IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC90085

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellants,

v.

STEVE AND ANITA RITCHIE,

Respondents.

Appeal From Circuit Court of Jasper County
Case No. 05AO-CC00402
The Honorable David Mouton

SUBSTITUTE BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANTS

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Jurisdictional Statement

This is an appeal from Judgment on stipulated facts granted in favor of Plaintiff in an insurance coverage dispute. The Judgment was granted by the Circuit Court of Jasper County. Appellant appealed the trial court's judgment to the Southern District of the Appellate Court. The Southern District Affirmed in Part, Reversed in Part and Remanded in an opinion filed March 10, 2009. The Southern District denied Appellant's Motions for Rehearing and for Transfer. This court sustained Appellant's Application for Transfer under Rule 83.02 on April 15, 2009. Article V, §10 MO. Const. vests jurisdiction in this court the same as if the case were heard on the original appeal.

Statement of Facts

Plaintiffs Steven Ritchie and Anita Ritchie are the parents of the deceased Kelsey Ritchie**.** LF 442**.** Kelsey Ritchie was a passenger in a vehicle driven by Noah Heath when she was tragically killed when the Heath vehicle collided with a vehicle driven by Adam Tomblin. *Id.* The incident is made more tragic because of the extremely reckless and foolish behavior on the parts of both Mr. Heath and Mr. Tomblin. LF 400-409. At the time of the accident, Kelsey Ritchie was an insured under the parents' automobile insurance policy. LF 444.

The subject policy's underinsured motorist coverage had listed per person policy limits of $100,000.00. The vehicles being driven by Noah Heath and Adam Tomblin were underinsured. Mr. Heath's vehicle was insured by OMNI Hartford, Policy #AG 119054 01, with liability limits of twenty-five thousand dollars ($25,000.00) per person and fifty thousand dollars ($50,000.00) per accident. *Id.* Mr. Tomblin's vehicle was insured by Progressive Insurance Company, Policy #50655728-1, with liability limits of fifty thousand dollars ($50,000.00) per person and one hundred thousand dollars ($100,000.00) per accident. *Id.*

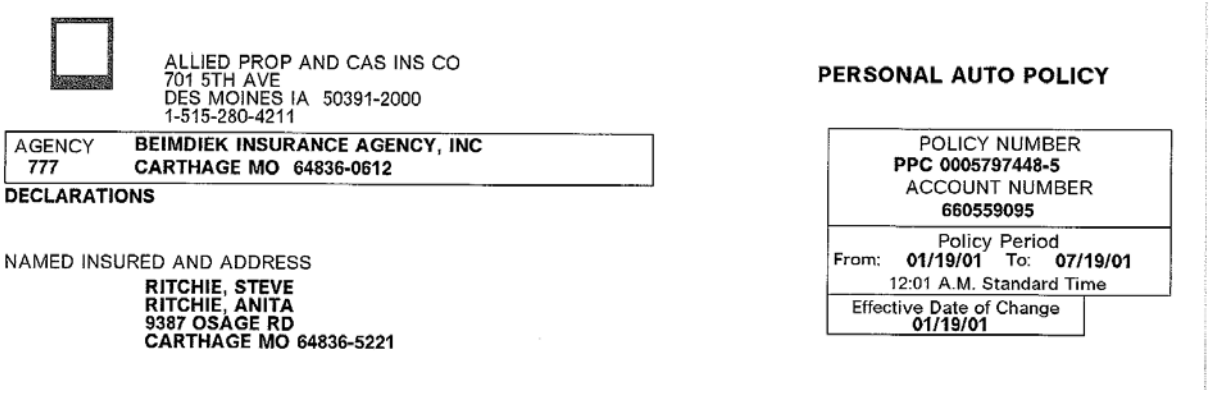
The underinsured tortfeasors paid the Plaintiffs less than the Underinsured Motorist coverage policy limit. Because the accident resulted in multiple injured parties, both of these insurance policies' limits were exhausted after the following payments to the Ritchies: twenty thousand dollars ($20,000.00) from Heath's insurer and forty thousand dollars ($40,000) from Tomblin's insurer. *Id.*

