IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO. DA 20-0464

JOSEPH RICHARD GOSS,

Plaintiff/Appellant,

v.

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

Defendant/Appellee.

APPELLANT JOSEPH GOSS' REPLY 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

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ARGUMENT

Does USAA's owned automobile exclusion, which precludes its named insured from recovering personal and portable underinsured motorist and medical payments coverages, violate Montana public policy?

USAA argues that its owned vehicle exclusion does not violate Montana public policy. It claims a distinction exists under Montana law between mandatory coverage (uninsured motorist coverage) and elective coverage (underinsured motorist coverage and medical payments coverage).[1] It suggests insurers may freely limit elective coverage through exclusions. In offering these arguments, USAA relies on inapplicable cases. Under the facts of this case, the Court should reject USAA's overtures as they mistakenly presuppose vehicle occupancy as the determinant for triggering personal and portable coverage.

A. Mandatory Versus Elective Coverages

USAA cites *Bennett v. State Farm Mut. Auto. Ins. Co.*, 758 F.Supp. 1388 (D. Mont. 1991), for the proposition that Montana law treats underinsured motorist coverage differently than it treats uninsured motorist coverage. Appellee's Answer Brief, pp. 10-11. Ironically, Judge Hatfield rejected this notion in *Bennett*.

[1] Mandatory in this context does not mean people must purchase the coverage. In this context, "mandatory" means that insurers must make this coverage available to insureds. See *Bartell v. American Home Assur. Co.*, 2002 MT 145, ¶ 7, 310 Mont. 276, 49 P.3d 623.

In *Bennett*, State Farm insured the plaintiff under two separate policies. The plaintiff paid separate premiums to have underinsured motorist coverage under each policy. After the pedestrian plaintiff was struck while crossing the street, she sought the underinsured motorist coverage limit under both policies. State Farm paid one of the limits but refused to pay the second limit under similar arguments posed by USAA. Judge Hatfield had to predict what this Court would do with the question presented. He concluded:

> The fact of foremost importance is that the Bennetts paid State Farm valuable consideration for optional underinsured motorist coverage under the two separate policies at issue. Consequently, we deal here with two separate contracts of insurance, each of which contained an underinsured motorist provision, and for which a separate premium was both paid by the insured and willingly accepted by the insurer. Consistent with the rationale expressed by the Montana Supreme Court in *Kemp*, the court is compelled to conclude that Bennett is entitled to recover the aggregate sum of the coverages provided by both of the underinsured motorist endorsements since a separate premium was charged and collected on each vehicle for that coverage.

Bennett, 758 F.Supp. at 1391. Judge Hatfield refused to treat the underinsured coverage issue differently than the same issue in the uninsured context. See *Bennett*, 758 F.Supp. at 1391-93.

Judge Hatfield's prediction of how this Court would treat the issue proved prescient. Two years later, this Court held, "[t]he absence of a statutory requirement is irrelevant, for the public policy considerations that invalidate contractual 'anti-stacking' provisions in an uninsured motorist endorsement also support invalidating

those provisions in an underinsured motorist endorsement." *Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 389, 862 P.2d 1146, 1148 (1993). Four years after *Bennett*, this Court again rejected purported distinctions between mandatory versus elective coverages. *Ruckdaschel v. State Farm Mut. Auto. Ins. Co.*, 285 Mont. 395, 399, 948 P.2d 700, 703 (1997) ("[T]he public policy concerns which apply in statutorily required insurance coverage contexts also apply to optional types of insurance coverage such as, in this case, medical payment coverage."). Six years after *Ruckdaschel*, this Court reaffirmed that public policy considerations remain the same whether the coverage implicates mandatory uninsured motorist coverage or elective underinsured motorist coverage. *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶ 21, 315 Mont. 107, 67 P.3d 892 ("Public policy considerations that favor adequate compensation for accident victims apply to UIM coverage in spite of the fact that UIM coverage is not mandatory in Montana."). See also *U.S. Specialty Ins. Co. v. Estate of Ward*, 2019 MT 72, ¶ 11, 395 Mont. 199, 444 P.3d 381 ("[W]hen there is no statute guiding the applicable policy, insurance provisions still may be against public policy and therefore void.").

