DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JANNIE M. VAUGHT, Plaintiff/Appellant, v. GEICO GENERAL INSURANCE COMPANY, a legal entity, Defendant/Appellee.	)	No. 1 CA-CV 11-0225 DEPARTMENT E **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-008163

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 Appellant Jannie Vaught seeks reversal of the trial court's grant of summary judgment in favor of Geico General

Insurance Company. She raises the issue whether the "definition of Underinsured Motor Vehicle in the endorsement to the Policy, which excludes an insured vehicle, is contrary to [Arizona Revised Statutes section ("A.R.S.")] 20-259.01(B) and (G), contrary to Arizona public policy, or both." We affirm the trial court's decision in favor of Geico on the basis of two supreme court decisions, *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 9 P.3d 1049 (2000), and *Duran v. Hartford Ins. Co.*, 160 Ariz. 223, 224, 772 P.2d 577, 578 (1989) ("*Duran I*").

FACTS AND PROCEDURAL HISTORY

¶2 On February 28, 2009, Vaught was injured in an automobile accident. Vaught was a passenger in a car owned by her daughter that was being driven by a non-family member at the time of the accident. The driver's negligence caused the accident. The record on appeal does not contain information suggesting that another vehicle was involved in the accident or that any person other than the driver was at fault. Geico had issued Vaught's daughter an automobile insurance policy that covered her vehicle. The policy had liability and underinsured motorist ("UIM") coverage limits of $50,000 per person/$100,000 aggregate. Under the Geico policy, the driver was insured for liability claims, and Vaught was an omnibus insured generally entitled to UIM coverage benefits.

¶3 Vaught asserted a negligence claim against the driver

of the car, and Geico paid Vaught $50,000, the full liability policy limit. According to Vaught, her damages exceeded $50,000, and therefore she sought further recovery from Geico under the UIM coverage. Geico declined to pay any UIM benefit to Vaught, based on the policy's definition of underinsured motor vehicle. According to Section IV (definitions) of the policy, "The term underinsured motor vehicle does not include: an insured auto provided that the insured has received the full amount of the liability coverage under the Bodily Injury Coverage of this policy." (emphasis omitted).

¶4 Vaught filed a complaint in superior court in April 2010. In February 2011, the trial court in a signed minute entry granted Geico summary judgment, concluding that "this case is controlled by *Duran I*." The court further explained that "the facts presented are analytically indistinguishable from those earlier confronted by the Supreme Court" and "this [c]ourt is bound to follow the Supreme Court's dictate, absent a clear indication of intent to abandon precedent that does not appear in this instance."

¶5 Vaught brings a timely appeal and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011).[1]

[1] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

ANALYSIS

¶6 We review a grant of summary judgment *de novo*, and we view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *See Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate only "if the facts produced in support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Id.* at ¶ 13 (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

Geico's UIM Insurance Policy Definition Is Not Against Arizona Public Policy, Nor Does It Contravene A.R.S. § 20-259.01

¶7 Arizona law mandates that any insurance carrier writing motor vehicle liability policies must also offer "underinsured motorist coverage which extends to and covers all persons insured under the policy." A.R.S. § 20-259.01(B) (Supp. 2011). Further, subsection (G) of the statute describes underinsured motorist coverage as:

> "Underinsured motorist coverage" includes coverage for a person if the sum of the limits of liability under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the total damages for bodily injury or death resulting from the accident. To the extent that the total

> damages exceed the total applicable liability limits, the underinsured motorist coverage provided in subsection B of this section is applicable to the difference.

