IN THE SUPREME COURT OF MISSOURI
EN BANC

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

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI

THE HONORABLE JASON R. BROWN
CIRCUIT JUDGE

SUBSTITUTE REPLY BRIEF OF APPELLANT OWNERS INSURANCE COMPANY

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REPLY STATEMENT OF FACTS

Respondents Vicki Craig and Chris Craig, in their Substitute Respondents' Brief, include a separate Statement of Facts. They assert the setoff language addressed by Owners in its Substitute Appellant's Brief was provided to the Craigs over a month after they had selected their coverage, several weeks after they paid for their coverage, and a week after their coverage had gone into effect. (Resp. S. Br. 4.)

The Craigs, at all relevant times, were on notice of the setoff language in the Owners policy. The Owners policy was a renewal policy, and the Craigs had been insured by Owners since 2003. (L.F. 108, 112, A7.) The September 2013 notice simply asked them to confirm the renewal and contact their agent if any updates to coverage were needed. (L.F. 159.) There were no changes to the Craigs 2013-2014 policy, with the exception of a "PAID IN FULL DISCOUNT." (L.F. 111, A6.)

A notice provided to the Craigs by Owners dated November 6, 2013, makes clear that the only change made to the 2013-2014 renewal policy was the addition of a "PAID IN FULL DISCOUNT." (L.F. 111, A6.) No other changes or additions are noted. (L.F. 111, A6.) Accordingly, the Craigs were insured under the same policy, with the same coverages and the same language, for at least the preceding policy year and chose to renew it.

The setoff language in the Owners was not new to the 2013-2014 renewal policy. The same language was included in the 2012-2013 policy. (L.F. 111, A6.) Moreover, the Missouri UNDERINSURED MOTORIST COVERAGE form, Form 79339 (7-10), had

been made part of Owners' automobile insurance policies since July 2010, the form's effective date. (L.F. 120, A8.)

There is also no dispute over the wording of the Owners policy. The Craigs and Owners stipulated that the Craigs 2013-2014 policy contained the setoff language at issue. (L.F. 67-68.)

Contrary to the Craigs' assertion, they were not directed by Owners solely to the policy's Declarations, which accompanied the September 2013. The same notice afforded the Craigs the opportunity to review their policy online. (L.F. 159.)

REPLY ARGUMENT

I. The trial court erred in entering summary judgment for Defendants Vicki Craig and Chris Craig, and in denying summary judgment for 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 Craigs do not challenge the plain wording of the limits of liability section of the Owners (UIM) endorsement as ambiguous. This provision states: "The Limit of Liability stated in the Declarations for Underinsured Motorist Coverage are for reference purposes only." (L.F. 66, 121, A9.) The provision continues: "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.) This provision concludes: "[I]n determining the total damage to which this Underinsured Motorist Coverage applies, the amount of money already paid to the injured person for compensatory damages … shall be deducted from the Limits of Liability stated in the Declarations …." (L.F. 68, 121, A9.)

Instead, the Craigs argue the limit of liability provision creates an ambiguity when read with the policy's declarations page, which identifies a $250,000 per person limit of liability for UIM coverage. The Craigs claim Owners sold them illusory coverage that Owners will never pay under any circumstances and charge Owners with engaging in "traps" to ensnare its policyholders. In support, the Craigs identify what they characterize as "two primary flaws" in Owners' argument. First, the setoff language was not provided to the Craigs when the policy was purchased, or even at the time the policy went into effect. Second, Owners' argument requires the Court to ignore the rest of the Owners policy and consider only the "later added set off language." (Resp. S. Br. at 11.)

The Craigs' argument fails as a matter of law. Owners did not sell the Craigs illusory coverage. The limits of liability provision advised them of the nature of the UIM limit stated on their declarations.

> 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.)

The policy contains no promise by Owners to pay the Craigs $250,000 in UIM coverage, without qualification, in the event they are involved in an accident with an underinsured motorist. No policyholder reading this language from the policy's limit of liability provision could reasonably conclude otherwise. Owners, in plain ambiguous

language, informed the Craigs that Owners would never pay them the stated limit of UIM coverage and then proceeded to advise them how their UIM coverage would be applied in the event of an accident, which included a setoff based on payments made on the at-fault driver's behalf.

