IN THE CIRCUIT COURT OF STONE COUNTY, MISSOURI

MARVIN PELLETT, ET AL

Plaintiffs,

MAR 16 2009

vs.

Case No. 07SN-CC00124

LEVI BLEVINS, ET AL

Defendants,

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JUDGMENT

I. FACTS & PROCEDURAL HISTORY

Count VIII of Plaintiffs 2nd Amended Petition is for a declaratory judgment regarding coverage issues on an insurance policy issued by Defendant Property and Casualty Insurance Company of Hartford (hereinafter "Hartford"). Likewise, Hartford seeks a declaratory judgment on the same coverage issues by counterclaim in its first amended answer to Plaintiffs second amended petition. Plaintiffs and Hartford have filed cross-motions for summary judgment on stipulated facts, asking the Court to decide as a matter of law, the amount of the underinsured coverage policy limits available under the facts of this case in Hartford's auto insurance policy. The Court has read the Hartford policy from cover to cover, the excellent briefs of counsel, and the numerous cases provided by both counsel as well as other cases.

The facts stipulated by the parties and material to the issue before the Court establish that Plaintiffs Marvin and Madeline Pellett, are husband and wife. Hartford issued the applicable insurance policy (Ex. 1 to Joint Stipulated Facts), to Marvin Pellett as the named insured but the policy specifically identified Mrs. Pellett as a driver. The same policy provided insurance coverage for two vehicles, a 2003 Ford Windstar titled only in the name of Mr. Pellett, and a 1995 Ford Taurus titled in both names. A separate premium was charged by Hartford for underinsured coverage for the Taurus and a separate premium was charged for underinsured coverage for the Windstar.

The policy provides the Pelletts up to $100,000.00 in underinsured motorists coverage arising out of its coverage of the Taurus, and it provides

up to $100,000.00 in underinsured motorists coverage to the Pelletts arising out of its coverage of the Windstar. The policy also provides uninsured motorists coverage in a separate section of the policy and a separate premium was charged by Hartford for the uninsured coverage.

On June 13, 2007, Marvin Pellett was operating the Windstar with Mrs. Pellett as a passenger, when it was involved in a collision with a vehicle operated by Defendant Blevins. Mrs. Pellett sustained bodily injury as that term is defined in the policy. Mr. Blevins was insured at the time of the collision by Shelter Insurance with liability policy limits for bodily injury of $50,000.00. Shelter has paid its limits of $50,000.00 to the Pelletts. Mrs. Pellett is now seeking additional insurance proceeds for her bodily injury from the underinsured coverage provided by the terms of the Hartford policy.

The total amount of damages for bodily injury that Mrs. Pellett may ultimately be entitled to recover from Defendant Blevins, has not been decided or agreed upon between the parties. Hartford concedes that Mrs. Pellett is entitled under the terms of its policy, of up to $100,000.00 in underinsured coverage (assuming her claim for bodily injury will support a recovery up to this limit). The dispute in this case is whether or not Mrs. Pellett is entitled to the $100,000.00 in coverage for the Taurus **AND** the $100,000.00 for the Windstar, or a total of up to $200,000.00 in underinsured coverage.

II. STANDARD

Plaintiffs and Hartford have filed cross motions for summary judgment on their respective requests for declaratory judgment. Both parties desire the Court to decide the question of how much underinsured coverage is provided by the Hartford policy and both parties agree there are no genuine issues of material fact that would prevent the Court from deciding this coverage issue as a matter of law.

Summary judgment is appropriate because the interpretation of an insurance policy is a question of law. ***Seeck v. Geico Insurance***, 212 S.W.3d 129, 132 (Mo. banc 2007). The rules of interpretation are well established. Insurance policies are construed by applying "*the meaning that would be attached by an ordinary person of average understanding*" and any ambiguities in a policy are construed against the insurer. *Id.* Language is

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ambiguous if it is open to at least two different reasonable constructions however, an unambiguous policy will be enforced according to its terms. ***Id.*** Policy provisions are not read in isolation but are interpreted in view of the policy as a whole. ***Id.*** at 133.

