

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 20-0464

JOSEPH RICHARD GOSS,

Plaintiff and Appellant,

vs.

USAA CASUALTY INSURANCE COMPANY, and DOES A-D, Inclusive,

Defendant and Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana Eighth Judicial District,
In and for the County of Cascade,
Cause No. DDV-18-0038; Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE ISSUES

Did the District Court err in granting USAA Casualty Insurance Company summary judgment because the applicable insurance policy excluded coverage for Joseph Richard Goss' accident in a two-wheeled motorcycle that he owned but did not insure with USAA Casualty Insurance Company.

STATEMENT OF THE CASE

Plaintiff/Appellant Joseph Richard Goss ("Goss") filed his Complaint on January 19, 2018, asserting two counts against Defendant/Appellee USAA Casualty Insurance Company ("USAA CIC"), namely Breach of Contract and Declaratory Relief. (Doc. No. 1). Under the Breach of Contract cause of action, Goss alleged USAA CIC breached by failing to pay benefits under the underinsured motorists ("UIM") coverage of his insurance policy with USAA CIC. (*Id.*). Under his Declaratory Relief cause of action, Goss sought declaratory judgment establishing coverage under the applicable insurance policy. (*Id.*).

On September 11, 2018, USAA CIC filed its Motion for Summary Judgment. (Doc. No. 19). Goss filed his Motion for Summary Judgment on November 22, 2019. (Doc. No. 36). Thereafter, on August 31, 2020, the District Court entered its Order Granting Defendant USAA's Motion for Summary Judgment. (Appendix to Appellant's Opening Brief ("Goss App.") A).

The District Court denied Goss' motion for summary judgment and granted USAA CIC's motion for summary judgment. (Goss App. A, p. 11). The District Court held Goss did not pay valuable consideration for UIM coverage or medical payments coverage to apply, and it was the lack of consideration paid for the motorcycle that subjected it to the exclusion. (Goss App. A, p. 10). Further, the District Court held Goss was not entitled to UIM benefits or Medical Payments coverage from USAA CIC. (*Id.*). It is from this Order which Goss files his appeal.

STATEMENT OF RELEVANT FACTS

Goss' case against USAA CIC stems from a May 21, 2015 motor vehicle accident. (Goss App. A, p. 2). At the time, Goss was traveling on his 2002 Yamaha V Star motorcycle in Great Falls, Montana. (*Id.*). Diann Stevens made a left turn in front of Goss, causing an unavoidable collision and Goss' motorcycle struck her vehicle. (*Id.*).

At the time of the accident, Goss insured four vehicles through USAA CIC. (*Id.*). Goss also owned the motorcycle involved in the accident; however, it was not insured with USAA CIC. (*Id.*; Doc. 19, p. 2). In fact, USAA CIC does not insure motorcycles. (Appendix to Appellee's Answer Brief ("USAA App.") D, p. 25, ll. 13-20). Instead, USAA CIC sends potential insureds to Progressive Insurance for motorcycle coverage. (USAA App. D, p. 25, ll. 3-8; p. 48, ll. 14-20). Coincidentally or not, Goss' motorcycle was insured through Progressive. (USAA

App. D, p. 47, ll. 8-15). However, Goss did not purchase UIM or Medical Payments coverage for his motorcycle from Progressive. (USAA App. D, p. 92, ll. 4-9).

Goss submitted a claim to USAA CIC for UIM benefits related to the May 21, 2015 accident. (Goss App. A, p. 2). Initially, USAA CIC accepted coverage and tendered \$25,000.00 to Goss. (*Id.*). After tendering the initial \$25,000.00, USAA CIC identified the payment had been made in error as the applicable policy did not provide coverage, and it halted further payment. (*Id.*). USAA CIC did not seek reimbursement of the \$25,000.00 paid in error to Goss. (Doc. No. 19, p. 2).

Goss was insured with USAA CIC under policy number 00256 96 61C 7109 8, effective April 24, 2015 to October 24, 2015 (hereinafter the “Policy”). (Doc. No. 39, p. 2). The UIM provisions in the Policy provide USAA CIC:

“[W]ill pay compensatory damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of BI sustained by a covered person and caused by an auto accident.

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle.”

