

IN THE SUPREME COURT  
STATE OF ARIZONA

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

Plaintiff/Appellee,

v.

JACEY LEE ORLANDO,

Defendant/Appellant.

No. CV-23-0228-PR

Court of Appeals, Division One  
No. 1 CA-CV 22-0447

Maricopa County  
Superior Court  
No. CV2020-006088

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**PETITION FOR REVIEW**

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## INTRODUCTION

In a published opinion, the court of appeals incorrectly decided an important question of law in a way that conflicts with its other decisions. The opinion will cause confusion in the lower courts and create illogical results for automobile insurers and insureds.

This Court has frequently addressed questions arising under Arizona's Uninsured/Underinsured Motorist Act ("UMA"), A.R.S. § 20-259.01. The UMA requires insurers to offer customers the right to purchase insurance for losses caused by motor vehicles with no coverage (uninsured or "UM") or with insufficient coverage (underinsured or "UIM").

The UMA works in harmony with the Financial Responsibility Act ("FRA"), which requires motor vehicles operated on public roads to maintain financial responsibility to cover injuries caused to others. *See* A.R.S. § 28-4135; A.R.S. § 28-4001 to -4153. In circumstances in which, the FRA notwithstanding, a vehicle is uninsured or inadequately insured, the UMA "closes the gap" by ensuring insureds have first-party coverage.

One question that arose not long after the UMA's enactment was whether it encompasses off-road vehicles (such as golf carts or other recreational vehicles), when operated off road. In 1982, the court of appeals answered that question in a straightforward way. It analyzed the UMA and the FRA and found the legislature

did not mandate coverage for off-road vehicles. *See Chase v. State Farm Mut. Auto. Ins. Co.*, 131 Ariz. 461, 464–65 (App. 1982). The court bolstered its conclusion with the transportation code, defining “vehicle” and “motor vehicle” as devices operated on public roads. *Id.* at 465–68.

The court reaffirmed its holding in *Chase* a few years later. It reasoned that, because the UMA exists to “close the gap in protection” where the FRA’s purposes would be thwarted, and because the FRA does not apply to off-road vehicles, the UMA does not apply to off-road vehicles either. *West Am. Ins. Co. v. Pirro*, 167 Ariz. 437, 438 (App. 1990). This has been established law in Arizona for over 40 years.

In its opinion below (“Op.”), the court of appeals limited *Chase* and *Pirro* to uninsured off-road vehicles. The court found that when an off-road vehicle has some (but not enough) coverage, the UMA mandates that insurers must offer UIM coverage. In other words, coverage under the UMA for off-road vehicles now turns on the happenstance of whether the vehicle’s owner obtained optional insurance for it.

Even without more, the Court should be skeptical of this holding. The idea that the nature of a motor vehicle under a single statute should turn on whether there is some insurance, or no insurance, is dubious. It is impossible to imagine why the legislature might desire such a strange result. Even accepting the

questionable premise that the legislature intended to extend gap filling UM/UIM coverage to off-road vehicles not even covered by the FRA, one would expect the legislature to require coverage where there is no insurance, not where there is at least some. The court of appeals' result is, accordingly, backwards and defies common sense.

The court of appeals did not grapple with questions of common sense or legislative intent, because it found the language of the UMA to be clear. Specifically, the court found that a clause in a subsection of the UMA dealing with UM coverage—"subject to the terms and conditions of coverage"—means insurers are free to write exemptions into their policies for UM coverage. A.R.S. § 20-259.01(E). Because the UMA does not contain a similar clause for UIM coverage, the court of appeals reasoned, by negative implication, that insurers cannot write exemptions into their policies for UIM coverage. Op. ¶ 17. The Court relied, in part, on *dicta* in *Cundiff v. State Farm Mutual Automobile Insurance Co.*, 217 Ariz. 358 ¶ 14 (2008), suggesting insurers may have greater authority to write UM exclusions than UIM exclusions. Op. ¶ 16.

The court of appeals asked the wrong question; it skipped a step. The threshold question is whether the UMA—the entire UMA—applies to off-road vehicles at all. State Farm is not claiming courts should read into the UMA (from the “subject to” clause or anything else) some authority allowing insurers to

exempt off-road vehicles from UIM coverage. Its argument is much simpler: Off-road vehicles, used off road, are not “motor vehicles” under the FRA, so there is no “gap” to “close” by requiring coverage under the UMA. This was the straightforward holding of *Chase* and *Pirro*, and it should be the straightforward holding here. The court of appeals erred by apparently believing *Chase* and *Pirro* turn on the “subject to” language. *See* Op. ¶ 14. They do not. The *Orlando* opinion directly contradicts the settled, correct holdings in *Chase* and *Pirro*: off-road vehicles used off road are not “motor vehicles” subject to the UMA.

Left undisturbed, *Orlando* will create mischief in the lower courts. The obvious tension between *Orlando* and *Chase/Pirro* will inject uncertainty into the business of writing insurance—an area where uncertainty is highly undesirable. *Orlando* also will open the door for extensive litigation about all manner of mishaps or losses that stretch the definition of “motor vehicle” beyond traditional notions, or do not involve a motor vehicle at all, so long as there is some basis to say there is insurance somewhere that makes it an underinsured, not an uninsured, case (which itself will be litigated).

Such confusion and litigation is unnecessary. Off-road vehicles used off road are not part of the FRA and thus not part of the UMA; the UMA has nothing to say about them because there are no gaps to fill. Insurers may provide coverage for them, but they need not do so. All agree that State Farm declined to do so here.

