 2010); *Haulers Ins. Co., Inc. v. Pounds*, 272 S.W.3d 902, 905 (Mo. App. 2008); *Chase Resorts, Inc. v. Safety Mut. Cas. Corp.*, 869 S.W.2d 145, 150 (Mo. App. 1992). At minimum, ambiguities are "acutely applicable" to exclusions. *Stark Liquidation Co. v. Florist's Mut. Ins. Comm.*, 243 S.W.3d 385, 393 (Mo. App. 2007). These are the tenets that inform the analysis and dictate the result. The most favorable meaning of "own" to Nathaniel is title. He did not have title to the Yamaha. The exclusion does not apply.

Defendants read *Lightner* and *Safeco* to eschew a "technical" interpretation of "own" because in both cases, title was held to be non-dispositive. Resp.Br. at 45, 51, 53. But Defendants ignore the reason for that determination – the tenet that ambiguities are resolved in favor of coverage. In *Lightner*, a father purchased a vehicle for the use of his son, adding his name to the certificate of title. The insurer argued that son's name on the title meant that he owned the vehicle, precluding coverage. 789 S.W.2d at 490. In *Safeco*, Roy Chapman was driving a vehicle owned by Dorothy Kloepper with permission from her daughter Jane. Roy's father had a policy with Safeco extending coverage to a relative if operating the vehicle with the owner's permission. 522 S.W.2d at 811. The question was whether Jane could be considered the "owner" of the vehicle.

*Id.* at 817. In both cases, this Court relied on ambiguity of the word "own" to construe it in a manner favoring the insured. *Lightner,* 789 S.W.2d at 490; *Safeco*, 522 S.W.2d at 817-18. In other words, the Court relaxed the title requirement in order to afford coverage.[1] Here, relaxing that requirement would have just the *opposite* effect. Indeed, as proposed by Defendants and interpreted by the Eastern District, the word "own" should be stripped of any concept of title at all, elevating mere possession in its stead to deny UIM coverage under any policy except the one insuring the vehicle being operated. This not only conflicts with insuring clause and personal nature of UIM coverage, but gives the owned-vehicle exclusion absolute anti-stacking effect. App.Br. at 31-33.

Defendants suggest that *McDonnell v. Economy Fire & Cas. Co.*, 936 S.W.2d 598 (Mo. App. 1996) upheld an "owned vehicle exclusion" like the one here. Resp.Br.at 57-58. It did not. As already discussed, *McDonnell* involved substitute vehicle coverage excluding injury while occupying a vehicle "owned by you or furnished or available for your regular use." *Id.* at 599. The plaintiff was driving a noninsured vehicle while her insured vehicle was being repaired. There was no question that she "owned" that vehicle, and no issue regarding the meaning of that word. And the context is entirely different

[1] The same is true of *American Economy Insurance Co. v. Paul*, 872 S.W.2d 496 (Mo. App. 1994), cited by Defendants, in which the insured purchased the vehicle her son was driving and a certificate of title was assigned but defectively executed. *Id.* at 497-98. Here, Nathaniel had not yet completed purchase of the Yamaha and there is no evidence that he had taken *any* steps to have title transferred.

than the one here. App.Br.at 31-32. By misapplying *McDonnell* as the "context" for interpreting the owned-vehicle exclusion, the Eastern District adopted a meaning of "own" – as a matter of law – that will always exclude coverage unless the insured is occupying the insured vehicle contrary to the insuring clause and the nature of UIM coverage, which is personal to the policyholder, not tied to the vehicle. App.Br. at 31-33; *Wasson*, 358 S.W.3d at 117; *Niswonger*, 992 S.W.2d at 313. And it defeats the purpose of UIM protection, which is to provide a source of payment were the liability coverage of the negligent motorist is insufficient. *Wasson*, 358 S.W.3d at 117. It would also mean that UIM coverage is restricted to a single policy, resulting in categorical anti-stacking effect. Defendants ignore these problems.

