NO. SC90085

In the Supreme Court of Missouri

STEVE AND ANITA RITCHIE,
Respondents

vs.

ALLIED PROPERTY & CASUALTY COMPANY,
Appellant

On Appeal from the Circuit Court of Jasper County, Missouri
29th Judicial Circuit, Division III
The Honorable David B. Mouton, Presiding

RESPONDENTS' SUBSTITUTE BRIEF

(Oral Argument Requested)

Glenn R. Gulick, Jr.
Missouri Bar No. 29937
1515 East 32nd Street
Joplin, Missouri 64804
(417)626-8579 (voice)
(417)626-7116 (facsimile)
gulick@joplininjurylaw.com
Counsel for Respondents

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because Allied was liable to the Ritchies for the full amount of the limits of liability for each of the applicable underinsured motorist coverages, in that:

a. The Ritchies' total damages substantially exceed the combined total of liability coverages and underinsured motorist coverages, such that there is no possibility of a double recovery;

b. Allied's policy of insurance is vague and ambiguous since the declarations page shows three separate vehicles owned by the Ritchies being insured, with each vehicle carrying underinsured motorist coverage with limits of $100,000 per person, $300,000 per vehicle. The Split Underinsured Motorists Limits endorsement indicates that the amount shown in the declarations "is the most we will pay…." These two provisions compel the logical conclusion that the Ritchies are entitled to the full $100,000 for each of the three separate underinsured motorists coverages, yet the interpretation urged by Allied would have the insurer never having to pay the amount listed in the declarations.

c. Allied made an unrebutted admission through a corporate representative it produced in response to a Rule 57.03(b)(4) notice, to the effect that Allied's definition of underinsured motorist coverage

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POINTS RELIED ON

POINT I

The trial court correctly entered its judgment in favor of the Ritchies, because Allied's policy of insurance provides at least Three Hundred Thousand Dollars in Underinsured Motorist Coverage for the death of their daughter caused by the negligence of two underinsured motorists, in that:

a. The "Other Insurance" clauses in both the Missouri and the Uninsured Motorists endorsements to Allied's policy of insurance provide that when the injured insured is occupying a non-owned vehicle (as was true here), and there are multiple underinsured motorist coverages (which is the case here with the three separate underinsured motorist coverages in the Ritchies' policy), then each of the three underinsured motorist coverages are excess to the other and therefore each of the three coverages "stack."

b. Allied's "Limits of Liability" clause uses the singular pronoun "this" when stating "This is the most we will pay…." Being singular, that clause cannot refer to both the "each accident" limit and the "each person" limit, and therefore the clause must be construed in the manner most favorable to the Ritchies as the insureds, which means that the greater "each accident" limit applies to the claim. Because the "each accident" limit is

$300,000, the trial court's judgment finding $300,000 in available underinsured motorist coverage, was appropriate.

c. The applicable "Limit of Liability" clause does not limit the amount of coverage based upon the number of underinsured motorists who caused the death. Under the doctrine of *inclusio unius, exclusion alterius,* the absence in Allied's insurance policy of any express prohibition against stacking based upon the number of negligent motorists who were underinsured, means that the Ritchies as insureds are entitled to stack both the "each person" ($100,000) and the "each accident" ($300,000) limits of liability for the underinsured motorist coverage for each of the two negligent motorists who were underinsured. Thus the available underinsured motorist coverage is not the mere $100,000 which Allied claims.

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

Seeck v. Geico General Insurance Co., 212 S.W.3d 129 (Mo. banc 2007)

Chamness v. American Family Mutual Insurance Company, 226 S.W.3d 199 (Mo. App. E.D. 2007)

American Family Mutual Insurance Co. v. Ragsdale, 213 S.W.3d 51 (Mo. App. W.D. 2007)

POINT II

The trial court correctly ruled that Allied was not entitled to deduct from the limits of liability of the underinsured motorist coverage, any amounts paid by the motorists who were underinsured, because Allied was liable to the Ritchies for the full amount of the limits of liability for each of the applicable underinsured motorist coverages, in that:

a. The Ritchies' total damages substantially exceed the combined total of liability coverages and underinsured motorist coverages, such that there is no possibility of a double recovery;

b. Allied's policy of insurance is vague and ambiguous since the declarations page shows three separate vehicles owned by the Ritchies being insured, with each vehicle carrying underinsured motorist coverage with limits of $100,000 per person, $300,000 per vehicle. The Split Underinsured Motorists Limits endorsement indicates that the amount shown in the declarations "is the most we will pay…." These two provisions compel the logical conclusion that the Ritchies are entitled to the full $100,000 for each of the three separate underinsured motorists coverages, yet the interpretation urged by Allied would have the insurer never having to pay the amount listed in the declarations.

c. Allied made an unrebutted admission through a corporate representative it produced in response to a Rule 57.03(b)(4) notice, to the effect that Allied's definition of underinsured motorist coverage displayed on its web site, representing it to be coverage which pays the difference between the amount recovered from the other driver and the amount of the damages, up to the limit of the policy, was the applicable definition for Allied's underinsured motorist coverage issued within the State of Missouri. Applying this definition requires Allied to pay the full limits of liability set out in the declarations page of the policy.

Jones v. Mid-Century Insurance Co., Case No. 89844 (Mo. July 6, 2009)

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

State ex rel. Corinne v. Jamison, 271 S.W.3d 549 (Mo. banc 2008)

POINT III

The trial court did singularly error in finding that the Ritchies are entitled to underinsured motorist coverage in the amount of Three Hundred Thousand Dollars, instead of Six Hundred Thousand Dollars,

Because the Ritchies are entitled to underinsured motorists benefits in the sum of Three Hundred Thousand Dollars for the negligence of the first underinsured driver, and to underinsured motorist benefits in the sum of Three Hundred Thousand Dollars for the negligence of the second underinsured driver, for a total of Six Hundred Thousand Dollars in underinsured motorist coverage,

In that the "Other Insurance" clause provides that the coverages provided in the policy will each be considered as excess, thereby resulting in stacking of the several coverages; and in that the applicable Limit of Liability clause does not limit the Insurer's liability when there are multiple underinsured motorists.

