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6 **ARIZONA SUPREME COURT**

7 State Farm Automobile Insurance
Company,
8
9 Plaintiff/Appellee,
v.
10 Jacey Lee Orlando
11 Defendant/Appellant.

No. CV-23-0228-PR

Court of Appeals No.: 1-CV-CV-22-0447

Maricopa County Superior Court No.:
CV2020-006088

12
13 **SUPPLEMENTAL BRIEF**

14 **A. UNDERINSURED MOTORIST COVERAGE IS NOT THE SAME AS**
15 **UNINSURED MOTORIST COVERAGE AND SHOULD BE TREATED**
16 **DIFFERENTLY.**

17 UIM coverage allows “the consumer to protect himself and family members
18 against the possibility that, in any given accident, there will be... insufficient liability
19 coverage to compensate for the actual damages sustained.” *Taylor v. Travelers Indemn.*
20 *Co. of Am.*, 198 Ariz. 310, ¶ 18 (2000). As the Arizona Supreme Court has repeated
liberally in favor of coverage. *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 294 (1985);

1 *Geyer v. Reserve Ins. Co.*, 8 Ariz.App. 464, 467 (1968) (citing numerous other cases)
2 (“Our Supreme Court has made it clear... that it regards the claims of automobile
3 accident victims to funds created by insurance as interests of the highest protectible
4 order.”). The UIM statute establishes a public policy that every insured is entitled to
5 recover damages he or she would have been able to recover if the underinsured person
6 had maintained an adequate policy. *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 294
7 (1985). For that reason, “exceptions to coverage not permitted by the statute are void.”
8 *Taylor v. Travelers Indem. Co. of America*, 198 Ariz. 310, ¶ 13 (2000).

9 In interpreting the UIM statute, this Court should first look at the text of the statute
10 itself. *Franklin v. CSAA*, 255 Ariz. 409, ¶ 8 (2023). “When the plain text of the statute is
11 clear and unambiguous, it controls unless an absurdity or constitutional violation results.”
12 *Id.* “Only if the statute is ambiguous will the Court look to the context of the statute, the
13 language used, the subject matter, its historical background, its effects and consequences,
14 and its spirit and purpose”. *Id.* This Court has previously declined requests to expand the
15 plain terms of A.R.S. § 20-259.01. *See Wilks v. Manobianco*, 237 Ariz. 443 ¶ 13 (2015).
16 As this Court stated in the Wilks case, “[i]f the legislature wants to amend the statute... it
17 must do so clearly...”. *Id.*

18 Here, A.R.S. § 20-259.01(B) indicates that “[e]very insurer writing automobile
19 liability or motor vehicle liability policies shall also make available to the named
20 insured... underinsured motorist coverage that extends to and covers all persons insured

1 under the policy, in limits not less than the liability limits for bodily injury or death
2 contained within the policy.” The Legislature went on to define underinsured motorist
3 coverage (“UIM”) differently than it did uninsured motorist coverage (“UM”).

4 As the Court of Appeals noted in its decision in this matter:

Uninsured Motorist Coverage	Underinsured Motorist Coverage
<p>6 "Uninsured motorist coverage", 7 <i>subject to the terms and conditions of</i> 8 <i>that coverage</i>, means coverage for 9 damages due to bodily injury or 10 death if the <i>motor vehicle</i> that caused 11 the bodily injury or death is not 12 insured by a motor vehicle liability 13 policy that contains at least the 14 limits prescribed in § 28-4009. For 15 the purposes of uninsured motorist 16 coverage, an uninsured motorist 17 does not include a person who is 18 insured under a motor vehicle 19 liability policy that complies with 20 § 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>

19 See *State Farm v. Orlando*, 256 Ariz. 55, ¶ 10 (2023).

1 The Legislature made clear their intent for UM and UIM coverages to be treated
2 differently when they stated: “[u]ninsured and underinsured motorist coverage are
3 separate and distinct and apply to different accident situations.” A.R.S. § 20-259.01(H).

