SUPREME COURT OF MISSOURI
en banc

JEFFERY D. SWADLEY, et. al.	)	
	)	
Respondents,	)	
	)	
vs.	)	SC95844
	)	
SHELTER MUTUAL INSURANCE COMPANY	)	
	)	
Appellant.	)	

APPEAL
FROM THE CIRCUIT COURT OF JASPER COUNTY, AT JOPLIN, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
HON. DAVID B. MOUTON, JUDGE

SUBSTITUTE BRIEF OF APPELLANT SHELTER MUTUAL INSURANCE COMPANY

Submitted by:
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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Circuit Court of Jasper County, Missouri declaring that the underinsured motorist endorsement in Plaintiffs/Respondents' policy of insurance was misleading and ambiguous.

The final judgment of the trial court from which this appeal is taken was entered on August 17, 2015. (*LF, Pg. 235).* Count II was dismissed by Plaintiffs with prejudice thus disposing of all issues and all parties. *(SLF, Pg. 252).* The Notice of Appeal was filed on September 17, 2015. (*LF, Pg. 237).*

No issue fell or falls within the exclusive appellate jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution. Therefore, jurisdiction initially fell with the Missouri Court of Appeals, Southern District. §477.060 R.S.Mo. However, upon transfer pursuant to §83.03, this matter was transferred to this Supreme Court for final determination of the issues raised by the parties as set forth in Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

This is an appeal from the final judgment of the Circuit Court of Jasper County, Missouri declaring that the underinsured motorist endorsement in Plaintiffs/Respondents' policy of insurance was misleading and ambiguous.

A. THE ACCIDENT & THE INSURANCE POLICY

On or about March 18, 2013, at approximately 8:00 p.m., Decedent Angela Swadley was the driver of a 2013 Toyota Scion TC, southbound on Missouri Route 249, approaching the intersection with Zora Street. (*LF, Pg.44)*. At the same time and place, Radjapov Sharabidin was employed by Silk Way Trans, LLC, and was a driving 2008 Volvo Penta tractor trailer unit, also southbound on Missouri Route 249 and approaching the intersection with Zora Street. (*LF, Pg. 44)*. Sharabidin attempted to change lanes and hit Decedent Swadley's vehicle, which caused her to strike the guardrail, return to the roadway and overturn. (*LF, Pg. 44)*. At about the same time and place, another driver, Nathaniel Dillon was driving a 2012 Yamaha Star Raider motorcycle, heading southbound on Missouri Route 249 and approaching the intersection with Zora Street. (*LF, Pg. 44)*. At about the same time and place, Decedent Swadley and decedent's daughter, Brooke Swadley, got out of their vehicle. (*LF, Pg. 44)*. As Dillon approached the intersection with Zora Street, he allowed his motorcycle to come into contact with the bumper of the 2013 Toyota Scion, which remained in the roadway as a result of the accident with Sharabidin. (*LF, Pg. 44)*. When Dillon's motorcycle contacted the 2013 Toyota Scion, Dillon lost control of his motorcycle and struck Decedent Swadley. (*LF, Pg. 44)*. As a direct and proximate result of the aforesaid collisions, Decedent Swadley suffered fatal injuries. (*LF,*

Pg. 44). Respondents' allege Sharabidin's and Silk Way Trans' negligence, carelessness, faults and omissions directly and proximately caused or contributed to cause the death of Decedent Angie Swadley. (*LF, Pg. 44).*

On March 18, 2013, the vehicle operated by Radjapov Sharabidin and Silk Way Trans had liability insurance in the amount of One Million Dollars ($1,000,000.00). (*LF, Pg. 81 and 113).* At the time of the accident, the Swadleys were insured by a policy of insurance issued by Shelter bearing number 24-1-3735763-4 (hereinafter "the Policy"). (*LF, Pg.44 and 82).* The Policy included an endorsement for underinsured motorist coverage which provided a monetary benefit that supplemented amounts paid to the insured up to the monetary limit stated in the declarations of $100,000.00. (*LF, Pg. 82 and 111).*

The Policy begins, following the declarations page, with "TO OUR CUSTOMERS – PLEASE NOTE". The note states in pertinent part,

> Please read this policy carefully. If you have questions, contact your Shelter Agent for answers. No agent can know your exact coverage needs or budget, so you must read the policy form, Declarations, and endorsements and make sure it provides the types of coverage you need in the amounts you requested.

The Policy further provides definitions for terms found in bolded type within the policy. The following terms are defined within the definitions section of the policy.

> "**Declarations**"
>
> (10) **Declaration** means the party of this policy titled "Auto Policy Declarations and Policy Schedule". It sets out many of the individual facts

related to **your** policy including the dates, types, and dollar limit of the various coverages.

