SUPREME COURT OF MISSOURI
EN BANC

JEFFREY D. SWADLEY, et al.,	)	
	)	
Respondents,	)	
	)	
vs.	)	**SC95844**
	)	
SHELTER MUTUAL INS. CO.,	)	
	)	
Appellant.	)	

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

SUBSTITUTE BRIEF OF RESPONDENTS

Submitted by:

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JURISDICTIONAL STATEMENT

Respondents hereby adopt and approve of the Jurisdictional Statement filed by Appellant.

STATEMENT OF FACTS

Decedent Angela Swadley ("Angie"), Respondents' mother and spouse, died as a direct result of a collision with a tractor trailer which occurred on March 18, 2013. (***LF 232; 234***). The parties stipulated that Respondents sustained at least $923,874.80 in damages as a result of Angie's wrongful death. (***LF 232***). Given the damages, the at-fault motorist's policy left the Swadleys with at least $100,000.00 in unsatisfied damages[1].

The Swadleys had purchased insurance to cover this situation, and at the time of the collision, a Shelter Auto policy issued to Jeffrey, Angela, and Brooke Swadley, policy No. 24-1-3735763-4 (hereinafter "the policy" or "the Shelter policy"), was valid and in effect. (***LF 235***). At the time of the collision, Angie Swadley was an insured under the terms of the policy for purposes of underinsured motorist coverage ("UIM"). (***LF 199***).

The policy's coverage limits to pay for additional damages due to the fault of an underinsured motorist were identified to be $100,000.00 per person. (***LF 83; 199; 235***). The Declarations page of the policy provides coverage for UIM coverage with limits of $100,000 per person and $300,000 per accident. (***LF 83; 199; 235***). The Declarations page tells the insured that [t]hese Declarations are part of your policy and replace all prior

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[1] As noted in Appellant's Brief, the Swadleys received $823,874.80 from the tortfeasor. (***App. Br. P. 6***). An injured motorcyclist received the balance of the $1.0 million policy for the injuries and damages he received in the wreck. (***See, LF 114***). However, this is not an issue for purposes of the present appeal.

Declarations." ***(LF 83).*** Although the Declarations Page has a column that contains information about "deductibles" for other coverages, it contains no indication that the UIM coverage is subject to a trigger or a reduction. ***(Id.).*** Nor does the Declarations Page suggest to the insured or state that the UIM coverage is only gap coverage. ***(Id.).***

The Limit of Liability section in the UIM Endorsement states as follows:

> The maximum limits of liability for this coverage are stated in the **Declarations** and are subject to the following limitations:
>
> (1) The limit shown for "each person" is the limit of **our** liability for the **claim** of any one **insured**. This limit applies to all **claims** made by others resulting from that **insured's bodily injury**, whether direct or derivative in nature.
>
> ...
>
> (3) The limits stated in the **Declarations** are reduced by the amount paid, or payable, to the insured for **damages** by:
>
> (a) All **persons** who are, or may be, legally liable for the **bodily injury** to that **insured**; and
>
> (b) All liability insurers of those persons.

(LF 106). While the first subsection of the Limit of Liability states that the maximum policy limits are stated on the Declarations page, the set-off in subsection (3) ensures that those same stated limits will never be reached, and will never be paid in full. ***(Id.)***

The policy itself, however, has multiple sections which direct the insured to those same Declarations as the place to determine their UIM coverage limits, and the place for

the insured to determine the coverages and limits of underinsured motorist liability. For starters, the policy defines the term "Declarations" to mean that part of the policy that "sets out many of the individual facts related to **your** policy including the dates, types, and dollar limit of the various coverages." ***(LF 86 (10)***).

Shelter's policy section titled "General Agreements on Which Insuring Agreements are Based" again directs the insured to the Declarations page to determine UIM coverage limits. It states, "**[y]ou** agree to check the **Declarations** each time **you** receive one, to make sure that all the coverages you requested are included in this policy; and the limit of **our** liability for each of those coverages is the amount **you** requested." (***LF 90***). This section directs the insured to notify Shelter within 10 days if the amounts of coverages listed on the Declarations are different from those requested. (***LF 90***). The next policy section is titled "Premium Payments" and states that Shelter promises "to insure **you** based on **your** promise to pay all premiums when due. If **you** pay the premium when due, this policy provides the insurance coverages in the amounts shown in the **Declarations**." (***LF 90***). While there are notations about the policy and coverages on the Declarations page, nowhere on the Declarations page does Shelter inform the insured that he or she will never, ever collect the full amount of UIM coverage shown there. (***LF 83***).

Based on their belief that they in fact purchased $100,000.00 in UIM coverage, after settling with the tortfeasor, the Swadleys sought payment of the $100,000.00 in UIM coverage identified in the policy they purchased from Shelter. ***(LF 113).*** While Shelter agrees that the Swadleys damages equal or exceed the combined limits of both

Angie's UIM coverage and the at-fault driver's liability coverage, Shelter contends that the Swadleys are entitled to no underinsurance at all. Shelter first contends that the tortfeasor was not an underinsured motor vehicle as defined in the policy, and second that, even if he were underinsured by the terms of the policy, no underinsurance remains for the Swadleys after the UIM policy limits are reduced by the amounts the Swadleys previously received from the tortfeasor[2]. ***(LF 125; 203; 232; 234; 30; 60; 64; App. Brief 10).***

[2] Although it was presented to the trial court as a basis for its motion for summary judgment, Shelter appears to have distanced itself from the argument that the policy set-off reduces any potential recovery to zero in this case. ***(LF 124-5.)*** While it might behoove Shelter to take the position that there is no set-off in this case, the policy language clearly permits Shelter to take a contrary position when beneficial. ***(See, LF 106.).***

POINT RELIED ON

The trial court did not err in declaring that Underinsured Motorist coverage was available under the policy because the Shelter policy at issue provides underinsured motorist coverage to the Swadleys for the March 18, 2013 collision in that the Shelter policy is ambiguous and must be construed in favor of the Swadleys, the insureds.

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ARGUMENT

POINT RELIED ON

The trial court did not err in declaring that Underinsured Motorist coverage was available under the policy because the Shelter policy at issue provides underinsured motorist coverage to the Swadleys for the March 18, 2013 collision in that the Shelter policy is ambiguous and must be construed in favor of the Swadleys, the insureds.

