

v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). In the case at bench, the parties have stipulated to all of the material facts.

January 13, 2000, was a clear day in Eastern Missouri, and at approximately 5:20 p.m. Plaintiff David Burns was driving one of his employer's pickup trucks south on Route MM near House Springs, Missouri. Amended Joint Stipulation of Uncontested Facts ("Facts") ¶ 3; Pltf. Ex. C, p 2. David Seaman ("Seaman"), was traveling north along Route MM, and lost control of his pickup truck, which crossed the center line and ran onto the opposite shoulder; Seaman then over-corrected into a side-ways skid directly into Burns' path. *Id.* The vehicles collided; with Burns' front end impacting the left side of Seaman's vehicle. The impact caused Seaman's pickup truck to burst into flame. Pltf. Ex. C, p. 3. Witnesses to the crash pulled Burns from his vehicle as the fire began to spread, but stated that "we could not do anything for [Seaman] because his vehicle was completely engulfed... ." *Id.* Seaman was pronounced dead at the scene.

Burns suffered severe injuries from the collision, and was airlifted from the scene to St. Johns Mercy Medical Center. Facts ¶ 5. Burns' injuries included fractures to the bones of his hips, knee, heels and foot, and surgery was performed on each fracture. *Id.* As a result of these injuries Burns is totally and permanently disabled from working. Facts ¶ 6.

Seaman was at fault for the accident, and consequently his insurance carrier, Workman's Auto Insurance Company ("Workman's"), paid Burns \$25,000.00; Seaman's coverage limit. Facts ¶ 7. Burns' employer carried underinsured motorist coverage on the truck Burns was driving in the amount of \$50,000.00, provided by Liberty Mutual Insurance Company ("Liberty Mutual"). Facts ¶ 9. Liberty Mutual paid the limits of this policy to Burns. *Id.* Also, Missouri's

Division of Workers Compensation awarded Burns \$40,930.56¹. Burns' employer also carried insurance pursuant to the Missouri Worker's Compensation Act, and that carrier has so far paid \$121,424.07 towards Burns' medical expenses related to the collision. Facts ¶ 12.

At the time of the collision, Burns was insured by State Farm, under policy number 300-6484-D19-25I ("Policy"). Facts ¶ 13. The Policy includes underinsured motorist coverage ("UIM"); the limit of which is \$100,000.00. Id. ¶ 15; Facts Ex. A at Declarations page. Burns' personal injury claims arising from injuries sustained in the collision exceed the Policy's \$100,000.00 limit. Facts ¶ 17. Burns' personal injury claims arising from injuries sustained in the collision also exceed the amounts paid to him by the Division of Workers Compensation, Liberty Mutual, Workman's, and Burns' employer's carrier. Facts ¶ 19. State Farm has denied Burns' claim for UIM benefits under the Policy. Id. ¶ 18.

The dispute in this case is straightforward; State Farm denied Burns' claim based on the fact that Burns' had received benefits from other sources in excess of the \$100,000.00 limit provided by the Policy. The Policy states that, with respect to UIM coverage (coverage W):

1. The amount of coverage is shown on declarations page under "Limits of Liability - W - Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages, including damages for care and loss of services, arising out of and due to ***bodily injury*** to one ***person***. Under "Each Accident" is the total amount of coverage, subject to the amounts shown under "Each Person" for all such damages arising out of and due to ***bodily injury*** to two or more ***persons*** in the same accident.
2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the ***insured*** under any worker's compensation, disability benefits, or similar law.

¹ This amount was further divided into payments to Burns and his attorneys for their fees and expenses. Additionally, weekly payments are being made to Burns and his attorneys; these are to continue for the rest of Burns' life. In light of the Court's construction of the Policy at issue in this case, the details of Burns' Workers Compensation award are immaterial.

5. The most we pay will be the lesser of:
 - a. the difference between the amount of the *insured's* damages for *bodily injury*, and the amount paid to the insured by or for any person or organization who is or may be held legally liable for the *bodily injury*; or
 - b. the limits of liability of this coverage.

Facts, Ex. A at p. 13 (emphasis in original).

Burns first contends that he is entitled to the full \$100,000.00 of coverage under the Policy regardless of other amounts already paid to him. He argues that he is entitled to the full \$100,000.00 of coverage because the declarations page lists the coverage and Seaman's vehicle was underinsured by stipulation. Thus, Burns argues that he "has the coverage regardless of whatever other payments he may have received for his injuries." This argument must be rejected because an insured cannot selectively edit an insurance policy, choosing a phrase here and another from there, rewriting the policy in the process. Under Missouri law, an insurance policy is a contract like any other and must be construed as a whole. *Dieckman v. Moran*, 414 S.W.2d 320, 321 (Mo. 1967); *Kyte v. American Family Mut. Ins. Co.*, 92 S.W.3d 295, 298 (Mo. App. W.D. 2002). Indeed a similar argument was rejected in *Kyte*, where the insured based his argument solely on the declarations and endorsements of an underinsured motorist policy; the *Kyte* court disagreed, holding that the insured's argument effectively "renders the endorsement's set-off provision meaningless." 92 S.W.3d at 299. Therefore, Burns' first argument must be rejected as it fails to consider the Policy as a whole.