III. ANALYSIS

There is only one auto policy at issue in this case but it insures two different vehicles. Its DECLARATION PAGE identifies the Taurus as Auto No. 1, and the Windstar as Auto No. 2, and states that "COVERAGE IS PROVIDED ONLY WHERE A PREMIUM IS SHOWN FOR THE AUTO AND COVERAGE." Below this statement, under Coverage C - Underinsured Motorists, the policy basically states that with its coverage of the Taurus, the "**named insured**" (defined in the policy as Mr. Pellett, because he is the named insured on the Declarations Page, and Mrs. Pellett, because she is his spouse and is a resident of his household), are provided underinsured coverage with a Limit of Liability of $100,000.00 per person and $300,000.00 per accident, at a premium cost of $5.00. The policy further states that with its coverage of the Windstar, Mr. and Mrs. Pellett, are provided with underinsured coverage with a Limit of Liability of $100,000.00 per person and $300,000.00 per accident, at a premium cost of $5.00.

As with most insurance polices, the Hartford policy contains, among other things, defined terms, general provisions and endorsements, all in addition to various specific coverage provisions and exclusions to that coverage. In addition to charging a separate premium for underinsured coverage, the Hartford Policy sets forth its coverage terms for uninsured coverage in **Part C**, Section I, and underinsured coverage in **Part C**, Section II. This clear separation between mandated uninsured coverage and voluntary underinsured coverage, eliminates one of the issues giving rise to the stacking controversy in many of the cases cited by both counsel and Hartford's clarity in that regard is commendable. It also enables the Court to focus on the policy language applicable to the issue in this case. That language is as follows:

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III a. The Policy Language

PART C, SECTION II - UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

A. We will pay compensatory damages which an **insured**[1] is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:

1. Sustained by an insured; and
2. Caused by an accident.

. . . .

B. "**Insured**" as used in this Part means:

1. You[2] or any **family member.**
2. Any other person **occupying your covered auto**.
3. Any person for damages that person is entitled to recover because of **bodily injury** to which this coverage applies sustained by a person described in **1.** or **2.** above.

C. "**Underinsured motor vehicle**" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for **bodily injury** under that bond or policy to an **insured** is not enough to pay the full amount the **insured** is legally entitled to recover as damages.

EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for bodily injury sustained:

. . . . . .

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[1] Terms, phrases or words that are specifically defined by the policy, are highlighted in bold type both in this opinion and in the policy.

[2] The policy defines the terms YOU and YOUR to mean the named insured and the spouse if a resident of the same household.

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LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident. This is the most we will pay regardless of the number of:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

.....

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this Part:

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.

2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing such coverage on a primary basis.

3. If the coverage under this policy is provided:

   a. On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis.

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b. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

In addition to the language found in **Part C** - Section II, Underinsured Coverage, the Hartford Policy contains the following language in **Part F**:

PART F - General Provisions.

TWO OR MORE AUTO POLICIES

If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

UNDERINSURED MOTORISTS COVERAGE

If the Underinsured Motorists Coverage Endorsement is attached to this policy, the provisions of the Underinsured Motorists Coverage Endorsement apply except as follows:

A. The first paragraph of the definition of **underinsured motor vehicle** is replaced by the following:

"**Underinsured motor vehicle**" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for **bodily injury** under that bond or policy to an **insured** is not enough to pay the full amount the **insured** is legally entitled to recover as damages.

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B. Paragraph B, of the **Limit of Liability** Provision[3] does not apply.

III b. - Application of Part F - General Provisions

Hartford first argues that the provisions of the **Two or More Auto Policies** language found in Part F - **General Provisions**, clearly and unambiguously limits Mrs. Pellett, as an insured, to $100,000.00 in possible Underinsured Coverage. The Court does not believe the limiting language contained in that general provision applies to this case, because only "*this policy*" is at issue.

