IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1516

TRACIE AKERS,

Appellant

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

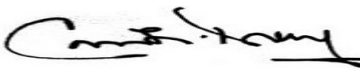
Appellee

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

Honorable Michael D. Huppert

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

DREW LAW FIRM, P.C.



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Cases

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Roth v. Evangelical Lutheran Good Samaritan Soc'y, 886 N.W.2d 601 (Iowa 2016).

Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988).

Talen v. Employers Mut. Cas. Co., 703 N.W.2d 395 (Iowa 2005).

Weatherbee v. Econ. Fire & Cas. Co., 508 N.W.2d 657 (Iowa 1993).

Statutes and Regulations

Iowa Code §516A.2(1)(a).

Iowa R. App. P. 6.907.

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a. *Whether chapter 516A mandates coverage of Tracie Akers' loss of consortium damages.*

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Cases

AFSCME/Iowa Council 61 v. State, 484 N.W.2d 390 (Iowa 1992).

Am. Family Mut. Ins. Co. v. Petersen, 679 N.W.2d 571 (Iowa 2004).

American States Ins. Co. v. Estate of Tollari, 362 N.W.2d 519 (Iowa 1985).

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Swainston v. American Family Mut. Ins. Co., 774 N.W.2d 478 (Iowa 2009).

Western Cas. & Sur. Co. v. General Cas. Co. of Wis., 200 N.W.2d 892, 894 (Iowa 1972).

Statutes and Regulations

Iowa Code §321A.1(11).

Iowa Code §516A.1 (Iowa 1970).

Iowa Code § 516A.2(1)(a).

Iowa R. App. P. 6.907.

Other

1 Antieau, Modern Constitutional Law § 3:22 (1969).

Motor Vehicle Safety Responsibility Act, H.F. 96, 52nd G.A., Ch. 172 (Iowa 1947) (bill book explanation of bill introduced).

ROUTING STATEMENT

This case presents substantial issues of first impression; thus, it should be retained by the Iowa Supreme Court, pursuant to Iowa R. App. P. 6.1101(2)(c).

Iowa law is undetermined as to whether intent to avoid duplication of coverage and enforceability of reduction-of-benefits provisions must be analyzed on an insured-by-insured basis under combined single limit policy language.

The only Iowa precedent addressing coverage of loss of consortium damages and enforceability of UM offsets under a combined single limit policy did not consider the issue in the case *sub judice*; that is: whether the insurer is entitled to reduce coverage of one insured as a result of third-party payments made to a different insured, based on the combined single limit of coverage. *See Condon v. Employers Mut. Cas. Co.*, 529 N.W.2d 630, 632 (Iowa Ct. App. 1995) (considering an offset provision in a UM policy with a combined single limit, and analyzing enforceability of offsets on an insured-by-insured basis). The parties have also been unable to locate persuasive authority in other jurisdictions.

Condon applied *McClure v. Employers Mut. Cas. Co*., 238 N.W.2d 321, 329-30 (Iowa 1976), and held the offsets advanced by EMCC unenforceable because there was no duplication of coverage or benefits payable to two distinct entities. *Condon*, 529 N.W.2d at 632. However, *Condon* was decided before *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 303-04 (Iowa 2000). While *Miller* did not address offsetting coverage of one insured because of third-party payments to another, it did overturn *Lindahl v. Howe*, 345 N.W.2d 548 (Iowa 1984) and declare that "actual duplication of benefits is not required by section 516A.2(1)." *Miller* 606 N.W.2d at 305.

Retention is indicated because disposition of this case requires: (1) a determination of the impact of *Miller*, if any, on the validity of precedent holding offsets for benefits flowing to one insured unenforceable as to coverage of a different insured; and (2) a first impression analysis regarding the enforceability and operation of reduction-of-benefit provisions applied to loss of consortium damages in a combined single limit policy.

STATEMENT OF THE CASE

This action arose out of Appellee EMCC's denial of uninsured motorist benefits under a one million dollar combined single limit policy.

The total damages of all insureds in the multi-party accident was well in excess of the one million dollar ($1,000,000) limit. Yet, over three hundred thousand dollars ($300,000) of the policy limit remains unpaid to any insured.

Appellant Tracie Akers and Appellee EMCC agree there are no genuine issues of material fact in dispute. However, Tracie Akers challenges EMCC's interpretation of both the policy and Iowa law. EMCC seeks to extinguish Tracie Akers' coverage by linking the coverage of her damages to the limit of coverage available to her husband, after permissible offsets to his coverage are applied—despite the fact that the language of its contract does not expressly provide for that result.

Iowa law does not limit insurance coverage for loss of consortium claims to coverage available to the bodily-injured insured, absent contract language to that effect. The EMCC policy does not expressly limit coverage for loss of consortium damages to the limit available to the bodily-injured insured. Rather, it covers all damages sustained by any insured up to the one million dollar ($1,000,000) combined single limit, upon proof of damages. (App. 81 (EMCC's contention under the terms of the policy, "any insured could receive the entire per-accident limit" upon proof of damages); App.

122, ¶15). Therefore, the EMCC policy covers Tracie Akers' independent, stipulated loss of consortium damages up to the $1M combined single limit.

Appellant contends Iowa Code chapter 516A permits only limitation and offset provisions which are designed to avoid duplication of insurance or other benefits flowing to the same insured. While *Miller* clarified that actual duplication is not required by section 516A.2, it reinforced the requirement that reduction-of-benefit provisions must be designed to avoid duplication. 606 N.W.2d at 305-07.

The legislative intent behind chapter 516A was to protect individual insureds—not the policy vendor. The legislature allowed for permissible reduction-of-benefit provisions designed to avoid duplication of insurance or benefits received by individual victims of a tortfeasor's negligence, to prevent a "double recovery" by the same insured. Thus, Appellant contends there must be some *potential* for duplication of coverage and benefits flowing to the same insured, which an enforceable offset provision is designed to avoid. The reduction-of-benefits provisions advanced by EMCC could not have been designed to avoid duplication as required by Iowa Code section 516A.2; therefore, the provisions are rendered ineffective.

By contrast, Appellee EMCC argues limitation and offset provisions permitted by 516A.2 may be applied on a "per accident" basis under a

combined single limit policy. Thus, EMCC contends the provisions at issue were designed to avoid a duplication of payments from any source flowing to the accident, for the protection of the insurer.

After EMCC denied David and Tracie's claims, they filed suit in Polk County district court. (App. 006)[1] EMCC filed a Motion for Partial Summary Judgment, contending it was entitled as a matter of law to: (1) "reduce the uninsured motorist policy limit by sums paid or payable to any insured for the accident," and (2) "limit the recovery (if any) for Tracie Akers' loss of consortium claim to the policy limits that remain available to her husband, David Akers, after all applicable reductions are applied." (App. 028, 031) EMCC argued Iowa law permits offsetting coverage to one insured based on third-party payments to other insureds. (App. 075-081)

David and Tracie resisted, and filed a Cross-Motion for Partial Summary Judgment. (App. 042) The Akers' challenged EMCC's assertion that it was entitled to amass credits for third-party payments to any insured, to eliminate its liability for claims of other insureds receiving no third-party recovery. (App. 051-060) The Akers' contended: (1) the policy construction

[1] The original action was brought by Appellant Tracie Akers and her husband David. It named American Family Insurance (the Akers' personal insurer) as a co-defendant. The Akers' claims against American Family have since been dismissed. David's claims against EMCC have also been dismissed.

advanced by EMCC conflicts with Iowa Code chapter 516A and the common law; (2) Tracie Akers' loss of consortium claim is a separate and distinct claim; (3) coverage available to Tracie Akers is not subject to reduction or offset for third-party recoveries flowing to her husband David, or any other insured; and (4) the EMCC policy is ambiguous with regard to operation of reduction and offset provisions. (App. 051-060, 062-064)

EMCC admitted that Tracie Akers is a separate insured under the policy, and that the policy covers loss of consortium damages regardless of whether the spouse sustained bodily injury. (App. 081). It further stated that under its policy "any insured could receive the entire per-accident limit (upon proof of damages)". *Id*. Both parties agreed that the most EMCC would have to *pay* for all claims arising out of the accident is one million dollars ($1,000,000). (App. 042, ¶5; App. 071-072)

The parties presented their arguments to the Hon. Michael D. Huppert at a January 9, 2018 hearing. On January 18, 2018, the district court entered an Order denying EMCC's Motion for Partial Summary Judgment, finding resolution of the questions of law could be appropriately delayed until after trial. (App. 089-091) At that point, EMCC had paid a total of $267,000 in settlement claims for the two injured students, and Geoffrey Buchanan. (App. 122, ¶ 16) Therefore, $733,000 of the $1M policy remained unpaid.

