6-19-2017

Eastman v. Farmers Insurance Company Appellant's Brief Dckt. 44889

IN THE SUPREME COURT OF THE STATE OF IDAHO

JENNIFER EASTMAN, a single woman, Plaintiff, vs. FARMERS INSURANCE COMPANY, an Idaho corporation Defendant.	Idaho Supreme Court No. 44889

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

THE HONORABLE RICH CHRISTENSEN, PRESIDING

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I. NATURE OF THE CASE

This is an appeal of a decision in District Court on the parties' cross- motions for summary judgment. Plaintiff, Jennifer Eastman, filed this declaratory judgment action asking the court to find she is entitled to underinsured motorist coverage (UIM) under her policy of insurance with Farmers Insurance Company. Defendant, Farmers, asserted that the Plaintiff was not entitled to UIM coverage since she was injured while traveling in another vehicle (Van) that carried its own UIM policy. Plaintiff asserts that since the at-fault vehicle and the Van had inadequate insurance to cover her injuries, Plaintiff can look to her remaining UIM coverage with Farmers to pay her uncompensated damages.

The parties filed cross-motions for summary judgment and the District Court ruled in Defendant's favor. Plaintiff argued that she was entitled to UIM coverage as a matter of law based on the public policy and contractual changes made to UIM coverage in the 2008 amendements to I.C. § 41-2502. Defendant argued that Plaintiff is not entitled to UIM coverage as a matter of law based upon the Court's decision in *Purdy v. Farmers Insurance Company,* 65 P.3d 184 (2002).

II. COURSE OF THE PROCEEDINGS

No facts are in dispute and both parties argue they are entitled to summary judgment as a matter of law. On June 21, 2016 Plaintiff filed her declaratory judgment action seeking UIM coverage. (R. 11) Both parties filed motions for summary judgment.

On December 1, 2016 the District Court granted Defendant's motion for summary judgment and denied Plaintiff's motion for summary judgment. (R. 333) In reaching its decision the District court concluded that Plaintiff's arguments were better suited for the Supreme Court. (R. 317-335).

III. STATEMENT OF FACTS

The Statement of Facts are primarily cited from Plaintiff's Memorandum in Support of Summary Judgment. (R. 171-174) The parties did not dispute any material facts in their cross-motions for summary judgment. (See R. 321)

1. Jennifer Eastman is a 35-year-old registered nurse employed by Providence Sacred Heart Medical Center in Spokane, Washington. She is a single mother of one and resides in Post Falls, Idaho. On March 18, 2014, Jennifer was a passenger in a Spokane transit Authority bus traveling from Spokane to Post Falls. Spokane Transit Authority provides van pool bus (Van) services from the Idaho border to downtown Spokane. While being transported from Spokane to Post Falls her bus was violently struck from behind by a vehicle driven by Sydney Salzman. Ms. Eastman and 3 other individuals who were riding in the van were injured. (R. 172).

2. Ms. Eastman claims that the injury caused venous thrombosis that required surgery. As a result of the injury and subsequent surgery she lost considerable amounts of

income and incurred medical expenses in excess of $209,237.60. In addition, Ms. Eastman suffers residual complications from the injury. (R. 172).

3. Ms. Salzman was insured with Progressive Insurance Company with policy limits of $50,000.00 per person/$100,000.00 per accident. On June 12, 2015 Ms. Salzman's insurance company settled with Jennifer Eastman for policy limits of $50,000.00. (R. 172, 197-199).

4. The Spokane Transit Authority bus that Ms. Eastman was a passenger in provides UIM coverage in the amount of $60,000.00, total for each bodily injury occurrence for passengers who are injured in its vehicles. After exhausting Ms. Salzman's insurance limits the 4 injured claimants made claims against the $60,000.00 UIM coverage. The parties and their attorneys mutually agreed to settle the claims for the policy limits of $60,000.00.00, with $48,846.00 going to Ms. Eastman. (R. 200-02). Clearly Ms. Eastman suffered the greatest injury.

5. During the time period relevant to this matter, January 27, 2014 through July 27, 2014, Farmers had issued a policy of insurance to Plaintiff. Under the policy, Plaintiff had $500,000.00 in underinsured motorist coverage (UIM). (R. 29, 53, 77, 79-80, 215-284).