(Doc. No. 39, p. 2). However, the Policy also provides the following exclusion:

“[W]e do not provide UIM Coverage for BI sustained by any covered person while occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for UIM under this policy. This includes a trailer of any type used with that vehicle.”

(Doc. No. 39, pp. 2-3). The purpose of the exclusion is not simply to exclude a motorcycle; the exclusion omits from coverage a vehicle an insured owns, but does not insure with USAA CIC. This promotes individuals insuring all of their vehicles appropriately, and for example, not insure one of seven vehicles and reap the benefits of coverages under the one vehicle they do insure. (USAA App. D, p. 89, ll. 14-24).

The Policy also included Medical Payments coverage and provides USAA CIC:

“[W]ill pay only the reasonable fee for medically necessary and appropriate medical services and the reasonable expense for funeral services because of BI caused by an auto accident, sustained by a covered person and incurred for services rendered within three years of the date of the accident.”

(Doc. No. 39, p. 3). Under the Medical Payments coverage, a covered person is defined as follows:

A “covered person” means:

1. You or any family member while occupying your covered auto.
2. Any other person while occupying your covered auto.
3. You or any family member while occupying any of the following vehicles if they are not your covered auto:
 - a. A private passenger auto or trailer;

- b. A moving truck or moving van, but only for your personal use while in the custody of or being operated by you or a family member; or
- c. A miscellaneous vehicle having at least four wheels.

(Doc. No. 39, p. 3). However, the Policy also provides the following exclusion under Medical Payments coverage:

We do not provide benefits under this Part for any covered person for BI:

- 1. Sustained while occupying any vehicle that is not your covered auto unless that vehicle is:
 - a. A four or six wheel land motor vehicle designed for use on public roads with a rated load capacity of no more than 2000 pounds;
 - b. A moving van for personal use;
 - c. A miscellaneous vehicle having at least four wheels;
or
 - d. A vehicle used in the business of farming or ranching.

(Doc. No. 39, pp. 3-4). When the policy's plain language is analyzed, the motorcycle at issue in this case was not a covered vehicle, and it was also excluded from coverage.

STANDARD OF REVIEW

The standard of review applicable to the district court's grant of summary judgment is *de novo*, using the same M. R. Civ. P. 56 criteria used by the district

court. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704.

Thus, the standard for review of an order granting summary judgment is *de novo*.

SUMMARY OF ARGUMENT

Summary judgment was appropriately granted to USAA CIC. The Order Granting Defendant USAA's Motion for Summary Judgment set out the applicable authority and contains a well-reasoned analysis. (*See* Goss App. A). Goss seeks coverage under the Policy where none exists. First, the Policy clearly excludes UIM coverage when occupying any motor vehicle owned by the policyholder which is not insured for UIM under the USAA CIC policy. Here, the motorcycle was not insured under the policy. Second, the Policy also excludes Medical Payments coverage when occupying a vehicle, such as Goss' motorcycle, that does not have at least four wheels.

Goss mistakenly relies on various cases addressing uninsured motorist coverage and stacking issues which are not pertinent to the analysis in this case. Contrary to Goss' position, the exclusions found in the Policy are not a violation of Montana public policy. Moreover, Goss did not insure his motorcycle with USAA CIC. While his motorcycle was insured with another carrier, Goss failed to obtain UIM and Medical Payments coverage from the other carrier.

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ARGUMENT

I. SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED TO USAA CIC GIVEN THE EXCLUSIONS IN THE POLICY.

Summary judgment is properly regarded as an integral part of the rules of procedure as a whole, which are designed to secure “the just, speedy and inexpensive determination of every action.” Rule 1, M.R.Civ.P.; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (discussing application of Fed.R.Civ.P. 56, which is nearly identical to M.R.Civ.P. 56). Rule 56 must be construed with due regard, not only to the rights of the plaintiff asserting claims, but also to the rights of persons, such as USAA CIC here, to demonstrate in the manner provided by the rules that Goss’ claims have no factual basis. *See e.g. Celotex*, 477 U.S. at 327.

Rule 56 of the Montana Rules of Civil Procedure initially requires the moving party to prove no genuine issues of material fact exist based on the pleadings, discovery, affidavits, and depositions in order for the court to grant summary judgment. “Summary judgment ‘shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Brewer v. Hawkinson*, 2009 MT 346, ¶ 19, 353 Mont. 154, ¶ 19, 221 P.3d 643, ¶ 19 (citing M.R.Civ.P. 56(c)). *See also Vettel–Becker v. Deaconess Medical Center*, 2008

MT 51, ¶ 26, 341 Mont. 435, 177 P.3d 1034. “Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact.” *Sullivan v. Contl. Constr. of Mont., LLC*, 2013 MT 106, ¶ 14, 370 Mont. 8, 299 P.3d 832 (see also *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)). The non-moving party must offer more than mere denial or speculative statements to raise a genuine issue of material fact. *Bruner*, 272 Mont. at 264, 900 P.2d at 903. After determining no genuine factual issues exist, the court must determine whether the moving party is entitled to judgment as a matter of law. *Id.*

In the case at hand, the parties agreed there were no genuine issues of material fact, as evidenced by the competing motions for summary judgment. If no genuine issues of material fact exist, it must then be determined whether the facts actually entitle the moving party to judgment as a matter of law. *Lorang v. Fortis*, 2008 MT 252, ¶ 39, 345 Mont. 12, 192 P.3d 186 (citing M.R. Civ. P. 56(c)). Thus, the only question before the District Court was which party was entitled to judgment as a matter of law. The District Court correctly held USAA CIC was entitled to judgment as a matter of law.

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A. Goss Is Not Entitled To UIM Under The Policy Based Upon The Applicable Exclusions.

The interpretation of an insurance contract is a question of law for the court to resolve. *Pablo v. Moore*, 2000 MT 48, ¶12, 298 Mont. 393, 995 P.2d 460.

Under Montana law, insurance policy provisions are interpreted “according to their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products.” *Stutzman v. Safeco Ins. CO. of Am.*, 284 Mont. 372, 376, 945 P.2d 32, 34 (1997). If an ambiguity exists, it will be strictly construed against the insurer, and the court must interpret any doubts as to coverage in favor of the insured. *Stutzman*, 284 Mont. at 379, 945 P.2d at 36; *Wendell v. St. Farm Mut. Auto. Ins. Co.*, 1999 MT 17, ¶¶ 14-15, 293 Mont. 140, 974 P.2d 623; *Counterpoint, Inc. v. Essex Ins. Co.*, 1998 MT 251, ¶ 13, 291 Mont. 189, 967 P.2d 393. However, absent any ambiguity, the language of an insurance contract governs its interpretation. *Stutzman*, 284 Mont. at 379, 945 P.2d at 36 (concluding that the court must enforce the insurance contract as written if its language is clear and explicit).

Here, Goss does not argue any ambiguity exists. Rather, his only argument is the exclusions contained in the Policy violated Montana public policy, despite his knowledge USAA CIC did not afford insurance coverage in Montana for motorcycles. Goss’ position is based upon distinguishable cases, which deal primarily with uninsured motorist coverage and stacking issues, which are not at

issue here. Unlike uninsured motorist coverage, an insurer is not required by statutory mandate to offer underinsured motorist coverage to a potential insured. *See Bennett v. State Farm Mut. Auto. Ins. Co.*, 758 F.Supp. 1388, 1390 (D. Mont. 1991)(citing *State Farm Mutual Automobile Ins. Co. v. Estate of Braun*, 243 Mont. 125, 793 P.2d 253 (1990)).

Montana courts first look to the policy's plain language when construing and analyzing the terms of an insurance policy. *Stutzman*, 284 Mont. at 379, 945 P.2d at 36. After construing the language of the policy itself, courts next look at whether the insurance contract violates public policy. *Id.*

1. The plain language of the Policy excludes coverage for Goss under UIM.

The Policy issued to Goss plainly excludes UIM coverage to Goss when he is occupying any motor vehicle he owned, but which was not insured for UIM under the USAA CIC Policy. (Doc. No. 39, pp. 2-3). Goss clearly owned the motorcycle involved in the May 12, 2015 accident, but he clearly did not insure it with USAA CIC. (Goss App. A, p. 2; Doc. 19, p. 2). Instead, Goss' motorcycle was insured through Progressive. (USAA App. D, p. 47, ll. 8-15).

Based upon the plain language of the Policy, Goss is not entitled to UIM coverage while he was occupying his motorcycle. Quite simply, Goss owned the motorcycle, but did not insure it with USAA CIC. Thus, the plain and

unambiguous language clearly excludes UIM coverage for Goss under the Policy based upon the facts of this particular accident.

2. The Policy does not violate Montana public policy.

Goss continues to argue the exclusion in the Policy violates Montana public policy and is unenforceable. However, Goss mistakenly relies on various cases addressing uninsured motorist coverage and stacking issues not at issue in his claim against USAA CIC. Further, Goss makes the same arguments before this Court which were rejected by the district court.

As set forth above, the Policy excludes UIM coverage when occupying any motor vehicle owned by the policyholder which is not insured for UIM under the Policy. This is commonly known as the “owned vehicle” exclusion. Uninsured motorist (“UM”) coverage is not treated like UIM coverage. *See Bennett*, 758 F.Supp. at 1390. Importantly, Goss did not pay for coverage for his motorcycle from USAA CIC, and he knew USAA CIC did not offer coverage in Montana. (*See* USAA App. D., p. 46, l. 25 through p. 47, l. 15).

Contrary to Goss’ misguided arguments, the crux of this case deals with an issue of settled law in Montana; namely, the “owned vehicle” exclusion. This Court, as well as United States District Courts for the State of Montana, have continually held “owned vehicle” exclusions are not against Montana public policy nor contrary to the reasonable expectations of the insured.

This Court addressed an owned vehicle exclusion in *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79. There, the plaintiffs were involved in an accident while traveling as passengers in their vehicle, which their daughter-in-law, Laura, was driving. *Monroe*, ¶ 6. The plaintiffs and Laura were insured by Safeco, with separate policies. *Monroe*, ¶ 7. Safeco paid out \$480,000 to plaintiffs under the bodily injury liability and medical payment benefits of the policies. *Monroe*, ¶¶ 7-8. However, plaintiffs then sought declaratory judgment for coverage under the UIM provisions of the insurance policies. *Monroe*, ¶ 8.

The policies defined an underinsured motor vehicle and then excluded from the definition any vehicle owned by or furnished for the regular use of you or any family member. *Monroe*, ¶ 16. This Court held the plain language of the policy clearly excluded the plaintiffs' vehicles from the definition of an underinsured motor vehicle. *Monroe*, ¶ 17. However, this Court then considered whether the exclusion violated public policy. *Id.*

Plaintiffs first argued the coverage was illusory. *Monroe*, ¶ 18. However, this Court disagreed. While the policy language makes UIM coverage unavailable for single car crashes that only involve the insured's own vehicle, UIM coverage is available in all other accidents so long as the accident involves another vehicle that is not owned by the insured. *Monroe*, ¶ 19. "In fact, the only instance in which the 'owned vehicle' exclusion renders UIM coverage per se unavailable is when the

accident only involves the insured's own vehicle.” *Id.* Thus, far from being illusory, plaintiffs' contention that they paid valuable consideration for non-existent UIM coverage was unfounded and therefore the provisions did not violate public policy. *Id.*

Similar to *Monroe*, the language in the Policy here makes UIM coverage unavailable for accidents that involve Goss' own vehicle which is not insured by USAA CIC. As Goss painstakingly provides in his opening brief, just as he did in the underlying case, UIM coverage is available in all other accidents so long as the accident involves a vehicle that is not owned by the insured. In fact, the only instance in which the exclusion at issue renders UIM coverage unavailable is when the accident involves the insured's own vehicle which is not insured by USAA CIC. However, Goss misses the point of the owned vehicle exclusion when he argues it makes no sense. (Opening Brief, p. 22). Contrary to his argument, the exclusion makes absolute sense, otherwise consumers would simply choose not to purchase UIM coverage for more than one of the vehicles they own. Accordingly, just as in *Monroe*, the provisions do not violate public policy, as Goss did not pay valuable consideration for UIM coverage for his motorcycle.

This Court also addressed a “no coverage” provision in *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 2003 MT 174, 316 Mont. 382, 73 P.3d 800. While *Lierboe* dealt with medical payments coverage, Goss would apply the same

analysis of UIM and Medical Payments coverage when considering his claim. In *Lierboe*, the plaintiff was involved in a motor vehicle accident while driving her 1986 Jeep Cherokee, which was insured by State Farm. *Lierboe*, ¶ 7. The plaintiff also had an interest in a corporation, Shining Mountain, which had an automobile insurance policy for a 1991 Dodge Dakota. *Lierboe*, ¶ 8. The Dodge policy included an exclusion, which provided there was no coverage for medical expenses sustained while occupying a vehicle owned by the insured which was not insured under the Dodge policy. *Lierboe*, ¶ 12. This Court held the plaintiff misconceived the insurance policies at issue and her accident was only covered by the Jeep policy and was not covered by the Dodge policy. *Lierboe*, ¶ 19. Specifically, the no coverage provision “clearly expresses the intention to limit coverage to injuries caused by the insured vehicle or vehicles.” *Lierboe*, ¶ 16 (citing *Hempen v. State Farm Mut. Auto. Ins. Co.*, 687 S.W.2d 894, 895 (Mo. 1985)). This Court further held coverage was excluded under the Dodge policy because the plaintiff did not occupy the vehicle covered by that policy. *Lierboe*, ¶ 22. Further, the plaintiff did not have reasonable expectations of coverage under the Dodge policy as she did not qualify as an insured. *Id.*

Here, Goss likewise cannot have a reasonable expectation of UIM coverage. Aside from the fact Goss knew USAA CIC did not insure motorcycles in Montana, the policy language is clear and unambiguous – coverage is not afforded to Goss if

he is injured while occupying a vehicle he owns but which is not insured for UIM by USAA CIC. It is undisputed Goss owned the 2002 Yamaha motorcycle and undisputed he did not insure the motorcycle for UIM with USAA CIC.

Accordingly, just as the plaintiff in *Lierboe*, Goss could not have a reasonable expectation of UIM coverage for his motorcycle under the Policy.

Additionally, the United State District Court for the State of Montana addressed an almost identical situation in *O'Connell v. Liberty Mut. Fire Ins. Co.*, 43 F.Supp.3d 1093 (D. Mont. 2014). In *O'Connell*, the plaintiffs were involved in a motor vehicle accident while driving their 2005 Yamaha Star motorcycle.

O'Connell, 43 F.Supp.3d at 1095. At the time of the accident, plaintiffs were insured with Liberty Mutual; however, the policy only covered three automobiles and did not cover their motorcycle. *Id.* Plaintiffs made a claim for UIM coverage under the Liberty Mutual policy. *Id.* Liberty Mutual denied the UIM claim, relying on a policy exclusion which excluded UIM coverage for bodily injury sustained while occupying “any motor vehicle you own which is not insured for this coverage under this policy.” *O'Connell*, 43 F.Supp.3d at 1096. Thus, plaintiffs filed suit to determine whether coverage existed.

While the parties’ main argument was regarding the ambiguity of the term “motor vehicle,” Judge Molloy held the “owned vehicle” exclusion to UIM coverage does not defeat the reasonable expectations of insureds and did not

violate public policy. *O'Connell*, 43 F.Supp.3d at 1099 (citing *Hamilton v. Trinity Universal Ins. Co.*, 465 F.Supp.2d 1060, 1065-67 (D. Mont. 2006)). Thus, plaintiff's arguments to the contrary were unpersuasive. *Id.*

Here, just as in *O'Connell*, the Policy covers multiple automobiles, but not Goss' motorcycle. Further, the exclusion for an owned vehicle is almost identical, as USAA CIC will not provide UIM coverage for bodily injury sustained by any covered person while occupying any motor vehicle owned by the insured which is not insured for UIM under the Policy. Accordingly, just as in *O'Connell* and the district court, this Court should hold the "owned vehicle" exclusion to UIM coverage is not against public policy or contrary to the reasonable expectations of the insured.

Further, in the *Hamilton* case, plaintiff was involved in a motor vehicle accident in a 1988 Toyota pickup and sought UIM coverage from Trinity Universal Insurance Company. *Hamilton*, 465 F.Supp.2d at 1061-1062. However, the 1988 Toyota was not listed on the Trinity policy. *Hamilton*, 465 F.Supp.2d at 1062. Thus, Trinity relied on the "owned vehicle exclusion" in the policy, which excluded coverage when sustained while occupying a motor vehicle owned by the insured which was not insured for UIM coverage under the Trinity policy. *Id.* Plaintiff argued the exclusion was void as against public policy. Notably, the plaintiff in *Hamilton* relied on the same cases Goss relies on here; namely

Jacobson v. Implement Dealers Mutual Insurance Co., 196 Mont. 542, 640 P.2d 908 (1982), *Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 862 P.2d 1146 (1993), and *Hardy v. Progressive Specialty Insurance Company*, 315 Mont. 107, 67 P.3d 892 (2003).