*Shelter Mutual Ins. v. Ballew*, 203 S.W.3d 789 (Mo. App. 2006), cited by Defendants, adds nothing. There, purchasers sued insured sellers for misrepresenting that a house was free of defects. The insurer refused to defend or indemnify based on exclusions for damage to "property owned by an insured." *Id.* at 793 n.8. The insureds asserted ambiguity respecting the time at which damage must occur for the exclusion to apply. *Id.* at 794. The court cited Webster's dictionary that "owned" means "held in one's own possession." *Id.* There was no issue pertaining to title, however, and in truth, whatever meaning was given to "own" would have sufficed because in order for a claim of negligent misrepresentation to exist, the defects must have existed prior to the sale. "Otherwise, there would have been no false representations." *Id.* at 793; *see also id.* at 795 (same). This case says nothing in regard to interpretation of "own" for purposes of an automobile insurance exclusion.

*State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207 (Mo. 1973), is even further afield. There, taxpayers entered into contracts providing that title to property they purchased passed to the government upon delivery. The question was whether they were liable for sales tax. Section 144.010(8) defined "retail sale" as "any transfer made by any person . . . of the ownership of, or title to, tangible personal property . . . ." *Id.* at 213 (quoting statute). This Court held that the General Assembly intended to place the tax burden upon "the person paying the purchase price," and because the statute referenced title and ownership disjunctively, it included both titleholders and persons who "exercise dominion over the property such as by directing who the recipient of such title shall be" as the taxpayers did through their contract. *Id.* at 215. This case interprets a taxation statute expressly including title and other incidents of ownership, not an insurance exclusion with attendant tenets of construction favoring the insured.

Here, the tenets of construction must be applied. Once it is acknowledged that the word "own" is ambiguous, the meaning most favorable to the insured must attach. Applying that tenet alone or in combination with strict construction of exclusions, the result is straightforward. Here, the most favorable meaning – the one that affords coverage – is title to the Yamaha, which it is undisputed Nathaniel did not have.

## III. DEFENDANTS FAILED TO ESTABLISH ENTITLEMENT TO SUMMARY JUDGMENT UNDER ANY REASONABLE MEANING OF "OWNED."

Judgment should have been entered in Nathaniel's favor for any of the reasons addressed, *supra*, Points I or II. Even if ownership means something less than title, but more than mere possession, however, judgment should not have been entered for Defendants.

It is Defendant's burden to establish that the exclusion applies. *Dodson Intern. Parts, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg Pennsylvania*, 332 S.W.3d 139, 145 (Mo. App. 2010). The record is viewed "in the light most favorable to the party against whom summary judgment was entered," affording him "the benefit of all reasonable inferences." *Safeco*, 318 S.W.3d at 199.

Defendants rely on the unsupported representations they made below, and continue to ignore the facts and inferences afforded to Nathaniel. Resp.Br.at 16-17, 41-42, 46-47, 58-59, 85-86. Nathaniel did not admit that he had "purchased" the Yamaha, but only that he had paid "some" money to his Uncle. App.Br.at 35. The fact that Nathaniel took out insurance on the Yamaha *does not* mean he "owned" it or admitted anything of the sort. Resp.Br.at 16. Nor is Nathaniel taking an inconsistent position. *Id.* at 85. The policy itself does not require title or any other attribute of ownership for liability coverage, which applies to "the **use** of" the insured vehicle (*see* LF0249), and is effective as either an owner's *or operator's* policy. App.Br.at 37 (citing cases). UIM coverage rests on Nathaniel's status as an insured person, without regard to the insured

vehicle at all. It is undisputed that Nathaniel did not have title. Defendants say that Nathaniel was "in the process of transferring title" (Resp.Br.at16-17, 41-42), but the evidence does not demonstrate that any such "process" had even begun; Nathaniel does not recall taking *any* steps toward transferring title. LF0339 (31:14-17). Defendants' representation that Nathaniel "treated the Yamaha . . . as his own" ignores their Rule 74.04(c) violations (App.Br.at 35), and does not support judgment for Defendants in any event. *Id.* at 36. The fact that Nathaniel had possession of, and was permitted to drive, the Yamaha is insufficient to prove ownership. In *Lightner*, the son had both possession and title, was allowed to drive the vehicle, "and have its general use with little or no controls." 789 S.W.2d at 490. But "nothing in the evidence indicated this was done other than with the permission of his father, and it [could] not seriously be suggested that he was free to voluntarily destroy, encumber, sell or otherwise dispose of the truck." *Id.* The same is even more true here, where Nathaniel did not have title, and the Yamaha was not a gift. Summary judgment for Defendants was improper.

