IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-1516
Polk County No. LACL134883

TRACIE AKERS,

Plaintiff-Appellant,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY
Defendant-Appellee,

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL D. HUPPERT

DEFENDANT-APPELLEE'S FINAL BRIEF AND CONTINGENT REQUEST FOR ORAL ARGUMENT

Jason T. Madden AT0004973
Thomas M. Boes AT0001048
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 243-4191
Fax: (515) 246-5808
E-Mail: madden.jason@bradshawlaw.com
E-Mail: boes.thomas@bradshawlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE
EMPLOYERS MUTUAL CASUALTY COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law **Page(s)**

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES

I. EMCC'S CONSTRUCTION AND APPLICATION OF THE POLICY'S LIMIT OF INSURANCE AND REDUCTION-OF-BENEFITS PROVISIONS COMPORTS WITH IOWA CODE CHAPTER 516A, LEGAL PRECEDENT, AND THE CLEAR AND UNAMBIGUOUS POLICY LANGUAGE.

Case Law

Amish Connection, Inc. v. State Farm Fire & Cas. Co., 861 N.W.2d 230 (Iowa 2015)

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

Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252 (Iowa 1972)

Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals, 919 N.W.2d 6 (Iowa 2018)

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002)

Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494 (Iowa 2013)

Cox v. Iowa Dep't of Human Servs., 920 N.W.2d 545 (Iowa 2018)

Daley v. United Servs. Auto. Ass'n, 541 A.2d 632 (Md. 1988)

Davenport v. Aid Ins. Co. (Mut.), 334 N.W.2d 711 (Iowa 1983)

English v. Pretti, No. W2001-01657-COA-R3CV, 2002 WL 31414093 (Tenn. Ct. App. Oct. 24, 2002)

Faeth v. State Farm Mut. Auto. Ins. Co., 707 N.W.2d 328 (Iowa 2005)

Fitzgerald v. State, 260 N.W. 681, 682 (Iowa 1935)

Flood Control Dist. of Maricopa Cty. v. Gaines, 43 P.3d 196 (Ariz. Ct. App. 2002)

Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co., 543 N.W.2d 591 (Iowa 1996)

Gentry v. Wise, 537 N.W.2d 732, 737 (Iowa 1995)

Glick v. Chocorua Forestlands Ltd. P'ship, 949 A.2d 693 (N.H. 2008)

Greenfield v. Cincinnati Ins. Co., 737 N.W.2d 112 (Iowa 2007)

Hagenow v. Am. Family Mut. Ins. Co., 846 N.W.2d 373 (Iowa 2014)

Harmon v. State Farm Mut. Auto. Ins. Co., 232 So. 2d 206 (Fla. Dist. Ct. App. 1970)

Hornick v. Owners Ins. Co., 511 N.W.2d 370 (Iowa 1993)

Hoyt v. Gutterz Bowl & Lounge L.L.C., 829 N.W.2d 772 (Iowa 2013)

Jahnke v. Deere & Co., 912 N.W.2d 136 (Iowa 2018)

Lane v. State Farm Mut. Auto. Ins. Co., 992 S.W.2d 545 (Tex. App. 1999)

Lepic By & Through Lepic v. Iowa Mut. Ins. Co., 402 N.W.2d 758 (Iowa 1987)

Lesikar v. Moon, 237 S.W.3d 361 (Tex. App. 2007)

Matthess v. State Farm Mut. Auto. Ins. Co., 548 N.W.2d 562 (Iowa 1996)

McClure v. Northland Ins. Companies, 424 N.W.2d 448 (Iowa 1988)

McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321 (Iowa 1976)

Miller v. Westfield Ins. Co., 606 N.W.2d 301 (Iowa 2000)

Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co., 959 S.W.2d 864 (Mo. Ct. App. 1997)

Moore v. State Farm Mut. Ins. Co., 710 S.W.2d 225 (Ky. 1986)

Moore v. Virginia Fire & Marine Ins. Co., 69 Va. 508 (1877)

Pitts v. Farm Bureau Life Ins. Co., 818 N.W.2d 91 (Iowa 2012))

Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759 (Iowa 2016)

Sallee v. Stewart, 827 N.W.2d 128 (Iowa 2013)

Schultze v. Landmark Hotel Corp., 463 N.W.2d 47 (Iowa 1990)

Southwest Georgia Fin. Corp. v. Colonial Am. Cas. & Sur. Co., 397 F. Appx. 563 (11th Cir. 2010)

State v. Romer, 832 N.W.2d 169 (Iowa 2013)

United States v. Fleet, 498 F.3d 1225 (11th Cir. 2007

Wormington v. City of Monett, 204 S.W.2d 264 (Mo. 1947)

Wright v. Scott, 410 N.W.2d 247 (Iowa 1987)

Veach v. Farmers Ins. Co., 460 N.W.2d 845 (Iowa 1990)

Statutes and Rules

Iowa Code § 516A.1

Iowa Code § 516A.2

Iowa Code § 321A.1(11)

Tenn. Code. § 56-7-1205

Other Authorities

Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance*, § 14.2A. (Rev. 2d Ed. 1999)

II. PLAINTIFF TRACIE AKERS' CLAIM FOR LOSS OF CONSORTIUM IS INEXTRICABLY LINKED TO DAVID AKERS' BODILY INJURY CLAIM AND THERE CAN BE NO SEPARATE RECOVERY.

Case Law

Craig v. IMT Ins. Co., 407 N.W.2d 584 (Iowa 1987)

Creamer v. State Farm Mut. Auto. Ins. Co., 514 N.E.2d 214 (Ill. App. 1987)

Dahlke v. State Farm Mut. Auto. Ins. Co., 451 N.W.2d 813 (Iowa 1990)

Essick v. Barksdale, 882 F. Supp. 365 (D. Del. 1995);

Gaines v. Standard Accident Ins. Co., 32 So.2d 633 (La. Ct. App.1947)

Keene v. Travelers Indem. Co. of Ill., 73 F. Supp. 2d 638 (W.D. Va. 1999)

Lepic By & Through Lepic v. Iowa Mut. Ins. Co., 402 N.W.2d 758 (Iowa 1987)

Saltzberg v. Lumbermens Mut. Cas. Co., 94 N.E.2d 269 (Mass. 1950)

Other Authorities

Annotation, *Construction and Application of Provision In Liability Policy Limiting the Amount of Insurer's Liability to One Person*, § 4[a], 13 A.L.R. 1228 (1967 & Supp. 1994)

ROUTING STATEMENT

This case should be routed to the Iowa Court of Appeals because it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

A. Nature of the Case.

A motor vehicle accident gave rise to uninsured motorist claims submitted to Defendant-Appellee Employers Mutual Casualty Company ("EMCC"). Relevant to the present case an uninsured motorist claim was submitted to EMCC by David Akers, who was the driver of the vehicle struck by the uninsured tortfeasor, and by his wife, Tracie Akers, who was not involved in the motor vehicle accident but who made a claim solely for loss of consortium damages. Tracie Akers is the only Plaintiff-Appellant in this action.

At the time of the motor vehicle accident, David Akers was driving a vehicle owned by his employer, Eldora-New Providence Community School District, and was doing so in the course of his employment. EMCC issued an applicable insurance policy to the Eldora-New Providence Community School District, which included business auto coverage and a coverage form for Iowa Uninsured and Underinsured Motorists Coverage. The insurance

policy issued by EMCC is a combined single limit policy. Therefore it does not include separate per person limits with an overarching per accident limit, but rather it includes a single limit of $1 million that applies to all injuries and damages that result from one accident—no matter the number of insureds or the number of claims.

