

No. 45640-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

TONYA HEDGES,
Plaintiff-Respondent,

v.

AMERICAN FAMILY INSURANCE,
Defendant-Appellant.

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APPELLANT'S BRIEF

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INTRODUCTION

This case involves Plaintiff-Respondent Tonya Hedges' claim for underinsured motorist benefits under her auto insurance policy with Defendant-Appellant American Family Insurance. American Family appeals the trial court's order and judgments granting Plaintiff's motion for summary judgment and denying American Family's motion for summary judgment.

Plaintiff was injured in a two-car collision caused by the driver of the other car. Plaintiff has recovered the \$250,000 policy limits available under the at-fault driver's liability insurance policy. Plaintiff has also recovered \$100,000 in underinsured motorist benefits from a State Farm policy insuring the vehicle she was driving at the time of the accident. This case involves Plaintiff's claim for an additional \$100,000 in underinsured motorist benefits under her policy with American Family.

The dispute turns on the interpretation an anti-stacking provision in the underinsured motorist endorsement. American Family contends the anti-stacking provision limits Plaintiff to \$100,000 in underinsured motorist benefits from all sources. Because she has recovered that amount from another policy, she is not entitled to benefits from American Family. Plaintiff argues that the anti-stacking provision allows her to recover underinsured motorist benefits up to a total of \$250,000—the policy limits of the at-fault driver's liability policy. She contends that because she has recovered only \$100,000, she is entitled to recover up to the full policy

limits of her \$100,000 underinsured motorist coverage with American Family.

ASSIGNMENTS OF ERROR

1. The trial court erred by granting Plaintiff's motion for summary judgment and ruling that American Family's auto insurance policy provides underinsured motorist benefits to Plaintiff in addition to the insurance benefits Plaintiff has recovered under two other auto insurance policies. (CP 63-70; CP 119-121.)

2. The trial court erred by denying American Family's motion for summary judgment and ruling that American Family's auto insurance policy provides underinsured motorist benefits to Plaintiff in addition to the insurance benefits Plaintiff has recovered under two other auto insurance policies. (CP 63-70; CP 119-121.)

3. The trial court erred by awarding attorney fees and costs to Plaintiff as the prevailing party on her claim for underinsured motorist benefits. (CP 109-115; CP 116-118.)

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Under the anti-stacking provision in Plaintiff's underinsured motorist coverage with American Family, what is the maximum amount of underinsured motorist benefits that Plaintiff may recover from all underinsured motorist policies: \$100,000 (the highest limit of liability for any policy providing underinsured motorist coverage for the accident) or \$250,000 (the at-fault driver's liability policy limits)? (Assignments of error 1 and 2.)

2. The trial court awarded attorney fees and costs to Plaintiff as the prevailing party on her claim for underinsured motorist benefits. If this court reverses the judgments for Plaintiff on her claim for underinsured motorist benefits, must it also reverse the award of attorney fees and costs? (Assignment of error 3.)

STATEMENT OF THE CASE

A. Statement of facts.

1. Plaintiff was involved in an automobile collision and received \$250,000 from the at-fault driver's liability insurance policy.

Plaintiff was injured in a two-car collision caused by the driver of the other vehicle. (CP 20, ¶¶ 1-3.) The at-fault driver was insured by a Farmers auto policy with a \$250,000 limit of liability. (CP 21, ¶¶ 8, 11.) Plaintiff settled her claim against the at-fault driver in exchange for his policy limits. (CP 22, ¶ 14.)

2. Plaintiff received \$100,000 in underinsured motorist benefits under the State Farm policy insuring the car she was operating at the time of the collision.

At the time of the collision, Plaintiff was driving her mother's car. (CP 20, ¶ 1.) That car was insured by a State Farm auto insurance policy. (CP 20-21, ¶ 5.) Plaintiff qualified as an insured under that policy. (CP 21, ¶ 5.)

State Farm's policy provided underinsured motorist coverage. (CP 20-21, ¶ 5.) Although the at-fault driver had liability insurance, he was nonetheless an underinsured driver because his policy's liability limits (\$250,000) were insufficient to cover all of Plaintiff's damages caused by

the collision. (CP 21, ¶ 8.) Consequently, Plaintiff made a claim for underinsured motorist benefits under her mother's State Farm policy, and State Farm paid to Plaintiff the \$100,000 policy limits for underinsured motorist coverage. (CP 22, ¶ 15.)

