

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **ORAL ARGUMENT CALENDAR**

3 **TUESDAY, FEBRUARY 22, 2011**

5 **1:30 P.M.**

6 **No. 29,537**

7 **FARMERS INSURANCE**
8 **COMPANY OF ARIZONA,**

Daniel O'Brien

9 **Plaintiff-Appellee,**

10 **vs.**

11 **CHRISTINE SANDOVAL and**
12 **MELISSA CARTER,**

Thomas Allison

13 **Defendants-Appellants.**

14 ***PANEL: CHIEF JUDGE CASTILLO, JUDGES WECHSLER AND**
15 **ROBLES**

16 ***Court of Appeals' panel members are listed in seniority order.**

17 **Panels may be changed without notice.**

18 **Oral Argument will be held in the Albuquerque Court of Appeals Pamela B. Minzner**
19 **Law Center, 2211 Tucker NE., Albuquerque, NM 87106**

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21 **parking pass. Limit one parking pass to each party arguing before the Court.**
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23 **license with the clerk's office to receive a parking pass.**

24 **January 19, 2011**

25
26

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**FARMERS INSURANCE COMPANY
OF ARIZONA,**

Plaintiff-Appellee,

vs.

**No. 29,537
Bernalillo County
CV-2008-7961**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

AUG 27 2009

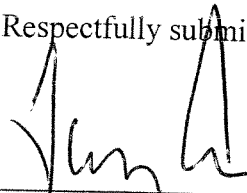
**CHRISTINE SANDOVAL and
MELISSA CARTER,**

Ben M. Newton

Defendants-Appellants.

APPELLANTS' BRIEF IN CHIEF

Respectfully submitted,



Thomas M. Allison
Whitener Law Firm, P.A.
*Attorneys for the Defendants-Appellants
Christine Sandoval and Melissa Carter*
4110 Cutler Ave., N.E.
Albuquerque, NM 87110
(505) 242-3333

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Statement of Compliance. The body of the Brief in Chief consists of 2,190 words and does not exceed 11,000 words. The word count is obtained from Microsoft Office Word 2003.

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SUMMARY OF PROCEEDINGS

Plaintiff-Appellee initiated the underlying suit by filing a *Complaint for Declaratory Judgment* on July 31, 2008 (RP 1-3). This is a direct appeal of the *Final Order* granting summary judgment in favor of Plaintiff-Appellee entered by the District Court on April 2, 2009 (RP 77-78). The District Court's *Final Order* was entered after consideration of cross-motions for summary judgment submitted by Plaintiff-Appellee and Defendants-Appellants.

The parties stipulated to all material facts (RP 15-18, 63) and submitted cross-motions for summary judgment (RP 15-26, 63-69) to the trial court below on the sole issue of the appropriate amount of the offset Plaintiff-Appellee was entitled to apply when considering the uninsured/underinsured motorist claims of Defendants-Appellants. What follows is a summary of the facts relevant to the issue presented for review.

This case involves bodily injury claims asserted by Defendants-Appellants Christine Sandoval and Melissa Carter ("Claimants" or "Defendants-Appellants") arising from a motor vehicle accident caused by an alleged drunk driver ("tortfeasor") (RP 15-18). The vehicle driven by the tortfeasor was insured with liability limits of \$25,000 per person and \$50,000 per occurrence. (RP 16) Claimants each assert claims for compensatory damages and punitive damages; however the tortfeasor's automobile liability insurer covers only compensatory damages and excludes punitive damages. (RP 16-17)

Claimants each estimate their claims for compensatory damages are less than the \$25,000 liability limits from tortfeasor's carrier [in other words, the full \$25,000 of

liability coverage from tortfeasor is not available to pay all damages claimed by Claimants which include punitive damages]. (RP 16)

Because the tortfeasor's insurer excludes punitive damages, Claimants have each presented claims to Farmers Insurance Company of Arizona ("Farmers" or "Plaintiff-Appellee"), their uninsured/underinsured motorist carrier, for punitive damages. (RP 17)

Farmers asserts that it is entitled to an offset [pursuant to Section 66-5-301 NMSA (2008) and/or the Farmers' policy language] for the amount of the *policy limits* carried by tortfeasor as opposed to an offset limited to the amount of liability insurance made available to pay Claimants' compensatory damages (again, punitive damages being excluded pursuant to an exclusion in the tortfeasor's policy). (RP 19)

Defendants-Appellants contend that by the trial court allowing Farmers to apply an offset for policy limits that were not actually paid to Defendants-Appellants, Defendants-Appellants were prevented from receiving at least the sum certain in underinsured coverage purchased for their benefit as well as reaching the absurd result that Defendants-Appellants would have had a greater recovery if they had been hit by a totally uninsured driver, rather than an underinsured driver.

