FILED
03/05/2019
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0599

DA 17-0599

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 51

KENNETH & KARI CROSS, HENLEY & NICOLA BRADY, and ROLAND & LANA REDFIELD,

Plaintiffs and Appellants,

v.

ROBERT and SHERLE WARREN; GRASS CHOPPER, LLC; TAYLOR WARREN and PROGRESSIVE INS. CO.,

Defendants and Appellees.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Big Horn, Cause No. DV 15-21
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

A. Clifford Edwards (argued), Roger W. Frickle, Edwards, Frickle & Culver, Billings, Montana

John C. Heenan (argued), Colin Gerstner, Gerstner Law PLLC Billings, Montana (for Lana Redfield)

Shane Colton, Jaclyn S. Laferriere, Edmiston & Colton, Billings, Montana (for Henley & Nicola Brady)

For Appellees:

Mark S. Williams (argued), Susan Moriarity Miltko, Williams Law Firm, Missoula, Montana (for Progressive Direct Ins. Company)

Paul Haffeman, Davis, Hatley, Haffeman & Tighe, Great Falls, Montana (for Robert and Sherle Warren and Grass Chopper LLC)

Tammy Wyatt-Shaw, Hammer, Quinn & Shaw, Kalispell, Montana (for Taylor Warren)

For Amici:

Ann L. Moderie, Moderie Law Firm, Polson, Montana
(for Montana Trial Lawyers Association)

Martha Sheehy, Sheehy Law Firm, Billings, Montana
(for Property Casualty Insurers Association of America)

Argued: September 21, 2018
Submitted: September 25, 2018
Decided: March 5, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Upon the District Court's certification of the issue pursuant to M. R. Civ. P. 54(b), Plaintiffs appeal the portion of the summary judgment order entered in favor of the Defendants, which denied Plaintiffs' claim that the four separate motor vehicle liability insurance coverages purchased by Robert and Sherle Warren (Warrens) from Progressive Direct Insurance Company (Progressive), should be "stacked" for application toward Plaintiffs' injury claims. Progressive appears in defense of the District Court's order. We affirm, addressing the following issue:

> *Did the District Court err by denying Plaintiffs' claim to stack the Defendants' motor vehicle liability insurance coverages for application to Plaintiffs' injury claims?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On January 8, 2015, while driving a 2000 GMC Sierra pick-up truck owned by his parents, Robert and Sherle Warren, eighteen-year-old Taylor Warren caused an accident resulting in injuries to Kenneth Cross, Henley Brady, and Roland Redfield. The truck was emblazed with "Grass Chopper" insignias on its door panels. Robert Warren owned and operated Grass Chopper, LLC as a sole proprietorship, but the truck was personally owned by the Warrens. For purposes of the insurance question before us in this appeal, liability for the accident is not disputed.

¶3 At the time of the accident, Taylor Warren was an insured driver, and the truck he was driving was an insured vehicle, under a Progressive motor vehicle insurance policy purchased by the Warrens. The policy covered all four members of the Warren family and

included separate liability coverages for each of the Warrens' four vehicles. Each vehicle's coverage provided identical bodily injury liability coverage limits of $100,000 for each person or $300,000 for each accident, although the premiums charged to the Warrens were different for each vehicle: Cadillac Escalade—$267; Chevy Impala—$251; Pontiac Grand Am—$184; and GMC Sierra—$249.

¶4 Following the accident, Progressive paid the limit of liability coverage, $100,000 to each of the three Plaintiffs injured in the accident (or, $300,000 total for the accident), under the Warrens' coverage on the GMC Sierra pick-up truck involved in the accident. However, Plaintiffs claimed, as set forth in their March 2016 Amended Complaint, that they were entitled to recover based upon the combined, or stacked, liability coverage limits for all four of the Warrens' vehicles, thus totaling $400,000 per person or $1,200,000 for the accident. Progressive denied Plaintiffs' claim to stack the four liability coverages, arguing that Plaintiffs had received the limits of the liability coverage available to them under the Warrens' policy. The parties filed competing motions for summary judgment on the issue.

¶5 Noting that this Court had not ruled that third-party liability coverages were stackable, the District Court cited the rulings of federal courts applying Montana law to the issue, which had denied stacking. The court reasoned that Montana cases requiring stacking of first-party coverages were inapplicable because first-party and third-party coverages were fundamentally different, that only named insureds could stack their coverages, that third-party liability coverage was not personal and portable like first-party

coverage, and that prohibition upon the stacking of third-party liability coverage did not render the Warrens' policy's coverage illusory. The District Court concluded that, "[b]ecause third party liability coverages are not stackable in Montana, § 33-23-203, MCA, Montana's anti-stacking statute, seems ill-suited when applied to an insurer that is attempting to avoid the stacking of third party liability limits," noting the Insurance Commissioner had promulgated instructions, pursuant to the statute, for filing of rates for stacking of first-party coverages, but not third-party coverages. Therefore, the District Court granted summary judgment to the Defendants.

¶6 Plaintiffs appeal.

STANDARD OF REVIEW

¶7 We review de novo a district court's ruling on summary judgment. *City of Missoula v. Mt. Water Co*., 2016 MT 183, ¶ 19, 384 Mont. 193, 378 P.3d 1113.

DISCUSSION

¶8 Plaintiffs argue the District Court erred by failing to apply § 33-23-203, MCA, to the question of stacking the third-party liability coverage claimed here. Plaintiffs characterize the statute as having been changed by 2007 amendments from "an anti-stacking statute into a pro-stacking statute," which now requires coverages to be stacked unless the insurer takes affirmative action otherwise. The oft-amended provision now states, in relevant part:

> (1) Unless a motor vehicle liability policy specifically provides otherwise, the limits of insurance coverage available under each part of the policy must be determined as follows, regardless of the number of motor vehicles insured

> under the policy, the number of policies issued by the same company covering the insured, or the number of separate premiums paid:
>
> . . .
>
> (c) the limits of the coverages specified under one policy or under more than one policy issued by the same company may not be added together to determine the limits of insurance coverages available under the policy or policies for any one accident if the premiums charged for the coverage by the insurer actuarially reflect the limiting of coverage separately to the vehicles covered by the policy and the premium rates have been filed with the commissioner.