3. Relying on an anti-stacking provision in its underinsured motorist endorsement, American Family denied Plaintiff's claim for underinsured motorist benefits.

At the time of the accident, Plaintiff was insured under an American Family auto insurance policy that she owned. (CP 21, ¶ 6.) The policy included underinsured motorist coverage. (CP 21, ¶ 6.)

Plaintiff made a claim for underinsured motorist benefits. (CP 22, ¶ 12.) American Family declined to provide benefits. (CP 22-23, ¶ 17; CP 24, ¶ 19.) The denial relied on a provision that barred an insured from increasing the amount of available coverage by stacking multiple underinsured motorist policies. Because that anti-stacking provision is central to this case, it is quoted in full here, and discussed in detail later:

F. ADDITIONAL GENERAL CONDITIONS

1. Other Insurance

a. Other Policies Issued By Us.

If two or more policies issued to **you** by **us** or any other member company of the American Family Insurance Group of companies apply to the same accident, the total limits of liability under all such policies shall not exceed the highest limit of liability under any one policy.

b. Other Liability Coverage From Other Sources.

If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total of all liability limits. But any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle while used as a temporary substitute for **your insured car**, is excess over any other similar insurance.

Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

(CP 187) (**bold** emphasis in original; *italics and bold* added.)

B. Procedural history.

1. Plaintiff brought this action against American Family.

Plaintiff commenced this action after American Family denied her claim. (CP 1.) The complaint alleges breach of the insurance contract based on the denial of Plaintiff's claim for underinsured motorist benefits. (CP 9-10.) The complaint also alleges several claims based on American Family's allegedly wrongful claims handling, including claims for violation of the Insurance Fair Conduct Act; breach of the duty of good faith; breach of fiduciary duty; and breach of the Consumer Protection Act. (CP 7-9.) These extra-contractual claims are not at issue in this appeal.

The parties agreed on stipulated facts (CP 20), then filed cross-motions for summary judgment. (CP 60; CP 168.) The cross-motions addressed only whether American Family's policy potentially provides underinsured motorist benefits to Plaintiff above the underinsured motorist benefits she has already recovered. The motions did not address the amount of benefits, if any, Plaintiff was entitled to recover if she established that the policy potentially provided any benefits.

The parties' coverage arguments will be examined in detail later. In summary, American Family argued that the anti-stacking provision, quoted above, bars Plaintiff from recovering any underinsured motorist benefits under its policy. Plaintiff argued that the anti-stacking provision does not have that effect and that, instead, benefits are available up to the policy's \$100,000 limit of liability for underinsured motorist coverage.

The trial court ruled for Plaintiff, but on grounds different from anything Plaintiff had argued in support of her motion. (CP 63-70.)

2. The trial court awarded fees and costs to Plaintiff, and entered judgment for Plaintiff.

Plaintiff then moved for an award of attorney fees and costs related to the breach of contract claim. (CP 93.) Plaintiff also moved for entry of judgment on the insurance-coverage issue. (CP 93.) In a written order, the trial court awarded fees and costs to Plaintiff. (CP 109, 113.) The court also concluded that there was no just reason to delay entry of judgment on the insurance coverage issues, including the award of attorney fees and costs. (CP 115.) Consistent with that order, the trial court entered a

judgment that Plaintiff is “entitled to UIM coverage and benefits up to \$100,000 under her automobile policy with Defendant American Family Insurance[.]” (CP 117.) The judgment also awarded fees and costs in the amount of \$34,696.63. (CP 116.)

3. The trial court entered a stipulated supplemental judgment awarding Plaintiff \$100,000 in underinsured motorist benefits under American Family’s policy.

The parties then submitted a stipulated supplemental judgment, which resolved the issue of the amount of benefits to which Plaintiff was due under American Family’s policy. (CP 119-121.) The supplemental judgment provided for a money award to Plaintiff in the amount of \$100,000. (CP 120.) The supplemental judgment further provided that the unresolved claims concerning American Family’s handling of Plaintiff’s underinsured motorist claim would be stayed if there were an appeal from the judgment and supplemental judgment resolving Plaintiff’s claim for underinsured motorist coverage. (CP 120.) In light of American Family’s appeal, those claims remain stayed in the trial court.

