IN THE SUPREME COURT OF MISSOURI
EN BANC

OWNERS INSURANCE COMPANY,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	APPEAL NO. SC95843
	)	
VICKI CRAIG and CHRIS CRAIG,	)	
	)	
RESPONDENTS.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI

THE HONORABLE JASON R. BROWN
CIRCUIT JUDGE

SUBSTITUTE BRIEF OF APPELLANT OWNERS INSURANCE COMPANY

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Owners Insurance Company appeals an adverse judgment in a declaratory judgment action to determine the amount of underinsured motorist coverage due Defendants Vicki Craig and Chris Craig, including the enforceability of the setoff provision in the Owners policy. (L.F. 271; A1.) Owners and the Craigs moved for summary judgment. (L.F. 71, 87.) On July 7, 2015, the trial court entered judgment for the Craigs and against Owners. (L.F. 271-73; A1-A3.) The trial court, at the same, time denied Owners' motion. (L.F. 273; A3.) Owners' timely appeal followed on August 6, 2015. (L.F. 276.)

Owners' appeal raises no issues subject to the exclusive appellate jurisdiction of the Missouri Supreme Court, as set forth in Article V, Section 3 of the Missouri Constitution. Therefore, this case fell initially within the general appellate jurisdiction of the Missouri Court of Appeals. Under Section 477.050, R.S.Mo. 2000, territorial jurisdiction rested with the Southern District of the Missouri Court of Appeals.

On appeal, the Southern District reversed the trial court's judgment on July 19, 2016, and remanded the case with instructions to the trial court to enter judgment for Owners. The Southern District's decision was not unanimous. The Honorable Nancy Steffen Rahmeyer, in her dissenting opinion, ordered the case transferred to this Court under Rule 83.03 on the ground that the majority opinion is contrary to a previous decision of an appellate court of this State. Therefore, appellate jurisdiction now rests with this Court under Rule 83.03 and Article V, Section 4 of the Missouri Constitution, which vests the Missouri Supreme Court with supervisory authority over the courts of Missouri.

STATEMENT OF FACTS

A. Introduction: The Trial Court's Judgment and the Southern District's Decision

Owners Insurance Company and the Craigs submitted this case to the trial court on competing summary judgment motions and stipulated facts. (L.F. 66, 71, 87.) The issue before the trial court was whether the Owners policy contained an enforceable setoff provision that entitled Owners to reduce the policy's stated limit for underinsured motorist coverage, $250,000, by the sum paid on the at-fault driver's behalf by his liability insurer, $50,000. Concerning the stated limit on the policy' declaration page, the Owners policy contained the following language:

> The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do **we** have a duty to pay **you** or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.

(L.F. 121; A9.)

The trial court sustained the Craigs' motion and denied Owners'. (L.F. 271-73; A1-3.) The trial court, in so ruling, found the Owners policy to be ambiguous based on the interplay between the policy's declaration page, which stated a $250,000 per person UIM limit, and the policy's setoff language. The trial court explained as follows:

> IN ANY EVENT, AFTER APPLICATION OF THE STANDARDS CITED ABOVE, THE COURT FINDS THE SUBJECT POLICY DOES INDEED

> TAKE AWAY IN PART OR IN WHOLE THE UNQUALIFIED GRANT OF $250,000 UIM COVERAGE FOUND IN ANOTHER PORTION OF THE POLICY [THE DECLARATION PAGE], AND, THAT THE MATERIAL PORTIONS ARE SIMPLY NOT PLAIN, CERTAIN, NON-SUGGESTIVE, NOR DISTINCT, WHEN VIEWED THROUGH THE LENS OF THE AVERAGE INSURED PURCHASING INSURANCE.

(L.F. 272; A2.)

The Southern District of the Missouri Court of Appeals, on Owners' appeal, disagreed and concluded that the Owners policy "clearly and unambiguously provided for the setoff. *Owners Ins. Co. v. Craig*, No. SD34053, *slip op*. at 1 (Mo. App. S.D. July 19, 2016). The Southern District explained:

> The Policy language in this case, viewed as a whole, reveals no ambiguity concerning the UIM limit and set-off. While the Declarations contained no caveat or disclaimer regarding UIM coverage, it did not state it was the sole expression of UIM coverage, and it referenced other forms, including the UIM endorsement.

Id., slip op. at 10-11. Significant to the Southern District's decision for Owners was the policy's language that advised the Craigs that Owners had no obligation under any circumstances to pay them the entire UIM limit stated on the policy's Declarations. *Id*., *slip. op*. at 11.

The Southern District's decision was not unanimous. The dissenting judge, as did the trial court, found the Owners policy to be ambiguous based on the interplay of the

policy's declaration page and setoff provision. *Owners Ins. Co. v. Craig*, No. SD34053, *slip op*. at 5 (Mo. App. S.D. July 19, 2016) (Rahmeyer, J., dissenting). The dissenting judge explained as follows:

> [T]he insurance company did not advise the consumer that they will never receive what they purchased. The company offered an amount of coverage as shown on the declaration page and paid an entirely different amount. On that declaration sheet, this consumer chose to pay for $250,000 per person/$500,000 per occurrence in underinsured motorist coverage, not $250,000 minus the $50,000. The carrier will never pay the full amount on the declaration page when the negligent driver is an insured driver because that driver has the statutory amount of liability insurance.

Id.[1]

B. The Owners Policy

The facts underlying the legal issues presented by this appeal are drawn from the parties' Stipulations of Facts, which Owners repeats.

[1] Judge Rahmeyer, in another appeal addressing whether the interplay of a policy's declaration page with limitations on UIM coverage rendered the policy ambiguous, transferred the case under Rule 83.03 on the same date the Southern District handed down its decision in this case. *Swadley v. Shelter Mut. Ins. Co.*, No. SD34129 (Mo. App. S.D. July 19, 2016) (Rahmeyer, J., dissenting).

1. Owners issued an automobile insurance policy to [the Craigs], both of whom are named insured[s], Policy No. 44-771-333-00, with effective dates of October 31, 2013, to October 31, 2014 (the "Policy"). . . . (L.F. 66.)[2]

2. The Policy was in full force and effect on the relevant dates in question, and provided underinsured motorist (UIM) coverage to [the Craigs] as the named insured[s] subject to certain provisions, conditions, limitations and exclusions. (L.F. 66.)

3. The Policy's Declarations list the Limits of Liability for UIM coverage as $250,000 per person. (L.F. 66, L.F. 112; A7.)