However, the next paragraph of Part F - General Provisions entitled **Underinsured Motorists Coverage**, does apply. First it eliminates any set-off against the $50,000.00 paid by Shelter by deleting the set off provisions found in Paragraph B of the **Limits of Liability** Provision of Part C, Section II. Second, it significantly changes the definition of an Underinsured Motor Vehicle:

From:

C. "**Underinsured Motor Vehicle**" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage."

To:

C. "**Underinsured motor vehicle**" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident *but the amount paid for* ***bodily injury*** *under that bond or policy to an* ***insured*** *is not enough to pay the full amount the* ***insured*** *is legally entitled to recover as damages.*" (*emphasis added*).

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[3] This changed Paragraph B of the **Limits of Liability** Provision under Part C, Section II, which stated: *"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. This includes all sums paid under Part A of this policy."* The Court assumes the elimination of this setoff provision is why the parties have stipulated there is at least a minimum of up to $100,000.00 available to Mrs. Pellett instead of just an additional $50,000.00.

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This policy definition basically means that anyone who does not have enough liability insurance coverage on their motor vehicle to pay the full amount of Ms. Pelletts damages, whatever they may be, is by Hartford's definition, underinsured. Put another way, according to Hartford, underinsured does not just mean, the negligent driver did not have as much coverage as Hartford provides. It means the negligent driver did not have enough coverage to pay all of Mrs. Pellett's damages.

Therefore, with respect to the coverage for the Taurus under the policy, Hartford promised to pay to Mrs. Pellett, up to $100,000.00 over the $50,000.00 she received from Shelter, if she is later found to be legally entitled to recover more than $50,000.00 for bodily injury, simply because Blevin did not have enough insurance coverage to "*pay the full amount the insured is legally entitled to recover as damages.*" *(emphasis added).*

Likewise, with respect to the coverage for the Windstar under the policy, Hartford also promised to pay to Mrs. Pellett, up to $100,000.00 over the $50,000.00 she received from Shelter, if she is later found to be legally entitled to recover more than $50,000.00 for bodily injury, simply because Blevin did not have enough insurance coverage to "*pay the full amount the insured is legally entitled to recover as damages.*" *(emphasis added).*

IIIc - The Exclusion section does not apply

The "*coverage*" language quoted above, constitutes a promise on the part of Hartford to pay up to $200,000.00 to Mrs. Pellett, in addition to the $50,000.00 she received from Defendant Blevins insurer. However, as with most insurance policies, what the coverage section giveth, the exclusion section taketh away.

The coverage section of the Hartford underinsured policy, is immediately followed by the **Exclusions** section. The parties agree that none of the exclusions to coverage apply to prevent Mrs. Pellett from recovering the combined $200,000.00 in coverage.

IIId - The Limit of Liability Section does not prevent stacking, in part because it is ambiguous.

The next section in the policy is the **Limits of Liability** section which states in pertinent part:

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LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident. This is the most we will pay regardless of the number of:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

. . . . .

Hartford claims this language prevents the stacking of coverage and argues the most it is obligated to pay, regardless of the number of vehicles or premiums shown in the Declarations, is "*the limit of liability shown in the Declarations for each person*", which is $100,000.00. Hartford claims this provision, unambiguously declares that the most Hartford is obligated to pay to any one person, in any one accident, for all damages arising out of "*bodily injury*" is $100,000.00 no matter how many vehicles are insured under the policy.

The Court disagrees.

In ***Rodriguez v. General Accident Insurance Company***, 808 W.W.2d 379, 383 - 84 (Mo. banc 1991), our Supreme Court found that similar language in the 2nd sentence of this **Limit of Liability** clause, clearly and unambiguously prohibited the stacking of coverage, where as in this case, one policy provided coverage for 2 different autos.