(Respondents incorporate the principal authorities from Point I)

ARGUMENT

POINT I

A. Standard of Review

Allied, the appellant-insurer, correctly states that the question before the Court is one of law, and therefore review is *de novo*. Such review is of the entirety of the record, and the appellate court will then make such judgment as should have been entered by the trial court. *Rathbun v. Cato Corporation*, 93 S.W.3d 771 (Mo. App. S.D. 2002). Therefore this Court is not limited to either affirming the judgment of the trial court or to sustaining the position of Allied. The Court can, in fact, enter judgment in an amount greater than that in the trial court's judgment.

B. Standards for Interpretation of Policies of Insurance

In every instance of consumer insurance, it is the insurer which drafted the contract of insurance. Therefore certain rules of construction apply which require the courts to resolve any ambiguity in the policy against the insurer.

> If the language of the policy is ambiguous and reasonably open to different constructions then the language will be interpreted in the manner that would ordinarily be understood by the lay person who bought and paid for the policy. There are at least two reasons for construing an ambiguous provision against the insurer: (1) insurance

> is designed to furnish protection to the insured, not defeat it; ambiguous provisions of a policy designed to cut down, restrict, or limit insurance coverage already granted, or which introduce exceptions or exemptions, must be strictly construed against the insurer; and (2) as the drafter of the policy, the insurance company is in the better position to remove ambiguity from the contract.

Pruitt v. Farmers Insurance Company, Inc., 950 S.W.2d 659, 665 (Mo. App. S.D. 1997).

1. THE POLICY OF INSURANCE IS READ FROM THE POINT OF VIEW OF A LAY PERSON, NOT THE INSURER

"To test whether the language in the policy is ambiguous, the language is considered in the light in which it would normally be understood by the lay person who bought and paid for the policy." *Heringer v. American Family Mutual Insurance Company,* 140 S.W.3d 100, 103 (Mo. App. W.D. 2004).

"When interpreting the language of an insurance policy, we give the language its plain meaning. The plain meaning is the meaning that would ordinarily be understood by the layperson who bought and paid for the policy. Words in an insurance policy are to be construed in accordance with the principle that the test is not what the insurer intended the words to mean, but rather what a reasonable layperson in the position of the insured would have thought they

meant." *Ware v. Geico General Insurance Co.,* 84 S.W.3d 99, 102 (Mo. App. E.D. 2002).

2. AN AMBIGUITY EXISTS EITHER WHEN AN INDIVIDUAL TERM, OR WHEN THE VARIOUS PROVISIONS OF THE POLICY AS A WHOLE, ARE READ TOGETHER, IS AMBIGUOUS, OR CAPABLE OF MORE THAN ONE INTERPRETATION, OR CONTAINS CONFLICTING CLAUSES

"If the policy language is ambiguous (if there is duplicity, indistinctness or uncertainty in its meaning), and therefore open to different constructions, then it will be interpreted in the manner that would ordinarily be understood by the lay person who bought and paid for the policy. Exclusionary clauses of policies are strictly construed against the insurer, and if they are ambiguous they will be construed favorable to the insured." *Little v. American States Insurance Company,* 179 S.W.3d 433, 439 (Mo. App. S.D. 2005).

In *Seeck v. Geico General Insurance Co.,* 212 S.W.3d 129 (Mo. banc 2007) the insurer attempted to avoid the ambiguity created by an "other insurance" clause, by pointing out other clauses in the policy. The insurer's argument, in effect, was that if the court ignored the "other insurance" clause, then the other clauses in the policy were clear and unambiguous, and so those clauses should be read by themselves. The Supreme Court rejected that argument, holding "Geico's

argument is inconsistent with the well-settled Missouri law requiring a court not to interpret policy provision in isolation but rather to evaluate a policy as a whole."

In other words a clause in an insurance policy, standing alone, might appear clear on its face. By reading that same clause in combination with another clause, however, a conflict can arise. The insurance company's usual defense in such a case is to claim that because one clause read in isolation is clear, then that clause must be enforced. The insurer always claims it is the clause which defeats coverage which is clear and controlling. The courts do not permit such game-playing by the insurers. Instead, the courts clearly hold that the inconsistency creates an ambiguity and then proceed to other rules of construction to determine the extent of coverage provided by the insurance policy.

3. AMBIGUITIES ARE RESOLVED IN FAVOR OF THE INSURED, AND IN FAVOR OF COVERAGE, AND AGAINST THE INSURER

"In general, where the language of any insurance policy is ambiguous, it must be construed against the insurer. Moreover, provisions restricting coverage are particularly construed most strongly against the insurer." *Alea London Limited v. Bono-Soltysiak Enterprises,* 186 S.W. 3d 403, 412 (Mo. App. E.D. 2006).

It is important to note that insurance policies are designed to provide protection and will be liberally interpreted to grant, rather than deny, coverage." *Poage v. State Farm Fire & Casualty Co.,* 203 S.W.3d 781, 783 (Mo. App. S.D.

2006). These rules are very logical in light of the public policy behind insurance, and the fact that the insurer writes the insurance policy.

4. DETERMINING THE EXISTENCE OF AN AMBIGUITY IS A QUESTION OF LAW FOR THE COURT TO DECIDE

"Whether an insurance policy is ambiguous is a question of law." *Martin v. United States Fidelity & Guaranty Co.*, 996 S.W.2d 506, 508 (Mo. banc 1999). This raises the ancillary proposition that when the Missouri Supreme Court has ruled that a particular clause is ambiguous, that finding of law is binding upon the lower courts. "We are constrained to follow the pertinent Supreme Court decisions of this State." *State ex rel. FAG v. Perigo,* 8 S.W. 3d 118, 123 (Mo. App. S.D. 1999). "(S)tare decisis is the cornerstone of our legal system. It is the identity of principle not similarity of facts, which furnishes authoritative precedent." *M&H Enterprises v. Tri-State Delta Chemicals, Inc.*, 984 S.W.2d 175, 178 (Mo. App. S.D. 1999).