4. The Policy contains certain provisions, definitions, references, conditions, statements, limitations and exclusions, the applicability and meaning of which are in dispute, including, among others, the following provisions:

Missouri

UNDERINSURED MOTORIST COVERAGE

Automobile Policy

It is agreed:

1. DEFINITIONS

---

[2] The Owners policy is set forth in the Legal File between L.F. 108 and L.F. 164 and is attached to the Craigs' Suggestions in Support of their Motion for Summary Judgment. Owners and the Craigs, in filing cross motions for summary judgment, stipulated to the Owners policy and its contents. There is no dispute over the policy's terms. Excerpts of the policy and its declarations pages are contained in the Appendix to this brief. (A4-A12.)

The following definitions apply in addition to those contained in **SECTION I – DEFINITIONS** of the policy.

* * *

b. **Underinsured automobile** means an **automobile** to which a **bodily injury** liability bond or liability insurance policy applies at the time of the **occurrence**:

(1) with limits of liability at least equal to or greater than the limits required by the Motor Vehicle Financial Responsibility Law of Missouri; and

(2) such limits of liability are less than those stated in the Declarations for Underinsured Motorist Coverage.

(L.F. 67, 120; A8.)

*** * ***

2. COVERAGE

a. **We** will pay compensatory damages, including but not limited to loss of consortium, that any insured is legally entitled to recover from the owner or operator of an **underinsured automobile** for **bodily injury** sustained by an insured person while **occupying** an **automobile** that is covered by **SECTION II – LIABILITY COVERAGE** of the policy.

(L.F. 67, 120, A8.)

*** * ***

4. LIMIT OF LIABILITY

a. The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do **we** have a duty to pay **you** or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.

b. Subject to the Limits of Liability stated in the Declarations for Underinsured Motorist Coverage and paragraph **4.a.** above, **our** payment for Underinsured Motorist Coverage shall not exceed the lowest of:

(1) the amount by which the Underinsured Motorist Coverage Limits of Liability stated in the Declarations exceed the total limits of all **bodily injury** liability bonds and liability insurance policies available to the owner or operator of the **underinsured automobile**.

(2) the amount by which compensatory damages, including but not limited to loss of consortium, because of **bodily injury** exceed the total limits of all **bodily injury** liability bonds and the liability insurance policies available to the owner or operator of the **underinsured automobile**.

* * *

d. If the Limits of Liability shown in the Declarations for Underinsured Motorist Coverage are equal to or greater than two times the limits for **bodily injury** pursuant to the Motor Vehicle Financial Responsibility Law of Missouri, in determining the total damages to which this Underinsured Motorist Coverage applies, the amount of money already paid to the injured person for compensatory damages including but not limited to loss of consortium, because of **bodily injury** caused by the owner or operator of an **underinsured automobile**, shall be deducted from the Limits of Liability stated in the Declarations, including payments made:

* * *

(3) by or on behalf of any person or organization who may be legally responsible for **bodily injury**.

(L.F. 67-68, 121, A9.)

* * *

AUTOMOBILE POLICY DECLARATIONS

* * *

1. 2008 HOND ACCORD EX-L

* * *

COVERAGES	LIMITS
Underinsured Motorist	$250,000 person/$500,000 occurrence
PREMIUM	CHANGE[3]
23.00	2.85-

(L.F. 68, 112; A7.)

* * *

A QUICK GUIDE TO YOUR POLICY

The DECLARATIONS contain: YOUR NAME

POLICY TERM

YOUR AUTOMOBILES

COVERAGES

LIMITS OF LIABILITY

ENDORSEMENTS THAT APPLY

* * *

(L.F. 68, 145; A11.)

[3] In the parties' Stipulation filed in the trial court, the declarations contained four columns in a single horizontal column: COVERAGES, LIMITS, PREMIUM, and CHANGE. (L.F. 68.) Due to required thirteen-point font, the original formatting could not be duplicated on appeal. The actual declarations page may be found in the Legal File at L.F. 112 and in the Appendix at A7.

INSURING AGREEMENT

The attached Declarations describe the **automobile(s) we** insure and the Coverages and Limits of Liability for which you have paid a premium.

(L.F. 69, 146; A12.)

* * *

C. The Underlying Accident and Insurance Claim

Owners and the Craigs also stipulated to the facts concerning the underlying accident and insurance claim. The parties' stipulations concerning these facts follow:

5. On or about March 1, 2014, [Vicki] Craig was injured in a car accident when the vehicle she was driving was struck by another vehicle, driven by Tlir Hnin Thang, while Ms. Craig was stopped at a red light. (L.F. 69.)

6. Mr. Thang was insured under a policy of insurance with Shelter Insurance Company ("Shelter"), with a per person bodily injury liability limit of $50,000. (L.F. 69.)

7. Shelter has paid Mr. Thang's $50,000 per person bodily injury limit to [the Craigs]. (L.F. 69.)

8. The parties agree that the policy and UIM coverage were in full force and effect on the date of the accident, and that [the Craigs'] damages exceed $300,000 arising out of the injuries sustained by Ms. Craig. [The Craigs] therefore seek UIM coverage in the full amount of the Policy's $250,000 per person UIM limit. (L.F. 69.)

9. On or about July 16, 2014, [the Craigs] made demand on Owners for the $250,000 per person UIM limit, which they asserted was the amount to which they were entitled under the Policy's UIM coverage provision. (L.F. 69.)

10. In November 2014, pursuant to agreement among the parties, Owners paid [the Craigs] $200,000, representing the $250,000 per person UIM limit with a deduction of the $50,000 payment [the Craigs] received from Shelter on behalf of Mr. Thang, and which all parties agree is owed under the terms of the Policy. (L.F. 69-70.)

D. The Trial Court's Judgment

Owners and the Craigs agreed to litigate the question whether the setoff provision in the Policy was enforceable. Thereafter, Owners and the Craigs submitted the case to the trial court on cross motions for summary judgment. (L.F.71, 87.) The trial court decided the question for the Craigs, as outlined above. Owners' timely appeal followed. (L.F. 274.)

POINT RELIED ON

I. The trial court erred in entering summary judgment for Defendants Vicki Craig and Chris Craig, and in denying summary judgment for Plaintiff Owners Insurance Company, because Owners was entitled to reduce the sum due Defendants on their claim for underinsured motorist coverage, in that the Owners policy clearly and unambiguously provided for a $50,000 deduction from the $250,000 each person limit of liability for underinsured motorist coverage under the policy based on the $50,000 sum paid by Shelter Insurance Company to Defendants on the at-fault driver's behalf and further advised Defendants that "[u]nder no circumstances [did] [Owners] have a duty to pay [Defendants] . . . the entire Limits of Liability stated in the Declarations for [underinsured motorist] coverage."