However, in ***Rodriguez***, the insurer did not charge a separate premium for underinsured coverage for each vehicle and the per accident coverage was identical in amount to the coverage provided by the alleged

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underinsured driver. In addition, the definition of underinsured motor vehicle was substantially different, and there was no language in the **Limit of Liability** section such as that found in the first sentence of the Hartford policy.

Moreover, the **Other Insurance** clause, that immediately follows the **Limit of Liability** clause in the Hartford policy, was not at issue in *Rodriguez*. ***Seeck***, *supra* at 133. For these reasons, the Court believes ***Rodriguez*** is distinguishable because the facts, policy language and issues were different.

In ***Lang v. Nationwide***, 970 S.W.2d 828, 832 (Mo. App. 1998), Nationwide included language in its **Limit of Liability** section that the Eastern District found prohibited stacking in "*plain, unequivocal terms*". That provision stated:

> "The insuring of more than one person or vehicle under this policy does not increase our Underinsured Motorist payment limits. In no event will any insured be entitled to more than the highest limit applicable under any policy issued by us." ***Id.***, at 831.

Similar plain and unequivocal anti-stacking language cannot be found in the **Limit of Liability** language of the Hartford policy.

In ***Jackson v. Safeco***, 949 S.W. 2d 130, 133 (Mo. App. S.D. 1997), the Safeco policy had similar language in its **Limit of Liability** section, but it was the following language, not found in Hartford's policy, that the Southern District held, clearly and unambiguously, prohibited stacking:

> "If more than one vehicle is insured under this policy, or if more than one policy issued to the insured applies to the same accident, the limits may not be stacked." **Id.** at 135.

Based on this language, the Southern District would not permit the insured to stack its coverages to meet the definition of an underinsured vehicle. ***Id.*** Even though the definition of an underinsured vehicle is not at issue in this case, the **Limit of Liability** section of the Hartford policy does not contain the kind of clear and unambiguous anti-stacking language found in the Safeco policy at issue in ***Jackson***.

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In ***Farm Bureau v. Barker***, 150 S.W.3d 103 (Mo. App. W.D. 2004), the Western District held that the **"Two or More Auto Policy Limits"** clause found in the general provisions, prohibited stacking, where the insured had purchased two separate auto policies. ***Id.***, at 106 -07. Hartford relies heavily on ***Farm Bureau v. Barker***, as being dispositive of the issues in this matter. The Court disagrees. The **Limit of Liability** language in that policy was not at issue and the **Two or More Auto Policy** provisions of the Hartford policy do not apply in this case.

The Court has been unable to find any precedent holding that language exactly the same or even substantially similar to the **Limit of Liability** language in the Hartford policy, clearly and unambiguously prohibits the stacking of the underinsured coverage for the Taurus and the Windstar in the Hartford policy.

The anti-stacking language in the third sentence of the **Limit of Liability** paragraph that limits Hartford's maximum liability regardless of the number of vehicles, insureds, premiums, etc., appears to only apply to the second sentence which by its terms, is referring to the per accident limit of $300,000.00. In other words, when the second and third sentences are read together, they mean that the maximum amount Hartford will pay, is $300,000.00 (the per accident limit), regardless of the number of insureds, vehicles, policies, or premiums.

It is true that the second sentence is subject to (limited by), the per person limit language of the first sentence which states:

> "The limit of liability shown in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident."

The language in the first sentence has been interpreted to prevent per person limits from being expanded to include any derivative claims for a second person (such as Mr. Pellett), "*arising out of bodily injury sustained by any one person in any one accident.*" ***Remspecher v. Jacobi***, 941 S.W.2d 701 (Mo. App. E.D. 1997).

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This appears to be the purpose of the first sentence. Because the per accident limit in the second sentence is subject to the per person limit in the first sentence, it is clear that Mrs. Pellett is limited to $100,000.00 under the Taurus coverage because that is the limit of liability shown in the Declarations for each person. ***American Family v. Gardner***, 957 S.W.2d 367, 369 (Mo. App. E.D. 1997).