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A. Summary of the Argument

In interpreting a policy of insurance, the Court must consider it in the light that an ordinary consumer would. ***Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007).** The Swadley policy therefore must be construed as the ordinary purchaser and "not in the manner of a painstaking lawyer." ***Reese v. United States Fire Ins. Co.*, 173 S.W.3d 287, 299 (Mo. App. W.D. 2005).** Here Shelter claims that the Swadleys are not entitled to any underinsured motorist coverage under the policy because the Swadleys cannot satisfy the definition of an underinsured motor vehicle. ***(LF 232; 234; 30; 60; 64; App. Brief 10).*** Shelter also argued to the trial court that the set-off applied, and that "[c]learly no underinsured motorist coverage remains after its limits are reduced by the amounts previously received by Plaintiffs." ***(LF 125.).***

Shelter's argument that the Swadleys' claim fails because they cannot meet the policy definition of underinsured motor vehicle is contrary to a long line of Missouri cases which have held that "[d]etermining whether the definition of an underinsured motor vehicle is met is not a threshold issue to determine whether the insured is entitled to underinsured motorist coverage." ***American Family Mut. Ins. Co. v. Ragsdale*, 213 S.W.3d 51, 54 (Mo. App. W.D. 2006).** "Rather, a court must 'review [ ] the whole policy to determine whether there is contradictory language that would cause confusion and ambiguity in the mind of the average policy holder.'" ***Nationwide Insurance Company of America v. Thomas*, 487 S.W.3d 9, 12 (Mo. App. E.D. 2016) (citing *Simmons v. Farmers Insurance Company, Inc.*, 479 S.W.3d 671, 675 (Mo. App. E.D. 2015)).**

This issue was very recently addressed by the Missouri court of appeals in the case of *Nationwide Insurance Company of America v. Thomas*, 487 S.W.3d 9 (Mo. App. E.D. 2016), wherein the court held that the UIM coverage was excess of liability coverage, despite the same definition of "underinsured motor vehicle" as in this case, and despite the same set-off clause provisions. *Simmons v. Farmers Insurance Company* reached a similar holding in 2015 when it found conflicts between a similar definition of "underinsured motor vehicle," the policy's declarations page, and the limit of liability provision. **479 S.W.3d 671 (Mo. App. E.D. 2015).** Many other cases have reached similar results. ***See, Seeck,* 212 S.W.3d 129; *Miller v. Ho Kun Yun*, 400 S.W.3d 779 (Mo. App. W.D. 2013); *Fanning v. Progressive Northwestern Ins. Co.*, 412 S.W.3d 360 (Mo. App. W.D. 2013); *Ragsdale*, 213 S.W.3d 51; *Chamness v. American Family*, 226 S.W.3d 199 (Mo. App. E.D. 2007); *Goza v. Hartford Underwriters*, 972 S.W.2d 371 (Mo. App. E.D. 1998).**

Shelter's argument that the policy set-off does not render the policy ambiguous is also unavailing and contrary to the case law. Shelter does not appear to dispute that the stated coverage is illusory because the insured will never receive the $100,000.00 in UIM coverage which the policy purports to provide[3]. When this same issue has recently been presented to this Court with regard to whether the set-off creates an ambiguity, all three times this Court has held the policy was at best ambiguous and invalidated the proposed

[3] In its prior briefing Shelter has set forth a hypothetical situation to argue that the policy limits are not illusory, but makes no such argument in this substitute brief. ***(LF 205).***

offset. ***Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009); *Ritchie v. Allied Property & Casualty*, 307 S.W.3d 1132 (Mo. banc 2009); *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013).**

Not only will the set-off reduce the coverage limit in all scenarios and thereby render the coverage's promised limits illusory, but the policy's definition of "underinsured motor vehicle" excludes UIM coverage entirely in all situations except where the insured happened to purchase more underinsurance coverage than the tortfeasor has in liability limits. **(*LF 89(51)*).** Thus, while the Swadleys thought they had secured $100,000.00 worth of underinsurance for the very situation presented here, Shelter told them they actually had purchased nothing. **(*LF 232; 234; 30; 60; 64; App. Brief 10*).**

Repeatedly, Shelter's briefing misleadingly categorizes the present issue as one of a "limitation" or "reduction" in coverage, when the issue here is a total exclusion of coverage altogether. **(*App. Br. P. 17-18.*).** Shelter states that the policy has "an endorsement for underinsured motorist which provide[s] a monetary benefit that supplement[s] amounts paid to the insured up to the monetary limit stated in the declarations of $100,000." **(*App. Br. P. 3*).** Yet according to Shelter's position in this case, the endorsement does not supplement anything, as there is no coverage at all.

Despite Shelter's position in this case, the Declarations page shows that the Swadleys had purchased UIM coverage of $100,000.00 per person and $300,000.00 per accident. **(*LF 83*).** Assuming that the average insured reads past the Declarations page, upon receiving the entire policy, the insured would turn to the next page which instructs the insured to "read this policy carefully," including the "policy form, Declarations, and

endorsements and make sure it provides the type of coverage you need in the amounts you requested." ***(LF 84)***. Following those instructions, the average insured would turn to the next page, "The Index," and see at the very top of the page that Shelter instructs them that, "The **Declarations** show the named insured, additional listed insureds, insured vehicle, policy period, types of coverage, and amount of insurance **you** have." ***(LF 85)*** (underline emphasis added). On the next page of Definitions, the insured is again told that the Declarations page "sets out many of the individual facts related to your policy, including the date, types, and dollar limit of the various coverages." ***(LF 86)***.

Reading on to the "General Agreements on Which Insuring Agreements are Based," the insured is informed that, "[**y**]**ou** agree to check the **Declarations** each time **you** receive one, to make sure that all the coverages **you** requested are included in this policy; and the limit of **our** liability for **each** of those coverages is the amount **you** requested." ***(LF 90)***. That section then tells the insured that he must notify Shelter "within 10 days of the date **you** receive any **Declarations** if **you** believe the coverages, or amounts of coverage, it shows are different from those **you** requested." ***(LF 90)***. The very next paragraph titled "Premium Payments" again tells the insured that Shelter agrees to insure them up to the amount listed in the Declarations: "[i]f **you** pay the premium when due, this policy provides the insurance coverages in the amounts shown in the **Declarations**." ***(LF 90)***.

Even Shelter acknowledges that this Court has held that the declarations set forth the policy's **essential** terms, albeit in an abbreviated form. ***(App. Br. P. 12)***. If a "triggering" definition, which very well may exclude UIM coverage altogether, and a set-

off, which reduces the coverage limits in all scenarios, are not "essential" terms, it is difficult to say what would be considered "essential." In reality, the $100,000/$300,000 figure seems far less "essential" under these circumstances, as the policy will never pay that amount anyway.

Setting aside the fact that the policy directs the insured to the Declarations page as the place to determine the coverage amounts, the Limit of Liability in the UIM Endorsement also signals to the insured that the policy will pay up to the amount stated in the Declarations. This is because the Limit of Liability is phrased with reference to the "maximum limits" of UIM coverage as stated in the Declarations, as well as the insured's total damages. ***(LF 106).*** Specifically, with respect to the Declarations, the Limit of Liability section states that, "[t]he limit shown for 'each person' is the limit of **our** liability for the **claim** of any one **insured**." ***(LF 106).*** Shelter's argument that the Swadleys "can point to no language in the policy that promises to pay the full amount of the UIM limit of liability listed on the declarations" is simply inaccurate. (***App. Brief, p. 22***.) The fact of the matter is that all of these sections of the policy are in conflict with: (1) the definition of an "underinsured motor vehicle," which nullifies coverage altogether when, in cases like this one, the tortfeasor has more liability insurance than UIM coverage; and (2) the set-off provision, which reduces liability below that promised on the Declarations page and ensures that the UIM coverage limits will never be paid in full.