Todd v. Missouri United School Ins. Council, 223 S.W.3d 156 (Mo. banc 2007)

Floyd-Tunnell v. Shelter Mut. Ins. Co., 439 S.W.3d 215 (Mo. banc 2014)

Peters v. Farmers Ins. Co., 726 S.W.2d 749 (Mo. banc 1987)

Naeger v. Farmers Ins. Co., Inc., 436 S.W.3d 654 (Mo. App. E.D. 2014)

STANDARD OF REVIEW

A. Standard of Review

The Court reviews the trial court's summary judgment *de novo*. *ITT Comm'l Fin. Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is only appropriate when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Id*. at 376. If the trial court's judgment is sustainable on any ground, it will not be overturned on appeal. *Lough by Lough v. Rolla Women's Clinic*, 866 S.W.2d 851, 852 (Mo. banc 1993).

The propriety of summary judgment is a question of law. *ITT Comm'l Fin. Corp.,* 854 S.W.2d at 376. The criteria, on appeal, for testing the propriety of a summary judgment are no different from the criteria that should be employed by a trial court to determine the propriety of initially sustaining the motion. *Gorman v. Farm Bureau Town & Country Ins. Co. of Mo.*, 977 S.W.2d 519, 521 (Mo. App. W.D. 1998). Since the trial court's judgment is based on the record and the law, an appellate court owes no deference to the trial court's ruling. *ITT Comm'l Fin. Corp.,* 854 S.W.2d at 376.

Typically, the denial of a summary judgment motion is not a final judgment for purposes of appeal. *Dollard v. Depositors Ins. Co.*, 96 S.W.3d 885, 887 (Mo. App. W.D. 2002). However, a denial of summary judgment is reviewable when the merits of the motion are inextricably intertwined with the issues of an appealable summary judgment in favor of another party. *First Nat'l Bank of Annapolis, N.A. v. Jefferson Ins. Co. of N.Y.,* 891 S.W.2d 140, 141 (Mo. App. S.D. 1995).

B. The Rules of Policy Interpretation

Resolution of this appeal requires the Court to review the terms of the Owners policy issued to the Craigs. The interpretation of an insurance policy is a question of law. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992). Summary judgment is appropriate if the issue to be resolved is the construction of a contract that is unambiguous on its face. *Clark v. American Family Mut. Ins. Co.*, 92 S.W.3d 198, 200 (Mo. App. E.D. 2002).

In construing a policy provision, courts give force and effect to the provision by making a reasonable interpretation to accomplish the parties' intention. *Wehmeier v State Farm Mut. Auto. Ins. Co.*, 556 S.W.2d 739, 741 (Mo. App. E.D. 1977). Seeming contradictions must be harmonized away if that is reasonably possible. *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973).

Insurance policies are contracts, and the rules of contract construction apply. *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. App. E.D. 1994). However, absent an ambiguity, the rules of construction may not be invoked. *Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo. banc 1999). When a contract is unambiguous, the parties' intent is to be ascertained from the contract alone. *Venture Stores, Inc. v. Pacific Beach Co.*, 980 S.W.2d 176, 181 (Mo. App. W.D. 1998).

The rules of construction mandate that words in an insurance contract are to be read in their plain and ordinary sense, and construed according to the common understanding and speech of laypeople. *Farmland Industries, Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. banc 1997). A contract or provision is not ambiguous merely because the parties

disagree over its meaning. *Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co.*, 51 S.W.3d 83, 87 (Mo. App. W.D. 2001).

An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the policy's language. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). Restated, policy language is ambiguous if it is reasonably and fairly open to different constructions. *Id*.

Ambiguities also may arise when an insurance policy takes away coverage promised elsewhere in the policy. *See, e.g., Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 140 (Mo. banc 2009) ("[I]f a contract 'promises something at one point and takes it away at another, there is an ambiguity ... [and if] policy language is ambiguous, it must be construed against the insurer.'") (citations omitted); *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 689 (Mo. banc 2009) ("Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage."). However, this rule is not a blanket one to be applied without discrimination or consideration of the policy as a whole. Otherwise, almost every insurance policy would be subject to ambiguity challenges based on limitations, exclusions, and conditions typically found in insurance policies.

The Missouri Supreme Court has made plain that the mere 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.3d 215, 221 (Mo. banc 2014).

> 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.

Todd v. Missouri United School Ins. Council, 223 S.W.3d 156, 162-63 (Mo. banc 2007). Thus, when a policy is read a whole, "[a] construction or interpretation of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all its provisions and is consistent with the general intent." *Dent Phelps School Dist. v. Hartford Fire Ins. Co.*, 870 S.W.2d 915, 920 (Mo. App. S.D. 1994).

Finally, a court may not rewrite a policy to provide coverage for which the parties never contracted. *Young v. Ray America, Inc.*, 673 S.W.2d 74, 81 (Mo. App. W.D. 1984). Nor may a court use its inventive powers to create ambiguities where none exist. *West v. Jacobs*, 790 S.W.2d 475, 477 (Mo. App. W.D. 1990). Likewise, a court may not create an ambiguity in order to distort unambiguous policy language or to enforce a particular policy construction that the court might otherwise prefer. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 594 S.W.2d 950, 954 (Mo. App. E.D. 1980).

ARGUMENT

I. The trial court erred in entering summary judgment for Defendants Vicki Craig and Chris Craig, and in denying summary judgment for Plaintiff Owners Insurance Company, because Owners was entitled to reduce the sum due Defendants on their claim for underinsured motorist coverage, in that the Owners policy clearly and unambiguously provided for a $50,000 deduction from the $250,000 each person limit of liability for underinsured motorist coverage under the policy based on the $50,000 sum paid by Shelter Insurance Company to Defendants on the at-fault driver's behalf and further advised Defendants that "[u]nder no circumstances [did] [Owners] have a duty to pay [Defendants] . . . the entire Limits of Liability stated in the Declarations for [underinsured motorist] coverage."

A. Introduction

The trial court, in entering summary judgment for the Craigs on their underinsured motorist (UIM) claim, found the interplay between the declaration page of the Owners Insurance Company policy and its setoff provision rendered the setoff provision unenforceable on ambiguity grounds. The trial court deemed the Owners policy to be ambiguous because the policy's setoff provision impermissibly reduced the "unqualified grant" of underinsured motorist coverage in the policy's declarations. In support of its decision, the trial court criticized the manner in which Owners drafted its policy and observed that the policy's declarations did not list any limitations on UIM coverage, and, thus, any limitation on UIM coverage set forth in the main body of the policy rendered the

policy ambiguous and required its construction in the Craigs' favor. The trial court erred in so ruling.