"**Underinsured motor vehicle**"

(51) **Underinsured motor vehicle** means a **motor vehicle** covered by a liability bond, governmental liability statute, or insurance policy, applicable to the **occurrence**; but the monetary limits of the bond, statutory coverage, or policy, are less than the limits of the underinsured motorist coverage shown in the **Declarations**. The following vehicles and types of vehicles are excluded from the definition of **underinsured motor vehicle:**

(a) The **described auto;**

(b) **Motor vehicles owned** by an **insured, spouse,** or a **resident** of any **insured's** household; and

(c) **Motor vehicles** being **used** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household, with **general consent.**

Endorsement number A-735.2-A titled "UNDERINSURED MOTORIST ENDORSEMENT," states, "The following coverage is provided under the policy only if it is show in the **Declarations**. It is subject to all conditions, exclusions, and limitations, of **our** liability as stated in this policy."

The Underinsured Motorist Endorsement also contains the following

INTRODUCTORY NOTE:

> This coverage provides a monetary benefit that supplements the amount paid to an **insured** when he or she sustains a covered **bodily injury**. It does not cover **claims** based on **property damage**. It is important to note that the sections headed: "LIMITS OF **OUR** L IABILITY" and "INSURANCE WITH OTHER COMPANIES" reduce the total limits provided under this endorsement by the amount paid to an **insured** by the **person(s)** who caused the injury, or paid under another insurance policy. **You** should, therefore, purchase this coverage with a monetary limit in the amount **you** want to ensure is the minimum amount available from all sources to compensate an **insured** for his, or her, injuries sustained in an **auto accident**.

and INSURING AGREEMENT:

> If the **owner** or **operator** of an **underinsured motor vehicle** is legally obligated to pay **damages, we** will pay the **uncompensated damages** subject to all provisions of this policy including those limits stated below in the sections headed: "LIMITS OF **OUR** LIABILITY" and "INSURNACE WITH OTHER COMPANIES".

and also provides LIMITS OF **OUR** LIABILITY:

> The maximum limits of liability for this coverage are stated in the **Declarations** and are subject to the following limitations:
>
> . . .
>
> (3) The limits stated in the **Declarations** are reduced by the amount paid, or payable, to the **insured** for **damages** by:
>
> (a) All **persons** who are, or may be, legally liable for the **bodily injury** to that **insured**; and
>
> (b) All liability insurers of those **persons.**

(LF, Pg. 111).

B. THE SWADLEYS' INSURANCE CLAIM

Following the accident, and after being paid $823,874.80[1] under the liability policy insuring Radjapov Sharabidin and Silk Way Trans, Respondents made a claim against Shelter for UIM coverage under policy number 24-1-3735763-4. *(LF, Pg. 113).* Shelter denied the claim stating that the motor vehicle operated by Radjapov Sharabidin was not an underinsured motor vehicle as defined by the policy because Sharabidin and Silk Way Trans had an insurance policy with monetary limits greater than the limits of the

[1] Nathaniel Dillon, driver of the 2012 Yamaha Star Rider motorcycle, was injured in the accident and also made a claim against Radjapov Sharabindin's liability policy. Nathaniel Dillon recovered the balance of the liability policy. *(LF, Pg. 113).* Nathaniel Dillon was insured at the time of the accident but Respondents, assumedly as part of a global settlement agreement, did not recover under Dillion's policy of insurance.

underinsured motorist coverage shown in the declarations of Shelter's policy. (*LF, Pg. 118).* Conversely, Respondents claim that the failure to meet the policy definition of an underinsured motor vehicle does not negate coverage because the policy as a whole is ambiguous. *(LF, Pg. 141).*

The parties' dispute over whether underinsured motorist coverage is available to Respondents is the subject of this appeal.

C. PROCEDURAL HISTORY & THE TRIAL COURT'S RULING

On May 27, 2014, Respondents filed a Petition for Damages in the Circuit Court of Jasper County, Missouri, naming Shelter as a Defendant. (*LF, Pg.18).* Respondents alleged they were entitled to the available limit of underinsured motorist coverage (*i.e.*, $100,000 per person). (*LF, Pg. 18).* On August 14, 2014, Respondents filed a Second Amended Petition for Damages dismissing the other two name defendants, leaving only Shelter as a defendant. (*LF, Pg. 54).* Respondents' claim for underinsured motorist coverage remained largely unchanged. Shelter filed its Motion for Summary Judgment on March 4, 2015 and Respondents filed a Cross-Motion for Partial Summary Judgment on April 3, 2015. *(LF, Pg. 64 and 128).*

Shelter stipulated that Respondents sustained at least $923,874.80 in damages as a result of the wrongful death of Angela Swadley. *(LF, Pg. 232).* Thus, the sole question with regards to Respondents' underinsured motorist claim is whether underinsured motorist coverage is available to Respondents.