None of these policy paragraphs cited, nor the Declarations page itself, informs the insured that: (1) the $100,000.00 in UIM coverage shown on the Declarations page, where Shelter repeatedly directs its insured to look for its coverage limits, are not the

actual limits of the policy; (2) Shelter intended those stated coverage limits to be illusory; (3) Shelter would never under any circumstances pay the full $100,000.00; or (4) if the tortfeasor has more liability coverage than the UIM coverage, there is no underinsurance at all under the policy. To the contrary, as described above, Shelter repeatedly assures its insureds that they have purchased underinsured motorists coverage up to the $100,000.00 coverage limit listed on the Declarations page. Thus, the average insured understands exactly what the Swadleys would: that Shelter will pay up to $100,000.00 in underinsured motorist coverage if the insured suffers a sufficient injury.

Despite these representations in its policy, Shelter now claims the Swadleys are not entitled to anything. Not because the Swadleys did not suffer a significant injury, since Shelter agrees that Angie's death left the Swadleys with at least $100,000.00 in uncompensated damages. Rather, Shelter claims that the language of the policy precludes UIM coverage entirely for Angie's death, that the policy set-off reduces recovery to zero, and that the Swadleys are not entitled to any underinsurance under the policy.

Not only is Shelter's argument contrary to the understanding of an ordinary insured, but it is also contrary to a long line of Missouri case law, including three recent cases in which this Court found that a set-off like the one in this policy renders the policy ambiguous. ***Jones*, 287 S.W.3d 687; *Ritchie*, 307 S.W.3d 132; *Manner*, 393 S.W.3d 58.** Shelter's response is to argue that *Manner* was overruled *sub-silentio* by *Floyd-Tunnell*, though *Floyd-Tunnell* is not even an underinsurance case, and though the vehicles whose coverage was at issue in *Floyd-Tunnel* were not even listed on the

declarations page. Shelter also argues that *Ritchie, Jones,* and *Manner* are not controlling on the issues to be decided, despite the fact that they are underinsurance cases which address the exact issues presented here regarding a UIM set-off. Finally, Shelter's argument on the definitional issue is contrary to recent decisions from other appellate courts which have held policy language to be ambiguous and found in favor of coverage for the insured, despite the same definition of underinsured motor vehicle. ***Simmons*, 479 S.W.3d 671; *Nationwide*, 487 S.W.3d 9; *Fanning v. Progressive Northwestern Ins. Co.*, 412 S.W.3d 360 (Mo. App. W.D. 2013); *Miller v. Ho Kun Yun*, 400 S.W.3d 779 (Mo. App. W.D. 2013).**

B. Standard of Review for Insurance Policy Interpretation

As the issue in this case is solely one of interpretation of insurance policies, the Court should determine whether the insurance policy language is ambiguous, or unambiguous, in any way. ***Miller*, 400 S.W.3d at 784.** An ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words in the policy. ***Id.*** "Where an insurance policy promises the insured something at one point but then takes it away at another, there is an ambiguity." ***Jones*, 287 S.W.3d at 689** (stating that, "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"). This is particularly true where the insurance company's interpretation of the policy language would mean that it never actually would be required to pay its insureds the full amount of underinsured motorist coverage its policy ostensibly provides. ***Id.* *See also, Chamness*, 226 S.W.3d 199, 204 (Mo. App. E.D. 2007).** If the provisions of an insurance policy are found to be ambiguous, they are construed against the insurer. ***Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992).**

The purpose of underinsured motorist coverage is to provide insurance coverage for insureds who have been bodily injured by a negligent motorist whose own automobile liability insurance coverage is insufficient to pay for the injured person's actual damages. ***Wasson v. Shelter Mut. Ins. Co.*, 358 S.W.3d 113, 117 (Mo. App. W.D. 2011).** In Missouri, there are no statutory requirements for underinsured motorist coverage and therefore the contract of insurance defines the limits of such coverage. ***Id.* at 118** (citations omitted). Courts cannot interpret policy provisions in isolation but rather

should evaluate policies as a whole. ***Ritchie*, 307 S.W.3d at 135**. Missouri courts will refuse to isolate and evaluate the endorsement's definition of underinsured motor vehicle in a vacuum. ***Id.* at 133–34; *Ragsdale*, 213 S.W.3d at 54.** Missouri courts have long-refused to decide UIM cases solely on the policy's narrow definition of the terms "underinsured motor vehicle." Rather, Missouri courts concentrate on a review of the whole policy. ***Ritchie*, 307 S.W.3d at 135; *Seeck*, 212 S.W.3d at 133; *Miller*, 400 S.W.3d at 784; *Nationwide*, 487 S.W.3d 9.**

C. The issue is not whether the policy definition of "underinsured motor vehicle" is ambiguous, but whether the policy as a whole is ambiguous, and the most recent and on-point cases have held similar policy language ambiguous and construed the UIM coverage as excess of liability coverage, despite finding the same definition of "underinsured motor vehicle" to be unambiguous.

The trial court in this case agreed with the Swadleys that the policy is misleading and ambiguous. ***(LF 231; 235).*** The trial court, however, did not specify its reasons for finding the policy misleading and ambiguous, or what specific parts of the policy it believed caused the ambiguity. ***(Id.)*** "If the trial court's judgment does not specify the basis upon which summary judgment was granted, we will uphold the decision if it was appropriate under any theory." ***Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919, 922 (Mo. App. S.D. 2012).** This court is "primarily concerned with the correctness of the result reached by the trial court," and therefore is "not bound by the [trial court's] rationale and may affirm the judgment on any grounds sufficient to sustain it." ***Russo v. Bruce*, 263 S.W.3d 684, 687 (Mo. App. S.D. 2008).** While Shelter now claims that it denied coverage under the policy solely because the tortfeasor was not an "underinsured motor vehicle," Shelter also argued to the trial court that the set-off reduced the UIM coverage limits to zero. ***(LF 125.).*** Thus, both the "triggering" definitional issue and the set-off issue were in front of the trial court for consideration.

The key issue before this Court is whether the policy is ambiguous in any way. ***Simmons*, 479 S.W.3d at 673.** When a court is unable to reconcile conflicting clauses in

a policy, inconsistent provisions will be construed most favorably to the insured. ***Id.*** Even where a definition is unambiguous in one section, if a contract "promises something at one point and takes it away at another, there is an ambiguity." ***Miller*, 400 S.W.3d at 786.**

The most recent decision which supports the Swadleys' claim to UIM coverage was issued by a Missouri appellate court in 2016 and is directly on-point to the issues to be decided here. ***Nationwide*, 487 S.W.3d 9.** Notably, after the appellate court decided in the insured's favor, Nationwide sought transfer to this Court, which this Court denied. ***See, Id.* at 9.** *Nationwide* was a "triggering language" case like this one, and the policy at issue similarly defined an "underinsured motor vehicle" as one whose "limit for bodily injury liability is less than the limit of liability for this coverage." ***Id.* at 11.** Like Shelter argues here, Nationwide argued that Thomas' injuries were not caused by an underinsured motor vehicle as that term is unambiguously defined in the policy because the liability policy limit of the tortfeasor exceeded the amount of underinsured motorist coverage provided by the policy. ***Id.* at 13.**

The Eastern District said the key issue was whether the policy was ambiguous in any way, and that an unambiguous definition section does not end the inquiry as to the existence of an ambiguity. ***Id.* at 12.** Rather, the court must review the entire policy, including the declarations page. ***Id.*** With respect to the role of the declarations page, the court stated as follows:

> If the declarations page does not adequately alert the ordinary insured of its limitations, this triggers an additional level of

> scrutiny when reading the rest of the policy for any language that may suggest the coverage is excess (payment of the full underinsured motorist coverage amount up to the insured's total injury costs), as opposed to gap (paying only the difference between the tortfeasor's liability limit and the underinsured motorist limit).