EMCC and David Akers then reached settlement of David's claim. While David's damages were in excess of one million dollars, after reducing the $1,000,000 limit of coverage by the workers' compensation benefits paid or payable to David Akers, EMCC settled his claim in the amount of $419,214.56. (App. 122, ¶ 17) In reaching this settlement figure, EMCC did not apply an offset for workers' compensation benefits paid or payable to Geoffrey Buchanan against the limit of coverage available to David Akers.

Thus, the cause of action was reduced to Tracie Akers' claim for coverage of her loss of consortium damages under the EMCC policy. The unpaid portion of the EMCC policy then totaled $313,785.44. (App. 123, ¶ 21)

On May 18, 2018, the parties entered a Joint Stipulation of Facts. EMCC and Tracie Akers agreed that a jury would find Ms. Akers' loss of consortium damages to equal the remainder of the unpaid policy Limit, and no genuine issues of material fact were in dispute. (App. 123, ¶ 23(a)) For purposes of the stipulation, EMCC did not seek to apply a credit or offset for any workers' compensation benefits paid or payable to Geoffrey Buchanan, or for any future medical benefits David Akers may receive pursuant to his workers' compensation settlement. (App. 124, ¶ 23(b), (c)).

EMCC contemporaneously filed a Renewed Motion for Summary Judgment and incorporated all of the argument it had advanced in previous filings. (App. 093, ¶ 5) Tracie Akers resisted, and filed a Renewed Cross-Motion for Summary Judgment. (App. 142-47)

At hearing on June 1, 2018, EMCC relied on its contention that the policy and Iowa law limit Tracie Akers' coverage to that available to her husband. EMCC claimed its policy provides that workers' compensation benefits flowing to David eviscerate coverage for Tracie's loss of consortium damages. (June 1, 2018 Hearing Transcript, 7:9-11)

Tracie Akers argued EMCC's construction of its policy violated Iowa law by impermissibly subordinating her independent loss of consortium claim, and limiting her coverage to that of her husband, without express contract provisions supporting such a limitation. (*Id.* at 8:23—10:15; 11:23—12:17; 18:1-7; 22:23—23:5; 23:15-23; 24:4-9) Ms. Akers further noted Iowa cases holding offsets of UM coverage to one insured for benefits actually received by a separate legal entity unenforceable. (*Id.* at 17:22-24; 25:13-21)

In its July 16, 2018 Ruling, the district court summarized the stipulated facts, and the questions presented:

> either the court should determine that the plaintiff's claim stands separate and apart from the claims of her husband (in

> which event, judgment should be entered in her favor for the stipulated amount of that claim), or that her claim is part of her husband's claim and therefore extinguished pursuant to the policy language at issue and Iowa law (resulting in judgment in favor of the defendant).

(App. 161) The court held:

> plaintiff is not entitled to further payment under defendant's policy. While a claim for loss of spousal consortium is the separate property right of the deprived spouse and an independent, nonderivative claim from that of the injured spouse . . . it is treated differently when looking at issues of insurance coverage. A claim for loss of consortium, while considered a personal injury to the deprived spouse, is not a separate bodily injury for purposes of determining limits of insurance coverage.
>
> Accordingly, it is allowable for the defendant to fold in the plaintiff's claim for loss of consortium with that of her injured spouse, again for purposes of the applicable limits of uninsured motorists coverage.

(App. 163) (internal citations omitted). The court further concluded Iowa Code chapter 516A makes it

> clear that an insurer need only provide uninsured motorist coverage at a level consistent with the minimum financial responsibility provided in §321A.1(11). . . . In this case, the defendant has paid out many times over the statutory minimum amount for uninsured coverage from this accident, and the parties have agreed that that coverage has been exhausted as a result of the various payments and offsets identified above. . . . the result here; namely, no ***additional*** coverage being available to the plaintiff, does not violate that statute.

(App. 164-65) (emphasis added).

Appellant Tracie Akers filed a Motion to Reconsider, Enlarge, and Amend, on July 31, 2018. She sought a ruling on whether the EMCC contract was ambiguous with regard to operation of reduction or offset provisions. (App. 168, ¶ 1) Appellant requested the Court amend its statement that the parties agreed that coverage under the policy had been exhausted, to reflect that such stipulation applied only to coverage applicable to David Akers. (App. 168, ¶ 2) Appellant also requested the Court acknowledge that Tracie Akers had received no payment of any kind from EMCC. (App. 169, ¶ 3 *cf.* App. 163, 165 (finding Tracie Akers not entitled to "*further* payment" or "*additional* coverage") (emphasis added)). Finally, Appellant sought conclusions of law on each of the sub-issues that allowed the Court to reach its ultimate conclusion. (App. 170, ¶ 6) The district court denied Appellant's motion with no additional analysis, on August 13, 2018. (App. 172-73)

Tracie Akers appeals the district court entry of summary judgment, holding: (1) Defendant may "fold in the plaintiff's claim for loss of consortium with that of her injured spouse . . . for purposes of the applicable limits of uninsured motorists coverage"; and (2) "exhaustion of [the uninsured motorist] limit through the stipulated payments to the other

claimants and applicable offsets under the policy are not violative of Iowa Code chapter 516A." (App. 163, 165)

STATEMENT OF FACTS

The parties stipulate there are no genuine issues of material fact in dispute. The facts most relevant to the legal issues presented for review are largely incorporated into the relevant events of prior proceedings. These events are presented in the Statement of the Case, above, to comply with Iowa R. App. P. 6.903(2)(e). Remaining background facts are set forth below.

David Akers has been a math teacher for South Hardin High School, in the Eldora-New Providence district, for eighteen years. David obtained his master's degree in educational leadership and principalship at UNI, in 2006. Prior to the accident which gave rise to this cause of action, David was an avid competitive golfer. He also served as the South Hardin High School girls' golf coach and worked as an EMT. David and his wife Tracie have three children.

On May 31, 2015, David drove two golf students and a co-worker to a golf tournament, in a vehicle owned by his employer, Eldora-New Providence Community School District. The vehicle he was driving was struck by a truck driven by an uninsured motorist. (App. 120, ¶¶ 1-3) David

and his co-worker, Geoffrey Buchanan, received workers' compensation benefits for their injuries sustained in the accident. (App. 077; App. 121, ¶ 7; App. 123, ¶20)

David sustained life-changing injuries to his left elbow, right ankle, and head. David's physical limitations impact his daily living, his work, and have dramatically altered his ability to participate in the recreational activities that were once a very significant part of his life and identity. David's brain injury resulted in cognitive impairment and personality changes. The accident also had a profound impact on Tracie's life, as she became caretaker for her young husband, who no longer resembled the man she married.

The vehicle in which David was injured was insured by EMCC. The EMCC policy had a combined single limit of $1,000,000 uninsured motorist coverage. Both David and his wife Tracie were "insureds" under the policy. (App. 081; App. 096, ¶4; App. 097, ¶14; App. 122, ¶14) Yet, EMCC denied David and Tracie's claims for uninsured motorist benefits.

ARGUMENT

I. The District Court erred by concluding Appellant's coverage for her loss of consortium damages was permissibly "folded in" with and limited to coverage available to her bodily-injured spouse.

Appellant preserved error. Appellant raised the issues, contending: (1) her loss of consortium claim is separate and distinct from her husband's claim; (2) the EMCC policy is ambiguous; (3) coverage of her damages under the EMCC policy is not tied to the limit of coverage available for her husband's claims; (4) the "per accident" policy does not subject Appellant's coverage to reductions applicable to her husband's coverage or to those of any other insured; and (5) Iowa law does not limit coverage for loss of consortium damages to that available to the bodily-injured insured, absent contract language to that effect. (App. 056-060, 062-64; App. 148-58) The district court ruled on these issues, and declined to provide more specific analysis upon request. (App. 163; App. 172-73)

Summary Judgment rulings are reviewed for errors at law. *Behm v. City of Cedar Rapids*, ___N.W.___, No. 16-1031, 2018 WL 4178517 at *20 (Iowa 2018); Iowa R. App. P. 6.907. Contract construction and interpretation rulings are also generally reviewed for correction of errors at

law. *Longfellow v. Sayler*, 737 N.W.2d 148, 153 (Iowa 2007); Iowa R. App. P. 6.907.

a. Loss of consortium is a separate and distinct claim, not subject to limitations of the bodily-injured insured's rights.