5. THE APPELLATE AND SUPREME COURTS OF THIS STATE HAVE RULED THAT THE "OTHER INSURANCE" CLAUSE CREATES AN AMBIGUITY REGARDING UNDERINSURED MOTORIST COVERAGE, EVEN AND ESPECIALLY WHERE COMPETING CLAUSES EXIST IN THE POLICY

In *Zemelman v. Equity Mutual Insurance Company,* 935 S.W.2d 673 (Mo. App. W.D. 1996), the insured was driving her own automobile when she was struck and injured by another vehicle. The insurer for the negligent driver paid its $100,000 liability limits. Zemelman's insurance policy provided for underinsured motorist benefits of $50,000. There was only one vehicle and one policy covering Zemelman, so there was no issue regarding "stacking" of UIM benefits. The policy also provided the UIM insurer with a set-off paid on behalf of the negligent driver. Hence Zemelman's UIM insurer claimed that the negligent driver was not even an underinsured motorist since they had liability limits greater than the UIM limit, and that even if the UIM insurer was liable, it owed nothing since the credit to which it was entitled exceeded its UIM limits.

The plaintiff, on the other hand, claimed that the UIM insurance policy was ambiguous because of the "other insurance" clause, which read:

> If there is other applicable insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. **However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.** (Emphasis by the Court).

The insurer claimed that the issue was controlled by *Rodriguez v. General Accident Ins. Co. of America,* 808 S.W.2d 379 (Mo. banc 1991). This is the same case upon

which Allied has consistently relied upon in the case at bar. But the *Zemelman* court found that *Rodriguez* never addressed the effect of the "other insurance" clause, and therefore was not guiding.

The *Zemelman* court then ruled that the presence of the "other insurance" clause creates an ambiguity which must be resolved in favor of the insureds:

> In essence, the courts have carved a nitch which allows the insured to avoid the harsh effect of *Rodriguez* and the unambiguous definition of the underinsured and limit of liability language. Where there is an 'excess' or 'other insurance' clause that provides the underinsured coverage is excess over all other collectible insurance at the time of the accident, a court may find that language is ambiguous when read with the limit of liability or the definition of underinsured motorist coverage if the Other Insurance clause may reasonably be understood to provide coverage over and above that collected from the tortfeasor. In *Rodriguez,* only the underinsured motor vehicle definition and the limit of liability language were held unambiguous and the court did not address the issue of an excess insurance clause. Thus, where this third clause exists and is raised as ambiguous, the courts have held the first two clauses unambiguous and found an ambiguity arises in the 'Other Insurance' clause and that is our holding here.

Zemelman at 677-8. The court determined that the insured plaintiff was entitled to claim up to the UIM policy limits of $50,000 against her insurer.

In *Goza v. Hartford Underwriters Insurance Co.*, 972 S.W.2d 371 (Mo. App. E.D. 1998) the plaintiff Goza was struck head on by a vehicle which crossed the center line. The negligent driver's insurer paid its limits of liability in the sum of $100,000 to Goza. Plaintiff also had a policy of insurance with Hartford, providing UIM coverage with individual per-person limits of $100,000. The Hartford policy contained definitions of underinsured vehicle and limit of liability clauses similar to those in the Allied policy, and in the policies involved in the other cases discussed under this section. The Hartford policy also contained the following "Other Insurance" provision:

> If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Hartford was aware of the *Zemelman* decision and tried to avoid its application by claiming that all of the other policy provisions had to be met before the Other Insurance clause was looked at. Continuing its argument, Hartford claimed that the other provisions would preclude plaintiff's claim. Therefore, it argued, the

Other Insurance clause could not create an ambiguity. The court firmly rejected this argument:

> The argument begs the question on the ultimate issue of ambiguity. Obviously, if we were to limit our inquiry only to the question of whether Goza's claim comports with the policy's definition of 'underinsured motor vehicle' and simply ignore altogether the existence of the Other Insurance clause, then of course Hartford's position would prevail. But Hartford has offered us no persuasive reason why the UIM provisions here at issue should be viewed separately or in isolation rather than read together.
>
> Further, we think an objective examination of the 'excess' language of the Other Insurance clause suggests not just that this language might reasonably be interpreted by an average lay person to mean underinsured coverage was excess to amounts recovered from the tortfeasor, **but also** to mean that this language prevailed over the preceding and apparently conflicting language contained in the policy's definition of underinsured and Limits of Liability sections. (Emphasis in the original).

Goza, 972 S.W.2d at 374-5. The court affirmed judgment for plaintiff Goza and against Hartford in the full amount of the UIM policy limits.

The next in this consistent line of cases is *Ware v. Geico General Insurance Co.*, 84 S.W.3d 99 (Mo. App. E.D. 2002). There the named insured's child was injured in an automobile collision and was paid all available liability insurance. The parent had automobile insurance which also insured the child, which provided for $100,000 in additional insurance. Geico refused to pay the underinsured motorist coverage for several reasons, two of which are relevant here. The first was that the policy provided that the limit of liability shall be reduced by all sums paid by the liability policies insuring the tortfeasors. The second was that Geico claimed the Other Insurance clause does not provide UIM in excess of liability coverage but only in excess of available underinsured motorist injury insurance. Geico's policy contained the following Other Insurance clause:

> When an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy, this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.

The court rejected each and every one of Geico's arguments, and found that the plaintiff was entitled to the full amount of UIM up to the limits of liability, and that the plaintiff was entitled to prejudgment interest upon that amount as well. The court's explanation for this holding is directly applicable to the present case:

A reasonable layperson in the position of Appellants may have understood the 'Other Insurance' provision to provide coverage over and above that furnished by the tortfeasor's insurance under the circumstances laid out in the provision. Further, reading the 'Other Insurance' provision in conjunction with the 'Limit of Liability' provisions creates an ambiguity. The method for calculating Geico's limit of liability is in conflict with the 'Other Insurance' provision because it is uncertain how the term 'excess' in the provision applies to the calculation of coverage.

* * * * *

Further, a reasonable layperson may have concluded that the 'Other Insurance' provision prevailed over the preceding and apparently conflicting 'Limit of Liability' provisions in that the 'Other Insurance' provision applies to a specific situation setting it apart, namely, when an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy. Additionally, we find that the clause 'the insurance which applies to the occupied motor vehicle is primary' refers to relative positions of liability, the order of insurer liability, not to relative amounts of liability.

> Accordingly, we find that the term 'excess' in the 'Other Insurance' provision of the Policy could reasonably be interpreted to provide coverage over and above that available from the tortfeasors, and thus the provision is ambiguous.

Ware, 84 S.W.3d at 102-3.