4. American Family appealed the judgment and supplemental judgment.

American Family timely appealed both the judgment and the supplemental judgment. (CP 122.) The court clerk issued a letter questioning appellate jurisdiction and asking for briefing from the parties. (See David C. Ponzoha’s letter dated December 23, 2013.) Commissioner Bearse ruled that appellate jurisdiction was proper over both the judgment

and the supplemental judgment. (See Commissioner Bearse's ruling dated January 28, 2014.)

SUMMARY OF ARGUMENT

Two underinsured motorist policies potentially provide benefits for Plaintiff's injuries: (1) the \$100,000 State Farm policy on Plaintiff's mother's vehicle, and (2) Plaintiff's \$100,000 underinsured motorist policy with American Family. Plaintiff has received \$100,000 in benefits under the State Farm policy. The issue in this case is whether American Family's policy allows Plaintiff to stack American Family's underinsured motorist coverage on top of the State Farm policy, thereby increasing the amount of underinsured motorist coverage to \$200,000.

"Stacking" refers to the practice of adding together coverages either within a single policy ("internal stacking"), or in different policies ("external stacking"), to increase the amount of available coverage. As authorized by the underinsured motorist statute, RCW 48.22.030(6), American Family's policy includes an anti-stacking provision that limits underinsured motorist benefits to "the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis." The highest limit for any underinsured motorist policy providing coverage for the accident is \$100,000. Thus, that is the "highest applicable limit" and sets the maximum amount of underinsured motorist benefits Plaintiff may recover. Because she received \$100,000 in underinsured motorist benefits from State Farm, she may not recover additional benefits from American Family.

ARGUMENT

A. The trial court erred by ruling that Plaintiff is entitled to underinsured motorist benefits under American Family's insurance policy.

1. Orders granting and denying summary judgment are reviewed de novo.

The first and second assignments of error challenge the trial court's order granting Plaintiff's motion for summary judgment and denying American Family's motion for summary judgment regarding whether Plaintiff may recover underinsured motorist benefits.

CR 56 governs summary-judgment motions. "Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003), *rev. den.*, 151 Wn.2d 1037, 95 P.3d 351 (2004). An appellate court reviews an order granting or denying summary judgment de novo, performing the same inquiry as the trial court. *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). By filing cross-motions for summary judgment based on stipulated facts, "the parties conceded that there were no material issues of fact." *Tiger Oil Corp. v. Department of Licensing, State of Washington*, 88 Wn. App. 925, 930, 946 P.2d 1235 (1997). Therefore, the only question on appeal "is whether the court's legal conclusions were correct." *Id.*

2. Underinsured motorist coverage provides benefits when the damages an insured is entitled to recover exceed the amount of available liability insurance.

Underinsured motorist coverage is governed by RCW 48.22.030.

An “underinsured motor vehicle” includes motor vehicles to which no liability insurance policy applies, and also motor vehicles to which a liability insurance policy applies, but the limits of liability under all applicable liability insurance policies is less than the damages the covered person is legally entitled to recover. RCW 48.22.030(1).¹ Thus, under the nomenclature adopted by the legislature, “uninsured” vehicles are included within the definition of “underinsured” vehicles. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 246 n. 9, 850 P.2d 1298 (1993).

Unless underinsured motorist coverage is expressly rejected (RCW 48.22.030(4)),² every insurance policy insuring against liability imposed

¹ “(1) ‘Underinsured motor vehicle’ means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.” RCW 48.22.030(1).

² “(4) 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. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or

by law for bodily injury, death, or property damage, must include underinsured motorist coverage. RCW 48.22.030(2).³

Underinsured motorist coverage provides “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles . . . because of bodily injury, death, or property damage[.]” RCW 48.22.030(2). Thus, the basic concept of underinsured motorist coverage is that “the insurer steps into the shoes of a negligent third party to pay the insured the amount, up to policy limits, by which the damage caused to the insured by the negligent third party exceeds the third party’s liability coverage.” *Greengo*

spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.” RCW 48.22.030(4).