After the tortfeasors payments for a combined sixty thousand dollars ($60,000.00), Allied paid the Ritchies forty thousand dollars bringing their total recovery to one hundred thousand dollars ($100,000.00.) On June 20, 2005, a Judgment was entered against Heath and Tomblin for the wrongful death of Kelsey Ritchie for one million eight hundred thousand dollars ($1,800,000.00). LF 444. Because the Plaintiffs' damages exceeded the money recovered from the tortfeasors, Allied paid the amount necessary to bring the Plaintiffs' recovery to the one hundred thousand dollar ($100,000.00) policy limit.

The Allied policy insured three (3) vehicles. The declarations page listed UIM coverage separately for the three (3) vehicles**.** LF 444. The UIM coverage policy limit for each of the three (3) separate vehicles was one hundred thousand dollars ($100,000.00) for each person with three hundred thousand dollars ($300,000) total for any one accident.

The parties stipulated as to the relevant Declarations, Limits of Liability Provision, and the "Other Insurance" provisions. These are reproduced here for convenience.

1. The Declarations:



ALLIED PROP AND CAS INS CO
701 5TH AVE
DES MOINES IA 50391-2000
1-515-280-4211

PERSONAL AUTO POLICY

AGENCY 777	**BEIMDIEK INSURANCE AGENCY, INC** **CARTHAGE MO 64836-0612**

DECLARATIONS

POLICY NUMBER
PPC 0005797448-5
ACCOUNT NUMBER
660559095

Policy Period
From: **01/19/01** To: **07/19/01**
12:01 A.M. Standard Time

Effective Date of Change
01/19/01

NAMED INSURED AND ADDRESS
RITCHIE, STEVE
RITCHIE, ANITA
9387 OSAGE RD
CARTHAGE MO 64836-5221

COVERAGE AND LIMITS OF LIABILITY (In Dollars)
Coverage is provided where a premium or limit of liability is shown for coverage.

VEHICLE	BODILY INJURY EACH PERSON	BODILY INJURY EACH ACCIDENT	PROPERTY DAMAGE EACH ACCIDENT	MEDICAL PAYMENTS EACH PERSON	PERSONAL INJURY PROTECTION OPTION		UNINSURED MOTORISTS EACH PERSON	UNINSURED MOTORISTS EACH ACCIDENT		UNDERINSURED MOTORISTS EACH PERSON	UNDERINSURED MOTORISTS EACH ACCIDENT
4	100,000	300,000	100,000	5,000			100,000	300,000		100,000	300,000
7	100,000	300,000	100,000	5,000			100,000	300,000		100,000	300,000
11	100,000	300,000	100,000	5,000			100,000	300,000		100,000	300,000

VEHICLE	DAMAGE TO YOUR VEHICLE: Other Than Collision Loss	DAMAGE TO YOUR VEHICLE: Collision Loss		TOWING PER DISABLEMENT	RENT RE TRN EXP PER DAY/ MAXIMUM						
	Actual Cash Value Minus Deductible										
4	100										
7	100	250									
11	100										

PREMIUMS (In Dollars)

VEH	BODILY INJURY	PROPERTY DAMAGE	MEDICAL PAYMENTS	PERSONAL INJURY PROTECTION	UNINSURED MOTORISTS		UNDER-INSURED MOTORISTS	DAMAGE TO YOUR VEHICLE: Other Than Collision Loss	DAMAGE TO YOUR VEHICLE: Collision Loss	TOWING	RENT RE TRN EXP
4	143.78	104.16	29.35		12.15		6.48	57.21			
7	44.18	32.00	6.31		12.15		6.48	31.06	57.71		
11	59.80	43.33	12.20		12.15		6.48	39.32			
VEH											
4											
7											
11											