The Owners policy is not ambiguous. Owners, in its policy, never promised to pay the entire limit of liability stated on the declarations page. Rather, Owners, through its policy language, directly and clearly informed the Craigs that the UIM limit of liability stated on the policy's declaration page was set forth for reference purposes only. (L.F. 66, 121; A9.) Owners further advised the Craigs that it would never pay the entire limit of liability for UIM coverage under any circumstances. The Owners policy stated, as follows:

> The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do **we** have a duty to pay **you** or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.

(L.F. 67, 121; A9.)

Owners also specifically and clearly informed the Craigs that Owners was entitled to deduct from the UIM limit stated on the policy's declarations the sum paid by or on behalf of any person who may be legally responsible for their injuries. (L.F. 68, 121; A9.) Under these circumstances, and as held by the Southern District's majority decision, the trial court should have entered summary judgment for Owners, and denied the Craigs' motion. The Owners policy is open to only one reasonable interpretation—the policy unequivocally provides that the stated $250,000 UIM limit in the declarations will be reduced by the $50,000 sum that Shelter Insurance Company paid to the Craigs on the

underinsured motorist's behalf. Therefore, the trial court's judgment for the Craigs should be reversed, and judgment as a matter of law should be entered for Owners. Contrary to the trial court's judgment, there is no requirement under Missouri law that a declarations page contain limitations on coverage, or advise the policyholder of same. *Naeger v. Farmers Ins. Co., Inc*., 436 S.W.3d 654, 660 (Mo. App. E.D. 2014).

B. The Owners policy clearly and unambiguously provides for a deduction of the $50,000 sum paid to the Craigs by Shelter Insurance Company from the policy's $250,000 UIM limit, such that Owners has satisfied in full its obligations under the policy by its $200,000 payment to the Craigs.

The interpretation of the set-off provision in the Owners policy is policy specific, turning on the policy's language. As observed by one Missouri appellate court, "although other decisions construing set-off provisions and their effect on UIM coverage can be instructive, they are not dispositive in the absence of *identical* policy language." *Long v. Shelter Ins. Cos.*, 351 S.W.3d 692, 702 (Mo. App. W.D. 2011) (emphasis added). Thus, while Missouri case law addressing setoff provisions in other cases may assist a court by providing general guidelines for interpretation, the specific language in the Owners policy ultimately defines the contract relationship between Owners and the Craigs and controls the amount of UIM coverage that the Craigs are due. *See id.*; *see also Kennedy v. Safeco Ins. Co. of Ill.*, 413 S.W.3d 14, 17 (Mo. App. S.D. 2013).

Under Missouri law, "[t]he cardinal rule for the courts in interpreting a contract, including an insurance policy, is to effectuate the parties' intent at the time of contracting."

Golden Rule Ins. Co. v. R.S., 368 S.W.3d 327, 334 (Mo. App. W.D. 2012) (quoting *Miller v. O'Brien*, 168 S.W.3d 109, 114 (Mo. App. W.D. 2005) (internal quotation marks omitted)). This is done by giving the policy language its plain and ordinary meaning. When a policy is unambiguous, its terms will be enforced as written. *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160 (Mo. banc 2007). Moreover, "[a] court is not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991). Therefore, this Court's analysis necessarily begins with an examination of the Owners policy language, *Kennedy*, 413 S.W.3d at 17, *Long*, 351 S.W.3d at 702, and if that language is unambiguous, the analysis ends by enforcing the policy as written. *Rodriguez*, 808 S.W.2d at 382.

The Owners policy clearly and unambiguously advised the Craigs that Owners is entitled to reduce the policy's stated $250,000 UIM limit by the $50,000 per person bodily injury liability limit available to the underinsured at-fault driver under his Shelter policy. Unlike the UIM policies 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 Owners policy did not contain the type of language that Missouri's courts have relied upon in finding ambiguities in UIM policy provisions that nullify a setoff against policy limits. In contrast to the policy language that this Court considered in *Ritchie* and *Jones*, at no point did Owners promise the Craigs that the $250,000 UIM limit stated

on the declaration page was "the most" Owners would pay, or that Owners "would pay up to" the $250,000 limit. The Owners policy contains no such promise.

Indeed, to the contrary, Owners instructed its insureds that it would NEVER pay its full UIM limit and that the sum due for UIM coverage would be determined by deducting the liability coverage available to the underinsured motorist from the sum stated on the declaration page for reference purposes. (L.F. 121; A9.) A policy that expressly states that it does not promise to pay the entire liability limit stated on the policy's declarations but instead clearly advises the policyholder that the sum stated on the declarations is only one part of the calculation used to determine what will be paid is quite different from the ambiguous policies considered by this Court in *Jones* and *Ritchie*, policies containing language in which the insurers had promised to pay the full liability limit for UIM coverage and which contained language that made plain that there were no circumstances under which those insurers would ever pay their full limits of liability.

Consider the Limit of Liability provisions in the Owners policy, which stands in marked contrast to the policies that this Court considered in *Jones* and *Ritchie*. In Paragraph 4.a., Owners advised its insureds as follows:

> The Limits of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only. Under no circumstances do **we** have a duty to pay **you** or any person entitled to Underinsured Motorist Coverage under this policy the entire Limits of Liability stated in the Declarations for this coverage.

(L.F. 67, 121; A9.)

Owners, in this paragraph, clearly and directly advised the Craigs that the number stated in the policy's declarations as the limit of liability for UIM coverage is for reference purposes only, and that Owners does not have a duty under ANY circumstance to pay the entire limit stated on the declarations page. Owners then advised the Craigs that the actual amount of UIM coverage would depend on other provisions in addition to the referenced number. The plain language of Paragraph 4.a. permits no other conclusion.

The next paragraph of the Limit of Liability provision, Paragraph 4.b., provides the setoff provision. This provision is expressly subject to Paragraph 4.a., and states:

> Subject to the limits of liability stated in the Declarations for Underinsured Motorist Coverage and paragraph **4.a.** above, **our** payment for Underinsured Motorist Coverage shall not exceed the lowest of:
>
> (1) the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all **bodily injury** liability bonds and liability insurance policies available to the owner or operator of the **underinsured automobile**; or
>
> (2) the amount by which compensatory damages, including but not limited to loss of consortium, because of **bodily injury** exceed the total limits of such **bodily injury** liability bonds and liability insurance policies available to the owner or operator of the **underinsured automobile**.