The question is whether or not the first sentence is subject to the anti-stacking language of the third sentence which would limit Mrs. Pellett to $100,000.00 no matter how many insureds, claims, premiums, or vehicles may be shown in the Declarations page of this policy.

The third sentence begins with the word "*this*", stating as follows:

This is the most we will pay regardless of the number of:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

It is not clear if the word "*This*" is referring to the $300,000.00 per accident limits discussed in the second sentence, or the $100,000.00 per person limits discussed in the first sentence, or both. The Court finds that an ordinary insured of average understanding, could reasonably construe the **Limit of Liability** section to only mean that $300,000.00 (the per accident limit), is the most Hartford will pay regardless of the number of insureds, premiums, vehicles, or claims made. The fact that the limiting language includes the "*number of claims made*", would certainly support this interpretation when read by an ordinary insured of average understanding.

Whether or not the anti-stacking language found in the third sentence applies to the first sentence, is open to at least two reasonable yet different constructions. Therefore it is ambiguous. ***Seeck***, supra at 132. In the absence of specific anti-stacking language such as that found in the policies at issue in ***Jackson***, *supra* at 133, or ***Lang***, *supra* at 832, the Court holds the **Limit of Liability** language in the Hartford policy does not clearly and unambiguously prohibit Mrs. Pellett from stacking the underinsured coverage for the Taurus and the Windstar. Doing so will not exceed the per

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accident limit of $300,000.00, which is all Hartford has limited itself to pay regardless of the number of vehicles or premiums shown in the Declarations.

III.e - The Other Insurance section

The **Limit of Liability** section discussed above, is followed by the **Other Insurance** section. The **Other Insurance** section states as follows:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this Part:

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.

2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing such coverage on a primary basis.

Hartford claims the language in paragraph 1 of this section limits its liability to a maximum of $100,000.00. Mrs. Pellett responds by claiming that when the language of paragraph 2 is compared with paragraph 1, it creates an ambiguity that should be resolved in favor of coverage. According to Mrs. Pellett, the $100,000.00 in coverage on the Taurus (which Mrs. Pellett clearly co-owned), is collectible and available for coverage on a primary basis and the additional $100,000.00 in coverage on the Windstar is available as excess under the provisions of paragraph 2 because she did not own the Windstar since her name was not on the title except as a T.O.D. beneficiary.

Hartford claims the language of paragraph 2 does not create an ambiguity and even if it did, paragraph 2 does not apply in this case because Mrs. Pellett either owned the Windstar as Mr. Pellett's spouse, or because the term "**you**" is defined to include Mrs. Pellett.

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To resolve these issues, the first question is whether or not the **Other Insurance** clause even applies in this case. The first paragraph describes when it applies by stating:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this Part:

1. Any ....

The Court believes the phrase "*insurance provided by this Part*", is referring to Part C of the policy and includes both uninsured (Section I of Part C), and underinsured (Section II of Part C). ***Kyte v. American Family***, 92 S.W.3d 295, 300 (Mo. App. 2002). Both types of coverage are in the nature of personal insurance that follows the person. ***Niswonger v. Farm Bureau***, 992 S.W.2d 308, 313 (Mo. App. 1999).

The Court believes the phrase "**...** *coverage that is similar to*", means other applicable and available **underinsured** coverage. Thus, the bodily injury liability coverage provided by Shelter on behalf of its insured Defendant Blevins is not "*other insurance*" as that term is used in this part of the Hartford policy.

The question is:

Does the not just similar, but identical underinsured coverage provisions in the same policy but for different vehicles, constitute "*other applicable insurance available under one or more policies or provisions of coverage...*"?

Put another way, if Mrs. Pellett obtains $100,000.00 for her underinsured coverage on the Taurus, is the underinsured coverage for the Taurus, "*other insurance*" as that term is used in the policy?