The competing motions were argued before the Circuit Court of Jasper County on June 15, 2015 and an order was filed that same date granting Respondents' Partial Motion

for Summary Judgment and denying Shelter's Motion for Summary Judgment. *(LF, Pg. 230).*

The trial court held that the policy was misleading and ambiguous. *(LF, Pg. 231).* Finding underinsured motorist coverage was available irrespective of the policy definition, the trial court ordered Shelter to pay the total sum of $100,000 to Respondents on their wrongful death claim. (*LF, Pg. 235).* Plaintiffs dismissed with prejudice Count II of their Petition. (*SLF, Pg. 252).*

On September 17, 2015, Shelter appealed this matter to the Southern District Court of Appeals. (*LF, Pg. 237).* The Southern District reversed the trial court's grant of summary judgment and remanded the case to the trial court. The dissent, pursuant to §83.03, transferred the matter to this Court.

POINT RELIED ON

I. The trial court erred in declaring that Underinsured Motorist coverage was available under the policy because the motor vehicle operated by Radjapov Sharabidin was not an underinsured motor vehicle under the clear and unambiguous definition in the policy and the policy as a whole is not misleading or ambiguous.

The principal authorities supporting this Point I include:

A. *Floyd-Tunnell v. Shelter Mutual Insurance*
439 S.W.3d 215 (Mo. 2014).

B. *Rodriguez v. General Acc. Ins. Co.*
808 S.W.2d 379, 381 (Mo. 1991).

ARGUMENT

SUMMARY OF ISSUES PRESENTED & STANDARD OF REVIEW

The parties do not dispute that Angela Swadley was an "insured" as defined by the policy; that Mrs. Swadley was killed as a result of an "accident"; or that the liability insurance provided by Radjapov Sharabidin's insurance policy was insufficient to pay all of Respondents' damages. The parties do not dispute that the total damages sustained by Respondents' before any payments by Radjapov Sharabidin's insurance policy, total at least $923,874.80. The parties do not dispute that Radjapov Sharabindin's had liability insurance in the amount of One Million Dollars ($1,000,000.00); or that Swadley's policy included an endorsement for underinsured motorist coverage shown in the Declarations with limits of only $100,000.00 per person. The parties disagree, however, whether underinsured motorist benefits are available for this loss under the policy of insurance.

Two years ago this Court reasserted that the simple fact that a policy contains a limitation on coverage or an exclusion does not render the policy ambiguous. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W. 215, 221 (Mo. banc 2014). Here, the Respondents do not claim any specific policy language is ambiguous, but rather argue that the absence of all relevant limitations or exclusions on the Declarations page creates an ambiguity. So, should the Court leave its earlier holding?

Shelter's answer is "no" because the singular issue of whether underinsured motorist coverage applies to this loss should be determined by the language of the policy, and that language is clear and unambiguous.

Missouri law is clear that the construction and interpretation of an insurance policy and the determination whether coverage applies are questions of law to be decided by the Court on *de novo* review. *Burns v. Smith,* 303 S.W.3d 505, 509 (Mo. banc 2010); *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 217 (Mo. banc. 2014). Furthermore, an insurance policy is a contract and the rules of construction determine the meaning of a contract's language. *Central Surety & Ins. Corp. v. New Amsterdam Cas. Co.*, 222 S.W.2d 76, 78 (Mo. Banc. 1949). With specific respect to Underinsured Motorist Coverage, it is important to note that UIM coverage is purely optional for the insured and there is no Missouri statutory or public policy requirement for such coverage. *Ritchie v. Allied Property & Cas. In. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009). Therefore, absent a statute or public policy requiring coverage, and insured and insurer are free to contract for coverage and a court must enforce the unambiguous contract terms. *Hempen v. State Farm Mut. Auto. Ins. Co.*, 687 S.W.2d 894, 894 (Mo. banc 1985).

The Court's function in coverage cases is to construe, not make, insurance contracts. *Central Surety. & Ins. Corp.*, 222 S.W.2d at 80. The courts should "refuse to create an ambiguity under the policy language where none exists, so as to construe the imaginary ambiguity in such a way to reach a result which some might consider desirable but which is not otherwise permissible under the policy or the law." *Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 142 (Mo. Banc 1980). A mere disagreement between the parties as to the interpretation of a term or provision in a policy does not create an ambiguity. *Lang v. Nationwide Mut. Fire Ins. Co.*, 970 S.W.2d 828, 830 (Mo. App. 1998).

> Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks. While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent.

Todd v. Missouri United Schools Ins. Council, 223 S.W.3d 156, 162063 (Mo. banc 2007). Further this Court has historically held that the Declarations do not grant coverage but set forth the policy's essential terms in an abbreviated form and are subject to refinement and definition in the policy. *Floyd-Tunnel*, 439 S.W.3d at 221 *citing Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749, 751 (Mo. banc 1987).