VEH	Total Premium Each Vehicle	Other Miscellaneous Endorsements Requiring Premium:			
4	353.13	No.	$	Sub-Total	$ 716.30
7	189.89		$	Other Endorsements/Fees	$
11	173.28		$		$
			$	Full Term Premium	$ 716.30
			$	Add'l Premium	$
			$	Return Premium	$

THIS IS NOT A BILL - SEE YOUR BILLING STATEMENT

Countersigned by - Authorized Representative

DIRECT BILL LKXB 05206 **E 660559095 71 173**

DESCRIPTION OF VEHICLE

VEH	Year	Trade Name	Body Type and Model	Identification Number	Cost/New	Max Value	HP	CC's	Class
4	1986	FORD	PICKUP	2FTDF1581GCB75767					821520
7	1995	PONT	4 DOOR	1G2WJ52M5SF329852					P11420
11	1989	ACURA	2 DOOR	JH4DA344XKS001885					P11220

ALTERNATE GARAGING LOCATIONS

VEH	Year	Make	Body Type and Model	Address
4	1986	FORD	F150	
7	1995	PONT	GRAND PRIX	
11	1989	ACURA	INTEGRA RS	

ENDORSEMENTS

Endorsements forming a part of this policy: IN0262 (1199) IN0570 (1197) AA0001 (0986) AA0001A (1098) AA0007 (1192) AA0011 (0195) AA0163 (0400) AA0309 (1190) AA0311 (0397) PP0402 (0486) PP0405 (0188) PP0455 (0486)

2. The Limits of Liability Provision:[1]

A. The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services, or death arising out of 'bodily injury' sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit for all damages for 'bodily injury' from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds;"
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

B. The limit of liability shall be reduced by all sums:

[1] The parties agree that this Split UIM Limits Provision replaced the first paragraph of the Limits of Liability provision of the UIM endorsement and it is this Split Limits Provision that is quoted here.

1. Paid because of 'bodily injury' or by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy… LF 443, 444.

3. The Other Insurance Provision:

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

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

2) Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage. LF 444, 350.

At a hearing scheduled on Defendant's motion for summary judgment, the parties agreed to submit the case to the Court on stipulated facts. The parties offered jointly to the court Exhibit A, the exhibits at issue in the case, and Exhibit B, all of the filings and

briefings related to the pending Summary Judgment Motion. See Docket Entry at LF 5, Exhibits at LF 316-437, MSJ Filings at LF 438-518.

Allied's position was that a payment of forty thousand ($40,000.00) met its contractual obligation under the UIM policy. The Trial Court disagreed and signed a draft Judgment prepared by Plaintiff's counsel for judgment in the amount of three hundred thousand dollars ($300,000.00) reduced by the forty thousand dollars ($40,000.00) already paid for a total judgment of two hundred sixty thousand dollars ($260,000.00). This appeal follows.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFFS/INSUREDS, BECAUSE IT WAS REQUIRED TO ENFORCE THE ANTI-STACKING PROVISIONS IN THE SUBJECT POLICY'S UNDERINSURED MOTORIST ENDORSEMENT IN THAT THESE PROVISIONS WERE UNAMBIGUOUS AND SET THE UNDERINSURED MOTORIST COVERAGE LIMIT AT ONE HUNDRED THOUSAND DOLLAR ($100,000.00) PER-PERSON REGARDLESS OF THE NUMBER OF VEHICLES INSURED BY THE POLICY.

Rodriguez v. General Acc. Ins. Co. of America, 808 S.W.2d 379 (Mo. banc 1991).

Niswonger v. Farm Bureau Town & Country, 992 S.W.2d 308, (Mo.App. E.D. 1999).

Farm Bureau Town and Country Ins. Co. of MO v. Barker, 150 S.W.2d 103 (Mo.App. W.D. 2004).

Grinnell Select Ins. Co. v. Baker, 362 F.3d 1005 (7th Cir. 2004).