Moreover, at all relevant times, the Craigs were on notice of the setoff language in the Owners policy. The language was not first added to the policy for the 2013-2014 policy period. The Owners policy was a renewal policy, which was identical to the 2012-2013 policy in all material respects but for the addition of a "PAID IN FULL DISCOUNT." (L.F. 111, A6.)

Contrary to the Craigs' assertions, Owners has not asked the Court to ignore the rest of the policy and consider only a provision that was later added to the policy. The setoff provision is not a later added provision. The provision has been part of the Owners policy issued to the Craigs at least as early as the 2012-2013 policy, if not before.[1] (L.F. 111.)

Rather, Owners has asked the Court to read the policy as a whole, and to consider the policy's declarations in the context of the policy as whole, consistent with the Court's decisions addressing the purpose that declarations pages play in insurance policies. This

[1] The UIM coverage form to the Owners policy is Form 79339 (7-10). (L.F. 120, A.9.) The form, which was adopted by Owners after the Court's decisions in *Jones* and *Ritchie*, first took effect in July 2010. (L.F. 120, A.9.) The Craigs were first insured by Owners in 2003. (L.F. 108, 112, A7.) Therefore, the Court may infer that they were on notice of the setoff provision as early as the inception of their 2010-2011 renewal policy.

Court has held that policy declarations do not grant coverage and do not bar provisions in the policy that limit the coverage stated in the declarations. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014); *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 160, 162-63 (Mo. banc 2007); and *Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749, 751 (Mo. banc 1987). As explained by this Court, declaration pages are not promises to pay the insured; they are not insuring agreements. *Floyd-Tunnell*, 439 S.W.3d at 221. Rather, declarations pages are summary in nature. Indeed, contrary to the Craigs' argument, which places primacy of place on the policy's declarations, this Court has never endorsed such a view. Instead, the 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 decision in *Floyd-Tunnell* demonstrates the trial court's judgment for the Craigs should be reversed. When the policy is read as a whole, and each part of the Owners policy is considered in light of this Court's decisions addressing declarations pages and policy interpretation, the setoff provision in the Owners policy should be upheld as a plain and unambiguous limitation on UIM coverage. The Court's decisions and the plain language of the Owners policy permit no other conclusion.

Finally, the Craigs invite the Court to adopt a blanket prohibition against setoff provisions in UIM coverage parts. They charge insurers with attempting to create a "Court-

condoned 'insured trap.'" (Resp. S. Br. 14.) However, there is nothing improper about a setoff provision. Setoff provisions have been part of automobile insurance policies since the advent of UIM coverage in Missouri. At one time, it was assumed that such provisions were enforceable. A unanimous Court in *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382-83 and n. 1 (Mo. banc 1991), rejected the proposition that limitations on UIM coverage that would foreclose the insured from recovering the entire limit of liability in a UIM coverage rendered such coverage meaningless or misleading. The Court, in *Rodriguez* explained that setoff provisions reinforce the definition of "underinsured motorist" in UIM coverage parts by providing that the limit of liability shall be reduced by all sums paid because of bodily injury by or on behalf of the legally responsible party. *Id.* at 382. Moreover, this Court, in both *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009), and *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009) acknowledged that unambiguous setoff provisions would be enforceable and even provided guidance as to how such provisions should be drafted. Owners, in drafting its UIM form, Form 79339 (7-10) (L.F. 120), which took effect in July 2010, sought to heed the Court's lessons in *Jones* and *Ritchie*.

The Court's insurance jurisprudence does not stand for the proposition that unambiguous setoff language becomes ambiguous when read alongside a declarations page. Nor do the Court's decisions stand for the proposition that setoff language is inherently ambiguous. In *Jones*, *Ritchie*, and *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013), the ambiguity in each case that the Court identified was within the provisions of the policies at issue. No such similar ambiguous language exists in the Owners policy.

Therefore, the trial court's judgment should be reversed. The Craigs' arguments do not compel a contrary conclusion.

B. Owners did not impermissibly seek to avoid payment of the policy's $250,000 UIM limit based on language that Owners did not provide the Craigs until after the policy was paid for and in effect.

Between pages 16 and 25 of their brief, the Craigs charge Owners with engaging in bait-and-switch conduct. They contend the Craigs purchased $250,000 in UIM coverage subject to policy language that Owners never provided to them, and that the Craigs never received this language until well after their policy was issued. The Craigs argument is unsupported by the facts and the law. Indeed, it is based on the false premise that the Craigs had no prior notice of the policy's setoff language.