Given this Court's clear pronouncements, USAA needs to be disabused of the notion that some arbitrary, fictional distinction exists between uninsured motorist coverage and its elective counterparts. Were that not the case, injured Montanans could stack uninsured motorist coverage but not underinsured motorist and medical

payments coverages. This Court has rejected such a proposition in striking unambiguous anti-stacking exclusions in underinsured motorist coverage and medical payments policies.

Recognizing the futility in advocating for an anti-stacking position, USAA argues this Court's anti-stacking analyses are inapplicable because this case does not invoke an anti-stacking provision. USAA suggests its owned vehicle exclusion is not an anti-stacking provision, rather it constitutes a coverage provision based on vehicle occupancy. This implies a "coverage" analysis rather than a "stacking" analysis. This Court rejected these same semantic acrobatics in *State Farm Mut. Auto. Ins. Co. v. Gibson*, 2007 MT 153, 337 Mont. 509, 163 P.3d 387.

In *Gibson*, the Gibsons (five passengers) were involved in a motor vehicle collision in Great Falls, Montana, while driving their Ford Escort. At the time of the collision, the Gibsons insured three vehicles with State Farm, including the Escort. They paid three separate premiums for medical payments coverage. The Gibsons incurred medical expenses greater than the single medical payment coverage limit applicable to the Escort. *Gibson*, ¶ 4. As such, the Gibsons requested medical payments coverage under all three vehicles/policies.

State Farm refused to provide medical payments coverage associated with the two uninvolved vehicles. State Farm claimed the other two medical payments coverages did not apply under the following exclusion:

What Is Not Covered

THERE IS NO COVERAGE: . . .

4. FOR MEDICAL EXPENSES FOR ***BODILY INJURY***:

a. SUSTAINED WHILE ***OCCUPYING*** OR THROUGH BEING STRUCK BY A MOTOR VEHICLE OWNED OR LEASED BY ***YOU*** OR ANY ***RELATIVE*** IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY[.]

Gibson, ¶¶ 5-6. Note that the State Farm exclusion is virtually identical to the exclusions USAA relies on here.

State Farm obviously knew about this Court's anti-stacking precedent which preceded *Gibson*. So, to circumvent a losing stacking argument, State Farm couched its exclusion as a coverage exclusion, not an anti-stacking exclusion. State Farm insisted that "'coverage' issues are distinct from 'stacking issues' . . . and the analysis of whether to stack the Gibsons' policies need not be made because the 'occupancy' clauses preclude coverage under the Gibsons' other two policies." *Gibson*, ¶ 12. This Court rejected State Farm's attempt at a thinly veiled distinction:

> The Gibsons . . . are family members, expressly named in the policies at issue. Moreover, the Gibsons paid three separate premiums to State Farm for MPC coverage in three policies.
>
> . . . .
>
> [T]he "occupancy" provision defeats coverage for which valuable consideration has been paid, and which the insured had every expectation of receiving in an instance such as this.

. . . .

> The anti-stacking effect of the language limiting recovery to vehicles occupied during the accident is further evidenced by State Farm's own admission that individuals injured as pedestrians or while occupying a non-owned vehicle are permitted to stack MPC. The only individuals not entitled to stack multiple MPCs under State Farm's current policy are insureds, like the Gibsons, who are injured in an accident in which they are occupying their own vehicle. The occupancy requirement clearly has the effect of precluding stacking.

Gibson, ¶¶ 15, 17, 20.