This Court should accept review, fix the conflict created by *Orlando*, and affirm the straightforward decision of the trial court.

### **ISSUE PRESENTED**

Is an insurer required to offer underinsured motorist coverage under A.R.S. § 20-259.01 for accidents that do not occur on a public road and involve a vehicle designed primarily for off-road use?

### **FACTS**

Orlando was injured on an ATV being operated off road. Op. ¶ 2. The ATV was insured. *Id.* Orlando received policy limits from the driver’s insurer, and then sought UIM coverage under her State Farm policy. *Id.* It is undisputed the policy does not extend UIM coverage to off-road vehicles, unless they are being used on public roads. Orlando claims this policy provision violates the UMA.

In the trial court, State Farm sought a declaratory judgment on coverage. Orlando counterclaimed, alleging breach of the policy and bad faith. On a motion for summary judgment, the superior court agreed the ATV was not an “underinsured motor vehicle” and State Farm did not act in bad faith. The court relied on *Chase* and *Pirro*, which upheld “nearly identical” definitions of covered motor vehicles. Op. ¶ 6.

The court of appeals reversed summary judgment on breach of contract but affirmed on bad faith. The court acknowledged *Chase* and *Pirro* would apply if

the ATV had no insurance coverage. Op. ¶ 15. But the court believed a different result was necessary because the ATV had some coverage. Op. ¶ 16. Without further analysis, the court assumed the reason why off-road vehicles may be exempted from UM coverage is language in § 20-259.01(E), which states that UM coverage is “subject to the terms and conditions” of the policy. Mistakenly believing this language is what permits insurers to exclude off-road vehicles from UM coverage, the court then made its critical error. It concluded the absence of similar language for UIM coverage must mean insurers do not have authority to exclude off-road vehicles used off road from UIM coverage. Op. ¶¶ 16–17. The court did not address the strange incongruity its holding created, because it found the statute’s language to be clear, precluding considerations of public policy. *Id.*

### **REASONS THE PETITION SHOULD BE GRANTED**

#### **The Court of Appeals Incorrectly Decided an Important Issue of Law and Created a Conflict**

Arizona law has never before required automobile insurers to cover off-road accidents involving off-road vehicles. Although *Orlando* recognized that is still the law for liability and UM coverages, it created a new obligation for insurers to offer UIM coverage for off-road vehicles. The court of appeals departed from longstanding precedent that the UMA, necessarily interpreted together with the FRA, does not apply to off-road vehicles. The court’s analysis was unreasonable and inconsistent with its own precedent. Its opinion also creates strange outcomes

not intended by the legislature. Left uncorrected, the court's errors will affect every automobile liability insurance policy in Arizona, and the unstable split in authority created by its opinion will cause unnecessary confusion and litigation under the UMA.

**A. The FRA and UMA Are Designed to Work Together**

*Orlando* conflicts with this Court's longstanding recognition of the interrelatedness between the FRA and UMA. The FRA came first, requiring motorists to purchase liability insurance "to protect drivers in the state against losses engendered by financially irresponsible owners or operators of motor vehicles." *State Farm Mut. Auto Ins. Co. v. Wilson*, 162 Ariz. 251, 253 (1989). Realizing some motorists failed to comply, the legislature passed the UMA, a sequel to the FRA, and required insurers to offer UM coverage. *Id.* Later, because "serious injuries are often caused by insured drivers with inadequate liability limits," the legislature amended the UMA and required insurers to offer UIM coverage. *Id.* at 253–54.

The FRA and UMA are "interwoven" by statute and case law. *State Farm Mut. Auto. Ins. Co. v. Eden*, 136 Ariz. 460, 462 (1983). UM and UIM coverage requirements were meant to "close the gap in protection" under the FRA. *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 104 (1993) (quoting *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 294 (1985)); see also 9 Couch on Ins. § 122:12 (3d ed.)

(recognizing that “[v]arious courts have found that [UM/UIM] was designed to complement the standard liability coverages” and “is also interpreted in conjunction with the Financial Responsibility Acts”). That is exactly what the court of appeals previously recognized in *Chase* and *Pirro* by interpreting the FRA and the UMA *in pari materia* to hold that off-road vehicles are not “motor vehicles” for purposes of insurance coverages. *See also State v. Gates*, 243 Ariz. 451, 453 ¶ 7 (2018) (statutes with similar purposes should be construed together).

**B. “Motor Vehicle” Does Not Include Off-road Vehicles**

An off-road vehicle, when used off-road, is not a “motor vehicle” under Arizona’s automobile insurance statutes. Everyone agrees that the FRA and the UM component of the UMA do not apply to off-road vehicles. That has been firmly established since *Chase*.

In *Chase*, the plaintiff argued the insurer was “not providing the minimum insurance coverage mandated by the UMA” because its policy excluded off-road vehicles from UM coverage. 131 Ariz. at 462–63. Acknowledging the UMA does not define which vehicles must be covered, the court “look[ed] elsewhere to determine the scope of coverage which insurance companies must provide.” *Id.* at 467. Given that “the legislature’s primary concern in the general area of automobile insurance was the protection of motorists using the public highways,”

the court held that excluding off-road vehicles “is not in conflict with the mandates of the [UMA] or the [FRA].” *Id.* at 467–68 (emphasis added).

