IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC90085

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant,

v.

STEVE AND ANITA RITCHIE,

Respondents.

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

APPELLANT'S REPLY BRIEF

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A. The Allied Policy's UIM Endorsement's Policy Limits Provisions, Including the Set-Off Language, Follows Language Held Unambiguous by the *Rodriguez* Opinion and Does not Contain the Contradicting Provisions Criticized in the *Seeck* and *Brown* Opinions.

Set-off language in an underinsured motorist ("UIM") endorsement is enforced if it is unambiguous. UIM coverage is not required by statute or public policy. *Lang v. Nationwide Mutual Fire Ins. Co.*, 970 s.w.2d 828, 832 (Mo.App. 1998). Unambiguous contractual terms in an underinsured motorist endorsement control the terms of the coverage. *Id.* A review of the set-off provision in a UIM endorsement includes reviewing whether the provision itself is unambiguous and also whether there is any statement elsewhere in the endorsement that conflicts with the set-off provision.

The following set-off language in a policy limits provision was enforceable because it was unambiguous: "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." *Rodriguez v. General Accident Ins.*, 808 s.W.2d 379, 381 (Mo. 1991). The policy limits provision examined by the *Rodriguez* opinion stated that the limit of liability was the amount shown in the schedule for the coverage and further stated that, "This is the most we will pay…" and then reduces this limit by, "all sums paid because of the "bodily injury" by persons legally responsible for the injury." *Id.* This policy limits provision has

been held by Appellate Courts and by this Court as an example of an unambiguous set-off provision.

For example, when an insurer used different set-off language than that examined by the *Rodriguez* opinion, the different language was found ambiguous. *Krombach v. The Mayflower Ins. Co. Ltd.* 827 s.W.2d 208, 211 (Mo. 1992). This Court stated:

> Had Mayflower intended to reduce the coverage limits by any amount paid by a tortfeasor or his insurer, Mayflower could have so stated in plain and unequivocal terms. For example, see the language of the policy in *Rodriguez* where the policy plainly stated, "The Limit of liability [previously defined] shall be reduced by all sums paid by or on behalf of the tortfeasor." *Id.* quoting *Rodriguez* at 381 (quotes and brackets in the original).

If a UIM endorsement has an unambiguous set-off provision but contradicts that provision somewhere else in the policy, the issue of set-off becomes ambiguous and is resolved in favor of the insured. This issue was recently addressed by this Court. *Seeck v. Geico* 212 S.W.3d 129 (Mo. 2007). In that case the UIM endorsement's "Other Insurance" clause contradicted the set-off provision creating an ambiguity on the issue of set-off. *Id.*

The ambiguity in that policy was created by the "Other Insurance" clause which provided that where the injury occurred in a non owned vehicle, "…this

(UIM) insurance is excess over any other insurance available to the insured…." *Id.* at 132 (parenthesis added). Where the injury was in a non-owned vehicle, the other insurance provision "appear[ed] to provide coverage" over and above the insurance of the tortfeasor which contradicted the set-off provision. *Id.*

Importantly, the court stated in a foot note:

> This is not to say that the presence of another insurance clause always renders a policy ambiguous. Such a clause can be clearly written and enforceable if not contradicted or rendered ambiguous by other clauses of the contract". *Id*. Citing as an example *Melton v. Country Mut. Ins. Co.* 75 S.W.3d 321, (Mo.App.E.D. 2002)

As noted in its Appellant's brief the Allied UIM endorsement at issue here does not contain the contradiction in the endorsement criticized by the *Seeck* opinion. Where the "Other Insurance" clause is in play and the injury occurred in a non-owned vehicle, the UIM coverage provided by Allied is not excess over any other applicable insurance but is excess over "any other collectible underinsured motorist coverage." This phrasing avoids the ambiguity by contradiction noted in the *Seeck* opinion. *Greene v. Federated Mutual Ins. Co.*, 13 S.W.3d 647 (Mo.App.E.D. 1999).

Similarly, the Allied UIM endorsement does not contain the language that was held to create an ambiguity by contradiction in the *Jones v. Mid-Century*,

2009 Lexis 312, (MO 2009). In that case, the policy stated in paragraph (a) that the policy limit was the lesser of:

> 1) The difference between the amount of an insured person's damages for bodily injury, and the amount paid to that insured person by or for any person or organization who is or may be held legally liable for the bodily injury; or
>
> 2) The limits of liability. *Id.*

Paragraph (a) then states that the policy limit is either the limits of the policy or the difference between the damages suffered and the amount paid by the tortfeasor or insurers of the tortfeasor. This contradicts Paragraph (b) which stated that the policy limit was subject to a set-off provision found in Paragraph (f) or in other words the policy limit was the amount shown in the declarations reduced by any amount paid by the tortfeasor or the tortfeasor's insurer(s). *Id.* These paragraphs contradict each other and "it is well-settled that where one section of an insurance contract promises coverage and another takes it away, the contract is ambiguous." *Id.* quoting *Seeck* at *133.*

The Allied policy's UIM endorsement does not contain the contradicting language found in Paragraph (a). Rather, the Allied policy uses a policy limits provision with set-off language like the one approved by this Court in its *Rodriguez* opinion. The Allied policy, like the policy reviewed in *Greene*, does not contain a contradiction of that set-off language in its other insurance provision. *Greene* at 649.

B. Respondents Have Not Preserved Any Trial Court Error for Appellate Review Including Respondents' Suggestion that the Underlying Policy Limits Are Doubled Because Two Cars Were Involved in the Accident.

In order to preserve for appeal any complaint of error by the Trial Court a respondent must file a cross appeal under Rule 81.04(b). *Kelly v. Hanson*, 959 S.W.2d 107, 112 (Mo. 1997). In this case, Respondents filed no notice of cross appeal and raise for the first time in their Response Brief their complaint of Trial Court error. Where Appellants fail to file a notice of cross-appeal, their complaints are not properly before the Court. *Wong v. Wong*, 138 S.W.3d 743 (Mo.App.E.D. 2003). In addition, Respondents' complaint of error is without merit. The subject policy specifically prohibits stacking regardless of the numbers of vehicles involved in the accident. LF 35.

Respectfully submitted,

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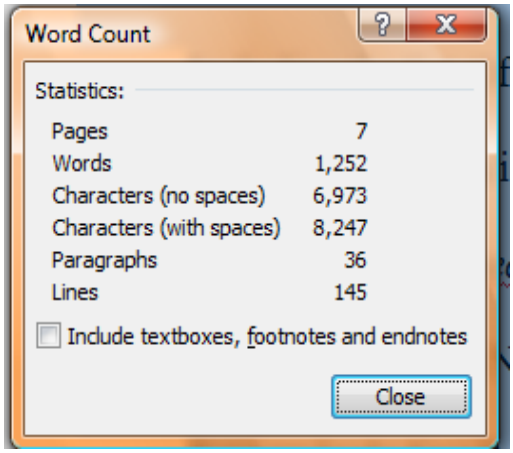
Certificate of Compliance with Rule 84.06(C)

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 1,252 words. The word count was derived from Microsoft Word.



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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, this 5th day of August 2009, as follows:

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