Section 33-23-203, MCA. Plaintiffs note the statute's term, "motor vehicle liability policy," is defined in § 33-23-204, MCA, and includes liability coverages, which vehicle owners are required to provide, in a minimum amount. *See* § 61-6-103, -301, MCA. In full, that definition states:

> (2) "Motor vehicle liability policy" means *a policy of automobile or motor vehicle insurance against liability required under Title 61, chapter 6, parts 1 and 3*, and all additional coverages included in or added to the policy by rider, endorsement, or otherwise, whether or not required under Title 61, including, without limitation, uninsured, underinsured, and medical payment coverages.

Section 33-23-204(2), MCA (emphasis added).

¶9 Thus, Plaintiffs argue the statute "applies to ***all*** automobile insurance coverages, ***including*** liability coverages," (emphasis in original), and that the District Court erred because "a Montana court may not properly reject, as somehow 'ill-suited,' application of this controlling Montana statute." Then, Plaintiffs contend Progressive failed to satisfy the requirements under subsection 203(1)(c) to foreclose stacking of coverages, because it did not charge a premium to "actuarially reflect the limiting of coverage separately to the

vehicles covered by the policy," and file those premium rates "with the commissioner." *See* § 33-23-203(1)(c), MCA. Consequently, Plaintiffs argue the liability coverages on all four of Warrens' vehicles must be stacked.

¶10 Progressive answers that Plaintiffs' characterization of § 33-23-203, MCA, as a re-made, "pro-stacking" statute, is "overreaching," and argues the statute has always been an anti-stacking statute, and remains so. Noting the syntax of subsection 203(1)(c), "the limits of coverages . . . may not be added together . . . if . . . ," followed by rate and filing requirements, Progressive argues the plain language "provides one, non-exclusive . . . . constitutionally permissible" method for insurers to foreclose stacking in light of this Court's holding partially striking down the statute as unconstitutional in *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶ 38, 315 Mont. 107, 67 P.3d 892. Noting this Court's precedent has never permitted "stacking for non-insureds seeking benefits under a policy they did not purchase," and the history of § 33-23-203, MCA, as an anti-stacking statute, Progressive contends "the only reasonable explanation is the Legislature intended to continue prohibiting stacking," and provided insurers "a way to prevent stacking that Montana common law would otherwise require," but "create[d] no rule requiring stacking." Progressive argues this interpretation is consistent with the statutory scheme in Title 61 setting mandatory minimum automobile coverage limits, because an automatic stacking rule would effectively mandate additional coverage for everyone with more than one insured vehicle. Progressive further offers its interpretation

is consistent with the remaining provisions of § 33-23-203, MCA, which include the following:

> (1)(a) the limits of insurance coverage available for any one accident are the limits specified for each coverage available under the policy insuring the motor vehicle involved in the accident;
>
> (1)(b) if the motor vehicle involved in the accident is not insured under a policy, the limits of the insurance coverages available for any one accident are the highest limits of the coverages specified under one policy for one motor vehicle insured under that policy;
>
> . . .
>
> (2) *A motor vehicle liability policy may also provide for other reasonable limitations*, exclusions, reductions of coverage, or subrogation clauses that are designed to prevent duplicate payments for the same element of loss under the motor vehicle liability policy . . . or *to prevent the adding together of insurance coverage limits in one policy or from more than one policy issued by the same company*. [(Emphasis added.)]

¶11 Finally, Progressive argues that, even if the statute imposed a general stacking obligation, Progressive satisfied the statute's rate and filing requirements permitting it to foreclose stacking, as its premium rates were actuarially based upon limiting coverage per separate vehicle and were filed with the Insurance Commissioner. In reply, Plaintiffs contest Progressive's claim to have met the rate and filing requirements, but argue that, "[a]t the very least, this is a fact issue that should be resolved by the district court."

¶12 The parties' widely divergent constructions of the current version of the statute well illustrate the interpretational challenge that the law, with its combination of old and new parts, now presents. Likewise, the Dissent offers that the 2007 amendments gave the law "a new, peculiar effect." Dissenting Opinion, ¶ 38 (positing the statute now neither

"affirmatively allows, nor precludes, stacking of [liability] coverages").[1] However, we need not resolve all of the parties' disputes over the statute's interpretation, and its designation as a pro-stacking or anti-stacking statute, to resolve the issue before us here. As noted above, "motor vehicle liability policy" is defined by § 33-23-204(2), MCA, as "a policy of automobile or motor vehicle insurance against liability required under Title 61, chapter 6, parts 1 and 3, and all additional coverages included in or added to the policy . . . including, without limitation, uninsured, underinsured, and medical payment coverages." The Warrens' policy, which provided automobile liability coverage in a section entitled "Liability to Others," is encompassed within this definition and, therefore, the application of § 33-23-203, MCA, to motor vehicle liability policies necessarily includes application to their policy as well. Plaintiffs are correct that the statute must be the starting point of an analysis regarding the stacking of coverages under that policy. However, how the statute applies and, ultimately, whether stacking of the policy's coverages is required, are questions necessitating further analysis.

[1] The interpretational difficulties are underscored by the Dissent's conclusions that portions of the statute no longer have independent effect, Dissenting Opinion, ¶ 38, and that other portions remain unconstitutional in light of our decision in *Hardy*. Dissenting Opinion, ¶ 38 n.4. These conclusions may find resistance in principles of statutory construction, including that 1) it has "long been a fundamental rule that statutes should be interpreted as a whole, *giving meaning to all*, if possible." *In re Marriage of Simpson*, 2018 MT 281, ¶ 17, 393 Mont. 340, 430 P.3d 999 (citing Section 1-2-101, MCA) (emphasis added); and 2) when a statute determined to be unconstitutional by the Court is revisited and revised by the Legislature, it returns to the Court in subsequent litigation with the presumption of constitutionality. *See Mead v. M.S.B., Inc*., 264 Mont. 465, 474, 872 P.2d 782, 788 (1994). Here, Plaintiffs do not challenge the constitutionality of any portion of § 33-23-203, MCA.