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFFS/INSUREDS, BECAUSE IT WAS REQUIRED TO ENFORCE THE SETOFF LANGUAGE IN THE SUBJECT POLICY'S UNDERINSURED MOTORIST ENDORSEMENT IN THAT THESE PROVISIONS WERE UNAMBIGUOUS AND REDUCED THIS COVERAGE LIMIT BY THE PAYMENTS TOTALLING SIXTY

THOUSAND DOLLARS ($60,000.00) MADE BY THOSE TORTFEASORS LEGALLY RESPONSIBLE FOR PLAINTIFFS' DAMAGES.

Rodriguez v. General Acc. Ins. Co. of America, 808 S.W.2d 379 (Mo. banc 1991).

Jackson v. Safeco Ins. Co. of America, 949 S.W.2d 130 (Mo.App. S.D. 1997).

Green v. Federated Mutual Ins. Co., 12 S.W.3d 647 (Mo.App. E.D. 1999).

ARGUMENT

Standard of Review

A. Standard of Review

When a case is tried on stipulated facts, as was this case, the only issue on appeal is whether the Court drew the proper legal conclusions from those stipulated facts. *Goza v. Hartford Underwriters Ins. Co.,* 972 S.W.2d 371, 373 (Mo.App. E.D. 1998). The interpretation of an insurance policy, including whether or not the policy is ambiguous is a question of law. *Ware v. Geico General Ins. Co.,* 84 S.W.3d 99, 102 (Mo.App. E.D. 2002). Questions of law are evaluated independently of the trial court's ruling. *Id.* In interpreting the language of an insurance policy, the Court gives the language its plain meaning the meaning ordinarily understood by a layperson who buys the policy. *Id.*

Absent an ambiguity, an insurance policy must be enforced according to its terms. *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 698 (Mo. banc 1982). An ambiguity arises when there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the insurance policy. *Ware* at 99. If an ambiguity exists in an insurance policy, it is construed against the insurer because the insurer is the one who is in the best position to remove ambiguity from a contract. *Id.* An ambiguity must not be created by distorting the language of an unambiguous policy or to enforce a particular construction which the Court may feel is more appropriate. *Rodriguez v. General Acc. Ins. Co. of America,* 808 S.W.2d 379, 382 (Mo. banc 1991).

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFFS/INSUREDS, BECAUSE IT WAS REQUIRED TO ENFORCE THE ANTI-STACKING PROVISIONS IN THE SUBJECT POLICY'S UNDERINSURED MOTORIST ENDORSEMENT IN THAT THESE PROVISIONS WERE UNAMBIGUOUS AND SET THE UNDERINSURED MOTORIST COVERAGE LIMIT AT ONE HUNDRED THOUSAND DOLLAR ($100,000.00) PER-PERSON REGARDLESS OF THE NUMBER OF VEHICLES INSURED BY THE POLICY.

A. Clear and Unambiguous Anti-Stacking Provisions In UIM Endorsements Are Enforced.

Multiplying the policy limits by the number of vehicles a person insures with an insurance company is known as stacking. An underinsured motorist endorsement can prevent stacking with clear and unambiguous ant-stacking language. *Rodriguez v. General Accident Ins. Co. of America*, 808 S.W.2d 379, 383 (Mo. 1991). This allows a consumer to purchase UIM coverage for more than one vehicle without having to pay for doubling or tripling the policy limit. For example, when UIM coverage does not stack, the consumer who purchases UIM coverage for a separate vehicle purchases UIM coverage for that second vehicle but does not double its policy limit.

Anti-stacking must be unambiguous. *Id.* Language that states the policy limit is the amount shown in the declarations regardless of the number of vehicles or premiums clearly and unambiguously prevents stacking. *Id.*

B. UIM Endorsements Like The One Interpreted by the *Niswonger* Opinion Have Clear Anti-Stacking Language in the Policy Limits Provision But Have "Other

Insurance" Provisions That Introduce an Ambiguity on the Issue of Stacking Where the Accident Occurs in Non-Owned Vehicle.