(L.F.67-68, 121; A9.)

Owners, in Paragraph 4.b., advised the Craigs that the $50,000 in liability coverage available to the underinsured motorist, *i.e.*, the set-off amount, shall be deducted from the lesser of two sums: (1) the policy's UIM limit; or (2) the Craigs' damages.

Based on the Craigs' claimed damages, the lesser sum is the difference between the policy's $250,000 per person UIM limit and the $50,000 per person limit under the Shelter policy. This difference, namely, $200,000, is the sum due the Craigs under the Owners policy on their UIM claim, and which Owners has paid to them.

This conclusion is confirmed by Paragraph 4.d. of the policy's Limit of Liability provision. Owners, in Paragraph 4.d., stated:

> . . . [I]n determining the total damages to which this Underinsured Motorist Coverage applies, the amount of money already paid to the injured person for compensatory damages…because of **bodily injury** caused by the owner or operator of an **underinsured automobile** shall be deducted from the Limits of Liability stated in the Declarations, including payments made…by or on behalf of any person or organization who may be legally responsible for the **bodily injury**.

(L.F. 68, 121; A9.)

Owners, through this language, informed the Craigs that the limit stated in the declarations, which they had already been informed was for reference purposes only and under which Owners never has a duty to pay the entire sum, would be reduced by any amounts paid to them by or on behalf of any person who may be legally responsible for the bodily injury sustained by the insured. In other words, through this provision, Owners

explained to the Craigs how the limit stated—a reference point only—is acted upon to arrive at the amount of UIM coverage actually owed in any given case. Thus, through this provision, Owners advised the Craigs that the stated $250,000 reference limit would be reduced by the $50,000 bodily injury liability limit paid to them under the Shelter policy on the underinsured motorist's behalf.

At no point did Owners promise in its policy that it would pay the full UIM limit stated in the declarations. Instead, Owners specifically informed the Craigs:

- That the Limit of Liability stated in the declarations was for reference purposes only—a starting point for application of the deduction that would yield the amount of UIM coverage to which they were entitled.
- That Owners is under no obligation to ever pay the full reference amount stated in the declarations.
- That the Limit of Liability would be reduced by the $50,000 each person bodily injury liability limit paid by Shelter on the underinsured at-fault driver's behalf.

The language in the Owners policy demonstrates the trial court erred in entering summary judgment for the Craigs. Owners in plain and unambiguous language advised the Craigs that there were no circumstances under which Owners would pay the entire UIM limit stated on the policy's declaration page. In addition, Owners, in language suggested by this Court in *Jones* and *Ritchie*, advised them that this sum, a reference point only, would be reduced by the sum paid on behalf of the operator of the underinsured motor vehicle.

Thus, the Owners policy is not ambiguous and should be enforced as written. The policy's language and Missouri law permit no other conclusion.

C. The policy's declarations do not constitute a coverage grant and do not render the policy's setoff provision unenforceable on ambiguity grounds.

The trial court's judgment and the Southern District's dissenting opinion rest on the interplay of the policy's declaration page with the policy's setoff provision. Both the trial court and the dissenting judge treated the policy's declarations as a promise by Owners to pay the Craigs $250,000 in UIM coverage without limitation or condition. Both also criticized Owners for not setting forth on its declaration page limitations on UIM coverage.

Their criticisms of the Owners policy should be rejected. The declaration page of an insurance policy is not an insuring agreement or a coverage grant. There is also no requirement that a declaration page contain the limitations on coverage stated elsewhere in the main body of the policy.

The Owners policy, by its setoff provision, does not take away coverage promised elsewhere in the policy, namely, in the policy's declarations, because the declarations do not constitute an insuring agreement or a grant of coverage. Both the trial court and the dissenting judge ignore this Court's precedent. This Court made plain in *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014), that "declarations pages do not grant any coverage."

This Court has taught that courts must consider the architecture of an insurance policy in deciding whether the policy is ambiguous, by taking into account the policy's

component parts and considering those components in context of the policy as a whole. *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160, 162-63 (Mo. banc 2007). These component parts include the declaration page, definitions, conditions, and exclusions, each category of which serves a particular purpose within the policy as a whole. *Id*. at 160.

The introductory part of an insurance policy is the policy's declarations. *Peters v. Farmers Ins. Co.*, 726 S.W.2d 749, 751 (Mo. banc 1987). This Court has stated that every insurance policy contains a number of essential provisions, in that the policy must identify the insured, the risk insured against, the policy's effective period, and the "amount the insurer is liable to pay for any given risk up to a specified amount." *Todd*, 223 S.W.3d at 160. It is these "essential terms" that "are usually stated *in abbreviated form* on a declarations page." *Id.* (emphasis added). Thus, it is not the declaration page that governs the coverage provided by an insurance policy, but the essential provisions actually stated in the policy as a whole. *See id.*

This Court has further explained, as follows:

> 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…. Though it is the duty of the court to reconcile conflicting clauses in a policy so far as their language reasonably permits,

> when reconciliation fails, inconsistent provisions will be construed most favorably to the insured. Courts may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists. 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.

Id. at 162-63 (internal citations and quotation marks omitted).

Both the trial court and dissenting judge gave no heed to this Court's precedent addressing how the several parts of an insurance policy must be read together. Indeed, they gave undue importance to a single part of the policy, namely, the declaration page, and failed to read the policy as a whole.

The fact that the setoff provision in the Owners policy limits the coverage stated on the declarations does not render the policy ambiguous. The Court's decisions in *Todd* and *Floyd-Tunnell* so demonstrate. Otherwise, every insurance policy containing a limitation on coverage in its main body would be ambiguous because that limitation would limit or reduce the stated coverage limits on the policy's declarations. But that is not the law as this Court has ruled.

Moreover, there is no requirement that declaration pages contain limitations on coverage stated elsewhere in the policy. The declarations are introductory only. The main body of the policy contains the applicable limitations on coverage. It would impose impossible drafting burdens on insurers to restate every limitation on coverage on their

declarations. Otherwise, the declarations, an introductory part of the policy, would necessarily subsume the whole.

Further, this Court has never endorsed the view that policy declarations override the main body of a policy or that a policyholder can rely on the declaration page in isolation to understand the precise scope of coverage. Indeed, quite to the contrary, this Court has emphasized the limited role that declarations pages play in insurance policies:

> The declarations state the policy's essential terms in an abbreviated form, and when the policy is read as a whole, it is clear that a reader must look elsewhere [other than the declarations] to determine the scope of coverage.