4 As is clear from the statutory text itself, the Legislature intended for UM coverage
5 to be “subject to the terms and conditions of that coverage” and to apply to a “motor
6 vehicle”, while UIM coverage applies to “*a person* if the sum of the limits of liability
7 under all bodily injury or death liability bonds and liability insurance policies applicable
8 at the time of the accident is less than the total damages for bodily injury or death
9 resulting from the accident.” (emphasis added). Thus, UIM coverage applies to a person
10 “when in another automobile, when on foot, when on a bicycle or when sitting on a
11 porch.” *Higgins v. Fireman’s Fund Ins. Co.*, 160 Ariz. 20, 23 (1989).

12 This difference in treatment of UM and UIM coverage has been illustrated in prior
13 published decisions. *Compare Terry v. Auto-Owners*, 184 Ariz. 246 (App. 1995)
14 (permitting a UM policy offset for worker’s compensation payments) *with Cundiff v.*
15 *State Farm Mut. Auto. Ins. Co.*, 217 Ariz 358 (2008) (not allowing a UIM policy offset
16 for worker’s compensation payments); *see also Schultz v. Farmers*, 167 Ariz. 148 (1991)
17 (permitting a UM policy offset for medical payments paid under the same policy) *with*
18 *Miller v. American Standard*, 759 F.Supp.2d 1144 (D.Ariz. 2010) (not permitting a UIM
19 policy offset for medical payments paid under the same policy).

1 While not explicitly stated, the “accident” the Legislature referred to is one
2 involving a “motor vehicle” where “the sum of the limits of liability under all bodily
3 injury or death liability bonds and liability insurance policies applicable at the time of the
4 accident is less than the total damages for bodily injury or death resulting from the
5 accident”. But, the Legislature failed to define in A.R.S. § 20-259.01 the type of motor
6 vehicle that must be involved for UIM coverage to apply.

7 Keeping in mind Arizona’s public policy, that UM and UIM statutes have a
8 remedial purpose and must be construed liberally in favor of coverage, an off-road
9 vehicle is a “motor vehicle”. A.R.S. § 28-101(87)(a) defines an “off-road recreational
10 motor vehicle” as “a motor vehicle that is designed primarily for recreational
11 nonhighway all-terrain travel and that is not operated on a public highway”. (emphasis
12 added). Additionally, an “all-terrain vehicle” is either “[a] motor vehicle...” or a
13 “recreational off-highway vehicle...”. A.R.S. § 28-101(3). Both an “off-road recreational
14 motor vehicle” and an “all-terrain vehicle” are, by their very definitions, “motor vehicles”
15 and, thus, satisfy the unstated requirement that UIM coverage applies to a “[motor
16 vehicle] accident”.

17 State Farm, however, would have this Court narrowly interpret what constitutes a
18 “motor vehicle” asserting, without statutory basis, that UIM coverage must only apply to
19 motor vehicles that are subject to Arizona’s mandatory minimum insurance laws. To do
20 so, this Court would be required to read into the UIM statute something that the

1 Legislature did not put there – or, as State Farm phrases it, to read the UMA with the
2 FRA *in pari materia*. However, this Court has already indicated, for good reasons, that
3 the UIM statute should not be read *in pari materia* with the mandatory minimum statute.

4 In *Employers Mut. Cas. Co. v. McKeon*, 159 Ariz. 111 (1988) this Court indicated:

5 [W]hile both [the FRA] and [the UMA] deal with aspects of
6 Arizona motor vehicle liability policies, the statutes approach
7 the subject from different perspectives. The 1951 law centers on
8 liability coverage protection of those injured by the insured’s
9 negligence; the later statute concerns uninsured law and now,
also, underinsured benefits protection of the insured. The laws
were enacted at different times to protect different interests.
Thus, an exclusion under liability protection does not require a
similar result for uninsured motorist protection.

10 Therefore, *in pari materia* does not fit the statutory framework
11 here... There being no statutory conflict or ambiguity,
12 application of the *in pari materia* doctrine to two statutes
enacted at different times to deal with different problems,
brings more confusion than enlightenment. [citation omitted].

13 *See also St. Paul Fire and Marine Ins. Co. v. Gilmore*, 168 Ariz. 159, fn. 6 (1991)

14 (“We have previously warned against reading [the FRA and the UMA] *in pari materia*...
15 Our warning, though not always heeded, *West American Ins. Co. v. Pirro*, 167 Ariz. 437,
16 808 P.2d 322 (Ct.App. 1990) remains in effect.”). State Farm asserts that these cases are
17 *dicta* but cite no opinions from any Court that expressly indicated that the FRA and UMA
18 should be read *in pari materia*.