¶8 Vaught argues that the policy's definition of underinsured motor vehicle constitutes an exclusion that is void as against public policy. Vaught cites *Taylor* and also asserts that "UIM statutes have a remedial purpose and must be construed liberally in favor of coverage, with strict and narrow construction given to offsets and exclusions." *Taylor*, 198 Ariz. at 314, ¶ 11, 9 P.3d at 1053 (emphasis omitted). Moreover, Vaught further cites *Taylor* and contends that "exceptions to coverage not permitted by the statute are void." *Id.* at 315, ¶ 13, 9 P.3d at 1054; *see also State Farm Mut. Auto. Ins. Co. v. Duran*, 163 Ariz. 1, 3, 785 P.2d 570, 572 (1989) ("*Duran II*") ("Public policy then and now precludes an insurer from voiding coverage by an exclusion not permitted by statute.").[2]

¶9 If we were writing on a clean slate, we might conclude that Vaught's argument has merit. The language of subsection

[2] The supreme court in *Duran II* declared a "furnished for regular use" UIM exclusion "void as against public policy" and contrary to A.R.S. § 20-259.01. 163 Ariz. at 4, 785 P.2d at 573. *Duran II* is distinguishable from our present case because it involved different facts and different policy provisions. *See id.* at 1-4, 785 Ariz. P.2d at 570-73; *see also Demko v. State Farm Mut. Auto. Ins. Co.*, 204 Ariz. 497, 499 n.2, ¶ 14, 65 P.3d 446, 448 n.2 (App. 2003).

20-259.01(G) arguably does not draw a distinction between the exhaustion of liability limits from other policies compared to the vehicle owner's policy. But we are not in a position to wrestle with the issues presented because we are bound by the decisions of the Arizona Supreme Court. *See Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 145, ¶ 13, 211 P.3d 16, 23 (App. 2009) (stating "we may not ignore and cannot alter or overrule our supreme court"). Resolution of this appeal, in this court, is controlled by the similar facts and ultimate conclusions of the supreme court in both *Taylor* and *Duran I*. Even if we agreed with Vaught's analysis that the broad language of A.R.S. § 20-259.01 does not authorize Geico's restrictive definition of an uninsured motor vehicle, which removes UIM coverage here, we are not in a position to embrace Vaught's contention. *See Demko*, 204 Ariz. at 499 n.1, ¶ 14, 65 P.3d at 448 n.1 (discussing the supreme court's decision in *Taylor* not to overrule *Duran I* and acknowledging that the court of appeals "lacks the authority to overrule a decision of the supreme court") (citations omitted).

¶10 The trial court based its ruling on *Duran I*, and Geico relies on *Duran I* to support its position that the trial court correctly ruled that Vaught should not be allowed to maintain a valid claim for UIM proceeds because she received the full amount of the liability coverage. In *Duran I*, Lisa Duran was a passenger in her grandmother's car and she was injured when her

brother (the driver) was involved in a rollover accident. 160 Ariz. at 223, 772 P.2d at 577. Duran's brother, as a permissive user, was insured for liability under their grandmother's automobile policy. *Id.* Hartford paid Duran the full $100,000 liability policy limit and a $5,000 limit for medical pay coverage. *Id.* Duran's injuries exceeded the policy limits, so she sought payment under her grandmother's policy's UIM coverage. *Id.* Hartford refused to pay based on the setoff provision in its policy which provided, "that monies paid to persons under the liability coverage offset amounts otherwise available under any other coverage of the same policy, including UIM coverage." *Id.*

¶11 In *Duran I*, our supreme court decided in Hartford's favor and held that "when an allegation of being underinsured is predicated on the amount of liability insurance in the same policy that provides the [UIM] insurance under which the claim is made . . . the underinsured coverage *may* not be stacked so as to in effect increase the liability coverage purchased by the named insured." *Id.* at 224, 772 P.2d at 578 (quoting 2 A. Widiss, Uninsured and Underinsured Motorist Insurance § 40.2, at 79 (2d ed. 1987) (emphasis in original)). Moreover, the court stated that nothing in A.R.S. § 20-259.01 "suggests any legislative intent to allow an injured passenger to 'stack' liability and UIM coverage." *Id.* This conclusion by the court

recognizes an exclusion to UIM coverage if the UIM claim would essentially increase the liability coverage through stacking. *See Demko*, 204 Ariz. at 500, ¶ 15, 65 P.3d at 449 (stating a UIM exclusion that prevents stacking is enforceable). The court limited its conclusion to the fact that in *Duran I* there was a single policy insured involved in an accident with only one tortfeasor, which is distinguishable from cases involving two tortfeasors or two separate insurance policies. *See Duran I*, 160 Ariz. at 224, 772 P.2d at 578; *Demko*, 204 Ariz. at 500, ¶ 15, 65 P.3d at 449.