This line of cases then concludes with the recent decision of the Missouri Supreme Court in *Seeck v. Geico General Insurance Co.,* 212 S.W.3d 129 (Mo. banc 2007). In that case Ms. Seeck was a passenger in a car that was rear-ended. The negligent tortfeasor was insured by Farmers Insurance, which paid it policy limits on the liability coverage of $50,000. Ms. Seeck was herself insured by a policy of insurance issued by Geico, which provided UIM coverage in the amount of $50,000. Demand was made upon Geico for UIM benefits. Geico refused, relying upon the same arguments that had been repeatedly rejected by the appellate courts. The court of appeals found against the UIM insurer, and transferred the case to the Missouri Supreme Court so as to eliminate any question on this issue. The Supreme Court in fact affirmed the preceding cases, and did make it quite clear that the earlier decisions did accurately state the law of Missouri and are still controlling.

The Supreme Court found that the Other Insurance clause created an ambiguity in the policy, which ambiguity required that the reasonable expectations

of the insured be met by interpreting the policy to provide UIM coverage over and above the liability limits paid by the tortfeasor. The Court found the pertinent policy to be "When an insured is occupying a motor vehicle owned by the insured . . . this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary."

The Supreme Court then ruled how this clause was to be interpreted. "This Court agrees that an 'ordinary person of average understanding' would interpret the excess insurance clause to mean that since Ms. Seeck has obtained recovery under the primary Farmers Insurance policy applicable to the occupied vehicle but has additional damages, she is entitled to coverage under the excess insurance clause of her own Geico policy." *Seeck,* S.W.3d at 132.

Geico took the same position as does Allied in the case before this Court. Geico claimed that the excess or Other Insurance clause would never even be reached because of other clauses in the policy, including the limit of liability clause. Our Supreme Court firmly rejected this argument: "Geico's argument is inconsistent with well-settled Missouri Law requiring a court not to interpret policy provisions in isolation but rather to evaluate a policy as a whole." *Seeck,* 212 S.W.3d at 133.

6. "OTHER INSURANCE" CLAUSES LIKE THE ONE HERE CONFLICT WITH AND VOID DIFFERENT COVERAGE, SET-OFFS,

LIMITS OF LIABILITY AND ANTI-STACKING CLAUSES DEPENDING UPON THE PARTICULAR ISSUES IN THE CASE

The preceding section establishes that our Courts frequently find the "Other Insurance" clauses to create ambiguities in underinsured motorist coverage, especially where--as occurred here--the insured is occupying a non-owned vehicle. Contrary to Allied's unsupported assumption, these cases have found the "Other Insurance" clauses to conflict with many different limiting clauses, depending upon the particular facts.

The instances in which the "other insurance" clauses have been found to void insurers' efforts to avoid responsibility include: determining whether or not the negligent driver met the definition of underinsured motorist; whether the insurer was permitted to a set-off of the amounts paid by the underinsured motorist; and whether multiple UIM coverages could be "stacked." Allied here lumps all of the cases together and assumes they are all the same. They are not.

In many of the cases the question was whether the negligent driver was even an underinsured motorist under the particular policy of insurance. The key fact in those cases was that the negligent motorist had liability insurance limits in the same or greater amount than the limits of liability for the underinsured motorist coverage. Cases with that fact pattern, and which did not involve an issue of stacking of coverages, include *Ware, Zemelman, Goza*, and *Seeck.* For ease of

discussion, these will be referred to as "coverage" cases because the main issue was whether the set-off against UIM coverage either reduced the coverage to zero or by definition excluded the negligent driver from being considered as underinsured.

Many of the coverage cases utilized the "Other Insurance" clause to keep the insurer from avoiding coverage. The insurer would point to clear language, often language approved in *Rodriguez.* In these instances the court would find that that unambiguous language which was blessed by *Rodriguez* nonetheless was caused to become ambiguous by reason of conflicting language in the Other Insurance clause.

To reach that result, the courts sometimes had to find that the Other Insurance clause could be construed by an ordinary person to mean that the underinsured motorist coverage was excess over and above the tortfeasor's liability insurance. The courts then held that this ambiguity trumped the clear language approved by *Rodriguez,* and therefore the insurer was liable for the full amount of the underinsured motorist coverage. This was done under the principle that ambiguities are construed against the insurer who drafted the policy.

The case presently before this Court is not a coverage case. Allied admits that each of the two tortfeasors who caused the death of Kelsey Ritchie had liability coverage in an amount less than the Ritchies' UIM coverage. Even adding

the liability coverages together resulted in only $60,000 being paid, while the Ritchies' policy provided UIM coverage on three separate vehicles, each with limits of $100,000 each person and $300,000 each accident. Therefore, the Ritchies do not have to show that their underinsured motorist coverage is in an amount greater than the tortfeasors' liability limits. That is simply not an issue in this case, and the Ritchies' case does not depend upon proving such a fact.

Where the existence of applicable UIM coverage is not the issue, but the question is whether multiple available UIM coverages can be stacked, then the courts look to see whether the Other Insurance clause treats each UIM coverage as excess such that the coverages stack. These will be referred to as "stacking" cases.

In *Niswonger v. Farm Bureau Town & Country Insurance Company of Missouri,* 992 S.W.2d 308 (Mo. App. S.D. 1999) the court invalidated the anti-stacking clause in the underinsured motorist coverage because it conflicted with the "Other Insurance" clause. That "Other Insurance" clause ended by stating "However, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance." For purposes of the stacking issue, the court considered "other similar insurance" to mean underinsured motorist insurance. "[T]here is no question that the term 'similar insurance' as used in this clause does, in fact, refer to 'other underinsured motorist insurance coverages." *Niswonger,* footnote 6.

The court found that when considering the "other insurance" clause to refer to underinsured motorist coverage, the clause conflicted with anti-stacking language in the policy:

> Plaintiffs argue that this sentence seems to say, in a very straightforward fashion, that when an insured is injured in an accident while occupying a non-owned vehicle (as Mr. Niswonger was), the underinsured motorist coverage provided by the endorsement is excess over any other applicable underinsured motorist coverage. Plaintiffs contend that an average lay person thus 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. That is, a reasonable lay person could interpret the sentence to specifically allow stacking of UIM coverages provided in their separate vehicle policies, for which separate UIM premiums have been paid, in the special situation where an accident occurs while the insured is occupying a non-owned vehicle. A reasonable lay person thus could look at it and think that the policy's anti-stacking provisions, which might normally and otherwise apply, do not apply

in the special situation where the insured is injured while occupying a non-owned vehicle. Therefore, plaintiffs argue, this sentence creates an ambiguity in the policy, because it conflicts with the other 'anti-stacking' language in the policy.