The uninsured motorist claim made by David Akers sought recovery for bodily injury damages. The uninsured motorist claim of Tracie Akers sought recovery of loss of consortium damages that exclusively arose because of the bodily injuries suffered by David Akers in the motor vehicle accident. In accordance with the terms of the combined single limit insurance policy issued by EMCC and consistent with relevant legal authorities EMCC evaluated the claims, including the insurance policy's "Limit of Insurance" and reductions to the Limit of Insurance as allowed by the terms of the contract.

Consistent with Iowa law, the insurance policy issued by EMCC included a reduction-of-benefits provision stating the entire Limit of Insurance "shall" be reduced by "all" and "any" workers' compensation benefits paid or payable to an insured as a result of the subject motor vehicle accident. The parties have stipulated that the amount of workers' compensation benefits David Akers either has received or will receive is

$580,785.44. Based on the clear contractual language the Limit of Insurance, including the limit available for Tracie Akers' loss of consortium claim, must be reduced by this amount. EMCC has further paid an additional $419,214.56 pursuant to a General Release and Settlement Agreement executed by David Akers relating to the uninsured motorist claim. Once the reduction-of-benefits provision was applied to the Limit of Insurance, in accordance with the policy language, and the amount paid by EMCC to settle with David Akers was applied against the reduced Limit of Insurance, the combined single limit of the insurance policy issued by EMCC was exhausted. Because the Limit of Insurance has been exhausted, Plaintiff Tracie Akers is not entitled to any additional recovery.

In addition, pursuant to the language of the insurance policy and relevant Iowa case law, Plaintiff Tracie Akers' loss of consortium claim must be included as a part of her husband's bodily injury claim. As the district court observed in granting summary judgment in favor of EMCC, for purposes of uninsured motorist coverage, the loss of consortium claim is not a separate bodily injury claim that receives a separate and distinct limit of insurance that stands apart from the actual bodily injury claim from which it arises. Therefore, once David Akers reached the Limit of Insurance, which the parties agree has already happened in this matter, then Tracie Akers'

uninsured motorist claim was also satisfied and the Limit of Insurance was exhausted.

It is also important that the General Release and Settlement Agreement with David Akers explicitly contemplated that in the event of a judicial determination that Tracie Akers is not entitled to separate and additional benefits for her loss of consortium claim, then it was agreed the settlement payment made to David Akers would be considered collective consideration to *both* David and Tracie Akers under the insurance policy.

B. Relevant Events of the Prior Proceedings.

Plaintiffs David Akers and Tracie Akers filed a Petition at Law on March 31, 2016. Defendant EMCC filed its Answer on April 28, 2016. On November 3, 2017, EMCC filed a Motion for Partial Summary Judgment. On November 30, 2017, Plaintiffs resisted and filed a Cross-Motion for Summary Judgment. On January 18, 2018, the district court filed an Order denying summary judgment. Following settlement between David Akers and EMCC, a Dismissal with Prejudice of Plaintiff David Akers Only was filed on April 27, 2018. On May 18, 2018, EMCC filed a Renewed Motion for Summary Judgment, addressing the claim alleged by Plaintiff Tracie Akers. On May 30, 2018, Plaintiff Tracie Akers filed a Resistance to Defendant's Renewed Motion for Summary Judgment and Renewed Cross-

Motion for Summary Judgment. On June 1, 2018, EMCC filed its Renewed Resistance to Plaintiff's Cross-Motion for Summary Judgment. A hearing on the summary judgment motions was held before the Honorable Michael D. Huppert on June 1, 2018.

On July 16, 2018, the district court issued a Ruling on Motions for Summary Judgment, within which the court granted EMCC's Motion, denied Plaintiff's Motion, and dismissed Plaintiff's claims with prejudice.

Plaintiff filed a Motion to Reconsider, Enlarge, and Amend on July 31, 2018, and the district court summarily denied the motion by Order filed August 13, 2018.

On August 31, 2018, Plaintiff filed a Notice of Appeal.

C. Disposition of the Case in the District Court.

The district court granted summary judgment to EMCC and dismissed the claims of Plaintiff Tracie Akers.

STATEMENT OF FACTS

David Akers was involved in a car accident on May 31, 2015 when the vehicle he was driving was struck by a truck driven by Frank Albert Glenn, Jr. (App. 120, ¶ 1). Glenn was at fault for the accident and was uninsured. (App. 120, ¶ 4; Exhibit B to EMCC's Statement of Undisputed Facts ("SUMF") in Support of Renewed Motion for Summary Judgment). At the time of the accident, David Akers was operating a vehicle owned by his employer, the Eldora-New Providence Community School District, and was doing so in the course of his employment. (App.120, ¶ 2). EMCC issued Policy No. 8E6-98-09-15 to named insured Eldora-New Providence Community School District, with a policy period from July 1, 2014 to July 1, 2015 (hereafter "the Policy"). (App. 13; App. 122, ¶ 14; App. 126). There were four occupants in the vehicle driven by David Akers at the time of the motor vehicle accident and all four were insureds under the Policy. (App. 122, ¶ 16). All occupants of the vehicle—David Akers, Geoff Buchanan, Haley Lawrence, and Haley Dilley—sustained bodily injuries as a result of the accident. (App. 120-22, ¶¶ 5, 16).

David Akers received workers' compensation benefits as a result of the motor vehicle accident. (App. 121, ¶¶ 7-8). As of February 13, 2018, EMCC had paid workers' compensation benefits to David Akers totaling

$445,547.97 and had reached a settlement of $135,237.47 to be paid as a weekly benefit of $824.14 until exhaustion. (App. 121, ¶¶ 7-8; App.__). Thus, the total settlement amount of the workers' compensation benefits paid or payable to David Akers is $580,785.44. (App. 121, ¶¶ 7-10). David Akers' potential claim for future medical benefits pursuant to his workers' compensation claim had not yet been resolved as of time of the parties' Joint Stipulation on May 18, 2018. (App. 121, ¶ 9).

On March 31, 2016, David and Tracie Akers filed suit against EMCC seeking uninsured motorist coverage benefits, whereby David sought to recover for bodily and personal injuries and Tracie sought to recover for loss of consortium damages. (App. 121, ¶¶ 11-12). The Policy provided for uninsured motorist coverage with a combined single limit of insurance of $1 million. (App. 122, ¶¶ 14-15; *see also* App. 126).

On or about April 10, 2018, EMCC and David Akers entered into a General Release and Settlement Agreement, pursuant to which EMCC agreed to pay $419,214.56 in exchange for David Akers' release and dismissal of his uninsured motorist claim under the Policy. (App. 122, ¶ 17; App. 102-08). The $580,785.44 workers' compensation settlement received by David Akers was applied as a reduction-of-benefits to the uninsured motorist coverage's Limit of Insurance and, therefore, the $419,214.56

uninsured motorist settlement paid to David Akers by EMCC exhausted the coverage available. (*See* App. 121-22, ¶¶ 10, 17; *see also* App. 139). The General Release and Settlement Agreement also addressed the alleged loss of consortium claim of Tracie Akers as follows:

> [David Akers'] spouse, Plaintiff Tracie Akers ("Tracie Akers"), is also asserting a claim for benefits under the Policy for loss of consortium damages arising from the incident of May 31, 2015. Whether Tracie Akers is entitled to receive any separate payment for her loss of consortium claim is being addressed by the Parties' submissions to the Iowa District Court for Polk County, Law No. LACL134883. In the event the Iowa District Court for Polk County and/or Iowa Court of Appeal and/or Iowa Supreme Court determines Tracie Akers is entitled to separate and additional benefits for her loss of consortium claim, a separate Settlement Agreement will be prepared consistent with the final ruling. Alternatively, if the Iowa District Court for Polk County and/or Iowa Court of Appeal and/or Iowa Supreme Court determines Tracie Akers is <u>not</u> entitled to separate and additional benefits for her loss of consortium claim, the **Parties agree the amount received pursuant to this Settlement Agreement shall be deemed to include all consideration and payments for the claims, collectively, asserted by David and Tracie Akers pursuant to the Policy**. In such event, David Akers agrees to indemnify and hold harmless EMCC from any claim that is, or could be, asserted by Tracie Akers pursuant to the Policy.