Burns' next argument is much more persuasive as it is based on the text of the Policy. He contends that the words "Any amount payable under this coverage" refers to the insured's damages, and not to the limits of the coverage. A proper discussion of this point will require the

Court to compare several Missouri cases, but first the Court should discuss Missouri's legal framework for the judicial construction of insurance policies² in general, and UIM policies in particular.

As stated *supra*, an insurance policy is a contract like any other, and must be construed as a whole. Where policies are unambiguous, they must be enforced as written unless a statute or public policy requires coverage. *Rodriguez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. 1991). "An ambiguity arises when there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* Put another way, policy "language is ambiguous if it is reasonably open to different constructions and the language used will be in the meaning that would ordinarily be understood by the layman who bought and paid for the policy." *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. 1992). Ambiguous provisions are construed against insurers; and this rule exists for two principal reasons:

First, insurance is designed to furnish protection to the insured, not defeat it. [Thus] [a]mbiguous provisions of a policy designed to cut down, restrict, or limit insurance coverage already granted, or introducing exceptions or exemptions must be strictly construed against the insurer. Second, as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract. As noted by Judge Learned Hand, "[T]he canon *contra proferentem* is more rigorously applied in insurance than in other contracts, in recognition of the difference between the parties in their acquaintance with the subject matter ... Insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion." *Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir.1947).

Id. at 210-11 (most internal citations omitted).

² The parties stipulated that Missouri law governs this diversity case. See Facts ¶ 21.

In *Rodriguez*, the Missouri Supreme Court found that \$50,000 paid on behalf of a tortfeasor to an insured was properly subtracted from the **limits of the insured's coverage** under the following provision:

LIMIT OF LIABILITY

*However the **limit of liability** shall be reduced by all sums paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally responsible.*

Rodriguez, 808 S.W.2d at 381 (emphasis added).

“The effect of this provision is to set off the \$50,000 paid by [the tortfeasor’s] insurer against the \$50,000 coverage provided by the [UIM insurer].” *Id.* at 382. Other language has been found insufficient to unambiguously provide a set-off from a UIM policy’s coverage limits. For example, in *American Family Mut. Ins. Co. v. Turner*, the court found that the phrase “Any amounts payable will be reduced by: (1) A payment made or amount payable by or on behalf of any person or organization which may be legally liable...” did not unambiguously refer to the policy coverage limits. 824 S.W.2d 19, 20-22 (Mo. App. E.D. 1991). The *Turner* court³ compared the language of *Turner*’s policy with the policy language in *Rodriguez*. Finding the former insufficient to carry the same meaning as the latter, the *Turner* court construed the term amount payable against the insurer; and held that “amounts payable” refers to “the damages legally due the insured.” *Id.* at 22. Thus, the insurer was only entitled to set-off the amounts

³ The *Turner* court also considered decisions from Indiana and Wisconsin indicating that even the eminent jurists on those courts have split on what exactly the term “amounts payable” refers to. *Turner*, 824 S.W.2d at 22 (comparing *Kaun v. Industrial Fire & Cas. Ins. Co.*, 148 Wis.2d 662, 436 N.W.2d 321 (Wis. 1989) (set-off of total liability) with *Tate v. Secura Ins.*, 561 N.E.2d 814 (Ind. App. 2 Dist. 1990) (set-off of coverage limits). Interestingly enough, the latter decision was reversed by Indiana’s Supreme Court in *Tate v. Secura Ins.*, 587 N.E.2d 665, (Ind. 1992) (“It is this amount of damages, not the coverage limit, which is the "amounts payable" to be reduced by the amount paid to Tate by or on behalf of the tortfeasor.”)

Turner received from the tortfeasor against the **total amount of damages**, not the **coverage limit** of Turner's UIM policy.

The foregoing would quickly lead this Court to construe the Policy in the case at bench against State Farm, except for the existence of *Addison v. State Farm Mut. Auto. Ins. Co.*, 932 S.W.2d 788 (Mo. App. E.D. 1996). In *Addison*, the same Missouri appellate court that decided *Turner*, distinguished the same insurance policy language as contained in the Policy in the case bench from that in *Turner*, and reached a contrary result. In *Addison*, the key phrase was "Any amount payable **under this coverage** shall be reduced by... ." versus the phrase "Any amounts payable will be reduced by... ." in *Turner*. *Addison*, 932 S.W.2d at 790 (emphasis added). Thus, were the Court to follow *Addison*, the addition of the words "under this coverage" would successfully convert what was a damages setoff provision into a coverage limit setoff provision.