## IV. THE OWNED-VEHICLE EXCLUSION IN THE SUZUKI POLICY DOES NOT APPLY UNDER THE CIRCUMSTANCES.

If it survives the conflict in Point I, the Suzuki policy exclusion still requires that the Yamaha was "owned" by James or "owned" by a "resident of [James'] household." LF0296. Both elements must be present. James did not own the Yamaha. Nathaniel did not own it either. Again, the exclusion does not apply. And even if Nathaniel did "own" the Yamaha, he was not a resident of James' household. App.Br.at 40-46.

Defendants assert that Nathaniel's use of Westmoor address for bank statements, medical bills, tax returns, and his driver's license should decide the issue. Resp.Br.at 70-72.[2] Not so. 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). It is the substantive law "that identifies which facts are material to a claim, and thereby determine[] which facts are critical." *American Family Mut. Ins. Co. v. Lacy*, 825 S.W.2d 306, 313 (Mo. App. 1991). The words "resident" of a "household" are terms of art in an insurance policy, requiring both permanency and the characteristic of a "family unit under one management." *Brown*, 657 S.W.2d at 275-76; *see also* App.Br.at 40-41 (citing cases). As a matter of law, a mere address – or even living under the same roof – is not the test. The facts presented by Nathaniel demonstrate that he did not live at Westmoor Drive on a permanent, or even consistent, basis and that he and James did not function as a family unit. App.Br.at 42-44 (setting out facts). These are the material facts dispositive under controlling standards.

Defendants' representation that Nathaniel's affidavit "states legal conclusions" (Resp.Br.at 69, 70) is ridiculous. Nathaniel's affidavit provides facts detailing his living arrangements. LF0242-0244 (¶¶24-41); LF0300-302 (¶¶5-11). And Defendants *admitted* those facts pursuant to Rule 74.04(c)(2). *See* LF0596 (¶¶23-41) (stating only "Denied"); App.Br.at 44. Defendants made no objection that these facts were legal conclusions,

[2] Many of the documents Defendants submitted were hearsay and/or unauthenticated and should not have been considered by the trial court at all. *See* LF0324-326 (¶¶17-26).

which would have been ill-taken even if they had. The notion that Nathaniel's affidavit is "self-serving" (Resp.Br.at 70) also is meritless. Affidavits are expressly contemplated by Rule 74.04 and Nathaniel simply filled in the details Defendants neglected to address at his deposition.

Advocating for remand, Defendants express chagrin over the dispute regarding applicability of the owned-vehicle exclusion, suggesting that their in-house counsel somehow understood from Nathaniel's response to the helmet defendants' interrogatories that Nathaniel "was living with his father." Resp.Br.at 16, 67-68 n.13. There is no evidence that in-house counsel ever saw this interrogatory answer, much less relied on it for any purpose. Moreover, the interrogatory asked for an "address," not in whose household Nathaniel resided. LF0425. At no time did Nathaniel concede that he was a "resident of [James'] household" for purposes of the exclusion. Nathaniel gave his father's address to the insurance agent (Resp.Br.at 16) because he used it as a mailing address. The agent did not explain any exclusion, describe what was meant by "resident," ask about his living arrangements, ask for an alternative address or indicate that one should be provided. LF0302(¶12). At bottom, an address and residency in a household are not synonymous as a matter of law. The legal standards for household residency are well established in Missouri and could hardly come as a surprise to an insurance lawyer for Defendants. If so, ignorance is no defense. *E.g., Grice v. City of St. Robert*, 824 S.W.2d 470, 472 (Mo. App. 1992). Defendants were *specifically* advised of these standards before they took Nathaniel's deposition. *See* LF0140-142. Yet they

failed to examine him on the factors material thereto.[3] The material facts were one-sided and unopposed. "Mindful that insurance policies are to be construed, if reasonably possible, to accomplish the designated protection, and provisions avoiding liability . . . are most strictly construed against the insurer," the facts establish that Nathaniel was not a resident of James' household. *Giokaris v. Kincaid*, 331 S.W.2d 633, 641 (Mo. 1960). Defendants had every opportunity to develop a record to defeat Nathaniel's summary judgment motion and to support their own. They did not. Defendants' evidence "does not bring the exclusion into effect." *Lacy*, 825 S.W.2d at 314. Nathaniel's defeats it.