POINT I

THE TRIAL COURT ERRED IN DECLARING THAT UNDERINSURED MOTORIST COVERAGE WAS AVAILABLE UNDER THE POLICY BECAUSE THE MOTOR VEHICLE OPERATED BY RADJAPOV SHARABIDIN WAS NOT AN UNDERINSURED MOTOR VEHICLE UNDER THE CLEAR AND UNAMBIGUOUS DEFINITION IN THE POLICY AND THE POLICY AS A WHOLE IS NOT MISLEADING OR AMBIGUOUS.

A. THE POLICY DEFEINITION OF "UNDERINSURED MOTOR VEHICLE" HAS BEEN HELD TO BE CLEAR AND UNAMBIGUOUS.

Although Shelter concedes that this Court's analysis does not stop with the Policy definition of "underinsured motor vehicle", it is important for the Court to begin its analysis with the basis for Shelter's denial of coverage under the policy. It is undisputed that Respondents cannot satisfy the policy definition of "underinsured motor vehicle." The definition of "underinsured motor vehicle" as defined in Shelter's policy has already been held by the Missouri Supreme Court in *Rodriquez* to be unambiguous[2]. 808 S.W.2d 379,

[2] This Court is not bound by the appellate court's recent holding in *Simmons v. Farmers Ins. Co.*, 479 S.W.3d 671 (Mo. App. E.D. 2015). Neither the court in *Simmons* or this Court in *Seeck* declared the "underinsured motor vehicle" definition to be ambiguous but found ambiguity within the policy as a whole when read in concert with the "excess insurance clause" in *Seeck*, 212 S.W.3d 129, 132 (Mo. banc 2007) and "the Declarations page and in the Limits of Liability section" in *Simmons.* 479 S.W.3d at 676. As clearly

381 (Mo. 1991). As in *Rodriquez*, Shelter's definition of "underinsured motor vehicle" clearly states that an underinsured motor vehicle is a vehicle whose coverage limits are "less than the limits" of Shelter's underinsured coverage shown in the Declarations. *Id*.

By their own admission, Respondents' acknowledge that their underinsured motorist coverage was less than the One Million Dollar ($1,000,000.00) liability limit available under the tortfeasor's policy of insurance (i.e., Radjapov Sharabidin and Silk Way Trans). (*LF, Pg. 132)*. The tortfeasor's vehicle, therefore, was not an underinsured motor vehicle as defined in the policy. Since the tortfeasor's vehicle did not meet the unambiguous definition of an "underinsured motor vehicle" contained in Shelter's unambiguous policy, coverage is not available. *Tapley v. Shelter Ins. Co.*, 91 S.W.3d 755, 764 (Mo.App. S.D. 2002) *See also Rodriquez* 808 S.W.2d at 382, *Hinshaw v. Farmers and Merchants Ins. Co.*, 912 S.W.2d 70 (Mo.App. E.D.1995).

B. THE UIM ENDORSEMENT IS NOT MISLEADING OR AMBIGOUS.

Respondents' argue that the failure to meet the definition of "underinsured motor vehicle" is not dispositive because other provisions within the policy are ambiguous requiring coverage. Contrary to Respondents' position, the Declarations page and "set-off" provision do not create latent ambiguities within the policy requiring coverage.

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demonstrated by these two cases, whether or not a policy is ambiguous is wholly dependent on the specific language within each policy.

i. The Declarations page does not promise coverage.

The most recent holding by this Court regarding this issue is *Floyd-Tunnell v. Shelter Mutual Insurance.* 439 S.W.3d 215 (Mo. 2014).[3] This Court for at least the second time very pointedly held that policy declarations do not grant coverage and do not bar provisions in the policy which limit the coverage stated in the declarations. *Id.* at 221, *see also Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749, 751 (Mo. banc 1987). Declaration pages are not insuring agreements. Since the coverage limits stated in the Declarations are subject to definition, modification, and limitation by the actual terms and conditions contained with the main body of the policy, they cannot form the basis for an ambiguity argument based on the "give and take rule." *Id.* The existence of UIM coverage and whether a set-off stated within the policy applies is wholly contingent on the language in the contract entered into between the insured and insurer. *Rodriquez,* 808 S.W.2d at 383. To the extent this Court's earlier opinion in *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo.

[3] Respondents have historically argued that this Court's holdings in cases like *Floyd-Tunnell* are inapplicable to the issues before this Court because they do not address the validity of the UIM setoff provision or the alleged ambiguity created by the declarations page. While this line of cases does not address UIM coverage, they do provide guidance on how to evaluate insurance policies as a whole, and specifically set forth the role of the declarations page in that analysis. *See Floyd v. Tunnell*, 439 S.W.3d 215; *Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749, 751 (Mo. banc 1987); *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160 (Mo. banc. 2007).