¶13 The statute's initial clause prefaces the statute with the condition, "[*u*]*nless a motor vehicle liability policy specifically provides otherwise,* the limits of insurance coverage available under each part of the policy must be determined as follows . . . ". Section 33-23-203(1), MCA (emphasis added). Thus, the first question to be considered when applying the statute, which defers to the provisions of the subject policy, is whether the policy specifically determines the limits of coverage, that is, whether the coverage limits can be stacked.

¶14 Plaintiffs argue this Court interpreted the initial clause of § 33-23-203(1), MCA, in *Christensen v. Mountain West Farm Bureau Mut. Ins. Co*., 2000 MT 378, 303 Mont. 493, 22 P.3d 624, to mean "unless the policy specifically permits stacking," and therefore, the clause only defers to policies that *permit* stacking, not to policies that *prohibit* it. However, in *Christensen* we were applying an earlier version of the statute that existed prior to our decision in *Hardy* partially invalidating it, and prior to the Legislature's revisions in 2007. As we explained about the version of the statute at issue in *Christensen*, "Section 33-23-203(1)(c), MCA, prohibits stacking regardless of the number of policies issued." *Christensen*, ¶ 39. It was therefore logical for the Court, in that context and without the necessity for broader analysis, to interpret the "provides otherwise" clause to refer to polices that "permit[] 'stacking.'" *Christensen*, ¶ 39. However, subsection 203(1)(c) has since been revised and, instead of providing a blanket prohibition on stacking, now provides a mechanism for *determining* whether coverage limits can be stacked, when viewed in the context of the statute as a whole. *See* § 33-23-203(1), (c), MCA ("[u]nless a

motor vehicle liability policy specifically provides otherwise, *the limits of insurance coverage* available under each part of the policy *must be determined as follows*," followed by the directive that coverages "may not be added together to determine the limits" if the process is undertaken whereby premium rates actuarially reflecting separate coverage per vehicle are filed with the Insurance Commissioner. (emphasis added)). Consequently, the initial clause of the statute now defers to insurance policies that provide alternate coverage stacking determinations to those provided by the statute.[2, 3]

¶15 The Warrens' policy contained a Declarations Page explaining the different coverages under the policy. On the Declarations Page, the bodily injury liability coverage limits, which would provide coverage for third-party claims such as Plaintiffs' here, were listed for each vehicle as "$100,000 each person/$300,000 each accident." The

[2] Plaintiffs' argument is inconsistent with their position that the 2007 legislative revisions changed the statute into a "pro-stacking" provision, because policies that "permit" stacking would no longer "provide otherwise" or treat stacking any differently than a statute that required stacking.

[3] The Dissent likewise takes the position that the opening clause of the statute refers to policies that "allow stacking," but acknowledges the existence of such policies is "unlikely." Dissenting Opinion, ¶ 36. Indeed, in the Court's experience, we have yet to encounter an automobile policy that "provides," § 33-23-203(1), MCA, for the stacking of coverages. Construing the statute in such an unrealistic manner may run counter to the principle that "the Court must construe a statute as a whole in order to avoid absurd results." *Engellant v. Engellant (In re Estate of Engellant)*, 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218. This position may also be inconsistent with the Dissent's assessment that the statute now neither "allows, nor precludes, stacking."

The Dissent correctly concludes that the new premium rate filing process provides an administrative "safe harbor" for anti-stacking policy provisions. Dissenting Opinion, ¶ 38. By complying with the process, insurers can obtain, under color of law, an initial approval for an anti-stacking policy. However, while enhancing their legal standing, the filing process should not be misunderstood as insulating such policies from legal challenges on constitutional and public policy grounds, such as the public policy arguments made by the Plaintiffs here. On these issues, our precedent remains unchanged.

Declarations Page also set forth a general statement prohibiting stacking, stating, "[t]he policy limits shown for a vehicle may not be combined with the limits for the same coverage on another vehicle unless the policy contract or endorsements indicate otherwise." This prohibition on stacking was reinforced by specific terms within the policy itself, which stated, "[t]e limit of liability shown on the declarations page for liability coverage is the most we will pay regardless of the number of: 1) claims made; 2) covered autos; 3) insured persons; 4) lawsuits brought; 5) vehicles involved in the accident; or 6) premiums paid." Finally, the policy reiterated that, "[i]f a covered auto is involved in an accident, we will not pay more than the limit of liability applicable to the covered auto involved in the accident." Pursuant to the statute's delegation of the issue to the policy, Progressive's policy specifically and unambiguously provided that stacking of coverages would not be permitted.[4]

¶16 Plaintiffs offer several arguments challenging the enforceability of the anti-stacking provisions of Progressive's policy on public policy grounds. Citing cases requiring stacking of first-party coverages, such as uninsured, underinsured, and medical payment coverages, Plaintiffs assert that "[a]ny distinction between so-called 'first-party' and 'third-party' coverages is meaningless." However, there are fundamental differences in the coverages that must be carefully considered by the Court in determining whether to void, on public policy grounds, a policy provision governing the stacking of coverage limits. *See Fisher v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 28, 371 Mont. 147,

[4] Plaintiffs do not contend the Progressive policy is ambiguous or its meaning is otherwise unclear.

305 P.3d 861 (citing "the necessity of conducting a critical analysis of Montana's public policy" before considering voiding an insurance policy provision).