***Id.* at 12-13 (citing *Simmons*, 479 S.W.3d at 675).**

In reviewing the policy, the court found that the limit of liability language suggested that the coverage was excess by phrasing its limits in terms of "all damages" suffered by the insured, and by "specifically refer[ing] the reader back to the declarations page, which as stated above lists a policy limit of $50,000 per person without further limitation." ***Id.* at 14.** The limit of liability section, however, was immediately followed by the "set-off" portion of the policy, which sought to limit the liability relative to the amount paid by the tortfeasor. ***Id.*** In finding ambiguity, the court cited this Court's decision in *Jones* and the fact that, if the insurer were allowed to set-off, the full liability amount would never be paid – a result that would be "inaccurate and misleading." ***Id.* (citing *Jones*, 287 S.W.3d at 692).**

Not only did the court find a contradiction and hence ambiguity in the declarations page, the limit of liability, and the set-off, but it also noted that Nationwide's interpretation of the policy would limit recovery to $0.00. ***Id.* at 14.** Relying on precedent, the court refused to indulge in an interpretation of the policy which rendered UIM coverage "completely illusory under these circumstances, despite the fact the

insured paid a separate premium for it. Such a construction is not favored by Missouri law." ***Id.* at 14-15 (citing *Miller*, 400 S.W.3d 779; *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266, 271 (Mo. banc 1983)).**

Similarly here, Shelter argues that the Swadleys cannot even "trigger" UIM coverage in this case because they cannot meet the definition of underinsured motor vehicle in the policy. **(*See, App. Brief pp. 6-7, 9*).** However, like *Nationwide*, the Shelter policy promises to pay the full coverage amount in the Declarations page and coverage clauses, yet contains a set-off and definition that take that promise away.

The Declarations page here promises a certain amount of coverage without stating any limitation. **(*LF 83*).** The Limit of Liability section, like *Nationwide*, reads in part as follows:

> The maximum limits of liability for this coverage are stated in the Declarations and are subject to the following limitations:
>
> (1) The limit shown for "each person" is the limit of our liability for the claim of any one insured. This limit applies to all claims made by others resulting from that insured's bodily injury, whether direct or derivative in nature.

(*LF 106*). Thus, like the Nationwide policy, the limit of liability specifically refers the insured back to the Declarations page to learn the maximum limit of liability. ***See, Nationwide*, 487 S.W.3d at 14.** The limit of liability also phrases the insured's damages in terms of the "maximum limits of liability" for all damages, or all claims resulting from bodily injury. ***See, id.***

Yet also like the Nationwide policy, the above-referenced section of the Limit of Liability is then followed by another section which seeks to set Shelter's limit of liability relative to the amount paid by the tortfeasor, rather than relative to the insured's total damages. ***(LF 106).*** The set-off section reads as follows:

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

(LF 106).

Such a contradiction between the Declarations page, the limit of liability, and the set-off, renders the policy contradictory and ambiguous because the full amount would never be paid. ***See, Nationwide*, 487 S.W.3d at 14.** Furthermore, to allow Shelter to reduce its payments by the tortfeasor's payment would limit recover to $0.00 and render the coverage completely illusory. ***Id.***

Simmons v. Farmers considered the same issue presented here, with Farmers Insurance arguing that the insured was not entitled to coverage because the tortfeasor was not driving an "underinsured motor vehicle" as the policy defined that term. **479 S.W.3d at 671.** Farmers also argued that the definition of UIM had been held unambiguous under *Rodriguez*. The *Simmons* court disagreed with Farmers and found two ambiguities in the policy. The first arose because the declarations page provided a certain amount of UIM coverage without stating any further limitations, yet that conflicted with the

definition of "underinsured motor vehicle," which only afforded coverage when the tortfeasor's limits were less than the amount of UIM coverage in the policy. ***Id.* at 676.**

The second ambiguity arose between the limit of liability section and the definition of an "underinsured motor vehicle." ***Id.* at 676.** The limit of liability section promised to pay the difference between the amount of an insured's damages for bodily injury and the amount paid to the insured by the tortfeasor, up to the limits of coverage. ***Id.* at 676-77.** However, reading the definition of an "underinsured motor vehicle" in isolation would mean that the insurer was not obligated to pay the insured anything. ***Id.* at 677.** The court found the limit of liability section conflicted with the policy's definition of UIM. ***Id.***

The same ambiguities are present in this case as the policy's definition of "underinsured motor vehicle" operates to exclude entirely that UIM coverage which is promised both on the Declarations page and in the limit of liability section. Furthermore, like the *Simmons* Court found, the policy definition of "underinsured motor vehicle" is in conflict with the set-off. Read in isolation, the set-off appears to grant coverage in an amount reduced by the tortfeasor's payment, yet the definition of underinsured motor vehicle excludes coverage entirely when the tortfeasor has more liability insurance than the policy's UIM coverage.

In another factually similar case, *Miller v. Ho Kun Yun*, the Court of Appeals held that the definition of an underinsured motor vehicle in an insurance contract was "ambiguous as to whether it applied in excess of tortfeasor's liability coverage, and thus ambiguity would be resolved in favor of insured." **400 S.W.3d 779 (Mo. App. W.D.**

2013). The *Miller* court looked critically at the fact that "nothing in the declarations sheet indicate[d] that if the tortfeasor's insurer pays $100,000.00 to an injured UIM insured [(the limit of Miller's UIM coverage)], no benefit is payable to the insured under the UIM coverage." ***Id.* at 791.** The *Miller* Court found ambiguity because nothing in the declarations page indicated that the UIM coverage was "gap" coverage rather than coverage that is excess to the tortfeasor's liability.

In *Fanning v. Progressive*, Progressive defined an "underinsured motor vehicle" in terms that are essentially identical to the policy definition in this case. **412 S.W.3d at 363.** Noting that Missouri tests for ambiguity by considering the language in "the light in which it would normally be understood by the lay person who bought and paid for the policy," *Fanning* highlighted that "in Missouri, this rule is more rigorously applied in insurance contracts than in other contracts." ***Id.* at 364 (citing *Long v. Shelter Ins. Co.*, 351 S.W.3d 692, 696 (Mo. App. W.D. 2011)).** The *Fanning* Court found that the policy was ambiguous as a result of a conflict between the policy definition of "underinsured motor vehicle," the policy definition of "declarations page," and the language that actually appears on the declarations page. ***Id.* at 365.** The court found that the policy definition of "underinsured motor vehicle" was ambiguous because it defines the declarations page as inclusive of the "limits of liability" and "coverages," but the declarations page omits crucial information indicating a key trigger that affects the monetary limits and any set-off.