We agree.

Niswonger, 992 S.W.2d at 315. Therefore even when the "other insurance" clause is construed as being limited to other underinsured motorist coverage, the courts hold that where the insured was in a non-owned vehicle the "other insurance" clause supercedes the anti-stacking language in the insurance policy.

C. The Contradiction between the "Other Insurance" and the "Limits of Liability" Clauses in the Insurer's Policy Creates an Irreconcilable Conflict Which Must Be Resolved by Defeating the "Limit of Liability" Restrictions

Niswonger controls. The "other insurance" clause in the Missouri endorsement, which applies to underinsured motorist coverage is:

VII. Underinsured Motorist Coverage

B. The Other Insurance Provision is amended to read as follows:

> 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 p. 54). The clause in *Niswonger* stated "any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance." The *Niswonger* court interpreted "other similar insurance" to mean "underinsured motorist" coverage. The clause in the policy issued to the Ritchies is virtually identical to how the court interpreted the *Niswonger* clause. There simply is no distinction.

Niswonger is very much alive and well. *Chamness v. American Family Mutual Insurance Company,* 226 S.W.3d 199 (Mo. App. E.D. 2007) expressly relied upon *Niswonger* to find an ambiguity in the insurance policy by reason of the conflict between the "other insurance" and the anti-stacking and the set-off provisions of the policy before the court. Another recent case which relied upon the *Niswonger* opinion to permit stacking of underinsured motorist coverages is *American Family Mutual Insurance Co. v. Ragsdale,* 213 S.W.3d 51 (Mo. App. W.D. 2007).

Missouri law is clear that the "Other Insurance" clause in Allied's policy renders the anti-stacking language ambiguous, and the Ritchies are entitled to stack

their three underinsured motorist coverages for their damages caused by each of the two underinsured motorists.

D. Allied Incorrectly Interprets the Law

Allied relies principally upon three cases: *Rodriguez; Green v. Federated Mutual Insurance Company*, 13 S.W.3d 647 (Mo. App. E.D. 1999); and *Farm Bureau Town & Country Insurance Company of Missouri v. Barker*, 150 S.W.3d 103 (Mo. App. W.D. 2004). All three of these cases deal with substantially different issues and have no application to the facts of the case at hand.

Rodriguez involved either a policy of insurance that did not include an "Other Insurance" clause, or else the issue of an ambiguity caused by such a clause was not raised by the insured. Numerous courts have distinguished *Rodriguez* on that basis, including our Supreme Court itself in *Seeck*: "(A)s *Zemelman* noted, in *Rodriguez*, only the underinsured motor vehicle definition and the limit of liability language were held unambiguous and the court did not address the issue." *Seeck*, 212 S.W.3d at 133.

Of special note is that the portion of *Rodriguez* upon which Allied relies, has been held to be merely dicta and of no precedential value. *Jones v. Mid-Century Insurance Co.*, Case No. 89844 (Mo. July 6, 2009).

Allied's next case, *Green*, did not involve stacking of multiple coverages. The plaintiff there was driving his employer's car which was insured by a policy

that provided underinsured motorist coverage in the sum of $50,000. There were no other UIM coverages available. The policy of insurance provided that the insurer was entitled to deduct any payments made by the negligent driver's liability insurer, as well as any payments received under any worker's compensation law. The plaintiff received more than $250,000.00 from these two sources, and the insurer claimed that plaintiff was therefore not entitled to underinsured motorist benefits.

The *Green* policy stated that "Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist insurance providing coverage on a primary basis." The court ruled that when compared to the clauses involved in *Goza*, *Zemelman* and *Jackson*, "Insurer has eliminated any such ambiguity here, because its language clearly states that the UIM coverage it provides is excess only over other UIM insurance, not excess over other collectible insurance of any kind." *Green*, 13 S.W.3d at 650. Therefore, held the court, the other driver was not an underinsured motorist because the plaintiff had recovered more than the limits of liability.

The facts in *Green* did not give rise to a possible ambiguity based upon stacking issues. Because there was only one possible UIM coverage, the "Other Insurance" clause would not be considered. The most that *Green* holds is that when the "Other Insurance" clause is limited to other underinsured motorist

coverage, the insured must use other means to establish that the negligent tortfeasor was underinsured. The issues in this case were not present or decided in *Green*.

The last case relied upon by Allied is the *Barker* decision. It also is of no aid to Allied.

First, the policy provisions in *Barker* are not identical to those present in the Allied's policy. The "Other Insurance" clause here (set out in paragraph VII.B. of the Missouri endorsement, LF p. 54) is nowhere as detailed or extensive as the section in the Farm Bureau policy issued to Barker. Allied tries to point to certain similarities between the two policies, picking and choosing what it wants to present. But the simple fact is that the two clauses are in no way identical.

Second, *Barker* is premised upon the assumption that "The sentence which was found to be offensive in *Niswonger* is not present in the Barkers' UIM endorsements…." The two sentences read:

Niswonger

> However, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any similar insurance.

Barker

> 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.

While the language in both sentences is different, the meaning in both is the same. In both policies, an ordinary lay person reading the policy could reasonably conclude that the underinsured motorist coverages are excess over any other insurance. The logic underlying the *Barker* opinion is flawed and should not be followed. It is significant that no other court has cited to *Barker* in spite of there being numerous underinsured motorist decisions since *Barker* was handed down.

Third, *Barker* simply cannot be considered good law after the Missouri Supreme Court decided *Seeck*. The determinative sentence in the "Other Insurance" clause reads:

Seeck

> When an insured is occupying a motor vehicle not owned by the insured … this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.

Seeck, 212 S.W.3d at 132. This is different from the "Other Insurance" clause in either *Niswonger* or *Baker*, yet is closest to that in *Baker*. The Supreme Court

nonetheless found that the sentence rendered the policy ambiguous, and held that Seeck was entitled to the $50,000 provided by Geico's UIM coverage, even though the negligent tortfeasor had paid the $50,000 limits under his liability coverage. Allied refuses to acknowledge the existence, and the controlling effect, of the Supreme Court's *Seeck* decision.