Certain policies with otherwise unambiguous anti-stacking provisions, have introduced an ambiguity on the issue of stacking in their "Other Insurance" clause where the injury occurred in a non-owned vehicle. *Niswonger v. Farm Bureau Town & Country Ins.* 992 S.W.2d 308 (Mo.App. E.D. 1999); *American Family Mutual Ins. Co. v. Ragsdale*, 213 S.W.3d 51 (Mo.App. W.D. 2006); *Chamness v. American Family Mutual Ins. Co.*, 226 S.W.3d 199 (Mo.App. E.D. 2007). "Other Insurance" clauses explain when the UIM coverage is to be considered primary coverage or excess coverage. That is whether the insurers UIM coverage pays first or second in the presence of other insurance policies covering damages from an accident. The "other insurance" clause of policies interpreted by the *Niswonger*, *Ragsdale*, and *Chamness* opinions introduced ambiguity on the issue of stacking where the injury occurred in a non-owned vehicles despite clear anti-stacking language in the policy-limits provision and the multiple auto provision.

These policies had policy-limit provisions that contained anti-stacking consistent with the *Rodriguez* case. See, for example, *Niswonger* at 314. They also contained similar "Other Automobile" provisions—here is the one from *Niswonger*:

> With respect to any occurrence…to which this or any other automobile insurance policy issued to the named insured or spouse by the company also applies, the total limit of the company's liability under all such policies

> shall not exceed the highest applicable limit of liability or benefit under any one such policy. *Id.*

Despite two clear anti-stacking provisions in the body of the UIM endorsement, these policies were interpreted as introducing an ambiguity on the issue of stacking for the specific situation of an injury which occurred in a non-owned vehicle. The offending language was found in the "Other Insurance" provisions. All three cases cite very similar "Other Insurance" provisions, here is the one interpreted in *Niswonger*:

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

The second sentence of this clause created the ambiguity. *Id.* An average person "could easily construe this sentence to mean that, in a non-owned vehicle accident, the UIM coverage provided by each endorsement in each separate Farm Bureau vehicle policy issued to him was in addition to the UIM coverage provided by the same endorsement in his other policies." *Id.*

The court addressed the insurer's objection that a person could not reasonably believe there was stacking given the two clear statements that recovery was limited to the

policy limit for one vehicle. *Id.* at 316. It did so by focusing on the word "however" in the second sentence of the clause.[2] *Id.* "The word 'however' in a contract is a word of exclusion, indicating an alternative intention, a contrast with a previous clause and a modification of it under other circumstances." *Id.* A reasonable person could understand there was no stacking except where the injury occurred in a non-owned vehicle because this sentence begins with "however." *Id.*

C. The "Other Insurance" Provision of the UIM Endorsement Reviewed in the *Barker* Opinion Cured the Ambiguities Noted by the *Niswonger* Opinion.

The insurer never intended the language found ambiguous by the *Niswonger* case to allow stacking but rather intended to explain that where there were multiple insurers involved, the UIM coverage provided under the endorsement was excess rather than primary coverage. The insurer amended its policy to make this clear. *Farm Bureau Town & Country Ins. Co. of Mo., v. Barker,* 150 S.W.3d 103 (2004).

The amended "Other Insurance" clause reads in part as follows:

> Other Insurance
>
> If there is other applicable insurance available under one or more policies or provisions of coverage:
>
> A. Any recovery for damages under all such policies or provisions of coverage may equal, but not exceed, the highest

[2] In *Chamness* and *Ragsdale* the correlating sentence begins with "but" rather than "however." *Chamness at 201; Ragsdale at 54.*

applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

B. Any insurance we provide with respect to a vehicle you do not own will be excess over any collectible insurance providing coverage on a primary basis.