The same is true in Shelter's policy. Like *Fanning*, the Shelter policy defines the Declarations as the part of the policy which "sets out . . . the dates, types, and dollar limit

of the various coverages. **(*LF 86 (10)*).** Like *Fanning*, the policy definition of an "underinsured motor vehicle" then tells the insured to look to the Declarations page to find the "dollar limit of the various coverages." ***See, Fanning*, 412 S.W.3d at 366.** However, the Declarations page indicates no limitation other than the monetary figure of $100,000/$300,000 for underinsured motorist coverage. ***Id.* at 366.**

Fanning found ambiguity in the fact that the very definition of "underinsured motor vehicle" defines the declarations page as inclusive of the limits of liability and coverages, but then omitted crucial information indicating a key trigger that affected the monetary limits and any set-off. *Id.* at 365. Notably, the *Fanning* Court went even further and held the policy's set-off provision created an additional ambiguity, despite the fact that the set-off should never come into play because of the policy definition of "underinsured motor vehicle." ***Id.* at 366** (stating that the insurer's "overly broad reliance on *Rodriguez* in this regard has been roundly rejected in numerous cases.").

Seeck v. Geico presented the same definition, and Geico argued, like Shelter does here, that the court should not even reach the ambiguity issue because the tortfeasor's vehicle did not qualify as an underinsured motorist under the policy. **212 S.W.3d at 132.** This Court noted that Geico's argument was "inconsistent with well-settled Missouri law" and looked at the policy as a whole. ***Id.* at 133.** This Court reaffirmed that when one clause of a policy appears to grant coverage but another takes it away, the policy is ambiguous. ***Id.*** The *Seeck* Court found such ambiguity within the other insurance clause. ***Id.***

These cases make clear that Shelter's definition of "underinsured motor vehicle" cannot be considered and enforced in isolation if there is ambiguity elsewhere in the policy. Here, the trial court's judgment should be sustained because the policy as a whole causes a reasonable insured to believe that UIM coverage is excess to the tortfeasor's liability limits. The policy, however, is contradictory and therefore ambiguous because: (1) the Declarations promise to pay $100,000 in UIM benefits; (2) the Limit of Liability, as well as multiple other places in the policy in general, reference the amount shown in the Declarations page as the amount of UIM coverage available under the policy; (3) the set-off clause operates so that the promised limits of the policy are illusory and will never be paid out; and (4) the definition of "underinsured motor vehicle" takes away UIM coverage entirely when the tortfeasor has more liability insurance than the insured has UIM coverage.

D. The trial court's judgment in finding the policy misleading and ambiguous was further correct in that the Shelter policy in multiple places directs the insured to the Declarations page to identify how much coverage they have purchased.

Shelter's brief argues that the language of its policy should allow it to sell coverage which it would never have to pay. But this Court and other Missouri appeals courts have repeatedly held that insurance companies are not permitted to sell insurance coverage which is totally illusory. ***Cano*, 656 S.W.2d at 271** ("a construction which may render a portion of the policy illusory should not be indulged in"); ***Nationwide*, 487 S.W.3d at 14** (allowing Nationwide to reduce its payment by tortfeasor's payment would limit recovery to $0.00, rendering UIM coverage completely illusory under these circumstances, a construction that is not favored by Missouri law); ***Beshears*, 468 S.W.3d at 412** (insurer's construction was rejected where it would permit the policy to promise to pay the full limits of liability and yet those limits would never be paid); ***Manner*, 393 S.W.3d at 66** (refusing to accept insurer's construction of the policy because it would allow them to promise to pay the full limits of liability and yet never pay those out); ***Ritchie*, 307 S.W.3d at 140** (insurer would never pay out the full amount of its stated limits of liability, making its statements that it would do so misleading); ***Jones*, 387 S.W.3d at 692** (stating that the set-off, as proposed by insurer, would take from the insured a substantial part of the benefit for which the insured contracted and would be in conflict with the clear language of other subsections of the limit of liability).

In support of its argument that it its policy clearly and unambiguously alerts the insured that the policy will never actually pay out the stated coverage amounts, Shelter spends much time focusing on specific and limited parts of the policy's Endorsement, mainly the "Introductory Note." ***(App. Br. 22; 24-25).*** The very first sentence of the Introductory Note itself, however, conflicts with other language in the policy. The Note tells the insured: "This coverage provides a monetary benefit that supplements the amount paid to an insured when he or she sustains a covered bodily injury." **(*LF 105*).** The Introductory Note goes on to state that the Limits of Liability and Insurance with other Companies sections reduce the total limits provided under the endorsement by the amount of the tortfeasor's payment. **(*LF 105*).**

These sections, however, are in conflict with the with the definition of "underinsured motor vehicle" which ONLY provides coverage when the tortfeasor's limits are less than the amount of UIM coverage in the policy. **(*LF 89 (51)*); *see also Simmons*, 479 S.W.3d at 676-77** (finding a conflict between the limit of liability section which promised to pay the difference between the amount of an insured's damages for bodily injury and the amount paid to the insured by the tortfeasor, up to the limits of coverage, and the definition of an "underinsured motor vehicle," which meant that the insurer was not obligated to pay the insured anything). Similarly here, if the insured is injured by a tortfeasor who has more liability coverage than the insured has UIM coverage, the Shelter policy will not provide any monetary benefit at all to the insured, will not supplement anything, and UIM coverage under the policy is rendered non-existent.

The Introductory Note aside, the fact of the matter is that Shelter's policy repeatedly and unambiguously refers the insured back to the Declarations page as the place to identify the amount of coverage they have purchased. Should the insured have any question about the meaning of the coverages shown on the Declarations page, the policy repeatedly reinforces that the Declarations show the maximum amount of insurance coverage that the policy provides. On The Index to the policy, the second page after the Declarations, the first line at the top of the page tells the insured that, "[t]he **Declarations** shows the **named insured**, additional listed insureds, insured vehicle, policy period, types of coverage, and amount of insurance **you** have." ***(L.F. 85)*** (underline emphasis added). This is just one example of the policy explicitly telling the insured that s/he has purchased $100,000.00 in UIM coverage.

In addition, the generally applicable policy section titled "General Agreements on Which Insuring Agreements are Based," likewise directs the insured to the Declarations page in order to confirm that the insured has obtained the requested coverage amounts:

> **YOUR** DUTY TO MAKE SURE **YOUR** COVERAGES ARE CORRECT
>
> **You** agree to check the **Declarations** each time **you** receive one, to make sure that:
>
> (1) All the coverages **you** requested are included in this policy; and
>
> (2) The limit of **our** liability for each of those coverages is the amount **you** requested.

> **You** agree to notify **us** within 10 days of the date **you** receive any **Declarations** if **you** believe the coverages, or amounts of coverage, it shows are different from those **you** requested. If **you** do not notify us of a discrepancy, **we** will presume the policy meets **your** requirements.

(L.F. 89-90).