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

The Court's holdings in *Todd* and *Floyd-Tunnell* are not novel or new. The Court has long recognized the limited role that declarations pages play in insurance policies. For example, in *Peters v. Farmers Ins. Co.*, the Court explained that "[t]he 'declarations' are introductory only and subject to refinement and definition in the body of the policy." 726 S.W.2d at 751.

Other courts applying Missouri law adhere to this same view:

- "While *Fanning* [*v. Progressive Nw. Ins. Co.*, 412 S.W.3d 360 (Mo. App. W.D. 2013)] supports the established practice of considering a policy's declarations page when analyzing an insurance contract, it 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." *Naeger v. Farmers Ins. Co.*, 436 S.W.3d 654, 660 (Mo. App. E.D. 2014).

- "[W]hen the ordinary reader reviews the Limits of Liability section, [the section] again informs the reader that '[t]he limits stated in the Declarations are reduced by the amount paid. . . .'" *Warden v. Shelter Mut. Ins. Co.*, 480 S.W.3d 403, 407-08 (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." *Yager v. Shelter General Ins. Co.*, 460 S.W.3d 68, 75 (Mo. App. W.D. 2015).
- "Nothing here suggests that the declarations page provides anything other than a summary of the policy's essential terms." *Burger v. Allied Prop. and Cas. Ins. Co*., 822 F.3d 445, 449 (8th Cir. 2016).
- "In Missouri, a policy [providing UIM coverage] is not ambiguous just because its broad statement of coverage [in the declarations] is later cabined by policy definitions or exclusions." *Midwestern Indem. Co. v. Brooks*, 779 F.3d 540, 546 (8th Cir. 2015).
- "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.'" *Jaudes v. Progressive Preferred Ins. Co.*, 11 F.Supp.3d 943, 956-57 (E.D. Mo. 2014) (citing *Todd*, 223 S.W.3d at 160) (emphasis in original).

The trial court's judgment and the Southern District's dissent cannot be reconciled with these decisions. In conflict with this Court's decisions in *Todd*, *Floyd-Tunnell*, and

Peters, the trial court and the Southern District's dissenting judge impermissibly elevated the Owners policy's declaration page as the single most important part of the policy and, in effect, wrote out of the policy any policy provision that they deemed to be in conflict with the declarations on ambiguity grounds.

This Court's decisions in *Todd*, *Floyd-Tunnell*, and *Peters* demonstrate that the trial court's judgment should be reversed. The interplay of the policy's declaration page with the policy's setoff language does not render the policy ambiguous. Indeed, consistent with the Court's decisions in *Todd* and *Floyd-Tunnell*, when the Owners policy is read as a whole, the policy's UIM coverage part contains an enforceable setoff provision that clearly and unambiguously states that the limit noted on the Policy's declarations is a reference point only, and is to be reduced according to the tortfeasor's available liability limit. Each provision in the Owners policy builds on and complements the others, rather than contradicting other provisions or creating ambiguities. The policy is clear and unambiguous. Although the trial court concluded that the interplay of the policy's declarations and setoff provision rendered the policy ambiguous, nowhere does the policy state anything other than that the limit of liability for UIM coverage is subject to the reduction called for in the policy's limit of liability provision.

D. The decisions of the Missouri Supreme Court in *Jones, Ritchie,* and *Manner* and the Southern District in *Beshears* do not compel a contrary conclusion.

Consistent with the arguments advanced by the Craigs in the trial court and in the Southern District, the Southern District's dissenting judge concluded that the Owners setoff

provision is ambiguous based on 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), and the Southern District's decision in *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408 (Mo. App. W.D. 2015). These decisions are not controlling. Each decision is policy-language specific, and none advances, as its holding, a blanket prohibition against setoff provisions. Indeed, this Court in *Jones* and *Ritchie* contemplated that an unambiguous setoff provision would be enforced.

1. This Court has not, on three separate occasions, held that UIM setoff provisions are per se ambiguous, where, as here, the policy never promises to pay the full limit stated in the declarations.

The Craigs, in the Southern District, argued that this Court has three times invalidated UIM setoff provisions, and that as a result, UIM setoff provisions are now inherently ambiguous when construed alongside the limits stated on a policy's declaration page. (Resp. Br. 15.) While it is true that this Court, and other Missouri courts, have held UIM setoff provisions to be ambiguous, none has done so in the face of the unique and plain and unambiguous language in the Owners policy. In each case, this Court identified an ambiguity between the setoff provision and other language within the policy itself. Moreover, in two of the three cases, this Court specifically acknowledged that an unambiguous setoff provision would be enforceable.

This Court invalidated a UIM setoff provision in *Jones v. Mid Century Ins. Co.*, on the ground that the policy's language was ambiguous. 287 S.W.3d 687 (Mo. banc 2009).

In *Jones*, the insured sustained over $150,000 in damages and the underinsured motorist had only $50,000 in liability coverage. *Id*. at 689. Based on the policy's setoff language, the UIM insurer deducted the underinsured motorist's $50,000 payment from the insured's $100,000 UIM coverage limit and paid the insured $50,000. *Id*. The insured argued the policy was ambiguous as to whether the insurer was entitled to the $50,000 deduction because, in multiple instances, the policy promised to pay the full limit of liability in the declarations. *Id*.

This Court agreed 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 policy's "Limit of Liability" provision went on to state that, subject to the other "Limit of Liability" provisions, "we will pay *up to* the limits of liability shown in the schedule below as shown in the Declarations." *Id*. (emphasis added). After twice promising to pay up to the amount stated on the declarations page, the "Limit of Liability" provisions then informed the insured that any amount of UIM coverage paid "shall be reduced by any amount paid or payable to or for an insured person...." *Id.*

Thus, this Court concluded that because in UIM cases there is always some liability insurance coverage, the amount listed as the UIM limit of liability on the declaration page would always be reduced by some amount. *Id*. at 691-92. Therefore, contrary to the policy's language, the insurer would never "pay up to the limits of liability" listed on the declarations as promised. *Id*. Since the policy promised a certain amount of available coverage, and then took that coverage away, the Court held the policy was ambiguous. *Id*.

at 692. The Court went on to note that this conflict could have been avoided if the policy had stated that the "the most we will pay" is the lesser of the difference between the damages and the amount paid to the insured by the tortfeasor, or "[t]he limits of liability of this coverage minus the amount already paid to that insured person." *Id.* at 691.