If the Pelletts had purchased two completely separate Hartford policies with different policy numbers, one for the Taurus and one for the Windstar, with identical language, and Mrs. Pellett had made a claim for underinsured coverage under the Taurus policy and then claimed additional

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or excess coverage under the separate Windstar policy on the same theory advanced in this case (i.e., she does not own the Windstar), there would be no question about the applicability of the OTHER INSURANCE clause under those circumstances based on the plain language of this clause.

Considering the separate premiums and separate (although identical) coverages for Auto 1 and Auto 2 in this policy, together with Hartford's use of the phrase "one or more policies ***or provisions of coverage***", the Court finds that the **Other Insurance** clause does apply to the facts of this case.

Having determined the **Other Insurance** clause does apply, the next question is whether or not paragraph 1 of this clause, plainly and unambiguously prohibits Mrs. Pellett from claiming $100,000.00 under the coverage for the Windstar, if she has already recovered $100,000.00 in underinsured coverage from the Taurus policy.

When the **Other Insurance** clause is read from the perspective of what coverage is provided by the Hartford policy for the Windstar, it can be reasonably read as follows:

OTHER INSURANCE

IF there is other applicable insurance available (*the underinsured motorist coverage for the Taurus is available and applicable*) under one or more policies or provisions of coverage (*does not have to be a separate policy*), that is similar to the insurance provided by this Part (*underinsured motorist coverage for the Windstar*):

(THEN)

1. Any recovery for damages (*by Mrs. Pellett*), under **all such** (*all underinsured coverages*) policies or provisions of coverage (*in this case there is only one provision of coverage, but it applies to two separate vehicles*) may equal but not exceed the highest applicable limit (*the highest applicable limit in this case is the per person limit, not the per accident limit*), for any one vehicle (*$100,000.00*), under **any** insurance (*not just other insurance or other similar insurance*), providing coverage on either a primary or excess basis.

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The Court believes that paragraph 1, clearly and unambiguously declares that if the **Other Insurance** clause applies, then, regardless of whether the Taurus coverage is deemed primary and the Windstar coverage is excess under the terms of paragraph 2 (assuming Mrs. Pellett does not own the Windstar), the policy will not pay more than $100,000.00 (the highest applicable per person limit for any one vehicle).

The policy states, "Any recovery under all such "*policies or provisions of coverage*", may equal but not exceed **...**". There is nothing ambiguous about the words "*any*" and "*all*". If the phrase "*under all such policies or provisions of coverage*" is not referring to the underinsured coverage for both the Taurus and the Windstar, then as discussed *supra*, the **Other Insurance** clause cannot apply in the first place.

However, Mrs. Pellett claims the language in the 2nd paragraph of the **Other Insurance** clause creates an ambiguity that would permit her to obtain the $100,000.00 in coverage for the Windstar in spite of the language in paragraph 1, because it constitutes insurance provided by Hartford for a vehicle that "*you*" (Mrs. Pellett), did not own.

Paragraph 2 states as follows:

2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing such coverage on a primary basis.

3. ...

It is undisputed that Mrs. Pellett was not a titled owner of the Windstar and that her and Mr. Pellett were married, living together and Mrs. Pellett never signed a renunciation of marital rights. It is also undisputed that the term "**you**" as used in the policy referred to Mr. Pellett (the named insured" **AND** Mrs. Pellett as his spouse because she resided with him. Therefore, **IF** the Windstar was a vehicle that Mr. **and** Mrs. Pellett ("**you**"), did not own, then paragraph 2 clearly applies and the Windstar coverage is excess "*over **any** collectible insurance providing coverage on a primary basis*".

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The second paragraph cannot be interpreted in isolation. It must be interpreted in light of the policy as a whole. ***Chamness v. American Family Mutual Insurance Co.***, 226 S.W.3d 199, 205 (Mo. App. 2007). The Court has read the many cases in which stacking of underinsured coverage was allowed because language similar to that found in paragraph 2 was part of an **Other Insurance** clause. *cf* ***Chamness***, *supra*, ***Seeck***, *supra*, and ***American Family v. Ragsdale***, 213 S.W.3d 51 (Mo. App. 2006).