ARGUMENT

The sole question for the Court is whether Farmers is entitled to an offset applied to uninsured/underinsured motorist coverage based on the liability limits of the tortfeasor's policy or, rather, should Farmers be entitled to offset only that portion of the tortfeasor's liability policy that is available to pay Defendants'-Appellants' damages when the amount made available from the tortfeasor's policy is *less than the UM/UIM coverage*? Defendants-Appellants contend that both by statute and contract, Farmers' offset should be

limited to the amount of liability proceeds actually available to the injured insureds when that amount is less than the amount of uninsured/underinsured motorist coverage.

The parties agree that the material facts are not disputed and accordingly the proper standard of review of the question(s) of law is de novo. *State Farm Mut. Auto. Ins. Co. v. Barker*, 136 N.M. 211, 96 P.3d 336 (Ct.App. 2004).

Defendants-Appellants believe that the specific facts of this case present a matter of first impression in New Mexico; however an analysis of how New Mexico appellate courts have interpreted the uninsured motorists' insurance statute, §66-5-301 NMSA (2008), and public policy considerations in the application of contractual offsets in the uninsured motorist context provide ample guidance for the Court in deciding this matter.

Statutory UIM offset

The parties agree that the applicable underinsured motorist statute in New Mexico is §66-5-301 NMSA (2008) and the pertinent portion thereof is :

B.... For purposes of this subsection, "underinsured motorist" means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage...

The legislative intent was to expand insurance coverage to protect the public from damage or injury caused by other motorists who were not insured and could not make the impaired party whole. *Sandoval v. Valdez*, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978). The uninsured motorist statute was intended to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured motorists. *Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 803 P.2d 243 (1990).

The uninsured motorist statute is liberally interpreted in order to implement its remedial purpose, and language in the statute that provides for an exception to uninsured coverage should be construed strictly to protect the insured. *Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 803 P.2d 243 (1990).

The purpose of this statute is to assure that in the event of an accident with an underinsured vehicle an insured motorist entitled to compensation will receive at least the sum certain in underinsured coverage purchased for his or her benefit. To the extent the amount of other available insurance proceeds from responsible underinsured tortfeasors does not equal or exceed the amount of coverage purchased, the underinsured motorist carrier must satisfy the difference. *Fasulo v. State Farm Mut. Auto. Ins. Co.*, 108 N.M. 807, 780 P.2d 633 (1989). (emphasis added).

In the case at bar, the only available insurance proceeds from the responsible tortfeasor are those which cover compensatory damages. These damages do not equal or exceed the amount of UIM coverage purchased and therefore Farmers must satisfy the difference. To assure that Defendants-Appellants will receive at least the sum certain in underinsured coverage purchased for their benefit (\$30,000 for each Defendant-Appellant), the offset should be based only on available insurance proceeds from the tortfeasor (those payable for compensatory damages, not including coverage which excludes punitives).

In the present case, each Defendant-Appellant estimates her compensatory damages at less than the tortfeasor's liability limits of \$25,000. (RP 16) If Farmers is allowed an offset based on the liability limits of \$25,000 rather than what insurance proceeds are actually available to each Defendant (compensatory/less than \$25,000), each

Defendant-Appellant will not be assured to receive at least the sum certain in uninsured coverage purchased for his or her benefit.

This is consistent with the holding in *Manzanares v. Allstate Insurance Company*, 140 N.M. 227, 141 P.3d 1281 (Ct. App. 2006). The Court in *Manzanares* upheld an offset provision in the Allstate policy that stated that the [claimant's] UIM limits would be reduced by "all amounts paid by or on behalf of the" uninsured, underinsured, or other responsible party. *Manzanares*, 140 N.M. at 229, 141 P.3d at 1283. In *Manzanares*, the claimant actually received from the tortfeasor's carrier an amount equal to her UIM coverage. She, therefore, did receive a sum certain equal to uninsured coverage purchased for her benefit and the offset could be upheld.