6. In an email dated January 22, 2016 Plaintiff informed Farmers of Plaintiff's intent to settle the STA UIM portion of the insurance coverage and provided Farmers

with the option to purchase that interest. (R. 203-05). On February 10, 2016 Plaintiff received a letter from Farmers denying coverage under Ms. Eastman's UIM coverage. (R. 206-09).

7. On April 15, 2016 Plaintiff provided a settlement demand/proof of loss to Farmers Insurance demanding policy limits minus credit for amounts recovered from other available coverage. (R. 210-214).

8. Farmers bases its UIM coverage denial on the policy language relating to "other insurance":

> COVERAGE C-1 UNDERinsured Motorist Coverage (FORM W2449102)
>
> **Other Insurance**
>
> 3. We will not provide insurance for a vehicle other than your insured car or insured motorcycle, unless the owner of that vehicle has no other insurance applicable to this part.

(R. 278).

IV. ARGUMENT

Standard of Review

The Supreme Court applies the same standard as the district court when reviewing a grant of a motion for summary judgment. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). Filing cross-motions for summary judgment does not change the standard of review and the Court evaluates each motion on its merits.

Stafford v. Klosterman, 134 Idaho 205, 206, 998 P.2d 1118, 1119 (2000). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "This Court will liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences and conclusions in favor of that party." *Arreguin v. Farmers Ins. Co.*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). The entire record is freely reviewed to determine if either side was entitled to summary judgment as a matter of law and to determine whether inferences drawn by the district court are reasonably supported by the record. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist.*, 148 Idaho 630, 634, 226 P.3d 1277, 1281 (2010).

For the purposes of this appeal, there are no disputed facts in issue and the issues presented are purely legal. Summary judgment in this declaratory judgment should be granted to Plaintiff. The Court should find that Plaintiff is entitled to UIM coverage because (1) public policy supports covering Plaintiff for the offset damages, and (2) the language in Plaintiff's insurance agreement supports UIM coverage.

Legal Argument

Plaintiff first argues that (A) the 2008 UIM mandate in I.C. § 41-2502 creating public policy entitles her to UIM coverage in this case. Plaintiff then argues that (B) the

additional language mandated in 2008 in Plaintiff's insurance policy grants her UIM coverage under the plain language. Plaintiff then explores how (C) the 2008 mandated language (Disclosure) must be deemed included in the insurance policy. Finally, Plaintiff argues that (D) she is entitled to UIM coverage because Defendant has not clearly and precisely limited UIM coverage under the terms of Plaintiff's insurance policy.

1. PUBLIC POLICY

A. The Public Policy Behind Requiring UIM Coverage Supports Plaintiff's UIM Coverage Claim With Farmers.

Plaintiff is entitled to UIM coverage under Idaho public policy. In 2008, the Idaho Legislature amended I.C. § 41-2502 to require insurance companies to offer UIM coverage. (R. 314-316) The UIM requirement created public policy to protect Idahoans from being undercompensated for their injuries:

> The Legislature clearly enacted the UIM amendments to protect the citizens of this State from being undercompensated for their injuries..."

Hill v. American Family Mutual Insurance Company, 150 Idaho 619, 627 (2011). By requiring UIM coverage, the Idaho Legislature acted to protect citizens from underinsured drivers:

> The Legislature accordingly intends to protect Idaho's citizens from driver's carrying policies above the statutorily required policy levels but who have insurance insufficient to compensate their tort victims.

Id. at 624. The Legislature mandated UIM coverage for two reasons: (1) to protect Idahoans with catastrophic injuries who would find themselves without sufficient coverage; and (2) to avoid the anomaly that injured Idaho motorists be in a position to collect more if the at fault driver had no insurance than if the driver was underinsured. *Id.* at 626.

Prior to 2008, Idaho statutes did not contain a UIM mandate. The absence of any UIM mandate prohibited insured's from making public policy arguments for UIM coverage:

> [T]he sole reason there was no clear public policy regarding UIM coverage was because 'Idaho statutes do not regulate underinsured motorist coverage.'

Hill, 150 Idaho at 623 (citing *Andrae v. Idaho Counties Risk Mgmt. Prgm. Underwriters,* 145 Idaho 33, 36 (2007)).