In distinguishing *Jacobson*, the Federal District Court acknowledged ***there is no statutory mandate*** in Montana ***for underinsured motorist coverage***. *Hamilton*, 465 F.Supp.2d at 1064 (emphasis added). Therefore, ***parties may freely contract*** to produce exclusions or limitations on coverage. *Id.* (emphasis added). Further, in distinguishing *Bennett* and *Hardy*, the Federal District Court held while that line of cases established public policy that an insurer may not exclude coverage for which it has received valuable consideration, plaintiff did not pay valuable consideration for underinsured motorist coverage for the 1988 Toyota. *Hamilton*, 465 F.Supp.2d at 1066. “In fact, Plaintiffs’ failure to pay valuable consideration is why the exclusion applies.” *Id.* Accordingly, the Federal District Court held the public policy articulated in *Bennett* and *Hardy* does not invalidate the owned vehicle exclusion. *Id.* “Although the court arguably relied on the personal and portable nature of underinsured motorist coverage in invalidating the exclusions at issue in *Bennett* and *Hardy*, the court relied more heavily on the principle that insureds should not be denied coverage for which they have paid adequate consideration.” *Id.* The Federal District Court then held plaintiff’s reliance on the

personal and portable nature of UIM coverage was not persuasive because that primary principle was not at issue and public policy supported enforcement of the owned vehicle exclusion. *Id.*

Next, the Federal District Court discussed *Stutzman*. The Federal District Court held that although the household exclusion in *Stutzman* and the owned vehicle exclusion serve different purposes, they both involve protecting insurers from “schemes” by insureds. *Hamilton*, 465 F.Supp.2d at 1066. The Federal District Court held:

“The owned vehicle exclusion at issue here, on the other hand, attempts to prevent insureds from receiving benefits they have not paid for. Specifically, the owned vehicle exclusion prevents Plaintiffs from receiving underinsured motorist benefits on a vehicle for which they have not purchased any coverage. Permitting such an exclusion is not against public policy. In fact, public policy actually supports enforcement of the exclusion. Montana law encourages all drivers to obtain automobile liability insurance for each of their vehicles. *See* Mont. Code Ann. § 61-6-301. Permitting Zach to receive underinsured motorist benefits when his vehicle was not insured would contravene the public policy of the state of Montana.”

Id. When addressing the reasonable expectations argument, the Federal District Court held it was not objectively reasonable for an insured to expect to receive UIM coverage for a vehicle for which he or she has not purchased any automobile insurance. *Hamilton*, 465 F.Supp.2d at 1067.

Goss argues *Hamilton* is not applicable as this case does not implicate a scheme. (Opening Brief, p. 35). The “scheme” in the instant case is Goss’ failure

to purchase UIM and Medical Payments coverage under the Progressive policy for his motorcycle, yet trying to obtain those benefits under the USAA CIC policy. Precisely as in *Hamilton*, Goss did not purchase UIM and Medical Payments coverage for his motorcycle from USAA CIC. Thus, he should be prevented from receiving benefits he has not paid for and should be held to the contracted exclusions. Additionally, Goss has already received \$25,000.00 in error, for which USAA CIC has not sought reimbursement.

Hamilton is directly on point in this case and the same holding should be found by this Court. Just as the Federal District Court held, USAA CIC testified the purpose of the exclusion is to promote insureds to insure all of their vehicles appropriately, and for example, not insure one of seven vehicles and reap the benefits of coverages under the one vehicle they do insure. (USAA App. D, p. 89, ll. 14-24). Under Goss' position, no individual would ever purchase UIM coverage for their motorcycle because it would be covered by other automobiles the individual insures. Based on this argument, Goss would receive UIM benefits when his vehicle was not insured for UIM, which would contravene the public policy of the state of Montana. Goss did not pay valuable consideration to USAA CIC for UIM coverage on his motorcycle. His failure to pay valuable consideration is why the exclusion applies. Accordingly, this Court should uphold the owned vehicle exclusion and affirm the district court's decision.