19 In sum, Orlando presents a brightline, easy to follow rule – clearly intended by the
20 Legislature based on the differing statutory language of each respective statute. In UM

1 claims, coverage is afforded “subject to the terms and conditions of that coverage” if the
2 “motor vehicle” was uninsured; but in UIM claims, coverage is afforded to “a person”
3 unless statutorily permissible exceptions apply. Here, an off-road vehicle is a motor
4 vehicle to which UIM coverage applies. The Legislature did not indicate that UIM
5 coverage only applies to those motor vehicles that are required to be insured under
6 Arizona’s mandatory minimum liability coverage laws and this Court should not read
7 into the UIM statute something that the Legislature did not put there.

8 **B. IF THE LEGISLATURE INTENDED TO EXCEPT OFFROAD VEHICLES**
9 **FROM UIM COVERAGE, THE LEGISLATURE COULD HAVE**
10 **EXPRESSLY SAID SO.**

11 UIM coverage “extends to and covers all persons insured under the policy”. A.R.S.
12 § 20-259.01(B). “Underinsured motorist coverage includes coverage for a person if the
13 sum of the limits of liability under all bodily injury or death liability bonds and liability
14 insurance policies applicable at the time of the accident is less than the total damages for
15 bodily injury or death resulting from the accident.”. A.R.S. § 20-259.01(G). Given these
16 broad statements of the availability of UIM coverage to purchasers, this Court has
17 determined that any limitations to UIM coverage must be provided for by statute. See
18 *Taylor v. Travelers Indem. Co. of America*, 198 Ariz. 310, ¶ 13 (2000) (“exceptions to
19 coverage not permitted by the statute are void.”).

20 And the Legislature certainly knew how to limit the applicability of UIM coverage,
if it wanted to do so. In the enacting statute, the legislature provided for specific

1 exceptions from UIM coverage. For example, an insurer “may” – but is not required to –
2 make UIM coverage available when the motor vehicle is used for “public or livery
3 conveyances or rented to others or that are used in the business primarily to transport
4 property or equipment.” A.R.S. § 20-259.01(C). Additionally, “an insurer is not required
5 to offer...[UIM] coverage... in connection with any general commercial liability policy,
6 excess policy, umbrella policy or other policy that does not provide primary motor
7 vehicle insurance...”. A.R.S. § 20-259.01(L).

8 If the Legislature wants to exclude off-road vehicles from coverage, the
9 Legislature certainly knew how to do so. By including some claims and excluding others,
10 the Legislature demonstrated an intent not to exclude off-road vehicles from UIM
11 coverage. *See Southwestern Iron and Steel Industries, Inc. v. State*, 123 Ariz. 78, 79,
12 (1979) (principle of *expression unius est exclusio alterius* dictates that the Legislature’s
13 express treatment of one item of a class and failure to include other items of the same
14 class demonstrates legislative intent not to include the latter items); *Quintero v. Rodgers*,
15 221 Ariz. 536 ¶ 13 (App. 2009) (holding that A.R.S. § 14-3110 barred claims for
16 “hedonic damages” because the Legislature expressly indicated claims for pain and
17 suffering did not survive the death of the claimant, but that A.R.S. § 14-3110 did not bar
18 a claim for punitive damages for a claimant’s estate because all claims, not otherwise
19 excluded, survived the death of the claimant and punitive damages were not excluded
20 under the statute).

1 Here, the Legislature specifically indicated that UIM coverage covered people.
2 While the Legislature made certain exceptions to coverage – off-road vehicles was not an
3 exception specified by the Legislature. If the Legislature wishes to except off-road
4 vehicles form coverage, it certainly knows how to do so.

5 **C. CONCLUSION**

6 The Arizona Supreme Court should affirm the Court of Appeals opinion in this
7 matter and reverse the trial court’s grant of summary judgment to State Farm.

8 Respectfully submitted this 14th day of June, 2024

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11 /s/ Mick Levin
12 Mick Levin
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