³“(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.” RCW 48.22.030(2).

v. *Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 804, 959 P.2d 657 (1998); *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 692, 926 P.2d 923 (1996) (“When an underinsured motorist causes injury, the insurance company of the injured party carrying UIM steps into the shoes of the negligent underinsured and supplements his policy.”). In this case, American Family’s insuring agreement said:

1. **We will pay compensatory damages an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of:**
 - a. **bodily injury** sustained by an **insured person** and caused by an accident; and
 - b. **property damage** caused by an accident and Underinsured Motorist – Property Damage is shown in the Declarations.
2. The liability of the owner or operator for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

(CP 186) (bold in original).

3. The underinsured motorist statute authorizes insurers to prohibit stacking of underinsured motorist policies.

Originally, the animating public policy for underinsured motorist coverage was providing full compensation to injured persons. *Greengo*, 135 Wn.2d at 808 (“Originally, we declared the public policy underlying . . . the uninsured motorist statute to be full compensation.”). But with the 1980 amendments to the underinsured motorist statute, “the policy shifted from full compensation to provision of a second layer of floating

protection.” *Id.* at 809. That public policy is relevant here, where Plaintiff is not pursuing a “second layer of floating coverage” but, instead, a *third* layer on top of (1) the liability insurance benefits she recovered from the at-fault driver, and (2) the underinsured motorist benefits she recovered from her mother’s insurance company.

Because the “public policy underlying UIM is creation of a second layer of floating protection for the insured,” the underinsured motorist statute allows anti-stacking clauses. *Id.* at 810; *Parker ex rel. Parker v. United Services Auto. Associates*, 97 Wn. App. 528, 529, 984 P.2d 458 (1999), *rev. den.*, 140 Wn.2d 1010 (2000) (“Generally, anti-stacking clauses do not violate public policy.”). Anti-stacking provisions are expressly authorized by RCW 4.22.030(6), which states: “The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.”

Of course, an insurer may choose to allow stacking since anti-stacking provisions are allowed but not required. But where an insurer includes an anti-stacking provision, it should be enforced since the underinsured motorist statute expressly authorizes them.

There are two types of stacking: internal and external. Internal stacking “is the adding together of various coverages within a single policy in such a manner as to increase available coverage limits.” *Britton v. Safeco Ins. Co. of America*, 104 Wn.2d 518, 532, 707 P.2d 125 (1985).

External stacking “is the practice of adding together different policy coverages to increase available coverage limits.” *National Merit Ins. Co. v. Yost*, 101 Wn. App. 236, 241, 3 P.3d 203, *rev. den.*, 142 Wn.2d 1011 (2000). This case involves external stacking because Plaintiff seeks to maximize her underinsured motorist benefits by recovering under two different policies: the State Farm policy on her mother’s car and her own policy with American Family.

American Family’s policy addresses external stacking in the last paragraph of the “other insurance” section within the underinsured motorist endorsement. (CP 187.) For convenience, the entire “other insurance” section is again set forth verbatim:

F. ADDITIONAL GENERAL CONDITIONS

1. Other Insurance

a. Other Policies Issued By **Us**.

If two or more policies issued to **you** by **us** or any other member company of the American Family Insurance Group of companies apply to the same accident, the total limits of liability under all such policies shall not exceed the highest limit of liability under any one policy.

b. Other Liability Coverage From Other Sources.

If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy’s proportion of the total of all liability limits. But any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle while used as a

temporary substitute for **your insured car**, is excess over any other similar insurance.

Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

(CP 187) (**bold** emphasis in original; *bold and italics* added).

4. Insurance policies are construed as contracts, and the court seeks to find the parties' intent based on the words in the policy.

This case turns on the meaning of the anti-external-stacking provision in the last paragraph of the "other insurance" section. American Family contends that, properly interpreted, the anti-stacking provision limits Plaintiff to \$100,000 in underinsured motorist benefits from all underinsured motorist policies. Since Plaintiff recovered \$100,000 in underinsured motorist benefits from State Farm, she is entitled to nothing from American Family. But the trial judge interpreted the anti-stacking provision to mean that Plaintiff may recover underinsured motorist benefits up to a maximum recovery of \$250,000. Since Plaintiff has recovered only \$100,000 from State Farm, she is eligible for another \$150,000 in underinsured motorist benefits, including all of the \$100,000 in benefits potentially available under the American Family policy.