The well-settled public policy consideration that insureds should receive a sum certain equal to uninsured motorist coverage purchased for their benefit when considering offset application can be seen in the analogous cases involving multiple claimants vying over limited liability insurance benefits. In the multiple claimants context, New Mexico case law clearly supports the proposition that insured motorists who are covered under an uninsured/underinsured motorist policy and who suffer from injuries resulting from an automobile accident are entitled to collect up to the limit of their underinsured motorist policy to the extent that the damages exceed the amounts that the tortfeasor's insurance has previously paid to them. *State Farm Mut. Auto. Ins. Co. v. Valencia*, 120 N.M. 662, 905 P.2d 202 (Ct. App. 1995). Put another way, where there are multiple claimants to the proceeds of a tortfeasor's liability coverage, in determining whether the tortfeasor is an underinsured motorist, the court must look to the liability proceeds actually available to

the injured insureds, not merely the express policy limits of the tortfeasor's liability coverage. *Gonzales v. Millers Cas. Ins. Co.*, 923 F.2d 1417 (10th Cir. 1991).

Contractual UIM offset

Farmers' contract language, in pertinent part is quoted on page 10 its Motion for Summary Judgment (RP 24) as follows:

Other insurance

...

2. The amount of Uninsured Motorist Coverage we will pay in Additional Definitions 4b shall be reduced by the amount of any other **bodily injury** coverage available to any party held to be liable for the **accident**.

(Underlined emphasis added by Defendants-Appellants)

In the instant case, the bodily injury coverage available to the tortfeasor is only coverage for compensatory damages. Therefore, even pursuant to Farmers contract, the amount due in Uninsured Motorist Coverage to each Defendant shall only be reduced by the amount available for compensatory damages, not by amounts neither available nor received by Defendants from the tortfeasor's carrier.

Further, and of overriding importance, an insurance company can not contractually restrict its uninsured motorist coverage that violate the remedial legislative policy behind the UM Statute. *See Montoya v. Dairyland Ins. Co.*, 394 F. Supp. 1337 (D.N.M. 1975). Accordingly, even if Farmers' contention is correct that its contractual offset is greater than what is available to the injured insured from the tortfeasor, the contractual language is contrary to public policy given the remedial nature of the New Mexico Uninsured Motorist Statute that insureds be assured an amount certain of underinsured coverage purchased for their own protection.

Defendants-Appellants contend that this is why, in part, the New Mexico Court of Appeals in *Manzanares, supra*, upheld the offset provision in the Allstate policy that stated that the [claimant's] UIM limits would be reduced by "all amounts paid by or on behalf of the" uninsured, underinsured, or other responsible party. *Manzanares*, 140 N.M. at 229, 141 P.3d at 1283. The Allstate provision did not violate public policy concerning the remedial nature of the New Mexico UM Statute; specifically that insureds be assured an amount certain of underinsured coverage purchased for their own protection.

Also instructive is the recent case of *State Farm Mutual Automobile Ins. Co. v. Jones*, 139 N.M. 558, 135 P.3d 1277 (Ct. App. 2006). In *Jones*, this Court clarified how an insurer may claim an offset against its underinsured motorist coverage when a third party pays a portion of a victim's damages. *Id.* In *Jones*, the Court had to deal with two insurers, each claiming an offset for the liability recovery obtained by Jones. *Id.*

In finding that State Farm would *not* be allowed a contractual offset, this Court noted that allowing a contractual offset (along with a statutory offset) would lead to an anomalous result, that Jones would be left with a total payment which was less than the amount of UIM purchased for her benefit. *Jones*, 139 N.M. at 566, 135 P.3d at 1285. Furthermore, allowing the two offsets would lead to the absurd result that Jones would have a greater recovery if she had been hit by a totally uninsured driver, rather than by an underinsured driver. *Id.* The Court doubted that the legislature intended such a result when it enacted the UM statute, and doubted that New Mexico case law interpreting the statute anticipated or would allow such an anomaly. *Id.*, (citing *See Schmick*, 103 N.M. at 221, 704 P.2d at 1097).


The rationale in the *Jones* case in whether to allow an insurer to apply an offset is appropriate in the case at bar. If Farmers is allowed an offset in an amount that exceeds that recovered from the tortfeasor by Defendants-Appellants, each Defendant-Appellant would be left with a total payment which is less than the amount of UIM purchased for her benefit. It also would lead to the absurd result that each Defendant-Appellant would have had a greater recovery if she had been hit by a totally uninsured driver, rather than by an underinsured driver (Each would have been able to collect the limits of \$30,000 per person from Farmers uninsured motorist coverage if she had been hit by an uninsured driver, rather than an underinsured driver).

CONCLUSION

The Court should reverse the trial court and remand for entry of summary judgment in favor of Defendants-Appellants finding that, as a matter of law, Appellee Farmers' offset is limited to the amount of liability proceeds actually available to the injured insureds, which amount is less than the underinsured motorist coverage purchased.

Respectfully submitted:

WHITENER LAW FIRM, P.A.



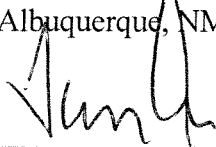
Thomas M. Allison
*Attorneys for Defendants-Appellants
Christine Sandoval and Melissa Carter*
4110 Cutler Ave. N.E
Albuquerque, NM 87110
(505) 242-3333

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Appellants' Brief in Chief* was mailed this 27th day of August, 2009 to the following:

The Honorable Theresa M. Baca
Second Judicial District Court
400 Lomas NW
P.O. Box 488
County Courthouse
Albuquerque, NM 87103

Daniel J. O'Brien, Esq.
O'Brien & Ulibarri, P.C.
Attorneys for Plaintiff-Appellee
Farmers Insurance Company of Arizona
6000 Indian School Rd NE, Suite 200
Albuquerque, NM 87110



Thomas M. Allison

COPY

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FARMERS INSURANCE COMPANY
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Plaintiff-Appellee,

v.

CHRISTINE SANDOVAL and
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Defendant-Appellant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

OCT 13 2009

Jan M. Martin

Ct. App. No. 29,537

Dist. Ct. No. CV 2008-7961

Civil Appeal from the Second Judicial District Court, County of Bernalillo
Honorable Theresa Baca, District Court Judge

PLAINTIFF-APPELLEE'S
ANSWER BRIEF

O'BRIEN & ULIBARRI, P.C.
Daniel J. O'Brien
6000 Indian School Road NE, Suite 200
Albuquerque, NM 87110
(505) 883-8181
Attorneys for the Plaintiff-Appellee
Farmers Insurance Company of Arizona

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Schmick v. State Farm Mut. Auto. Ins. Co.,

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7, 8, 9, 10, 12

SUMMARY OF PROCEEDINGS

Appellee Farmers Insurance Company of Arizona (“FICA”) agrees with Appellants’ Statement of Facts in Appellants’ Brief in Chief, but notes that the following facts that are also important to a decision in this case:

Appellants’ compensatory damages were less than the tortfeasor’s underlying policy limits of \$25,000, so Appellants have indicated that they will voluntarily settle with the tortfeasor’s insurer for less than these policy limits. (R.P. p. 2, 63).

The policy limits of the UM/UIM policy issued by Appellee FICA to Appellant Carter were \$30,000.00 per person and \$60,000.00 per occurrence. (R.P. p. 2, 63). Because the tortfeasor’s policy excluded punitive damages under the liability portion of the policy, Appellants claimed that the tortfeasor was underinsured for the full amount of all damages to which they were entitled, and demanded \$30,000 each in punitive damages from Appellee. (R.P. p. 2-3, 63).

In its Motion for Summary Judgment filed in the District Court, Appellee did not concede that Appellants were entitled to punitive damages. Nor did Appellee concede that the amount of punitive damages to which Appellants were entitled was \$30,000 each. (R.P. pp. 18-19). However, Appellee responded to Appellants’ demands by paying \$5000 to each

Appellant. (R.P. pp. 17-19, 63). Appellee determined this amount by offsetting the \$30,000 per person UIM coverage by the \$25,000 per person tortfeasor liability limits. Since the UIM coverage exceeded the liability policy limits by \$5000 for each Appellant, Appellee paid this amount to each Appellant. (R.P. p. 17). As will be discussed in the Argument section of this Answer Brief, Appellee believed that an offset in this amount was required by the language of N.M.S.A. 1978 § 66-5-301 (B) (2008).

Additionally, the \$5000 per Appellant was determined according to the language of the UIM policy issued to Appellant Carter. The UIM policy states, in pertinent part, as follows:

PART II - UNINSURED MOTORIST

Coverage C - Uninsured Motorist Coverage (Including Underinsured Coverage)

We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **uninsured motor vehicle** ...

4. **Uninsured motor vehicle** means a **motor vehicle** which is:
...

b. Insured by a **bodily injury** and **property damage** liability bond or policy at the time of the **accident** which provides coverage in amounts less than the limits of Uninsured Motorist Coverage shown in Declarations.

...

Other Insurance

...

2. The amount of Uninsured Motorist Coverage we will pay in Additional Definitions 4b shall be reduced by ~~the~~ any other **bodily injury** coverage available to any party held to be liable for the **accident**.

(R. P., pp. 23, 43-44).

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Since the policy requires that UIM payments be reduced by any bodily injury coverage available to the tortfeasor, Appellee reduced its payments to Appellants by the tortfeasor's full coverage amount of \$25,000 per person, rather than any lesser amounts that Appellants may eventually receive in settlement.

Because of the manner in which "underinsured motorist" is defined by § 66-5-301 (B) (2008), and because of the language in the UIM policy issued to Appellant Carter, Appellee believed it had paid the full amount of any UIM benefits that could possibly be due under the policy. Appellants agreed that Appellee was entitled to an offset, but disagreed as to the amount. Appellant therefore filed a Complaint for Declaratory Judgment to ask the Court to determine the amount of the offset that is required when UIM claimants voluntarily settle for less than the tortfeasor's policy limits. (R.P. pp. 1-4). The District Court granted Appellee's Motion for Summary

judgment on this issue, and ruled that Appellee had paid the full amounts required under the UIM policy. (R.P. p. 77). Appellants filed this appeal.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo the granting of summary judgment and construes reasonable inferences from the record in favor of the party opposing the motion. *Celaya v. Hall*, 2004 NMSC 5, 135 N.M. 115, 85 P.3d 239. This Court also reviews de novo questions of statutory construction. *State Farm Mut. Auto Ins. Co. v. Luebbers*, 2005 NMCA 112, 138 N.M. 289, 119 P.3d 169, cert. quashed, 2006 NMCERT 10, 140 N.M. 675, 146 P.3d 810.

The sole issue presented for this Court's consideration is the amount of the UIM offset required by both N.M.S.A. 1978 § 66-5-301 (B) (2008) and the language of the FICA UIM policy in this case. No New Mexico cases specifically address this issue. Appellants argue that UIM payments can be offset only by those amounts actually paid by the tortfeasor's insurer. Appellee submits that the clear language of the UIM statute requires an insurer to offset UIM payments by the tortfeasor's full policy limits rather than any lesser amounts actually paid by the tortfeasor's insurer.

Additionally, the language of the FICA policy requires all UIM payments to be offset by the tortfeasor's full policy limits.

II. STATUTORY UIM OFFSET

UIM coverage is mandated by N.M.S.A. 1978 § 66-5-301 (B) (2008).

Numerous New Mexico courts have interpreted this statute, and have held that UIM coverage must be offset by the tortfeasor's liability policy limits.

See, for example *Manzanares v. Allstate Insurance Company*, 2006 NMCA 104, 140 N.M. 227, 141 P.3d 1281; *State Farm Mutual Automobile Insurance Company v. Jones*, 2006 NMCA 60, 139 N.M. 558, 135 P.3d 1277; *Schmick v. State Farm Mutual Automobile Insurance Company*, 103 N.M. 216, 704 P.2d 1092 (1985); *Mountain States Mutual Casualty Company v. Martinez*, 115 N.M. 141, 848 P.2d 527 (1993); and *American States Insurance Company v. Frost*, 110 N.M. 188, 793 P.2d 1341 (1990).

In each of these cases, the tortfeasor paid its full policy limits, and the UIM insureds then claimed additional damages from their UIM insurers. For this reason, the UIM insurers offset their payments by the full liability policy limits of the tortfeasor, and the specific question of how the offset should be calculated when the insured voluntarily settles for less than the tortfeasor's liability limits did not arise. To answer the de novo question

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presented in this case, this Court must look to the statutory definition of “underinsured motorist”.

§ 66-5-301 (B), defines "underinsured motorist" as “an operator of a motor vehicle” who has “bodily injury liability insurance” that is “less than the limits of liability under the insured's uninsured motorist coverage”. As the New Mexico Supreme Court stated in Schmick, supra:

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The statutory definition of underinsured motorist indicates that an insured is entitled to underinsurance benefits to the extent that his uninsured/underinsured coverage exceeds the tortfeasor's liability insurance...

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The statute defines one as being underinsured to the extent that the insured's uninsured motorist coverage exceeds the underinsured's liability coverage. § 66-5-301(B). It is apparent from the statutory definition that the Legislature intended that the amount of underinsurance benefits due would differ depending on the relative amounts of coverage purchased by the tortfeasor and the insured.

... The state of being underinsured exists when the aggregate of the insured's uninsured motorist coverage reduced by the tortfeasor's liability coverage is greater than zero.

103 N.M. 216 at 219, 222 and 223, emphasis added.

See also *Manzanares v. Allstate Insurance Company*, supra, which states that an “underinsured motorist” is “one who has bodily injury liability

limits that are less than the insured's UIM coverage.” 2006 NMCA 104 ¶ 7 (emphasis added).

agree

Thus, the statute and the cases define UIM insurance only in relation to the full liability policy limits of the tortfeasor. In other words, UIM coverage exists only when the full policy limits of the tortfeasor are taken into account, and the tortfeasor’s **policy limits** are less than the claimant’s UIM limits. There is no mention in § 66-5-301(B) of payments actually received by the claimant from the tortfeasor’s liability insurer, or situations in which the claimant voluntarily settles with the tortfeasor for less than the policy limits, then demands additional UIM benefits from his or her UIM insurer. Since the statute creates and defines UIM insurance in terms of the tortfeasor’s full liability coverage only, UIM payments must be offset by the full liability limits of the tortfeasor’s policy, and not by any lesser amounts accepted by the insured.

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This conclusion is supported by the holding of the New Mexico Supreme Court in Schmick. Since the insureds in Schmick settled with the tortfeasor’s insurer for the full policy limits, the Court did not specifically address the factual situation presented in this case. But Schmick is instructive because the Supreme Court stated that, after application of the offset, “an insured collects from his underinsured motorist carrier **the**

difference between his uninsured motorist coverage and the tortfeasor's liability coverage or the difference between his damages and the tortfeasor's liability coverage, whichever is less.” Schmick, supra (emphasis added). And, “under a statute like ours, where the most an insured can receive is the amount of underinsurance purchased for his benefit, that amount must be offset by available liability proceeds. Hence ... the maximum recovery is always offset by the tortfeasor's liability insurance coverage.” Schmick, supra (emphasis added).

Appellants argue that, if the UIM insurer is allowed to offset payments by the full amount of the tortfeasor’s liability coverage, rather than lesser amounts actually paid, Appellants will not receive a “sum certain” equal to the UIM insurance available to them. But Appellants’ argument ignores the clear language of § 66-5-301(B), which defines “underinsured motorist” only in relation to the full policy limits of the tortfeasor, and not in relation to amounts actually paid by the tortfeasor. As the court stated in State Farm Auto. Ins. Co. v. Ovitz, 117 N.M. 547, 873 P.2d 979 (1994), underinsured motorist coverage is not intended to provide coverage in every uncompensated situation.

Appellants also cite the 10th Circuit case of Gonzales v. Millers Casualty Insurance Company of Texas, 923 F.2d 1417 (10th Cir. 1991) for

the proposition that § 66-5-301(B) allows UIM payments to be offset by the amounts actually paid by the tortfeasor, rather than the policy limits of the tortfeasor. However, Gonzales is inapplicable to this case. Gonzales is limited to situations in which multiple parties demand payment under the tortfeasor's insurance policy; the tortfeasor's policy limits are paid in full through division among the multiple parties; but the parties are still not compensated for their actual injuries because several parties are claiming against the same policy limits.

The court stated in Gonzales that “[t]he meaning of § 66-5-301 (B) is not self-evident in the multiple claimant situation.” Id. However, § 66-5-301 (B) **is** self-evident when multiple parties are not claiming against the same policy limits; the parties can be fully compensated for their injuries within the tortfeasor's policy limits available to each party; and the parties voluntarily propose to accept less than the full policy limits. In cases where multiple claimants are not involved, the offset required by § 66-5-301 (B) and numerous New Mexico cases must be calculated in relation to the full liability policy limits of the tortfeasor, and not any lesser amounts accepted in settlement by Appellants.

III. CONTRACTUAL UIM OFFSET

In addition to the requirements of § 66-5-301 (B), the FICA policy contractually requires UIM payments to be offset by the full amount of the tortfeasor's liability limits. As outlined in the Summary of Proceedings above, the FICA policy defines an underinsured motor vehicle as a vehicle whose full insurance coverage is less than the limits of uninsured motorist coverage shown in the declarations of the FICA policy. Additionally, the policy does not say that UIM coverage will be reduced by any other bodily injury payments received by the claimants, but instead states that the UIM coverage "shall be reduced" by the amount of the tortfeasor's "coverage". (R. P., pp. 23, 43-44). This can only mean that UIM coverage shall be offset by the full amount of the tortfeasor's liability coverage, and not by any lesser amounts that the claimant voluntarily accepts from the tortfeasor's insurer.

In *Manzanares, supra*, the court held that, when the language of an insurance policy provides for a contractual UIM offset, that offset will be applied as written. Here, the policy states that any UIM payments must be reduced by the full amount of the tortfeasor's policy limits. Since the tortfeasor's policy limits are \$25,000 per person, and Appellee's UIM coverage is \$30,000 per person, the most Appellee can ever owe in UIM

damages in this case are \$5000 per person. Appellee has paid \$5000 to Appellant Carter, and \$5000 to Appellant Sandoval, and owes no further UIM amounts to either claimant.

Appellants argue that the contractual offset in the FICA policy is greater than the offset allowed by statute, and so it cannot be applied in this case. However, as set forth in Section I of this Answer Brief, the FICA contractual offset does not conflict with the UIM statutory language and instead is identical to the statutory offset. Appellants' arguments are without merit.

Finally, Appellants argue that the FICA policy language only allows FICA to reduce UIM benefits by any other bodily injury coverage "available" to any party held to be liable for the accident. (See FICA policy, with emphasis on "available" added by Appellants in their brief to this Court.) According to Appellants, the tortfeasor's policy excludes punitive damages, so the only coverage "available" to Appellants is coverage for compensatory damages. (See Appellants' Brief in Chief, p. 6).

However, Appellants' arguments ignore *Manzanares, supra*, which held that "it would ... be illogical to create a special rule that allows offset of UIM coverage for bodily injury damages, but does not allow offset for punitive damages." *Manzanares, supra* at 229. *Manzanares* thus indicates

rationale
that there is no special rule or consideration that would allow a claimant to separate compensatory damages from punitive damages for purposes of the UIM offset, and the offset must be applied equally to the full policy limits no matter how the claimants characterize their damages.

Finally, Appellants' arguments confuse coverage "available" to Appellants with coverage "available" to the tortfeasor. The coverage actually available to Appellants may be less than the full policy limits because punitive damages are excluded by the tortfeasor's policy but, in this case, the "coverage available **to any party held liable for the accident**" (emphasis added), or the coverage available to the tortfeasor, is the full \$25,000 for each claimant. When read as a whole, the policy language requires a reduction using the full coverage available to the tortfeasor for any one accident, not the coverage available to Appellants if that coverage is less because of Appellants' characterizations of their damages.

CONCLUSION

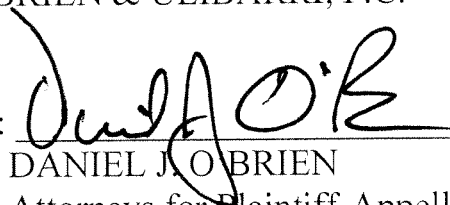
Under § 66-5-301 (B), Appellee is entitled to reduce any UIM payments by the full amount of the tortfeasor's liability coverage available to Appellants, whether or not Appellants accept lesser amounts in settlement. Additionally, under its policy language and New Mexico case law, Appellee is contractually required to reduce its UIM payments by the

full amount of the tortfeasor's liability coverage. Since Appellee has already paid Appellants the difference between the tortfeasor's liability coverage and the UIM policy limits, Appellee owes no further amounts to Appellants. The District Court's order granting Appellee's Motion for Summary Judgment and denying Appellants' Cross Motion for Summary Judgment should be affirmed.

Respectfully submitted,

O'BRIEN & ULIBARRI, P.C.

By:



DANIEL J. O'BRIEN

Attorneys for Plaintiff-Appellee

6000 Indian School Road NE, Suite 800

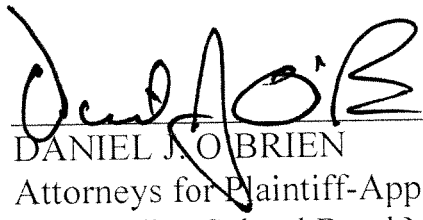
Albuquerque, NM 87110

(505) 883-8181

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was mailed by first class postage to Thomas Allison, Esq., at 4110 Cutler Avenue N.E., Albuquerque, NM 87110 on this 13th day of October, 2009.

O'BRIEN & ULIBARRI, P.C.

By: 
DANIEL J. O'BRIEN
Attorneys for Plaintiff-Appellee
6000 Indian School Road NE, Suite 800
Albuquerque, NM 87110
(505) 883-8181

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FARMERS INSURANCE COMPANY
OF ARIZONA,

Plaintiff-Appellee,

vs.

No. 29,537
Bernalillo County
CV-2008-7961

CHRISTINE SANDOVAL and
MELISSA CARTER,

Defendants-Appellants.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

NOV 02 2009

San M. Martin

APPELLANTS' REPLY BRIEF

Respectfully submitted:


WHITENER LAW FIRM, P.A.

Thomas M. Allison
Attorneys for Appellants
Christine Sandoval and Melissa Carter
4110 Cutler Ave. N.E
Albuquerque, NM 87110
(505) 242-3333

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Statutory UIM Offset Argument

Plaintiff-Appellee Farmers Insurance Company of Arizona (“Farmers”) repeatedly claims that the question presented to this Court involves how to calculate the UIM offset when the insured *voluntarily settles for less than the tortfeasor’s liability limits*. See *Answer Brief* at page 4; 7; 9. This mischaracterizes the facts in the record. Claimants each assert claims for compensatory damages and punitive damages; however the tortfeasor’s automobile liability insurer covers only compensatory damages and excludes punitive damages. (RP 16-17). Claimants each estimate their claims for compensatory damages are less than the \$25,000 liability limits from tortfeasor’s carrier [in other words, the full \$25,000 of liability coverage from tortfeasor is not available to pay all damages claimed by Claimants which include punitive damages]. (RP 16).

Despite Farmers’ repeated claims, Claimants simply have not voluntarily agreed to accept less than the tortfeasor’s liability limits. Claimants’ valid claims for punitive damages due to the tortfeasor’s alleged drunk driving are excluded by the tortfeasor’s liability insurer.

Farmers also dismisses the persuasive reasoning of *Gonzales v. Millers Cas. Ins. Co.*, 923 F.2d 1417 (10th Cir. 1991), which allowed a UIM payment to be offset only by amounts actually paid by the tortfeasor, rather than by the policy limits of the tortfeasor stating that it is restricted to just multiple-claimant situations (multiple claimants dividing the tortfeasor’s liability limits and still not fully compensated). See *Answer Brief* at page 9.

However, the rationale in *Gonzales* should not be ignored. *Gonzales* states that in determining whether the tortfeasor is an underinsured motorist, the court must look to the

liability proceeds actually available to the injured insureds, not merely the express policy limits of the tortfeasor's liability coverage. *Gonzales v. Millers Cas. Ins. Co.*, 923 F.2d 1417 (10th Cir. 1991). Just as the multiple claimants in *Gonzales*, Claimants in the case at bar cannot be fully compensated for their damages by the tortfeasor's liability policy.

Contractual UIM offset

Farmers' reliance on *Manzanares v. Allstate Insurance Company*, 140 N.M. 227, 141 P.3d 1281 (Ct.App. 2006) to support its claim to a contractual offset is misplaced as *Manzanares* is easily distinguished from the facts of the case at bar. In *Manzanares*, the limits of the tortfeasor's liability coverage was made available to, and received by, claimant. The Court in *Manzanares* therefore allowed Allstate the contractual offset as claimant had actually received more from the tortfeasor than what claimant had purchased in UM coverage from Allstate.

Here, Claimants will receive *less* from tortfeasor's liability insurance than what they purchased in UM coverage from Farmers. To apply a contractual offset as proposed by Farmers in this context should therefore be found to be against public policy. See *State Farm Mutual Automobile Ins. Co. v. Jones*, 139 N.M. 558, 135 P.3d 1277 (Ct. App. 2006) (disallowing a contractual offset to be taken in addition to a statutory offset as it would have lead to an anomalous result of claimant receiving total payment which was less than the amount of UIM purchased for her benefit).

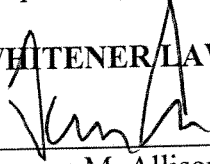
CONCLUSION

The Court should reverse the trial court and remand for entry of summary judgment in favor of Defendants-Appellants finding that, as a matter of law, Appellee Farmers' offset

is limited to the amount of liability proceeds actually available to the injured insureds,
which amount is less than the underinsured motorist coverage purchased.

Respectfully submitted:

WHITENER LAW FIRM, P.A.



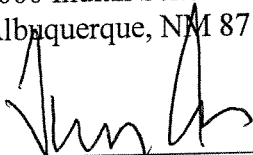
Thomas M. Allison
*Attorneys for Defendants-Appellants
Christine Sandoval and Melissa Carter*
4110 Cutler Ave. N.E
Albuquerque, NM 87110
(505) 242-3333

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Appellants' Brief in Chief*
was mailed this 2nd day of November, 2009 to the following:

The Honorable Theresa M. Baca
Second Judicial District Court
400 Lomas NW
P.O. Box 488
County Courthouse
Albuquerque, NM 87103

Daniel J. O'Brien, Esq.
O'Brien & Ulibarri, P.C.
6000 Indian School Rd NE, Suite 200
Albuquerque, NM 87110



Thomas M. Allison