> We have rejected public policy challenges related to UIM policies *only* because 'our statutes do not require an automobile insurer to include underinsured vehicle coverage in its policies or even to offer this coverage to its insureds.

Id. (citing *Farmers Ins. Co. v. Buffa,* 119 Idaho 345, 347, 806 P.2d 438, 440 (1991) (emphasis added).

The 2008 UIM mandate created public policy related to UIM coverage and changed prior Idaho case law. After 2008, the *Hill* case was the first to apply public

policy considerations to UIM coverage. *Hill* involved an insured's claim for UIM when the insured had settled with the tortfeasor for below policy limits for bodily injury. The question was whether an "exhaustion" clause in the insurance contract requiring the insured to deplete the tortfeasor's bodily insurance limit before making a claim against the UIM violated public policy. In ruling that it violated public policy, the Court focused on the 2008 UIM mandate as public policy that UIM exhaustion clauses thwart "the Legislature's goal of protecting motorists from underinsured drivers." *Id.* at 626. The Court noted that requiring insureds to secure full recovery would cause unnecessary litigation costs, expense, and delay if an insured was required to secure full recovery prior to making a UIM claim. *Id.* Furthermore, the Court noted that Idaho courts would have to suffer through unnecessary litigation so that claimants could preserve their benefits. *Id.*

The Court agreed with other jurisdictions finding exhaustion clauses against public policy, citing the importance placed on UIM coverage public policy:

> [T]he insured's ability to recover UIM benefits should be 'scrupulously guarded' because 'UIM coverage is intended to provide excess coverage to compensate an insured against losses for which there would otherwise be no coverage."

Id (emphasis added) (citing *Horace Mann Ins. Co. v. Adkins,* 599 S.E.2d 720, 725-26 (2004).

Recently, the Supreme Court discussed UIM public policy when analyzing anti-stacking language. See *Gearhart v. Mutual of Enumclaw Ins. Co.,* 160 Idaho 664, 665 (2016). In *Gearhart,* the Supreme Court applied the public policy considerations addressed in the *Hill* case and found that allowing an insured to stack UIM coverage supported public policy. *Id.* at 668. In *Gearhart* the plaintiff was injured while traveling in a vehicle not owned by his parents and made a claim under each parents' separate UIM policy of $300,000 each. *Id.* at 666. The insurance company argued that policy reasons supported rejecting the stacking of two $300,000 UIM polices: anti-stacking should be upheld to make insurance affordable to other prospective insured. The Court found this argument unpersuasive:

> **It is posited that the anti-stacking provisions must be upheld in order to make insurance affordable and available to other prospective insureds. However, it is not clear that this is particularly accurate under the circumstances of this case.** Both of Trent's parents bought Enumclaw policies that purportedly covered their child for up to $300,000 in UIM benefits in the event of an accident. If the parents had decided to purchase just one policy with a much higher UIM benefit, it is debatable that the premium would have been more than twice as much. Indeed, it is intuitive that one single policy with a substantially higher limit would have likely been less than the cost of two separate policies with lower limits. Since the record does not disclose the premium costs that might have been involved under either scenario, it is debatable as to whether or not public policy would be better served by enforcing the anti-stacking limit contended for by Enumclaw under the facts of this case. **What we do know with some certainty, however, is that reversal of the district court's judgment would result in Trent being substantially undercompensated for his injuries, even though reasonable insurance buyers would be excused if**

> **they were to conclude that two separate $300,000 UIM policies purchased by two separate purchasers would be available to cover injuries exceeding $600,000.** We therefore affirm the district court's holding, but on the ground that the actual language employed in the Enumclaw policies is confusing to the extent that it is ineffective to establish a barrier to recovery of Trent's actual damages in the full amount of the limit provided in each of the two Enumclaw policies

Id. at 668-669 (emphasis added).

Gearhart reiterated that public policy supports fully compensating tort victims:

> It is difficult to see how the public policy enunciated in Hill is advanced by allowing Enumclaw to cause Trent to be undercompensated for his injuries by imposing the barrier of the anti-stacking provision under the circumstances of this case. It must be recalled that Trent's parents each purchased an Enumclaw policy, each paying the required premium in order to obtain $300,000 in UIM benefits for the protection of their child. As noted above, Enumclaw concedes for purposes of this action that Trent's damages "exceeded the coverages available under all policies at issue in this case." **If the barrier sought to be imposed by Enumclaw is allowed to be imposed, Trent will end up getting undercompensated by more than half. Thus, either his parents or perhaps the taxpayers will end up having to bear the additional costs for his medical care.**

Id. at 668 (emphasis added). Premiums were paid for both policies and public policy supported stacking both UIM limits to fully compensate the Plaintiff.