Resolving this case requires interpreting the anti-stacking provision. "Construction of an insurance contract is a question of law." *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009). Insurance policies are construed as contracts. *Quadrant Corp. v.*

American States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). In interpreting an insurance contract, the court looks “to the intent of the parties, which is ascertained from the language of the contract.” *Campbell*, 166 Wn.2d at 472. “Language in an insurance contract is to be given its ordinary meaning, and courts should read the policy as the average person purchasing insurance would.” *Id.* The court considers the policy as a whole, and gives it a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance. *Quadrant Corp.*, 154 Wn.2d at 171. A construction that contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties. *Campbell*, 166 Wn.2d at 472. “Although contracts of insurance are to be construed in favor of the insured and most strongly against the insurer, [courts] cannot modify clear and unambiguous language in an insurance policy or revise the insurance contract under the theory of construing it.” *Britton*, 104 Wn.2d at 528 (footnote omitted).

A clause is ambiguous only if, on its face, it is fairly susceptible to two different and reasonable interpretations. *Quadrant Corp.*, 154 Wn.2d at 171. If a clause is ambiguous, the court may rely on extrinsic evidence to resolve the ambiguity. *Id.* “Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured.” *Id.* The fact that determining the scope of coverage might require examining several provisions does not render the provisions

inconsistent or ambiguous. *Doyle v. State Farm Ins. Co.*, 61 Wn. App. 640, 644, 811 P.2d 968, *rev. den.*, 118 Wn.2d 1005 (1991).

5. The anti-stacking provision in the other-insurance section of the underinsured motorist endorsement limits Plaintiff to recovering no more than \$100,000 in underinsured motorist benefits from all underinsured motorist policies.

We now turn to the policy's other-insurance section, which includes the anti-external-stacking provision. Although only the last paragraph is directly relevant to the issue before the court, we will briefly walk through the entire other-insurance section.

Section F(1)(a) has one paragraph, which states:

a. Other Policies Issued By Us.

If two or more policies issued to **you** by **us** or any other member company of the American Family Insurance Group of companies apply to the same accident, the total limits of liability under all such policies shall not exceed the highest limit of liability under any one policy.

This paragraph is concerned with situations where more than one American Family policy applies to an accident. The clause bars stacking the limits of liability under such policies. This paragraph is not relevant here because this case involves only one American Family policy.

Section F(1)(b) has two paragraphs. The first paragraph states:

If there is other similar insurance for a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total of all liability limits. But any insurance provided under this

endorsement for an **insured person** while **occupying** a vehicle **you** do not own, including any vehicle while used as a temporary substitute for **your insured car**, is excess over any other similar insurance.

This paragraph is concerned with how underinsured motorist benefits are allocated among different policies where more than one underinsured motorist policy applies to an accident. The paragraph makes clear that it is concerned with multiple underinsured motorist policies because the paragraph, which appears in the policy's underinsured motorist endorsement, begins by referring to "other similar insurance." The Washington Supreme Court has explained that "[i]n the UIM context, '[t]he term "similar insurance" is appropriately understood to be other underinsured motorist insurance coverages.'" *Greengo*, 135 Wn.2d at 806-07 (quoting 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1, at 238 (2d ed. 1995)). The next two sentences provide that UIM benefits are proportioned consistent with the policies' liability limits except that American Family's coverage is excess where the claim arises from an accident that occurred while the insured person was occupying a vehicle the insured person did not own.

That is the situation here, where Plaintiff's injuries arose from an accident that occurred while she was driving a vehicle she did not own. Accordingly, under the terms of this paragraph, American Family's underinsured motorist policy was excess in relation to State Farm's underinsured motorist policy covering Plaintiff's mother's vehicle. Again, this paragraph is not directly relevant to resolving this case because this

case does not involve a dispute about apportioning coverage among multiple policies, although the primary/excess provision explains why State Farm paid its policy limits without seeking to allocate any part of the coverage to American Family.