## V. THE POLICIES CAN BE STACKED.

All of the policies can be stacked under the first and/or second sentence of the Other Insurance clause. App.Br.at 47-49. As to the Suzuki policy, it is *undisputed* that Nathaniel (a relative and thus an "insured person") was occupying a motorcycle that James ("**you**," *i.e.*, the policyholder) did not own. The second sentence plainly applies to this policy and permits stacking. *Ritchie,* 307 S.W.3d at 137; *Chamness v. American*

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[3] *E.g., Brown*, 657 S.W.2d at 275-76 (sharing of household expenses and/or financial accounts; telephone listing, where possessions kept); *Missouri Ins. Co. v. Ward*, 487 S.W.2d 449, 451 (Mo. 1972) (son and grandson moved in temporarily with father; son bought own groceries; seldom ate together; utilities paid by father; telephone listing in son's name); *American Family Mut. Ins. Co. v. Hoffman ex rel. Schmutzler*, 46 S.W.3d 631, 634-36 (Mo. App. 2001) (where possessions kept; freedom to come and go; intermittent or permanent living location).

*Family Mut. Ins. Co.*, 226 S.W.3d 199, 203 (Mo. App. 2007); *Ragsdale*, 213 S.W.3d at 55-57; *Niswonger*, 992 S.W.2d at 315-16.[4]

The second sentence in Nathaniel's Ford policies also applies. The word "own" is still 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 did not "own" the Yamaha, but was occupying a motorcycle still "owned" by his Uncle. Stacking is again permitted under the second sentence. The first sentence applies regardless of who owned the Yamaha and also permits stacking. *Clark v. American Family Mut. Ins. Co.*, 92 S.W.3d 198, 203 (Mo. App. 1992).[5]

*O'Driscoll v. Azim Mutapcic*, 210 S.W.3d 368 (Mo. App. 2006), cited by Defendants (Resp.Br.at 83-85) is inapposite. First, the owned-vehicle provision in that case expressly applied to "an insured," unlike the exclusion here. *Id.* at 370. Second, no conflict was identified or addressed vis-à-vis that provision and the insuring clause, which, in this case, promises UIM coverage regardless of whether Nathaniel was occupying the insured vehicle. Third, the Other Insurance provision in *O'Driscoll* was

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[4] Defendants do not dispute that Nathaniel is an insured person under James' policy. Protestations aside, neither did they dispute applicability of the second sentence in James' policy. *See* Resp.Br.at 8, citing LF0316-17 (addressing Yamaha policy and first sentence of Other Insurance clause vis-à-vis General Provision 3). No matter. They cannot.

[5] Defendants contend that *Clark* (and *Kyte*) permits set-off, but that is a separate issue. Resp.Br. at 74 n.15, 80-83. .

different than the one here (*id.* at 373), which has been specifically addressed and found to permit stacking in *Clark*, *Chamness*, and *Ragsdale*. Defendants cannot overcome the ambiguities that make the owned-vehicle exclusion inapplicable, and permit stacking, for all these reasons.

## VI. GENERAL PROVISION NO. 3 DOES NOT APPLY.

The "two-or-more" vehicle provision also does not preclude stacking. First, the provision's language and placement in the policy renders it ambiguous. App.Br.at 51-53. Defendants did not address this ambiguity below or before the Eastern District. They do not do so now. Second, the provision does not apply by its terms to the Yamaha or the Suzuki policy because American Standard issued only one policy to Nathaniel and one policy to James. App.Br.at 50-51, 53; *see Karscig v. McConville*, 303 S.W.3d 499, 504 (Mo. banc 2010) (two-or-more provision inapplicable to single policy). It can apply, if at all, only to one of the two Ford policies issued by American Family. App.Br.at 54-55. It does not apply, however, because of the Other Insurance clause.

*Murray v. American Family Mut. Ins. Co.*, 429 F.3d 757 (8th Cir. 2005) and *American Family Mut. Ins. Co. v. Martin*, 728 N.E.2d 115 (Ill. App. 2000), on which Defendants rely (Resp.Br.at 89-94) are not binding on this Court, and do not change the analysis. They address the first sentence of the Other Insurance clause. In both cases, the insured had multiple policies issued by a single insurer–American Family. Both found that General Provision 3 "covers situations where two or more cars belonging to the same insured are covered by policies issued by [the same company]" and in that situation, its total liability limit "will not exceed the highest liability limit under any one policy."