This Court is not bound by the decision in *Addison*, and although *Rodriguez* and *Krombach* are informative, those cases do not deal directly with the language of the Policy. Where there is no state supreme court case on point, a federal court sitting in diversity has the duty to predict how the state's highest court would resolve the claim. *ANR Western Coal Development Co. v. Basin Elec. Power Co-op.*, 276 F.3d 957, 964 (8th Cir. 2002); *Lincoln Benefit Life Co. v. Edwards*, 243 F.3d 457, 465 (8th Cir. 2001). This Court must therefore decide whether the Missouri Supreme Court would hold the words "Any amount payable under this coverage shall be reduced" to convey the existence of a coverage limit set-off provision or merely a damages set-off provision.

The Court concludes that, were the Missouri Supreme Court to decide this issue, the limitation language in the Policy would be held insufficiently clear and unambiguous to serve as

a coverage limit set-off. In contrast to the language in *Rodriguez* and *Krombach*, where the coverage limitation actually mentioned the limit of coverage, the words “amount payable under this coverage” in the Policy in this case could reasonably be understood to refer to the damages that the UIM policy covers, and not unambiguously to the \$100,000.00 coverage limit. This Court is not convinced that the distinction drawn in *Addison* is appropriate.

It is the opinion of this Court that the words “Limits of Liability”, “amount of coverage” and “amount payable under this coverage” are not clearly synonymous. State Farm’s argument to the contrary is strained because it relies heavily on the extraction of shades of meaning from provisions throughout the Policy. It is further weakened by the fact that State Farm used the phrase “limits of liability” in paragraph 5(b) of the Limits of Liability section of the UIM Policy to refer to its maximum responsibility. State Farm, the drafter of the Policy, was in the best position to clarify its intended meaning in paragraph 2, and this Court finds the reading urged by the Plaintiff in this case to be reasonable given State Farm’s choice of the words “amount payable under this coverage” rather than “amount of coverage” or “limits of liability” as in the preceding and subsequent paragraphs in the Policy.

This case illustrates the wisdom of the rule that the insurer should be held responsible for making its coverage limitations clear in its policy. State Farm drafted the Policy, and could have very easily parroted the language deemed unambiguous in *Rodriguez* to ensure clarity. Instead, State Farm has elected to coax meaning out of an ambiguous phrase. The Court simply cannot go along with State Farm and the *Addison* court, because the result is incompatible with Missouri Supreme Court precedent.

The Court must next take up the issue of the effect of the Policy’s “Other Insurance” clause which states that:

If the *insured* sustains *bodily injury* while *occupying* a vehicle not owned or leased by *you, your spouse* or any *relative*, this coverage applies:

- a. as excess to any underinsured motor vehicle coverage which applies to the vehicle as primary coverage, but
- b. only in the amount by which it exceeds the primary coverage.

Policy, p. 14.

Plaintiff concedes that Missouri courts have upheld the application of “Other Insurance” clauses and that the parties have stipulated that Liberty Mutual, Burns’ employer’s insurer, paid Burns \$50,000.00. Plaintiff’s Reply Memorandum (#34), p. 6. Thus, the applicable coverage limit must be reduced to \$50,000.00.

As a consequence, the damages Burns sustained must be set-off by the amounts “paid or payable to or for [Burns] under any worker’s compensation, disability benefits or similar law.” and further reduced by “the difference between the amount of [Burns’] damages for bodily injury, and the amount paid to [him] by or for any person or organization who is or may be held legally liable... .” State Farm is required to pay Burns’ remaining damages up to the adjusted coverage limit of \$50,000.00.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff David Lee Burns’ Cross-Motion for Summary Judgment (#33) be and is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that Defendant State Farm Mutual Automobile Insurance Company’s Cross-Motion for Summary Judgment (#22) be and is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, under the stipulated facts of this case, State Farm Mutual Automobile Insurance Company is required to pay the

difference between David Lee Burns' damages sustained during the January 13, 2000, collision, and the amount paid to him or to others on his behalf, up to a maximum of \$50,000.00, under the terms of policy number 300-6484-D19-251.

IT IS FINALLY ORDERED that this case is **DISMISSED**.

Dated this 25th day of November, 2003.

/s/ STEPHEN N. LIMBAUGH
SENIOR UNITED STATES DISTRICT JUDGE