"It is well established that consortium is the separate property right of each spouse; it is an independent, nonderivative claim." *Huber v. Hovey*, 501 N.W.2d 53, 57 (Iowa 1993); *Grabill v. Adams County Fair and Racing*, 666 N.W.2d 592, 597 (Iowa 2003) (reaffirming *Huber* after amendment to Iowa Code Section 668.3(1)(b)); *Nichols v. Schweitzer*, 472 N.W.2d 266, 271 (Iowa 1991) (observing the deprived spouse has an "independent claim" and the right to sue for loss of consortium belongs to the deprived spouse, not the injured person); *Schwennen v. Abell*, 430 N.W.2d 98, 101-02 (Iowa 1988) (rejecting the argument that a deprived spouse's cause of action is derivative of the injured spouse's claim, and noting the Court's "emphatic confirmation of the deprived spouse's individual ownership of the loss of consortium claim"). All "loss of consortium recoveries pursuant to common law go to the person who incurred the loss." *Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co.*, 543 N.W.2d 591, 595 (Iowa 1996); *Jones v. State Farm Mut. Auto. Ins. Co.*, 760 N.W.2d 186, 188-89 (Iowa 2008).

The right to pursue a loss of consortium cause of action is not derived from the bodily-injured individual's rights, nor is it subject to the limitations of the bodily-injured individual's rights. *See Roth v. Evangelical Lutheran Good Samaritan Soc'y*, 886 N.W.2d 601, 615 (Iowa 2016) (clarifying that the Court's characterization of a loss of consortium action in *Roquet by Roquet v. Jervis B. Webb Co.*, 436 N.W.2d 46, 47 (Iowa 1989) "meant that the consortium cause of action is derived *from a statute*, not that it is derivative of the decedent's rights and therefore subject to the decedent's litigation-related agreements" and ultimately holding adult children's loss of consortium claims not arbitrable merely because the associated wrongful-death action is otherwise arbitrable) (emphasis in original).

The distinct and wholly independent nature of a loss of consortium action for recovery under a contract of insurance is underscored by the fact that the right to recover loss of consortium damages survives even when there is no right to recover for the underlying bodily injury. *Craig v. IMT Ins. Co.*, 407 N.W.2d 584, 586 (Iowa 1987) (holding a loss of consortium claim viable despite the fact that the decedent did not have a cause of action, and observing a loss of consortium claim is an "independent and distinct cause of action wholly separate from any cause of action" available to the decedent); *Hinners v. Pekin Ins. Co.*, 431 N.W.2d 345, 347 (Iowa 1988)

(finding coverage for spousal loss of consortium although the individual sustaining the bodily injury was not an insured, and thus had no right to recovery).

Tracie Akers' loss of consortium claim is "wholly separate from" the cause of action available to David Akers. *Craig*, 407 N.W.2d at 586. David Akers' and Tracie Akers' claims against the uninsured motorist coverage arise out of the same incident, but from two separate and distinct torts. The uninsured motorist owed a separate duty to each spouse, and by breaching those duties, committed two separate torts. *Huber*, 501 N.W.2d at 57 ("a separate duty is owed to each spouse . . . [t]hus, a separate tort is committed when an actor's conduct deprives a spouse of the right to consortium").

Tracie Akers' right as an independent insured to recover pursuant to the EMCC contract is not derived from David Akers' rights, or subject to the limitations of his rights under the policy. The EMCC contract covers Tracie Akers' loss of consortium damages caused by the uninsured motorist's breach of the separate duty owed to her. *Id.*; (App. 138-39).

b. The EMCC policy does not limit coverage for loss of consortium damages to the limit available to the bodily-injured insured.

EMCC elected to provide a combined single limit policy, which entitles all insureds to one million dollars ($1,000,000) of coverage, subject

to a maximum payment for all damages resulting from any one accident. (App. 081 (EMCC's contention that under the terms of the policy, "any insured could receive the entire per-accident limit" upon proof of damages); App. 122, ¶15). EMCC concedes Tracie Akers is a separate insured under the policy, which provides coverage for her loss of consortium damages, regardless of whether she sustained bodily injury.[2] (App. 081)

The EMCC policy covers loss of consortium damages in the same manner it covers all other damages—up to the one million dollar "accident" limit, upon proof of damages. Unlike some split-limit policies, which limit all damages arising from a bodily injury to an "each person" limit of coverage; the EMCC combined single limit policy does not tie the coverage limit for loss of consortium damages to the coverage limit applicable to the bodily-injured insured, any more than to that of all other insureds. The EMCC policy contains the following pertinent coverage provisions:

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[2] The Iowa Supreme Court has expressly rejected the argument that an insured must establish her own bodily injury in order to recover for a loss-of-consortium claim, stating: "Section 516A.1 does not require the insured to have sustained the bodily injury. The statute requires only that there be bodily injury to a person which results in damage to the insured." *Weatherbee v. Econ. Fire & Cas. Co.*, 508 N.W.2d 657, 661 (Iowa 1993) (internal citation omitted); *Jones*, 760 N.W.2d at 190 (same, applying *Weatherbee*); *Hinners*, 431 N.W.2d at 346-47 (finding it "quite clear" that "coverage mandated by Section 516A.1 is not limited to claims for [bodily] injury to the insured; it merely requires policy coverage for damages arising out of 'bodily injury.'").

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". The damages must result from the "bodily injury" caused by an "accident".

***

B. Who Is An Insured

2.

b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

***

D. Limit of Insurance

1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the Limit Of Insurance For Uninsured And Underinsured Motorists Coverage shown in this endorsement.

2. . . . the Limit of Insurance shall be reduced by:

a. All sums paid or payable under any workers' compensation, disability benefits or similar law . . . .

(App. 138-39).

EMCC primarily relies[3] on the contract provisions that define Tracie as an insured "because of" David's bodily injury, and cover her separate and

[3] As noted above, EMCC incorporated all of its previous argument into its Renewed Motion. Its original argument advanced the theory that the policy entitled EMCC to apply offsets for third party payments received by any insured, to reduce the limit of coverage available to any and all other insureds. EMCC eventually abandoned its position that workers' compensation benefits paid or payable to Geoffrey Buchanan offset coverage for Tracie Akers. However, EMCC continues to claim offsets for workers' compensation benefits paid to David Akers completely extinguish

distinct damages that "result from" David's bodily injury, to support its contention that the coverage *limits* for the separate claims of the independent insureds are somehow linked. (App. 082) However, beyond the combined single limit providing a maximum payment for all damages resulting from the accident, no policy terms expressly link the coverage limit for loss of consortium damages to the coverage limit available to the bodily-injured insured.

The EMCC policy does not expressly provide that offsets applicable to the coverage of a bodily-injured insured also reduce the limit of coverage available for loss of consortium damages sustained because of that bodily injury. Nor does the EMCC policy expressly provide that third-party payments to one insured shall be offset against the limit of coverage available for all insureds. While section D(2)(a) indicates sums paid or payable under workers' compensation reduce the Limit of coverage; the contract is ambiguous as to whether the limit of coverage is to be analyzed,

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coverage available to Tracie Akers. The focus of EMCC's argument shifted to its contention that Tracie's coverage is limited to the coverage available to her husband—an apparent reversal from its earlier statement that every insured has an independent right to the $1M coverage limit, upon proof of damages. Ultimately, EMCC contends the provision supporting offset of workers' compensation payments against David Akers' coverage also operates to offset coverage for Tracie Akers' loss of consortium damages.

and offsets are to be applied, on an insured-by-insured basis, or a per-accident basis.

c. The EMCC Policy is Ambiguous.

In undertaking their task to interpret the language of an insurance contract, courts attempt to ascertain the parties' intent from the language, unless the policy is ambiguous. *Hagenow v. Am. Family Mut. Ins. Co.*, 846 N.W.2d 373, 377 (Iowa 2014). "[A]mbiguity exists when, after application of our relevant rules of interpretation, a genuine uncertainty results as to which of two or more meanings is proper." *Id.* (quoting *Am. Family Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571, 576 (Iowa 2004)).