*Murray*, 429 F.2d at 766; *Martin*, 728 N.E.2d at 116. "Read in this context," they held, the first sentence must "refer[] only to a situation where a different policy issued by a different company applies" since otherwise, the same company's "share would always be 100%." *Id.* Both courts, however, disregard the actual language of the first sentence, under which American Family promised to pay according to "this policy's proportion," *i.e.*, the proportion that "this policy" bears to the total limits of all "similar insurance," which unquestionably includes other UIM policies. The company's "share" is the payment it makes under one policy's "proportion" to the other. *Clark,* 92 S.W.3d at 203. The first sentence refers to the issuing company ("**we** will pay **our** share) and no one else. While generally, provisions are harmonized, if possible, to avoid nullifying one of two contradictory provisions (*Murray*, 429 F.2d at 766),[6] it also is true that plain and straightforward language is construed as written. If, as *Murray* says, the first sentence would always "trump" General Provision 3 where multiple policies are issued by the same company, that is the result of the language American Family chose. And under *Murray*, General Provision 3 always trumps the first sentence in the same situation. An average policyholder would expect that he is "entitled to [UIM] coverage under . . . both policies since he paid for both." *Clark*, 92 SW.3d at 203. To the extent General Provision 3 purports to take away one of them, it creates an ambiguity, resolved in Nathaniel's favor. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo. banc 2007).

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[6] The case *Murray* cites for this tenet, *Dent Phelps R-II School Dist. v. Harford Fire Ins. Co.*, 870 S.W.2d 915, 920 (Mo.App.1994), applied it to provide, not defeat coverage.

Moreover, neither *Murray* nor *Martin* addressed the first ambiguity raised by Nathaniel. App.Br.at 51-53. Finally, they are inapplicable to the *second* sentence of the Other Insurance clause, which also applies in this case. *See Chamness*, 226 S.W.3d at 207-208 (*Murray* and *Martin* do not apply to second sentence); *Durbin v. Deitrick*, 323 S.W.3d 122, 125 (Mo. App. 2010) (second sentence conflicts with General Provision 3).

Even ignoring the first ambiguity, and accepting the *Murray/Martin* interpretation as to the first sentence without regard to the second, Nathaniel would still be entitled to stack at least three policies since General Provision 3: (1) does not apply to the Yamaha or 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.

## VII. THE OTHER MOTORIST WAS UNDERINSURED.

Missouri courts consistently hold that policies may be stacked to meet the definition of an underinsured motor vehicle. In *Ragsdale*, the insured had two policies, each with $100,000 in UIM coverage. The negligent motorist had a policy with $100,000 in liability coverage. 213 S.W.3d at 53. Like it does here, American Family asserted that the court must determine whether the tortfeasor's vehicle was underinsured before reaching the question of stacking. *Id.* at 54. The Western District disagreed, recognizing that "by doing so, [it] would be reviewing the policy's definition of underinsured motor vehicle in a vacuum," and so it cannot be a threshold issue. *Id.* at 54. Rather, the Court looked first to the Other Insurance clause to see if it permitted stacking and precluded set-off. Holding that it did, the Court affirmed judgment for the insureds. *Id.* at 55-56. In *Chamness*, the Eastern District reached the same conclusion. There, the negligent

motorist's policy had $100,000 in liability coverage, the same as the limits of UIM coverage in each of the plaintiff's policies. 226 SW.3d at 205 n.2. Relying on *Seeck* and *Ragsdale*, the Court "rejected the notion that an insured is only entitled to underinsured motorist coverage if the definition of an underinsured motor vehicle is met" and that this definition is not considered in isolation. *Id.* at 205. Holding that the Other Insurance clause permitted stacking and precluded set-off, the court reversed summary judgment for American Family with directions to enter judgment for the insured. *Id.* at 208; *accord Keating v. Gavrilovici*, 861 S.W.2d 205, 207 (Mo. App. 1992).

Defendants rely on *Rodriguez v. General Accident Ins. Co. of America*, 808 S.W.3d 379 (Mo. banc 1999) (Resp.Br.at 28-30), which did not involve an Other Insurance clause and is distinguishable on that basis. *Seeck,* 212 S.W.3d at 133; *Chamness*, 226 S.W.3d at 133; *Ragsdale*, 213 S.W.3d at 55. *See also Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 692 n.3 (Mo. banc 2009) (characterizing *Rodriguez* discussion regarding UIM coverage as "dicta").