2013), could be interpreted to hold that an ambiguity arises anytime a UIM "set-off" reduces the coverage limits stated in the Declarations, such holding was modified and explained by this Court in *Floyd-Tunnell* – which was decided 19 months after *Manner*. *Floyd-Tunnell*, 439 S.W.3d 215 (Mo. 2014). To the extent that *Manne*r may have alluded to the contrary, the *Floyd-Tunnell* Court articulated the current state of the law on this precise issue in very clear terms:

> Doris next argues that the partial exclusion renders the policies ambiguous because it reduces coverage below the limits set forth on the declarations pages. The mere presence of an exclusion does not render an insurance policy ambiguous, however.
>
> Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks. While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent.... Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable.

Floyd-Tunnell, 439 S.W.3d at 221.

Most significantly, Respondents have been unable to point to any specific language within the Policy that purports to create an ambiguity or has the effect of promising

coverage in one section and taking away coverage in another section. Thus the finding of an ambiguity, built entirely on the notion that declarations "give" coverage which cannot later be limited or reduced by a "set-off," is irreconcilable with this Court's instructions on the issue in *Todd* and *Floyd-Tunnell*. *Todd*, 223 S.W.3dat 160, *Floyd-Tunnell*, 439 S.W.3d at 221. As recognized in *Floyd-Tunnell*, a "set-off" provision that may appear to "conflict" with the summary of information in the policy declarations simply is not indicative of ambiguity. *Id*. This Court's instruction on this issue has been repeatedly followed by courts applying Missouri law. *See, e.g., Jaudes v. Progressive Preferred Ins. Co.*, 11 F.Supp.3d 943, 957 ("There is nothing about the words used . . . that would lead an ordinary person of average understanding to believe that the declarations page . . . contains anything more than an 'abbreviated form" of the policy's 'essential terms.'"); *Midwestern Indem. Co. v. Brooks*, 779, F.3d 540, 546 (8th Cir. 2015) ("In Missouri, a policy is not ambiguous just because its broad statement of coverage [in the declarations] is later cabined by policy definitions or exclusions."); *Naeger v. Farmers Ins. Co.*, 436 S.W.3d 654, 660 (Mo.App.E.D. 2014) ("*Fanning* . . . does not stand for the proposition that a policy's declarations page must notify an insured of limitations or exclusions to UIM coverage absent such a requirement by the policy itself."); *Warden v. Shelter Mutual Insurance Company*, 480 S.W.3d 403, 407 (Mo. App. W.D. 2015) (Court held declarations page did not override a UIM liability limitation or render that limitation ambiguous).; *Burger v. Allied Property and Cas. Ins. Co.*, 822 F.3d 445, 449 (8th Cir. 2016) ("Nothing here suggests that the declarations page provides anything other than a summary of the policy's essential terms."); *Yager v. Shelter General Insurance Company*, 460 S.W.3d 68 (Mo. App.

W.D. 2015) ("Yager is simply mistaken in arguing that the coverage summary provided on a policy's declarations page can create an ambiguity when construed in connection with the policy's actual terms."). To hold otherwise would create an ambiguity in every insurance policy that contains any limitation in the body of the policy because that limitation would reduce the stated coverage limits on the policy's declaration. This clearly is not the state of the law.[4] Respondent's argument at best is one of placement, not ambiguity, and there is no case law that supports the proposition that unambiguous limiting language in an insurance policy is ambiguous solely because of the page on which it falls. Taking Respondents argument to its logical conclusion, the only way to eliminate the possibility of an ambiguity would be for the declarations' page to contain the entire policy.

[4] An insurance policy is a contract and the basic principles of contract law apply. To hold that all "important" terms of a contract must be contained on the first page of a contract invalidates the long standing obligation of an individual to read a contract. Although Respondents continually reiterate the notion of "evaluating the policy as a whole", they are in reality asking this Court to stop its evaluation of the policy at the Declarations page. The practical effect of Respondents position would result in a requirement that insurance companies set forth all limitations or reductions on the declarations page so that insureds no longer have to read their policy "as a whole." Absolving an insured from any obligation in reading the insurance contract is in direct conflict with the long standing holdings of this Court and the basic tenants of contract law.

ii. The "set-off" provision in this UIM endorsement does not render the policy ambiguous.

This Court's decisions in *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009), *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009), and *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013) are not controlling in this appeal because (1) each decision was based on policy-language specific rather than the physical placement of language; (2) *Floyd-Tunnell* over-ruled them to the extent they could be construed to support Respondents latent ambiguity theory; and (3) none of these prior decisions created a blanket prohibition against set-off provisions, thus supporting this Court recognition in *Jones* and *Ritchie* that unambiguous set-off provisions are enforceable. *Id.*

Respondents do not argue that the limits of liability section of the UIM endorsement is ambiguous. Additionally, no Missouri Appellate Court has ever declared Shelter's Endorsement A-735.2-A to be ambiguous[5]. The particular policy at issue here is designated as Shelter Policy number 24-1-3735763-4. (*LF Pg. 111*) The particular UIM Endorsement identified in the Declarations that applies to Respondents' claim is form A-735.2-A and reflects policy limits of $100,000 per person and $300,000 per accident. (*LF Pg. 82*).

[5] The court in *Warden v. Shelter Mutual Insurance Company*, 480 S.W.3d 403 (Mo. App. W.D. 2015) reviewed the identical UIM Endorsement and held, "Given the multiple efforts to alert the ordinary reader to the set-off provision and the plain language explanation of its function, we hold that it is neither ambiguous nor misleading." *Id.*

Although the UIM coverage is first subject to the definition of "underinsured motor vehicle" in the policy, the two-page UIM Endorsement sets forth the particular terms and limitations of Respondents' UIM coverage. (*LF Pg. 111*). As previously stated by this Court, the existence of UIM coverage and the terms of that coverage are governed by the contract entered between the insured and the insurer. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009) (quoting *Rodriquez v. Gen Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 383 (Mo. 1991))). Unlike the UIM polices before this Court in *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009), and *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009), the Swadley policy did not contain the same type of language that other courts have cited to in support of finding ambiguities in the UIM endorsement to prohibit application of the set-off language.

In *Jones*, this Court held that the set-off language was ambiguous because the policy's limit of liability provision stated that "the most it will pay" is the lesser of the $100,000 limit of liability amount listed in the declarations or the difference between the damages and the payment already made. *Id.* at 690. The provision also stated, "we will pay up to the limits of liability shown in the schedule below as show in the Declarations." This Court further opined the conflict could have been avoided, resulting in enforcement of the set-off, if the limit of liability provision had stated the most the policy would pay was, "The limits of this coverage minus the amount already paid to that insured person." Shelter has done exactly that. In Shelter's Limits of Liability section within its UIM endorsement, it states, "The limits in the Declarations <u>are reduced</u> by the amount paid, or

payable to the insured for damages by: (a) All persons who are, or may be, legally, liable for the bodily injury to that insured…" (*LF Pg. 11)*(emphasis added)

In *Ritchie*, this Court held that the off-set provision was ambiguous because the limits of liability section stated that coverage was provided up to $100,000 per person and stated in several places the limit was "the most we will pay." 307 S.W.3d 132, 135 (Mo. 2009). This Court, however, reiterated that a plain and clearly worded off-set provisions would be enforceable. "[T]he mere fact that $100,000 will never be paid out is not misleading, for the policy never suggests that this is its liability limit and never implies that it may pay out that amount." Shelter's policy never implies that it will pay out the amount stated in the declarations. In fact, the UIM endorsement begins by advising the insured that the monetary benefit under this coverage "supplements the amount paid to an insured." There is clearly no promise that this coverage is in fact excess.

In *Manner*, this Court focused mainly on the policy's anti-stacking provisions, but also briefly addressed the policy's set-off provision. 393 S.W.3d 58 (Mo. banc 2013) Citing *Ritchie*, this Court found an ambiguity in the policy because a promise to pay the policy's limit in the underinsured motorist endorsement was contradicted by set-off language that would prevent the full amount of the limits promised in the underinsured motorist endorsement from being paid. This Court did not hold, however, that the ambiguity arose solely from the amount listed in the declarations page but because of the amounts seemingly promised in the endorsement. Shelter's endorsement makes no such promises.

In contrast to the policies considered by this Court in *Ritchie, Jones* and *Manner*, at no point did Shelter purport to tell the Swadleys that the $100,000 limit of UIM coverage shown in the Declarations was "the most" Shelter would pay, or that Shelter "would pay up to" the $100,000 limit. Respondents can point to no language in the policy that promises to pay the full amount of the UIM limit of liability listed on the declarations. Shelter's endorsement clearly advises its insured that this coverage is to supplement the amounts paid to the insured in order to collectively total the monetary limit stated in the declarations. Therefore, the analysis must begin with the policy language. At the top of Endorsement A-735.2-A/A-735.3-A, the following relevant language appears:

> UNDERINSURED MOTORIST ENDORSEMENT
>
> * * *
>
> The following coverage is provided under this policy only if it is shown in the **Declarations**. It is subject to all conditions, exclusions, and limitations, of **our** liability as stated in this policy.
>
> INTRODUCTORY NOTE:
>
> This coverage provides a monetary benefit that supplements the amount paid to an **insured** when he or she sustains a covered **bodily injury**. It does not cover **claims** based on **property damage**. <u>It is important to note that the sections headed: "LIMITS OF **OUR** L IABILITY" and "I NSURANCE WITH OTHER COMPANIES" reduce the total limits provided under this endorsement by the</u>

amount paid to an **insured** by the **person(s)** who caused the injury, or paid under another insurance policy. **You** should, therefore, purchase this coverage with a monetary limit in the amount **you** want to ensure is the minimum amount available from all sources to compensate an **insured** for his, or her, injuries sustained in an **auto accident**.

INSURING AGREEMENT

If the **owner** or **operator** of an **underinsured motor vehicle** is legally obligated to pay **damages, we** will pay the **uncompensated damages** subject to all provisions of this policy including those stated below in the sections headed: "LIMITS OF **OUR** LIABILITY" and "INSURANCE WITH OTHER COMPANIES".

* * *

LIMITS OF **OUR** LIABILITY

The maximum limits of liability for this coverage are stated in the **Declarations** and are subject to the following limitations:

* * *

(3) The limits stated in the **Declarations** are reduced by the amount paid, or payable, to the **insured** for **damages** by:

(a) All persons who are, or may be, legally liable for the **bodily injury** to that **insured**; and

(b) All liability insurers of those **persons.**

(*LF Pg. 111*)[Emphasis in original Policy]

Importantly, it should be noted that within the actual Policy, Shelter has underscored several of the various provisions to emphasize to the insured that the UIM coverage limits are subject to possible limitations. Shelter goes further and affirmatively advises the insured that he or she should purchase UIM coverage in an amount that they want to "*ensure is the minimum amount available from all sources to compensate an insured for his, or her, injuries sustained in an auto accident.*" By purchasing $100,000 in UIM coverage, Jeff and Angie Swadley were thereby ensuring that they would have at least $100,000 available to them from all sources to compensate them for the wrongful death of Angie Swadley as a result of the accident with Radjapov Sharabidin. Of course, because Radajpov Sharabindin was not operating an "underinsured motor vehicle" as defined by the policy, Respondents received greatly in excess of the available limits, specifically $823,874.00.

Shelter has heeded the lessons provided by this Court in *Jones* and *Ritchie* and has clarified and strengthened its policy provision by highlighting the limitations of coverage in order to eliminate any argument that the amount set forth in the declarations will be paid without reduction. The Introductory Note at the beginning of the UIM Endorsement states, "It is important to note that the sections headed: 'LIMITS OF **OUR** LIABILITY' and 'INSURANCE WITH OTHER COMPANIES' reduce the total limits provided under this endorsement by the amount paid to an **insured** by the **person(s)** who caused the injury, or paid under another insurance policy." The insured is advised from the outset

that the 'LIMITS OF OUR LIABILITY' and 'INSURANCE WITH OTHER COMPANIES' sections will reduce the policy endorsement's total limits by the amount paid under another insurance policy.

Thus, from the very outset, the UIM Endorsement explicitly advised the Swadleys of a number of very important things relative to their coverage. In very clear and emphasized fashion, they were made aware that:

1. the UIM coverage was subject to all conditions, exclusions, and limitations of Shelter's liability as stated in this policy; **and**
2. it was important for them to take note that the sections headed: "LIMITS OF OUR LIABILITY" and "INSURANCE WITH OTHER COMPANIES" reduce the total limits provided under this endorsement by the amount paid to an insured by the person(s) who caused the injury, or paid under another insurance policy – and in fact, this admonition was ***underlined*** in the policy to make it more conspicuous; **and**
3. because the UIM coverage limits would be reduced by payments from the person who caused their injury, it was important for them to purchase UIM coverage with limits in whatever sum that they wanted to ensure would be the minimum amount available from <u>all sources</u> to compensate them for injuries sustained in an auto accident.

Immediately following these admonitions, the policy sets forth the Insuring Agreement:

INSURING AGREEMENT

> If the **owner** or **operator** of an **underinsured motor vehicle** is legally obligated to pay **damages**, **we** will pay the **uncompensated damages** subject to all provisions of this policy including those stated below in the sections headed: "LIMITS OF **OUR** LIABILITY" and "INSURANCE WITH OTHER COMPANIES".
>
> (*LF Pg. 111)* [underlined in original]

Again, the insured is clearly advised in emphasized fashion that any payments to be made under the policy are subject to *all* policy provisions and in particular, those set forth in the sections headed: "LIMITS OF **OUR** LIABILITY" and "INSURANCE WITH OTHER COMPANIES."[6] This is now the *second* time within the first twenty-three (23) lines of text that the insured is told that the UIM coverage is subject to the "Limits of Our Liability" clause and is directed to that provision. If the Swadleys then were to look on the second page and locate that section of the policy, the Swadleys would be advised as follows:

> LIMITS OF **OUR** LIABILITY
>
> The maximum limits of liability for this coverage are stated in the **Declarations** and are subject to the following limitations:
>
> (1) The limit shown for "each person" is the limit of **our** liability for the

[6] By way of clarification, the "INSURANCE WITH OTHER COMPANIES" clause does not apply here and is not relevant to the issues in the present action.

claim of any one **insured**. This limit applies to all **claims** made by others resulting from that **insured**'**s bodily injury**, whether direct or derivative in nature.