This is another example of the Shelter policy telling its insureds to "check the **Declarations**" to make sure that "[t]he limit of **our** liability for each of those coverages is the amount **you** requested." ***(Id.).*** As in *Fanning*, the policy tells the insured to look to the Declarations to determine the "limit of our liability," yet omits crucial information regarding a set-off to the limit of liability which makes the policy limits, as stated in the Declarations, completely illusory. ***Fanning*, 412 S.W.3d at 366.** Shelter's argument emphasizes a few underlined sentences in the Endorsement which purport to limit coverage, yet ignore whole other sections of the policy which grant the $100,000.00 in full.

Seeing that the term "**Declarations**" is in bold and thus a defined term, if the insured still had any questions about what is shown on the Declarations, s/he would refer to the Shelter policy's definition of "**Declarations**." That definition again leads an ordinary insured to believe that the Declarations page reflects the coverage amounts under the policy. The policy defines "**Declarations**" as follows:

> **Declarations** means the part of this policy titled "Auto Policy Declarations and Policy Schedule." It sets out many of the

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

(L.F. 86 (10)) (underline emphasis added).

The very next section of the general policy after the section "General Agreements on which Insuring Agreements are Based" is titled "Premium Payments" and states as follows: "**We** agree to insure **you** based on **your** promise to pay all premiums when due. If **you** pay the premium when due, this policy provides the insurance coverages in the amounts shown in the **Declarations**." ***(L.F. 90)*** (underline emphasis added). Little does the insured know that this statement is simply not true because the policy will never, ever pay the $100,000/$300,000 shown in the Declarations.

Furthermore, the policy at issue here has the same Underinsured Motorist Endorsement "heading" as that presented in *Beshears*, and tells the insured he or she has up to $100,000.00 per person underinsured motorist coverage. ***See, Beshears*, 468 S.W.3d at 409.** The heading is located at the top and center of the Underinsured Motorist Endorsement and would be the very first thing the insured would see and read on the UIM Endorsement. ***(L.F. 105).***

Heading on the Shelter Policy UIM Endorsement		**Heading on the *Beshears* Policy UIM Endorsement**	
Endorsement Number	Limits of Liability	Endorsement Number	Limits of Liability
A-735.2-A	Same as Coverage A Limits	A-577.7-A	Same as Coverage A Limits
(L.F. 105).		***Beshears*, 468 S.W.3d at 409.**	

Endorsement Number A-735.2-A, referenced above, is the policy's Underinsured Motorist Endorsement, and tells the insured the underinsured motorist coverage limits of liability are the "Same as Coverage A Limits." ***(L.F. 105).*** Again, the ordinary insured will refer to the Declarations page in order to learn the coverage amounts for Coverage A, as that is the only location where are they stated in the entire policy. The Declarations Page states the limits for Coverage A, Bodily Injury, are $100,000 Each Person and $300,000 Each Accident. ***(L.F. 83).*** Thus, the heading of the Underinsured Motorist Endorsement yet again tells the insured he has purchased $100,000/$300,000 worth of underinsured motorist coverage.

Time and time again, the Shelter policy declares that it will pay the amount shown in the Declarations, and even defines "Declarations" as setting out the dollar limit of the various coverages, yet by operation of the set-off Shelter will never pay the dollar limit of underinsured motorist coverage shown in the Declarations. Not only that, but the policy definition of "underinsured motor vehicle" purports to exclude coverage entirely in situations as this where the tortfeasor has more liability insurance than the insured has in

UIM coverage. Where a policy promises something at one point and takes it away at another, there is an ambiguity. ***Jones*, 287 S.W.3d at 689**.

The essence of Shelter's argument is that this Court should ignore the Declarations page entirely, and declare that the insured cannot and should not rely upon the Declarations page for any information about UIM coverages. Yet the Declarations page itself tells the insured that "[t]hese Declarations are part of your policy." **(*LF 83.*).** Furthermore, as already discussed, there are many places in the Shelter policy as well as the UIM Endorsement itself that refer the insured back to the Declarations page, over and over again, to determine their underinsured motorist coverage limits. Shelter's argument ignores that the Declarations page is very much a part of this policy because Shelter's very own policy language has made it so.

Shelter relies heavily, if not entirely, on *Floyd-Tunnell v. Shelter*, 439 S.W.3d 215 (Mo. banc 2014), with respect to the role this Court should assign to the declarations page in an underinsured motorist case. There are many distinguishing factor in *Floyd-Tunnell* which Shelter fails to consider here. Probably the most critical distinction is that *Floyd-Tunnell* is an uninsured motorist case that addressed **the amount of coverage available on two vehicles which were not covered vehicles by the terms of the policy at issue and which were not involved in the wreck**. ***Id.* at 217.** Because the two vehicles at issue were not even insured vehicles listed on the declarations page, there was not the concomitant granting of coverage on the declarations page that we have in this case. Said another way, the declarations page in *Floyd-Tunnell* did not give any indication that the coverage sought was even provided under the policy. The same is true of *Yager v.*

Shelter, another case relied on by Shelter regarding the role of a declarations page. **460 S.W.3d 68, 75 (Mo. App. W.D. 2015)** ("an examination of the declarations pages of the Shelter policies does not give any indication that the policies provide *any* coverage for vehicles other than the described autos. . . . frankly, there is nothing on the declarations pages which would alert a reader that the policies provide coverage").

In this case, there is no dispute that the decedent Angie Swadley was driving a vehicle which was an insured vehicle and **listed on the Declarations page under the terms of the applicable policy.** ***(LF 132(2), 83.)***. In fact, the vehicle Angie was driving was the only vehicle listed on the Declarations page. ***(LF 83.)***. There is also no dispute that the Declarations page lists $100,000 in underinsured motorist coverage for that insured vehicle. ***(LF 83, 135-36.)***. Thus, *Floyd-Tunnell* had extremely good reason to minimize the role of the declarations in that case, because, unlike this case, the vehicles at issue in *Floyd-Tunnell* were not even listed on the declarations page.

Furthermore, *Floyd-Tunnell* was an uninsured motorist case, not an underinsured motorist case like this one, and the issue in *Floyd-Tunnell* was **how much coverage** was available on the policy; not whether there is any coverage **at all**. Shelter confuses a limitation of coverage – on a vehicle not listed on the declarations page – with an exclusion of coverage altogether – on a vehicle specifically named on the declarations page. Shelter misleadingly argues that its policy language must be upheld, lest this Court "create an ambiguity in every insurance policy that contains any limitation in the body of the policy because that limitation would reduce the stated coverage limits on the policy's declaration." ***(App. Br. 17-18)***. Shelter's argument in this case is not that the Swadleys

should receive "limited" coverage, but that the Swadleys should receive **no coverage at all** on a vehicle that is explicitly named in the policy. Shelter therefore asks this Court to allow it to sell underinsurance which promises a stated amount of coverage on a particular vehicle, and not only will that full stated amount never be paid out, but in some situations such as this one, the insured will recover nothing at all. *Floyd-Tunnell* simply did not address the situation where an insurer seeks to exclude coverage entirely for a risk and a vehicle that is explicitly covered on the declarations page.