Now we arrive at the final paragraph, which states:

Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

This paragraph addresses the maximum amount of underinsured motorist benefits the insured may recover when more than one underinsured motorist policy applies to a claim on either a primary or excess basis. First, the sentence makes clear that it is only concerned with underinsured motorist benefits because it refers to “all such policies.” The only logical reading of this sentence is that the phrase “all such policies” refers back to “other similar insurance” discussed in the first sentence of the preceding paragraph within the same subsection. The phrase “all such policies” must refer to some antecedent reference to a type of policy. The closest antecedent reference is “other similar insurance” which, as we have discussed, means other underinsured motorist coverage. Thus, at its very beginning, the final paragraph signals that it is addressing underinsured motorist coverage.

The sentence then concludes by barring external stacking of underinsured motorist coverage. It accomplishes this by stating that the

amount of underinsured motorist benefits recovered under “all such policies” (*i.e.*, all underinsured motorist policies) may equal, but not exceed, “the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.” Thus, consistent with the statutory authorization in RCW 48.22.030(6), American Family barred stacking of multiple underinsured motorist policies but, instead, provided that the maximum amount of underinsured motorist benefits recoverable under all such policies was the highest limit of liability under any of those policies applicable to the accident.

As applied to this case, the anti-external-stacking provision limits Plaintiff to \$100,000 in underinsured motorist benefits. This is because there are two underinsured motorist policies applicable to her claim, and each has a \$100,000 limit of liability. Therefore, the highest limit of liability, and the maximum amount she can recover, is \$100,000. Since she has recovered that amount from State Farm, there is nothing available to be recovered from American Family.

This interpretation is consistent with the public policy underlying underinsured motorist coverage. For more than 30 years, the relevant public policy has been to provide a second layer of floating protection. *Greengo*, 135 Wn.2d at 809. That is all that is required by the underinsured-motorist statute, and that is what Plaintiff has already recovered here. American Family was not required to—and did not—provide a third layer of coverage.

The trial court, however, reached a different conclusion. The court characterized its interpretation as the “only one reasonable interpretation of this provision” (CP 68) even though the trial court adopted an interpretation that neither party had suggested. The trial court ruled that the maximum amount of underinsured motorist coverage available to Plaintiff was set by the limit of liability in the at-fault driver’s Farmers liability insurance policy. Thus, the trial court reached the incongruous, and apparently unprecedented,⁴ conclusion that an anti-external-stacking clause had the effect of allowing Plaintiff to stack underinsured motorist coverages to a limit greater than the combined limit of liability under all underinsured motorist policies applicable to the accident.

The court came to this conclusion by deciding that the phrase “any insurance providing coverage” did not refer to any underinsured motorist policy but, instead, included every policy and coverage of any kind, including liability insurance policies applicable to the accident. Although the court did not explain its reasoning, it appears that the court decided that “any insurance providing coverage” was not limited to any *underinsured motorist* insurance providing coverage because the word “insurance” was not modified with the phrasal adjective “underinsured motorist.”

⁴ American Family has found no case where the maximum amount of underinsured motorist benefits is determined by reference to the liability limits under the at-fault driver’s policy.

The trial court's interpretation is inconsistent with both case law and logic which is, perhaps, why that interpretation was not advanced by Plaintiff in support of her motion for summary judgment.

The court interpreted a nearly identical anti-stacking provision in *Doyle*, 61 Wn. App. 640. In *Doyle*, the plaintiff was injured while riding as a passenger in someone else's vehicle. As in the present case, three insurance policies were potentially applicable to the accident:

- Liability insurance policy covering the at-fault driver's vehicle (\$300,000 limit of liability).
- Underinsured motorist coverage covering the vehicle in which the plaintiff was a passenger (\$50,000 per person underinsured motorist policy).
- The plaintiff's own underinsured motorist policy (\$50,000 limit of liability).