B. Goss Is Not Entitled To Medical Payments Coverage Under The Policy.

While Goss does not provide a different analysis for the Medical Payments coverage portion of the Policy, there is a separate exclusion applicable to Medical Payments coverage. Further, the Medical Payments exclusion does not violate Montana public policy.

1. The plain language of the Policy excludes coverage for Goss under Medical Payments.

The Policy issued to Goss plainly excludes Medical Payments coverage sustained by Goss while occupying a non-covered motor vehicle which has less than four wheels. (Doc. No. 39, pp. 3-4). It is undisputed Goss was occupying a non-covered motor vehicle under the Policy. Rather, Goss was occupying his motorcycle which was insured through Progressive. (USAA App. D, p. 47, ll. 8-15).

Based upon the plain language of the Policy, Goss is not entitled to Medical Payments coverage while occupying a non-covered motor vehicle which has less than four wheels. Goss was occupying a non-covered motor vehicle and the motorcycle has less than four wheels. Thus, the plain and unambiguous language clearly excludes Medical Payments coverage for Goss under the Policy based upon the facts of this particular accident.

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2. The Medical Payments exclusion is not in violation of Montana public policy.

The same analysis regarding Montana public policy set forth above under the UIM coverage applies to the Medical Payments coverage. Similar to *Lierboe*, the Policy provisions in this case clearly express the intention to limit coverage to injuries caused by vehicles having at least four wheels. *See Lierboe*, ¶ 16. The parties may freely contract to produce exclusions or limitations on coverage. *Hamilton*, 465 F.Supp.2d at 1064.

Goss did not pay valuable consideration to USAA CIC for Medical Payments coverage on his motorcycle. Accordingly, this Court should uphold the exclusion and affirm the district court's decision.

II. THE CASE LAW RELIED ON BY GOSS IS DISTINGUISHABLE OR DOES NOT SUPPORT GOSS' CLAIMS.

Throughout the case in the District Court below, and now in his Opening Brief, Goss ignores the distinction between UM and UIM coverage. Goss claims that the UIM and Medical Payments exclusions in the Policy are unenforceable and violate Montana public policy. However, Goss relies primarily on cases involving UM coverage and stacking issues. *See e.g. Mitchell v. State Farm Ins. Co.*, 2003 MT 102, 315 Mont. 281, 68 P.3d 703; *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892; *Chilberg v. Rose*, 273 Mont. 414, 903 P.2d 1377 (1995); *Bennett v. State Farm Mut. Auto Ins. Co.*, 261 Mont. 386, 862 P.2d

1146 (1993); and *Jacobson v. Implement Dealers Mut. Ins. Co.*, 196 Mont. 542, 640 P.2d 908 (1982). Each of these cases is either distinguishable or does not support Goss’ position. Further, this Court has regularly upheld limitations in coverage unrelated to stacking. See e.g. *Am. Family Mut. Ins. Co. v. Livengood*, 1998 MT 329, ¶ 27, 292 Mont. 244, 970 P.2d 1050 (“nonowned automobile exclusion” did not violate Montana public policy because the policy at issue provided the “mandatory liability coverage required by §§ 61-6-301(1) and 61-6-103(2)(b)”).

First, the *Mitchell* and *Hardy* cases involved “anti-stacking” provisions and the reasonable expectations of the insured. This Court held in *Mitchell* that the UIM terms were ambiguous and violated the reasonable expectations of the insured. *Mitchell*, ¶ 31. Likewise, this Court held in *Hardy* that the terms were ambiguous and violated the insured’s reasonable expectations. *Hardy*, ¶ 29. Neither case involved an exclusion, such as an owned vehicle exclusion, similar to the Policy at issue in this case. Further, neither ambiguity nor stacking are at issue here. Thus, *Mitchell* and *Hardy* are distinguishable and do not support Goss’ effort to obtain UIM for the motorcycle he did not insure with USAA CIC.