C. (Paragraph C is lengthy and not copied here. It has two parts. Part one divides liability where coverage is provided on a primary basis and part two divides liability where the coverage is provided on an excess basis.) *Barker* at 107.

This "Other Insurance" provision cured the ambiguity or contradiction found in the language interpreted by the *Niswonger* opinion. *Id.* at 108. First, the provision addressing the situation of an injury in a non-owned vehicle language did not begin with the word, however. *Id.* Thus it does not contradict the anti-stacking language of the policy. *Id.* Second, it was not the last sentence of the "Other Insurance" provision. *Id.* Third, the "Other Insurance" provision contained sentence A which, "dispels the ambiguity and potential confusion found in the *Niswonger* opinion. *Id.* "Sentence A makes it perfectly clear that whether the other applicable UIM insurance is considered primary or excess coverage, any recovery from Farm Bureau for damages under all such policies may not exceed the highest applicable limit for any one vehicle." *Id.*

D. The Allied Policy's "Other Insurance" Provision, Like the One Reviewed in *Barker*, Clearly and Unambiguously Preserves and Reinforces

the Anti-Stacking Intent of Its Policy Limits Provision Including Where the Injury Occurs in a Non-owned vehicle.

The Allied policy's "Other Insurance" provision clarifies the anti-stacking intent of the policy. First, it makes it clear that the "Other Insurance" provision only applies in the presence of another UIM endorsement. Its opening sentence reads, "If there is other applicable underinsured motorist coverage available under one or more policies or provisions of coverage." In this case, there is only one policy with underinsured motorist coverage at play in this case, the Allied policy. Because there is no other UIM coverage in play, the "Other Insurance" clause is not reached by the facts in this case. *Ragsdale*, 213 S.W.3d at 56; *Chamness*, 226 S.W.3d at 206.

Second, where there is other applicable underinsured motorist coverage the provision states clearly that, "[a]ny recovery for damages may equal but not exceed the highest applicable limit for any one vehicle under this insurance or other insurance providing coverage on either a primary or excess basis." This sentence, like sentence A in the *Barker* policy's "Other Insurance" clause makes it clear that whether coverage is provided as primary or excess the policy limit is the highest limit for one vehicle.

Third, the contrary word "however" or "but" is not there. After the insured reads that "any recovery for damages may equal but not exceed the highest applicable limit for any one vehicle…providing coverage on either a primary or excess basis," the second sentence states, "[a]ny coverage we provide with respect

to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage."

The subject policy's "Other Insurance" clause does not introduce an ambiguity on the issue of stacking where the accident occurs in a non-owned vehicle. First, the Allied "other insurance" provision doesn't apply because there is no other insurance providing UIM coverage other than the allied UIM endorsement. Second, the "Other Insurance" clause, like the one in *Barker,* makes it clear that whether the UIM coverage is considered primary or excess the policy limit is the highest limit for only one vehicle. Finally, the non-owned vehicle clause does not start with the word "however" or "but" and so assigns the UIM coverage excess status where there is other applicable UIM coverage without contradicting the anti-stacking language of the policy. The "Other Insurance" provision restates and reinforces the endorsements anti-stacking provisions.

E. The Allied Policy's UIM endorsement's Policy Limits Provision both Implicitly, Expressly, and Unambiguously Prevents Stacking.

Allied's limits of liability provision clearly and unambiguously prevents stacking. Respondent's arguments to the trial court were wholly unsupported by case law and were an example of torturing policy language to find an ambiguity.

Respondent attacked the first paragraph of the limits of liability provision which is reproduced here for convenience.

Split Underinsured Motorists Limits

A. The limit of liability shown in the Declarations for each person for

> Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services, or death arising out of 'bodily injury' sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit for all damages for 'bodily injury' from any one accident. This is the most we will pay regardless of the number of:
>
> 1. "Insureds;"
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident.