The Purdy case and other jurisdictions:

Now that public policy attaches to UIM coverage, prior Idaho cases dealing with UIM must be re-visited. For instance, *Purdy v. Farmers Insurance Company,* 65 P.3d 184 (2002), would not be good case law. In *Purdy,* the Court denied UIM coverage under

facts and language similar to our case, finding that the language in the policy was not ambiguous. But *Purdy* only dealt with contract interpretation arguments: public policy arguments were not argued or addressed. With the 2008 UIM mandate, the law changed—invalidating *Purdy*'s holding.

Other jurisdictions have found that "other insurance" provisions related to UIM denials violate public policy. *See Kline v. Famers Insurance Exchange,* 277 Neb. 874 (2009); (Exclusion denying UIM coverage when a person is injured while occupying a vehicle they do not own but is insured for UIM coverage under another's policy was void and against public policy); *Estate of Sinn by Sinn v. Mid-Century Ins. Co.,* 288 Ill.All.3d 193 (1997) ("Other insurance" provision that states that the insurer would not provide UIM benefits for vehicle other than the owned insured car unless the other owner lacked UIM coverage was against public policy.); *Veach v. Farmers Ins. Co.,* 460 N.W.2d 845 (Iowa 1990) (UIM policy exclusion is void against public policy because it excludes from coverage any vehicle not owned by the named insured which has UIM coverage under a different policy.) Finding UIM coverage in this case is consistent with these other jurisdictions.

Public Policy in this case

In our case, UIM coverage is now mandated and the public policy identified in *Hill* supports a finding of UIM coverage here. Plaintiff received a total of $98,846.00 in

compensation from the tortfeasor and the Van's UIM coverage. Plaintiff claims damages well above this total amount recovered. As *Hill* identified, UIM is meant to protect Idaho citizens from drivers with insufficient insurance coverage. To deny Plaintiff a UIM claim would leave her in a position where she suffered a catastrophic injury "without redress." This flies directly in the face of the UIM public policy.

Importantly, Plaintiff would have fully recovered under her UIM if the Van had no insurance at all.[1] The *Hill* case specifically spoke out against this contradictory situation where Plaintiff would be in a better position if the Van carried no coverage at all. This is the exact situation the *Hill* case was seeking to avoid. Placing a Plaintiff in a position to recover more if a driver was uninsured than underinsured is an anomaly of prior case law: an anomaly that the UIM mandate is meant to rectify. Here, Plaintiff should benefit the same from insurance coverage she purchased whether the Van carried UIM or not.

The analysis in the *Gearhart* case is analogous to our case. Plaintiff asserts special damages (in excess of $209,237.60) well above the total recoverable insurance of $98,846.00, which includes considerable amounts of income and incurred medical expenses. Just like in *Gearhart,* Farmers is trying to avoid stacking UIM benefits in this case. As *Gearhart* emphasized, Plaintiff paid for UIM coverage of $500,000 under her

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[1] Farmers argues that since the Van had (the bare minimum) UIM coverage, Plaintiff cannot seek the benefit of her remaining $500,000 UIM policy. Under the terms of the "other insurance" provision, this exlusion does not apply if the Van has no insurance at all. (R. 275, 314)

policy. If she is denied the right to recover UIM benefits *she paid for* she will be undercompensated for her injury. The public policy identified in *Hill* and *Gearhart* supports Plaintiff's UIM coverage.

The bottom line is, Plaintiff paid for UIM coverage of $500,000 under her policy. Plaintiff asserts damages well above the total recoverable insurance of $98,846.00. Plaintiff's right to recover UIM benefits must be "scrupulously guarded...to provide excess coverage to compensate [plaintiff] against losses for which there would otherwise be no coverage." *Hill,* 150 Idaho at 626. Plaintiff deserves to be compensated for coverage she paid for. Denial of UIM coverage in this instance violates public policy.