Goss argued to the District Court that, for a named insured who pays premiums for personal and portable coverage, the coverage does not follow vehicle occupancy. *Gibson* confirms this rule of law. As in *Gibson*, Goss is the named insured on the USAA policy and paid three separate premiums for the personal and portable underinsured motorist and medical payments coverages. The owned vehicle exclusion USAA relies upon tracks the State Farm exclusion in *Gibson* almost verbatim. *Gibson* holds that such a provision cannot withstand scrutiny, regardless of semantics, because it has the effect of an anti-stacking provision in derogation of Montana's public policy. *Gibson*, ¶ 22. Accordingly, USAA's attempt at recharacterizing the analysis as a "coverage" issue, rather than a "stacking" issue, must fail.

Vehicle occupancy becomes relevant only when a non-insured suffers injuries in a vehicle—i.e., someone who did not pay valuable consideration for the coverage. That individual triggers insurance coverage simply by occupying the vehicle.

However, the vehicle occupancy consideration is inapplicable when a named, premium paying insured like Goss suffers the harms.

B. Cases USAA Relies Upon

USAA relies on two cases from this Court (*Monroe* and *Lierboe*) and two federal court cases (*O'Connell* and *Hamilton*). This Court's cases that USAA relies upon do not stand for the proposition USAA claims. As for the federal court cases, the analysis employed to reach the result contravenes the analysis this Court must follow under Montana Supreme Court precedent. Nevertheless, this Court is not bound by federal court precedent. See *Hardy*, ¶ 22.

1. Montana Supreme Court Cases

USAA suggests the coverage issue here aligns with the analysis in *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79. However, *Monroe* contemplates entirely different policy exclusions and facts.

Goss addressed *Monroe* in his opening brief. *Monroe* implicates the family member exclusion, triggering a separate analysis. Because of concerns about family member collusion, this Court upheld the family member exclusion as one of two narrow exceptions to the personal and portable coverage principles.

Conversely, the exclusions USAA relies on purport to reject underinsured motorist and medical payments coverages because Goss did not insure the motorcycle with USAA. Unlike the dispositive factor in *Monroe*, ownership alone

is not the pivotal issue. Rather, USAA's exclusions turn on whether the subject vehicle was insured under the policy. Aside from this major coverage distinction, the *Monroe* facts contemplate a wholly distinct scenario. This case does not implicate a single vehicle accident. Goss suffered harms from the negligence of an unrelated third party, operating a vehicle with no connection to Goss. This significantly alters the analysis.

USAA also relies on *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 2003 MT 174, 316 Mont. 382, 73 P.3d 800. There, Lierboe was involved in an automobile collision while occupying a Jeep. Besides the Jeep coverage, Lierboe sought to recover medical payments coverage on a Dodge pickup covered under a policy owned by a corporation. Lierboe was not a named insured under the corporate policy and did not occupy the Dodge pickup under that policy to make her an insured. Since she did not qualify as an insured under the corporate policy, she could not trigger coverage under the same. See *Lierboe*, ¶ 22; *U.S. Specialty Ins. Co.*, ¶ 15.

This Court noted this pivotal *Lierboe* distinction in *Gibson*:

> In *Lierboe*, Kristine Lierboe suffered injuries as the result of an automobile accident while driving her Jeep Cherokee that she insured with State Farm. Lierboe sought to stack the Jeep's MPC with the MPC for a Dodge Dakota (Dodge) which was owned by Shining Mountain Design and Construction (Shining Mountain), a corporation in which Lierboe had a shareholder interest. We concluded that Lierboe was not covered under more than one policy because she was not a named insured on the policy for the Dodge and was not occupying the Dodge at the time of the accident. We also stated that Lierboe did not have reasonable expectations of coverage because she did not qualify as an

> insured under the Shining Mountain policy and did not purchase or pay for the policy covering the Dodge.
>
> In *Lierboe*, we relied on *Chilberg v. Rose*, 273 Mont. 414, 903 P.2d 1377 (1995), for the proposition that a person does not have a reasonable expectation for coverage when that person did not purchase the policy and does not qualify as an insured except by occupying the car involved in the accident. Chilberg had sustained injuries while a passenger in a vehicle owned by Jay Dean and insured by Mid–Century Insurance Company. Chilberg did not fit within the definition of insured, either as a named insured, family member, or occupant of a vehicle insured under Dean's other two policies. This Court stated that the underlying public policy favoring stacking would not be served because Chilberg could not have reasonably expected coverage under policies he did not purchase, and under which he did not otherwise qualify as an insured.
>
> Thus, both *Chilberg* and *Lierboe* sought to stack polices that did not name them as insureds and for which they did not pay premiums. The Gibsons, by contrast, are family members, expressly named in the policies at issue. Moreover, the Gibsons paid three separate premiums to State Farm for MPC coverage in three policies. In light of these facts, State Farm's reliance on *Lierboe* is unavailing. Rather, the facts presented here align this case with our previous opinions in *Hardy* and *Ruckdaschel*, in which we disapproved on public policy grounds of policy language which defeated coverage for which valuable consideration had been paid—i.e., policy language which rendered the purchased coverage "illusory."

Gibson, ¶¶ 13-15 (some citations omitted).

As in *Gibson*, *Lierboe* does not apply here because its factual predicate bears no resemblance to this case. Goss is the named insured under the USAA policy. As the named insured under the USAA policy, who paid valuable consideration for the personal and portable insurance coverages, Goss has reasonable expectations of coverage.

In his opening brief, Goss noted that this Court has carved out two narrow exceptions to the availability of personal and portable coverage: (1) a person must qualify as an insured under the policy and (2) an injured party cannot trigger underinsured motorist coverage when he/she is injured at the hands of a family member (to avoid potentially collusive claims among family members). Appellant Joseph Goss' Opening Brief, pp. 29-33. *Lierboe* falls under the first exception as confirmed in *Gibson*. *Monroe* falls under the second exception. As neither exception applies to Goss' case, *Lierboe* and *Monroe* maintain no relevance to the analysis.

2. Federal Court Cases

USAA cites *Hamilton v. Trinity Universal Ins. Co.*, 465 F.Supp.2d 1060 (D. Mont. 2006), and *O'Connell v. Liberty Mut. Fire Ins. Co.*, 43 F.Supp.3d 1093 (D. Mont. 2014), in support of its position.

Judge Molloy first addressed the owned vehicle exclusion in *Hamilton* in 2006. Because this Court had not yet addressed this exclusion, Judge Molloy attempted to predict what it would do if confronted with the same. Judge Molloy did not have the benefit of *Gibson* to guide him. This Court would issue *Gibson* approximately seven months after *Hamilton*. Without *Gibson's* guidance, Judge Molloy erroneously focused on the **vehicle** in *Hamilton*, rather than the **insured**. Further, he was troubled by plaintiff Zach Hamilton's attempt to recover benefits

that he did not pay for. *Hamilton*, 465 F.Supp.2d at 1066. As such, Judge Molloy held Zach Hamilton could not recover benefits he did not pay for, and thereby enforced the owned vehicle exclusion.

However, as *Gibson* later confirmed, Judge Molloy's analysis erroneously focused on the vehicle at issue, rather than the personal and portable nature of the insurance coverage. *U.S. Specialty Ins. Co.* later reaffirmed that personal and portable coverage is "not dependent upon the insured occupying an insured vehicle." *U.S. Specialty Ins. Co.*, ¶ 16. Rather, "when coverage is personal to the insured, there is no connection to the 'automobile listed on the policy.'" *U.S. Specialty Ins. Co.*, ¶ 18. So, Judge Molloy's reasonable expectation analysis should have centered on expectations regarding personal and portable coverage instead of expectations regarding a particular vehicle. *Gibson*, *U.S. Specialty Ins. Co.*, and the foregoing cases confirm that Montana law rejects *Hamilton* and application of the owned vehicle exclusion under the facts of this case.

O'Connell offers nothing more to the analysis. *O'Connell* was before Judge Molloy on an ambiguity issue (not present here) and the same enforceability issue he considered in *Hamilton*. Judge Molloy followed his *Hamilton* ruling regarding enforceability of the exclusion without any further analysis. Accordingly, *O'Connell* is plagued by the incorrect focus in *Hamilton*.

C. The Proper Analysis Under Montana Law

USAA laments a scenario where an insured owns seven vehicles, pays for one single coverage limit, and then qualifies for coverage while occupying any of the vehicles. Appellee's Answer Brief, pp. 4, 19. Essentially, USAA argues that enforcement of the personal and portable principle amounts to a "scheme." Appellee's Answer Brief, pp. 18-19. Instead of observing the portability of such insurance coverage, USAA would bind coverage for named insureds to vehicle occupancy.

For USAA to feign surprise about the portable nature of the coverage is shortsighted. Under USAA's hypothetical scenario, the insured will have paid for a single limit of personal and portable coverage. The insurer would have willingly accepted the insurance premiums for the portable coverage. If the insured is later injured in one of the seven vehicles, the insured is entitled to the single limit he or she purchased—nothing more, nothing less. Stacking would not exist if the insured paid for one single limit. An insured simply cannot stack a coverage he/she did not purchase. This rule of law is not as esoteric as USAA suggests. It harkens back to the oft-repeated parental mantra—you get what you pay for. If an insured pays for personal and portable coverage, he/she is entitled to recover the personal and portable coverage when injured. Likewise, if an insurer earns money from the sale of personal and portable insurance coverage, it must tender the proceeds of that

coverage to an injured insured. This is not a scheme—it is the rule of law in Montana.

USAA's proposition of tying coverage to vehicle occupancy for a named insured would turn Montana law on its head. Under USAA's approach, personal and portable coverage would no longer apply to maimed pedestrians. Stacking under Montana law would vanish because an injured insured can occupy only one vehicle at a time. If a named insured is hurt under these facts by an uninsured motorist, he/she could recover uninsured motorist coverage under *Jacobson v. Implement Dealers Mut. Ins. Co.*, 196 Mont. 542, 640 P.2d 908 (1982). However, if USAA's position carries the day, that same named insured could not recover underinsured motorist coverage if hit by an underinsured motorist. The injured named insured could not recover underinsured motorist benefits because of the owned vehicle exclusion, but that injured insured could recover medical payments coverage under *Gibson* because this Court has invalidated the owned vehicle exclusion in the medical payments coverage context. All the personal and portable references under Montana law would be suspect depending on the facts and coverage at issue.

To highlight the absurdity of USAA's position, the following considers a hypothetical scenario. Imagine a workplace that has seven coworkers. USAA provides automobile insurance for all seven employees. Each of the seven employees is the named insured under the USAA policy and has paid separate

premiums for uninsured, underinsured, and medical payments coverage on several vehicles. On the same day, all seven of these employees drive to work and experience the following:

Employee 1: This employee's motorcycle will not start when she tries to leave her home. In a pinch, she borrows her neighbor's motorcycle to get to work. She is hit by an underinsured motorist on the way to work.

Employee 2: This employee test drives a new motorcycle over her lunch hour. While on the test drive, the employee is hit by an inattentive, underinsured driver.

Employee 3: This employee is on his way to work when his motorcycle breaks down. He gets a ride from another coworker the rest of the way, as a passenger on the coworker's motorcycle. An underinsured motorist blows through a red light and hits the motorcycle carrying the two coworkers.

Employee 4: This employee goes for a walk over his lunch hour and is lawfully crossing the street in a crosswalk when he is hit by an underinsured tortfeasor motorist.

Employee 5: This employee rides her bike home after work. A negligent, underinsured motorist rolls through a stop sign and hits the employee.

Employee 6: This employee drives his motorcycle to work. The motorcycle is not listed as a covered vehicle under the USAA policy. Along the way, an **uninsured** motorist violates several traffic laws and hits the employee and his motorcycle.

Employee 7: This employee drives his motorcycle to work. The motorcycle is not listed as a covered vehicle under

> the USAA policy. Along the way, an **underinsured** motorist violates several traffic laws and hits the employee and his motorcycle.