Finally, *Floyd-Tunnel* addresses the enforceability of what is known as a "step-down provision," which limited coverage to $25,000 on owned vehicles that are **not covered** by the policy. ***Id.* at 217.** Step down provisions are nearly universally acceptable, not against Missouri public policy, and enforceable provisions under Missouri law, so long as they comply with the required minimum limits. ***Farmers Ins. Co., Inc. v. Pierrousakos*, 255 F.3d 639 (8th Cir. 2001) (applying Missouri law); *Shelter Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 210 S.W.3d 338 (Mo. App. E.D. 2006); *Windsor Ins. v. Lucas*, 24 S.W.3d 151 (Mo. App. E.D. 2000); *Trantham v. Old Republic Ins. Co.*, 797 S.W.2d 771 (Mo. App. 1990).** The same cannot be said of this policy's set-off provisions, or its definition of "underinsured motor vehicle," both provisions which courts around the state have repeatedly found ambiguous and unenforceable when considered in conjunction with other policy language. ***Ritchie*, 307 S.W.3d 132; *Jones*, 287 S.W.3d 687; *Beshears*, 468 S.W.3d 408; *Nationwide*, 487 S.W.3d 9; *Simmons*, 479 S.W.3d 671.**

Shelter also relies heavily on *Rodriguez* to argue that no coverage is available to the Swadleys because they cannot satisfy the definition of an "underinsured motor vehicle" under the policy. *Rodriguez* was decided over one quarter of a century ago, and a recent case has addressed its current application:

> [*Rodriguez*] must be understood as to its current significance in light of decisions of the Missouri Supreme Court that have followed. Subsequent decisions have made clear that the fact that a definition is clear and unambiguous does not end the inquiry as to the existence of an ambiguity until the court has reviewed the "whole policy" to determine whether there is contradictory language that would cause confusion and ambiguity in the mind of the average policyholder.

***Miller*, 400 S.W.3d at 786.**

Numerous cases since *Rodriguez* have considered policies that define an "underinsured motor vehicle" as one with liability limits less than the insured's UIM limits, yet found in favor of UIM coverage under the policy, despite the fact that the insured had collected the same amount or more from the tortfeasor. ***Beshears*, 468 S.W.3d at 408; *Fanning*, 412 S.W.3d at 365-69; *Miller*, 400 S.W.3d at 785-93; *Wasson*, 358 S.W.3d 113; *Long*, 351 S.W.3d 692; *Chamness*, 226 S.W.3d at 201-08; *Ragsdale*, 213 S.W.3d at 55-57.** In addition, this Court has recognized that *Rodriguez* did not give an insurer license to make contrary-to-fact statements about the coverage it provides in a policy. ***Jones*, 287 S.W.3d at 692.**

Regarding *Rodriguez*, this Court in *Jones* stated that there was no underinsurance in *Rodriguez*, so its subsequent discussion of how to interpret underinsured motorist coverage was mere dicta. ***Id.* 287 S.W.3d at 692 n.3** ("[t]his Court, therefore, need not reach the issue whether the *dicta* in *Rodriguez* accurately states Missouri law, for it is not applicable here."). Since *Rodriguez* said there was no underinsurance, it did not identify whether there were any material limitations that would alert a reasonable insured that the limits would never be fully paid out. Thus, Shelter's discussion of *Rodriguez* misses the mark because it does not analyze and compare the statements about the coverage it provides in other parts of the policy, such as the Declarations page, the set off, the Limit of Liability, and the general policy language, with the cases decided since *Rodriguez*.

E. The trial court's judgment in finding the policy misleading and ambiguous was further correct in that Missouri Courts, including three opinions by this court, have repeatedly held that a set-off for UIM coverage is at best ambiguous, and requires the full coverage be paid.

Having no on-point law to support its argument that set-off does not create ambiguity, Shelter resorts to arguing that this Court's decisions in *Ritchie, Jones,* and *Manner* are not controlling because they were overruled by *Floyd-Tunnell*. *Floyd-Tunnell* gave no indication that it was overruling any prior cases, much less prior UIM cases which are not even on-point. Nonetheless, Shelter goes on to argue that its policy language is different from these on-point UIM cases and that Shelter never promised to pay the UIM limits it actually sold to its insured.

With respect to whether a set-off creates ambiguity, contrary to Shelter's argument that the policy must use the phrase "the most we will pay," this Court has stated that ambiguity is created by any policy language which, by a reasonable construction, suggests the policy will pay the full limits. ***Jones*, 287 S.W.3d at 692.** Here, that language is found in the Limit of Liability section which says the Declarations page shows the "maximum limits of liability for this coverage," and that "[t]he limit shown for 'each person' is the limit of our liability for the claim of any one insured." **(*LF 106*).** This language clearly conveys to the insured that the policy will pay up to the amounts listed on the Declarations page. ***See, Nationwide*, 487 S.W.3d at 14.**

Jones said that the set-off contained in subsection (f) of the limit of liability section could not be reconciled with subsections (a) and (b), which stated that the policy

would pay up to the limits of liability. ***Jones*, 287 S.W.3d at 691-92.** Judge Stith, writing for a unanimous Court, held that the set off is not permissible because the insurance company would never actually be called upon to pay the full amount of coverage which "its policy ostensibly provides" in the declarations. ***Id.* at 689.** The *Jones* Court resolved the conflict by taking the offset from the insured's total damages rather than the policy's limit of liability. ***Id.* at 693.**

Shelter's argument that it has tailored its Limits of Liability section to comply with the holding of *Jones* cannot withstand scrutiny. **(*App. Br. 20*).** *Jones* found ambiguity in the fact that the Limit of Liability section stated to the insured that it would pay the lesser of: (1) the difference between an insured's damages and the amount paid to the insured by anyone legally liable; OR (2) the limit of liability of this coverage. ***Id.* at 690.** This Court said the language was ambiguous because the policy would never pay the limits of liability of the coverage by virtue of the set-off, but this Court suggested that ambiguity could be resolved by incorporating the set-off language into the same subsection that contains the promise to pay. ***Id.* at 691** (stating that the conflict could be avoided by inserting additional words to indicate that insurer would pay up to the limits of liability of the coverage minus the amount already paid to that insured person).

Here, Shelter's Limit of Liability explicitly tells the insured in subsection (1): "[t]he limit shown for 'each person' is the limit of our liability for the claim of any one insured. This limit applies to all claims made by others resulting from that insured's bodily injury, whether direct or derivative in nature." **(*LF 106*).** Shelter did not heed this Court's advice in *Jones* and incorporate the set-off into the same subsection that contains

the promise to pay. ***(Id.)***. When Shelter's policy tells the insured that "the limit shown for 'each person' is the limit of our liability for the claim of any one insured," Shelter misleads the insured because two subsections later, Shelter states that the limits stated in the Declarations will always be reduced.