The Craigs' argument ignores that their policy is a renewal policy. The Craigs have been insured with Owners since 2003. (L.F. 108, A7.) According to the policy information in the record on appeal, their 2013-2014, the policy at issue, is identical to their 2012-2013 policy, with the exception of a "PAID IN FULL DISCOUNT." (L.F. 111, A6.) The policy notes no other changes to the policy effective October 31, 2013. (L.F. 111, A6.) Accordingly, the Craigs were insured under the same policy, with the same coverages, and the same language for at least the preceding year and chose to renew the policy. Under the circumstances, the Craigs cannot claim lack of notice of the contents of their policy. There is no authority under Missouri law that excuses policyholders from examining their policies. *Jenkad Enterprises, Inc. v. Transportation Ins. Co.*, 18 S.W.3d 34, 38 (Mo. App. E.D. 2000).

Regardless, this is not a bait-and-switch case, as the Craigs contend. At all relevant times, the Craigs had notice of the setoff provision. The provision was in their 2012-2013 policy. The provision was also in their 2013-2014 policy. Indeed, the Craigs stipulated that the provision was in their policy. (L.F. 66-67.) Owners did nothing to hide or hold back the provision.

The Craigs' focus on the September 2013 notice from Owners does not support a contrary conclusion. The notice simply asked the Craigs to confirm the renewal and contact their agent if any updates to their coverage under the policy were needed. (L.F. 159.) The Craigs requested no changes to their policy. Moreover, although the notice directed the Craigs to examine their declarations, the notice also invited them to review their policy online. (L.F. 159.)

The fact that a paper copy of the renewal policy did not accompany the September 2013 notice does not advance the Craigs' argument. This case does not involve the addition of after-the-fact-setoff language.

Since the 2013-2014 renewal policy contained no materials changes to the 2012-2013 policy (L.F. 111, A6), the fact that the actual 2013-2014 policy was delivered to the Craigs after they received the September 2013 notice did not deprive them of notice of the setoff provision. Indeed, under Missouri law, absent advanced notice from the insurer, policyholders are entitled to assume that a renewal policy contains the very same terms and conditions as those contained in the policy because a renewal policy is required to contain the same terms and conditions as those contained in the preceding policy. *Hester v. American Family Mut. Ins. Co.*, 733 S.W.2d 1, 2 (Mo. App. E.D. 1987). Restated, a renewal

policy – by definition – is a contract with the same terms and conditions as those contained in the policy that is renewed. *Rice v. Provident Life & Acc. Ins. Co*., 102 S.W.2d 147, 150 (Mo. App. 1937).

Under the facts and the law, the Craigs should not be permitted to claim that Owners engaged in duplicitous behavior designed to trick or deceive them. In no way did Owners unilaterally change the terms of the Craigs' 2013-2014 policy. During the 2012-2013 policy period, if not before, the Craigs possessed the very same policy language that they claim Owners withheld from them at the time of the September 2013 notice.

The Craigs' authorities do not save their argument. Their citation to *Sturgis v. American Hosp. & Life Ins. Co*., 174 S.W.2d 917 (Mo. App. 1943), is inapposite. (Resp. S. Br. 20.) The policy at issue in *Sturgis*, on its face, contained inconsistent and repugnant provisions concerning coverage. *Id*. at 920. The Owners policy suffers from no similar defect. The policy's setoff provision is not contradicted by any other provision in the policy.

The Craigs' citation to Montana bait-and-switch cases is equally unavailing. (Respondents' Substitute Brief at 20-21.) The court's decision is *Hardy v. Progressive Specialty Ins. Co*., 67 P.3d 892, 896-97 (Mont. 2003), was decided on Montana public policy grounds as well as the court's holding that the policy's declarations page should have advised the policyholder of the limitations on UIM coverage stated elsewhere in the policy. In effect, the Montana court required UIM coverage written as "gap" coverage to be treated as "excess" coverage.