All seven employees suffered severe injuries in the incidents, resulting in costly medical bills, many months off work, and permanent functional restrictions.

USAA concedes, under the policies and Montana law, that Employees 1-6 are entitled to underinsured (or uninsured for Employee 6) motorist coverage, and to stack their coverages regardless of vehicle occupancy. This concession derives from the personal and portable nature of first party coverages—not vehicle occupancy. Yet, USAA steadfastly rejects coverage for Employee 7 simply because of an owned vehicle exclusion. There are no distinctions between the circumstances surrounding Employees 6 and 7, except who they are hit by. Because Employee 6 was hit by an uninsured tortfeasor, he is entitled to coverage under *Jacobson*. USAA claims Employee 7 cannot obtain the same result because he had the misfortune of being hit by an underinsured motorist, not an uninsured motorist. Thus, under USAA's approach, the status of the tortfeasor determines coverage for Employees 6 and 7. This arbitrary, disparate treatment finds no support under Montana law.

Nearly forty years ago, this Court noted:

> We conclude that once uninsured motorist coverage is purchased, the insured and his relatives insured for liability have uninsured motorist protection under all circumstances. Uninsured motorist coverage, like no-fault coverage, is personal and portable.

> . . . 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.

Jacobson, 196 Mont. at 548, 640 P.2d at 912 (emphasis added). Like uninsured motorist coverage, underinsured motorist and medical payments coverages constitute personal and portable coverages. Since 1982, this Court has continued to follow the *Jacobson* model in the personal and portable insurance coverage context, regardless of whether the analysis implicates uninsured motorist coverage, underinsured motorist coverage, or medical payments coverage. *Hardy*, ¶¶ 40, 44; *Bennett*, 261 Mont. at 389, 862 P.2d at 1148; *Farmers Alliance Mut. Ins. Co. v. Holeman*, 1998 MT 155, 289 Mont. 312, 961 P.2d 114.

Again, by definition, personal and portable coverage is "not dependent upon the insured occupying an insured vehicle." *U.S. Specialty Ins. Co.*, ¶ 16. "[W]hen coverage is personal to the insured, there is no connection to the 'automobile listed on the policy.'" *U.S. Specialty Ins. Co.*, ¶ 18. As Justice McKinnon acknowledged in her concurring opinion in *U.S. Specialty Ins. Co.*:

> This Court has required the stacking of vehicle insurance coverage when the claimant is within the specific policy's definition of "insured" and when the claimant is a first party seeking to stack "personal and portable" coverages for which the claimant paid separate premiums. The instances in which this Court has required the stacking of motor vehicle coverages, despite the policies' terms providing otherwise, have been limited to first-party claimants seeking to stack uninsured motorist, underinsured motorist, and medical payment coverages. . . . Importantly, the Court permits first-party coverages to

> be stacked based on the rationale that insurers may not defeat coverage that first-party insureds paid valuable consideration for and reasonably expect.

U.S. Specialty Ins. Co., ¶ 23. That passage describes this case to a tee.

CONCLUSION

The issue for this Court's consideration is whether USAA can limit the personal and portable nature of Goss' underinsured motorist and medical payments coverage through an "owned vehicle" exclusion under the facts of this case. This Court's prior precedent rejects such a notion. Montana law recognizes only two limited circumstances under which an insurer may curb the availability of personal and portable coverage—when the injured party is not a named insured and when the insured is injured at the hands of a family member. Neither scenario exists here.

Accordingly, this Court should reverse the District Court's summary judgment ruling and hold that the exclusions upon which USAA relies are void as against Montana public policy. The Court should hold that the underinsured motorist and medical payments coverages Goss maintained with USAA provide coverage for Goss' collision-related damages.

Respectfully submitted this 5th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, except for footnotes and quoted and indented material; has left, right, top and bottom margins of one inch; and the word count calculated by Microsoft Word is not more than 5,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

Dated this this 5th day of March, 2021.

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I, Keith D. Marr, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-05-2021:

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