Defendants also cite *Melton v Country Mutual Ins.*, 75 S.W.3d 321 (Mo. App. 2002), which is also distinguishable. There, the plaintiff was a passenger in a vehicle owned and operated by another person, who lost control due to her own negligence and that of two other motorists. Plaintiff recovered a total of $300,000 from their liability policies and requested UIM coverage under her own. The Court found the definition of underinsured motor vehicle unmet, rejecting plaintiff's invocation of the Other Insurance provision, which provided that "we will pay . . . the proportion **our** limits of liability bear to the total of all applicable limits. However, in the case of **motor vehicles you** do not

own, this policy will be excess and *will apply only if the amount* ***our*** *limit of liability exceeds the sum of the applicable limits of liability of all other applicable insurance*." *Id.* at 326 (bold in original; italics added by opinion). The Other Insurance provision here does not contain this language.

In sum, Defendants' suggestion that the definition of underinsured motorist should be taken up first and in isolation in order to deny coverage is incorrect. If Nathaniel can stack any one of the three policies in addition to his Yamaha policy, Schiermeier was an underinsured motorist. For all the reasons addressed *supra*, he can.

## VIII. DEFENDANTS ARE NOT ENTITLED TO SET-OFF.

### A. Conflict Within The Limit Of Liability Language

Set-off, as interpreted by Defendants, conflicts with the liability limits "maximum" language as held in *Ritchie*, 307 S.W.3d at 137, 140-41; *see also Jones*, 287 S.W.3d 687. Defendants strain to say that the policy language in *Jones* is different than the language here, but they do not and cannot make the same claim regarding the language in *Ritchie*. Resp.Br.at 95-96. It is virtually identical:

***Ritchie*** – "[t]he limit of liability. . .for each person for [UIM] coverage is *our maximum limit of liability for all damages*. . .arising out of 'bodily injury' sustained by any one person in any one accident" and the "*maximum limit of liability for all damages* for 'bodily injury' resulting from any one accident. This is the most we will pay regardless of" the number of insureds, claims, or vehicles. 307 S.W.3d at 136-37.

**Here** – "[t]he limit [of liability of this coverage] 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" and "*the maximum* for bodily injury by two or more persons in any one accident," and "[w]e will pay *no more than these maximums*" no matter the number of vehicles, injured persons, or claims involved. LF0256 (emphasis added).

The problem identified in *Ritchie* and *Jones* is the same problem here – because we are dealing with UIM coverage, the insured will always have recovered something from the other motorist's liability carrier. Therefore, Defendants will never pay the full amount (the maximum) of its stated limits, "making its statements that it would do so misleading." 307 S.W.3d at 140.[7] The solution is an alternative construction "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. In this way, it avoids a double recovery." *Id.* at 141. This analysis is fully applicable here.

Defendants take issue with the conclusion that they would never pay out the full amount based on a scenario in which the negligent motorist's liability insurer pays out the full limits to some but not all claimants, who Defendants contend (without citation), would "not have an [UM] claim . . . because the tortfeasor *was insured*" but would be entitled to full UIM benefits. Resp.Br.at 99 (emphasis original). There are two problems with this hypothetical. First, it *is* a hypothetical and not the circumstance presented. Second, the policies define "uninsured motor vehicle" as including a vehicle that *is*

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[7] What the insurer's witness conceded in *Ritchie* was no more than what the policy said – the insurer would never actually pay the full amount. *Id.* That verbal concession was not the basis for decision as Defendants' suggest. Resp.Br.at 96-97.

insured "but the company denies coverage." *See* LF0251. If the negligent motorist's insurer denies coverage for any reason, UM coverage is triggered. By contrast, UIM coverage is triggered when liability coverage is available but less than the UIM coverage. The coverage will be one thing or the other. Here, it is UIM. In the case of UIM coverage, "*some* amount *always* will have been received from the tortfeasor—that is why the insured is seeking to collect *under*insured rather than *un*insured motorist coverage." *Jones*, 287 S.W.3d at 692. Just so.

Defendants also complain that other state laws might mandate that the UIM coverage be excess, citing an Arizona statute. Resp.Br.at 101. Nathaniel does not live in Arizona; the policies at issue are governed by the law of this state. Defendants also disavow any statements that they will pay Nathaniel's "damages." *Id.* at 102. That is belied by the insuring clause ("We will pay compensatory *damages* for bodily injury" to insured) as well as the limits of liability clause ("[t]he limit for each person is the maximum for all *damages*"). Defendants did not deny the *Ritchie* conflict before the trial court or the Eastern District. They should not be heard to do so now. In any event, Defendants' arguments are meritless.