In *Pirro*, the court again reached the same conclusion because “[t]o hold otherwise would lead to absurd results.” 167 Ariz. at 438. “[S]ince liability insurance need only cover motor vehicles *operated on highways* and, since uninsured motorist coverage is intended to provide the reciprocal or mutual equivalent of automobile liability coverage under the [FRA] . . . it follows that excluding such vehicles from uninsured motorist coverage does not violate the public policy of the State of Arizona.” *Id.*

Although *Orlando* directly conflicts with *Chase* and *Pirro*, it does not purport to overrule them, creating asymmetry and an unstable split requiring this Court’s review. *Chase* and *Pirro* held the UMA does not apply to off-road vehicles at all. By contrast, the opinion below holds that an insurer’s ability to exclude off-road vehicles from coverage under the UMA requires an express statutory authorization. The conflict among these published decisions is reason enough for this Court’s review. *See* ARCAP 23(d)(3). Moreover, the law in Arizona now is that insurers must provide UIM (but not UM) coverage to off-road vehicles that need not even be insured under the FRA. The Court should not allow this result to stand.

**C. There Is No Rational Reason for the Definition of Motor Vehicle to Turn on Whether a Vehicle Is Uninsured Versus Underinsured**

*Orlando* reaches exactly the holding the court of appeals previously warned, in *Pirro*, would lead to absurd results. Worse yet, *Pirro* merely contemplated the absurdity of interpreting two interrelated legislative acts about automobile insurance—the FRA and UMA—to apply to different types of motor vehicles. *Pirro*, 167 Ariz. at 438. The opinion below reaches an even more unreasonable interpretation, which is that requirements within the same statute about automobile insurance—A.R.S. § 20-259.01—apply to different types of motor vehicles.

The unreasonableness of this interpretation is further illustrated by its effects. Consider a person who purchased both UM and UIM coverage. If injured in an off-road accident by an uninsured off-road vehicle, he has no source of recovery. But, if injured by an insured off-road vehicle, he has two sources of recovery. That disparity makes no sense. If anything, it is the opposite of what one would expect from legislation meant to help insureds recover damages for injuries caused by financially irresponsible motorists. Nor is there any rational reason to suspect the legislature intended availability of coverage under the UMA to turn on the happenstance of whether an owner insured the off-road vehicle.

The Court should presume the legislature did not enact a statute that causes absurd results. *See Town of Florence v. Webb*, 40 Ariz. 60, 64 (1932) (statutory interpretation “must reach a result which is reasonable rather than one which will

result in an absurdity”); *In re Estate of Zaritsky*, 198 Ariz. 599, 603 ¶ 11 (App. 2000) (“[W]e presume the framers of the statute did not intend an absurd result and our construction must avoid such a consequence.”).<sup>1</sup>

Neither the court of appeals nor Plaintiff offer any reason to believe the legislature chose to require UIM coverage for off-road vehicles when it did not require UM coverage or liability coverage under the same circumstances. *Pirro*, 167 Ariz. at 438; *Insura Prop. & Cas. Co. v. Steele*, 800 N.E.2d 91, 96 (Ill. Ct. App. 2003) (because UIM coverage is meant to “fill in a gap left by mandatory liability insurance, it would make no sense to interpret the statute to mandate that such coverage be provided to cover vehicles for which even basic liability insurance is not required”).

#### **D. The Court of Appeals Skipped a Crucial Step**

The court of appeals reached its strange result because it skipped the first step in the analysis. The threshold issue for whether an exclusion is valid is “whether the legislature has required the coverage in question.” *Wilson*, 162 Ariz. at 253; *cf. also Lowing*, 176 Ariz. at 103–05. An exclusion is void only when “it

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<sup>1</sup> The court of appeals believed the statute’s language is clear. Op. ¶ 17. There is no language in the UMA, plain or otherwise, precluding insurers from exempting off-road vehicles from UIM coverage. The court inferred a prohibition from the absence of language that appears elsewhere. *Id.* There is no principle of statutory interpretation that blocks the Court from considering absurdity of result in these circumstances. *Lowing*, 176 Ariz. at 103.

removes that which the statute requires to be in the policy.” *Rashid v. State Farm Mut. Auto. Ins. Co.*, 163 Ariz. 270, 275 (1990).

The decision below never considered whether the UMA requires coverage for off-road vehicles. It only considered whether the UMA authorizes an exclusion. Op. ¶¶ 16–20. And, because the UIM subsections do not include the same “subject to” language as the UM subsections, the court held the UMA does not allow the exclusion. Op. ¶ 17. The court’s fundamental error was looking for statutory language to support an exclusion to coverage the statute never required.

The court of appeals’ underlying premise—that “[t]he legislature provided for notable differences” in the UM and UIM subsections—is immaterial. The initial question is what the UMA requires in the first place. Op. ¶ 10. The UMA does not clearly or unambiguously require an insurer to provide coverage for accidents involving vehicles designed primarily for off-road use while not on a public road. The UMA does not define “motor vehicle,” “motorist,” “underinsured motor vehicle,” or “uninsured motor vehicle” at all.<sup>2</sup> As a result, the court of appeals should have applied the reasoning of *Chase* and *Pirro*. Instead, it drew

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<sup>2</sup> Although none of these terms is defined, the legislature has tacitly approved the courts’ use of the FRA to define “motor vehicle” by never defining it differently within the UMA, despite numerous other amendments over the years. See *Galloway v. Vanderpool*, 205 Ariz. 252, 256 ¶ 17 (2003). State Farm notes that while A.R.S. § 20-259.01(D) says “Uninsured motor vehicles” include vehicles insured by an insolvent insurer, that subsection does not otherwise seek to define the term further.

superficial distinctions from those cases and relied on *dicta* from *Cundiff* to treat UM and UIM differently.