At the beginning of the Statement of Facts, the Court was advised that Allied had failed to identify in its Brief certain critically important decisions affecting the merits of the appeal. The *Seeck* decision is one of those important decisions that are necessary to any intelligent discussion regarding underinsured motorist coverage when the insured is occupying a non-owned vehicle. Allied does not mention *Seeck* and does not even try to distinguish it. The fair implication is that Allied knows that case is controlling, and Allied is unable to distinguish it. Allied also fails to acknowledge *Chamness*, which followed *Seeck* and which reaffirmed *Niswonger*.

Allied has simply put its blinders on, ignoring the facts and the law which demonstrate that Allied's appeal is wholly without merit. Without even mentioning these important decisions, Allied cannot even claim to be making a good faith attempt to distinguish those cases from the present one.

E. Independent of the Ambiguity Created by the "Other Insurance" Clause, the Ambiguity in the "Limit of Liability" Clause Requires That the Coverages Stack for Each of the Three UIM Coverages

The "Limit of Liability" clause is ambiguous independent of the conflict with the "Other Insurance" clause. These grounds further support the correctness of the trial court's judgment.

The applicable "Limit of Liability" clause is found in the Split Underinsured Motorists Limits endorsement (LF p. 59):

> LIMIT OF LIABILITY
>
> 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 Motorist Coverage is our 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:
>
> 1. Insureds;
> 2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident.

Two ambiguities arise because of the wording which Allied chose to use in this clause.

First, Allied uses the singular pronoun "this" when it writes "This is the most we will pay regardless of the number of…." This sentence follows distinct sentences which discuss first the "each person" limit and then the "each accident" limit. The singular pronoun "this" cannot refer to both the "each person" and the "each accident" limit. Had Allied intended to refer to both limits, it should and would have used the plural pronoun "these."

Further evidence of this ambiguity can be found in the separate Split Uninsured Motorists Limits (LF p. 61). There Allied set out the discussion of "each person" and "each accident" limits in separately numbered paragraphs, followed by a third paragraph which commences "Subject to the maximum limits of liability set forth in 1 and 2 above…."

A reasonable lay person, reading the "Limits of Liability" language in the Split Underinsured Motorists Limits endorsement, would not interpret the language "This is the most we will pay…." as referring to both the "each person" and the "each accident" limit. This is especially true when the Split Uninsured Motorists Limits endorsement is so much clearer that it intends to refer to both limits. A

reasonable lay person would not think that Allied would be so clear in one clause and so unclear in another when trying to express the same idea.

The ambiguity in the "Limit of Liability" clause means that the clause is either unenforceable in this context, or else must be construed in whatever form is most favorable to the Ritchies as the insureds.

The "Limit of Liability" clause is also ambiguous in the present context because the Ritchies have underinsured motorist claims against each of two underinsured motorists. Mr. Hart, the adjustor who was responsible for overseeing this claim, was produced by Allied as its corporate representative. In his deposition the following testimony occurred:

> Q. Under "Limit of Liability" –
>
> A. Yes.
>
> Q. – you say – by you, I mean the company – "This is the most we will pay regardless of the number of" – and then there are four paragraphs set out; right?
>
> A. Yes.
>
> Q. Do any of those four paragraphs contain a statement that the limit of liability is the most that will be paid regardless of the number of underinsured motorists?

(Objections of counsel omitted as having never been ruled upon by trial court)

A. No.

(LF p. 270). The maxim "*expressio unius est exclusio alterius*," that is, the expression of one thing is the exclusion of another, applies to contracts. *General American Life Insurance Co. v. Barrett*, 847 S.W.2d 125, 133 (Mo. App. W.D. 1993). By including instances where the limits of liability would be applied, the Limit of Liability clause excludes instances which are not listed. Because the policy does not attempt to limit liability based upon the number of underinsured motorists who caused Kelsey Ritchie's death, Allied may not now claim that its liability to the Ritchies is limited by a selective reading of the "Limits of Liability" clause while ignoring the remainder of the policy.

F. Conclusion

Allied tries to use its vaguely worded policy provisions to avoid its responsibility for UIM coverages, even though the Ritchies paid the premiums which Allied set. By including conflicting clauses, Allied is in a position to point to and claim priority of whichever clause happens to avoid liability under the particular facts at hand. Allied then can say, in each instance, that the policy provision upon which the insured relies is clearly contrary to the other provision, which "obviously" controls.

This type of bandying about of conflicting clauses is exactly what the courts now refuse to condone or enforce. Missouri Courts have consistently refused to permit this abusive tactic, and the trial court's judgment was proper under the law and the facts. That judgment should be affirmed.

POINT II

The trial court correctly ruled that Allied was not entitled to deduct from the limits of liability of the underinsured motorist coverage, any amounts paid by the motorists who were underinsured, because Allied was liable to the Ritchies for the full amount of the limits of liability for each of the applicable underinsured motorist coverages, in that:

a. The Ritchie's total damages substantially exceed the combined total of liability coverages and underinsured motorist coverages, such that there is no possibility of a double recovery;

b. Allied's policy of insurance is vague and ambiguous since the declarations page shows three separate vehicles owned by the Ritchies being insured, with each vehicle carrying underinsured motorist coverage with limits of $100,000 per person, $300,000 per vehicle. The Split Underinsured Motorists Limits endorsement indicates that the amount shown in the declarations "is the most we will pay…." These two provisions compel the logical conclusion that the Ritchies are entitled to the full $100,000 for each of the three separate underinsured motorists coverages, yet the interpretation urged by Allied would have the insurer never having to pay the amount listed in the declarations.

c. Allied made an unrebutted admission through a corporate representative it produced in response to a Rule 57.03(b)(4) notice, to the effect that Allied's definition of underinsured motorist coverage displayed on its web site, representing it to be coverage which pays the difference between the amount recovered from the other driver and the amount of the damages, up to the limit of the policy, was the applicable definition for Allied's underinsured motorist coverage issued within the State of Missouri. Applying this definition requires Allied to pay the full limits of liability set out in the declarations page of the policy.

This issue was visited quite recently in *Jones v. Mid-Century Insurance Co.*, Case No. 89844 (Mo. July 6, 2009). Under the holding in that decision, there are two separate reasons why the Allied policy must be held to provide coverage without deduction for any amounts paid by the underinsured drivers.

The first reason *Jones* requires the conclusion that Allied's policy is ambiguous on this issue, is that the policy declares it will provide underinsured motorist coverage in the amount of $100,000 per person, $300,000 per accident, for each of the three vehicles owned by the Ritchies insured under that policy. (LF p. 77). After traversing through the Underinsured Motorists Coverage endorsement (LF pp. 112-4), then the Missouri Amendments endorsement to that endorsement (LF pp. 104-110), and then the Split Underinsured Motorists Limits

endorsement (LF p. 115), the ordinary consumer finds language in the Limits of Liability clause which refers him or her to the declarations page (LF p. 77) and then states that "This is the most we will pay regardless of the number of …." Just as Mid-Century did in *Jones,* Allied seeks to avoid this clear and obvious result, by referring the Court to a different portion of the policy. But *Jones* held that to cause the third clause to control, the court would have to re-write the policy and add words to the declarations page and to the Limits of Liability clause. Re-writing of the policy is not permitted, and Allied is bound by the language it chose to put into its policy.

Allied's choice of the phrase "this is the most we will pay" is used repeatedly throughout its policy. It is in the Limits of Liability clause describing the liability coverage. (LF p. 33). It is in the Limits of Liability clause in the Medical Payments section of the policy. (LF p. 34). It is in the Limits of Liability clause of the Uninsured Motorist coverage. (LF p. 36, 61). In all of these instances, the reasonable possibility exists for Allied to have to pay to or on behalf of an insured, the entire amount listed in the Declarations page for the respective coverages.

So in at least three other coverages issued by Allied to the Ritchies, the use of the phrase "this is the most we will pay" has a consistent and common meaning.

The insured can reasonably expect that if their loss is as great as the amount of the stated coverage, then they will receive the limits of liability for that coverage.

Allied seeks to avoid the application of the same meaning for the phrase "this is the most we will pay" by saying that another clause clarifies the insurer's intent. It clarifies nothing. Instead, it creates a direct conflict with the reasonable expectations of the policyholder. As *Jones* teaches us, this third clause which Allied relies upon is conflicting at best and at worst is misleading.

Allied was deposed in accordance with Rule 57.03(b)(4). Its corporate representative could not identify any instance where the insurer would pay the amount of underinsured motorists coverage described on the declarations page. (LF pp. 149, 150). The representative admitted that the phrase "the most we will pay" in the underinsured motorist coverage means "the most the policy will pay." (LF p. 150; depo p. 25 lines 1 through 20). That is the construction which reasonable people would put on that language, and it is the construction to which Allied should be held.

In this case a trial on the merits was conducted against the underinsured drivers. A judgment was entered in the sum of $1,800,000. Only Sixty Thousand Dollars was paid by the driver's liability insurers. If this is not the instance where Allied should be held to honor its contractual obligations and pay "the most we will pay," then there is no case where Allied would ever be liable for the limits of

liability stated in the Declarations page. And that means the underinsured coverage is not and never will be what it is represented to be in the other portions of the policy.

Allied's appeal must fail on the merits for one more reason. Allied's Rule 57.03(b)(4) corporate representative agreed that the definition of underinsured motorist coverage which Insurer placed on its website, applies to the Ritchies' UIM claim. The corporate representative read the definition, which is:

> This coverage typically pays the difference between the amount recovered from the other driver and the amount of the damages, up to the limit of the policy.

(LF p. 265; depo. P. 21, lines 15-17). Mr. Hart agrees that this language applies to a UIM claim in Missouri as well as any other state (LF p. 265, depo. P. 23, lines 4 through 16). That admission is not made by the witness, but rather by Allied which designated him as its corporate representative. *State ex rel. Corinne v. Jamison*, 271 S.W.3d 549 (Mo. en banc. 2008).

The corporate representative therefore admits that that this coverage pays the difference between the amount that is paid by the negligent driver, and the insured's damages. Any lay witness would reasonably interpret this definition as meaning that the policy limit was the only limit on the amount that would be paid over and above the amount recovered from the other driver. This is bolstered by

the affidavit of Scott Grau, head of Information Technology for Allied. The explanation of UIM coverage which was on Allied's website at the times relevant to this case are consistent with a lay person's understanding that the UIM coverage would apply without deduction to cover the insured's losses, with the policy limit being a limit on the amount that the insurer paid, not a limit on the total amount the insured would receive.

It should be noted that at the time of its opinion, the Court of Appeals in this case did not have the benefit of this Court's decision in *Jones.* Even so, the majority decision of the Southern District which permitted Allied to deduct the payments by the underinsured motorists, is contrary to precedent that was presented to that court. An example is *Chamness v. American Family Mutual Insurance Co.*, 226 S.W.3d 199 (Mo. App. E.D. 2007). There, the court found an ambiguity in the "other insurance" clause which was of the very type which is present in the Allied policy. Having found an ambiguity that applied to the coverage at issue, the *Chamness* court correctly held that the ambiguity applied to both the question of stacking of multiple UIM coverages, and to the issue of whether the UIM coverage applied over and above any amounts recovered from the negligent drivers.

The dissent in the Court of Appeals in the instant case, correctly would have held that the ambiguity could not be selectively ignored in considering both

questions. When a policyholder of ordinary intelligence is led astray by vaguely worded inconsistent clauses, he or she cannot be expected to parse when that ambiguity might be brushed aside. Once an ambiguity is found that affects the issue of coverage of the underinsured motorist coverage, that ambiguity requires the UIM provision to be construed in favor of the insured. This is true for deciding whether the insurer can contradict other language in its policy and thereby never allow an insured to recover the promised limits of liability. This is also true for stacking.

In this case a trial on the merits was conducted against the underinsured drivers. A judgment was entered in the amount of $1,800,000. Only $60,000 was paid by the drivers' liability insurers. If this is not the instance where Allied should be held to honor its contractual obligations and pay the purchased limits of liability, then there is no case where Allied would ever be liable for the limits of liability stated in the declarations page. And that means the underinsured coverage is not and never will be what it is represented to be in the other portions of the policy.