¶12 Similar to *Duran I*, Vaught's claim involves a single automobile policy with liability and UIM coverage and one tortfeasor, the driver. Allowing Vaught to recover UIM benefits under the policy would be contrary to *Duran I's* anti-stacking determination for a single policy holder seeking a UIM recovery after receiving the liability policy limit. In accordance with *Duran I*, Vaught cannot recover both the full liability limit and UIM benefits.

¶13 *Taylor* is also similar to the case before us now, but with an important difference. Mrs. Taylor was a passenger in a vehicle driven by her husband. *Taylor*, 198 Ariz. at 312, ¶ 2, 9 P.3d at 1051. Mr. Taylor was negligent, causing his own death along with serious injuries to his wife and modest injuries to four others in another vehicle. *Id.* The Taylors had a $300,000

liability insurance policy and a $300,000 UIM coverage limit. *Id.* Travelers paid its liability policy limit to the five claimants: Mrs. Taylor received $183,500 for her injuries, and the other four claimants shared the remaining $116,500. *Id.* Mrs. Taylor's injuries were not fully compensated and she made a claim for UIM benefits. *Id.*

¶14 The Travelers policy excluded UIM coverage for bodily injury sustained by any person who has received payment for such injury under the liability coverage provided in the policy. *Id.* at ¶ 3. Based on this exclusion, Travelers denied the claim. *Id.*

¶15 The supreme court relied on the language of A.R.S. § 20-259.01, explaining that the statute "means what it says: Where there is insufficient liability coverage available to compensate for the actual damages sustained, the named insured or a family member injured in or by the family car . . . may turn to his or her UIM coverage to make up the difference between actual damages and the available liability coverage." *Id.* at 317-18, ¶ 22, 9 P.3d at 1056-57.

¶16 The court in *Taylor* concluded that UIM is a gap filling device necessarily used when the injuries exceed the liability policy limits and

> when the full amount of liability coverage is unavailable to a UIM claimant who is also an insured under the same policy. In that

> event, UIM coverage may be used to cover the difference between the liability payment available to the insured and the amount of the insured's damages or the limits of UIM, whichever is less.

Id. at 321, ¶ 32, 9 P.3d at 1060. The court determined that because of the principles established in *Duran I*, Mrs. Taylor was entitled to the policy limit amount of $300,000 from the liability and UIM coverages. Having received $183,500 from the liability coverage, she was entitled to an additional $116,500 from the UIM coverage. *Id.* The court reasoned however, that Mrs. Taylor was not entitled to a double recovery or more insurance protection than she had purchased, meaning that she was not entitled to the full $300,000 of UIM coverage on top of the $183,500 she had recovered from the liability coverage. *Id.* at 315, 319, 320, ¶¶ 14, 26, 29, 9 P.3d at 1054, 1058, 1059. The court explained that "when . . . the injured person has recovered the full amount of the liability insurance, there is no persuasive reason to allow her also to collect under the UIM coverage if an offset provision is clear and unambiguous." *Id.* at 319, ¶ 25, 9 P.3d at 1058 (citation omitted).

¶17 Here, unlike in *Taylor*, Vaught did not have to share any of the liability coverage; she recovered the full "per person" limit provided under the policy, $50,000. Therefore, there was no gap to fill with the UIM policy. Vaught's claim for the additional amount of $50,000 from the UIM policy, on top

of the liability amount already received, would be a duplicate recovery in contravention of the *Taylor* and *Duran I* rationales and holdings. Therefore, Vaught is not entitled to recover UIM benefits under the Geico policy.

CONCLUSION

¶18 We affirm the trial court's grant of summary judgment. Vaught requested attorneys' fees pursuant to A.R.S. § 12-341.01 and costs, but she is not the prevailing party on appeal. Geico, as the prevailing party, is entitled to an award of taxable costs on appeal conditioned upon its compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICIA A. OROZCO, Presiding Judge

___/s/_____
PHILIP HALL, Judge