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I. Introduction

This matter involves the amount of underinsured motorist (“UIM”) insurance coverage that is available to the Appellant, Thomas Humleker, who was injured in an on-the-job traffic accident in 2005, under an insurance policy issued to his employer, United States Bakery (“USB”), by Zurich American Insurance Company (“Zurich”). The trial court held that USB waived the policy’s general \$1 million limit as the amount of UIM coverage and selected a lower, \$60,000 limit for UIM coverage when the Zurich policy was issued in 2003.

Under Washington law, the UIM limits in an insurance policy are equal to the general liability limits, unless the insured — here USB — elects a lower limit or rejects UIM coverage altogether. The insured’s election must be in writing and be “specific and unequivocal.” Washington law does not require that any particular writing be used; however, the insured must designate the specific amount of UIM coverage he “has in mind.”

Here, USB waived UIM coverage equal to policy limits and selected a lower UIM limit. USB’s Chief Financial Officer Jerry Boness signed a form specifying \$60,000 as the “Selected Limits” for UIM coverage in Washington. Mr. Boness was informed of and aware that

the general liability limits of USB's policy were \$1 million and that this would be the limit for UIM coverage if he did not waive or select lower UIM limits. He also was informed of and aware of USB's options in this respect. Thus, the trial court properly found that the limits of UIM coverage available to Humleker were \$60,000.

II. Identity of Respondent

Respondent Zurich American Insurance Company ("Zurich") submits this brief pursuant to RAP 10.1.

III. Assignments of Error

Zurich makes no assignments of error.¹

IV. Statement of the Case

A. Insurance

Zurich issued Policy No. BAP 3790262-02 for the period Feb. 1, 2005, to Feb. 1, 2006, to USB. Humleker, as an employee of USB injured in the course and scope of his employment, was insured under the policy's UIM provisions for the injuries he suffered in his accident.

The USB Business Automobile Policy carries general liability limits of \$1 million, but includes a "Washington Underinsured Motorists

¹ Humleker assigns error to the trial court's denial of his motion for reconsideration. Brief of Appellant at 2. However, Humleker has devoted no argument to this assignment of error; therefore, it has been waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Coverage” endorsement that limits UIM coverage for “bodily injury” to \$60,000. CP 195 (¶ 2); CP 212, 252.

Jerry Boness, USB’s Chief Financial Officer, was responsible for procuring the Zurich policy. CP 327 (¶ 3). In doing so, Mr. Boness worked with Sharon Livas, a broker with Arthur J. Gallagher & Co., to obtain general policy information and coverages. CP 328 (¶ 4).

Mr. Boness had a long discussion with Ms. Livas regarding limits for both uninsured motorist (“UM”) and UIM coverage. CP 328 (¶ 5). Ms. Livas explained that, with respect to coverage in Washington and other states, USB could elect to keep the UM and UIM limits at \$1 million; USB could waive the coverage entirely; or USB could select lower limits on a per-state basis, in which case USB would be charged a lower overall premium. *Id.* Mr. Boness elected lower limits for UM and UIM coverage. *Id.* (¶ 6).

As part of the policy underwriting process, a Zurich account executive, Bill Ennis, sent a letter to Mr. Boness on April 29, 2003, forwarding various UM/UIM notice and waiver forms for each of the 50 states, including Washington, which Mr. Ennis would have obtained pursuant to Zurich’s underwriting requirements then in effect. CP 196 (¶¶ 4–6), 285–326; CP 328–329 (¶¶ 7–8), 418–423; CP 485–487 (¶¶ 4–6,

8-9), 489. This was and continues to be Zurich's standard operating practice. CP 485-486 (¶¶ 6, 8).

Mr. Ennis's letter states:

These forms have been prepared, as permitted by individual state law, to reflect the coverage limits you requested for Uninsured Motorists Coverage, and where available, Underinsured Motorists Coverage.

To minimize the inconvenience to you, we have designed the Uninsured/ Underinsured Motorists Coverage Selection/Rejection/Limits Summary Form to eliminate the need for your signing and dating each individual state form. ... The limits you have chosen for Uninsured and Underinsured Motorists coverage have been entered as applicable on the summary form.

* * * *

... By signing and dating the summary form, you agree that you have read and understand each state specific form and that the selections or rejections marked on the state forms have been accepted by you without signing and dating each form individually.

Failure to promptly review, sign and return the required forms will result in coverage limits imposed by operation of state law (and the corresponding premium charges for those limits) that are different from the limits you have indicated you wish to elect.

CP 285, 418 (emphasis in original). The Summary Form and state-specific forms reflected, as stated in Mr. Ennis's letter, "the coverages and/or limits (Mr. Boness) requested." CP 328 (¶ 7).

The Summary Form states:

**UNINSURED/UNDERINSURED MOTORISTS
COVERAGE OPTION II
SELECTION/REJECTION LIMITS
SUMMARY FORM**

Your policy(s) contain Uninsured/Underinsured Motorists Coverage Selection/Rejection and Limits Options forms which allow you to reject coverage or to select various limits and coverage options. Your signature on this form indicates that you have read and understand each state form and that the selections or rejections marked on the state forms have been accepted by you without signing and dating each form. This form provides a summary of the selected Limits by State. However, in those states marked with an asterisk (*), the first named insured must sign that state's selection/rejection form.

CP 289–290, 422–423 (emphasis in original). The line for Washington in the Summary Form's table, which was not marked with an asterisk, lists "Selected Limits" as \$60,000. *Id.* Mr. Boness signed and returned the separate state forms, as well as the Summary Form. CP 196 (¶ 5), 289–323; CP 329 (¶ 8); CP 422–423.

Mr. Boness's signature on the Summary Form appears below the following disclaimer:

I acknowledge that I have reviewed each individual state's selection/rejection form, I have made the elections indicated and that I have the authority to sign this form on behalf of all Named Insured's [sic] on those policies listed above.

CP 290, 423. Mr. Boness had a “clear understanding” of the forms provided to him by Mr. Ennis. CP 329 (¶ 8). He understood the Summary Form to set forth the minimum UM and UIM limits he had requested, including the \$60,000 limit for Washington as indicated on this form. *Id.* He further understood that in selecting lower limits, the policy premium would be lower, and that if he did not sign and return the Summary Form, the UM and UIM limits in Washington (as well as in other states) would equal the policy’s general \$1 million liability limit. *Id.* (¶¶ 8-9). In so doing, Mr. Boness made a “knowing and informed waiver of available UM and UIM limits of \$1 million and instead elected UM and UIM limits of \$60,000 for the State of Washington.” *Id.* (¶ 9).

No separately signed state form for Washington was required; however, under Zurich’s standard procedures, Mr. Boness would have received a notice form for Washington, along with one from every other state. CP 326; CP 485-487 (¶¶ 4-9), 489. The Washington form would have been filled out to reflect the coverage selection Mr. Boness had made — in this case, \$60,000 for UIM coverage. CP 487 (¶ 9). The two lower boxes would have been marked with an “X” and “\$60,000” would have been entered on the line in front of “each accident” to reflect USB’s selections for Washington coverage. *Id.*

Mr. Boness understood that he was not required to sign and return the other state forms that did not require a separate signature, including the Washington form. CP 329 (¶ 8), 420.

In 2003, the Washington form was one of the 50 state-specific forms that account executives, such as Mr. Ennis, would have obtained from Zurich's pre-printed and pre-packaged set of UM/UIM Selection/Rejection forms, along with an insured cover memo, the Summary Form and the other state-specific forms. CP 485 (¶¶ 2, 5). This was and remains the practice whenever a policy such as USB's is written and the insured requests lower UM/UIM limits, although the various forms are now generated by Zurich's UM-AUTOMATE system. CP 485-86 (¶¶ 2, 5-6, 8). This particular form, as indicated on the form itself, has been available since 1991. CP 486, 489.

Washington does not require that a state-specific form or any particular form be signed by an insured, but allows an insured to make a signed rejection or election of UIM limits on a summary form, such as the Summary Form included in the underwriting file. CP 486 (¶ 7).²

² Humleker did not dispute any of the declaration testimony of Curt Shipton (CP 195-196), Jerry Boness (CP 327-329) or Andrea Burns (CP 484-487) submitted by Zurich in support of its motion for summary judgment: "For purposes of summary judgment only, Mr. Humleker concurs with all facts set forth in Zurich American's Motion for Summary Judgment." CP 163, note 1.

B. The Trial Court Action

Zurich moved for summary judgment on grounds that USB had elected lower UIM limits under RCW § 48.22.030(4) and applicable Washington case law. CP 424–442. The trial court granted Zurich’s motion in a Memorandum Opinion dated August 24, 2009. CP 105–118. Humleker moved for reconsideration, which the trial court denied in a Memorandum Opinion dated October 7, 2009. CP 18–22. A final order was entered on October 22, 2009. CP 14–16.