2. INSURANCE POLICY CONTRACT

B. Under The Terms Of The Insurance Agreement, Plaintiff Is Entitled To UIM Coverage.

1. *2008 Language Defining UIM*

The 2008 amendments to I.C. § 41-2502 mandated language that provides UIM in this case. The general rule is that because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract "must be construed most strongly against the insurer." *Mutual of Enumclaw Ins. Co. v. Roberts,* 128 Idaho 232, 235, (1996). The question of whether a policy is ambiguous is a question of law over which this Court exercises free review. *Baker v.*

Farm Bureau Mut. Ins. Co. of Idaho, Inc., 130 Idaho 415, 416-417 (Ct. App. 1997). "To determine whether a policy is ambiguous, the Court must ask whether the policy 'is reasonably subject to conflicting interpretation.'" *Mutual of Enumclaw v. Box,* 127 Idaho 851, 853 (1995). Subsequent changes in state law that are designed to protect the public welfare can invalidate a contract provision on public policy grounds. *Hill v. American Family Mut. Ins. Co.,* 150 Idaho 619, 623 (2010).

In 2008, the legislature added language to I.C. § 41-2502 mandating that every UIM policy contain a form defining UIM coverage. The Legislature required a standard disclosure form that informs policy holders about their UIM coverage. This standard language specifically describes UIM as providing "difference in limits" or "offset" coverage to insureds when there is insufficient insurance coverage from other owners or operators:

> IDAHO UNINSURED MOTORIST & UNDERINSURED MOTORIST DISCLOSURE STATEMENT (FORM 8169101)
>
> **UIM** coverage may pay damages for bodily injury to an insured person who is legally entitled to collect damages from the owner or operator of a vehicle with inadequate limits of liability insurance coverage.
>
> **UIM** coverage is offered in different form by different insurers, and insurers are not required to offer more than one type of UIM coverage. There are two commonly available forms of UIM coverage - "Difference in limits" (or "Offset") Coverage and "Excess" Coverage. Your insurance policy offers "Difference in Limits" which is briefly explained below:

- **"Difference in Limits" (or "Offset") Coverage** – The policy's UIM coverage limits are reduced or eliminated by the amount of any damages *recovered by any insured, from or on behalf of any underinsured(s) owner or operator(s).*

(R. 275, 314). (emphasis added).

The language of the Disclosure plainly states that the insured's recovery from its own UIM is merely "offset" by the amount she recovers from "any underinsured." The Disclosure identifies an "offset" irrespective of who is underinsured, whether it be an owner *or* operator. The remaining UIM isn't terminated, but the insured is able to recover the "difference in [the] limits." The Disclosure's plain language defines UIM coverage to be offset by the amount Plaintiff recovered from any other owners/operators. Farmers' position that Plaintiff loses her entire UIM benefit is contrary to the language in the 2008 insurance policy.

Farmers relies on *Purdy,* which found an insured's UIM could be cutoff if the insured was riding in a third party vehicle. The denial of UIM in *Purdy* revolved around the old "other insurance" policy language, which reads:

Other Insurance

3. We will not provide insurance for a vehicle other than your insured car or your insured motorcycle, unless the owner of that vehicle has no other insurance applicable to this part.

(R. 277-78). Farmers denied Plaintiff's UIM claim on the basis of this "other insurance" provision, arguing that the Supreme Court in its 2002 *Purdy* decision found this provision was not ambiguous and excluded UIM coverage. While this is an accurate description of *Purdy's* holding in 2002, the insurance policy in that case is different from the modified post-2008 insurance policy. The 2008 Disclosure modified UIM coverage: UIM now is "offset" by "any damages" recovered from "any underinsured owner or operator."

Reading the "Other Insurance" provision as *Purdy* suggests directly conflicts with the 2008 UIM definition. The legislature specifically described how UIM is to function: an insured's UIM is merely reduced, or offset, by other available coverage. Under the *Purdy* interpretation, UIM would be eliminated entirely when there is recovery from another source. The 2008 legislative change of UIM invalidates the *Purdy* holding.