**B. Conflict With The Other Insurance Provision**

Alternatively, set-off is defeated by the Other Insurance provision. Again, James did not own the Yamaha Nathaniel was occupying. The second sentence of the Other Insurance clause plainly applies to James' policy and there is no set-off. *Chamness*, 226 S.W.3d at 206-208; *Ragsdale*, 213 S.W.3d at 57.

As to Nathaniel's policies, the first sentence permits stacking regardless of whether he owned the Yamaha and is inconsistent with set-off. In *Clark*, the Court found stacking appropriate under the first sentence of the Other Insurance provision, but also that American Family could set off the amount paid by the negligent motorist's liability policy. 92 S.W.3d at 204. In addressing set-off, *Clark* merely distinguished cases pertaining to "excess" provisions because the second sentence did not apply under the facts (Mr. Clark was not occupying the vehicle). *Id.* *Kyte v. American Family Mut. Ins. Co.*, 92 S.W.3d 295 (Mo. App. 2002) held that "other similar insurance" means other UIM coverage, not the other driver's liability coverage. *Id.* at 300. The provision in *Lang v. Nationwide Mut. Fire Ins. Co.*, 970 S.W.2d 828 (Mo. App. 1998) on which *Kyte* relied, however, was quite different than the American Family provision, referring to "other insurance *similar to this coverage*." *Id.* at 831 (emphasis added). By contrast, the American Family provision refers to "other similar insurance *on a loss covered by* this endorsement." *See* LF0270-271 (emphasis added). As later correctly recognized in *Chamness*, "similar" does not mean identical. 226 S.W.3d at 206. Was Schiermeier's automobile liability policy "similar insurance" on a "loss covered by" Nathaniel's UIM coverage? Respectfully, the answer is yes. The first sentence of the Other Insurance clause says that American Family will pay its proportionate share "of the total limits of *all* [i.e., any] similar insurance" while, as Defendants interpret it, the set-off provision reduces that share in the amount paid by Schiermeier's liability insurer. There is an ambiguity.

The Court need not, however, reach this issue. *Ritchie* resolves the set-off question. If *Ritchie* does not apply, the second sentence of the Other Insurance clause does. Because "owned" is not defined and can mean more than one thing, it is ambiguous and construed in Nathaniel's favor. *Lightner*, 789 S.W.2d at 490. Thus, the second sentence applies and defeats set-off under all authorities so holding.

## IX. NON-MOTORIST PAYMENT AND POLICIES ARE NOT CONSIDERED.

Set-off is resolved by *Ritchie* or the Other Insurance clause and this Court need go no further. But any argument that set-off or exhaustion applies to non-motorist defendants otherwise is meritless. Defendants focus their energy on exhaustion, Resp.Br.at 33-38, and improperly attempt to meld that provision with the set-off provision. *Id.* at 37. Neither applies to the helmet defendants.

*Rodriquez*, on which Defendants rely for set-off, dealt with a negligent motorist, not other tortfeasors. Resp.Br.at 32-33.[8] Defendants cite nothing to support set-off based

[8] Defendants urge that set-off of the $100,000 "serves to reduce any recovery by Plaintiff Manner to zero." Resp.Br.at 31. Below, Defendants asserted set-off (as well as exhaustion) only as to the Yamaha policy, which they (incorrectly) viewed as the only policy providing UIM coverage. *See* LF0313-14; LF0316. To the extent Defendants suggest that the $100,000 can be credited not once but four times, they provide no authority for such a proposition. Court in other states have rejected it. *E.g. Aaron v. State Farm Mut. Auto Ins. Co.*, 34 P.3d 929, 934 (Wyo.2002) (collecting cases and holding that auto liability payment is credited only once, pro rata if more than one UIM