"An insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms." *Benzer v. Iowa Mut. Tornado Ins. Ass'n*, 216 N.W.2d 385, 388 (Iowa 1974). The court will adopt the construction most favorable to the insured when a provision is ambiguous. *Id.*

The EMCC policy, when read as a whole, is fairly susceptible to at least two interpretations with regard to operation of reduction or offset provisions.

i. Uninsured Endorsement.

The uninsured endorsement is ambiguous with regard to applicability

of reduction and offset provisions. Section D(1) sets forth the maximum payment for all damages resulting from any one accident (the "Limit"). The number of insureds and claims does not impact the maximum *payment*. (App. 139).

Section D(2)(a) of the EMCC policy calls for a reduction of the Limit as to "[a]ll sums paid or payable under any workers' compensation, disability benefits or similar law . . . ." The provision does not expressly state that such reduction will apply as to every insured involved in an accident—including those that receive no third-party benefits of any kind. Thus, it may be reasonably interpreted to provide for such reduction only as to the individual insured receiving such benefits.

While Appellant concedes the word "all" is often interpreted expansively, the provision when read with the policy as a whole could be reasonably interpreted to mean: (1) "all sums paid or payable" to an insured offset the limit of coverage only as to the insured actually receiving the payment; or (2) "all sums paid or payable" to any insured involved in the accident reduce the limit of coverage to all other insureds.

The word "any" may serve as many different parts of speech, depending on usage. Because the word "any" can function in so many

different ways in the English language, it has many meanings. The word "any" in section D(2)(a) may operate as an indefinite determiner[4] used to indicate alternatives or an indefinite adjective modifying the series that follows, thereby indicating one or more of the listed items may apply as the object of the preposition.

Such use of the word "any" may indicate the policy Limit applicable to an insured receiving a third-party recovery is subject to reduction for his recoveries of insurance or other benefits of any of the following varieties: (1) sums paid under workers' compensation; and/or (2) sums paid under disability benefits; and/or (3) sums paid under a similar law. This interpretation would prevent "double recovery" and allow the provision to capture all permissible offsets for "insurance or other benefits" in compliance with the Code, without applying reductions to insureds receiving no third-party recovery.

EMCC's construction requires the word "any" to be given the broadest meaning of "every; all" to indicate any such benefits received by any insured involved in the accident would reduce the Limit available to all insureds. However, even if the word "any" is defined as "every; all", it may still be interpreted favorably as to Appellant Tracie Akers, to mean that

4 Indefinite determiners are used to introduce a noun phrase and precede any additional adjectives that modify the noun.

every category of workers' compensation benefits—*e.g.*, both indemnity and medical benefits—are subject to reduction, yet only against coverage of the insured receiving those benefits.

Significantly, EMCC did not offset the limit for all workers compensation benefits paid or payable to any insured against coverage available for all insureds in its settlements with Haley Dilley, Haley Lawrence, Geoffrey Buchanan, and David Akers. (*See* App. 122, ¶¶16, 17, 19; App. 123, ¶20) Nor does EMCC seek to apply an offset for any workers' compensation benefits "paid or payable" to Geoffrey Buchanan against the limit of coverage available for Tracie Akers' loss of consortium damages. (App. 124, ¶ 23(b))

ii. Definition of "Insured".

The policy definition of "Insured" may be reasonably interpreted to require reduction and offset analyses to be conducted separately as to each insured. The definition purports to apply coverage separately to each insured, except with respect to the Limit. (App. 136, Definition G). This provision, fairly susceptible to two different interpretations, states in pertinent part:

> Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

Id. EMCC has not explained how "the coverage afforded applies separately to each insured" if not for purposes of analysis of applicable coverage offsets or exclusions.

This provision could reasonably be interpreted as holding all insureds subject to the maximum total *payment* of $1,000,000 per accident; but clarifying that "coverage afforded applies separately to each insured who is seeking coverage" with respect to reductions or offsets. *Id.* All insureds are independently entitled to the $1M Limit of coverage, upon proof of damages. (App. 081 (EMCC's contention that under the terms of the policy, "any insured could receive the entire per-accident limit" upon proof of damages)). However, applicability of reduction-of-benefits provisions would be analyzed on an insured-by-insured basis. The Limit for each insured would be offset only for benefits received by that insured. After separate coverage calculations were performed, and each insureds' damages established, benefits would be distributed on a pro rata basis.

When considering the EMCC policy as a whole, it is ambiguous with regard to operation of reduction, limitation, and offset provisions. EMCC had a duty to clearly and explicitly define such provisions. *Benzer*, 216

N.W.2d at 388. Given the ambiguity of the policy language, the provisions should be interpreted favorably as to the insureds. *Id.* To avoid the absurd result that benefits flowing to one insured could extinguish the rights of another, the policy should be interpreted to reduce the Limit of coverage available to an insured only if the insured receives third-party benefits.

d. Iowa law does not limit insurance coverage for loss of consortium claims to coverage available to the bodily-injured insured, absent express contract language to that effect.

"In Iowa, insurance coverage is a contractual matter and is ultimately based on policy provisions." *Jones*, 760 N.W.2d at 188 (quoting *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 402 (Iowa 2005)) (internal quotation marks omitted). Iowa law does not automatically apply policy provisions limiting or excluding coverage for a bodily-injured individual to an independent loss of consortium claim. *Jones*, 760 N.W. 2d at 189 (rejecting the insurer's argument that a loss of consortium claim was automatically excluded, as derivative of a bodily injury for which coverage was excluded).

Analysis of coverage limits for loss of consortium damages requires interpretation of the individual policy at issue. *Id.* at 188-89. If an insurer wishes to exclude, limit, or offset coverage for an independent loss of

consortium claim, the plain language of a policy must achieve that end. *See id.* at 189. Enforceable reduction-of-benefits provisions must be designed to avoid duplication of insurance or other benefits. Iowa Code § 516A.2(1)(a) (2015).

The EMCC policy provides that Tracie—like all other insureds—has an independent right to the $1M Limit. (App. 081 (EMCC's contention that under the terms of the policy, "any insured could receive the entire per-accident limit" upon proof of damages)). To relieve EMCC of its obligation to cover Tracie's stipulated damages, the contract must provide a limitation, reduction, or offset provision that: (1) applies to and exhausts Tracie's coverage; and (2) was designed to avoid duplication of insurance or other benefits. Iowa Code §516A.2. No such provision is present in the EMCC policy.

The EMCC contract does not limit coverage for Tracie Akers' damages to the coverage available to David Akers, after offsets to his coverage are applied. As set forth in detail above, the only way the EMCC contract links the coverage limits applicable to Tracie and David Akers is by virtue of the $1,000,000 combined single limit of liability for all damages sustained by any insured, arising from the accident.

The EMCC policy does not expressly provide that offsets applicable to the coverage of a bodily-injured insured also reduce the limit of coverage available for loss of consortium damages sustained because of that bodily injury. Reduction-of-benefits provisions applicable to coverage for a bodily-injured individual do not automatically apply to an independent loss of consortium claim. *Jones*, 760 N.W. 2d at 189. Therefore, the limit of coverage available to compensate Tracie Akers for her separate and distinct, stipulated loss of consortium damages has not been exhausted.

Appellant Tracie Akers contends the district court's conclusion that otherwise independent, nonderivative, loss of consortium claims are "treated differently when looking at issues of insurance coverage" is error. (App. 163) Iowa law does not diminish or subordinate a loss of consortium claim merely because the damages are covered by an insurance policy. To the contrary, a claim for recovery of loss of consortium damages under a contract of insurance remains distinct and wholly independent from the claim of a bodily-injured insured. *Craig*, 407 N.W.2d at 586 (observing a loss of consortium claim is an "independent and distinct cause of action wholly separate from any cause of action" available to the decedent). The right to recover loss of consortium damages pursuant to an uninsured motorist policy survives even when there is no right to recover for the

underlying bodily injury. *Id.*; *Hinners*, 431 N.W.2d at 347 (finding coverage for spousal loss of consortium although the individual sustaining the bodily injury was not an insured, and thus had no right to recovery).