**1. *Chase and Pirro Did Not Rely on “Subject To” Language***

*Chase* and *Pirro* squarely hold the UMA does not require an insurer to offer UM coverage for off-road accidents caused by vehicles designed for off-road use. They reached that holding because the UMA does not define “motor vehicle” and it makes sense to read the UMA and FRA together. *Chase*, 131 Ariz. at 465; *Pirro*, 167 Ariz. at 438. Contrary to the court of appeals’ understanding, those cases did not rely on the “subject to” language to justify exclusions from UM coverage. Because the presence of the “subject to” clause in the UM subsection had nothing to do with the holdings in *Chase* and *Pirro*, the absence of that clause in the UIM subsection cannot be a basis for rejecting those cases.

**2. *The Court of Appeals Unnecessarily Creates Confusion About the Meaning of the UM “Subject To” Clause***

The court of appeals also unnecessarily weighed in on the meaning of *Cundiff*. In *Cundiff*, this Court held that an insurer cannot reduce UIM coverage by the amount an insured recovers under workers compensation benefits. 217 Ariz. at 359, ¶ 1. In *dicta*, the Court noted the UM subsection “provides that such coverage is ‘subject to the terms and conditions of that coverage,’” while the UIM subsection does not. *Id.* ¶ 14.

*Orlando* is premised on this distinction, effectively elevating *Cundiff's dicta* to a holding that an insurer's authority to write provisions is fundamentally different for UIM and UM coverages. There are multiple problems with this confusing and controversial aspect of *Orlando*.

First, even if the “subject to” language discussed in *Cundiff* authorizes exclusions from UM coverage, that does not support an interpretation that the threshold requirement for what constitutes a “motor vehicle” and “motorist” depends on the type of coverage (liability, UM, or UIM). *See* 3B Sutherland Statutory Construction § 72:4 (8th ed.) (“Identical words used in different parts of the same, or a similar, statute usually have the same meaning.”). Although the UMA distinguishes between the meaning of “uninsured” and “underinsured,” it never distinguishes between the types of vehicles covered.

Second, and conversely, if *Orlando* is correct about the meaning of the “subject to” language in subsection E in the UMA, then the UMA would give insurers *carte blanche* to exclude any type of vehicle—e.g., sports cars—from UM coverage. Insureds likely would find this result surprising, unwelcome, and inconsistent with many years of decisions. While the implications of the *dicta* in *Cundiff* is an open question, no other Arizona court has adopted *Orlando's* reasoning, which is in conflict with cases invalidating UM exclusions. *E.g. Lowing*, 176 Ariz. at 102.

Finally, whatever *Cundiff* might mean, there was no need for the court of appeals to invoke it here. This case does not turn on the existence of “subject to” language in one part of the UMA but not the other; vehicles used off-road are not covered by the UMA at all.

*Orlando*, accordingly, not only creates a conflict with *Chase* and *Pirro*, it also unnecessarily creates confusion about *Cundiff*. This Court should clarify that “motor vehicle” means the same thing for liability coverage, UM coverage, and UIM coverage, and does not include off-road vehicles when used off road. See *Arizona ex rel. Brnovich v. Maricopa Cty. Community College Dist. Bd.*, 243 Ariz. 539, 542 ¶ 12 (2018) (“[W]e construe the same words with only one meaning if possible.”).

### CONCLUSION

The Court should grant the Petition and affirm the judgment of the superior court.<sup>3</sup>

RESPECTFULLY SUBMITTED this 16th day of October, 2023.

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<sup>3</sup> State Farm requests an award of attorney fees under A.R.S. § 12-341.01.

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IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE FARM AUTOMOBILE INSURANCE COMPANY,  
*Plaintiff/Appellee,*

*v.*

JACEY LEE ORLANDO, *Defendant/Appellant.*

No. 1 CA-CV 22-0447  
FILED 8-15-2023

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Appeal from the Superior Court in Maricopa County  
No. CV2020-006088  
The Honorable Katherine M. Cooper, Judge

**AFFIRMED IN PART; VACATED AND REMANDED IN PART**

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STATE FARM v. ORLANDO  
Opinion of the Court

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**OPINION**

Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Daniel J. Kiley joined.

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**M O R S E**, Judge:

¶1 Jacey Lee Orlando challenges the superior court's grant of summary judgment to State Farm Automobile Insurance Company ("State Farm") on her breach of contract and insurance bad faith counterclaims. We reject State Farm's argument that cases interpreting Arizona's uninsured motorist ("UM") statute compel the superior court's grant of summary judgment on Orlando's underinsured motorist ("UIM") claim. Because Arizona's UIM statute does not allow the off-highway vehicle exclusion allowed under the UM statute, we vacate and remand for further proceedings on Orlando's breach of contract claim. But because Orlando has failed to show any genuine issue of material fact as to bad faith, we affirm summary judgment on that claim.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Orlando, a passenger on an all-terrain vehicle ("ATV"), was injured during a February 2018 rollover accident in California's Imperial Sand Dunes. After receiving policy limits from the driver's insurer, Orlando made an UIM claim on her State Farm automobile insurance policy ("Policy").

¶3 On June 10, 2019, counsel for State Farm wrote Orlando's counsel stating that "it does not appear that [the Policy] provides [UIM] coverage" because the ATV was not an "underinsured motor vehicle" under the Policy:

*Underinsured Motor Vehicle* does not include a land motor vehicle:

2. designed for use primarily off public roads except while on public roads[.]

...