The Craigs' argument that *Jones* stands for the proposition that "[a] policy which promises UIM coverage for a specific amount on the declarations page of the policy … cannot be allowed to take an offset from the at-fault driver's liability coverage," and that when a policy "cannot be reconciled to require the full coverage be paid as shown on the declarations schedule, such insurance policy must be found ambiguous," is unsupported by the Court's decision. (Resp. Br. 17.) That this Court in *Jones* specifically suggested how the policy's offset language could have been phrased so as not to create an ambiguity demonstrates that the Court acknowledged that enforceable setoff provisions are permissible so long as they do not create an ambiguity. 287 S.W.3d at 691 (suggesting additional policy language that would work "[t]o avoid this conflict"). Restated, this Court in *Jones* did not create a requirement that a setoff provision must be noted on the declarations, nor did *Jones* create a blanket rule holding that all setoff provisions are ambiguous, regardless of the language employed by the policy.

The Owners policy not only includes language similar to the language suggested by this Court in *Jones*, but goes further by prefacing the UIM endorsement's Limit of Liability with a provision unequivocally stating that the amount stated on the declarations is for reference purposes only, and that "[u]nder no circumstances" does Owners have a duty to pay the entire UIM liability limit stated in the declarations. (L.F. 67, 121; A9.) Unlike in

Jones, at no point did Owners promise to pay the full amount of the limit of liability stated on the declarations. The Craigs' assertion that *Jones* stands for the proposition that the existence of an amount listed in the policy's declarations can, by itself, create an ambiguity, even when the policy's language makes no promises to pay the full amount listed, is simply incorrect.

In *Ritchie v. Allied Prop. & Cas. Ins. Co.*, this Court again invalidated a setoff provision because of ambiguity. 307 S.W.3d 132 (Mo. banc 2009). The *Ritchie* policy's "Limit of Liability" provisions stated that "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 … [t]his is the most we will pay regardless of" the number of insured, claims, or vehicles. *Id*. at 136. The policy's "Limit of Liability" provisions then stated "[t]he limit of liability shall be reduced by all sums" paid by the tortfeasor. *Id*. As in *Jones*, the policy's "Limit of Liability" language promised to pay up to the amount listed on the declarations in one provision, and in the next provision stated that it never would pay the full amount listed on the declarations. *Id*. at 140.

This Court, in finding the policy ambiguous, noted that "[b]oth the declarations page for the policy *and the limit of liability provision* state that coverage is provided up to $100,000 per person, $300,000 per accident … and, *in multiple places, states that 'this is the most we will pay' and that this limit of liability is the maximum it will pay*." *Id*. (emphasis added). *Id*. As in *Jones*, the Court in *Ritchie* did not rely on the mere existence of a UIM limit of liability amount on the policy's declarations to find an ambiguity.

Moreover, the Court expressly denied that setoff provisions are never enforceable, and confirmed that they are permissible when the policy's language is unambiguous. *Id*. at 141 n.10. Specifically:

> A policy that plainly states that it only will pay the difference between the amount recovered from the underinsured motorist and [the policy limits] is enforceable. In such a case, the mere fact that [the policy limits] will never be paid is not misleading, for the policy never suggests that this is its liability limit and never implies that it may pay out that amount.

Id.

The Court's statement contradicts the Craigs' argument that "*Ritchie* again held an insurer cannot argue it is entitled to a setoff from the stated limits in a UIM case, as it would allow the insurer to never pay the full amount of coverage set forth in the declarations," because the decision contemplates upholding such provisions when the language of the policy is clear and unambiguous. (Resp. Br. 18.) Here, the Owners policy "plainly states" that Owners will only pay the difference between the amount recovered from the tortfeasor and the policy limits listed in the declarations, and will never pay the full amount listed in the policy's declarations. Under *Ritchie*, this language is not misleading, nor is it impermissible. Indeed, the Owners language was drafted with the objective of following this Court's teachings on how to draft an insurance policy with an enforceable UIM setoff provision.

The final Supreme Court case is *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013). There, this Court principally discussed the policy's anti-stacking provisions;

however, the Court briefly addressed the policy's setoff provision as well. *Id*. at 66. Citing *Ritchie*, the Court in *Manner* held the policy ambiguous because the policy contained a promise to pay the policy's limits that was contradicted by setoff language that would prevent the full amount of the policy's limits from being paid. *Id*. The Court in *Manner* did not recite the language that it read to have made such a promise, nor did the Court suggest that the promise stemmed solely from the amount listed in the declarations. Indeed, since deciding *Manner* in 2013, the Supreme Court made plain in *Floyd-Tunnell v. Shelter Mut. Ins. Co.* that declarations pages themselves do not convey any coverage. 439 S.W.3d at 221.

Accordingly, while it is true this Court has three times in the past seven years invalidated setoff provisions, none of these cases involved the same policy language at issue here, and two of these cases expressly support the proposition that when, as here, the setoff provision is not contradicted by a promise to pay the entire limits of liability stated on the declarations, the setoff should be upheld. Moreover, none of these cases has held that an otherwise clear and unambiguous setoff provision can be rendered ambiguous solely because the policy's declarations state a UIM limit.

2. The Southern District's decision in *Beshears v. Shelter Mut. Ins. Co.* does not address the unambiguous setoff language in the Owners policy and is therefore not controlling.

The Southern District's dissenting judge also identified the Southern District's decision in *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408 (Mo. App. S.D. 2015), as a decision that conflicts with the majority's decision for Owners. While the Southern District

in *Beshears* invalidated a policy's setoff provision based on this Court's decision in *Manner*, the decision is inapposite for the same reason the holding in *Manner* is inapposite—the decision addresses policy language different from the language at issue here. *See Long*, 351 S.W.3d at 702. Moreover, the *Beshears* holding did not go so far as to hold, as the Craigs suggested in the Southern District, that "there is an 'inherent ambiguity' in a UIM policy when an insurer attempts to avoid every [sic] paying the limits of coverage based on an offset provision." (Resp. Br. 24.)