The case concerned the amount of underinsured motorist benefits available to her under her own policy. Resolution of the case focused on the other insurance provision in the plaintiff's auto policy. It read:

Other Insurance

If this policy and any other policy providing **underinsured motorist** coverage apply to the same loss, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy. If other **underinsured motorist** coverage applies, we'll pay only our fair share of the loss. That share is our proportion of the total **underinsured motorist** insurance that applies to the loss. But any insurance we provide when **you** or a **covered person** use a vehicle **you** don't own will be excess over any other collectible insurance.

Id. at 642.

The “other insurance” provision in *Doyle* is similar to the provision in American Family’s policy. Most significantly, in *Doyle*, the maximum amount of underinsured motorist coverage available under all underinsured motorist policies was set at “the highest limit of liability that applies under any one policy.” *Id.* The phrase “any one policy” was not confined or limited to “any one *underinsured motorist* policy.” So, under the reasoning apparently applied by the trial court in this case, the Court of Appeals in *Doyle* should have interpreted the “other insurance” clause as setting a maximum amount of recovery at \$300,000—the limit of liability applicable to the at-fault driver’s liability policy. But that is not how the court interpreted the provision. Instead, it interpreted the provision as setting the maximum recovery under all underinsured motorist policies as being the highest limit of liability for underinsured motorist benefits under any underinsured motorist policy. *Id.* at 642. The court then moved to an issue not presented here: whether the policy’s excess clause was an exception to the anti-stacking wording and allowed the insured to stack her own underinsured coverage on top of the other underinsured motorist policy. For our purposes, *Doyle* is instructive because it reflects the common sense understanding that where an anti-stacking provision says that the maximum amount of underinsured motorist benefits available is the highest limit that applies under any policy, it is referring to any policy of underinsured motorist coverage and rather than other types of policies providing other types of coverage.

The court reached a similar conclusion in *Frey v. Hartford Underwriters Ins. Co.*, 2005 WL 3143954 (E.D. Wisc. 2005). *Frey* was a death case. For simplicity, we will refer to the decedent as the plaintiff.

The plaintiff was killed when the vehicle in which he was a passenger was struck from behind. The vehicle in which the plaintiff was a passenger was covered by a \$100,000 underinsured motorist policy. In addition, plaintiff was an insured under his own \$100,000 underinsured motorist policy.

The plaintiff's policy had this other-insurance clause, which is nearly identical to Plaintiff's American Family policy:

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided under this Part C Section II(1) Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

Id. at *1.

As with American Family's policy, in *Frey* the maximum amount of benefits recoverable under all underinsured motorist policies was set at "the highest applicable limit for any one vehicle ***under any insurance*** providing coverage on either a primary or excess basis." (Emphasis added.) The court interpreted this provision to mean that any recovery of underinsured motorist benefits could not exceed the highest applicable limit for any policy of *underinsured motorist* coverage applicable to the accident. *Id.* at *2 ("Put another way, the recovery is maxed out at

\$100,000 because the insured's recovery may not exceed the limit under either of the [UIM] policies at issue, which is \$100,000 in both cases.”).

The issue in *Frey* was slightly different from the issue presented here (and in *Doyle*) because in *Frey* there was not a liability policy with limits higher than the limits provided by the underinsured motorist policies. Thus, the court in *Frey* was not specifically asked to consider the possibility that “any insurance providing coverage on either a primary or excess basis” could mean a liability insurance policy applicable to the accident. But the court's failure to even recognize that possibility demonstrates the implausibility of such an interpretation.

The only plausible and sensible interpretation of American Family's policy is that “any insurance providing coverage on either a primary or excess basis” means any underinsured motorist policy. The anti-stacking provision appears in an endorsement devoted solely to underinsured motorist coverage. Furthermore, it appears in a section that begins by referring to “other similar insurance” which, as we have discussed, means other underinsured motorist coverage. The section then refers to “all such policies” which, again, refers back to underinsured motorist policies. Thus, the consistent thread throughout the other-insurance section is that it is discussing underinsured motorist coverage. It makes no sense that the final words referring to “any insurance providing coverage” would suddenly leap to, and encompass, liability insurance policies.

Such an interpretation would also be inconsistent with the purpose of anti-external-stacking provisions, which is to establish a single, maximum recovery in the amount of the highest limit of underinsured motorist coverage available under any applicable policy.

For all of these reasons, the trial court incorrectly interpreted the anti-stacking provision in American Family's policy.