Nor can the Montana Supreme Court's decision in *Hardy* be reconciled with Missouri law. Unlike Montana, there is no comparable public policy applicable to UIM coverage in Missouri. *Rodriguez*, 808 S.W.2d at 383. UIM coverage is a matter of contract between the insurer and the insured. Thus, in the absence of any ambiguity, the clear language of the contract prevails. *Id*. at 383-84. Under Missouri law, there is no requirement that such coverage be treated as excess coverage unless the policy affords UIM coverage with limits less than twice the minimum limits required by Missouri's Motor Vehicle Financial Responsibility Law. MO. REV. STAT. § 379.204. Here, since the referenced UIM limit in the Owners policy is $250,000, Section 379.204 has no application. Thus, a UIM coverage part written as "gap" coverage, such as the Owners policy, is permissible under Missouri law.

Also, the Montana court's treatment of the declarations page in the policy at issue is contrary to this Court's decisions. The Montana court essentially treated the policy's declarations page as a promise of coverage to the policyholder that trumped the language of the policy. 67 P.3d. at 897. Missouri law permits no similar result. Declarations pages under Missouri play a limited role. As this Court held in *Floyd-Tunnell*, "declarations pages do not grant any coverage," and the policyholder "must look elsewhere [other than the declarations] to determine the scope of coverage" afforded by the policy. 439 S.W.3d at 221.

Likewise, the Craigs' invocation of the rule that a policy is ambiguous when the policy promises the insured something at one point but then takes it away at another has no application here. The rule in *Floyd-Tunnell* defeats their argument. The policy's

declarations page does not constitute an insuring agreement promising the Craigs a certain amount of UIM coverage. *Id*. at 221. Therefore, the declarations cannot be read to promise coverage that the policy's limit of liability provision takes away. The opposite is true. The limit of liability provision defines the UIM coverage that is available to the Craigs under the policy. Indeed, the rule invoked by the Craigs has no application when the limiting provisions in an insurance policy are unambiguously stated. *Todd*, 223 S.W.3d at 162-63. Here, there is no contention that the actual wording of the policy's limit of liability provision, including the setoff provision, is ambiguous.

The Craigs go on to argue that an endorsement after a policy is issued, which attempts to reduce coverage, cannot be relied upon by the insurer. (Resp. S. Br. 24.) Their argument rests on the false proposition that the setoff provision is an after-the-fact addition to their policy. Their assertion is simply not true. 2013-2014 policy is identical to the 2012-2013 policy. (L.F. 111, A6.) There were no substantive additions or changes to the policy in the 2013-2014 policy. Moreover, the actual policy issued was not an endorsement issued to previously existed policy. It was the policy. The September 2013 notice was not an insurance policy and contained no policy terms. (L.F. 159.) And the declarations provided with that notice did not constitute a stand-alone insuring agreement that was contradicted by the actual terms of the policy. As instructed by the Court in *Floyd-Tunnell*, the actual terms of the policy must be discerned from the policy itself. 439 S.W.3d at 221.

Finally, the Craigs argue they paid premiums for $250,000 in UIM coverage. (Resp. S. Br. 18.) However, they cannot claim they paid premiums for $250,000 in UIM coverage without limitation. Their premiums are a function of the policy's terms, which contain the

setoff provision at issue. Had their UIM coverage been written as pure excess coverage, which is the result of the trial court's decision, their premium would have no doubt have been greater.

C. The policy's declarations do not render the policy's setoff provision ambiguous or otherwise unenforceable.

Between pages 25 and 31 of their Substitute Brief, the Craigs argue the Owners policy is ambiguous because the policy, at multiple places, directed them to the policy's declarations to identify how much UIM coverage they purchased. Their argument should be denied. Once again, the Craig's argument rests on the false proposition that they had no notice of the setoff language in the Owners policy. Their 2013-2014 policy was a renewal policy and contained the very same provisions as their prior policy. (L.F. 111, A6.) Therefore, they had notice of the setoff provision before they received the September 2013 notice.

Regardless, the various references to the policy's declarations cited by the Craigs do not render the setoff provision ambiguous. The Craigs argue that, when they purchased their policy, they were sent the September 2013 notice directing them to review the policy's declarations to confirm that the policy contained the correct coverages, and that, accordingly, the notice confirms the importance of the declarations for the UIM coverage that they purchased. Their argument ignores that they were already on notice of the language in the entire Owners policy because their 2013-2014 policy was a renewal policy that contained the very same language contained in the policy issue the year before. (L.F. 111, A6.) Their argument also ignores the very same notice invited the Craigs to review

their policy, and not just the declarations, online. (L.F. 159.) And, their argument further ignores that the notice contains no suggestion that the declarations contain all relevant policy terms and that there were no limitations on coverage, except those that might be stated on the declarations.