The same legal reasoning and analysis used to find coverage based on an ambiguity in those cases would apply in this case. However, none of those cases had the same language found in paragraph 1 of Hartford's **Other Insurance** clause. In most, if not all of those cases, the **Other Insurance** clause consisted of only one paragraph and the "*excess coverage*" language found to be ambiguous was found in the last sentence of that paragraph and was preceeded by a disjunctive such as "*however*".

The policy language in the cases reviewed by the Court in which the insured was not permitted to stack coverage despite similar excess coverage language in the **Other Insurance** clause in the policies at issue in those cases, had anti-stacking language in the **Limit of Liability** clause that is not present in the Hartford policy. It appears the reason stacking was not permitted in those cases was based on that additional anti-stacking language. ***Lang***, *supra* at 831; ***Farm Bureau v. Barker***, *supra* at 107.

In ***Farm Bureau v. Barker***, the Western District, reviewed language similar to the Hartford policy, i.e., where the **Other Insurance** clause language was broken down into separate paragraphs similar to the Hartford policy. Although not identical to the language in the Hartford policy, the Western District held the language in the 1st paragraph eliminated the ambiguity found in the policy at issue in ***Niswonger***, *supra*; ***Id***, at 107.

However, the Western District actually based its decision on the **Two or More Auto Policies** exclusion in the general provisions. The observation made by the Western District that the language of the 1st paragraph in the Other Insurance clause at issue in that case "eliminated the ambiguity found in **Niswonger"**, was unnecessary to the Court's decision and appears to be dicta.

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In ***Jackson v. Safeco***, 949 S.W.2d 130, 135 (Mo. App. S.D. 1997), the Southern District found that language in an underinsured **Limit of Liability** clause that specifically stated "*if more than one policy issued to insured applies to the same accident, the limits may not be stacked*", was clear and unambiguous. On that basis, the Southern District did not permit stacking of underinsured coverage.

However, the Southern District in ***Jackson***, permitted the insured to recover underinsured benefits because the Court found that language identical to paragraph 2 in the Hartford policy and found in the **Other Insurance** clause at issue in ***Jackson***, created an ambiguity that entitled the insured to underinsured coverage. ***Id.*** at 136.

The ***Jackson*** court, identified the fact that there was a paragraph 1 in the **Other Insurance** language at issue in that case but does not identify what that language was. The court only says "*There are other provisions in this section which may or may not limit the effect of this language.*" If the language of paragraph 1 in the **Other Insurance** clause at issue in ***Jackson***, contained language substantially similar to the language in paragraph 1 of the Hartford policy, and the Court had still found an ambiguity in favor of coverage, this Court would be compelled to find in favor of Mrs. Pellett based on the holding in ***Jackson*** and similar cases cited above.

However, in the absence of any cases construing the same language as that found in the Hartford policy, the Court must rely on the long established principles of Missouri law used to interpret an insurance policy. In that regard, the Court finds the language in the 2nd paragraph, creates an ambiguity that must be construed in favor of coverage for the insured.

The 2nd paragraph of the Other Insurance clause is as clear in its effect as the 1st paragraph appears to be. Together they read as follows:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this Part:

1. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable

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limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing such coverage on a primary basis.

The second paragraph clearly and unambiguously declares that if Hartford provides insurance for a vehicle that is not owned by both Mr. **and** Mrs. Pellett or is not owned by Mrs. Pellett, then that insurance "*shall be excess over any collectible insurance*". Just as there is nothing ambiguous about Hartford's use of the terms *any* and *all* in paragraph 1, there is nothing ambiguous about Hartford's use of the phrase "*shall be*" and "*any collectible insurance*" in the 2nd paragraph.