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We will pay compensatory damages for *bodily injury* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*.

The bodily injury must be:

1. sustained by an *insured*; and
2. caused by an accident that involves the operation, maintenance, or use of an *underinsured motor vehicle* as a motor vehicle.

State Farm's counsel cited two cases addressing UM coverage—*Chase v. State Farm Mutual Automobile Insurance Co.*, 131 Ariz. 461 (App. 1982), and *West American Insurance Co. v. Pirro*, 167 Ariz. 437 (App. 1990)—to maintain that, when read together, Arizona's Financial Responsibility Act ("FRA"), A.R.S. §§ 28-4001 to -4153, and Uninsured/Underinsured Motorist Act ("UMA"), A.R.S. § 20-259.01, "do not compel coverage for vehicles that are not intended to be operated on the highways." Stating that it appeared "Arizona courts have already decided this issue in the context of [UM] coverage," State Farm's counsel invited Orlando to provide contrary "information or analysis" if she disagreed with State Farm's conclusion.

¶4 Orlando did not respond. State Farm's counsel followed up in writing four months later, again inviting a response. Seven months after that, State Farm sued seeking a declaratory judgment that the Policy did not provide UIM coverage for the ATV accident. Orlando counterclaimed, alleging breach of the Policy and for bad faith.

¶5 State Farm moved for summary judgment, contending the Policy did not provide UIM coverage because the ATV was not an "underinsured motor vehicle." State Farm also contended Orlando had presented no evidence to support a bad faith claim. Orlando opposed the motion, arguing, as relevant to this appeal, that the Policy definition could not limit UIM coverage because "exceptions to [UIM] coverage not permitted by the [UMA] are void." Orlando also offered a declaration from her expert witness, Frederick Berry, who she contended had detailed "over twenty different explanations from which a reasonable jury could find sufficient evidence to find that State Farm has acted in bad faith."

¶6 The superior court granted State Farm's motion. The court concluded the ATV was not an "underinsured motor vehicle" under the Policy because it was "designed for use primarily off public roads" and the accident did not occur on a public road. The court further concluded the

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UMA did not bar the definition's limitation on UIM coverage because it was "nearly identical to [definitions] approved of in *Pirro* and *Chase*." It further concluded that Orlando had presented "no evidence that State Farm acted unreasonably in the handling of Orlando's claim or knew that it was acting unreasonably or with reckless disregard that such knowledge could be imputed to it." The court also awarded State Farm attorney fees and costs.

¶7 Orlando moved for a new trial, contending *Pirro* and *Chase* did not apply because they addressed UM, not UIM, coverage. She also again cited the Berry declaration to argue fact questions remained as to whether State Farm processed her claim in bad faith. The court denied Orlando's motion. Orlando timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(5)(a).

**DISCUSSION**

¶8 Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review a grant of summary judgment de novo and view the evidence and reasonable inferences in a light most favorable to Orlando as the non-moving party. *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 58, ¶ 9 (2022).

¶9 The interpretation of an insurance contract is a question of law we review de novo. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, ¶ 8 (2008). "[T]he insurer bears the burden to establish the applicability of any exclusion." *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 13 (App. 2000).

**I. Breach of Contract Claim.**

¶10 Two statutory subsections of the UMA govern "uninsured motorist coverage," and "underinsured motorist coverage." See A.R.S. § 20-259.01(E), (G). While similar, the subsections are not identical.

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Uninsured Motorist Coverage	Underinsured Motorist Coverage
<p>"Uninsured motorist coverage", <i>subject to the terms and conditions of that coverage</i>, means coverage for damages due to bodily injury or death if the <i>motor vehicle</i> that caused the bodily injury or death is not insured by a motor vehicle liability policy that contains at least the limits prescribed in § 28-4009. For the purposes of uninsured motorist coverage, an uninsured motorist does not include a person who is insured under a motor vehicle liability policy that complies with § 28-4009.</p> <p>A.R.S. § 20-259.01(E) (emphasis added).</p>	<p>"Underinsured motorist coverage" includes coverage for a <i>person</i> if the sum of the limits of liability under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the total damages for bodily injury or death resulting from the accident. To the extent that the total damages exceed the total applicable liability limits, the underinsured motorist coverage provided in subsection B of this section is applicable to the difference.</p> <p>A.R.S. § 20-259.01(G) (emphasis added).</p>

The legislature provided for notable differences in these two statutory subsections. For example, UM coverage may be "subject to the terms and conditions" of the policy but the UIM subsection allows for no similar limitation. *Id.* And UM coverage provides for damages "caused" by a "motor vehicle" but UIM provides coverage for damages "resulting from [an] accident," without reference to a motor vehicle. *Id.*; see A.R.S. § 20-259.01(D) (defining "uninsured motor vehicles"). The UMA requires every insurer who writes motor vehicle liability policies to offer UIM coverage. A.R.S. § 20-259.01(B); *Brown v. State Farm Mut. Auto. Ins. Co.*, 163 Ariz. 323, 327 (1989). "[T]he legislature intended a broad application of UIM coverage to provide benefits up to the policy limits whenever the insured is not indemnified fully by the available limits of liability." *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 315, ¶ 15 (2000). "[E]xceptions to [UIM] coverage not permitted by the statute are void." *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 360, ¶ 9 (2008) (quoting *Taylor*, 198 Ariz. at 315, ¶ 13).