The district court's holding that "it is allowable for [EMCC] to fold in [Tracie Akers'] claim for loss of consortium with that of her injured spouse" because loss of spousal consortium "is not a separate bodily injury for purposes of determining limits of insurance coverage" also misses the mark. (App. 163) Whether Tracie Akers sustained a separate bodily injury would only be pertinent to the coverage analysis if the policy provided a separate coverage limit for damages resulting from each bodily injury. It is undisputed that the EMCC policy does not.

EMCC concedes Tracie Akers' loss of consortium damages are covered under its policy, regardless of whether she sustained a bodily injury. (App. 081) Indeed, it is well settled that Iowa Code Section 516A.1 does not require the insured to have sustained bodily injury; rather, it requires policy coverage for damages arising out of bodily injury. *Weatherbee*, 508 N.W.2d at 661; *Hinners*, 431 N.W.2d at 346-47.

The district court's reliance on two cases that did not consider UM offsets or review combined single limit policies is misplaced. Both *Lepic ex. rel. Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758 (Iowa 1987) and *Dahlke v.*

State Farm Mut. Auto. Ins., 451 N.W.2d 813 (Iowa 1990) are readily distinguishable.

In *Lepic*, the Iowa Supreme Court construed materially different policy language, and did not consider UM offsets. The *Lepic* Court succinctly set forth the question presented, and the parameters of its holding:

> The issue before us . . . is whether the limit of liability as to "each person" in the underinsured motorist or bodily injury liability coverages ***of certain automobile insurance policies*** applies to each person sustaining bodily injury and all claims arising therefrom, or, instead, applies to each person claiming damages as a result of a bodily injury sustained by a covered person. We conclude ***the "each person" liability limit in these policies*** caps recovery for all claims arising from one bodily injury, including therein recovery of loss of consortium damages. . . .
>
> ***The clear language of [the] policies*** limits the insurer's liability for covered damages to [the "each person" limit] for all damages all persons suffer as a result of a bodily injury to one person. Thus, ***under the policies***, the parents' loss of consortium claims must be lumped with their children's claims in determining if the "each person" limit of liability has been exhausted.

Id. at 759, 765 (emphasis added). Thus, the *Lepic* Court considered specific language in split-limit policies and confined its holding to those policies that contain the language the court reviewed.

The split-limit policy language reviewed by the *Lepic* Court provided an "each person" limit "for all damages for bodily injury sustained by any one person in any one accident" and a separate "each accident" limit. *Id.* at

760. The "operative language in the policies [the Court was] called upon to interpret [was] the phrase '*all damages for bodily injury sustained by any one person* in any one accident'"—that is, the provision setting forth the "each person" limit. *Id.* at 761 (emphasis added).

After finding the contract language not ambiguous, the Court applied rules of contract interpretation, and concluded the phrase "sustained by any one person" modified the phrase "for bodily injury." Therefore, the Court concluded the words "all damages for bodily injury sustained by any one person" limited the insurer's liability for all damages arising out of bodily injury to one person to the "each person" limit. *Id.* at 761-62.

The Court reviewed other jurisdictions' treatment of insurance limits for loss of consortium damages in split-limit policies with "each person" language. It found that the majority of other courts reviewing split-limit policies had concluded loss of consortium damages were limited to the amount of coverage for bodily injury to one person, based upon the plain language of the contracts setting forth the "each person" limit. *Id.* at 763-64. Again, the *Lepic* Court expressly limited its holding to the split-limit contract language in the policies it reviewed. *Id.* at 765.

Lepic is not controlling under the facts of the case *sub judice*. Review of the EMCC policy demonstrates the "each person" limit present in *Lepic* is

undeniably absent. Rather, the EMCC policy covers all types of damages sustained by any insured under a single limit. Under the EMCC policy "any insured could receive the entire per-accident limit" upon proof of damages. (App. 081) Moreover, the Iowa Supreme Court has expressly rejected the notion that *Lepic* supports the proposition that an insurer should be entitled to offset monies obtained by one insured against its UM liability to a different insured. *Fort Madison*, 543 N.W.2d at 597, n.6.

The district court's reliance on *Dahlke* is similarly misplaced. (App. 163) The *Dahlke* Court did not address enforceability of UM offsets applicable to a bodily-injured insured, against coverage for the loss of consortium claimant. Rather, *Dahlke* was presented to the court on the insurer's motion for summary judgment, to enforce an endorsement to the Dahlkes' policies that prevented stacking. 451 N.W.2d at 814.

In *Dahlke*, a minor and his parents were both insured by State Farm. The minor was killed by an uninsured motorist. The limits of decedent's policy were paid; his policy was not at issue. *Id*. His parents filed a claim under their coverage, claiming they too sustained "bodily injury" as a result of their son's death, due to psychological effects and associated physiological symptoms of the loss of their child. *Id.* at 814-15.

The question before the *Dahlke* Court was whether loss of consortium qualified as a "bodily injury" under the following coverage provision of the parents' policy:

> We will pay for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.

Id. at 814. The court held "the term 'bodily injury' is clear on its face and does not include the physical manifestations of the parents' loss here." *Id.* at 815.

The district court correctly cited *Dahlke* for the proposition that loss of consortium is not a "bodily injury." However, *Dahlke* does not support the district court's conclusion that "it is allowable for [EMCC] to fold in [Tracie Akers'] claim for loss of consortium with that of her injured spouse . . . for purposes of the applicable limits of insurance coverage." (App. 163) *Dahlke* simply did not consider UM offsets, or address the question of whether coverage for loss of consortium damages is linked to coverage of the bodily-injured individual.

Authority relied on by EMCC and the district court is factually and legally distinguishable. Neither EMCC nor the district court cited controlling authority in support of the proposition that Iowa law automatically limits insurance coverage for loss of consortium claims to the

coverage available to the bodily-injured insured, because such authority does not exist.

The district court erred by concluding EMCC permissibly limited coverage for Tracie Akers' loss of consortium damages to the limit of coverage available to her bodily-injured spouse, absent express policy language to that effect.

II. Coverage and offset provisions as interpreted by EMCC violate Iowa Code chapter 516A.

Error has been preserved on this issue. Appellant raised the issue in Plaintiffs' Memorandum of Authorities in Support of their Resistance to Defendant EMCC's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment, and Plaintiff's Memorandum of Authorities in Support of her Resistance to Defendant's Renewed Motion for Summary Judgment and Renewed Cross-Motion for Summary Judgment. (App. 051-060; App. 154-58) The district court decided the issue, concluding, "exhaustion of [Appellant's uninsured motorist coverage] limit through the stipulated payments to the other claimants and applicable offsets under the policy are not violative of Iowa Code chapter 516A." (App. 165) The court declined to provide further analysis in response to Appellant's Motion to Reconsider, Enlarge, and Amend. (App. 172)

Summary Judgment, contract construction and interpretation, and statutory interpretation rulings are reviewed for errors at law. Iowa R. App. P. 6.907; *Behm*, ___N.W.___, No. 16-1031, 2018 WL 4178517 at *20; *Longfellow*, 737 N.W.2d at 153; *Cote v. Derby Ins. Agency, Inc.*, 908 N.W.2d 861, 864 (Iowa 2018).

a. Statutory mandate.

In 1950, most Iowa drivers were uninsured. The legislature adopted the Motor Vehicle Responsibility Act, codified at Chapter 321A, to offer "protection to the innocent public" from the sometimes severe damage a financially irresponsible and careless driver may inflict. (Motor Vehicle Safety Responsibility Act, H.F. 96, 52nd G.A., Ch. 172) (Iowa 1947) (bill book explanation of bill introduced). The legislature observed the large number of uninsured vehicles "all too frequently left persons, wholly without fault, without any effective remedy . . . ." *Id.*

The new Act required a driver involved in an accident that resulted in bodily injury, death, or damage to property in excess of fifty dollars to guarantee the payment of damages. *Id.* If he failed to do so, the driver's license would be suspended until he had paid the damages and furnished proof of continuing financial responsibility. *Id.*

The 1967 enactment of Chapter 516A required uninsured motorist coverage to be offered in every liability policy. Iowa Code §516A.1 (Iowa 1970). The purpose of mandating uninsured motorist coverage was to ensure protection for victims of uninsured motorists. *Fort Madison*, 543 N.W.2d at 594; *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 909 (Iowa 1973); *Miller*, 606 N.W.2d at 303; *Hagenow*, 846 N.W.2d at 382-83; *Petersen*, 679 N.W.2d at 579; *Benzer*, 216 N.W.2d at 388.