V. **Argument**

A. Summary Judgment Standard

The Court’s review is *de novo* and it conducts the same inquiry as the trial court.³

In responding to a summary judgment motion, the non-moving plaintiff, “by affidavits or as otherwise provided in this rule [CR 56], must set forth specific facts showing that there is a genuine issue for trial.”⁴ To defeat summary judgment, a plaintiff must establish specific and material facts to support each element of his or her case.⁵ A dispute

³ *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

⁴ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989).

⁵ *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).

over non-material facts does not justify denying the motion. If the plaintiff will bear the burden of proof at trial as to an element essential to its case, as Humleker did here with respect to the Zurich policy, and fails to make a showing sufficient to establish a genuine issue of material fact as to that element, then summary judgment is appropriate.⁶

B. Principles of Insurance Policy Construction

The interpretation of an insurance policy is a question of law, properly resolved on a motion for summary judgment,⁷ and is also reviewed *de novo*.⁸ In construing an insurance policy, the court must read the entire contract together “so as to give force and effect to each clause.”⁹ “Courts view insurance contracts in their entirety and do not interpret phrases in isolation.”¹⁰ In construing insurance contracts, the court must “examin[e] the contract as a whole,”¹¹ and “repair to the fundamental rule that all parties to a contract are held to language of the contract — and insurance contracts are no exception.”¹² While the Court

⁶ *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1406 (W.D. Wash. 1990).

⁷ See *Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

⁸ *Alaska Nat’l Ins. Co. v. Bryan*, 125 Wn. App. 24, 30, 104 P.3d 1 (2004).

⁹ *Transcontinental Ins. Co.*, 111 Wn.2d at 456.

¹⁰ *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 14, 977 P.2d 617 (1999).

¹¹ *National Merit Ins. Co. v. Yost*, 101 Wn. App. 236, 239, 3 P.3d 203 (2000).

¹² *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 811, 959 P.2d 657 (1998).

is to apply a sensible construction that would be understood by the average person, “[a]t the same time, we do not allow an insured’s expectations to override the plain language of the contract.”¹³

Ambiguity exists “only ‘if the *language on its face* is fairly susceptible to two different but reasonable interpretations.’”¹⁴ Courts will not construe language to create an ambiguity to resolve policy terms against the insurer when it is clear from contextual analysis that no coverage was intended.¹⁵ “[W]here the language in an insurance policy is clear, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.”¹⁶

C. UIM/UM Waivers Under Washington Law

In Washington, insurance companies must offer UIM coverage and provide limits equal to the liability coverage limits unless an insured specifically rejects such coverage.¹⁷ As stated in RCW § 48.22.030(4):

¹³ *Cle Elum Bowl, Inc. v. North Pac. Ins. Co.*, 96 Wn. App. 698, 702–03, 981 P.2d 872 (1999). “The contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.” *WPUDUS v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

¹⁴ *Yost*, 101 Wn. App. at 239 (emphasis in original); *Transcontinental*, 111 Wn.2d at 456.

¹⁵ *West Am. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 80 Wn.2d 38, 44, 491 P.2d 641 (1971).

¹⁶ *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 14, 977 P.2d 617 (1999).

¹⁷ *Cochran v. Great W. Cas. Co.*, 116 Wn. App. 636, 641, 67 P.3d 1123 (2003); *Bates v. State Farm Ins. Co.*, 43 Wn. App. 720, 724, 719 P.2d 171 (1986) (citing RCW § 48.22.030(2)–(4)). In *Cochran*, the insured “selected the UIM

A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply.

The writing required by RCW § 48.22.030(4) must be “specific and unequivocal”¹⁸ and reflect an “affirmative and conscious act” rejecting UIM coverage.¹⁹ When a writing evidences a rejection of UIM coverage, the court may consider that writing and other extrinsic evidence of the insured’s intent to determine the effectiveness of the rejection.²⁰ No particular form needs to be used to waive or select lower UIM limits; in fact, very little in the way of a writing is required.²¹

The writing must set forth the amount of UIM coverage that the insured “has in mind.”²² The Court also has stated, where the insured had no choice but to waive UIM coverage in a car rental contract, that

coverage it wanted by signing a UIM selection form that paraphrased RCW 48.22.030, explaining that insurers must make UIM coverage available but that insureds may reject that coverage.” 116 Wn. App. at 638.

¹⁸ *Galbraith v. National Union Fire Ins. Co.*, 78 Wn. App. 526, 532, 897 P.2d 417 (1995).

¹⁹ *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 254, 850 P.2d 1298 (1993).

²⁰ *Galbraith*, 78 Wn. App. at 530–31. See also *American Commerce Ins. Co. v. Ensley*, 153 Wn. App. 31, 40 (2009).

²¹ See CP 444–446, Thomas V. Harris, *Washington Insurance Law*, § 33.4 at 33-8 & n.76 (2d ed. 2006) (citing *Koop v. Safeway Stores, Inc.*, 66 Wn. App. 149, 155, 831 P.2d 777 (1993), and noting: “[A]ny writing that discloses the intent of an insured to waive UIM coverage will constitute an effective rejection.”).

²² *Galbraith*, 78 Wn. App. at 532.

the insured must be given a “choice between rejecting or accepting UIM coverage.”²³ Finally, the insured should be advised “of the right to UIM coverage up to the maximum policy limits.”²⁴ A combination of these elements constitutes the “affirmative and conscious act” of waiver referenced in *Clements* — in short, an informed and knowing waiver. All of these elements are present in this case.

D. USB’s Waiver of UIM Limits Meets the Statutory Requirements.

The issue here is whether, pursuant to RCW § 48.22.030(4), USB knowingly waived, in writing, UIM limits of \$1 million and instead elected limits of \$60,000. That is exactly what happened in this case.

1. *USB’s Waiver of a Higher UIM Limit and Selection of a Lower Limit Is in Writing.*

The Summary Form meets the statutory requirement for a writing selecting a lower UIM limit.²⁵ CP 422–423. The form sets forth the “UM/UIM – Combined Single Limit” and “Selected Limits” for each state, including \$60,000 for Washington. *Id.* Mr. Boness signed the

²³ *Corley v. Hertz Corp.*, 76 Wn. App. 687, 693, 887 P.2d 401 (1994).

²⁴ *Cochran*, 116 Wn. App. at 644–45.

²⁵ *See Koop*, 66 Wn. App. at 155 & n.3 (finding that a letter from the insured to the insurer requesting a policy endorsement waiving UIM coverage to be sufficient); *Weir v. American Motorists Ins. Co.*, 63 Wn. App. 187, 816 P.2d 1278 (1991) (finding that broker’s bid proposal requesting “Minimum Statutory Uninsured Motorists (where Mandatory)” coverage to be written rejection under RCW § 48.22.030(4)); *Ensley*, 153 Wn. App. at 39 (insured “signed the appropriate waiver to permit reduced levels of UIM coverage”).

form. *Id.*; CP 329 (¶ 8). Nothing further is required to meet the writing requirement.

2. *USB's Written Waiver Is an Effective Rejection of a Higher UIM Limit in Favor of a Lower UIM Limit.*

Once a statutory writing is established, the question becomes whether it is specific and unequivocal and, thus, constitutes an informed and knowing waiver. Despite the terminology used by the courts, this is not a heavy burden.²⁶ “[A]ny writing that discloses the intent of an insured to waive UIM coverage will constitute an effective rejection.”²⁷

Here, the Summary Form is an effective waiver of UIM coverage equal to the policy’s liability limit and a selection of lower limits of \$60,000. In *Cochran*, this Court expressly acknowledged the effectiveness of such a waiver, right down to the dollar amount: “CTE requested a specific amount of UIM coverage, and thereby it rejected UIM coverage above \$60,000.”²⁸

CTE, the insured, had filled out a form that stated:

Underinsured Motorists Insurance (including uninsured motorists insurance) must be provided for either bodily injury liability or bodily injury and property damage liability. The bodily injury coverage must be provided at limits equal to the policy’s liability limit(s) but

²⁶ *Galbraith*, 78 Wn. App. at 532; *Ensley*, 153 Wn. App. at 39.

²⁷ CP 446, Harris, *Washington Insurance Law*, § 33.4 at 33-8 & n.76.

²⁸ 116 Wn. App. at 644.

not higher than that limit(s). I have the right to reject this coverage in writing or select limits lower than the policy's liability limit(s).

The form then listed several UIM coverage options, with space to check the desired option. CTE selected a lower limit than the statutory default and submitted the form through its insurance broker. Cochran claimed that despite the selection of a lower limit, the insurer failed to obtain CTE's *rejection* of the default coverage in writing, and UIM coverage was therefore equal to the liability coverage.²⁹

This Court went on to hold:

Here, the documentary evidence established that Smith knew that CTE was entitled to UIM benefits equal to liability limits but, *on the advice of insurance brokers*, requested UIM coverage of only \$60,000.

* * * *

Having been advised of the statutory maximum UIM limits requirement, CTE's choice of \$60,000 on the UIM selection form followed advisement of the right to UIM coverage up to the maximum policy limits. Thus, it evidenced the insured's intent to reject UIM coverage above the \$60,000 amount requested. The writing is sufficiently specific and unequivocal to establish that CTE knowingly requested that Great West set the policy's UIM limits at \$60,000 and thereby rejected statutory UIM limits identical to the policy's liability limits.³⁰

²⁹ *Marks v. Washington Ins. Guar. Ass'n*, 123 Wn. App. 274, 281-82, 94 P.3d 352 (2004) (quoting, citing *Cochran*, 116 Wn. App. at 639-40; emphasis added).

³⁰ 116 Wn. App. at 642, 644-45 (emphasis added).

In so finding, this Court affirmed the findings of the trial court “that CTE’s UIM waiver was clear and specific:”

It shows the amount that the insured wants; in other words, like the cases say what he has in mind and I think that is all that’s required. [The insurer] met their statutory obligation under the law under [RCW 48.22.030(4)] to provide something in writing regarding the UIM coverage that is desired by the insured.³¹

This Court also endorsed a similar waiver in *Marks*, despite the fact that the signature was illegible and the name of the person who signed it was not included.³² Therein, this Court distinguished *Galbraith*, where the Court found that the insured had failed to specify an amount of coverage, and relied on its decision in *Cochran*.³³ Despite the claimant’s contention that the form’s reference to “decreasing” rather than “floating” UIM coverage rendered the writing ambiguous and ineffective, the *Marks* court reversed the trial court and granted summary judgment in favor of the insurer, finding that the waiver was both “specific and unequivocal” under *Galbraith* and “an affirmative and conscious act” under *Clements*.³⁴

³¹ *Id.* at 640.

³² 123 Wn. App. at 275 n.2, 278–79. As in this case, however, the plaintiff “did not dispute that the form was signed by an authorized ... agent.” *Id.* at 275 n.2.

³³ *Id.* at 280–82.

³⁴ *See id.* at 279–80.

Here, Marks's employer, Blue Star, filled out a form similar to that in *Cochran*. *As in Cochran, Blue Star's agent clearly selected an alternate UIM limit and facially satisfied the requirements of a written rejection.*

* * * *

Regardless [of the insured's drafting argument], Blue Star clearly rejected the statutory default UIM coverage limit in favor of a lower limit. *The form clearly demonstrates that Blue Star affirmatively rejected in writing the default UIM coverage by accepting an alternate amount of coverage.*

... [T]he form is sufficiently complete and the decision maker sufficiently informed to meet the specificity requirements of RCW 48.22.030(4) and the case law applying it.

Here, the rejection form was valid, and WIGA's liability is limited to Blue Star's UIM policy limit of \$50,000 floating UIM coverage.³⁵

Similarly, the Summary Form here was "sufficiently complete" — particularly in combination with the notice provided in the Washington form and by Ms. Livas — and Mr. Boness was "sufficiently informed to meet the specificity requirements" of the statute.

Most recently in *Ensley*, Division III found a waiver sufficient under the following facts:

[The agent] told [the insured] that she would need to sign a document to lower the limits and her premium. [The insured] signed an authorization on which UIM bodily injury and property damage coverage for \$50,000 per person and

³⁵ *Id.* at 282, 283–84 (emphasis added).

\$100,000 per accident was selected. The form included a preprinted statement verifying that the insurer offered the policyholder UIM coverage and that the policyholder understood that she “must choose limits lower than or equal to [her] Bodily Injury Liability Limits.” [The insured] signed the document, but none of the other writing on the form is hers. She did not fill in the date or insurance policy number or check any of the boxes indicating which coverage levels she accepted.³⁶

The Court found: “Here, the insurers offered a form that clearly states the amount of partial UIM coverage accepted, and [the insured] signed that form.”³⁷ As this Court found in *Cochran*, “a writing that reflects the insured’s intent to reject UIM coverage satisfies the waiver provisions of RCW 48.22.030(4) and preserves the expectations of the parties.”³⁸

Further, when there is a writing rejecting UIM coverage, the court may consider the writing and other extrinsic evidence of the insured’s intent to determine the effectiveness of the rejection.³⁹ Here, the evidence clearly shows that, by signing the Summary Form, Mr. Boness made an affirmative selection of a \$60,000 UIM limit for Washington, *i.e.*, the amount of insurance he “ha[d] in mind,”⁴⁰ based

³⁶ 153 Wn. App. at 35–36, 40 (citation to record omitted).

³⁷ *Id.* at 39.

³⁸ 116 Wn. App. at 643 (citing *Weir*, 63 Wn. App. at 192).

³⁹ *Galbraith*, 78 Wn. App. at 530–31.

⁴⁰ *Id.* at 532.

upon his discussions with USB's broker and his knowledge that the policy otherwise provided for liability limits of \$1 million, which he rejected, and a conforming endorsement was issued. CP 328-329 (¶¶ 5, 8-9). Mr. Ennis's letter also put USB on notice and Mr. Boness was aware that the policy's general liability limits of \$1 million would be imposed and higher premiums charged if USB did not select lower limits. CP 329 (¶ 8), 420, 423. In addition, the Summary Form and the Washington rejection/notice form both reinforced the fact that Zurich had to make UIM coverage equal to policy limits available, but that USB could reject it or select lower limits. CP 326, 422. This evidence more than meets the legal standard followed in *Cochran* and *Marks*.

As stated in *Ensley*, which was decided only three days after the trial court's summary judgment ruling here (and published about two and a half months later):

[The insured] intended to reduce the amount of UIM coverage in the Ensleys' policy to reduce the family's premium. ... There is ... no genuine issue of material fact over whether [the insured] intended to sign a form that rejected the full amount of UIM coverage available to the Ensleys and to instead accept only a partial amount of \$50,000 per person and \$100,000 per accident.⁴¹

⁴¹ See *Ensley*, 153 Wn. App. at 40.

USB's intent is similarly clear and its selection of a lower UIM limit is equally effective. As stated by Mr. Boness:

I had a clear understanding of the forms provided to me by Mr. Ennis. Based upon my discussions with Ms. Livas and my review of (the Summary Form), I understood it to set forth the minimum UM and UIM limits I had requested, including the \$60,000 limit for the State of Washington as indicated on this form. ...

In signing (the Summary Form), I understood that \$1 million limits were available under the policy, that in signing the form I was selecting lower limits of \$60,000 for UM and UIM coverage in the State of Washington, and that I was thereby waiving the higher limits of \$1 million otherwise available under the policy. I made a knowing and informed waiver of available UM and UIM limits of \$1 million and instead elected UM and UIM limits of \$60,000 for the State of Washington.⁴²

The courts' discussions in *Cochran*, *Marks* and *Ensley* precisely describe the circumstances here. The effect of the notice provided to Mr. Boness and the Summary Form is no different.

In *Galbraith*, the *only* reported case in which an insured's voluntary, attempted written waiver was rejected, the writing did not include the specific minimum UIM limit the insured "ha[d] in mind" nor

⁴² CP 329 (¶¶ 8-9); *see also* CP 328 (¶¶ 4-5). *See also Weir*, 63 Wn. App. at 192, where the Court found that affidavits submitted by the insurer demonstrated the insured's intent to reject UIM coverage.

did the policy — facts that do not apply here.⁴³ As the Court stated in

Ensley:

Cases in which the writing requirement was not satisfied differ factually from the circumstances here. In *Clements*, the insurer produced no writing that could demonstrate a written rejection of UIM coverage. And in *Galbraith*, the court found that the policy-holder's written request for "minimum statutory UIM coverage only [in states] 'where Mandatory'" was not specific or unequivocal enough to satisfy the Washington written rejection requirement. *Here, the insurers offered a form that clearly states the amount of partial UIM coverage accepted, and [the insured] signed that form.*⁴⁴

All of the essential elements of an "affirmative and conscious act" waiving maximum UIM limits and selecting lower limits are present here in the signed Summary Form and Mr. Boness's declaration. Applying the holding in *Cochran* to the facts here, we obtain the same result:

⁴³ In *Galbraith*, the Court held that a declaration submitted by the insured that its intent was "to purchase the minimum limits allowed by law for uninsured motorist coverage" failed to show what amount the insured "understood or intended that the 'minimum limits'" would be equivalent to. When the policy itself failed to specify a dollar figure limit, but only that limits for UM and UIM coverage would be "Statutory," the Court found that the failure to specify the "amount of coverage the insured has in mind" failed to meet the requirement that a written rejection of UIM coverage be "specific and unequivocal." 78 Wn. App. at 528, 532.

An asserted writing also was rejected in *Corley v. Hertz Corp.*, 76 Wn. App. 687, 887 P.2d 401 (1994), also under facts that do not apply here. In *Corley*, the plaintiff signed what was essentially a contract of adhesion — a rental car agreement that purported to waive UIM coverage. The Court found that because Corley was not "given a choice between rejecting or accepting UIM coverage," the asserted waiver was ineffective. *Id.* at 693. See also *Alamo Rent A Car, Inc. v. Schulman*, 78 Wn. App. 412, 415, 897 P.2d 405 (1995) (citing *Corley*), cited in Brief of Appellant at 13.

⁴⁴ 153 Wn. App. at 39 (citations omitted; emphasis added).

Having been advised of the statutory maximum UIM limits requirement, (USB's) choice of \$60,000 on the UIM selection form followed advisement of the right to UIM coverage up to the maximum policy limits. Thus, it evidenced (USB's) intent to reject UIM coverage above the \$60,000 amount requested. The writing is *sufficiently specific and unequivocal* to establish that (USB) knowingly requested that (Zurich) set the policy's UIM limits at \$60,000 and thereby rejected statutory UIM limits identical to the policy's liability limits.⁴⁵

E. Humleker's Arguments Do Not Affect the Application of Washington Law to the Undisputed Facts Here.

Humleker's appeal is based — as was his opposition below — entirely on an assertion that what is “specific and unequivocal” on its face and under the law is actually ambiguous, to wit: Where the Summary Form states that USB has selected \$60,000 UIM limits, it actually means something — anything — else. Relying on purported rules of law that do not exist, out-of-state authority that does not set forth Washington law and a tortured analysis of the Washington case law that does apply, Humleker asserts that the above facts, which are undisputed, do not result in a waiver under RCW § 48.22.030(4). In short, Humleker contends that what looks like a duck, walks like a duck and talks like a duck, is a dog.

⁴⁵ See *Cochran*, 116 Wn. App. at 644–45 (emphasis added).

Of course, nothing could be further from the truth. USB made a knowing and informed decision, and its representative signed a “specific and unequivocal” waiver reflecting an “affirmative and conscious act” rejecting UIM coverage.⁴⁶ As a result, the UIM limits in USB’s policy are \$60,000.

1. Public Policy Does Not Negate the UIM Waiver Here.

Not only does public policy not preclude UIM waivers, public policy expressly allows them.⁴⁷ “Not all insurance exclusions or limitations violate the state’s public policy, and the fact that the injured party is not fully compensated for his injuries does not necessitate the conclusion that the application of a policy exclusion or limitation violates public policy.”⁴⁸ Humleker acknowledges that UIM coverage can be waived under RCW § 48.22.030(4). Brief of Appellant at 12.

Nevertheless, Humleker argues that public policy should override the waiver here. *Id.* at 13. No case supports such a premise with respect to UIM waivers; in fact, the case law is to the contrary:

⁴⁶ *Galbraith*, 78 Wn. App. at 532; *Clements*, 121 Wn.2d at 254.

⁴⁷ See *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 144, 34 P.3d 809 (2001) (“In those Washington cases in which public policy has served to enhance coverage by overriding policy exclusions, the courts have relied on a public policy ‘convincingly expressed’ in state statutes.”); *Certain Underwriters at Lloyd’s London v. Valiant Ins. Co.*, 2010 Wash. App. LEXIS 736 at *11–12 (¶20), No. 63692-8-I, slip op. at 9 (Wash. Ct. App., Div. I, April 12, 2010).

⁴⁸ *Bates*, 43 Wn. App. at 726.

It is clear from the record Nestle Foods did not want UIM coverage and never paid a premium for it. That intent is manifest in its proposal and the policy endorsement. *To find coverage under these circumstances would not further any public policy and would be contrary to the insurance contract bargained for between the parties.*⁴⁹

The case law cited by Humleker also does not support his assertion that a “broad public policy of ensuring full compensation to injured victims” (Brief of Appellant at 13) applies here. There is no “full compensation” public policy with respect to UIM policies.⁵⁰

The Court in *Greengo v. Public Employees Mut. Ins. Co.* noted that, prior to the 1980 amendments to RCW § 48.22.030, “the public policy underlying the predecessor uninsured motorist statute (was) full compensation.” When the Legislature amended the statute, adding UIM coverage, “the policy shifted from full compensation to provision of a second layer of floating protection.”⁵¹

In the same vein, Humleker’s references to *Clements* (Brief of Appellant at 12) are no more applicable here — along with the rest of Humleker’s public policy argument — than they were before the trial

⁴⁹ *Weir*, 63 Wn. App. at 192 (emphasis added). See also *Galbraith*, 78 Wn. App. at 529–30.

⁵⁰ *Bates*, 43 Wn. App. at 726, *supra*, at 22.

⁵¹ 135 Wn.2d 799, 808–09, 959 P.2d 657 (1998). The Legislature’s action overruled *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86 Wn.2d 264, 543 P.2d 634 (1975). *Id.* See also *Bates*, 43 Wn. App. at 725–26.

court. Humleker's citation to *Clements* was included in the Court's ruling to counter Clements' argument that "the UIM provisions [of RCW § 48.22.030] reflect a public policy in favor of assuring full compensation to victims of motor vehicle accidents."⁵² In so doing, the Court quoted language from *Touchette v. Northwestern Mut. Ins. Co.*⁵³ that was superseded by the 1980 amendments to RCW § 48.22.030(2), which now "permits the type of exclusionary provision invalidated in *Touchette*."⁵⁴

Because the question in *Clements*, as here, concerned the effectiveness of a waiver of UM/UIM coverage, and not whether a policy exclusion was enforceable under the statute, the Court then went on to effectively distinguish *Touchette* and other cases cited by Clements, and noted the distinction between the public policy underlying *uninsured* motorist coverage versus *underinsured* coverage.

The public policy of protecting the innocent victim of an uninsured motorist is applied to the underinsured motorist *to the extent that it is applicable*.

Petitioner Clements is correct when he stresses the protective aspect of the statute. However, cases cited by him to support his argument are those

⁵² 121 Wn.2d at 251.

⁵³ 80 Wn.2d 327, 335, 494 P.2d 479 (1972). Humleker also cites *Touchette*. Brief of Appellant at 9.

⁵⁴ *Doss v. State Farm Ins. Co.*, 57 Wn. App. 1, 5, 786 P.2d 801 (1990).

where exclusions were prohibited under existing UIM coverage. *While recognizing the protective policy behind the statute, this court has stated that the statute also provides for waiver of this protection by the parties.*

* * * *

Since waiver of UIM coverage is permitted under Washington statutes, waiver by Bard, the named insured in this case, would be neither void nor unenforceable if it meets all statutory requirements.⁵⁵

The other cases cited by Humleker are similarly distinguishable. *Van Votto v. Hertz Corp.* mainly construes Oregon law. The Washington case law it does cite pre-dates the 1980 amendments to RCW § 48.22.030.⁵⁶ *Tissell v. Liberty Mut. Ins. Co.* involved a UIM family member exclusion that had “not been authorized by the Legislature.”⁵⁷ In *Brown v. Snohomish County Phys. Corp.*, the Court construed health care service contracts, not UIM policy provisions.⁵⁸

RCW § 48.22.030(2) and the case law — particularly the cases decided by this Court — expressly allow UIM waivers such as that evidenced by the Summary Form here. Public policy simply does not enter into the equation.

⁵⁵ *Clements*, 121 Wn.2d at 251–52. As is well known, the Court in *Clements* found no waiver because the requisite writing was missing. *Id.* at 254–55.

⁵⁶ 120 Wn.2d 416, 420, 841 P.2d 1244 (1992).

⁵⁷ 115 Wn.2d 107, 112, 795 P.2d 126 (1990).

⁵⁸ 120 Wn.2d 747, 749, 845 P.2d 334 (1993).