The plain language "offset" applies in Plaintiff's case. Plaintiff received $50,000.00 from the at-fault party, and $48,846.00 from the underinsured operator she was riding in. As the Disclosure explains, Plaintiff's UIM claim must be offset by any damages she recovers from "***any*** underinsured owner or operator." Plaintiff recovered $98,846.00. Consistent with the terms of the insurance agreement and the Disclosure, Plaintiff is entitled to pursue the remaining difference in limits of $401,154.00 from her own policy.

C. The Disclosure Is Part Of The Insurance Policy.

In denying UIM coverage to Plaintiff, Farmers maintains that the Disclosure is not part of the insurance policy and it does not have to recognize the language contained therein. The Disclosure is part of the insurance policy for numerous reasons: (1) Idaho Code mandates its inclusion, and Farmers added additional language to the Disclosure delivered to the Plaintiff; (2) the Disclosure is incorporated by reference; and (3) to ignore the Disclosure would create illusory coverage.

1. *The Disclosure Must Be Part Of The Policy Based On I.C. § 41-2502(3) And Farmers Representations.*

Defendant argues that the Disclosure, by its own terms, is not an agreement and cannot ben included in Plaintiff's insurance policy. This cannot be the case as it would make I.C. § 41-2502(3) meaningless and mere surplusage. The Disclosure is required to be included in any insurance policy, and Farmers certified that it *was* part of the policy. (R. 97-98)

When interpreting the meaning of the language contained in a statute, this Court's task is to give effect to the legislature's intent and purpose. *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983). In construing a statute, the Supreme Court may examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes. *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983). It

is incumbent upon this Court to interpret a statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute. *Walker v. Nationwide Fin. Corp.* of Idaho, 102 Idaho 266, 629 P.2d 662 (1981). The Supreme Court will not construe a statute in a way which makes mere surplusage of provisions included therein. *Hartley v. Miller–Stephan*, 107 Idaho 688, 692 P.2d 332 (1984).

The Disclosure is required to be included with the UIM insurance policy. *See* I.C. § 41-2502 (3); Department of Insurance Bulletin No. 08-08. (R. 314-16). If the Disclosure was not part of the policy, as Farmer's argues, the mandatory language of the statute requiring its inclusion would be meaningless.

Furthermore, not only does the statue require the Disclosure be included in the policy, Farmers made affirmative representations in the Disclosure by adding additional language. (R. 97-98) Farmers affirmatively represented under the definition of UIM to include the statement that **"Your insurance policy offers "Difference in Limits" which is explained as follows...."** (R. 77). (Emphasis Added) Farmers further represented to Ms. Eastman that her "**UIM coverage limits are reduced or eliminated by the amount of any damages recovered by any insured, from or on behalf of any underinsured owner(s) or operator(s).**" (R. 77) (Emphasis added).

In summary, the statute requires inclusion of the Disclosure and Farmers cetified that the Disclosure was part of the insurance contract. (R. 97-98) The Disclosure must have meaning; otherwise the 2008 amendments to the statute would have no purpose. Farmers was aware of the Disclosure and affirmatively represented to Plaintiff that she had "Difference in limits" coverage in her insurance policy. The Disclosure is included.

2. *The Disclosure Statement Is Incorporated Into The Policy By Reference*.

A signed agreement may incorporate by reference to another agreement, which is not signed by the parties, if the terms to be incorporated are adequately identified and readily available for inspection by the parties. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 320, 246 P.3d 961, 973 (2010).

In this case, the Disclosure was identified in the policy (actually included) and was available for inspection. On top of that, Defendant actually modified the language of the Disclosure, evidencing its awareness of the Disclosure and binding it to the terms contained therein. The terms of the Disclosure are incorporated into and define terms in the insurance policy. Farmers identified the page in question as being part of the policy and modified the language to explain the type of coverage Plaintiff had. (R. 97-98). The modified language actually, affirmatively states, "Your insurance policy offers "Difference in Limits" which is explained below." (R. 275, 314).