Absent an express waiver, Iowa Code chapter 516A mandates that insurers provide their insureds at least minimum coverage for damages caused by uninsured motorists. *Fort Madison*, 543 N.W.2d at 594; *Miller*, 606 N.W.2d at 303-04. To support a recovery for damage caused by an uninsured motorist, Section 516A.1 requires:

> (1) the injured person is an insured under the insurance policy provisions; (2) the injured person is "legally entitled to recover damages from the owner or operator of an uninsured motor vehicle;" (3) the injury to the insured was "caused by accident;" and (4) the injury arose "out of the ownership, maintenance, or use" of an uninsured motor vehicle.

Hagenow, 846 N.W.2d at 378 (quoting *Petersen*, 679 N.W.2d at 575 n.1 (Iowa 2004)); *Hinners*, 431 N.W.2d at 346.

Coverage mandated under Section 516A.1 is not limited to claims for bodily injury to the insured. Rather, policies must cover damages arising out of bodily injury to any person, if it causes damage to a covered person.

Hinners, 431 N.W.2d at 346-47. Thus, an insured's spousal loss of consortium claim must be covered pursuant to Iowa Code Section 516A.1. *Id.* at 347.

Iowa Code section 516A.1 requires insurers to offer coverage for uninsured motorists with limits "*at least* equal to those stated in section 321A.1, subsection 11." *Id.* (Emphasis added). While the legislative goal may have been to ensure a safety net of coverage, the statutory *minimum* was and is just that—the bare minimum limit of coverage an insurer may offer in compliance with the mandate. The provisions of the Motor Vehicle Responsibility Act do not void provisions of a voluntary insurance contract. *Western Cas. & Sur. Co. v. General Cas. Co. of Wis.*, 200 N.W.2d 892, 894 (Iowa 1972).

Insurers are not required to offer uninsured motorist coverage in excess of the statutory minimum; but they enjoy the freedom to contract to do so. Iowa Code § 516A.2(1)(a); *AFSCME/Iowa Council 61 v. State*, 484 N.W.2d 390, 394 (Iowa 1992) ("Freedom of contract is a basic right, protected under the liberty concept of both the Fifth and Fourteenth Amendment due process clauses.") (quoting 1 Antieau, Modern Constitutional Law § 3:22, at 244 (1969)). Nothing in Chapter 516A prevents insurers from contracting to provide greater coverage. *Benzer*, 216

N.W.2d at 387. "Section 516A.2 specifies the legislation shall not be construed as requiring coverage which exceeds the minimum amount: *it does not set a limit on the maximum protection*." *Id.* (emphasis added).

Chapter 516A does not limit insurers' liability to the minimums prescribed in Section 321A.1(11) if they choose to sell policies with higher limits. Coverage an insurer elects to underwrite and sell may be limited or offset only by provisions which are "designed to avoid duplication[5] of insurance or other benefits." §516A.2(1)(a); *Miller*, 606 N.W.2d at 306.

As the proponent of the reduction-of-benefits provision, EMCC carries the burden to establish its enforceability. *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 121 (Iowa 2007). Enforceable offsets must be both authorized by statute and supported by an express reduction-of-benefits provision in the policy at issue. *Id.* at 117. An insurer cannot offer coverage more restrictive than that required by statute. *Hagenow,* 846 N.W.2d at 377-78; *Jones*, 760 N.W.2d at 189. If a policy contains a reduction-of-benefits

[5] A "duplication" is an identical copy—something "consisting of or existing in two corresponding or identical parts" or "the same as another." https://www.merriam-webster.com/dictionary/duplicate (last accessed May 26, 2018); *see Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 121 (Iowa 2007) (describing the court's task to determine which elements of loss were "*duplicative or the same as*" payments made under a workers' compensation settlement) (emphasis added).

provision not authorized by statute, the provision is rendered ineffective. *Greenfield*, 737 N.W.2d at 117; *Hinners*, 431 N.W.2d at 346.

The district court concluded the interpretation of the policy advanced by EMCC did not violate chapter 516A, because EMCC had paid claims to other insureds in excess of the statutory "per accident" minimum. (App. 164-65) The court reasoned "an insurer need only provide uninsured motorist coverage at a level consistent with the minimum financial responsibility" reflected in the Code. (App. 164)

Appellant respectfully submits the district court misinterpreted the legislative mandate for minimum coverage limits as a limitation on insurers' maximum liability, without analyzing EMCC's contractual liability based on the policy it actually sold. *See Benzer*, 216 N.W.2d at 387 ("Section 516A.1 sets a minimum amount of insurance which must be offered for the insured's protection. Section 516A.2 . . . does not set a limit on the maximum protection" afforded by uninsured motorist coverage.). The statutory minimum of uninsured motorist coverage does not control EMCC's liability here, because it elected to sell a policy with a $1,000,000 limit. EMCC chose to sell a policy with higher limits of coverage in exchange for higher premiums. It must perform under the contract it drafted and sold.

EMCC must cover Tracie Akers' damages up to the $1,000,000 limit; unless it can establish an express reduction-of-benefits provision, authorized by section 516A.2, offsets Tracie's coverage.

b. Enforceability of limitation and offset provisions should be analyzed on an insured-by-insured basis.

Well-established principles of statutory construction require that a statute is construed to give effect to the legislature's intention. *Swainston v. American Family Mut. Ins. Co.*, 774 N.W.2d 478, 482 (Iowa 2009) (quoting *Mortensen v. Heritage Mut. Ins. Co.*, 590 N.W.2d 35, 39 (Iowa 1999)). In its search for legislative intent, the Iowa Supreme Court considers "the objects sought to be accomplished and the evils and mischief sought to be remedied and seek[s] a result that will advance rather than defeat the statute's purpose." *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 333 (Iowa 2005).

Iowa Code Section 516A was enacted to protect the insurance consumer, not the policy vendor. *Fort Madison*, 543 N.W.2d at 594 (citing *Rodman*, 208 N.W.2d at 909). "The fundamental goal of the UM statute is to provide insureds with insurance protection when injured as a result of the fault of an uninsured motorist." *Miller*, 606 N.W.2d at 303 (emphasis added); *Hagenow*, 846 N.W.2d at 382-83 ("It is plain the legislature intended to assure protection to an insured against motorists whose liability

to the insured is not covered.") (quoting *Rodman*, 208 N.W.2d at 909; *Petersen*, 679 N.W.2d at 579 ("our legislature intended to assure protection to an insured against motorists whose liability to the insured is not covered") (internal quotation marks and citations omitted).

The Iowa Supreme Court has acknowledged the "broad intent and purpose of the legislation" requiring insurers to offer uninsured motorist coverage. *Benzer*, 216 N.W.2d at 388. The *Benzer* Court emphasized "the title of chapter 516A: 'Protection Against Uninsured or Hit-And-Run Motorists'" and observed the "coverage which must be offered to every insured is '*for the protection of persons insured* under such policy'." *Id.* (quoting 516A.1) (emphasis added). The Court also recognized the importance of focusing on the legislative intent to protect the insured when grappling with the interpretation of uninsured motorist policies:

> It is not the purpose of the uninsured motorist law to provide coverage for the uninsured vehicle, but its object is to afford the insured additional protection in event of an accident. Here, [the insurer] does not stand in the shoes of [the tortfeasor], the uninsured motorist. Its policy does not insure [the tortfeasor] against liability. It insures [the victim] and others protected under the policy against inadequate compensation.

Id. (quoting *Horne v. Superior Life Ins. Co.*, 123 S.E.2d 401, 404 (1962)).

Consistent with its intent to protect the insurance consumer, the legislature allowed for permissible limitation, offset, and exclusion

provisions designed to prevent windfall, double recoveries by the same insured. *See id.* at 387 ("Section 516A.2, by equating 'insurance' with 'benefits' arguably could be construed as expressing *only* a legislative intent to prohibit the pyramiding of separate coverages to recover more than the actual damages.")(emphasis added); *Miller*, 606 N.W.2d at 310 (*Cady, J., dissenting*) ("The legislature knew multiple insurance policies often come into play, and permitted the exclusion to avoid the duplication of uninsured motorist benefits that would otherwise occur when more than one policy of insurance provides uninsured motorist coverage.")