2. *USB Was Offered — and Waived — UIM Coverage Equal to Policy Limits.*

As noted by Humleker (Brief of Appellant at 14), UIM coverage equal to a policy's limits must be made available by the insurer. However, "the insured is free to waive it."⁵⁹ This conforms with RCW § 48.22.030. RCW § 48.22.030(2) states that no policy "shall be issued" without providing UIM coverage and that such "coverage [is] required to be offered," although nothing in writing is required. At the same time, RCW § 48.22.030(4) provides that if a named insured rejects UIM coverage in writing, "subsection[] (2) ... shall not apply." In short, where there is a written waiver of UIM coverage, as here, no "offer" is required.⁶⁰ Nevertheless, under the undisputed facts, UIM coverage equal to policy limits was offered to USB. CP 328–329.

However, while conceding that "Washington's statute (does) not require the insurer to make a 'written offer' of coverage to the insured" (Brief of Appellant at 18), Humleker contends that the discussions between Mr. Boness and Ms. Livas, USB's broker, do not satisfy the

⁵⁹ *Clements*, 121 Wn.2d at 250.

⁶⁰ See *Cochran*, 116 Wn. App. at 641 ("[I]nsurers must provide UIM coverage and must offer UIM coverage limits equal to the insured's liability coverage limits *unless specifically rejected*["]) (emphasis added); *Bates*, 43 Wn. App. at 724 ("All new or renewed automobile insurance policies must offer underinsured motorist coverage in the same amount as the insured's third party liability coverage *unless the insured rejects all or part of such coverage*["]) (emphasis added).

purported offer requirement because there is no evidence of communications between Zurich and USB. *Id.* at 17–18. The law does not support such an assertion.

First, to any extent the statute requires an offer of limits where UIM coverage at policy limits is waived, the Washington courts have expressly found that this information can be communicated by a broker and entirely to the exclusion of the insurer.⁶¹ For example, in *Weir* there was no contact between the insurer and the insured, only between the insurer and the insured’s broker, and there was no evidence that an offer of maximum coverage was ever made, particularly by the insurer. To the contrary, the broker’s bid proposal to insurers was for coverage for “Minimum Statutory Uninsured Motorists (where Mandatory),” which is what the insurer provided.⁶²

⁶¹ *Roser v. Anderson*, 584 N.E.2d 865 (Ill. Ct. App. 1991), which was based on different statutory language and does not express Washington law on this subject, does not apply here. Its holding that the issuance of a policy with lower UIM limits, absent any other evidence of a writing waiving UIM coverage equal to policy limits, is on a par with *Clements*. *Roser* is cited in *Jochim v. State Farm Mut. Ins. Co.*, 90 Wn. App. 408, 415, 952 P.2d 630 (1998), but only for the premise that “an insurer must obtain an additional, separate waiver of UIM insurance *only* where there is an attendant or concomitant increase in liability coverage limits.”

⁶² 63 Wn. App. at 188–89. *See also Ensley*, 153 Wn. App. at 39; *Cochran*, 116 Wn. App. at 638–40 (broker secured policy and provided insured with waiver); *Galbraith*, 78 Wn. App. at 528, 531 (discussing and approving effect of broker requesting coverage from insurer based upon insured’s coverage selections); *Koop*, 66 Wn. App. at 151–52. Oddly, Humleker cites *Galbraith* for the effect of a broker’s action and then denies its application. Brief of Appellant at 19.

What the law requires is that the insured be given a “choice” of options. *See* Brief of Appellant at 17 (citing *Cochran*); CP 174–75. In this respect, there is no substantive difference between the waiver here and the waiver in *Cochran*. In *Cochran*, the insured’s representative stated that he did not recall receiving an offer of UIM coverage equal to liability coverage. The insured’s broker, on the other hand, attested to providing the representative with a form substantially similar to the Washington form provided by Zurich to Mr. Boness.⁶³ Ultimately, this Court stated:

Here, the documentary evidence established that Smith knew that CTE was entitled to UIM benefits equal to liability limits but, on the advice of insurance brokers, requested UIM coverage of only \$60,000.

* * * *

CTE requested a specific amount of UIM coverage, and thereby it rejected UIM coverage above \$60,000.⁶⁴

In short, it was enough that the insured had been “advised of the statutory maximum UIM limits requirement” in order to make an informed waiver.⁶⁵

Second, as to Humleker’s contention that an “offer” must be

⁶³ 116 Wn. App. at 640.

⁶⁴ *Id.* at 642, 644.

⁶⁵ *Id.* at 644.

communicated directly by the insurer to the insured, while this is not an accurate statement of the law, there are such communications in the record between Mr. Ennis and Mr. Boness. CP 328–329 (¶¶ 7–9); CP 418–420. Even so, *Weir*, *Galbraith* and *Cochran* all demonstrate that no such insurer-insured contact is required. In all three cases, the requisite notice was provided by a broker, not the insurer,⁶⁶ *i.e.*, the exact broker-insured contact that Humleker contends was ineffective in this case.⁶⁷ As the *Weir* court held: “[T]here is nothing in Washington’s UIM statute or our case law precluding an agent from acting on behalf of an insured in rejecting UIM coverage[.]”⁶⁸

Mr. Boness’s undisputed declaration demonstrates that he was provided both notice of the availability of UIM coverage equal to policy limits and a choice of the coverage he wished to select. CP 328–329 (¶¶ 4–5, 8–9). Mr. Boness knew his options, he was given a choice and

⁶⁶ See also *Ensley*, 153 Wn. App. at 39 (“Division One of this court has specifically rejected the contention that ‘writings prepared by the insured’s broker may not serve to waive UIM coverage.’”) (quoting *Galbraith* 78 Wn. App. at 531).

⁶⁷ *Weir*, 63 Wn. App. at 188–89. See also *Cochran*, 116 Wn. App. at 638 (“We hold that because the bid form CTE submitted through its insurance broker expressly selected an alternate amount of UIM coverage, CTE waived the maximum policy limits in writing as required by RCW 48.22.030.”); *Galbraith*, 78 Wn. App. at 528, 531 (discussing and approving effect of broker requesting coverage from insurer based upon insured’s coverage selections: “We similarly reject Galbraith’s contentions that writings prepared by the insured’s broker may not serve to waive UIM coverage.”).

⁶⁸ 63 Wn. App. at 190–91.

he chose lower limits.

3. *An Insurer May Prepare and Provide the Requisite Waiver.*

Humleker spends several pages of his argument trying to support a premise that only a writing prepared by an insured (or an insured's agent), as opposed to one prepared by an insurer, can be an effective waiver of UIM coverage equal to policy limits. Brief of Appellant at 19–23.⁶⁹ It is interesting to note that in the scope of this argument, Humleker essentially endorses the use of waivers such as those construed in *Weir*, *Koop*, *Galbraith* and *Cochran*, all of which were prepared by brokers for the respective insureds,⁷⁰ a process that — as noted above — Humleker earlier contends results in an ineffective waiver because it does not involve contact between the insured and insurer. Brief of Appellant at 14–19.

There is no basis for an assertion that only a writing prepared by an insured, or on its behalf, can be an effective waiver. RCW § 48.22.030(4) says nothing about the form the written waiver must take

⁶⁹ The argument then devolves into a discussion of whether the Summary Form here is “specific and unequivocal,” which is addressed, *infra*.

⁷⁰ *Weir*, 63 Wn. App. at 188–89; *Koop*, 66 Wn. App. at 151–52; *Galbraith*, 73 Wn. App. at 528–29; *Cochran*, 116 Wn. App. at 638–40. *See also Marks*, 123 Wn. App. at 278–79 (the source of the waiver form acknowledged as effective by this Court is not disclosed in the opinion).

or who may or must provide it.⁷¹ Furthermore, in *Ensley* the waiver form was prepared by a AAA insurance agent, *i.e.*, an agent of the insurer American Commerce.⁷² Ensley asserted “that the waiver was ineffective because someone else filled in the date and the coverage preferences.”⁷³ The Court rejected this argument: “Here, the insurers offered a form that clearly states the amount of partial UIM coverage accepted, and Donna signed that form.”⁷⁴

4. *The Summary Form Is a “Specific and Unequivocal” Waiver.*

The requirement that an insured’s written election of lower UIM limits be “specific and unequivocal” is not an unbending rule. Rather, the law sets forth a “minimal requirement of specificity.”⁷⁵ This Court in *Cochran* found the submitted writing “*sufficiently* specific and unequivocal to establish that [the insured] knowingly requested that [the insurer] set the policy’s UIM limits at \$60,000 and thereby rejected statutory UIM limits identical to the policy’s liability limits.”⁷⁶ In

⁷¹ See CP 446, Harris, *Washington Insurance Law*, § 33.4 at 33-8 & n.76.

⁷² 153 Wn. App. at 35-36.

⁷³ *Id.* at 39.

⁷⁴ *Id.*

⁷⁵ *Galbraith*, 78 Wn. App. at 532.

⁷⁶ 116 Wn. App. at 644-45 (emphasis added). See also *Marks*, 123 Wn. App. at 280 (citing other cases examining “whether the insured’s choice was sufficiently ‘specific and unequivocal’”).

Ensley, the Court noted that the writing in *Galbraith* “was not specific or unequivocal *enough*.”⁷⁷ “Sufficient” clarity is all that is required and precisely what the trial court found here:

The Court believes that the cases in Washington as expressed to date would find the summary form a sufficient written document to constitute a valid waiver which, although less clear and unequivocal than might have been created, nevertheless is sufficient to meet the standard of the statute.

CP 118.

Humleker, however, asserts that because the Summary Form here does not exactly match the forms endorsed by this Court in *Cochran* and *Marks*, it “does not pass muster.” Brief of Appellant at 28. Again, no specific form of writing is required and several kinds of writings have been approved by the Washington appellate courts.⁷⁸

Cochran does not require that the signed waiver “inform the insured of ‘the right to select UIM coverage in an amount equal to the policy’s liability limit.’” Brief of Appellant at 27. The quoted phrase is taken from *Cochran*,⁷⁹ where this Court was merely describing what was in the waiver form presented. In fact, the available \$1 million policy

⁷⁷ 153 Wn. App. at 39 (emphasis added).

⁷⁸ See, e.g., *id.* at 35–36; *Koop*, 66 Wn. App. at 151–52.

⁷⁹ 116 Wn. App. at 640.

limits were not mentioned anywhere.⁸⁰ Most recently, there was no specific limits language included in the writing endorsed by the Court in *Ensley* other than a general reference that the insured “must choose limits lower than or equal to [her] Bodily Injury Liability Limits.”⁸¹

In short, it is enough that the insured is advised that UIM coverage equal to policy limits is available. Here, Mr. Boness expressly was so advised and both the Summary Form and the letters from Mr. Ennis indicated that, absent selection of lower limits, higher limits would be imposed. CP 328 (¶¶ 4–5), 418–420, 422–23.

Humleker also wrongly contends that “there is no documentary evidence establishing that (USB) intended to reject UIM coverage.” Brief of Appellant at 25. The Summary Form, with its selection of \$60,000 UIM coverage for Washington, clearly reflects USB’s intent to reject UIM coverage equal to policy limits. USB “requested a specific amount of UIM coverage, and thereby it rejected UIM coverage above

⁸⁰ *Id.* at 639.

⁸¹ 153 Wn. App. at 35–36. No Washington case requires that the availability of higher limits for UM/UIM coverage be communicated to the insured in the waiver document. *See Weir*, 63 Wn. App. at 192 (“A writing which, as here, reflects the insured’s intent to reject UIM coverage satisfies the purpose of the statute and preserves the expectations of the parties ...”). The trial court here understood this premise, noting that the insured’s waiver must be “made with full knowledge of the state law and the opportunity to have different limits, and in particular higher limits, than those selected.” CP 116. It is undisputed that Mr. Boness received this information from Ms. Livas.

\$60,000.”⁸² There also is documentary evidence in the record that USB, through Mr. Boness, was advised of the UIM policy limits requirement. CP 285–287, 290, 326, 328–329 (¶¶ 7–9). Mr. Boness further attested that he had expressly been advised of the limits requirement by Ms. Livas. CP 328 (¶ 5).

Having been advised of the statutory maximum UIM limits requirement, CTE’s choice of \$60,000 on the UIM selection form followed advisement of the right to UIM coverage up to the maximum policy limits. Thus, it evidenced the insured’s intent to reject UIM coverage above the \$60,000 amount requested.⁸³

The Summary Form and the notice provided to USB meet all of the requirements for specificity.

Humleker also finds asserted ambiguity in a heading on the Summary Form, which says in its entirety: OPTION II State Minimum/UIM — Combined Single Limit.” CP 422. Humleker interprets this to serve his own purposes and contends it creates an ambiguity because UIM minimum limits in Washington are zero, yet Mr. Boness selected \$60,000 limits for Washington. If this were a case such as *Galbraith*, where no number was specified in the Summary Form,

⁸² *Cochran*, 116 Wn. App. at 644.

⁸³ *Id.* at 644–45.

Humleker might have a point. However, the law and the facts prove otherwise.

First, headings in insurance policies do not confer or retract coverage.⁸⁴ Second, the meaning of this heading is explained in the record. It refers to *either* the minimum UM/UIM coverage *or* the minimum combined single limit for liability coverage required in the respective states. CP 45 (¶ 3).⁸⁵ With respect to Washington, where UM/UIM coverage is not required, “State Min ... Combined Single Limit” refers to the minimum combined single limit required for general auto liability coverage: \$60,000. *Id.*⁸⁶ In short, this is the “minimum” amount of coverage that Zurich sells to insureds who do not wish to reject UM/UIM coverage entirely (where allowed). *Id.*

Further, “minimum” implies, if anything, *some* coverage, not *no* coverage. For those insureds who do wish to reject UM/UIM coverage in states where that is allowed, Zurich issues an “Option I” form. Its heading reads: “Rejection/Minimum Mandatory Coverage.” CP 45–46

⁸⁴ See *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 838, 841, 734 P.2d 17 (1987).

⁸⁵ Humleker moved to strike this declaration, but the motion was rendered moot by the trial court’s ruling denying Humleker’s motion for reconsideration. CP 17. The trial court did not consider this declaration in denying Humleker’s motion. CP 18.

⁸⁶ See RCW §§ 46.30.020(1)(a), 46.29.090(1) (requiring minimum auto liability coverage of \$25,000 per person and \$50,000 per accident for bodily injury, and \$10,000 for property damage).

(¶ 4), 51–52. For states such as Washington, where UM/UIM coverage can be rejected, “No coverage” is indicated on this form, *i.e.*, “Rejection.” For states where a minimum of UM and/or UIM coverage is required, the states’ respective “split limits” for bodily injury (per person and per accident) and property damage are listed as the “Selected Limits,” *i.e.*, “Minimum Mandatory Coverage.” *Id.* In those states that require minimum UM coverage but where UIM coverage can be waived, the “Selected Limits” are the mandatory split limits for UM coverage and “No coverage” for UIM. *Id.*

Third, Humleker’s apparent contention that the heading misstates Washington law and, thus, renders the Summary Form invalid, finds no basis in the case law. This Court’s holding in *Marks* demonstrates that such asserted discrepancies that may grant an insured more coverage than he asked for or thought he was getting do not defeat the effectiveness of a UM/UIM waiver. In *Marks*, despite the fact that the waiver form at issue incorrectly described “decreasing” coverage rather than “floating” UIM coverage,⁸⁷ this Court found “the form was valid.”⁸⁸

Marks claims that *Cochran* does not control our decision in this case because, unlike the form in *Cochran*, Blue Star’s form misstated Washington

⁸⁷ 123 Wn. App. at 279–80.

⁸⁸ *Id.* at 284.

UIM coverage law and that therefore Blue Star's rejection was uninformed and invalid.

* * * *

Marks correctly asserts that the form Blue Star signed describes decreasing, not floating, layer coverage. But he has not suggested that this description was material to Blue Star's rejection of the statutory default level and selection of a lower level of coverage. Moreover, nothing in the record suggests that Blue Star would not have rejected the statutory default UIM limit had the form properly defined the Washington "floating" UIM coverage requirement. ... Regardless, Blue Star clearly rejected the statutory default UIM coverage limit in favor of a lower limit. The form clearly demonstrates that Blue Star affirmatively rejected in writing the default UIM coverage by accepting an alternate amount of coverage.⁸⁹

Fourth, there is a similar lack of a factual record here on materiality. An abbreviation in a heading, which makes no reference to any state law, is not what is material; rather, materiality lies in what the insured selects — the amount he "has in mind." Mr. Boness understood the Summary Form and knew what he was asking for when he signed the Summary Form.

In signing (the Summary Form), I understood that \$1 million limits were available under the policy, that in signing the form I was selecting lower limits of \$60,000 ... and that I was thereby waiving the higher limits of \$1 million otherwise available under the policy. I made a knowing and informed waiver of available UM and UIM limits

⁸⁹ *Id.* at 282–84.

of \$1 million and instead selected UM and UIM limits of \$60,000 for the State of Washington.

CP 329 (¶ 9). As the trial court noted, the limits Mr. Boness selected are clear: “The summary form does contain a list of the ‘selected limits’ of insurance showing that in Washington the limit selected was \$60,000.” CP 117. Combined with Mr. Boness’s selection of \$60,000 of UIM limits on the Summary Form and his signature on that form, the writing is a “specific and unequivocal” waiver reflecting an “affirmative and conscious act” waiving greater UIM coverage.

5. *Stemple Does Not Set Forth Washington Law and Does Not Apply Under the Facts of This Case.*

Humleker makes much of a U.S. District Court case out of Kansas, *Stemple v. Zurich Am. Ins. Co.*,⁹⁰ construing the effect of Zurich’s Summary Form under — contrary to Humleker’s contention — substantially and materially different facts than those present here. *Stemple* also is not a statement of Washington law and does not even set forth definitive Kansas law as it is a federal district court decision with no precedential value.⁹¹

⁹⁰ 584 F. Supp. 2d 1304 (D. Kan. 2008).

⁹¹ The *Stemple* decision was aptly distinguished by the trial court judge. CP 113–115, 118 (“When one looks at cases in the State of Washington ... , it appears that a writing signed by the insured which clearly reflects the insured’s intent to knowingly reject higher UIM coverage available, would satisfy the waiver provisions of the statute and preserve the expectations of the parties.” (citing *Cochran*, *Weir* and

Principally, the court in *Stemple* found only that there was a question of fact regarding the existence of an effective waiver and, therefore, denied Zurich's motion for summary judgment.⁹² Most significant in this respect is the court's statement rejecting the argument "that the insured's signing of the Summary Form *by itself* is adequate to establish the fact that (the insured) rejected the higher (UM/UIM) limits otherwise applicable."⁹³ Here, the Summary Form can, but does not have to, stand on its own.

In *Stemple*, no Kansas-specific form was provided to the insured with respect to the truck policy at issue (although one was provided with another policy), a fact significant to the court;⁹⁴ none of the forms for any of the other states identified on the Summary Form was included in the record;⁹⁵ and, it appears, there was no declaration from the insured or a representative regarding the selection of lower limits. However, such documents and facts are in the record here, and were not disputed

Corley). See *Cochran*, 116 Wn. App. at 643 ("[A] writing that reflects the insured's intent to reject UIM coverage satisfies the waiver provisions of RCW 48.22.030(4) and preserves the expectations of the parties.").

⁹² 584 F. Supp. 2d at 1314 ("The evidence submitted regarding defendant's motion for summary judgment does not clearly demonstrate the absence of material issues of fact.").

⁹³ *Id.* at 1313.

⁹⁴ *Id.* at 1311-12.

⁹⁵ *Id.* at 1313. The other state forms are included here. CP 291-323.

by Humleker. There also is no sample rejection form here from the state Insurance Commissioner's Office; in *Stemple*, the court found "striking" differences between the Zurich form and the Kansas Insurance Department's sample form.⁹⁶

In this latter respect, as elsewhere, the *Stemple* decision simply does not reflect Washington law. No Washington case compares the waiver form at issue with a form from another state or elsewhere. Rather, Washington courts look solely to the language in the waiver form at issue to see if it reflects the intent of the insured with respect to the coverage desired and is sufficiently specific under Washington law.⁹⁷ Again, there is no preferred Washington form.⁹⁸

The court's hang-up in *Stemple* was the absence of any evidence of intent beyond the Summary Form itself.⁹⁹ If the Court here similarly is concerned with whether the Summary Form sufficiently reflects USB's intent, then it may look to Mr. Boness's declaration for further evidence.

Humleker's further assertion that a decision here affirming the trial court "would, effectively, render Washington less insured friendly than Kansas" (Brief of Appellant at 34) and would be wrong for that

⁹⁶ *Id.* at 1312-13.

⁹⁷ See *Galbraith*, 78 Wn. App. at 530-31.

⁹⁸ CP 446, Harris, *Washington Insurance Law*, § 33.4 at 33-8 & n.76.

⁹⁹ 584 F. Supp. 2d at 1311.

reason, is belied, for example, by the Court's refusal to follow a harsher-to-insurers standard in Louisiana, despite the similarity of the states' statutes.¹⁰⁰ In *Weir*, the Court stated:

Finally, the estate asserts the bid proposal requesting "Minimum Statutory Uninsured Motorists (where Mandatory)" coverage was not specific enough to meet the statute's requirement of a "writing", relying on *Roger v. Estate of Moulton*, 513 So. 2d 1126, 1132 (La. 1987). In *Roger*, the court held a valid rejection must be set forth in a single document signed by the named insured or authorized representative rejecting coverage as of a specific date and refer to a specific policy; a writing of a less precise nature, regardless of the insured's intent, was held to be insufficient.

We do not find this Louisiana decision persuasive in light of this State's objective to give effect to the insured's intent. *A writing which, as here, reflects the insured's intent to reject UIM coverage satisfies the purpose of the statute and preserves the expectations of the parties without the additional formalities required in Louisiana. ...* In the circumstances presented here, we find the statutory requirement of rejection in writing was satisfied.¹⁰¹

Similarly, the Summary Form which, as here, "reflects the insured's intent to reject UIM coverage satisfies the purpose of the statute and

¹⁰⁰ See *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 550, 707 P.2d 1319 (1985); *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 5, 665 P.2d 891 (1983).

¹⁰¹ 63 Wn. App. at 192 (emphasis added).

preserves the expectations of the parties without the additional formalities required” by the court in *Stemple*.

6. *The Insured’s Intent Is Relevant.*

As already noted, “absent ... a written rejection, the intent of the various parties is irrelevant to a determination of coverage.”¹⁰² It therefore follows that when there *is* a written rejection, *e.g.*, the Summary Form, the parties’ intent *is* relevant. As noted by the trial court:

If the purpose of the public policy is to insure that insureds making a coverage decision have full information, then it would make little sense to exclude consideration of information provided outside of the writing if, in fact, there is a writing which clearly indicates an intent to select a different coverage than that mandated by the law.

CP 116.

In asserting that the Court should not consider extrinsic evidence of intent, Humleker relies principally upon *Clements*. However, *Clements* simply does not apply under the facts of this case. In *Clements*, there was no writing for the Court to construe. Thus, the rule obtains that “absent ... a written rejection, the intent of the various parties is irrelevant to a determination of coverage.”¹⁰³

¹⁰² *Ensley*, 153 Wn. App. at 40 (quoting *Clements*, 121 Wn.2d at 256).

¹⁰³ *Clements*, 121 Wn.2d at 256.

Furthermore, Humleker's contention (Brief of Appellant at 39) that the interests of third-party UIM insureds, such as himself, override the intent of the contracting parties, *i.e.*, the insurer and the named insured (USB), is directly contradicted by Washington law. As provided in RCW § 48.22.030, the "named insured" is the party that possesses the right of election. Here, that is USB, the named insured on the Zurich policy.

This court will not ... strain to impose upon employers the obligation to provide UIM coverage for their employees. ... [N]amed insureds pay the premiums and purchase the coverage they desire, while "other insureds" like Koop, simply happen to be covered by virtue of the circumstances attending a given accident. It would be impractical to impose on insurers the obligation to offer the opportunity to reject UIM coverage to all persons who might, at some future time, become "other insureds" because they are permitted by the named insured to occupy the insured vehicle.¹⁰⁴

Humleker, citing this Court's decision in *Cochran*, also makes the baseless assertion that "it is inappropriate to consider 'after the fact' evidence suggesting what an insured's intent might have been at the time of contracting." Brief of Appellant at 27. First, no case is cited for this assertion and *Cochran* certainly "reiterates" no such "principle." *See id.* Such language is not to be found anywhere in the decision. Rather, this Court simply found "the factual question of the insured's intent (to

¹⁰⁴ *Koop*, 66 Wn. App. at 155-56.

be) irrelevant” because the writing in question “evidenced the insured’s intent to reject UIM coverage above the \$60,000 amount requested.”¹⁰⁵

At the same time, this Court noted:

From the documents and declarations submitted, the trial court concluded that the broker (Raleigh) and CTE evaluated CTE’s insurance needs and that CTE, aware that it could purchase \$1 million in UIM coverage, requested only \$60,000.¹⁰⁶

Second, most recently, Division III cited what appears to be the deposition testimony of Donna Ensley in the clerk’s papers, *i.e.*, “after the fact” evidence of the insured’s intent, in ascertaining the facts under which UIM limits were waived.¹⁰⁷

Donna intended to reduce the amount of UIM coverage in the Ensleys’ policy to reduce the family’s premium. ... There is ... no genuine issue of material fact over whether Donna intended to sign a form that rejected the full amount of UIM coverage available to the Ensleys and to instead accept only a partial amount of \$50,000 per person and \$100,000 per accident.¹⁰⁸

Third, in *Galbraith*, the insurer submitted an insurance binder prepared by the insured’s broker as evidence of a writing rejecting UIM policy limits. Given the existence of a writing, the Court proceeded to

¹⁰⁵ 116 Wn. App. at 645.