(App. 104-05) (emphasis added).

Following this settlement, the only alleged unresolved uninsured motorist claim arising out of the May 31, 2015 motor vehicle accident was the loss of consortium claim of Tracie Akers. (App. 122, ¶ 16-18). Tracie Akers was not involved in the motor vehicle accident and did not sustain any

bodily injury as a result of the accident. (App. 122, ¶ 13). For purposes of the cross-motions for summary judgment in the district court concerning Tracie Akers' loss of consortium claim, the parties stipulated the amount of her damages is $313,785.44. (App. 123, ¶ 23). However, Tracie Akers' loss of consortium claim for uninsured motorist benefits is necessarily subject to the Policy's Limit of Insurance, including the reduction-of-benefits provision included in the Policy and approved under Iowa law. (*See* App. 139).

ARGUMENT

Plaintiff's brief presents two arguments on appeal. First, Plaintiff contends the district court erred in holding her loss of consortium damages could be "folded in" with and limited to the coverage available to her bodily-injured spouse. Second, Plaintiff contends EMCC's construction of the Policy violates Iowa Code chapter 516A's requirement of providing certain minimum uninsured motorist coverage. EMCC will address these brief points in reverse order because resolution of the first issue in EMCC's favor makes it unnecessary for the court to address the second issue.

I. EMCC'S CONSTRUCTION AND APPLICATION OF THE POLICY'S LIMIT OF INSURANCE AND REDUCTION-OF-BENEFITS PROVISIONS COMPORTS WITH IOWA CODE CHAPTER 516A, LEGAL PRECEDENT, AND THE CLEAR AND UNAMBIGUOUS POLICY LANGUAGE.

A. Preservation of Error

EMCC agrees that Plaintiff preserved error on this issue.

B. Standard of Review

Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013). The appellate court may affirm the summary judgment ruling of the district court on any alternative ground urged on appeal that was raised in the district court even if it was not the one on which the court

based its ruling. *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 780 (Iowa 2013) (citing *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 97 (Iowa 2012)).

C. Discussion

The district court correctly held Tracie Akers is not entitled to further payment under the Policy for her loss of consortium claim. Pursuant to the Policy and governing Iowa law, Tracie Akers' loss of consortium claim is subject to the same policy limits as her husband's claim. Because operation of the reduction-of-benefits provision and payments made to David Akers fully exhausted the policy limits, no further recovery by Tracie Akers is permitted.

1. Relevant Background of Uninsured Motorist Coverage in Iowa.

The mandatory minimum for uninsured motorist coverage is codified in Iowa Code chapter 516A. The pertinent provisions relevantly state as follows:

> No automobile liability or motor vehicle liability insurance policy insuring against liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or supplemental thereto, for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or a

> hit-and-run motor vehicle or an underinsured motor vehicle because of bodily injury, sickness, or disease, including death resulting therefrom, caused by accident and arising out of the ownership, maintenance, or use of such uninsured or underinsured motor vehicle, or arising out of physical contact of such hit-and-run motor vehicle with the person insured or with a motor vehicle which the person insured is occupying at the time of the accident. Both the uninsured motor vehicle or hit-and-run motor vehicle coverage, and the underinsured motor vehicle coverage shall include limits for bodily injury or death at least equal to those stated in section 321A.1, subsection 11. …

Iowa Code § 516A.1.

> Except with respect to a policy containing both underinsured motor vehicle coverage and uninsured or hit-and-run motor vehicle coverage, nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits for bodily injury or death prescribed in section 321A.1, subsection 11**. Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits**.

Iowa Code § 516A.2(1)(a) (emphasis added).

The circumscribed purpose of uninsured motorist coverage is well-established by numerous decisions of the Iowa Supreme Court. The limited purpose is "to make certain that an injured party receives minimum compensation for his or her injuries." *Greenfield v. Cincinnati Ins. Co.*, 737

N.W.2d 112, 118 (Iowa 2007). The intent is for uninsured motorist coverage merely to provide "a safety net of coverage." *Id.* Stated otherwise:

> It is plain the legislature intended to assure protection to an insured against motorists whose liability to the insured is not covered. Under the uninsured motorist statute we believe an automobile or motor vehicle liability policy must protect the insured in any case **to the same extent as if the tortfeasor had carried liability insurance** covering his liability to the insured in the amounts required to establish financial responsibility.

Faeth v. State Farm Mut. Auto. Ins. Co., 707 N.W.2d 328, 334 (Iowa 2005) (emphasis added). On this reasoning, the Iowa Supreme Court applies a "narrow coverage view" of uninsured motorist coverage. *Greenfield*, 737 N.W.2d at 112.

Pursuant to Iowa Code section 516A.1 every automobile liability insurance policy is required to include uninsured motorist coverage minimum limits of $20,000 for bodily injury or death for a single person, and $40,000 for two or more persons in any one accident. Iowa Code §§ 516A.1; 321A.1(11). Iowa Code section 516A.2 further explicitly permits insurers to include reduction-of-benefits provisions that reduce the policy limit in certain circumstances. Particularly providing that "forms of coverage may include terms, exclusions, limitations, conditions and offsets which are designed to avoid duplication of insurance or other benefits." Iowa Code § 516A.2(1)(a). This reduction-of-benefits provision is "unique"

and "authorizes policy clauses that eliminate duplication of insurance or other benefits in various ways." *Gentry v. Wise*, 537 N.W.2d 732, 737 (Iowa 1995); Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance*, § 14.2A., at 849–50 (Rev. 2d Ed. 1999) (noting Iowa, Tennessee, and California, are the only states with legislative authorization of reduction-of-benefits provisions). The reduction-of-benefits provision of section 516A.2 was "enacted for the protection of the insurer in certain situations." *Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co.*, 543 N.W.2d 591, 594 (Iowa 1996).

In accordance with the statutory enactment and Iowa's "narrow coverage view" of uninsured motorist coverage, the Iowa Supreme Court has approved "subtracting from the policy limit **any recovery** from other sources." *McClure v. Northland Ins. Companies*, 424 N.W.2d 448, 449 (Iowa 1988) (emphasis added). In so doing, the Iowa Supreme Court has explicitly approved offsetting workers' compensation benefits against uninsured motorist coverage recovery because such benefits qualify as "'insurance or other benefits' pursuant to section 516A.2 which offset the insurer's liability." *Davenport v. Aid Ins. Co. (Mut.)*, 334 N.W.2d 711, 714 (Iowa 1983).

2. The Clear and Unambiguous Language of the Policy Reduces the "Limit of Insurance" by All Sums Paid or Payable as Workers' Compensation Benefits.

With the preceding background in mind, the next step is to examine the particular issues that arise out of the language of the Policy and facts of the present case. Ultimately, this case presents a straightforward matter of construction of an insurance policy contract. Insurance policy construction is "the process of giving legal effect to a contract." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). The "cardinal rule" of construction of an insurance policy is that "the intent of the parties must control, and the court determines the intent of the parties by looking at what the policy itself says." *Id.* In construing an insurance contract, where the language of the insurance policy is clear and unambiguous, the court must enforce the policy as written. *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 236 (Iowa 2015).

In the present case, the Policy provisions are clear and unambiguous and the key facts have been stipulated to by the parties. The parties have agreed and stipulated that the Policy's uninsured motorist coverage provides for an initial "Limit of Insurance" of $1 million and this Limit of Insurance is a "Combined Single Limit" as it relates to all uninsured motorist claims for each accident. (App. 122, ¶ 15; *see also* App. 126). The Limit of

Insurance is a capitalized term that is defined by a section all its own in the Policy's Uninsured and Underinsured Motorist Coverage Form (hereafter "UM/UIM Coverage Form"). (App. 139). That section defines the term "Limit of Insurance" as follows:

> **D. Limit of Insurance**
>
> **1.** Regardless of the number of …"insureds,"… claims made or vehicles involved in the "accident," the most we will pay for damages resulting from any one "accident" is the Limit of Insurance For Uninsured And Underinsured Motorists Coverage shown in this endorsement.
>
> **2.** With respect to damages resulting from an "accident" with an "uninsured motor vehicle"…, the Limit of Insurance shall be reduced by:
>
> **a.** All sums paid or payable under any workers' compensation, disability benefits or similar law….

(App. 139).

The Policy's definition of the Limit of Insurance pertinently provides for a two-step process for calculating the Limit of Insurance available for a particular accident and the connected uninsured motorist claim or claims. First, paragraph D.1. of the Policy sets the ceiling—the absolute highest amount of money that will be paid under the Policy's uninsured motorist

coverage—as equal to the Limit of Insurance shown on the coverage endorsement. This starting figure is undisputedly $1,000,000.

Then, at least for the purposes of the present case, the second step for calculating the Limit of Insurance with regards to a particular motor vehicle accident is set out in paragraph D.2. Paragraph D.2. requires that "the Limit of Insurance **shall** be reduced by … **[a]ll** sums paid or payable under **any** workers' compensation … law." (App. 139) (emphasis added). This provision is clear and direct and its language and must be applied as written. *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 682 (Iowa 2008) ("[I]f there is no ambiguity, the court will not write a new contract of insurance for the parties.").

Use of word "shall" makes this reduction-of-benefits provision a *mandatory* requirement. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 771 (Iowa 2016) (stating on the topic of statutory construction that "[w]hen the term 'shall' appears in a statute, it generally connotes the imposition of a mandatory duty"); *see also Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 272 (Minn. 2004) ("It is a well-worn maxim that use of the term 'shall' reflects a mandatory imposition."). "The word 'shall' does not convey discretion. It is not a leeway word, but a word of command." *United States v. Fleet*, 498 F.3d 1225, 1229 (11th Cir. 2007);

see also Glick v. Chocorua Forestlands Ltd. P'ship, 949 A.2d 693, 701 (N.H. 2008) ("In common parlance, the word 'shall' is 'used to express a command.'") (citing *Webster's Third New International Dictionary* 2085 (unabridged ed. 2002)); *Lesikar v. Moon*, 237 S.W.3d 361, 367 (Tex. App. 2007) ("The word 'shall' as used in contracts is generally mandatory."). Therefore, the insurance contract in this case must be construed to mean that it is mandatory and compulsory to reduce the Limit of Insurance as instructed by the provision(s) that follow—i.e. workers' compensation benefits paid as a result of the accident.

Use of the words "all" and "any" further make this provision clear and categorical. The Policy language requires that *all* and *any* workers compensation benefits necessarily reduce the Policy's combined single Limit of Insurance. As the Virginia Supreme Court stated long ago: "A more comprehensive word than 'all' cannot be found in the English language." *Moore v. Virginia Fire & Marine Ins. Co.*, 69 Va. 508, 516 (1877). The Iowa Supreme Court has similarly stated: "'All' is a fairly comprehensive word. It leaves nothing outside of it." *Fitzgerald v. State*, 260 N.W. 681, 682 (Iowa 1935). The same has been stated in more recent decisions, for example:

> The word "all" means exactly what it imports. It is defined in Webster's New International Dictionary, 2d Ed., as "the whole

> number." A more comprehensive word cannot be found in the English language. Standing by itself **the word means all and nothing less than all**.

Flood Control Dist. of Maricopa Cty. v. Gaines, 43 P.3d 196, 200 (Ariz. Ct. App. 2002) (emphasis added); *see also Daley v. United Servs. Auto. Ass'n*, 541 A.2d 632, 636 (Md. 1988) ("The simple, pure 'all' is the most comprehensive word in the English language. There is no way to expand on it or improve it.").

The term "any" similarly has a broad and comprehensive meaning and effect. "The United States Supreme Court and [the Eleventh Circuit Court of Appeals] have recognized on many occasions that the word 'any' is a powerful and broad word, and that it does not mean 'some' or 'all but a few,' but instead means 'all.'" *Southwest Georgia Fin. Corp. v. Colonial Am. Cas. & Sur. Co.*, 397 F. Appx. 563, 567–68 (11th Cir. 2010); *see also Wormington v. City of Monett*, 204 S.W.2d 264, 267 (Mo. 1947) (stating the word "any" is "all comprehensive" and "is the equivalent of 'every' and 'all'"). Ultimately, inclusion of the terms "all" and "any" in the Policy's reduction-of-benefits provision leaves no room for doubt and requires that every dollar of workers' compensation benefits paid as a result of the subject motor vehicle accident must diminish the Limit of Insurance.

The Policy's definition of "insured" instills further clarity that the combined single Limit of Insurance is subject to reduction by all workers' compensation benefits that are paid to any insured claimant. The Policy defines "insured" as:

> [A]ny person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. **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.

(App. 136). This provision makes clear that, while certain aspects of coverage are to be separately evaluated as to each insured, the Limit of Insurance is **not** separately evaluated as to any insured claimant. Rather, the Limit of Insurance is truly a combined single limit and must be adjusted in its entirety by the particular conditions set out in the Policy—including reductions for payments of workers' compensation benefits.

Finally, reference back to paragraph D.1. of the UM/UIM Coverage Form seals the analysis. Paragraph D.1. states that "[r]egardless of the number of … 'insureds' [or] claims made… the most [EMCC] will pay for **all** damages resulting from any one 'accident' is the Limit of Insurance." (App. 139). Here too, the Policy includes the simple, pure "all", which is the most comprehensive word in the English language and "leaves nothing outside of it." *Fitzgerald*, 260 N.W. at 682. This language makes clear that

once the Limit of Insurance has been properly determined in the manner prescribed by the Policy, that amount becomes the ceiling EMCC will pay for *all* damages resulting from the accident. There is no basis, as Plaintiff contends, to read this language to mean the Policy applies individually to separate insureds, claims, or claimants. In fact, the Policy provides to the contrary with clarity and precision.

Ultimately, the Policy language is clear, mandatory, comprehensive, and broad. The Policy language requiring reduction to the Limit of Insurance is a compulsory and express command to reduce the Limit of Insurance in the event of particular circumstances. The Policy's definition of Limit of Insurance broadly requires—without equivocation—that payment of "all" sums under "any" workers' compensation law must reduce the Limit of Insurance if the benefits result from the subject accident. Upon determination of the Limit of Insurance, after reductions are applied, the reduced Limit of Insurance is the maximum amount EMCC will pay for any and all damages that result from the accident—no matter if the damages are for bodily injury or for loss of consortium or if the damages are alleged by one claimant or multiple claimants. The Policy says what it means and it means what it says; it must be enforced as written and this court cannot write

a new contract of insurance for the benefit of the Plaintiff. *Amish Connection*, 861 N.W.2d at 236.

For purposes of the present case, the amount of workers' compensation benefits paid or payable to David Akers has been stipulated to and the total is $580,785.44. (App. 121, ¶¶ 7-8). Applied as a reduction to the Limit of Insurance, as the Policy language compels, the defined Limit of Insurance is reduced from $1 million to $419,214.56. By the terms of the Policy, this reduced amount is "the most [EMCC] will pay for all damages resulting from any one 'accident'… ." (App. 139). In order to settle the uninsured motorist claim made by David Akers, EMCC and David Akers entered into a General Release and Settlement Agreement, whereby EMCC paid $419,214.56 to David Akers in exchange for a release and dismissal of his uninsured motorist claim that arose out of the May 31, 2015 motor vehicle accident.[1] (App. 102-08). Having paid the Policy's Limit of Insurance of $419,214.56, EMCC has paid all it is contractually obligated to

[1] As was previously noted in the Statement of Facts section, the settlement agreement with David Akers also included a provision that explicitly contemplated that in the event of a judicial determination that Tracie Akers is not entitled to separate and additional benefits for her loss of consortium claim, then the settlement payment made to David Akers would be considered collective consideration to both David and Tracie Akers under the Policy.

pay and, therefore, Tracie Akers cannot obtain any further recovery from EMCC pursuant to her loss of consortium claim.

3. The Iowa Supreme Court has Approved the Validity of Workers' Compensation Reduction-Of-Benefits Provisions of the Type Included in the Policy's Limit of Insurance Definition.

Iowa's uninsured motorist statute expressly allows that the insurer "may include terms, exclusions, limitation, conditions, and offset which are designed to avoid duplication of insurance or other benefits." Iowa Code § 516A.2(1)(a). The Iowa Supreme Court has approved provisions for reduction-of-benefits virtually identical to the provision at issue in the present case—that the Limit of Insurance shall be reduced by "[a]ll sums paid or payable under any workers' compensation law, disability benefits law or similar law." *Matthess v. State Farm Mut. Auto. Ins. Co.*, 548 N.W.2d 562, 564 (Iowa 1996); *see also McClure v. Employers Mut. Cas. Co.*, 238 N.W.2d 321, 329 (Iowa 1976) ("[W]e hold that the words 'insurance or other benefits' in the second sentence of s 516A.2 encompass workmen's compensation."). Stated otherwise by the Iowa Supreme Court: "Any recovery from a third party is 'duplicative' in the context of uninsured motorist coverage." *Greenfield*, 737 N.W.2d at 118. Thus, recovery of workers' compensation benefits are most certainly duplicative and are properly the subject of a reduction-of-benefits provision under Iowa Code §

516A.2(1)(a). *See id.*; *see also Gentry*, 537 N.W.2d at 737 (affirming that deduction of workers' compensation benefits is consistent with uninsured motorist statute).

4. Because the Workers' Compensation Reduction-Of-Benefits Provision is "*Designed To*" Avoid Duplication it is Applicable and Enforceable in the Present Case.

Based on the statutory language and Iowa case law interpreting the statute the essential aspect of a reduction-of-benefits provision is that it be "designed to" avoid duplication of insurance or other benefits. There is no requirement of *actual* duplication or even that there is *potential* duplication under some certain set of facts—either hypothetical or based on the reality of the particular case. In the present case, the Policy's reduction-of-benefits provision is plainly and unambiguously designed to avoid the duplication of benefits on a per-accident basis, the provision is consistent with the statute and case law, and the reduction-of-benefits provision must be enforced as written.

Most closely related to the present case is *Miller v. Westfield Ins. Co.*, where the court held the final sentence of Iowa Code section 516A.2(1)(a)—concerning permissible exclusions, limitations, conditions or offsets—meant an exclusion must be "designed to" avoid duplication, but in application it is not necessary that it avoid *actual* duplication. 606 N.W.2d 301, 305 (Iowa

2000). In analyzing the statute, the court recognized the common meaning of the word "design" is "to plan or have in mind as a purpose: INTEND, PURPOSE, CONTEMPLATE." *Id.* (quoting Webster's Third New International Dictionary 611 (unabr. ed.1993). Consistent with this statutory language and the common meaning of the term "design," the court held:

> [T]here is no reasonable interpretation of the provision in question other than that the General Assembly meant to authorize exclusions that are *intended* to or have the *purpose* of avoiding duplication of benefits. Requiring the *actual* duplication of benefits is simply contrary to the language used by the legislature. … In summary, under a proper application of the rules of statutory interpretation, we conclude **actual duplication of benefits is not required by section 516A.2(1)**

Id. (emphasis added in bold); *see also Hornick v. Owners Ins. Co.*, 511 N.W.2d 370, 372 (Iowa 1993) (holding that if a coverage limiting provision is an "attempt to avoid duplication of insurance coverage [it] is permitted under the Iowa Code section 516A.2").

In the present case, the reduction-of-benefits provision is plainly "designed to" avoid duplication of benefits. By its own terms it only applies "[w]ith respect to damages from an 'accident' with an 'uninsured motor vehicle'… .". (Exhibit C to SUMF). With this language there is no reasonable basis to claim the provision is anything but designed, intended, or has the purpose to avoid duplication.

Moreover, even if the reduction-of-benefits provision exhausts all coverage it retains its enforceability—as long as the provision is compliant with Iowa Code section 516A.2(1). *Davenport*, 334 N.W.2d at 715 (holding alternate recovery that was of the nature of "insurance or other benefits" and was in excess of the uninsured motorist policy's maximum policy benefit precluded any uninsured motorist coverage); *see also Lepic By & Through Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758, 764 (Iowa 1987) (citing approvingly to *Moore v. State Farm Mut. Ins. Co.*, 710 S.W.2d 225, 226 (Ky. 1986) (holding that wife could not obtain any recovery for loss of consortium because the limit of liability has already been paid on husband's claim)).

The issue of exhaustion was further directly addressed in the case of *Harmon v. State Farm Mut. Auto. Ins. Co.*, which also involved uninsured motorist coverage. 232 So. 2d 206, 207-08 (Fla. Dist. Ct. App. 1970). In *Harmon*, the court was faced with the issue of: "Whether an insurance company may settle with two insureds in the full amount of the policy limits, thereby exhausting the limits of the policy to the exclusion of another insured under the uninsured motorist provisions of said policy." *Id.* at 207. Addressing the issue, the court stated the general rule is that:

> [W]here multiple claims arise out of one accident, the liability insurer has the right to enter reasonable settlements

> with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more claimants are left without recourse against the insurance company.

Id. The court went on to conclude this rule continued to apply as it concerned multiple uninsured motorist claims, holding:

> In the case *sub judice*, if appellant were making a claim against a liability insurer which insured the person responsible for the death of appellant's son, according to the above-cited authorities he could not complain of the situation in which he finds himself. Florida's uninsured motorist statute was passed to place insureds who are injured by uninsured motorists in the same position as if those motorists had been insured. Appellant asks us to place him in a preferential position or make him better off than if the uninsured motorist had maintained liability insurance. This was not the intent of the legislature.
>
> Although we appreciate appellant's distinction between claims of insureds under insurance policies and mere third-party claims against liability insurers, we feel that to impose a duty upon insurers to ascertain all claimants under their uninsured motorist coverages before settling with any, and to require them to settle such claims at their peril is contrary to the policy of encouraging compromises and speedy settlements, and would do more harm than good. If such a duty is to be imposed under the uninsured motorist statute, it must be done by the legislature.

Id. at 208.

The same logic applies to Iowa's uninsured motorist statute. The Iowa Supreme Court has described the purpose of Iowa's uninsured motorist statute in the same terms: "[T]he purpose of uninsured ... motorist insurance is to put the claimant in the same position the claimant would have been had

the tortfeasor been adequately insured." *Hagenow v. Am. Family Mut. Ins. Co.*, 846 N.W.2d 373, 380 (Iowa 2014). Thus, under Iowa law, this court should similarly conclude that insurers have the right to enter into reasonable settlements with uninsured motorist claimants regardless of whether the settlements deplete or even exhaust the policy limits. In fact, because the insurer has a duty to act in good faith and pay claims when they are owed, an insurer would risk alternative liability if it failed to pay reasonable settlements when such settlements can be consummated. *See Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252, 254 (Iowa 1972) (holding the law imposes on insurer "a duty not to … withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy"). The Iowa courts have long adopted a policy that compromise and settlement should be encouraged. *See, e.g., Wright v. Scott*, 410 N.W.2d 247, 249 (Iowa 1987) ("We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized"). Decisions from a number of other jurisdictions are in accord.[2]

---

[2] *See,e.g., Lane v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 545, 552 (Tex. App. 1999) (holding insurer may properly settle with covered person in uninsured or underinsured motorist case even when settlement depletes or exhausts the policy limits as to other claimants); *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864, 870 (Mo. Ct. App. 1997) (holding

Plaintiff's response to the fact that the Policy's reduction-of-benefits provision is consistent with the statute and clearly applicable in the present case is to attempt to rewrite the statute. Plaintiff asserts the provision in the Policy is "nevertheless unenforceable because there is simply no *potential* for duplication of benefits received by the same insured… ." (Appellant's Brief, p. 61). In so arguing, Plaintiff seeks to individualize the operation of the statute for each insured despite the complete absence of such language in the statute. *See* Iowa Code §§ 516A.1 and 516A.2.

If the legislature desired that each reduction-of-benefits that is allowed as an offset of the Limit of Insurance to apply only to the particular insured that received such benefits, it easily could have said so. However, limiting language of this nature is not present in Iowa Code section 516A.2(1)(a). The preeminent rule of statutory interpretation is to look for the statute's plain meaning through its text and "the court should not search for meaning beyond the express terms of the statute." *Cox v. Iowa Dep't of*

---

insurer may properly settle with only one insured even if it exhausts coverage as to other insureds); *Goughan v. Rutgers Cas. Ins. Co.*, 570 A.2d 501, 503 (N.J. Super. Law. Div. 1989) (holding insurer may properly settle with one underinsured motorist claimant even if it exhausts the policy limit to detriment of other claimants); *Gerdes v. Travelers Ins. Co.*, 440 N.Y.S.2d 976, 978 (N.Y. Sup. Ct. 1981) (holding in uninsured motorist matter that "an insurer who settles with some parties injured in a collision is liable only for the remainder of the policy limits even though it may have been aware that the total claims would probably exceed the policy limits").

Human Servs., 920 N.W.2d 545, 553 (Iowa 2018). As stated by the U.S. Supreme Court:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002).

The court may not add modifying words to the statute or change its terms under the guise of judicial construction. *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990). The court endeavors to interpret and apply a statute "by looking at the language the legislature chose to use, *not the language they might have used.*" *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 14 (Iowa 2018) (emphasis added). Importantly, "[s]tatutory text may express legislative intent by omission as well as inclusion, and we may not read language into the statute that is not evident from the language the legislature has chosen." *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 143 (Iowa 2018). In the end, if the legislature had intended for the reduction-of-benefits provision to be individualized as to each insured and that it could not be applied to offset a combined single limit policy, then the legislature could have easily written appropriate

language into the statute. *See State v. Romer*, 832 N.W.2d 169, 177–78 (Iowa 2013) (declining to read additional terms into a statute and stating that if legislature intended to include a term, it could have done so). The absence of such language is telling and this court must apply the statute as written.

Among the authority cited by Plaintiff in support of her position is *American States Ins. Co. v. Estate of Tollari*, which is readily distinguishable and of no persuasive value. 362 N.W.2d 519 (Iowa 1985). The *American States* case involved an *under*insured motorist coverage dispute following a motor vehicle accident resulting in five fatalities among the passengers of a single vehicle. *Id.* at 520. All liability insurance was paid out and equally divided amongst the estates of the decedents—the total amount of liability insurance available was $120,000 and $24,000 was paid to each estate. *Id.* Thereafter, one of the decedents, Tollari, was determined to be a covered person under another policy that included *under*insured motorist coverage in the amount of $50,000. Thus, in *American States*, Tollari was the one and only insured making a claim pursuant to his own underinsured motorist coverage, and in that instance the court recognized the Tollari estate was rightfully entitled to fully collect the underinsured motorist benefit. However, for purposes of the case at bar, there are two relevant insureds (David Akers and Tracie Akers) that are insured under a

single policy with a combined single limit policy—unlike *American States*, the present case does not involve reconciliation of two different policies under which different people were insured. This distinction makes the *American States* case plainly distinguishable and of no precedential value.

Nonetheless, in *dicta*, the *American States* decision does provide a description of how uninsured motorist coverage is intended to function under the Iowa Code chapter 516A, which provides some welcome guidance. The court stated the manner uninsured motorist coverage is to be paid is as follows:

> If the tortfeasor has no liability insurance the injured plaintiff can, under his own uninsured motorist coverage, recover his loss from the tort, *subject to the limit of that uninsured coverage—assuming no duplication of benefits exists*.

Id. at 522 (emphasis added). Consistent with EMCC's position in the present case, the court explained payment of uninsured motorist coverage benefits is subject to the particular policy's limit of insurance and recognized a reduction-of-benefits provision can properly reduce the limit of insurance. *Id.* This is precisely EMCC's position here. The Limit of Insurance of the uninsured motorist coverage in the EMCC Policy is $1 million, but the Policy includes a reduction-of-benefits provision that redefines the Limit of Insurance to a lower figure to the extent of workers' compensation benefits paid as a result of the same motor vehicle accident. Once the $1 million

dollar policy limit was reduced by the workers' compensation benefits that were paid to David Akers, the subsequent settlement exhausted the reduced Limit of Insurance. Because uninsured motorist recovery is "subject to the limit of that uninsured coverage," there can be no further insurance recovery by Tracie Akers. *Id.*

Other cases cited by Plaintiff to advance the argument in favor of an insured-by-insured analysis are similarly distinguishable and of no persuasive value. In *Fort Madison*, 543 N.W.2d 591, another case cited by Plaintiff, there was no insured-by-insured analysis to conduct because there was only a single insured/claimant making a claim for uninsured motorist benefits. Moreover, even if the facts of that case could somehow be analogized to this case, the policy language was drastically different in that it allowed for the insurer to recover from "from the proceeds of any settlement or judgment the injured person obtains from any party liable for the bodily injury." *Fort Madison*, 543 N.W.2d at 592. The provision at issue in the case at bar is a reduction-of-benefits provision that reduces the Limit of Insurance for uninsured motorist claimants under certain conditions and, thus, operates in a manner far different than the policy in *Fort Madison*. Finally, this court must recognize that any language in *Fort Madison* concerning duplication of benefits was written years before the *Miller*

decision (606 N.W.2d 301), which provided a course-correction to the statutory construction Iowa Code section 516A.2(1). Assertions in *Fort Madison* on duplication of benefits that are inconsistent with *Miller* are plainly overruled.

The case of *Condon v. Employers Mut. Cas. Co.*, 529 N.W.2d 630 (Iowa Ct. App. 1995), which was also decided years before *Miller*, is similarly unhelpful to resolving the case at bar. In *Condon*, just as in *Fort Madison*, and starkly different from the case at bar, there was only a single claimant seeking uninsured motorist benefits. *Condon*, 529 N.W. 2d at 631. In short, the *Condon* decision provides no assistance for resolution of the present case.

When the Tennessee Court of Appeals was confronted with a case much like the present case the court held in the manner urged by EMCC. In the case of *English v. Pretti*, Sherri English was struck by an uninsured motor vehicle while in the course and scope of her employment. *English v. Pretti*, No. W2001-01657-COA-R3CV, 2002 WL 31414093, at *1 (Tenn. Ct. App. Oct. 24, 2002). Sherri English and her husband David English brought suit against their uninsured motorist carrier seeking recovery for Sherri's personal injuries and for David's loss of consortium. The Englishes' uninsured motorist carrier provided for $100,000 in coverage for

bodily injury to one person as a result of an accident. *Id.* at *2. Just as in the present case, the policy at issue in *English* also included a reduction-of-benefits provision that reduced the limit of insurance by "all amounts paid or payable under any workers compensation law." *Id.* Moreover, just like the present case, Tennessee's statute concerning minimum coverage for underinsured and uninsured motorist insurance includes the exact same language approving of reduction-of-benefits in certain circumstances, stating: "Such forms of coverage may include such terms, exclusions, limitations, conditions, and offsets, which are designed to avoid duplication of insurance and other benefits." Tenn. Code § 56-7-1205; *compare to* Iowa Code § 516A.2(1)(a).

Sherri English received $106,675.92 in workers' compensation benefits for her claim. Applying the reduction-of-benefits provision, the court held Sherri was not entitled to any further recovery because the workers' compensation benefits exceeded the uninsured motorist policy's coverage limitation. Turning to David English's loss of consortium claim, the court recognized and agreed that David's loss of consortium claim was a separate and distinct cause of action. However, because the limit of insurance was the most the insurer was obligated to pay under the policy and because the workers' compensation benefits offset the entirety of the limit of

insurance, David English was not entitled to any additional recovery under the policy. The court held:

> While Mr. English has a separate and distinct cause of action against the tortfeasors in this case, his injuries are not covered under the policy of insurance where the maximum coverage has been offset by the workers' compensation benefits received by Ms. English. As noted above, the offset provision in the insurance policy offsets coverage, not actual damages. The policy limits for injuries arising from the one injury to Ms. English have been offset by the workers' compensation award, notwithstanding Mr. English's separate cause of action for loss of consortium.

Id. at *6.

Ultimately, this court should rule in the same manner as the court in *English*, for all the reasons set out *supra*.

Furthermore, Plaintiff's contention that allowing the reduction of benefits against the overall Limit of Insurance causes coverage to be illusory as to her is divorced from the facts and reality of the present case. The General Release and Settlement Agreement executed by David Akers explicitly provides that upon a holding that Tracie Akers cannot obtain separate and additional benefits for loss of consortium, then the amount paid in settlement ($419,214.56) shall be deemed collective consideration to both David and Tracie Akers pursuant to the Policy. (App. 104-05). Therefore, enforcing the Policy as-written does not render coverage illusory as to Tracie Akers, but rather Tracie Akers' consideration will be deemed to be a part of

the $419,214.56 paid by EMCC for this uninsured motorist claim. Plaintiff has no basis to claim coverage is illusory or otherwise does not provide the statutory minimum coverage to her.

5. Summary of the Application of the Clear and Unambiguous Terms of the Policy.

The Policy is straightforward and written in the plainest terms possible. Boiled down to a series of steps of analysis the Policy demands the result advanced by EMCC. The steps of analysis, in brief summary, are as follows:

(1) The most that will be paid for "**all** damages resulting from one 'accident' is the 'Limit of Insurance'."

(2) The Limit of Insurance is a defined term in the Policy and based on the Policy's declarations and paragraph D.1. of the UM/UIM Coverage Form, the Limit of Insurance starts at $1 million.

(3) The Limit of Insurance starts at $1 million, but that is not where it ends. Paragraph D.2. provides for particular *mandatory* reductions to the Limit of Insurance in clear and plain language.

(4) The reduction applicable in the present case reduces the Limit of Insurance by "**all**" sums paid or payable under "**any**" workers' compensation law as a result of the accident.

(5) By its own defining language, therefore, the Limit of Insurance decreases in the event workers' compensation benefits are paid or payable as a result of the accident.

(6) It is stipulated that $580,785.44 was paid or payable in workers' compensation benefits to David Akers due to the accident. This sum "shall" reduce the Limit of Insurance, in turn making the Limit of Insurance $419,214.56.

(7) The reduced Limit of Insurance becomes "the most [EMCC] will pay of **all** damages resulting from any one 'accident.'" Thus, the most EMCC will pay is $419,214.56.

(8) Absent from the Policy language is any provision that states, indicates, suggests, or even hints that the reduction to the Limit of Insurance is only to be applied to one claimant and not another claimant. Rather the policy provision that defines Limit of Insurance states the Limit of Insurance, as whole, is reduced under particular circumstances and the maximum amount EMCC is required to pay under the Policy is the reduced Limit of Insurance.

(9) EMCC entered into a General Release and Settlement Agreement with David Akers to settle the uninsured motorist claim and thereby issued payment of $419,214.56.

(10) The payment of the $419,214.56 has now exhausted EMCC's Limit of Insurance pursuant to the Policy and EMCC has no obligation to pay any separate or additional monies to Tracie Akers for her loss of consortium claim.

(11) Because the Limit of Insurance is exhausted and Tracie Akers is not entitled to separate and additional benefits, by operation of the provision included in the General Release and Settlement Agreement, the $419,214.56 is deemed to be collective consideration to David and Tracie Akers for the uninsured motorist claim.

The result advocated by EMCC is plainly commanded by the clear and unambiguous terms of the Policy and is further buttressed by the fact uninsured motorist coverage is subject to a "narrow coverage view" under Iowa law. *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845, 848 (Iowa 1990). Under the narrow coverage view, workers' compensation benefits are definitively duplicative in nature and are properly deducted from the Limit

of Insurance. *See id.* Therefore, for the reasons stated here and in the preceding sections and premised upon all of the authorities cited to and relied upon, the district court's grant of summary judgment and dismissal of Plaintiff's claim must be affirmed.

II. PLAINTIFF TRACIE AKERS' CLAIM FOR LOSS OF CONSORTIUM IS INEXTRICABLY LINKED TO DAVID AKERS' BODILY INJURY CLAIM AND THERE CAN BE NO SEPARATE RECOVERY.

A. Preservation of Error

EMCC agrees that Plaintiff preserved error on this issue.

B. Standard of Review

Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Sallee*, 827 N.W.2d at 132.

C. Discussion

Even if the court holds the Limit of Insurance was not reduced for all claimants by the workers' compensation benefits paid to David Akers and then exhausted by the General Release and Settlement Agreement entered into with David Akers, the court must still hold that Plaintiff Tracie Akers' loss of consortium claim is constrained by the same Limit of Insurance that applies to David Akers. Therefore, Plaintiff is not entitled to any further recovery under the Policy for her loss of consortium claim.

EMCC agrees that case law has concluded a loss of consortium claim is an independent tort claim under Iowa law. However, the present case does not involve such a tort claim made against a negligent tortfeasor. Rather, the present case arises out of contract—the Policy and the UM/UIM Coverage Form contained therein. Thus, Plaintiff's potential recovery is not based on her purported independent tort claim; rather, Plaintiff's recovery for loss of consortium against EMCC is necessarily contingent on the terms of the insurance contract. Neither by statute nor case law does Iowa legal authority offer support for Plaintiff's contention that loss of consortium provides a separate right to uninsured motorist coverage that stands apart from the injury claim of the insured that sustains "bodily injury"—the trigger under the Policy. In reality, Iowa legal authorities and the language of the Policy are inapposite to Plaintiff's position.