(2) The limit shown for "each accident" is subject to the limit for "each person" and is the total limit of **our** liability for the **claims** of two or more **individuals**. This limit applies to all **claims** made by others resulting from those **insureds**' **bodily injuries**, whether direct or derivative.

(3) The limits stated in the **Declarations** are reduced by the amount paid, or payable, to the **insured** for **damages** by:

(a) All **persons** who are, or may be, legally liable for the **bodily injury** to that **insured**; and

(b) All liability insurers of those **persons**.

* * *

(*LF Pg. 111)* [underlined in original]

By reading the "LIMIT OF **OUR** LIABILITY" clause, the insured is additionally made aware of several limitations on the coverage, in clear and unambiguous terms. First, in subparagraphs (1) and (2) the policy explains how the coverage is limited in various ways with respect to "each person" versus "each accident." In addition, the policy also advises the Swadleys in subparagraphs (3)(a)-(b) that the $100,000 per person UIM limit stated in the Declarations will be reduced by the amount paid to them for damages by the person who was legally liable for decedent's injuries.

iii. The availability of "set-off" in UIM policies was contemplated and approved by the legislature.

To accept Respondents' argument that the Declarations page and set-off provision create an ambiguity warranting coverage irrespective of the clear and unambiguous definition of "underinsured motor vehicle" precluding coverage, would be tantamount to establishing a rule of law that makes UIM set-off language per se unenforceable, which would be in direct conflict with Missouri's only UIM statute. R.S.Mo. §379.204 provides that, if UIM coverage is offered, the limit of such coverage must equal or exceed twice the minimum limits of liability coverage required by R.S.Mo. §303.020 (the Motor Vehicle Financial Responsibility Law ("MVFRL")). If the legislature did not intend to permit insurers the right of "set-off" in UIM policies, it would have had no reason to enact R.S.Mo. §379.204. Pursuant to §379.204, UIM coverage with a coverage limit that is less than that required by statute will be treated as "excess coverage." Conversely, here, Shelter's maximum UIM limit of liability is four times the minimum limits of liability required by the MVFRL. Therefore, it is not to be treated as "excess coverage," absent an ambiguity in the policy language. The very existence of R.S.Mo. §379.204 demonstrates the legislature's recognition and acceptance of insurers' freedom of contract and right to include plainly worded "set-off" provisions in UIM endorsements. While the statute ensures that UIM coverage cannot be offered in such a way that it would be unavailable in most instances, it also acknowledges and accepts the right of private parties to contract for a "set-off." In effect, with §379.204, the legislature has identified a narrow set of circumstances under which Missouri law does not allow an insurer to offset the amount

recovered from the tortfeasor's liability insurer. If *Manner* was to be interpreted and enforced in the way Respondents will likely suggest, there would be no enforcement of any UIM "set-off" provisions in cases where the insured has recovered from the tortfeasor's insurer. This in turn would render §379.204 superfluous. That cannot be the result intended by *Manner*, and it certainly would not be the outcome commanded by *Floyd-Tunnell*.

CONCLUSION

The circuit court erred in finding that Respondents were entitled to underinsured motorist coverage and that the policy as a whole was ambiguous and misleading. Respondents are unable to satisfy the policy definition for "underinsured motor vehicle" and the policy's declarations page and set-off provisions are clear and unambiguous warranting no coverage under the underinsured motor vehicle endorsement. The Declarations page does not promise coverage because the Declarations are subject to definitions, modifications, and limitations which are repeated ad nauseam and emphasized within the policy. Further, the UIM endorsement unambiguously requires a "set-off" against the UIM limit of liability of Shelter's policy for amounts received from the underlying tortfeasor. The endorsements "Introductory Note", "Insuring Agreement", and "Limits of **Our** Liability" sections establish the limitations on coverage and repeatedly inform the insured that amounts paid on behalf of a tortfeasor will be "set-off" against the UIM coverage limits. Neither the declarations page or the endorsement ever promise to pay the full amount of the UIM limit of liability listed in the policy's declarations.

Wherefore, Shelter requests this Court overrule the circuit court's partial summary judgment in favor of Respondents and hold that, as a matter of law, Respondents are not entitled to underinsured motorist benefits under the policy.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Missouri Supreme Court Rule 84.06(c) that:

1. This Brief of Appellant includes the information required by Missouri Supreme Court Rule 55.03;

2. This Brief of Appellant complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. This Brief of the Appellant, excluding the cover page, signature blocks, Affidavit of Service, this Certificate of Compliance, and the Appendix, contains 7669 words, as determined by the word-count tool contained in the Microsoft Word software with which this Brief of Appellant was prepared.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed electronically this 5th day of October, 2016 via CM/ECF in the Missouri Supreme Court, with notice of same being electronically served by the Court to the following:

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