¹⁰⁶ *Id.* at 640.

¹⁰⁷ *Ensley*, 153 Wn. App. at 38-40.

¹⁰⁸ *Id.* at 40.

consider extrinsic evidence of the insured's and insurer's intent. Although the Court eventually ruled that the binder did not satisfy the requirements of RCW § 48.22.030(4),¹⁰⁹ it still considered the parties' intent. "*Weir* permits us to consider the binder together with extrinsic evidence of the parties' intent at the time of contracting."¹¹⁰

The problem in *Galbraith*, as the Court pointed out, was "discerning what they *did* intend." The parties failed to express a specific dollar amount of coverage; thus it is from *Galbraith* that the rule obtains: "A writing cannot serve as an effective waiver of UIM coverage if it does not show the amount of coverage the insured has in mind."¹¹¹ Here, there is no question regarding the amount of coverage USB requested for UIM insurance in Washington — it was \$60,000.¹¹²

In this respect, *Weir* still is good law, despite Humleker's attempts to discredit it. As Humleker must concede and the *Galbraith*

¹⁰⁹ See *Ensley*, 153 Wn. App. at 39.

¹¹⁰ 78 Wn. App. at 531.

¹¹¹ *Id.* at 532 (emphasis in original).

¹¹² Humleker distorts the holding in *Galbraith*. Brief of Appellant at 23–24. "The problem," the Court said, "is discerning what [the insured and insurer] *did* intend" the amount of coverage to be, although they did not intend \$1 million limits. 78 Wn. App. at 531. The Court did not "decline[] to give effect to" the parties' intent. Brief of Appellant at 24. Rather, it could not discern the parties' intent. The result was an ambiguity as to the amount of coverage provided under the policy. There is no such ambiguity here. The Summary Form clearly indicates the amount of UIM coverage USB had in mind.

Court noted, “*Clements* did not overrule *Weir*.”¹¹³ As this Court noted in *Cochran*, *Weir* holds “that a writing that reflects the insured’s intent to reject UIM coverage satisfies the waiver provisions of RCW 48.22.030(4) and preserves the expectations of the parties.”¹¹⁴

The only effect, if any, that *Clements* had on the holding in *Weir* “is that the insured’s intent to waive UIM coverage must be manifested in writing.” Once such a writing is produced, as here, the Court may consider the writing “together with the extrinsic evidence of the parties’ intent at the time of contracting.”¹¹⁵

In *Weir*, the Court agreed with the insurer’s argument that the “bid proposal coupled with the policy’s endorsement met the statute’s requirement of a written rejection.”¹¹⁶ In so doing, the Court rejected the plaintiff’s contention that the trial court erred in considering the insured’s intentions in rejecting UIM coverage. It held:

Our courts have long adhered to the rule [that] the court’s duty in construing an insurance contract is to determine the intent of the parties at the time of contracting. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987). There is no logical reason to apply this rule to other

¹¹³ 78 Wn. App. at 530.

¹¹⁴ 116 Wn. App. at 643 (citing *Weir*, 63 Wn. App. at 192). See also Memorandum Opinion on Summary Judgment, CP 89.

¹¹⁵ *Galbraith*, 78 Wn. App. at 531.

¹¹⁶ 63 Wn. App. at 189.

insurance provisions and exclude its application here. Nestle Foods' intent is relevant in construing the bid proposal and policy endorsement. It is clear from the record Nestle Foods did not want UIM coverage and never paid a premium for it. That intent is manifest in its proposal and the policy endorsement. *To find coverage under these circumstances would not further any public policy and would be contrary to the insurance contract bargained for between the parties.*¹¹⁷

It also is evident that the Court in *Clements* would have considered the insured's "after the fact" statements of intent if a writing had been produced.

The affidavit of Stuart Storch, corporate risk manager for Bard, at least tends to support Respondent Travelers' position that Bard neither wanted nor paid for UIM coverage and that Bard intended to exercise rejection under the Washington statute. This does not, however, respond to the question whether that rejection was in writing.¹¹⁸

Here, USB's intent is manifest in the Summary Form signed by Mr. Boness and unequivocal. Even if the form itself is not sufficient (as Humleker contends), then USB's intent is made all the clearer by the undisputed, extrinsic evidence.¹¹⁹

¹¹⁷ *Id.* at 192 (emphasis added). See also *Galbraith*, 78 Wn. App. at 529-30.

¹¹⁸ 121 Wn.2d at 251. See also *id.* at 252 ("The evidence presented by Respondent Travelers supports a conclusion that Bard intended to waive UIM coverage under the Washington statute.").

¹¹⁹ See, *supra*, at 17-21; CP 328-329 (¶¶ 4-5, 8-9).

7. *The Washington Form Is Relevant.*

Although Humleker did not dispute any of the facts placed in the record, including the veracity of Andrea Burns' declaration, he nevertheless contends that the Court should not consider the Washington Rejection of Underinsured Motorists Coverage or Selection of Lower Limit of Liability form (CP 326) under *Torgerson v. State Farm Mut. Auto. Ins. Co.*¹²⁰ However, contrary to Humleker's assertion, Zurich did not submit the Washington form as evidence of a written waiver, but rather to demonstrate notice to USB. It also is clear from the facts of this case that *Torgerson* does not apply.

In *Torgerson*, there was no written, signed rejection form in evidence; this was the linchpin in the court's decision.¹²¹ Here, a signed, written rejection form *is* in evidence and there is "specific recollection" that Mr. Boness signed it. CP 329 (¶ 8). Unlike the Torgersons, the insured (USB) did not deny signing a waiver. The Summary Form is in evidence and Mr. Boness attests to signing it. Because the Washington form also is in the record, and the uncontested evidence is

¹²⁰ 91 Wn. App. 952, 957 P.2d 1283 (1998).

¹²¹ *Id.* at 962-63. The Torgersons denied signing a waiver (*id.* at 956) and one could not be located.

that it was filled out and would have been provided to Mr. Boness to review, it is proper for the Court to consider it as evidence of notice.

8. *Humleker Is Not Entitled to Declaratory Judgment or an Award of Fees.*

Humleker asks that the Court reverse and instruct the trial court to enter judgment on his behalf that the UIM limits are \$1 million, and to award him attorneys' fees under *Olympic Steamship Co. v. Centennial Ins. Co.*¹²² However, Humleker did not move for summary judgment below and, therefore, would not be entitled to judgment regardless of the Court's decision. Further, absent an ultimate judgment against Zurich, Humleker is not entitled to an award of *Olympic Steamship* fees.

VI. CONCLUSION

The trial court's finding that the Summary Form constitutes an effective UIM waiver is a correct interpretation of Washington law. "[H]ere the summary form, makes it clear on its face that higher limits could be selected and, in light of the amount chosen on the summary form were being rejected." CP 118.

No Washington case holds that a writing reflecting an insured's intent to select lower UIM limits, designating the amount of coverage desired, and signed by the insured is an ineffective rejection of higher

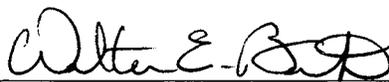
¹²² 117 Wn.2d 37, 811 P.2d 673 (1991).

limits. In fact, as this Court has held, “a writing that reflects the insured’s intent to reject UIM coverage satisfies the waiver provisions of RCW 48.22.030(4) and preserves the expectations of the parties.”¹²³

The insured, USB, through Jerry Boness, signed a form specifically requesting and denominating \$60,000 in UIM coverage for Washington. Mr. Boness was aware that the policy’s general liability limit of \$1 million would apply to UIM claims if he did not exercise the option to reject UIM coverage or select a lower limit. He selected \$60,000 in UIM coverage. Nothing further is required under the law.¹²⁴ Therefore, the UIM limit under USB’s policy is \$60,000, as selected by Mr. Boness in a knowing and informed decision. No other conclusion is supported by the facts or the law. The trial court’s order granting Zurich’s motion for summary judgment should be affirmed.

Respectfully submitted this 14th day of April, 2010.

KARR TUTTLE CAMPBELL

By: 
Walter E. Barton, WSBA #26408

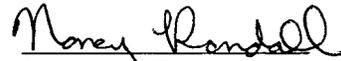
Attorneys for Respondent Zurich American
Insurance Company

¹²³ *Cochran*, 116 Wn. App. at 643.

¹²⁴ *See id.* at 644 (“CTE requested a specific amount of UIM coverage, and thereby it rejected UIM coverage above \$60,000.”).

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that I am over the age of 18 and not a party to the above-captioned action. That on April 14, 2010, I caused to be served upon counsel listed below in the manner indicated a true and correct copy of the foregoing Brief of Respondent.


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