3. *The Disclosure Is Part Of The UIM Policy, Which Creates Illusory Coverage If The Purdy Interpretation Prevails.*

When an insurance policy purports to offer underinsured motorist coverage, then effectively bars an insured from coverage through exclusions and other contractual provisions, then the contract is illusory and is unenforceable. *See Martinez v. Idaho Counties Reciprocal Mgmt. Program,* 134 Idaho 247, 252 (2001). In *Martinez*, the court looked at a contract which was memorialized for the specific purpose of providing underinsured motorist coverage. After parsing through the contractual provisions related to underinsured motorist coverage, the Court noted that the exclusions operated to effectively bar an insured from UIM coverage:

> **"2. By use of definitions and exclusions, the policy creates only an illusion of uninsured motorist coverage.**
>
> While Martinez agrees that he was excluded from uninsured/underinsured motorist coverage because of the employee exclusion, he urges that the coverage is illusory because every possible claimant can be excluded. Upon reviewing the policy, we find merit to this argument.
>
> To maintain a claim under this policy, a claimant injured in an accident with an uninsured motorist would first need to fit within the definition of an insured under the policy. In the policy issued to the City, the general insuring agreement defines who is an insured for uninsured/ underinsured motorist protection."

Id. at 251.

However, the exclusions provisions were so extensive that they effectively failed to provide coverage, except under rare circumstances.[2] The Court held that:

> Upon review of these requirements and exclusions, it appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons. **The declarations page of the policy contains language and words of coverage, then by definition and exclusion takes away the coverage.** The fact that there might be some small circumstance where coverage could arguably exist does not change the reality that, when the policy is considered in its entirety, the City was receiving only an illusion of coverage for its premiums. **This Court will not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased.** *Bonner County v. Panhandle Rodeo Ass'n, Inc.*, 101 Idaho 772, 776, 620 P.2d 1102, 1106 (1980) ([T]he ambiguous circumstance in which a policy has been issued purportedly providing coverage but with exclusionary provisions which, if applied, would narrow that coverage to "defeat the very purpose or object of the insurance.")."

Id. at 252 (emphasis added).

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[2] Policy Provisions: (specifically set forth previously)

1. Using the vehicle. To be covered under the uninsured/underinsured motorist section, the claimant must have been using the automobile at the time of the accident.

2. Legally responsible for the automobile. In addition to using the automobile, the injured party must also have been legally responsible for the use of the vehicle at the time of the accident.

Once both of these requirements have been met, a claimant must then demonstrate that the exclusions do not apply. The exclusions to the uninsured/underinsured motorist coverage are as follows:

Exclusions: (specifically set forth previously)

(a) Reasonably expected. Any bodily injury or property damage which the City expected or reasonably could have expected is excluded.

(b) Insured's property. Any property owned by the City which is damaged in an accident is excluded from uninsured/underinsured motorist coverage.

(c) Bodily injuries to Employees. This excludes any person who could file a claim under workers' compensation, unemployment compensation, disability benefits, employers liability, or for indemnity or contribution by any person for bodily injuries to an employee.

Similar to the *Martinez* court, the policy in this case creates an illusion of UIM coverage and is ineffective in excluding UIM coverage. As identified in section 3 above, the Disclosure mandated by the 2008 amendment defines UIM to be "reduced" by coverage from other sources. Under the exclusion, using the *Purdy* interpretation, UIM would be eliminated when there is UIM from another source (e.g., any UIM from another vehicle). The Disclosure (and 2008 amendments) strictly establishes an "offset" for the remaining recovery, whereas the exclusion completely eliminates recovery. If the court were to apply the exemption as interpreted by *Purdy,* the "difference in limits" becomes an illusory situation: if another vehicle has UIM, the exclusion eliminates recovery and does not provide a "difference in limits." As the *Martinez* court explained, this is not permissible.

D. Unless There Is "Clear And Precise Language" Restricting Coverage, UIM Coverage Is Available To Plaintiff.

Based on the Disclosure and the insurance policy language, a reasonable insurance buyer would believe that she had UIM coverage in this case. As the Idaho Supreme Court has recently stated, "[t]he burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage." *Gearhart,* 160 Idaho at 667 (2016) (citing *Weinstein v. Prudential Prop. & Cas. Ins. Co.,* 149 Idaho 299, 320-21 (2010)). Farmers has not restricted UIM coverage.