The policy in *Beshears* promised to pay "the uncompensated damages, subject to the limit of our liability stated in this coverage." 468 S.W.3d at 410. The policy defined "uncompensated damages" as "the portion of the damages that exceeds the total amount paid … to the insured by, or on behalf of, all persons legally obligated to pay those damages." *Id.* The policy then explains that the "limits of liability for this coverage are stated in the Declarations," but goes on to state that these limits would be reduced by the amount already paid for damages by the tortfeasor. *Id.*

Based on this language, the Southern District in *Beshears* held the policy contained an "inherent ambiguity" "for the reason explained in *Manner*." *Id.* at 412. As noted above, in *Manner*, this Court held that the policy at issue "promises to pay the listed limits of liability … yet these limits never would be paid." 393 S.W.3d at 66. The policy in *Beshears*, contained the same promise to pay "uncompensated damages," which as defined, has been found by some courts to promise excess coverage that cannot be later reduced by a setoff provision. *See Long*, 351 S.W.3d at 702-03. Accordingly, while the policy in *Beshears* may

have contained a promise to pay up to the full amount of the UIM limit in the declarations, the language creating that promise is not present in the Owners policy.

The Owners policy contains no language that can be construed as a promise to pay the entire sum stated on the policy's declarations. Declaration pages are not coverage grants or promises to pay. *Floyd-Tunnell*, 439 S.W.3d at 221. Moreover, unlike any policy addressed in any of the case law cited by the Craigs or relied upon by the Southern District's dissenting judge, the Owners policy, before discussing the setoff provisions, expressly informs the policyholder that the limit stated on the declarations is just a reference, and that the entire amount will never be paid. (L.F. 121; A9.) Neither *Manner*, nor *Beshears*, nor any other Missouri case has addressed such language, let alone found an ambiguity under such circumstances.

To invalidate a setoff provision in an unambiguous policy that never promises to pay up to the full amount listed on the declarations, which is itself not a promise to pay, goes against the cardinal rule of contract interpretation, which "is to effectuate the parties' intent at the time of contracting." *Golden Rule Ins. Co. v. R.S.*, 368 S.W.3d 327, 334 (Mo. App. W.D. 2012). Indeed, this Court in *Ritchie*, the principal decision cited by this Court in *Manner*, made clear that "[a] policy that plainly states it only will pay the difference between the amount recovered from the underinsured motorist and [the limit of liability listed in the declarations] *is* enforceable." 307 S.W.3d at 141 n.10 (emphasis added). Simply put, there is no "slight of hand" here, as the Craigs suggested in the Southern District, because the Owners policy makes clear that Owners has no duty to pay the entire

UIM limit stated on the policy's declarations, before introducing the setoff provisions explaining how those sums will be reduced.

3. The Missouri Court of Appeals' decision in *Fanning*, which focuses on the language of the policy's declaration page, should not be followed because the decision is contrary to this Court's precedent and limited to its facts.

Owners anticipates the Craigs will cite the Missouri Court of Appeals' decision in *Fanning v. Progressive Nw. Ins. Co.*, 412 S.W.3d 360 (Mo. App. W.D. 2013), in support of affirmance of the trial court's judgment. The *Fanning* decision, however, is not controlling. The decision is policy-language specific and limited to its facts. The decision is also contrary to this Court's precedent.

The *Fanning* decision cannot be read to support the conclusion that the Owners policy is ambiguous because there is no provision advising the Craigs in the policy's declarations that the policy's UIM limit is subject to limitations on coverage stated elsewhere in the policy. The *Fanning* decision is limited to its facts and to the specific policy language at issue, language that is markedly different from the language in the Owners policy.

In *Fanning*, the insurer's policy did not contain language stating the insurer was under no duty to pay the amounts listed on the declarations page. This language, which is contained in the Owners policy, informed the Craigs that the amount stated on the policy's declarations page is a reference point -- a starting point only -- and not the limit that will be paid. Each term in the Owners policy must be given its ordinary meaning and, thus, the

policy should be read as it is written, and as a whole. No provision should be allowed to perish by way of construction.

Moreover, the declaration page's statement that the policy's each person UIM limit is $250,000 does not conflict with any provision in the policy's Limit of Liability section. Contrary to the trial court's judgment, the Owners policy, by its setoff provision, does not take away coverage promised elsewhere in the policy, namely, in the policy's declarations. Owners never made such a promise in its policy. Owners did not do so on its declaration page. As this Court has made plain, "declaration pages do not grant any coverage." *Floyd-Tunnell*, 439 S.W.3d at 221. Therefore, the *Fanning* decision, which conflicts with this Court's decisions addressing declaration pages, should not be followed.

E. Conclusion

Owners has no obligation under any circumstance to pay the entire stated UIM limit on the policy's declarations to its insureds. Owners so advised its insureds in plain and unambiguous language.

The setoff language in the Owners policy is also plain and unambiguous. The Owners policy plainly states, in language suggested by this Court in *Jones* and *Ritchie*, that Owners is entitled to deduct from the UIM limit the liability coverage available to the underinsured motorist.

And contrary to the trial court's judgment, Owners had no duty to advise the Craigs of the limitations on coverage set forth in the policy's main body on the policy's declaration page. As held by this Court, declaration pages are introductory only and "do not grant any coverage." *Floyd-Tunnell*, 439 S.W.3d at 221. Thus, "when the [Owners] policy is read as

a whole, it is clear that a reader must look elsewhere to determine the scope of coverage." *Id*.

In this case, the "elsewhere," namely, the policy's Limit of Liability provision, provides this guidance and clearly advises the Craigs that under no circumstances are they entitled to recover the entire sum stated for UIM coverage on the policy's declarations. The trial court's judgment for the Craigs should therefore be reversed, with instructions for judgment to be entered for Owners. The policy's clear language and this Court's controlling precedent permit no other conclusion.

CONCLUSION

Plaintiff-Appellant Owners Insurance Company respectfully requests the Court to reverse the trial court's summary judgment for Defendants Vicki Craig and Chris Craig. In addition, under Rule 84.14, Owners Insurance Company requests the Court to enter judgment in its favor, or, in the alternative, to remand this matter with instructions to the trial court to sustain Owners Insurance Company's summary judgment motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed through the Missouri Court's electronic filing system on October 19, 2016, to be served on: Mr. Steve Garner and Mr. Mr. Jeff Bauer, Strong-Garner-Bauer, P.C., 415 E. Chestnut Expressway, Springfield, MO 65802.

/s/ T. Michael Ward

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Appellant's Substitute Brief includes the information required by Rule 55.03.

2. The Appellant's Substitute Brief complies with the limitations contained in Rule 84.06;

3. The Appellant's Substitute Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 11,132 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Substitute Brief was prepared; and

4. Appellant's Substitute Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ T. Michael Ward

CERTIFICATION UNDER RULE 55.03(A)

Pursuant to Rule 55.03(a) of the Missouri Rules of Civil Procedure, the undersigned hereby certifies that he/she signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

/s/ T. Michael Ward

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