Beginning with the Policy, the language recognizes the potential for loss of consortium recovery, but that recovery is permitted only if it results from bodily injury of an insured. At the outset, the coverage provision of the UM/UIM Coverage Form makes clear benefits will be paid for compensatory damages, but the "damage must **result from** 'bodily injury' caused by an 'accident'." (App. 138) (emphasis added). Furthermore, in defining Who Is An Insured, the Policy contemplates a consortium claim but

only to "[a]nyone for damages he or she is entitled to recover **because of** 'bodily injury' sustained by another 'insured.'" (App. 139). It is undisputed that Tracie Akers did *not* sustain bodily injury. (App. 122, ¶ 13). Tracie Akers' potential right to recover loss of consortium damages arose *only* because of David Akers' bodily injury—if David Akers had not sustained bodily injury during the accident, she would not be entitled to any claim or recovery under the Policy. In short, Tracie Akers' status as an insured is tied directly to the bodily injury of David Akers and, therefore, her Limit of Insurance is necessarily coextensive with David Akers.

Pursuant to this policy language and the undisputed facts, the combined single limit set out in the Policy must be considered together as to David Akers and Tracie Akers. Because of the inextricable intertwining of David and Tracie's claims, once one or both of these claimants have exhausted the Policy's Limit of Insurance, then the coverage reaches its culmination such that the combined recovery of the connected claimants does not exceed the Limit of Insurance.

This construction of the Policy language is confirmed by Iowa case law. In *Lepic*, the Iowa Supreme Court was confronted with the issue of whether a loss of consortium claim is its own separate injury for the purposes of a policy limit, or whether the loss of consortium claim was

enfolded into the bodily injured person's claim for policy limit purposes. 402 N.W.2d at 760. In analyzing the matter, the court approvingly cited a Florida decision stating: "The limits of liability under the policy are not affected by the number of causes of action that might accrue from the bodily injury of a single person." *Id.* at 765 (citing *Mackoul v. Fidelity & Casualty Co.*, 402 So.2d 1259, 1260 (Fla. Dist. Ct. App. 1981). Rather, if additional personal injury claims grow out of one bodily injury claim, such claims are subject to the limit of liability connected to the bodily injury claim. Ultimately, the Iowa Supreme Court held the loss of consortium claim "must be lumped with the [bodily injured person's] claims in determining if the 'each person' limit of the policy has been exhausted." *Id.* at 765. Applying this holding, the court noted that, although loss of consortium is a *personal* injury, it is not a *bodily* injury to the deprived spouse or parent. *Id.* at 763. Therefore, the Court held the parents in *Lepic* were not entitled to separate damages and recovery for their loss of consortium claim because the limit of liability applicable to the bodily injured children had been exhausted. *Id.* at 765.

Subsequent to *Lepic*, Iowa case law has consistently held that loss of consortium may be a personal injury, but loss of consortium is *not* a separate bodily injury and a separate limit on insurance will *not* attach to claims for

loss of consortium. *See Dahlke v. State Farm Mut. Auto. Ins. Co.*, 451 N.W.2d 813, 815 (Iowa 1990) (citing cases and holding loss of consortium claim involving physical manifestation of grief were not separate bodily injury under uninsured motorist policy); *Craig v. IMT Ins. Co.*, 407 N.W.2d 584, 586 (Iowa 1987) (holding both parents' loss of consortium claims were tied to the viable unborn child's policy limit in uninsured motorist case). As a result, Iowa courts have routinely limited the claim of the person pursuing loss of consortium to the coverage limit applicable to the bodily injured insured. Other jurisdictions have cited to *Lepic* and other similar authorities[3] for the proposition that "the number of persons sustaining bodily injury in an auto accident controls the amount of coverage provided by the policy; the number of individuals claiming consequential damages is immaterial." *Essick v. Barksdale*, 882 F. Supp. 365, 372 (D. Del. 1995); *see, e.g.*, *Keene v. Travelers Indem. Co. of Ill.*, 73 F. Supp. 2d 638, 641 (W.D. Va. 1999) (discussing *Lepic* and concluding that "the ordinary language in the policy is

---

[3] *See, e.g.*, *Saltzberg v. Lumbermens Mut. Cas. Co.*, 94 N.E.2d 269, 271 (Mass. 1950); *Gaines v. Standard Accident Ins. Co.*, 32 So.2d 633, 638 (La. Ct. App.1947); Annotation, *Construction and Application of Provision In Liability Policy Limiting the Amount of Insurer's Liability to One Person*, § 4[a], 13 A.L.R. 1228, 1234 (1967 & Supp. 1994) (observing that policies can tie a policy limit to all damages flowing from an insured's bodily injury, regardless of whether other people also suffered damages arising from that bodily injury).

that the limit applies to all claims for damages resulting from bodily injury sustained by one person, regardless of who asserts the claims"); *Creamer v. State Farm Mut. Auto. Ins. Co.*, 514 N.E.2d 214, 216 (Ill. App. 1987) (citing *Lepic* for the proposition that "[l]oss of consortium is a personal rather than a bodily injury and is generally included and subject to the policy limitations for bodily injury to one person").

The language in this Policy leads to the same result—Tracie Akers' loss of consortium claim is subject to the same policy limit applicable to David Akers' bodily injury claim. *See Lepic*, 402 N.W.2d at 760 (noting policy language included "Coverage is our maximum limit of liability *for all damages for bodily injury sustained by any one person in any one accident*" (emphasis in original)). Thus, the full coverage limit was exhausted by execution of the General Release and Settlement Agreement by David Akers' and EMCC's payment of $419,214.56.

As discussed above, EMCC has issued payment of $419,214.56 in uninsured motorist benefits pursuant to the General Release and Settlement Agreement executed by David Akers, and David Akers will receive at total of $580,785.44 in workers' compensation benefits for his injuries from the accident. (App. 121-22, ¶¶ 7-10, 17. The parties have stipulated that David Akers' workers' compensation settlement was properly applied to offset the

uninsured motorist coverage available to cover David Akers' injuries. (App. 122, ¶ 18). As a result, $1 million has been paid by EMCC for David Akers' bodily injuries arising out of the accident between his workers' compensation and uninsured motorist benefits. (App. 121-22, ¶¶ 7-10, 17). That amount is the coverage limit for bodily injuries from this accident. (App. 126). This is clear from the declarations page, which states uninsured motorist limit of insurance is a "combined single limit" for all claims that arise out of one accident. (App. 126).

EMCC paid the coverage limit for damages resulting from David Akers' bodily injury caused by the accident. Tracie Akers' sole right to recover under the policy is a *result of* and *because of* David Akers' bodily injury and is necessarily lumped into his coverage limit. Therefore, there is no remaining coverage available to Tracie Akers. The district court's ruling granting summary judgment to EMCC and dismissing Plaintiff's claim with prejudice must be affirmed.

CONCLUSION

For the reasons stated herein, Defendant requests the summary judgment ruling be affirmed.

CONTINGENT REQUEST FOR ORAL ARGUMENT

Defendant requests to be heard in oral argument if Plaintiff is granted oral argument.

BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.

By: */s/ Thomas M. Boes*

Jason T. Madden AT000
Thomas M. Boes AT0001048
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 243-4191
Fax: (515) 246-5808
madden.jason@bradshawlaw.com
boes.thomas@bradshawlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE
EMPLOYERS MUTUAL CASUALTY COMPANY

CERTIFICATE OF COSTS

The undersigned hereby certify that the actual cost of reproducing the necessary copies of this document was $ N/A - EDMS, exclusive of sales tax, delivery, and postage.

By: */s/ Thomas M. Boes*
Thomas M. Boes

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 10,187 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: */s/ Thomas M. Boes*
Thomas M. Boes

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellee's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 29th day of January, 2019:

Tom L. Drew
Lindsay Hecht Strosche
DREW LAW FIRM
535 40th Street
Des Moines, IA 50312

By: */s/ Thomas M. Boes*
Thomas M. Boes