The problem with Hartford's policy language, is that instead of plainly stating that multiple underinsured coverages cannot be stacked, like the insurer did in ***Jackson***, *supra*, Hartford uses phrases like "any recovery for damages"; "may equal but not exceed"; and "highest applicable limits". Hartford leaves it to the imagination of the ordinary insured of average understanding to figure out which limits are the "highest applicable" and which coverage is primary and which coverage is excess.

Insurance policies are construed by applying "*the meaning that would be attached by an ordinary person of average understanding*" and any ambiguities in a policy are construed against the insurer. ***Seeck***, at 132. The 1st paragraph of the Other Insurance clause may be easily understood by the Court to be an attempt on the part of Hartford to limit Mrs. Pellett's total recovery for damages under her policy to $100,000.00. However, there is no question in the Court's mind, that the language in paragraph 2, would clearly and unambiguously be understood by an ordinary insured of average understanding, to mean that the underinsured coverage for the Windstar is available as excess coverage over the underinsured coverage for the Taurus.

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Paragraph 1 attempts to limit Mrs. Pelletts total recovery to $100,000.00 while paragraph 2 clearly makes the Windstar coverage excess over the Taurus coverage. They must be read together. Neither paragraph can be read in a vacuum. When read together, the Court finds there is an irreconcilable ambiguity between these two paragraphs that must be construed in favor of coverage. Of note is the fact that Hartford does not state that the provisions of paragraph 2 are subject to the limits of paragraph 1.

Therefore, the Court finds that **IF** Mrs. Pellett did not own the Windstar, then paragraph 2 of the Other Insurance clause applies to provide up to $100,000.00 as excess over the $100,000.00 over the coverage for the Taurus.

III-f. Mrs. Pelletts ownership of the Windstar

The 2nd paragraph of the **Other Insurance** clause provides excess coverage **IF** the Windstar was a vehicle "**you**" do not own. Whether or not Mrs. Pellett was an "**owner**" of the Windstar appears to be a mixed question of fact and law. ***Lightner v. Farmers Insurance Co.***, 789 S.W.2d 487 (Mo. banc 1990). While it may ultimately be a question of law, the Court must interpret the the meaning of the undefined term "**own**" as used in the policy in light of the special circumstances in this case. ***Id.*** at 489.

The parties have stipulated that Mr. and Mrs. Pellett were married, living together, and that Mrs. Pellett had not waived her marital rights. Mr. Pellett bought the Windstar in his own name and financed it in his own name. The parties chose to title the Taurus as co-owners, but Mrs. Pellett is only a T.O.D. beneficiary on the Windstar. Mr. Pellett is the owner of the Hartford policy, and the named insured, while Mrs. Pellett is a named driver. Mr. Pellett was the sole recipient of the proceeds of the property damage to the Windstar. Shelter Insurance did not require Mrs. Pellett to release any claims she may have had to property damage proceeds for damage to the Windstar.

While the issue of whether or not a motor vehicle is owned may involve much more than looking at how the vehicle is titled, the Court finds that under the circumstances of this case and based on the facts stipulated by the parties, for whatever reason, Mr. and Mrs. Pellett consciously chose for Mrs. Pellett to not have a present ownership interest in the Windstar.

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For these reasons, the Court finds that the Windstar was a vehicle for which Hartford provided insurance coverage but which Mrs. Pellett did not own, and Mr. and Mrs. Pellett, together, did not own. Therefore, paragraph 2 of the Other Insurance clause, applies in this case.

IV. CONCLUSION

For these reasons, the Court sustains Plaintiff's motion for summary judgment on Count VIII of her 2nd amended petition for declaratory judgment and overrules Defendant Hartford's motion for summary judgment on its counterclaim for declaratory judgment.

On the sole issue of whether or not, Plaintiff Pellett is entitled to stack her underinsured coverage for the Taurus and the Windstar, the Court finds in favor of Plaintiff.

SO ORDERED.

3-13-09
Date

Judge Mark A. Stephens

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