Nor can the declarations be given the primacy of place in the policy that the Craigs seek to confer on them. The Craigs seek to give the policy's declarations far greater weight than this Court has afforded this discrete part of an insurance policy. Indeed, their argument is at war with the Court's precedent. As explained by the Court in *Floyd-Tunnell*, "[t]he 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 to determine the scope of coverage." 439 S.W.3d at 221. Moreover, the Court has further observed that "[d]efinitions, exclusions, conditions, and endorsements are necessary provisions in insurance policies." *Todd*, 223 S.W.3d at 160. And no Missouri court has required insurers to place all such limitations on coverage on the declarations page itself.

If the contrary were true, the declarations page would necessarily subsume the entire policy and take on a role such provisions were never intended to perform. If the omission of a limitation on coverage from the declarations page renders the policy ambiguous, then a declarations page would have to duplicate the policy in its entirety to ensure that limitations in the main body of the policy are enforceable.

Such a contrary rule would not be without widespread consequences. Almost every insurance policy extant would fall prey to such a challenge based on the limited role that declarations pages play as coverage summaries and would require insurers to change the

basic architecture of their policies. The Court in *Floyd-Tunnell* implicitly recognized the unreasonable nature of the argument that the Craigs have advanced. The Court made plain that policyholders must look to the main body of their policies to understand the scope of the overage that they have purchased, especially since declarations pages by and of themselves do not grant any coverage. 439 S.W.3d at 221.

The Craigs also find the predicate for ambiguity in the policy's "A QUICK GUIDE TO YOUR POLICY." They assert this provision also points the policyholder to the declarations page to confirm the coverages and limits that have been purchased. (Resp. S. Br. 27; L.F. 48, 145, A11.) They characterize this provision as a guide to the "newly provided additional policy provisions." (Resp. S. Br. 27.) However, there were no newly added policy provisions to the policy. The Craigs' policy was a renewal policy that contained the very same provisions as those contained in the prior year's policy. (L.F. 111, A6.)

Moreover, the Craigs ignore critical language contained in the "Quick Guide." Before mentioning the declarations, the "Quick Guide" makes clear that the insured should "READ YOUR POLICY CAREFULLY," because "[t]his cover sheet provides only a brief outline of some of the important features of your policy," and because "[t]he policy itself sets forth, in detail, the rights and obligations of both you and your insurance company." (L.F. 48, 145, A11.) The "Quick Guide" concludes, again, that "IT IS THEREFORE IMPORTANT THAT YOU READ YOUR POLICY." (*Id.*) After repeatedly urging the insured to read the policy in its entirety, the "Quick Guide" states "the DECLARATIONS contain" and then lists the informational headings found on the declarations, including

"COVERAGES" and "LIMITS OF LIABILITY." (*Id.*) The "Quick Guide" then proceeds to list the headings for the policy's terms and corresponding page numbers. (*Id.*)

The "Quick Guide," which lists what informational headings can be found on the declarations, makes no promises about the scope of available coverage, and certainly does not, as the Craigs argue, instruct them to look exclusively to the policy's declarations to determine both what coverages they had as well as the limits of liability for each coverage under the policy. (Resp. S. Br. 27.) If anything, the "Quick Guide" makes clear that the Craigs *should not* rely solely on the declarations to determine the scope of their coverage because the "Quick Guide" informed them that the "rights and obligations" of the insurer and the insured are detailed in the policy, and directed them to read the policy in its entirety. (L.F. 48, 145, A11.)

The Craigs recourse to the policy's "INSURING AGREEMENT" in the policy's bodily injury/property damage coverage part in an attempt to bolster their ambiguity argument also fails to advance their position. (Resp. S. Br. 27.) The "INSURING AGREEMENT" states that "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. 49, 146, A12.) They argue this language provides another example of the policy pointing the reader to the declarations to determine coverages and limits. (Resp. S. Br. 13.)