Appellant does not find any Missouri appellate case reviewing this language. Perhaps that is because it resembles closely the language ruled as unambiguous in the *Rodriguez* case. *Rodriguez,* 808 S.W.2d 379 (Mo. Banc 1991). Other jurisdictions find that this language unambiguously prevents stacking. *Grinnell Select Ins. Co. v. Baker*, 362 F.3d 1005 (7th Cir. 2004)(Interpreting Illinois law). In the *Grinnell* case, the insureds sought to stack the coverage of two (2) vehicles insured under the same policy with per person/per accident limits of $100,00.00/$200,000.00. In interpreting the same language used in the Allied Policy, the court found that the coverage limits provision both implicitly and expressly limited stacking.

The first sentence of the policy limits provision implicitly prevents stacking. In both the policy reviewed by the 7th Circuit and the subject Allied policy that sentence

reads, “The limit of liability shown in the Declarations for each person for Bodily Injury Liability (in our case its UIM) is our maximum limit of liability for all damages, including damages for care, loss of services or death arising out of “bodily injury” sustained by any one person in any one auto accident.” *Grinnell* at 1005, (LF 257).

The third sentence of the policy limits provision expressly prevents stacking. Again the language interpreted by the 7th Circuit and the subject Allied policy is identical: “This is the most we will pay regardless of the number of:… 1. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident.” *Id.*

The court went on to comment, “It is hard to imagine clearer language.” *Id.* Because “Illinois enforces clear anti-stacking clauses,” the 7th District went on to predict that the Illinois Supreme Court would enforce this anti-stacking language, including because, “Plenty of decisions in other states hold that this or similar language forecloses stacking.” *Id. (*Including the *Rodriguez* opinion in its string citation*.)* The 7th Circuit was correct. The Illinois Supreme Court did follow the *Grinnell* case and upheld this language as unambiguously preventing stacking in the context of underinsured motorist coverage. *Hobbs v. Hartford Ins. Co.,* 823 N.E.2d 561 (Ill. 2005).

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PLAINTIFFS/INSUREDS, BECAUSE IT WAS REQUIRED TO ENFORCE THE SETOFF LANGUAGE IN THE SUBJECT POLICY'S UNDERINSURED MOTORIST ENDORSEMENT IN THAT THESE PROVISIONS WERE UNAMBIGUOUS AND REDUCED THIS COVERAGE LIMIT BY THE PAYMENTS TOTALLING SIXTY THOUSAND DOLLARS ($60,000.00) MADE BY THE TORTFEASORS LEGALLY RESPONSIBLE FOR MS. RITCHIE'S DEATH

A. The Allied Policy's UIM Endorsement Unambiguously Reduces the UIM Coverage's Limits by Amounts Paid by the Tortfeasors Legally Responsible for the Damages.

The subject UIM endorsement states: "The limit of liability shall be reduced by all sums paid because of "bodily injury" by or on behalf of person or organizations who may be legally responsible." In this case, Mr. Heath and Mr. Tomblin were found legally responsible for the accident which resulted in the death of Kelsey Ritchie. These two (2) tortfeasors have paid between them sixty thousand dollars ($60,000.00). Under the set-off provision, the UIM coverage limit is reduced by this payment.

The set-off language included in the Allied policy has been upheld by the Missouri Supreme Court as unambiguously allowing a set-off for payments made by the tortfeasor. *Rodriguez v. General Accident Ins.*, 808 S.W.2d 379 (Mo.App. 1991). In that case, the language held to be clear and unambiguous was: "However, the limit of liability shall be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible." *Id.* at 381. The Allied set-off provision

uses similar language. Allied's policy, then, clearly informed the insurer that the UIM coverage limit was the most that would be paid and that it would be reduced by payments made by the tortfeasor(s).

B. The Allied Policy's UIM Endorsement's "Other Insurance" Provision does not introduce an ambiguity on the issue of setoff.