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¶11 State Farm relies on *Chase* and *Pirro* to support its "underinsured motor vehicle" Policy definition. In *Chase*, the plaintiff was struck by a golf cart that crashed into a model home garage. 131 Ariz. at 462. The plaintiff sought UM benefits, but his insurer denied coverage based on an "uninsured motor vehicle" policy definition similar to the definition at issue here:

[T]he term uninsured motor vehicle shall not include:

. . . .

(A) land motor vehicle designed for use principally off public roads except while being used on public roads . . . .

*Id.* The plaintiff argued the FRA obligated "owners or operators to purchase insurance covering liability incurred both on and off the public highway." *Id.* at 464. While we held that the FRA and UMA should be read together, we concluded the FRA was "silent as to any requirement that insurance policies obtained to provide proof of financial responsibility also cover off-road accidents." *Id.* at 465.

¶12 Because the UMA did not define "uninsured motor vehicle" at that time, we looked to the definition section of Arizona's transportation statutes, which defined "vehicle," in relevant part, as a "device in, upon or by which any person or property is or may be transported upon a public highway" and "motor vehicle" as a "self-propelled vehicle" with exceptions not relevant to this case. *Id.* (quoting A.R.S. § 28-101). We cited several out-of-state cases supporting the conclusion that a vehicle designed for off-road use was not a "motor vehicle" unless it was used on a public road:

[W]e must conclude that the term is intended to include motor vehicles which should be insured under the Act but are not, and motor vehicles which, though not subject to compulsory insurance under the Act, are at some time operated on the public highways. Only in these instances is the uninsured motorists provision serving its intended purpose of complementing the original Act and furthering the financial protection accorded thereby to persons injured by motor vehicles on the public highways. This purpose would not be served by interpreting the uninsured motorists provision so as to cover accidents involving motor vehicles not subject to compulsory insurance and which occur on private property.

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*Id.* at 468 (quoting *Autry v. Aetna Life & Cas. Ins. Co.*, 242 S.E.2d 172, 175 (N.C. Ct. App. 1978)).<sup>1</sup>

¶13 *Pirro* involved a similar "uninsured motor vehicle" definition that excluded from UM coverage vehicles "[d]esigned mainly for use off public roads while not on public roads." 167 Ariz. at 438. We cited the FRA's requirement at that time which required "[e]very motor vehicle operated on any highway in this state . . . be covered by" some form of liability insurance. *Id.* (citing then-A.R.S. § 28-1521(A)). From there, we reasoned that because "liability insurance need only cover motor vehicles operated on highways and," because UM coverage "is intended to provide the reciprocal or mutual equivalent of automobile liability coverage under the [FRA] and automobiles that are not intended to be operated on the highways need not be covered by liability insurance, . . . excluding such vehicles from [UM] coverage does not violate" public policy. *Id.* As the dune buggy at issue in *Pirro* was designed for off-road use and was not on a highway when the accident occurred, we held the insurer was not obligated to provide UM coverage. *Id.* at 438-39.

¶14 The UMA now defines "uninsured motor vehicle" to include, "subject to the terms and conditions of that coverage, . . . any insured motor vehicle if the liability insurer of the vehicle is unable to make payment on the liability of its insured, within the limits of the coverage, because of insolvency." A.R.S. § 20-259.01(D). And the FRA now defines "motor vehicle" to mean "a self-propelled vehicle that is registered or required to be registered under the laws of this state," but only motor vehicles "operated on a highway in this state" are subject to its requirements. A.R.S. §§ 28-4001(3), -4135(A).

¶15 The parties agree (1) the ATV at issue was registered in Arizona as an off-highway vehicle, and (2) the accident occurred in the Imperial Sand Dunes in California. If this case involved UM coverage, then the reasoning of *Chase* and *Pirro*—that insurers need not provide UM coverage for accidents involving vehicles not subject to the FRA's requirements—would apply.

¶16 Orlando points out, however, that UM and UIM coverages "are separate and distinct and apply to different accident situations." A.R.S. § 20-259.01(H). Orlando relies on *Cundiff*, where our supreme court held

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<sup>1</sup> The current FRA exempts golf carts "used in the operation of a golf course or only incidentally operated or moved on a highway." A.R.S. § 28-4132(8).

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that workers' compensation benefits could not be offset against available UIM benefits. 217 Ariz. at 361, ¶ 12. The court distinguished a prior UM case that allowed a similar offset if the insured was fully compensated because "[t]he statutory provision defining UM coverage expressly provides that such coverage is 'subject to the terms and conditions of that coverage,' while the [statutory] provision defining UIM coverage does not provide a similar limitation." *Id.* at 361-62, ¶ 14 (citations omitted) (quoting A.R.S. § 20-259.01(E)); *cf. Terry v. Auto-Owners Ins. Co.*, 184 Ariz. 246, 249-50 (App. 1995) (allowing for a workers' compensation offset provision in an UM policy as long as it did not prevent full recovery of damages).

¶17 The definition at issue in this case is a "term and condition" of the Policy. State Farm nonetheless contends "the same public policy considerations apply to underinsured motorist coverage as to uninsured motorist coverage," citing *Higgins v. Fireman's Fund Insurance Co.*, 160 Ariz. 20, 22 (1989). We reject this argument for two reasons. First, we look to public policy when interpreting a statute only if the statutory language is unclear. *See Liebsohn v. Hobbs*, 254 Ariz. 1, 4, ¶ 10 (2022) (noting courts only consider a statute's "subject matter and purpose" if its language "has more than one reasonable meaning"). The UM statutory subsection provides that coverage may be "subject to the terms and conditions of that coverage." A.R.S. § 20-259.01(E). The UIM statutory subsection does not. A.R.S. § 20-259.01(G). When the legislature includes language allowing conditions for one type of coverage and does not include such language for another type of coverage, "it does so with the intent of ascribing different meanings and consequences to that language." *Workers for Responsible Dev. v. City of Tempe*, 254 Ariz. 505, 511, ¶ 21 (App. 2023) (quoting *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249-50, ¶ 8 (App. 2006)). State Farm does not identify the ambiguity created by the different statutory texts.