The Craigs' argument should be denied. Once again, they are selective in their quotation from the policy. They fail to cite the entire "INSURING AGREEMENT" – in particular language that again reminded them that Owners "agree[d] to insure the described automobile(s) for those Coverages and Limits of Liability *subject to the terms and*

conditions of this policy." (L.F. 49, 146, A12) (emphasis added). As with the "Quick Guide," this language from the "INSURING AGREEMENT" instructed the Craigs that the declarations are subject to the policy's terms. In doing so, the "INSURING AGREEMENT" reinforced the applicability of the policy language to the coverages and limits listed in the declarations page, rather than giving the declarations page a place of primacy within the policy and without consideration of the policy's actual terms. To this end, the Craigs' argument fails to heed the Court's decision in *Floyd-Tunnell* which makes plains that a policyholder must look beyond the declarations page to understand that the scope of coverage available to them. 439 S.W.3d at 221. The Owners policy comports with the Court's dictates. The Craigs' argument does not.

Owners did not purposely direct the Craigs to the declarations page to identify how much UIM coverage that they had purchased, as the Craigs argue. Rather, Owners reiterated that the coverages and limits on the declarations are subject to the policy's terms and that the insured should read the entire policy. (L.F. 48-49, 145-146, A11, A12.) Nonetheless, even assuming that an insured looks to the declarations, which do not contain the disputed limitation to ascertain coverage, this fact would not end the inquiry as to whether the policy is ambiguous because the policy still must be read as a whole. *See Naeger v. Farmers Ins. Co., Inc.*, 436 S.W.3d 654, 660 (Mo. App. E.D. 2014) (finding no support 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").

Whether it is necessary to also include a limitation in the policy on the declarations as well was recently discussed in *Simmons v. Farmers Ins. Co.* In *Simmons*, the court

examined a policy containing a declarations page stating that the policy would provide $50,000 of UIM coverage per person, without including any further limitations. 479 S.W.3d 671, 675 (Mo. App. E.D. 2015). The insurer argued that because the tortfeasor had liability insurance equal to that of the insured's UIM coverage, the tortfeasor's vehicle was not an "underinsured motor vehicle" within the meaning of the policy's definition, which included only motor vehicles that maintained liability coverage "less than" that of the insured's UIM coverage. *Id*. at 676.

The *Simmons* court held that where the policy's declarations do not identify any limitations on UIM coverage it would employ an "additional level of scrutiny" when examining the remainder of the policy for language suggesting coverage should be considered "excess" over that of the UIM coverage. *Id*. at 677. In examining the remainder of the policy with "additional scrutiny," the court found an ambiguity within the policy's limit of liability provision. *Id*. at 675-76. This provision defined the UIM limit as the difference between the amount of the insured's damages for bodily injury and the amount paid to the insured by the underinsured motorist *up to* the limits of the coverage, which contradicted the policy's definition of "underinsured motor vehicle." *Id*. Accordingly, upon finding this ambiguity within the policy's language, the court read the policy in favor of coverage. *Id*. *See also Nationwide Ins. Co. of America v. Thomas*, 487 S.W.3d 9, 13 (Mo. App. E.D. 2016) (applying the same "heightened scrutiny" standard where the declarations contained no limitations).

Because a declarations page only provides an "abbreviated" version of the policy's essential terms, the fact that the declarations here do not reference the applicable limitation

does not, by itself, render the policy ambiguous. *Floyd-Tunnell*, 439 S.W.3d at 221. As *Simmons* and *Nationwide* demonstrate, a court must still examine the language of the policy as a whole to determine whether it contains contradictory or confusing language that may prevent the insured from discovering the applicable limitation. *Simmons*, 479 S.W.3d at 673. In *Simmons* and *Nationwide*, the policies contained contradictory language that would cause a reasonable insured confusion as to whether the full limit of liability listed in the declarations would actually be paid. No similar contradiction exists here. Even under the strictest of scrutiny, the language of the Owners policy clearly and unambiguously informs the reader that the full amount of the UIM limit of liability listed on the policy's declarations page is for reference purposes only, and will not be paid in its entirety. (L.F. 67, 121, A9.) The policy then proceeds to explain how reductions will be taken from those amounts listed in the declarations. (L.F. 67-68, 121, A9.)

Restated, the policy's provisions, without contradiction, advised the Craigs that the policy will only pay the UIM limit stated in the declarations page reduced by the amount paid to the insured by the underinsured motorist. Accordingly, the fact that the declarations page does not list every applicable limitation on the policy's UIM coverage does not render the policy ambiguous. While the policy and the notice provided to the Craigs generally referenced the coverages listed in the declarations page, the declarations page contained no promises concerning the scope of that coverage, and the policy makes clear that those coverages are subject to, and limited by, the policy's terms, and that the Craigs should read the policy. Upon reading the policy, the language unambiguously informs the reader that

the most Owners will pay is the UIM limit listed in the declarations reduced by the amount of the underinsured motorist's liability coverage. (L.F. 67-68, 121, A9.)

The Craigs' recourse to the "reasonable expectations" doctrine has no application here. (Resp. S. Br. 29.) This Court has made plain that the doctrine is inapplicable when the relevant policy language is unambiguous. This Court has instructed that a determination as to whether an insured's expectation was reasonable requires the Court to review the policy language, and if the policy language is plain, straightforward, and susceptible of only one meaning, the rules of construction are inapplicable, and absent public policy to the contrary, the contract will be enforced as written. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009); *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991) ("[T]he application of the objective reasonable expectation doctrine depends on the presence of an ambiguity in the contract language."); and *Nabil v. State Farm Mut. Auto. Ins. Co.*, 877 S.W.2d 177, 179 (Mo. App. W.D. 1994) (Absent public policy, the "reasonable expectations" doctrine is not applicable to change the meaning of unambiguous policy language.).

Here, the limit of liability provision states:

> 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.) There is no policy ambiguity here. A policyholder reading this policy as a whole would not be confused by this language. Under this language, no policyholder could be found to have reasonably understood to have UIM coverage with a $250,000 limit without any limitation or qualification.

The Craigs' citations to *Wasson v. Shelter Mut. Ins. Co.*, 358 S.W.3d 113 (Mo. App. W.D. 2011), *Miller v. Yun*, 400 S.W.3d 779 (Mo. App. W.D. 2013), and *Fanning v. Progressive Northwestern Ins. Co.*, 412 S.W.3d 360 (Mo. App. W.D. 2013), for the proposition that an average insured considering the policy's declarations would understand the policy to provide $250,000 in UIM coverage does not survive examination of the actual holdings in those cases, each of which turns on its own facts and the policy language. None of the cases addresses the specific policy language in the Owners policy, and none found the policy at issue ambiguous based solely on the language in the policy's declarations.

Finally, the Craigs remarkably charge Owners with attempting to read the policy's setoff provision in isolation. (Resp. S. Br. 29, 30 n. 3.) Their charge is Orwellian in its dimensions. As made plain by Owners in both its opening brief and this reply, Owners has consistently maintained that the policy should be read as a whole, consistent with this Court's decisions in *Floyd-Tunnell* and *Todd*, and according each part of the policy a reasonable interpretation according to its plain language and purpose. Accordingly, in addressing the policy's declarations page, Owners has done nothing more than heed the Court's precedent addressing this discrete part of an insurance policy that instructs policyholders to look to the main body of the body to determine the scope of their coverage, and not the declarations. 439 S.W.3d at 221. Since the declarations are introductory only

"and subject to refinement and definition in the body of the policy (*Peters*, 726 S.W.2d at 751)," and "do not grant any coverage (*Floyd-Tunnell*, 439 S.W.3d at 221)," it is only right and proper that Owners addressed the plain language of the policy's limitation of liability provision in determining the UIM coverage available to the Craigs, in the context of examining the policy as a whole. In no way can the Craigs' argument be reconciled with this Court's decisions in *Floyd-Tunnell*, *Todd*, and *Peters*.

D. The Missouri Supreme Court has not, on three separate occasions, held that UIM setoffs are ambiguous, where, as here, the policy never promises to pay the full limit stated in the declarations.

The Craigs, between pages 31 and 39 of their brief, argue Owners has attempted to avoid this Court's multiple holdings that setoff provisions in UIM coverage create illusory coverage. This is not the case. Owners, in adopting its 2010 UIM form, sought to follow the Court's decisions that acknowledged that an unambiguous setoff provision would be enforceable.

The language in the Owners policy eliminates any specter that the policy's UIM coverage is illusory in nature. The introductory paragraph in the policy's limit of liability provision informed the Craigs that the limit of liability stated on the declarations for UIM coverage was for reference purposes only and that Owners, under no circumstances, had an obligation to pay the full limit stated on the declarations. (L.F. 121, A9.)

The Craigs argue the interests of certainty, predictability, and uniformity of results require affirmance of the trial court's judgment and that the public good is ill served by uncertainty in the law. (Resp. S. Br. 31, 35.) In support, they cite the Court's three UIM

cases in which setoff provisions were held to be ambiguous. While it is true that this Court, and other Missouri courts, have found UIM setoff provisions to be ambiguous, no court has done so in the face of the unambiguous language in the Owners policy. In each of its three UIM cases, this Court identified an ambiguity arising from the interplay between the setoff provision and other language within the policy. Moreover, in two of the three cases, the Court specifically affirmed that an unambiguous setoff provision would be enforceable, and even suggested how insurers might draft such a provision.

In *Jones v. Mid Century Ins. Co.* 287 S.W.3d 687, 691 (Mo. banc 2009), the Court noted that the ambiguity in the setoff provision could have been avoided if only 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. In *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009), the Court confirmed that the setoff provisions are permissible when the language is unambiguous. *Id*. at 141 n.10.

The Craigs also assert the term "Limits" is inherently ambiguous when considered in conjunction with a setoff provision. (Resp. S. Br. 38.) They suggest that this word conveys the sense the word refers to the maximum amount of coverage that an insurer will pay. Their argument cannot be reconciled with the policy's plain language. When the policy is read as a whole and the declarations are read together with the policy's limit of liability provision, Owners, in clear and unambiguous language, advised the Craigs that it would never pay the entire limit for UIM coverage stated on the policy's declarations. (L.F. 121, A9.)

E. Owners' case citations are not inapplicable to its policy or to UIM setoffs.

The Craigs, in the final subpoint, attack Owners' case citations. They cite Rule 84.04(d)(5) and argue that Owners has not relied on any authority directly on point. They argument should be denied.

This case turns on the architecture of the Owners policy. The Craigs give primacy of place to the policy's declarations. In contrast, Owners maintains the policy should be considered as a whole, and the declarations should be read according to this Court's precedent addressing declarations pages and their place in insurance policies.

None of the cases cited by the Craigs that have invalidated setoff provisions contains the same language as the Owners policy. Courts recognize that each policy stands on its own terms. Thus, in *Long v. Shelter Ins. Co.*, 351 S.W.3d 692, 702 (Mo. App. W.D. 2011), the Missouri Court of Appeals held that "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) (emphasis added)." Thus, when there are no cases on point, the court "must begin [its] analysis with the language of the policy." *Id.*

Accordingly, Owners' case citations under its points relied on were proper. In *Todd*, the Court held that "[d]efinitions, exclusions, conditions and endorsements are necessary provisions of insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable." 223 S.W.3d at 162-63. In *Floyd-Tunnell*, the Court held that "declarations pages do not grant any coverage," and that policyholders "must look elsewhere to determine the scope of [their] coverage." 439 S.W.3d at 221. In

Peters, 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. And, in *Naeger*, the Court addressed the import of declarations pages when a policy is read a whole. 436 S.W.3d at 660.

F. Conclusion

The Owners policy is not ambiguous. The interplay between the policy's declarations page and the policy's setoff provision does not render the policy indistinct, unclear, or duplicitous. In no way would an average insured understand the Owners policy to have promised to pay the full limits of UIM coverage listed in the declarations because the policy explicitly informs the reader that it will never pay the full limits stated on the declarations.

Contrary to Craigs' argument, this provision was not a newly added provision. It was part of their policy in effect during the preceding 2012-2013 policy period, if not before. They have also stipulated that this language was in their policy. Owners set no traps for them. Nothing was hidden from them.

While other decisions have invalidated setoff provisions because of ambiguities, none has done so in the face of the language at issue. In no way can it be argued that an average insured would be confused by language stating "[u]nder 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 page for this coverage." (L.F. 121, A9.) Because declarations pages alone are not a promise of coverage, and because no other provision in the policy contradicts this clear and unambiguous limiting

provision, the policy's setoff provision is enforceable. Therefore, the trial court's judgment for the Craigs should be reversed.

CONCLUSION

Appellant Owners Insurance Company respectfully requests the Court to reverse the trial court's summary judgment for Respondents Vicki Craig and Chris Craig and to enter judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Substitute Reply Brief was filed through the Missouri Court's electronic filing system on December 21, 2016, to be served on: Mr. Steve Garner and 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 Reply Brief includes the information required by Rule 55.03.

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

3. The Appellant's Substitute Reply Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 7,595 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Substitute Reply Brief was prepared; and

4. Appellant's Substitute Reply 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 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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