In *Gearhart,* the Idaho Supreme Court found that the insurance company failed to "clearly and precisely" restrict UIM coverage in its anti-stacking provision. *Id.* In that case, a divorced couple owned separate, identical $300,000 UIM policies for their child who was severely injured while riding in a third party vehicle. *Id.* at 665. The child sought to recover $300,000 under each policy, for a total of $600,000 in coverage. *Id.* The insurance company argued that the anti-stacking provision precluded the child from stacking the limits. *Id.* The court reviewed the insurance policy language and concluded the anti-staking language did not "clearly and precisely" restrict UIM coverage:

> The language employed in the Other Insurance provision of the two Enumclaw policies is confusing to the extent of being an ineffective barrier to the coverage afforded by both policies. The provision reads:
>
> > If there is other applicable similar insurance we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits. If this policy and any other policy providing similar insurance apply to the accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any one policy. However, insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
>
> Good luck to the average insurance buyer in deciphering the meaning of this provision.

Gearhart, 160 Idaho at 667. The Plaintiff in *Gearhart* was able to stack both UIM benefits for a total of $600,000 coverage. *Id.* at 669.

In our case, reading the language of the Disclosure with other language in the policy, Farmers does not "clearly and precisely" restrict Plaintiff's UIM coverage. Reading the "Other Insurance" provision in the insurance policy by itself is insufficient to limit Plaintiff's UIM:

> **Other Insurance**
>
> 3. We will not provide insurance for a vehicle other than your insured car or your insured motorcycle, unless the owner of that vehicle has no other insurance applicable to this part.

(R. 277-78). This provision doesn't identify what "no other insurance applicable to this part" means. To a reasonable insurance purchaser, this provision could provide a limit to coverage when traveling in a vehicle other than the insured vehicle in a variety of circumstances: the driver/owner doesn't have any liability insurance available, the driver/owner is uninsured, the driver/owner is underinsured, or merely the driver/owner has inadequate liability or underinsurance coverage. This language does not "clearly and precisely" restrict Plaintiff from stacking her own UIM coverage on top of UIM coverage from a third party.

The situation is made worse for the Plaintiff and other insureds when considering other confusing and conflicting portions of Farmers' UIM policy. For instance, the C-1

Underinsured Motorist Coverage supplement appears to extend coverage resulting from injury to the insured from *any* underinsured vehicle:

> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an UNDERinsured motor vehicle because of bodily injury sustained by the insured person.

(R. 277).

Furthermore, the Disclosure defines UIM as affirmatively providing additional coverage, which is "offset" by payment from other insurance:

> **UIM** coverage may pay damages for bodily injury to an insured person who is legally entitled to collect damages from the owner or operator of a vehicle with inadequate limits of liability insurance coverage.
>
> **UIM** coverage is offered in different form by different insurers, and insurers are not required to offer more than one type of UIM coverage. There are two commonly available forms of UIM coverage - "Difference in limits" (or "Offset") Coverage and "Excess" Coverage. Your insurance policy offers "Difference in Limits" which is briefly explained below:
>
> - **"Difference in Limits" (or "Offset") Coverage** – The policy's UIM coverage limits are reduced or eliminated by the amount of any damages *recovered by any insured, from or on behalf of any underinsured(s) owner or operator(s).*

(R. 275), (emphasis added). As the Disclosure states, UIM is only reduced or "offset" by insurance recovered from other underinsured. Nothing in the C-1 supplement or the Disclosure eliminates Plaintiff's UIM just because there is UIM from other sources. Echoing the words of Justice Burdick, in regards to these

seemingly conflicting UIM policy provisions, "[g]ood luck to the average insurance buyer in deciphering the meaning of th[ese] provision[s]." *Gearhart,* 160 Idaho at 667.

In summary, the Disclosure indicates that UIM coverage will only be "offset" by limits paid by other policies for an insured's claims. The C-1 UIM Disclosure supplement indicates UIM is available to *any insured* when an owner or operator is underinsured. This language would lead a reasonable insurance buyer to believe that she would have UIM coverage while traveling in another vehicle if there was insufficient insurance to cover her injuries. Farmers has not clearly and precisely restricted coverage—in fact the language indicates the contrary: that there is coverage.

IV. CONCLUSION

The 2008 amendments to I.C. § 41-2502 created public policy and contractual UIM coverage in this case. Consistent with *Hill* and *Gearhart*, the Court should find the Plaintiff is entitled to UIM coverage under her policy.

Dated this 19 day of June, 2017.

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of June, 2017, I served a true and correct copy of the above and foregoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

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