Thus, Shelter's policy suffers from the same conflicts as the *Jones* policy when it tells the insured that the limit shown on the Declarations page is the limit of liability for the coverage. Shelter may argue that subsections (1) and (2) are subject to the set-off stated in subsection (3), but the same was true in *Jones*, where the limit of liability clause set forth the set-off in another later subsection. ***Jones*, 287 S.W.3d at 692.** This Court rejected the same argument in *Jones* and said that the set-off does not "cure or avoid" the promise to pay, but rather "conflict[s] with it." ***Ritchie*, 307 S.W.3d at 140.**

This Court reached the same decision in ***Ritchie*** with respect to a set-off, and noted it had rejected a "nearly identical argument" in *Jones*. ***Ritchie*, 307 S.W.3d at 134.** In *Ritchie*, this Court found that policy language which stated that the limit of liability "is our maximum limit" conflicted with the policy's set-off language, which reduced the limit of liability "by all sums paid on behalf of persons [or] organizations who might be legally responsible." ***Ritchie*, 307 S.W.3d at 137.**

This Court yet again reached a similar conclusion on similar language in ***Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013)**. In *Manner*, the insurer argued that it was allowed to reduce the UIM limits stated on the declarations page by payments made by the tortfeasor. This Court rejected that argument and found that the Manner policy promised to pay the listed limits of liability, and not simply the listed limits of liability

reduced by the amount paid by the tortfeasor. **393 S.W.3d at 66.** *Manner* explicitly said, "Offset Not Permitted." ***Id.* at 66.**

Beshears v. Shelter Mut. Ins. Co., following the holding in *Manner*, also found ambiguity where the policy promised to pay uncompensated damages, yet later in the limit of liability section purported to reduce its liability by any amounts received from the tortfeasor. **468 S.W.3d 408 (Mo. App. S.D. 2015).**

The same conflicts in *Ritchie, Jones, Manner*, and *Beshears* policies are present here. The Limits of Liability section states that the "maximum limits of liability for this coverage are stated in the Declarations" and that "the limits shown for 'each person' is the limit of our liability for the claim of any one insured." ***(LF 106).*** The section also phrases the limits in terms of the insured's total damages and says that the limit applies to "all claims made by others resulting from that insured's bodily injury, whether direct or derivative in nature." ***(Id.).*** However, like the *Jones, Ritchie, Manner*, and *Beshears* policies, the Limit of Liability section goes on to say that the limits of liability will be reduced by the amount paid by the tortfeasor. ***(Id.)*** The set-off does not cure or avoid the granting of coverage in the Limit of Liability, but rather conflicts with it. ***Ritchie*, 307 S.W.3d at 140.**

F. RSMo. section 379.204 was enacted in order to prevent insurance companies from selling illusory coverage, which is exactly what Shelter seeks to do in this case.

Shelter argues that the Swadleys are asking this Court to take a position in direct contradiction to Missouri's UIM statute, which proves that the legislature specifically contemplated and approved of set-offs. ***(App. Br. 28.)***. First, the Swadleys are not arguing that Shelter's policy is illegal or violates a statute, but rather that their policy language is ambiguous.

More importantly, however, section 379.204 actually supports the Swadleys' arguments in this case. The legislature specifically passed this statute in order to prevent insurance companies from selling illusory insurance policies. ***See, Buehne v. State Farm Mut. Auto Ins. Co.*, 232 S.W.3d 603, 607-08 (Mo. App. E.D. 2007)** (stating that the statute is to prevent a situation where the insured would never collect the limits of their underinsured coverage and to protect an insured from paying premiums for underinsured coverage which he or she would never collect). The statute was thus enacted to prevent the exact thing which Shelter seeks to do here, which is to sell underinsured motorist coverage which the insured would never collect and the insurer would never have to pay. The ability to sell an illusory insurance policy with no coverage at all is the exact thing which Shelter seeks to do in this instance, and which the Swadleys contend they cannot.

In addition, Missouri courts allow an underinsured motorist carrier to set-off, but have held the carrier must set-off from the insured's actual damages, rather than the underinsurance policy limits. ***Manner*, 393 S.W.3d at 66** (stating that the "damages

were $1.5 million. Reducing those damages by the $100,000 paid by the tortfeasor leaves a remaining $1.4 million in damages, which far exceeds the $400,000 he can recover under the policies. The full limits of liability, therefore, are recoverable."); ***see also, Beshears***, stating that "*Manner* now controls the analysis of the set-off issue and is dispositive here." Thus, the most recent cases to come out of this Court have held that the set-off creates ambiguity which must be resolved in favor of the insured, up to the amount listed in the limits of liability section, if sufficient damages are still outstanding. ***Manner*, 393 S.W.3d at 66.**

G. The trial court's judgment in finding the policy misleading and ambiguous was further correct in that Shelter's interpretation does not comport with the general understanding of what UIM coverage is, or with Shelter's advertising of UIM coverage to potential insureds, and the coverage does not clearly inform the insured that the coverage is something different.

Underinsured motorist coverage "refers to coverage intended to provide a source of recovery for insureds (up to the insurer's liability limit for such coverage) who have been bodily injured by a negligent motorist whose own automobile liability insurance coverage is insufficient to fully pay for the insured person's actual damages." ***Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.*, 992 S.W.2d 308, 313 (Mo. App. E.D. 1999)**; ***see also Wendt v. Gen. Acc. Ins. Co.*, 895 S.W.2d 210, 217 (Mo. banc 1995)**. If a policy includes UIM coverage, it is well settled that "[f]rom an objective point of view, the objective of underinsured motorist coverage is always the same: to cover [the insured] for damages over and above that which the tortfeasor can provide." ***Zemelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 679 (Mo. App. W.D. 1996).**

Most ordinary lay persons of average understanding think of UIM coverage as coverage over and above the other driver's liability limits for bodily injury damages whose value exceeds the other driver's liability coverage. ***See Wasson*, 358 S.W.3d 113.** Here, as already discussed, numerous provisions of the policy lead an insured to see the coverage in that same fashion, and that is in fact the way in which Shelter advertises its coverages. On its website Shelter describes its underinsured motorist coverage this way:

Uninsured/Underinsured Motorist – Bodily Injury

Uninsured motorist bodily injury coverage can help pay medical or funeral expenses for you, most relatives living in your household, or anyone driving your car with your permission. Uninsured motorist coverage applies if

- The other driver was at fault and did not have current insurance, or
- The other driver's available insurance limits are less than the full amount owed for your damages[4].

(LF 192). Ordinary insureds are not going to purchase UIM coverage if they believe that nothing will be owed to them just because the other driver's liability limits happen to be the same as or greater than the insureds' UIM limits. If Shelter wishes to sell gap underinsurance with a triggering definition, it must make that clear and unambiguous to the insured, which it has not done in this policy.

[4] This appears to be a typographical error and that Shelter is actually referring to underinsurance in this bullet point, even though the introductory sentence only references "uninsured motorist coverage," since uninsured would not apply if the other driver has insurance.

CONCLUSION

For the foregoing reasons, the Swadleys ask that this Court affirm the trial court's Judgment finding that the policy is misleading and ambiguous and that therefore the Swadleys are entitled to the full $100,000.00 in stated UIM coverage under the policy.

CERTIFICATE OF COMPLIANCE

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

1. This Brief of Respondents includes the information required by Missouri Supreme Court Rule 55.03;
2. This Brief of Respondents complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).
3. The Brief of Respondents, excluding the cover page, signature blocks, Certificate of Service and Certificate of Compliance, contains 11,467 words, as determined by the word-count tool contained in the Microsoft Word software with which this Brief of Respondents was prepared.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed electronically this 14th day of November, 2016, via CM/ECF in the Supreme Court of Missouri, with notice of same being electronically served by the Court to the following:

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