Next, in *Chilberg* the insured owner of the vehicle “purchased an auto insurance policy from Mid-Century covering the car in which Chilberg was riding.” *Chilberg*, 273 Mont. at 415, 903 P.2d at 1378. “The policy provided

coverage for medical expenses and for bodily injury caused by uninsured motorists.” *Id.* Since Goss did not purchase insurance for his motorcycle from USAA CIC, *Chilberg* is distinguishable.

Further, *Chilberg* recognized exclusions to UIM coverage are permissible. “Chilberg does not fit within the definition of insured, either as a named insured, family member, **or occupant of a vehicle insured under that policy.**” *Chilberg*, 273 Mont. at 419, 903 P.2d at 1380 (emphasis added). “Further, the public policy rationale underlying stacking, namely prohibiting insurers from defeating coverage which the insured reasonably expected, is not served by stacking the policies in the instant case.” *Id.*

As in *Chilberg*, Goss was not an occupant of a vehicle insured under the Policy. Further, Goss should have no reasonable expectation of UIM or Medical Payments coverage for his motorcycle from USAA CIC, as he knew USAA CIC did not insure motorcycles, he did not insure his motorcycle with USAA CIC, and he did not purchase UIM or Medical Payments coverage for his motorcycle from Progressive.

Additionally, in *Bennett* this Court held “[a]n ‘other insurance’ clause that prohibits stacking of underinsured motorist coverage provided by separate policies from the same insurer is void as against Montana public policy.” *Bennett*, 261 Mont. at 390, 862 P.2d at 1149. Notably, there is no holding in *Bennett* regarding

UIM exclusions being against Montana public policy. Further, the parties in *Bennett* did not contract for an exclusion which limits UIM coverage to the occupancy of an owned vehicle insured under the policy. Accordingly, *Bennett* does not support Goss' position and the Policy at issue here clearly and unambiguously excludes the coverage sought by Goss.

Lastly, *Jacobson* involved an express waiver of UM coverage and did not involve UIM coverage issues. The *Jacobson* decision found legislative public policy against any limitation on UM coverage, as the passage of Montana Code Annotated § 33-23-201 applied UM coverage to all circumstances. *Jacobson*, 196 Mont. at 546, 640 P.2d at 911. However, there is no similar statute regarding UIM coverage. Since UM coverage is not at issue in this case, *Jacobson* is inapplicable.

Accordingly, the cases relied on by Goss do not warrant reversal of the district court. As the District Court appropriately held, based upon applicable Montana law, the UIM and Medical Payments exclusions in the Policy do not violate Montana public policy and are enforceable.

CONCLUSION

USAA CIC does not insure motorcycles in Montana and Goss did not insure the motorcycle he owned with USAA CIC. Further, UIM and Medical Payments coverage is optional, and parties may freely contract to produce exclusions or

limitations on coverage. The Policy clearly excludes coverage for Goss' accident in a two-wheeled motorcycle that Goss owned but did not insure with USAA CIC.

Contrary to Goss' argument, *Bennett* and *Hardy* do not invalidate the owned vehicle exclusion. The owned vehicle exclusion prevents Goss from receiving UIM benefits on a vehicle, his motorcycle, for which he did not purchase any UIM coverage. Permitting Goss to receive UIM benefits when his motorcycle was not insured for UIM would contravene the public policy of the State of Montana. Goss argues he should receive insurance on a vehicle USAA CIC did not insure and excluded from coverage. It is not objectively reasonable for Goss to expect to receive UIM coverage for a vehicle for which he has not purchased any UIM coverage and which is excluded under the terms of the policy.

For the same reasons, the exclusion for Medical Payments coverage is valid and not contrary to Montana public policy. Goss did not purchase Medical Payments coverage for his motorcycle and USAA CIC excluded Medical Payments coverage for vehicles with less than four wheels.

Accordingly, the District Court appropriately entered summary judgment in favor of USAA CIC and should be affirmed.

For the reasons set forth herein, Defendant/Appellee USAA Casualty Insurance Company respectfully requests this Court affirm the District Court's

Order Granting Defendant USAA's Motion for Summary Judgment. (Goss App. A).

DATED this 22nd day of January, 2021.

By /s/ David M. McLean

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellee's Answer Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 5,803 words.

/s/ David M. McLean

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CERTIFICATE OF SERVICE

I, David Matthew McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-22-2021:

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Dated: 01-22-2021