Coverage an insurer elects to underwrite and sell may be limited or offset only by provisions which are "designed to avoid duplication of insurance or other benefits." § 516A.2(1)(a). Given the "broad protective design of the legislature" enforceability of limitation and offset provisions should be analyzed on an insured-by-insured basis, to assess whether such provisions are designed or intended to avoid duplication of benefits received by an individual insured. *See Benzer*, 216 N.W.2d at 391 (construing a contract of insurance with "the broad protective design of the legislature" and concluding a limitation clause allowed the insurer to avoid paying damages only to the extent the plaintiffs actually received payment from other insurance).

Appellant concedes uninsured motorist coverage is applied with a "narrow coverage view" in mind; thus, third-party recoveries received by an insured are deemed duplicative of uninsured coverage applicable *to the same insured*. *Greenfield*, 737 N.W.2d at 115; *see also Davenport v. Aid Ins. Co. (Mutual)*, 334 N.W.2d 711 (Iowa 1983) (upholding an offset for a third-party recovery of tort damages flowing to the same insured seeking coverage under the policy). However, *Greenfield* does not support the proposition that benefits flowing to one insured may reduce the policy limit available to a different insured, for damages resulting from the same accident.

In *Greenfield*, the Court considered whether an injured employee's recovery under her employer's underinsured policy may be reduced by workers' compensation benefits she received for injuries arising out of the accident. 737 N.W.2d at 115. The Court compared the law with regard to under- and uninsured motorist coverage, observing: "[a]ny recovery from a third party is 'duplicative' in the context of uninsured motorist coverage, while only payments that cover the same type of injury are 'duplicative' of underinsured motorist coverage." *Id.* at 118. With this language, the *Greenfield* Court acknowledged third-party recoveries are duplicative of uninsured coverage for the insured receiving the third-party recovery.

The Iowa Supreme Court has explained its approval of offsets based on intent to avoid duplication "of course, assumes the monies sought to be offset by the insurer were received by the party or entity seeking to recover UM benefits." *Fort Madison*, 543 N.W.2d at 594; *see also, e.g. Gentry v. Wise*, 537 N.W.2d 732, 736 (Iowa 1995) (upholding a reduction provision "where other benefits are *available to the insured*") (emphasis added).

In *Fort Madison*, a mother and father were killed in a one-car accident. They were survived by a minor child. The father was the driver, and intoxicated at the time of the accident. He was an uninsured motorist for the purposes of the claim asserted by the mother's estate. The mother and child were covered by a UM policy that contained a setoff clause for proceeds of any settlement or judgment the injured person obtains from a liable party. The child's conservator obtained a settlement of a dramshop claim, arising from the child's damages for loss of consortium. The father's estate also transferred assets to the child's conservator. 543 N.W.2d at 591-93.

The mother's estate seeking UM benefits was not a beneficiary of or a party to the child's settlement. Similarly, the estate was not a beneficiary of the child's related probate disbursement and had no interest in those proceeds. The district court dismissed the mother's estate's action for

uninsured benefits, finding offsets for sums received by the insured child equaled or exceeded the applicable UM coverage limits. *Id.* at 593.

The *Fort Madison* Court reversed the district court's application of offsets to coverage available to the mother's estate, holding the provisions of the UM policy were unenforceable, because there could be no "double recovery" for the mother's estate based on recoveries by the child. *Id.* at 595-96. While the claims and recoveries were related by the underlying accident, coverage to the mother's estate could only be offset by monies received by her estate. Significantly, the *Fort Madison* Court rejected application of *Lepic*, aptly observing it did not involve UM offset issues, and concluding *Lepic* did not support the insurer's argument that it should be entitled to offset monies obtained by one insured against its UM liability to a different insured. *Id.* at 597, n.6.

Like the mother's estate in *Fort Madison*, Tracie Akers is not a beneficiary of or a party to the other insureds' workers' compensation benefits or settlements. *See id.* at 593. Her loss of consortium claim is a separate and distinct claim against the "each accident" policy limit, not subject to reduction or offset for benefits flowing to other insureds. There is no *potential* for "double recovery" or "duplication" of her coverage based on

insurance or benefits flowing to other insureds. Therefore, the reduction and offset provisions as advanced by EMCC are unenforceable.

Insurance coverage for loss of consortium damages is not duplicative of a workers' compensation recovery by a separate legal entity. *McClure*, 238 N.W.2d at 329-30; *Condon*, 529 N.W.2d at 631-32; *see also Greenfield*, 737 N.W.2d at 124 (finding, in an underinsured context, a husband's loss of consortium award not duplicative of his injured wife's workers' compensation settlement). Provisions purporting to offset workers' compensation benefits paid or payable to one individual against the UM coverage of a separate and distinct legal entity are unenforceable.[6] *McClure*, 238 N.W.2d at 329-30; *Condon*, 529 N.W.2d at 631-32. Such provisions could not be designed to avoid duplication, because there is no potential for duplication, or "double recovery" for an insured receiving no other benefit, insurance, or settlement of any kind.

In *McClure*, workers' compensation benefits were paid to a surviving spouse, who also served as the administrator of the decedent's estate. 238 N.W.2d at 323. The administrator brought a claim against the uninsured motorist coverage. *Id.* The workers' compensation death benefit never

[6] As set forth in the Routing Statement, the impact of *Miller* on the holdings of *McClure*, *Condon*, and *Fort Madison* is unclear.

became a part of the estate of the deceased; therefore, the administrator had received no benefits.[7] *Id.* at 329.

The *McClure* Court considered whether a provision purporting to offset benefits paid to the widow against coverage payable to the administrator was permissible under Section 516A.2. *Id.* at 328-330. It held the provision unenforceable, concluding that even when two separate and distinct legal entities are embodied by the same individual, benefits flowing to one entity cannot duplicate insurance received by another entity. *Id.*

In *Condon*, the decedent sustained injuries caused by an uninsured motorist while in the course of his employment. 529 N.W.2d at 631. He received workers' compensation benefits for several weeks, and ultimately died from his injuries. *Id.* After his death, his surviving spouse continued receiving workers' compensation benefits. *Id.* Like the plaintiff in *McClure*, the surviving spouse served as administrator of her late husband's estate, and filed a wrongful death action. *Id.*

The insurer intervened as the provider of uninsured coverage and the motorist was dismissed. The matter proceeded as the administrator's claim for benefits under the combined single limit UM policy. The insurer

[7] The *McClure* Court distinguished a Tennessee case where workers' compensation benefits and uninsured motorist benefits were both payable to the surviving widow, resulting in a duplication of benefits flowing to one individual. 238 N.W.2d at 329.

appealed a district court ruling that disallowed an offset of the workers' compensation benefits paid or payable to the surviving spouse from the uninsured policy limits. *Id.* at 630-32.

The Iowa Court of Appeals analyzed enforceability of the offset provisions in the combined single limit policy.[8] The *Condon* Court affirmed the district court, applying *McClure*, holding proceeds flowing to the administrator of the husband's estate could not duplicate workers' compensation benefits payable to the surviving spouse. *Id.* at 632.

From the 1967 enactment of chapter 516A through 1999, the Iowa Supreme Court consistently held section 516A.2 authorized reduction-of-benefits provisions to prevent actual duplication. In 1984, The Iowa Supreme Court concluded the "legislature intended only to authorize insurers to exclude coverage for contingencies in which duplication actually occurs." *Lindahl*, 345 N.W.2d at 551. It reasoned:

> The broad mandate of coverage under section 516A.1 would mean little if an insurer could defend any exclusion of coverage by asserting it was designed to prevent a possible duplication of insurance or other benefits without regard to whether such duplication occurs. We do not believe the legislature intended such a result.

Id.

[8] While the policy at issue in *Condon* was a combined single limit policy, the insurer did not argue it was entitled to offsets based on the combined single limit.

The *Lindahl* Court held an owned-but-not-insured policy exclusion was not authorized by section 516A.2 and violated Iowa Code section 516A.1. *Lindahl*, 345 N.W.2d at 549.[9] The Court observed disposition of the case was not controlled by precedent in which potential duplication was found to exist, because the policy did not identify what insurance or benefits the exclusion was designed to avoid duplicating. *Id.* at 551.