on amounts received from non-motorist defendants. The policies themselves dictate to the contrary. The set-off provision states that "[t]he limits of liability *of this coverage* will be reduced by: "[a] payment made . . . 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*." *See* LF0257 (emphasis added). Defendants emphasize the word "or" when discussing the exhaustion provision (in which this language does not appear) (Resp.Br. at 37) but cannot ignore the language emphasized here. "This coverage" means "compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover *from the owner or operator of an* ***underinsured motor vehicle*****"** and that "*arise[s] out of the use* of the **underinsured motor vehicle**." *See* LF0256 (emphasis added). The UIM coverage itself applies only to damages recoverable *from a motorist* using a vehicle that is underinsured, *i.e.*, "insured by a liability bond or policy" with "bodily injury liability limits less than" the UIM limits. LF0257 (Definitions ¶3). Elsewhere in their brief, Defendants correctly refer to Schiermeier alone as the relevant tortfeasor. Resp.Br. at 98. Whether paid directly or through liability insurance, the insuring clause together with the set-off language plainly tie the reducing payment to someone liable for loss caused by the same thing giving rise

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policy). The policy also contradicts such a position. Once Schiermeier's liability carrier paid the $100,000 limit, Schiermeier had no further collectible auto liability insurance and no longer was "legally liable" for that amount. His payment cannot be credited to each policy *in seriatim* in the full amount.

to the UIM coverage in the first place – use of an underinsured motor vehicle. At best, there is an ambiguity that must be resolved in Nathaniel's favor.

Even if the $750,000 received from the helmet defendants is considered – which it should not be – the damages remaining after reduction ($1,500,000 – ($100,000 + $750,000) = $650,000) is still more than the combined UIM coverage, and Defendants are "responsible for the difference." *Ritchie*, 307 S.W.3d at 141.

The exhaustion provision 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." LF0256 (emphasis added). This provision does not refer to "person[s] or organizations which may be legally liable" and does not refer to any and all types of "bodily injury" policies Resp.Br.at 37. It speaks to a particular type of policy, *i.e.*, a "bodily injury liability bond[] or polic[y]." The ***only time*** that phrase appears is in express reference to the "underinsured motor vehicle." *See* LF0257 (Definitions ¶3).[9] And again, "this coverage" means damages recoverable from the "owner or operator" of an underinsured motor vehicle.[10] The whole context and structure of the UIM endorsement is addressed to the interaction between two or more

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[9] Even if this phrase is as broad as Defendants suggest, which it is not, Defendants made no effort to demonstrate that the helmet defendants had *any* sort of policy capable of being exhausted. *See* Resp.Br.at 33.

[10] Defendants have never disputed that Nathaniel was legally entitled to recover his full $1,500,000 damages from Schiermeier.

automobile policies. The very existence of UIM coverage is based on comparing Nathaniel's UIM coverage with the liability coverage of the negligent motorist. Defendants cite no authority for throwing some *other* tortfeasor into this mix and fundamentally altering the comparator for triggering UIM protection. Plaintiff has located no Missouri cases adopting such an approach. *Lewis v. State Farm Mut. Automobile Ins.*, 857 S.W.2d 465 (Mo. App. 1993), on which Defendants rely, is inapplicable as it involved two *automobile* policies. Here, there is only one.

Defendants do not suggest that they were unaware of Nathaniel's suit against the helmet defendants. If exhaustion truly applied to them, suit for UIM coverage would have been premature. *See Kinney v. Schneider Nat'l Carriers, Inc.*, 213 S.W.3d 179, 183-84 (2007) (citing *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo. banc 1994)). There is no dispute that Nathaniel exhausted the limits of Schiermeier's liability coverage. Defendants themselves did not assert failure to exhaust some *other* policy to disavow UIM coverage, but to the contrary, consented to suit after settlement with the other defendants. LF0010-11; LF0014; LF0174; Resp.Br.at 16; *Kinney*, 213 S.W.3d at 183-84 (consent to suit waives exhaustion). Defendants do not address this issue, and their own set-off argument presumes that coverage exists in the first place. By its terms and context, "bodily injury liability bonds or policies" refers to the liability policy of the negligent motorist. Any other interpretation renders the endorsement highly misleading and ambiguous, again requiring resolution in Nathaniel's favor. *See Ritchie*, 307 S.W.3d at 140 (interpretation rendering provisions misleading cannot stand).

## CONCLUSION

For all the reasons addressed here and in his opening brief, Nathaniel Manner respectfully requests this Court to reverse summary judgment for Defendants with directions to enter judgment in Nathaniel's favor pursuant to Rule 84.14 or at least reverse judgment for Defendants.

## 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 7,632 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.

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Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned, certify that I have on this 18th day of June, 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:

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