¶18 Second, the public policy stated in *Higgins*—that "innocent members of the public who have purchased underinsured motorist coverage are entitled to coverage as if the offending driver was insured in the amount of the underinsured policy limit"—does not aid State Farm in this case. 160 Ariz. at 23. We also stated in *Higgins* that the UMA "does not permit the insurer to void the coverage by . . . exceptions not permitted in the statute." *Id.*; *see State Farm Mut. Auto. Ins. Co. v. Duran*, 163 Ariz. 1, 3 (1989). The only express limit on UIM coverage in the UMA—the anti-stacking provision of A.R.S. § 20-259.01(H)—does not apply. *Am. Fam. Mut. Ins. Co. v. Sharp*, 229 Ariz. 487, 491, ¶ 12 (2012); *see Franklin v. CSAA Gen. Ins. Co.*, --- Ariz. ---, ---, ¶¶ 9-24 (July 28, 2023) (interpreting the anti-stacking provision for UIM coverage). And State Farm does not contend

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Orlando received full compensation from the driver's liability insurance. See A.R.S. § 20-259.01(G) (noting UIM coverage applies "[t]o the extent that the total damages exceed the total applicable liability limits").

¶19 State Farm also cites several cases that permitted UIM insurers to define who is a named insured, contending that "public policy does not restrict the parties' right to agree on who is an insured." *Beaver v. Am. Fam. Mut. Ins. Co.*, 234 Ariz. 584, 586, ¶ 8 (App. 2014) (cleaned up) (quoting *Am. States Ins. Co. v. C & G Contracting, Inc.*, 186 Ariz. 421, 426 (App. 1996)). This is consistent with the text of the UMA, which provides that UIM coverage "extends to and covers all persons insured under the policy." A.R.S. § 20-259.01(B). State Farm cites no UMA language that allows insurers to limit UIM coverage based on the vehicle or vehicles involved in an accident. Cf. *Taylor*, 198 Ariz. at 316, ¶ 16 ("First party UIM insurance follows and protects the person, not the vehicle.").

¶20 For these reasons, we hold that the Policy's "underinsured motor vehicle" definition cannot limit or bar UIM coverage based on the type of vehicle involved. See *Sharp*, 229 Ariz. at 492, ¶ 16 ("Subsection (G) requires an insurer to provide UIM coverage, '[t]o the extent that the total damages exceed the total applicable liability limits.' Any policy provision to the contrary is void and unenforceable."). We therefore vacate the grant of summary judgment on Orlando's breach of contract claim and remand for further proceedings on that claim.

## II. Bad Faith Claim.

¶21 Orlando also challenges the grant of summary judgment on her bad faith claim. An insurer owes a duty to act in good faith for its insured's benefit, and a breach of that duty may result in a claim for the tort of bad faith. *Sobieski v. Am. Standard Ins. Co. of Wis.*, 240 Ariz. 531, 534, ¶ 10 (App. 2016). But "an insurer's reasonable but incorrect policy interpretation does not, by itself, constitute bad faith." *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 215, ¶ 94 (App. 2010). To defeat State Farm's motion for summary judgment, Orlando had to present "sufficient evidence from which reasonable jurors could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable." *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 238, ¶ 22 (2000).

¶22 Orlando relies on Berry's declaration to contend genuine issues of material fact remain as to whether State Farm acted in bad faith.

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Orlando's controverting statement of facts contained two paragraphs discussing Berry's declaration. The first paragraph stated the following:

Berry concluded that "State Farm has misused its power of money, time, superior knowledge and litigation tolerance as it provided sub-standard claim service to [Orlando]. In its claim evaluation and later in its claim investigation, State Farm was not prompt and thorough and did not give equal consideration to the interests of [Orlando] as it gave its own interests."

The cited page from Berry's declaration repeats this same language. Such conclusory statements, however, are insufficient to withstand summary judgment. *See Nolde v. Frankie*, 192 Ariz. 276, 282, ¶ 28 (App. 1998) (stating affidavits that "provide mere conclusory statements" are insufficient to defeat a motion for summary judgment); *Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) ("[A]ffidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment.").

¶23 The second paragraph stated that Berry had "outlined over twenty deficiencies in State Farm's handling of . . . Orlando's claim." But neither that paragraph nor Berry's declaration sets forth specific facts to support any of the alleged deficiencies. *See* Ariz. R. Civ. P. 56(e) (requiring affidavits offered in opposition to summary judgment to "set forth specific facts showing a genuine issue for trial"). For example, Berry stated that he "believe[d] . . . State Farm made an early evaluation of the UIM claim before much claim investigation." He also stated his "belief" that State Farm had set no reserve for Orlando's UIM and bad faith claims. He cited no record evidence to support either of these "beliefs." *See Badia v. City of Casa Grande*, 195 Ariz. 349, 357, ¶ 29 (App. 1999) ("Sheer speculation is insufficient to . . . defeat summary judgment.").