¶17 First, this Court has required stacking of first-party coverages that we found to be "personal and portable," including uninsured motorist, underinsured motorist, and medical payment coverages. *See Kemp v. Allstate Ins. Co.*, 183 Mont. 526, 601 P.2d 20 (1979) (uninsured motorist coverage); *Bennett v. State Farm Mut. Auto. Ins. Co*., 261 Mont. 386, 862 P.2d 1146 (1993) (underinsured motorist coverage); *Ruckdaschel v. State Farm Mut. Auto. Ins. Co.*, 285 Mont. 395, 948 P.2d 700 (1997) (medical payment coverage); *Hardy* (underinsured motorist coverage); *State Farm Mut. Auto. Ins. Co. v. Gibson*, 2007 MT 153, 337 Mont. 509, 163 P.3d 387 (medical payment coverage). We have found coverage to be "personal and portable" when it applies in "all circumstances," or, in other words, is applicable without regard to the ownership or use of a motor vehicle. *Jacobson v. Implement Dealers Mut. Ins. Co.*, 196 Mont. 542, 548, 640 P.2d 908, 912 (1982) ("They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick." (internal quotation omitted) (citation omitted)); *see also Bennett*, 261 Mont. at 389, 862 P.2d at 1148 (declaring coverage was "personal" because it "does not depend on the insured person occupying an insured vehicle."). Indeed, in *Ruckdaschel*, the insured was injured as a pedestrian when struck by a vehicle, and she was permitted to stack the medical payment coverages under the three motor vehicle policies she had purchased. *Ruckdaschel*, 285 Mont. at 399, 948 P.2d at 703.

¶18 Liability coverage is not likewise portable and applicable in "all circumstances." As Progressive's policy here provides, liability coverage is applicable only "with respect to an accident arising out of the ownership, maintenance, or use of an auto or trailer." The policy does not follow the insureds to provide coverage in other scenarios. Consequently, had Taylor Warren injured the Plaintiffs by a negligent act other than one "arising out of the ownership, maintenance, or use" of a vehicle, Progressive's policy would provide no liability coverage whatsoever for Plaintiffs' injury claims.

¶19 There is a limited portability characteristic of liability coverage in the sense that it follows the insureds when they are driving a substitute vehicle owned by another party, who is not insured under the subject policy, which is a requirement of statute. *See* § 61-6-103(2), MCA. However, coverage is still triggered by, and dependent upon, the use or involvement of a motor vehicle. "While an argument can be made that the coverage is in some sense personal because it follows the insured to a non-owned vehicle, liability coverage is nevertheless vehicle dependent. The liability coverage is not like a first-party or personal-accident policy such as uninsured motorist or medical pay coverages. . . . Liability coverage results solely because a vehicle is involved." *Slack v. Robinson*, 71 P.3d 514, ¶ 25 (N.M. Ct. App. 2003). Although done in passing, we have recognized this distinction, noting, "*Christensen* involved liability coverage, as opposed to personal and

portable coverages." *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 35, 325 Mont. 207, 104 P.3d 483.[5]

¶20 Because liability coverage is tied to the use or involvement of a motor vehicle, each additional insured vehicle presents a separate and additional risk: that by using it, another driver could cause an additional liability-incurring accident. Indeed, while an individual could not personally operate multiple insured vehicles at once, it is entirely possible for vehicles driven by multiple permissive drivers to be involved in different liability-creating accidents at the same time, or later within the policy period. Nonetheless, each vehicle's use triggers liability coverage for damages incurred in each separate accident, pursuant to the premium paid for that vehicle, securing a full coverage limit in the amount purchased and identified by the policy. Here, Progressive paid the liability coverage limit for the Warrens' GMC Sierra pickup involved in the accident, in the full amount stated on the Declarations Page, but also continued to assume the risk that full coverage limits on the Warrens' second, third, and fourth vehicles would be payable for claims as well, and thus, the separate premiums secured protection for the Warrens that was not illusory. A policy is illusory if it "defeat[s] coverage for which the insurer has received valuable consideration." *Fisher*, ¶ 33 (citing *Bennett*, 261 Mont. at 389, 862 P.2d at 1148); *see also*

[5] The Dissent disagrees, and urges that third-party liability coverage "is no less personal and portable than first-party UM, UIM, and Med-Pay coverages," and thus should be stackable. Dissenting Opinion, ¶ 41. However, it cites no jurisprudential authority to support a recognition of third-party liability coverage as portable, and makes no effort to refute the authorities cited herein for the contrary position that automobile liability coverage operates differently.

Gibson, ¶ 11 (citing *Hardy*, ¶ 40) ("[A] provision that defeats coverage for which valuable consideration has been received violates Montana public policy.").

¶21 The coverage here is contrasted with the underinsured coverage we found to be illusory in *Hardy*. There, the insured was injured in an automobile accident, and the $50,000 he recovered from the tortfeasor was insufficient to cover his damages. *Hardy*, ¶ 7. The insured had purchased underinsured motorist coverage, for which the declaration page of his policy stated limits of $50,000 per person and $100,000 per accident for his vehicles. *Hardy*, ¶ 9. However, the policy had definitional and offset provisions, including the requirement that UIM coverage was offset by amounts the insured recovered from the tortfeasor, that defeated the entirety of the policy's stated $50,000 limits of underinsured coverage, preventing any recovery. We held that the policy provisions "render[ed] coverage that Progressive promised to provide illusory, and defeat[ed] the insured's reasonable expectation." *Hardy*, ¶ 29. However, here, the premiums charged and paid represent consideration for separate liability coverages for each vehicle, to cover the additional risks of incurring liability for the separate use of those vehicles. Thus, "[t]he Policy provides the liability coverage for which the premium was paid." *Fisher*, ¶ 33.

¶22 Given that liability coverage is tied to a particular vehicle's use and is not personal and portable, that the policy here provided liability coverage that was not illusory, that the policy unambiguously and repeatedly stated that coverages on separate vehicles could not be stacked, as authorized by § 33-23-203(1), MCA, and that Progressive paid out the coverage limit for the Warrens' GMC Sierra as set forth on the Declaration Page, we cannot

conclude it was reasonable to expect the policy would pay more. In particular, the Plaintiffs were strangers to the insurance contract, and, at most, could have reasonably expected only that a vehicle causing injury to them would carry liability insurance in the amounts required by Title 61—$25,000 per person and $50,000 per accident—as nothing would require an owner to acquire more. Here, those expectations were not violated because, not only did the Warrens satisfy Title 61 by carrying the mandated minimum coverage, they also purchased higher coverage limits.

¶23 We therefore conclude that public policy considerations do not require judicial voiding of the anti-stacking provisions of Progressive's policy as applied to liability coverage, and that the District Court did not err in granting summary judgment to Progressive. We concluded in *Hardy* that "an anti-stacking provision in an insurance policy that permits an insurer to receive valuable consideration for coverage that is not provided violates Montana public policy." *Hardy*, ¶ 42. However, in contrast to the policy provisions that defeated the underinsured coverage at issue in *Hardy*, the liability coverage at issue here, as demonstrated above, does not permit Progressive to receive valuable consideration for coverage it does not provide.

¶24 This holding is consistent with the conclusion reached by many courts and commentators on the issue. *See*, generally, New Appleman on Insurance Law Library Edition § 63.16 (2018) ("The number of vehicles insured under a particular policy does not affect the liability limits available for . . . third party liability claims arising from a single accident. There is no 'stacking' of coverages as there may when there are

uninsured/underinsured claims."); *Gordon v. Gordon*, 41 P.3d 391, 394 (Okla. 2002) ("A variety of theories supporting the proposition that liability coverages should be stacked ha[ve] been advanced in the many opinions from around the country . . . . [and] have been uniformly rejected by the courts that have considered them."); *Stevenson ex rel. Stevenson v. Anthem Cas. Ins. Grp.*, 15 S.W.3d 720, 724 (Ky. 1999) (rejecting stacking of liability coverages because the passenger plaintiff "did not pay for the coverage and had no reasonable expectation of collecting it"); *Agnew v. Am. Family Mut. Ins. Co.*, 441 N.W.2d 222, 227 (Wis. 1989) (holding a third party cannot stack liability coverage from vehicles not involved in the accident); *Houser v. Gilbert*, 389 N.W.2d 626, 629 (N.D. 1986) (quoting *Oarr v. Gov't Emps. Ins. Co.*, 383 A.2d 1112, 1117 (Md. 1978) ("[W]hen considering liability coverage 'the courts, with near uniformity, have held the first party coverage cases [on medical payment and uninsured motorist coverages] to be inapplicable and have found the policy to be unambiguous and to preclude "stacking" [of third party liability coverages].'"); *Bagnal v. Foremost Ins. Grp.*, No. 2:09-cv-1474-DCN, 2010 U.S. Dist. LEXIS 18567, at *30 (D.S.C. Mar. 2, 2010) (quoting *Ruppe v. Auto-Owners Ins. Co.*, 496 S.E.2d 631, 633 (S.C. 1998)) ("'Liability coverage . . . is limited to the particular vehicle for which it is purchased. The extent of liability coverage is thus statutorily defined by the amount of coverage on the insured vehicle and does not encompass coverage applicable to other vehicles.'"); *Rando v. Cal. State Auto. Ass'n*, 684 P.2d 501, 506 (Nev. 1984) (adding "our imprimatur to the uniform conclusion reached by courts in other jurisdictions disallowing stacking [of liability policies]"). United States District Courts in

Montana have reached the same conclusion, although employing a different rationale. *See Morris v. Estate of Bishop* No. CV 16-6-BU-SEH, 2016 U.S. Dist. LEXIS 151912, at *6 (D. Mont. Nov. 2, 2016) (denying stacking for passenger plaintiffs because "[i]t is axiomatic that a liability insurance policy provides coverage only to [] 'insured person[s],'" and thus, plaintiffs are only entitled to seek third-party coverage); and *Hecht v. Mt. W. Farm Bureau Mut. Ins. Co*., No. CV 15-40-GF-BMM, 2016 U.S. Dist. LEXIS 27384, at *6 (D. Mont. Mar. 3, 2016) (passenger plaintiff did not meet the policies' definition of "insured," so stacking "does not apply under Montana law.").

¶25 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON

Justice Laurie McKinnon, concurring.

¶26 I agree with the Court's conclusion that the Warrens' policy's language prohibits the stacking of liability coverage. The Warrens' policy unambiguously precludes stacking of liability coverage, stating: "If a covered auto is involved in an accident, we will not pay more than the limit of liability applicable to the covered auto involved in that accident." The Warrens' policy's anti-stacking clause does not contravene § 33-23-203, MCA, which allows insurers to provide that coverages are not stacked. More fundamentally, however,

the premise upon which this Court in *Hardy* invalidated a contract provision between an insured and insurer has no application to a third party who is not a named insured, not a party to the contract, and has no basis to mount a coverage dispute against the insurer. I write separately to address these points.

¶27 First, § 33-23-203, MCA, entitled "*Limitation* of liability under motor vehicle liability policy," allows insurers to limit the stacking of coverages. (Emphasis added.) The plain language of § 33-23-203, MCA, limits "insurance coverage available under each part of the policy" and clearly prohibits stacking of policies "[u]nless a motor vehicle liability policy specifically provides otherwise . . . ." Section 33-23-203, MCA, reinforces limitations of coverage in various scenarios and demands an examination of the policy itself. Subsection (2) allows the policy to have limitations to prevent duplicate payments or "to prevent the adding together of insurance coverage limits in one policy or from more than one policy issued by the same company." As noted by the Dissent, subsection (1)(c) creates a "safe harbor" for the insurer if the insurer's premiums "actuarially reflect the limiting of coverage separately to the vehicles covered by the policy and the premium rates have been filed with the commissioner." Subsection (1)(c) does not, however, imply § 33-23-203, MCA, is a "pro-stacking" statute or create a rule requiring stacking when an insurance contract's terms provide otherwise. The plain language of § 33-23-203, MCA, limits coverage and allows insurers to prevent stacking that may be challenged as unlawful pursuant to this Court's precedent in *Hardy*. Following our decision in *Hardy* that insurance companies may not prohibit stacking "to the extent that it allows charging

premiums for illusory coverage," the Legislature continued to allow policies to prohibit stacking to the extent constitutionally permissible. *Hardy*, ¶ 38. Thus, § 33-23-203(1)(c), MCA, as amended in 2007, does not require stacking of liability limits when multiple premiums are charged. The 2007 amendment did not convert an "anti-stacking" statute into a "pro-stacking" one—it simply allowed insurers to prevent stacking except where unconstitutional pursuant to *Hardy.*

¶28 Importantly, however, this Court's precedent prohibiting stacking in certain instances is premised upon the insured's expectations in the context of the insured's insurance contract with an insurer; more specifically, within the context of first-party uninsured motorist (UM), underinsured motorist (UIM), and medical payment (Med Pay) coverage. First-party coverages are distinct from third-party coverages because first-party coverages are "personal and portable" to the insured and the coverage would be illusory—the insured would pay premiums for unreceived coverage—if not stacked. Coverage is illusory if a provision defeats coverage for which the insurer received valuable consideration. *Fisher*, ¶ 33. Coverage is not illusory if the *insureds* received coverage as set forth in the policy. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 15, 389 Mont. 48, 403 P.3d 664. Here, the liability coverage protected the Warrens from Cross's third-party liability claim *in the amount negotiated by the insurer and insured as the policy's limit.* Claimant Cross is not entitled to stack the Warrens' coverages from other vehicles that the contract between the Warrens, the insureds, and Progressive, the insurer, would not allow. Claimant Cross is not the named insured, did

not pay any premiums for the Warrens' liability coverage, is not a party to the insurance contract between the Warrens and Progressive, and has no expectation of additional coverage from the Warrens' policy. Claimant Cross's only reasonable expectation of liability coverage was for the minimum amounts required by law—$25,000 per person and $50,000 per accident. Section 61-6-103(1)(b)(i)-(ii), MCA.

¶29 In my view, the primary reason stacking is prohibited here is based on the important distinction between optional first-party coverage (UM, UIM, and Med Pay) and legally-mandated third-party coverage (bodily injury and property damage). First-party coverage is purchased by the insured to benefit and protect the insured personally. It is personal and portable and meant to cover the insured where an accident is covered by the insured's UM, UIM, or Med Pay policy. To ensure the insured's coverage is not illusory—and to make sure the first-party insured receives the coverage for which she paid—an insurance company cannot prohibit stacking of first-party coverages if the insured paid separate premiums. A third-party claimant, in contrast, is not a named insured and is not entitled to stack liability limits in the same manner as a first-party claimant. The third-party claimant is not a named insured and therefore can never claim to have had a reasonable expectation of the right to stack coverage limits when the insured and insurer entered into the insurance contract.

¶30 The key to understanding the reasoning behind this Court's stacking precedent always relates back to the fundamental distinction between first- and third-party coverages.

Here, Claimant Cross is a third party and not entitled to stack the Warrens' liability coverages.[1]

/S/ LAURIE McKINNON

Justice Dirk Sandefur, dissenting.

¶31 I dissent from the Majority holding that the four bodily injury coverages (hereinafter third-party liability coverages) under the Progressive motor vehicle liability policy (MVLP) at issue are not stackable here. The jump-off point for the Majority holding is a demonstrably erroneous construction of the introductory clause of § 33-23-203(1), MCA, thereby conveniently avoiding the troublesome operation and effect of the very statute enacted and repeatedly amended by the Legislature to *allow* insurers to preclude stacking of MVLP coverages. Oddly and illogically, the Majority holding allows insurers to preclude stacking outside of the statute enacted in response to our decisions invalidating such preclusions unless and until otherwise clearly provided by the Legislature.

¶32 The third and current version of § 33-23-203, MCA, reflects and is the product of the Legislature's unchanged intent and continuing effort to allow insurers to contractually preclude stacking of similar MVLP coverages. On each occasion in 1981, 1997, and 2007, the Legislature has acted at the urging of the insurance industry for the purported purpose

[1] It makes no difference whether the Warrens assign their first-party rights under the insurance contract to Cross, as Cross could only enforce the terms of the policy that prevent stacking of liability coverages. Liability coverage is connected to a specific vehicle and does not become personal and portable through an assignment.

of keeping insurance rates affordable to the public.[1] Even a cursory summary of the advent and evolution of the Legislature's anti-stacking efforts reveals the fallacy of the Majority analysis.

¶33 In a series of cases since 1979, we have consistently held that, as a matter of generally applicable contract law, policy provisions barring stacking of similar MVLP coverages purchased under one or more policies are void and unenforceable in violation of public policy. We based those decisions on the personal and portable nature of the coverages at issue and public policy (1) in favor of requiring insurers to provide MVLP coverages for which they have charged separate payment in full and (2) further favoring mandatory and optional motor vehicle liability coverages to compensate persons injured in motor vehicle accidents. In reaction to our early decisions, the 1981 Legislature first enacted § 33-23-203(1), MCA, to bar stacking of similar MVLP coverages available "*unless [the policy] specifically provides otherwise.*" (Emphasis added.) In 1997, in response to later court decisions noting the limited scope of the express language of the statute, the Legislature amended § 33-23-203(1), MCA, to more broadly bar stacking of all MVLP coverages regardless of whether available under single or multiple policies, whether

[1] Whether and to what extent, if any, stacking of similar MVLP coverages for which insurers have charged separate premiums has any actual negative effect on the rates insurers charge or must charge to provide those coverages at a reasonable rate is not at issue and not a matter of record in this case.

or how the insurer charged separate premiums, or whether the coverages were mandatory or optional.[2]

¶34 However, in 2003, we held that the 1997 version of § 33-23-203(1), MCA, was unconstitutionally arbitrary on the ground that, by allowing MVLPs to bar stacking of MVLP coverages, it effectively allowed insurers to charge for coverages not actually provided, an effect not reasonably related to the statute's purpose of making and maintaining MVLP premiums reasonably affordable. *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶ 38, 315 Mont. 107, 67 P.3d 892. In reaction to that decision, the 2007 Legislature amended § 33-23-203(1)(c), MCA, to allow MVLPs to preclude stacking as intended under the 1997 statute "if the premiums charged for the coverage by the insurer actuarially reflect the limiting of coverage separately to the vehicles covered by the policy and the premium rates have been filed with the [insurance] commissioner." *See* 2007 Mont. Laws ch. 201, § 1 (HB 587). Based on our 2003 decision and the 2007 legislative history, the sole purpose of the amendment was to bolster the statute to withstand constitutional scrutiny and thereby effect the Legislature's purpose and intent to preclude stacking unless otherwise specifically authorized by the policy.

¶35 As critical here, the introductory clause to § 33-23-203(1), MCA ("[u]nless a [MVLP] specifically provides otherwise"), has remained unchanged since the original enactment in 1981. On two separate occasions prior to the 2007 amendment, we clearly and unequivocally construed the introductory clause to mean *unless the policy specifically*

[2] *See* 1997 Mont. Laws ch. 495, §§ 1-2.

allows stacking. *Christensen v. Mountain W. Farm Bureau Mut. Ins. Co.*, 2000 MT 378, ¶ 39, 303 Mont. 493, 22 P.3d 624 (§ 33-23-203(1)(c) "prohibits stacking . . . unless the policy at issue . . . specifically permits 'stacking'"); *Farmers All. Mut. Ins. Co. v. Holeman*, 278 Mont. 274, 278, 924 P.2d 1315, 1317 (1996) ("it is clear" from the express language of § 33-23-203(1), MCA, "that 'stacking' is not allowed 'unless a [MVLP] specifically provide[s] otherwise'"). Nothing in the express language or legislative history of the 2007 amendment of § 33-23-203(1)(c) evinces *any* effect or intent to alter the clear and unequivocal original meaning and purpose of the introductory clause, certainly not as contorted by the Majority.

¶36 Correctly construing the introductory clause in accordance with its unchanged original meaning, and based on the express language and history of subsections (1)(a)-(c), § 33-23-203(1) has three basic components and functions. First, as it has since 1981, the introductory clause provides an exception to the main anti-stacking bar in the unlikely case that a MVLP may specifically allow stacking. Second, § 33-23-203(1)(a)-(b) specifies statutory limits of MVLP coverages for any one accident "under the policy insuring the motor vehicle involved" or when "the motor vehicle involved . . . is not insured under a policy" at issue. Third, in conjunction with the limits specified in subsections (1)(a) and (1)(b), § 33-23-203(1)(c) allows MVLPs to preclude stacking if the insurer has filed the subject "premium rates" with the Montana Insurance Commissioner and "the premiums charged for" the coverages "actuarially reflect" the limitation of the coverages separately to specific vehicles. Bolstered to survive constitutional scrutiny by the 2007 amendment

of subsection (1)(c), § 33-23-203(1) thus now effects the Legislature's current intent to allow insurers, upon compliance with subsection (1)(c), to preclude stacking free from pesky contract law attack on public policy grounds.[3]

¶37 Intended or not, Plaintiffs assert that the 2007 amendment altered the character of § 33-23-203(1) as merely an anti-stacking statute to further *affirmatively* permit stacking except upon insurer compliance with subsection (1)(c). However, nothing in the express language or 2007 legislative history supports that proposition. From inception to date, the sole purpose of § 33-23-203(1) has been to preclude stacking of MVLP coverages unless the policy specifically allows stacking. The sole purpose of the 2007 amendment of subsection (1)(c) was to bolster the statute to survive constitutional scrutiny in direct response to our decision in *Hardy*.

¶38 However, though not entirely the effect asserted by Plaintiffs, the limited language and narrow focus of the 2007 amendment nonetheless gave § 33-23-203(1) a new, peculiar effect. Construed together in context as an integrated whole, subsections (1)(a) and (1)(b) of § 33-23-203(1) are inseparable part and parcel with subsection (1)(c) and thus cannot be logically construed to preclude stacking absent compliance with subsection (1)(c). Consequently, absent compliance with subsection (1)(c), § 33-23-203(1) now *neither* affirmatively allows, nor precludes, stacking of MVLP coverages—it merely provides a

[3] Whether the 2007 amendment to subsection (1)(c) is indeed sufficient for § 33-23-203(1), MCA, to survive constitutional scrutiny is not at issue in this case.

safe harbor for anti-stacking provisions in compliance with subsection (1)(c). Absent compliance with subsection (1)(c), § 33-23-203(1) simply has no effect on MVLPs.[4]

¶39 To the extent not superseded by statute, generally applicable contract law governs whether anti-stacking provisions are valid and enforceable. *See Hardy*, ¶¶ 39-41. As a matter of generally applicable contract law, we have long held that anti-stacking provisions in UM, UIM, and Med-Pay[5] coverages are invalid and unenforceable based on their personal and portable nature and public policy (1) in favor of requiring insurers to provide similar coverages for which they have charged separate premiums and (2) further favoring mandatory and optional motor vehicle liability coverages to compensate persons injured in accidents. *See, e.g.*, *St. Farm Mut. Auto. Ins. Co. v. Gibson*, 2007 MT 153, ¶¶ 21-22, 337

[4] The Majority attempts to further bolster its reasoning by citation to § 33-23-203(1), MCA (MVLP "may also provide for *other* reasonable limitations, exclusions, reductions of coverage . . . to prevent the adding together of . . . coverage limits in one policy or from more than one policy issued by the same company" (emphasis added)). Under the plain meaning and grammatical usage of § 33-23-203(2) in context with subsection (1), subsection (2) merely authorizes various referenced types of additional restrictions *other* than the foregoing anti-stacking provision in subsection (1) and in regard to which the word "other" refers. Moreover, the Legislature enacted the language in § 33-23-203(2) upon which the Majority now relies (i.e., a "policy may also provide for other reasonable limitations, exclusions, reductions of coverage . . . designed . . . *to prevent the adding together of insurance coverage limits in one policy or from more than one policy issued by the same company*") as part of the 1997 version of § 33-23-203, *see* 1997 Mont. Laws ch. 495 (SB 44), which we subsequently held was unconstitutional without limitation in violation of Article II, Section 17 of the Montana Constitution (substantive due process) as not rationally related to the legislative objective of keeping motor vehicle insurance affordable. *Hardy*, ¶¶ 34-38. Consequently, in the wake of *Hardy* and given the purpose of the 2007 amendment to remedy the cited constitutional defect, it is preposterous to assert that language previously deemed unconstitutional as a stacking bar can now be an independent source of statutory authority to that same end outside and away from the very statutory language added by the 2007 Legislature (§ 33-23-203(1)(c) (2007 Mont. Laws ch. 201 (HB 587)) to remedy the constitutional defect.

[5] As referenced herein, "UM" means "uninsured motorist coverage," "UIM" means "underinsured motorist coverage," and "Med-Pay" means "medical expense coverage."

Mont. 509, 163 P.3d 387; *Dakota Fire Ins. Co. v. Oie*, 1998 MT 288, ¶ 32, 291 Mont. 486, 968 P.2d 1126; *Ruckdaschel v. St. Farm Mut. Auto. Ins. Co.*, 285 Mont. 395, 397-99, 948 P.2d 700, 702-03 (1997); *Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 388-89, 862 P.2d 1146, 1148 (1993); *Chaffee v. U. S. Fid. & Guar. Co.*, 181 Mont. 1, 6-7, 591 P.2d 1102, 1104-05 (1979). As that line of cases has developed, we have applied those principles regardless of who paid for the coverages or whether they were mandatory or optional.

¶40 While we have not previously had the opportunity to squarely consider their application to third-party liability coverage, the contract law principles upon which we have found anti-stacking provisions in UM, UIM, and Med-Pay coverages unenforceable are equally applicable to third-party liability coverages without material distinction. The fact that MVLPs tie third-party liability coverage to insured drivers of particular insured vehicles is not significant to stacking because the primary reason for tying third-party liability coverage to particular vehicles is not to keep costs down but, rather, the Legislature's public policy requirement and intent to protect the public from injury caused by the tortious conduct of others no matter who is driving a licensed motor vehicle. *See* §§ 61-6-103(1)(b), -301(1)(a), MCA.

¶41 Moreover, third-party liability coverage is no less personal and portable than first-party UM, UIM, and Med-Pay coverages. Mandatory motor vehicle liability insurance coverage goes with an insured driver regardless of whether driving an insured or uninsured vehicle. *See* § 61-6-103(2), MCA. As in the Progressive policy at issue, optional

third-party liability coverages in excess of mandatory minimums similarly travel with an insured driver pursuant to "any vehicle" provisions or similar provisions typically in those policies. In pertinent part, the Progressive policy at issue defines an "insured person" as "you . . . with respect to an accident arising out of the ownership . . . or use of an auto. . . ." The policy then defines a "covered auto" as "any auto . . . shown on the declarations page for the coverages applicable to that auto . . . [or] *any additional auto*." (Emphasis added.)

¶42 Finally, regardless of the facts that third-party claimants are not parties to the insurance contract and that the coverage also protects the first-party insured, the other equally, if not more important purpose of third-party liability coverages is to protect the public from injury caused by the tortious conduct of others. *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶¶ 38-41, 315 Mont. 231, 69 P.3d 652; *Watters v. Guaranty Nat'l Ins. Co.*, 2000 MT 150, ¶ 29, 300 Mont. 91, 3 P.3d 626, *overruled on other grounds by Shilhanek v. D-2 Trucking*, 2003 MT 122, ¶ 21, 315 MT 519, 70 P.3d 721. *See also Brewer*, ¶¶ 47-50 (Trieweiler J., dissenting); *Bennett*, 261 Mont. at 388-89, 862 P.2d at 1148. Consistent with that important purpose, third-party claimants have the statutory right to prompt, fair, and equitable compensation from insurers under third-party liability policies. *See* §§ 33-18-201(6), -242, MCA. Whether as a matter of statutory or contract law, third-party claimants are intended third-party beneficiaries of mandatory and optional third-party coverages regardless of not being party to the contract. *See* §§ 33-18-201(6), -242, 61-6-103(1)(b), (2), -301(a), MCA; *Brewer*, ¶¶ 38-41; *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶¶ 18-22, 363 Mont. 151, 267 P.3d 756, *abrogated on*

other grounds by Chipman v. Northwest Healthcare Corp., 2012 MT 242, ¶¶ 47-52, 366 Mont. 450, 288 P.3d 193; *Harman v. MIA Serv. Contracts*, 260 Mont. 67, 72-73, 858 P.2d 19, 22-23 (1993); Restatement (Second) of Contracts § 302 (Am. Law Inst. 1981). *See also Brewer*, ¶¶ 47-50 (Trieweiler J., dissenting). Consequently, as in regard to the first-party MVLP coverages, anti-stacking provisions pertaining to mandatory or optional third-party liability coverages are invalid and unenforceable in violation of public policy, except as the Legislature may hereafter otherwise provide.

¶43 Applied here, as acknowledged by the Majority, the Progressive third-party liability coverages at issue are MVLP coverages, as broadly defined by § 33-23-204(2), MCA, and referenced in § 33-23-203(1), MCA. Pursuant to the introductory clause of § 33-23-203(1), those coverages are subject to the anti-stacking provisions of § 33-23-203(1)(a)-(c), as applicable, unless the policy specifically *allows* stacking. The terms of the policy at issue do not specifically allow stacking of provided MVLP coverages. Thus, the coverages at issue are subject to § 33-23-203(1)(c), MCA.

¶44 Section 33-23-203(1)(c), MCA, requires only that an insurer file the subject MVLP premium rates and that those rates "actuarially reflect the limiting" of MVLP coverages separately to specific covered vehicles. Section 33-23-203(1)(c) does not currently require insurers to file any statement or proof showing the required actuarial correlation. Beyond genuine material dispute on the Rule 56 record, Progressive timely filed its subject MVLP "premium rates" with the Insurance Commissioner. However, genuine issues of material

fact remain on the Rule 56 record as to whether those rates "actuarially reflect the limiting" of those coverages separately to specific covered vehicles.

¶45 Contrary to the Majority holding, the District Court erroneously granted summary judgment that the third-party liability coverages at issue are not stackable here. I would thus reverse and remand for further proceedings to determine whether the premium rates for the coverages at issue "actuarially reflect the limiting" of the coverages separately to specific covered vehicles as contemplated by § 33-23-203(1)(c), MCA. If so, I would instruct the District Court to re-enter summary judgment in favor of Progressive. If not, I would instruct the Court to enter summary judgment in favor of the Plaintiffs and proceed accordingly.

¶46 I dissent.

/S/ DIRK M. SANDEFUR

Justice Ingrid Gustafson joins in the dissenting Opinion of Justice Sandefur.

/S/ INGRID GUSTAFSON