After *Lindahl*, the legislature modified section 516A.2, but left the language interpreted in *Lindahl* unchanged, seemingly acquiescing to the Court's interpretation. However, sixteen years later, in a 4-3 decision, the Iowa Supreme Court overturned *Lindahl*, to hold "actual duplication is not required under section 516A.2(1)." *Miller*, 606 N.W.2d at 306. Rather, enforceable reduction-of-benefits provisions must be "*intended* to or have the *purpose* of avoiding duplication of benefits." *Id.* at 305-06 (emphasis in original).

[9] In *Lindahl*, State Farm insured the plaintiff's automobile in a policy providing uninsured motorist coverage. The plaintiff was injured by an uninsured motorist while operating his motorcycle. *Id.* While the conditions for mandatory coverage were present, State Farm sought to defeat coverage under its exclusion because the plaintiff's uninsured motorist coverage was purchased in a policy for a different vehicle than the one he occupied at the time of the accident. *Id.* at 550. The insurer defended its exclusion provision, claiming it was authorized by section 516A.2.

As in *Lindahl*, the *Miller* Court considered enforceability of an owned-but-not-insured exclusion. However, unlike the plaintiff in *Lindahl*, the injured motorist in *Miller* had expressly rejected the offer of uninsured coverage in the policy for the motorcycle he was driving at the time of the accident. *Id.* at 302-03. The plaintiff had a separate policy for a different vehicle, issued by defendant Westfield Insurance Company, which provided uninsured coverage. *Id.* However, the Westfield policy excluded uninsured coverage for automobiles owned by the insured, but not covered under the liability policy. *Id.* at 303. Thus, the *Miller* Court considered enforceability of an exclusion as applied to a single insured.

The four-Justice majority in *Miller* concluded that requiring actual duplication was contrary to the statutory language chosen by the legislature. *Id.* at 305. The Court held the exclusion was enforceable because if the insured had purchased the UM coverage offered under his motorcycle policy, there would have been a duplication of UM coverage to the same insured. *Id.* at 307. The Court found "[i]t was this anticipated duplication that the exclusion was intended to avoid." *Id.* at 307.

Justice Cady penned a robust dissent joined by Justices Larson and Snell. The dissent rejects the *Miller* majority's conclusion that the *Lindahl* decision failed to properly apply the rules of statutory construction to

accurately discern the legislative intent of sections 516A.1 and 516A.2. *Id.* at 307. Justice Cady noted the result in *Lindahl* was the majority rule in other jurisdictions that had addressed the question under similar statutes, and had been followed by other jurisdictions since the decision was made. *Id.* at 307-08. He further emphasized that the Iowa legislature had acquiesced to the *Lindahl* Court's interpretation. *Id.* at 307-08. The dissent opined:

> *Lindahl* did not read the word "designed" out of section 516A.2, nor did it mischaracterize the policy of section 516A.1 by describing it as a "broad mandate of coverage." *Lindahl* properly observed that the legislature had a purpose in enacting section 516A.1 which would be lost if insurers could use exclusions in the manner now articulated by the majority. Thus, *Lindahl* properly observed that there must be some actual, not fanciful potential for duplication of insurance or benefits, which the exclusion is designed to avoid.

Id. at 309.

While the *Miller* majority abandoned the requirement for actual duplication, it reinforced the requirement that reduction-of-benefits provisions must be designed to avoid duplication—that is, they must be "*intended* to or have the *purpose* of avoiding duplication" of benefits. *Id.* at 305 (emphasis in original). The Court found the exclusion provision at issue satisfied the duplication requirement because *duplication could and would have occurred* if the plaintiff had purchased uninsured motorist coverage under his motorcycle policy. *Id.* at 307. Thus, *Miller* did not abandon the

requirement that there must be some *potential* duplication that an enforceable reduction-of-benefits provision is intended to avoid. *Id.*

Appellant concedes that no actual duplication is required post-*Miller*.[10] However, the reduction-of-benefits provision as advanced by EMCC is nevertheless unenforceable because there is simply no *potential* for duplication of benefits received by the same insured, which the provision could be designed to avoid. Insurance coverage for one insured's losses could never result in *duplication* of benefits received by a different insured for separate and distinct damages.

The EMCC provision purports to apply offsets for virtually any third-party payment, payable to any insured, to reduce the limit of insurance available to every insured, for any kind of loss resulting from the same accident. Allowing insurers to offset a combined single limit of coverage in this manner renders the uninsured coverage illusory for those insureds receiving no payment of any kind, from any source. *See American States Ins. Co. v. Estate of Tollari*, 362 N.W.2d 519, 522 (Iowa 1985) (finding liability coverage exhausted by other insureds cannot enter the underinsured calculation because it is illusory as to the insured bringing the claim).

[10] It is undisputed that no actual duplication exists between workers' compensation payments made to David Akers and uninsured coverage applicable to Tracie Akers' separate loss of consortium damages. (App. 075, 083)

EMCC contends its contract complies with chapter 516A, because the terms are designed to avoid duplication of payments from any source flowing to an accident. (App. 076-080). This interpretation allows for exclusions and offsets which were designed to protect insurance companies from paying claims in the most catastrophic accidents, by amassing credits for payments made by other entities that flow to any insured involved in an accident, to the detriment of insureds who receive nothing.

Under this scheme, injured Iowans receiving no benefits of any kind would be disenfranchised, despite the fact that they have no power or standing to influence the recoveries by other insureds. The net afforded by EMCC's interpretation of the law has gaping holes through which too many innocent Iowans may fall.

Coverage offset provisions as interpreted by EMCC could only comply with the Code if the legislative intent behind 516A was to protect the policy vendor at the expense of individual insureds. Acceptance of EMCC's interpretation would depart from 45 years of Iowa Supreme Court precedent. *Rodman*, 208 N.W.2d at 909 (observing chapter 516A was enacted to protect the insurance consumer—not the policy vendor). While *Miller* demonstrated that this protection is not without limit, the protection belongs to the individual insured.

To comply with the legislative intent to protect insurance consumers, enforceability of limitation and offset provisions must be analyzed on an insured-by-insured basis, to assess whether such provisions are designed to avoid potential duplication of benefits received by an individual insured.

CONCLUSION

Tracie Akers' loss of consortium claim is a separate and distinct claim, not derived from nor limited to David Akers' rights. Iowa law does not automatically link coverage available for loss of consortium damages to the rights of the bodily-injured person. Such a connection may only be established by virtue of express contract language, which is not present in the EMCC policy.

To give effect to the legislative intent to protect victims of uninsured motorists, determination of the intent or purpose to avoid duplication must be analyzed on an insured-by-insured basis. Reduction-of-benefit provisions advanced by EMCC could not be designed to avoid duplication, and are thus unenforceable.

Tracie Akers does not seek a double recovery, but merely one recovery within the remaining policy limit, in the amount of her stipulated damages. By contrast, Appellee EMCC seeks to exploit permissible

limitations intended to prevent a duplicative or "windfall" award to a single insured, to defeat legitimate claims for separate and distinct losses of other insureds. EMCC's construction of the policy conflicts with the fundamental legislative goal of chapter 516A and yields more restrictive coverage than that mandated by the legislature; thus, its reduction-of-benefit provisions are rendered ineffective.

Appellant respectfully requests the Court to construe the provisions of the ambiguous EMCC contract in her favor, and conclude the policy does not limit coverage for her loss of consortium damages to the limit applicable to her husband after offsets to his coverage are applied. In the event the Court concludes the EMCC policy offsets Tracie Akers' coverage in the amount of third-party benefits received by any other insured, Appellant respectfully requests the Court hold such reduction-of-benefit provisions unenforceable, as in violation of Chapter 516A. Finally, Appellant seeks entry of judgment against EMCC in the amount of her stipulated damages.[11]

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument on the submission of this case.

[11] The parties stipulated Tracie Akers' damages would equal the remainder of the unpaid benefits under the EMCC policy: $313, 785.44. (App. 123, ¶ 23(a))

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2), because this brief has been prepared in a proportionately spaced typeface using Times New Roman in size 14 font and contains 11,938 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

_____ October 22, 2018

Lindsay Hecht Strosche Date

PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that on the 18th day of January, 2019, she electronically filed the above named document with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa R. Elec. P. 16.315(1)(b), this constitutes service of the document for purposes of the Iowa Court Rules.

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