The trial court properly ruled that Allied was not entitled to deduct from the limits of liability stated in the Declarations page, any amounts paid by the negligent motorists. That is consistent with *Jones* and with the reasonable expectation of the insured.

POINT III

The trial court did singularly error in finding that the Ritchies are entitled to underinsured motorist coverage in the amount of Three Hundred Thousand Dollars, instead of Six Hundred Thousand Dollars,

Because the Ritchies are entitled to underinsured motorists benefits in the sum of Three Hundred Thousand Dollars for the negligence of the first underinsured driver, and to underinsured motorist benefits in the sum of Three Hundred Thousand Dollars for the negligence of the second underinsured driver, for a total of Six Hundred Thousand Dollars in underinsured motorist coverage,

In that the "Other Insurance" clause provides that the coverages provided in the policy will each be considered as excess, thereby resulting in stacking of the several coverages; and in that the applicable Limit of Liability clause does not limit the Insurer's liability when there are multiple underinsured motorists.

A. Standard of Review

Construction of an insurance contract is a question of law, and review is *de novo*. *Seeck v. Geico General Insurance Company,* 212 S.W.3d 129, 132 (Mo. banc 2007). The Court need not simply affirm the judgment or grant the relief

requested by appellant. Instead, the Court should give such judgment as should have been entered by the trial court. Supreme Court Rule 84.14.

B. Judgment Should Be Entered for the Ritchies for Six Hundred Thousand Dollars as Provided by the Underinsured Motorist Coverage under Insurer's Policy

The Ritchies incorporate by reference all arguments advanced in Point I, and they will not be repeated here. It will be noted that Allied's Rule 57.03(b)(4) corporate representative did acknowledge that the policy of insurance did not contain language which purported to limit coverage on the basis of the number of negligent underinsured drivers. (LF p. 154) It is the position of the Ritchies in this Point III that they are entitled to stack the three separate UIM coverages for their claim against the underinsured motorist Noah Heath, and to stack the three separate UIM coverages for their claim against the underinsured motorist Adam Tomblin, for total UIM benefits of $600,000. This claim was presented to the trial court in the petition (LF pp. 7-13) and their response to Allied's motion for summary judgment (LF p. 63-65).

At the trial against the tortfeasors, the court entered judgment against Tomblin and Heath for $1,800,000 for the wrongful death of plaintiffs' daughter. Tomblin's and Heath's liability insurers paid a total of $60,000. Even payment by Allied of the full $600,000 that it owes for underinsured motorist coverage, would

leave a substantial portion of the judgment unsatisfied. This is not an instance of double recovery.

The UIM coverages in Insurer's policy stack for a total of $600,000 for two reasons. The first reason is that the "Other Insurance" clause specifically states that the underinsured motorist coverage "shall be excess over any other collectible underinsured motorist coverage." Because plaintiff's daughter was riding in a non-owned automobile, each of the UIM coverages provided by Insurer is defined in the policy as excess coverage. Therefore each coverage pays its pro-rata share of the liability until the limits are exhausted. Since the unpaid amount of the judgment against the two underinsured motorists is greater than the total of all of the UIM coverages provided by Insurer's policy, each of the coverages should be paid in full, for each of the two underinsured motorists.

Second, the "Limit of Liability" clause is vague both in the use of the singular pronoun "this," and in that the clause does not purport to limit Allied's liability on the basis of the number of underinsured motorists that caused the death of the Ritchies' child. The policy language establishes the first point. Allied, through its corporate representative, admits the second.

Either the excess language in the "Other Insurance" clause or the ambiguity in the "Limit of Liability" clause is reason enough to require that judgment be entered for the Ritchies in the sum of $600,000. Based upon the facts and the law

this would be the correct judgment, and it is wholly consistent with justice and with an ordinary lay person's understanding of the insurance benefits that are due under the Insurer's policy of insurance.

CONCLUSION

Allied wrote the policy of insurance which was sold to the Ritchies. Allied wrote the policy language, Allied made the policy such that any consumer of ordinary experience would reasonably believe that setting policy limits in the declarations page and then saying that "this is the most we will pay" means that Allied would pay that amount when damages exceeded the policy limits. The Ritchies in the case ask the Court only to require Allied to honor its contract.

Allied and amicus Missouri Insurance Coalition ask for clarification on how to sell a full loaf of underinsured motorist coverage while only having to pay out half a loaf on any claim. This Court has already provided such clarification in the recent case of *Jones v. Mid-Century Insurance Co.*, Case No. 89844 (Mo. July 6, 2009). All that insurers have to do is to write a contract using ordinary language that consumers can understand. And not play word games and not make a policy too complicated to reasonably understand. And be fair. If insurers will follow these simple rules, ambiguities will be eliminated and this Court will not be called upon as often to resolve convoluted and confusing policies.

The judgment should be corrected to hold Allied liable to the Ritchies in the sum of Six Hundred Thousand Dollars, less the Forty Thousand Dollars that Allied

has already paid. In the alternative, the judgment of the trial court should be affirmed.

Respectfully submitted,

GLENN R. GULICK
Missouri Bar No. 29937
1515 East 32nd Street
Joplin, Missouri 64804
Telephone: (417)626-8579
Facsimile: (417)626-7116
E-mail: gulick@joplininjurylaw.com

COUNSEL FOR RESPONDENTS

CERTIFICATES OF COMPLIANCE

COMES NOW Glenn R. Gulick, Jr., attorney for Respondents, and hereby certifies that the above and foregoing Substitute Brief complies with the limitations of Supreme Court Rule 84.06(b); that the number of words contained in said Substitute Brief as defined by Rule 84.06(b) and as calculated by the Microsoft Word 2007 program with which the Substitute Brief was written is 10,794.

Counsel further certifies that Supreme Court Rule 84.06(g) and Special Rule 13 of this Court have been complied with in that the CD-ROM accompanying the original and nine copies of the written Substitute Brief filed with this Court contains a digital copy of this Substitute Brief prepared in Microsoft Word 2007; that the digital file was scanned with the current version of Norton Anti-Virus; and that the digital file was found to be virus free.

GLENN R. GULICK, JR.
Missouri Bar No. 29937
1515 East 32nd Street, Suite A
Joplin, Missouri 64804
Telephone: (417)626-8579
Facsimile: (417)626-7116
gulick@joplininjurylaw.com

COUNSEL FOR RESPONDENTS