The UIM endorsement's "Other Insurance" provision does not introduce an ambiguity on the issue of set-off where the injury occurred in a non-owned vehicle. The UIM endorsement's Limits of Liability provision sates, "The limit of liability shall be reduced by all sums paid because of "bodily injury" by or on behalf of person or organizations who may be legally responsible." *LF 254.* The UIM endorsement's Other Insurance provision states, "Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage." *Id.* 256.

Had the policy stated that coverage with respect to un-owned vehicles was excess over any other collectible insurance or something similar, there would have been an ambiguity as to whether the UIM coverage was excess to the "other collectible insurance"--that is excess over and above the money paid by the tortfeasor's insurer rather than reduced by the money paid by the tortfeasor. *Jackson v. Safeco Ins. Co. of America,* 949 S.W.2d 130 (Mo.App. S.D. 1997). The Eastern District has ruled that language like that in the Allied policy introduced no such ambiguity, "[The] insurer has eliminated any such ambiguity here, because its language clearly states that the UIM coverage it provides is excess over only other UIM insurance, not excess over other

collectible insurance of any kind." *Green v. Federated Mutual Ins. Co.*, 13 S.W.3d 647, 648-49 (Mo.App. E.D. 1999).

G. Conclusion

A court is required to enforce the unambiguous terms of an insurance contract. In this case, The Underinsured Motorist Endorsement purchased by the Ritchies promised a recovery of at least one hundred thousand dollars ($100,000.00) in the event of an accident involving underinsured motorists. Ms. Ritchie was killed in an accident involving two (2) underinsured vehicles. The policy limits of both tortfeasors were exhausted after payment to the Ritchies of a total of sixty thousand dollars ($60,000.00). Allied then paid an additional forty thousand dollars ($40,000.00) to meet its obligation to pay the each-person UIM coverage limit of one hundred thousand dollars ($100,000.00).

The policy uses language which is clear and unambiguous to communicate to the insured that the policy limit is the each-person limit for one vehicle a shown in the Declarations. Adding vehicles to the UIM coverage increased the scope of the UIM coverage to the added vehicles, but did not double or triple the coverage limit. In addition, the policy clearly and unambiguously explained that the UIM coverage limit was reduced by payments made by tortfeasors.

The Trial Court's judgment should be reversed with an instruction to enter judgment in favor of Allied including that it has paid its contractual obligations under the subject UIM endorsement.

Respectfully submitted,

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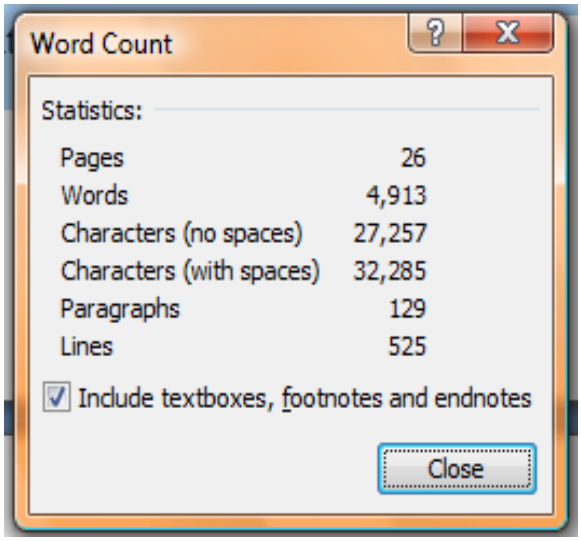
Certificate of Compliance with Rule 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(C) in that, beginning with the Table of Contents and concluding with the last sentence before the signature block, the brief contains 4,913 words. The word count was derived from Microsoft Word.



Disks were prepared using Microsoft Word and were scanned and certified as virus free.

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Certificate of Service

I, the undersigned, do hereby certify that true and accurate copies in the amount specified by Rule 84 of the foregoing documents were served via U.S. Mail, postage prepaid, and via Facsimile this 15th of June 2009, as follows:

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