6. The phrase "limits of liability" does not render ambiguous the other-insurance section in the underinsured motorist endorsement.

Plaintiff's primary argument to the trial court was that the other-insurance section was ambiguous because it referred to "limits of liability," "limit of liability," and "liability limits." Plaintiff argued that these phrases apply only in the context of insurance for liability imposed by law for bodily injury, death, or property damage and, consequently, they rendered ambiguous whether the other-insurance section even applied to underinsured motorist coverage. Because Plaintiff might reprise this argument on appeal, we address it now.

In short, there is no support for the notion that "limits of liability" or "liability limits" are phrases associated solely with insurance coverage for liability imposed by law for causing bodily injury, death, or property damage. This argument is thoroughly refuted by the underinsured motorist statute itself, which uses the phrases "limit of liability" and "limits of liability" to describe the maximum amount of *underinsured motorist* benefits available to an insured. RCW 48.22.030(5) ("The limit of liability

under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.”); RCW 48.22.030(6) (“The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.”).

Consistent with the underinsured motorist statute, American Family used the phrase “limits of liability” in its underinsured motorist endorsement to describe the maximum amount of benefits it would pay under the underinsured motorist coverage. (CP 186: “The limits of liability are the most we will pay regardless of the number a. insured persons; b. claims made; c. vehicles or premiums shown in the Declarations; d. premiums paid; or e. vehicles involved in the accident.”).

Finally, the Washington Court of Appeals has explained that in the context of underinsured motorist coverage, the phrase “limit of liability” “refers to the overall extent of liability under the policy.” *Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy*, 71 Wn. App. 226, 232, 857 P.2d 1064 (1993). Therefore, the phrase “limit of liability” does not apply only in the context of insurance for liability imposed by law for causing injuries, damage, or death, and, instead, specifically refers to the maximum amount of benefits payable under an underinsured motorist policy. Plaintiff’s contention that the policy was ambiguous because it

referred to “limits of liability” in the underinsured motorist endorsement is unpersuasive.

In summary, this court should reverse the trial court’s order and judgments that Plaintiff is entitled to underinsured motorist benefits under American Family’s policy.

B. If this court reverses the judgments concerning Plaintiff’s entitlement to underinsured motorist benefits, it must also reverse the award of fees and costs.

Plaintiff was awarded attorney fees and costs in the sum of \$34,696.63. (CP 116.) That award was predicated on Plaintiff having prevailed on her claim for insurance coverage. *See Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) (insured who prevails in insurance-coverage litigation is entitled to recover fees).

If this court reverses the judgments for Plaintiff concerning her entitlement to underinsured motorist benefits, then it must also reverse the award of fees and costs because the predicate for that award will no longer exist. *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 889, 91 P.3d 897 (2004) (reversing fee award where the appellate court reversed the trial court’s decision concerning the insurer’s duty to indemnify the insured).

CONCLUSION

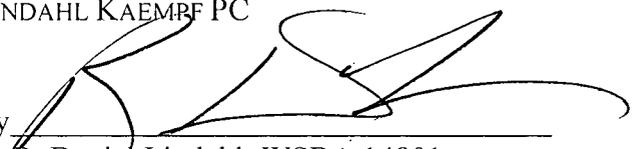
This court should reverse both the judgment and the supplemental judgment and remand with directions to enter a judgment in favor of American Family that Plaintiff is not entitled to recover underinsured

motorist benefits under American Family's policy.

Dated: April 25, 2014.

Respectfully submitted,

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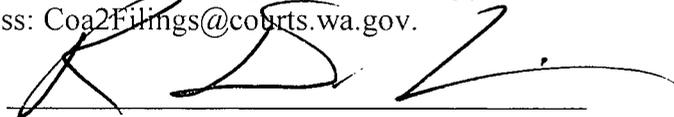
CERTIFICATE OF SERVICE

I certify that on April 24, 2014, I mailed a copy of the foregoing Appellant's Brief to the persons listed below, at the addresses indicated, postage prepaid.

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I further certify that on April 24, 2014, I filed the foregoing Appellant's Brief by email to the Washington Court of Appeals at the following email address: Coa2Filings@courts.wa.gov.



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