¶24 Berry also opined that, "[i]n [his] experience, insurers purposefully locate matters . . . to be particularly harmful to the insurer or helpful to its client/insured[] outside of the claim file because their contents hardly ever support nonpayment of an insurance claim." He identified no such "matters" in this case and cited no evidence to suggest State Farm "purposefully" removed anything from its claim file. *See Sobieski*, 240 Ariz. at 542, ¶ 45 (rejecting expert opinion that insurer's business policies "'could' or 'might' result in pressure on the claims department because he had seen that happen in other insurance companies").

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¶25 Berry also speculated that State Farm retained a "law-trained" person who "may have been acting as State Farm's adjuster and potential trial witness," but identified no such person. He then speculated this unidentified person "may have been tasked to develop information that is useful to State Farm as it looked for ways to 'deny' the claim and defend any ensuing first-party [sic] 'bad faith' claim litigation." But, again, Berry cites no evidence to suggest any such thing occurred. Berry also generally opined that insurers should not retain "independent adjusters, attorneys, experts or consultants that are biased," but did not point to any evidence of bias in this case. See *Aida Renta Tr. v. Maricopa County*, 221 Ariz. 603, 611, ¶ 19 (App. 2009) ("We will not allow an expert to base a conclusory opinion on no facts.").

¶26 Berry opined that State Farm did not act promptly because it did not correspond until three months after Orlando's counsel sent the March 5, 2019 "demand letter." That letter was not, however, a demand letter. On the contrary, the letter merely put State Farm on "notice of [the] collision in the event that there *should later arise a claim under your policy*, including . . . underinsured motorist . . . claims." (Emphasis added.) Indeed, the letter expressly stated that Orlando was "NOT opening a UM/UIM claim at this time" and that her counsel would "provide [State Farm] with appropriate notice if and when we determine that either UM/UIM may be applicable to this collision." There is nothing in the record showing when, or even if, Orlando later gave such notice. Because the March 5, 2019 letter sent by Orlando's counsel was not a demand letter, the letter triggered no obligation on State Farm's part to respond, promptly or otherwise. Notably, Berry cited this same three-month period as the only support for his opinion that State Farm "never intended to pay [the] UIM claim" and would litigate this case all the way to the Arizona Supreme Court.

¶27 Berry also opined that State Farm "did not make any serious efforts to resolve [Orlando's] claim of insurer bad faith claim handling." Berry, however, cited no evidence to show Orlando disclosed her intent to pursue a bad faith claim before filing her counterclaims in this litigation. He also cited no authority to support his opinion that State Farm's duty to "conduct a prompt, thorough and fair claim investigation and . . . evaluation continues . . . even into claim litigation." He also cited no industry standards governing how an insurer should investigate and evaluate a bad faith claim already in litigation.

¶28 In summary, Berry's declaration offered conclusory allegations, but no specific evidence, to support a finding that State Farm

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acted in bad faith. Accordingly, Berry's declaration did not defeat State Farm's summary judgment motion. *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 520, ¶ 19 (App. 2009) (concluding an expert affidavit that "contain[ed] only speculation and no specific facts demonstrating a material factual dispute" could not defeat summary judgment).

¶29 Orlando also argues that State Farm has violated its obligation to promptly investigate and determine her claim because State Farm has yet "to actually accept or deny [her] claim." Orlando observes that neither of State Farm's letters "actually denied [her] claim," and State Farm "chose not to make a determination as to whether there was coverage" when it filed this action seeking a judicial determination of the issue. By failing to ever "mak[e] a coverage decision," she concludes, State Farm violated its duty "to make a prompt determination of her claim."

¶30 But during the proceedings before the superior court, Orlando based her bad faith claim on her contention that State Farm had wrongfully denied her benefits, not, as she now contends, that State Farm never made a decision. Her counterclaims for breach of contract and bad faith were based on State Farm's alleged "*de facto* denial of benefits." And, in her opposition to State Farm's motion for summary judgment, she cited Berry's declaration to support her position that "a reasonable jury could determine that State Farm acted in bad faith in denying [her] claim." Not until she filed her motion for new trial did Orlando assert that State Farm had not processed and resolved her claim. Based on her positions before the superior court, Orlando waived the argument that State Farm committed bad faith by failing to decide whether to deny her claim. *See Kent v. Carter-Kent*, 235 Ariz. 309, 313, ¶ 20 (App. 2014) (finding argument waived when raised for first time in new trial motion); *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, 593-94, ¶ 25 (App. 2021) ("[L]egal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits." (quoting *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011))).

¶31 We therefore affirm summary judgment on Orlando's bad faith claim.

### III. Attorney Fees.

¶32 State Farm requests reasonable attorney fees incurred in this appeal under A.R.S. § 12-341.01(A). While this case arises out of the Policy,

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in our discretion and because neither party is completely successful on appeal, we deny State Farm's request, without prejudice to the superior court awarding such fees at the conclusion of this case. *See Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 544 (1982) ("[A]n action alleging insurer's bad faith is one 'arising out of a contract' within the meaning of [§] 12-341.01(A)."); *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 221, ¶¶ 13-14 (App. 2012) (holding that an UIM coverage dispute arises out of contract for purposes of A.R.S. § 12-341.01(A)).

**CONCLUSION**

¶33 We affirm summary judgment on Orlando's bad faith claim, vacate summary judgment on her breach of contract claim, and remand for further proceedings. We also vacate the superior court's attorney fees and cost awards because it is not clear at this time who will ultimately be the successful party. The superior court may consider attorney fees and taxable cost applications as appropriate at the conclusion of the proceedings on remand. Orlando is the successful party on balance in this appeal and may recover taxable costs incurred in this court upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA