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

MICHELE E. HOELBL and WILLIAM T. HOELBL, wife and husband, Plaintiffs/Appellants, v. GEICO GENERAL INSURANCE COMPANY, a foreign (District of Columbia) property and casualty insurer, doing business in Arizona, Defendant/Appellee.	No. 1 CA-CV 11-0703 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-094647

The Honorable Karen A. Potts, Judge

REVERSED AND REMANDED

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S W A N N, Judge

¶1 Michele E. Hoelbl appeals from the superior court's grant of summary judgment in favor of GEICO General Insurance Company in Hoelbl's declaratory judgment action. Hoelbl owns a GEICO multi-vehicle insurance policy, and was injured in one of the insured vehicles while riding as a passenger as it was being driven by a family member. GEICO paid Hoelbl the policy limits under the liability portion of her policy on the insured vehicle. The superior court concluded that Hoelbl was not also entitled to recover under the underinsured motorist ("UIM") coverage for one of the other vehicles. Bound by the supreme court's decision in *American Family Mutual Insurance Co. v. Sharp*, 229 Ariz. 487, 277 P.3d 192 (2012), decided while this appeal was pending, we reverse and remand for entry of judgment in favor of Hoelbl.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2007, Hoelbl and her husband purchased from GEICO a multi-vehicle insurance policy for four vehicles. The policy provided various types of insurance coverage for each vehicle, including bodily injury liability insurance limited to $100,000 per person and UIM insurance limited to $100,000 per person, and specified separate portions of the total premium to be paid for each coverage for each vehicle. For purposes of the UIM coverage, the policy defined "insureds" to include the named

insureds and their spouses living in the same household ("you"), and relatives living in the same household ("your relatives").

¶3 The policy provided that GEICO would pay "damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury . . . sustained by the insured[,] . . . caused by the accident[,] . . . [and] aris[ing] out of the ownership, maintenance, or use of the underinsured motor vehicle." The policy specified, however, that the term "underinsured motor vehicle" does not include "insured auto[s]" -- i.e., vehicles "described in the declarations and covered by the bodily injury liability coverage of this policy." The policy also included a detailed "anti-stacking" section that provided:

> When coverage is afforded to two or more autos, the limits of liability shall apply separately to each auto as stated in the declarations but shall not exceed the highest limit of liability applicable to one auto.
>
> If separate policies or coverages with us are in effect for you or any person in your household, they may not be combined to increase the limit of our liability for a loss; however, you have the right to select which policy or coverage is to be applicable to that loss. . . .
>
> To avoid duplicate recovery, and without reducing the limit of our liability, the damages payable under this coverage will be reduced by all amounts:
>
> (a) paid by or for all persons or organizations liable for the injury;

(b) paid or payable under the Bodily Injury Coverage or Auto Medical Payments Coverage of this policy; or
(c) paid or payable under any workers' compensation law, disability benefits law or any similar law.

The policy concluded with the provision that "[a]ny terms of this policy in conflict with the statutes of Arizona are amended to conform to those statutes."

¶4 In July 2007, Hoelbl was injured in a single-vehicle accident while riding as a passenger in one of the insured vehicles, driven by her daughter. Hoelbl recovered $100,000 in liability insurance from GEICO under her policy, but GEICO denied Hoelbl's claim for an additional $100,000 under the coverage for one of the insured vehicles not involved in the accident. The parties do not dispute on appeal that Hoelbl's injuries exceeded $100,000.

¶5 Hoelbl's complaint sought a judgment declaring that she was entitled to collect the UIM insurance under the coverage for one of the uninvolved vehicles. GEICO filed a motion for summary judgment based on the policy's terms and the then-current case law interpreting Arizona's Uninsured and Underinsured Motorist Act ("the Act"), codified at A.R.S. § 20-259.01. The superior court granted GEICO's motion for summary judgment. Hoelbl now appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 The parties dispute whether Arizona law requires GEICO to pay Hoelbl the full amount of liability insurance covering the vehicle involved in the accident *and* the UIM insurance covering one of the uninvolved vehicles under her multi-vehicle policy. We review the grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). We also review issues of statutory interpretation de novo. *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 347, ¶ 7, 248 P.3d 193, 195 (2011).

¶7 The Act requires motor vehicle liability insurers to offer UIM coverage for all insureds in limits not less than the policy's liability limits for bodily injury or death. A.R.S. § 20-259.01(B). UIM coverage is distinct from liability coverage, because it provides its purchaser a source of recovery in the event she is injured by a tortfeasor whose liability insurance cannot fully compensate her injuries. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 258, 782 P.2d 727, 734 (1989); *Brown v. State Farm Mut. Auto. Ins. Co.*, 163 Ariz. 323, 327, 788 P.2d 56, 60 (1989). Subsection (G) of the Act provides: "To the extent that the total damages exceed the total applicable liability limits, the underinsured motorist coverage . . . is applicable to the difference." The UIM coverage follows the insured person and applies even when the

insured vehicle was not involved in the incident that caused the injury. *State Farm Mut. Auto. Ins. Co. v. Duran ("Duran II")*, 163 Ariz. 1, 3, 785 P.2d 570, 572 (1989).

¶8 Subsection (H) of the Act provides that an insurer may prohibit "stacking": "If multiple policies or coverages purchased by one insured on different vehicles apply to an accident or claim, the insurer may limit the coverage so that only one policy or coverage, selected by the insured, shall be applicable to any one accident." To obtain the benefit of subsection (H), an insurer must expressly include an anti-stacking provision in the policy. *State Farm Mut. Auto. Ins. Co. v. Lindsey*, 182 Ariz. 329, 331, 897 P.2d 631, 633 (1995). Policy provisions providing coverage exceptions broader than those allowed by the Act, however, are void. *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 360, ¶ 9, 174 P.3d 270, 272 (2008).

¶9 Our supreme court has held that the Act limits UIM recovery where it is sought under the same single-vehicle policy from which liability insurance has been paid -- i.e., where the insured plaintiff's injuries were caused by a co-insured instead of a third party -- if the policy has an anti-stacking provision. The court therefore disallowed any UIM recovery in *Duran v. Hartford Insurance Co. ("Duran I")*, 160 Ariz. 223, 772 P.2d 577 (1989), and allowed only limited UIM recovery in *Taylor*

v. Travelers Indemnity Co. of America, 198 Ariz. 310, 9 P.3d 1049 (2000).

¶10 In *Duran I*, Duran was injured in a single-car accident while riding as a passenger in her grandmother's car, driven by her brother. 160 Ariz. at 223, 772 P.2d at 577. The grandmother had an insurance policy for the car, and the insurer paid Duran the full limits of the liability insurance and the medical payments insurance under the policy but refused Duran's request for full compensation under the policy's UIM coverage. *Id.* The superior court granted summary judgment for the insurer, and our supreme court affirmed, holding:

> 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)). The court further held that "[n]othing in the [Act] suggests any legislative intent to allow an injured passenger to 'stack' liability and UIM coverage so as to, in effect, increase the named insured's liability coverage." *Id.*

¶11 In *Taylor*, Taylor was a passenger in the family car when her husband's negligent driving caused a collision that killed Taylor's husband and injured Taylor and four occupants of

a second car. 198 Ariz. at 312, ¶ 2, 9 P.3d at 1051. Taylor's husband was the named insured on the policy for their car; Taylor was insured under the policy as a family member. *Id.* Taylor and the occupants of the second car each made claims on the policy's liability coverage, and the insurer settled those claims by apportioning the full limit of the liability insurance among the five claimants. *Id.* Based on the policy's language prohibiting UIM recovery where any liability recovery was received, the insurer refused Taylor's request to receive additional payment under the policy's UIM coverage to fully compensate her for her injuries. *Id.* at ¶¶ 2-3. The superior court granted summary judgment for the insurer. *Id.* at 313, ¶ 5, 9 P.3d at 1052. Our supreme court reversed and remanded, holding that Taylor was entitled to UIM recovery to the extent required to "fill the gap" that "exists when the full amount of liability coverage is unavailable to a UIM claimant who is also an insured under the same policy," by covering "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 reasoned, however, that Taylor was not entitled to double recovery and therefore could not receive the full limit of the UIM coverage because the amount of UIM recovery available to her was offset by the amount of liability insurance she had been

paid. *See id.* at 315, 320-21, ¶¶ 15, 29, 32, 9 P.3d at 1054, 1059-60. *Taylor*, therefore, drew a distinction between an enforceable anti-stacking provision and an unenforceable provision precluding an insured from collecting the full liability limits. *Demko v. State Farm Mut. Auto. Ins. Co.*, 204 Ariz. 497, 500, ¶ 15, 65 P.3d 446, 449 (App. 2003).

¶12 Under *Duran I* and *Taylor*, the circumstances under which an insured, who was injured by a co-insured's negligence, may recover under both the liability and the UIM provisions of her own single-car policy are very limited. But under the supreme court's opinion in *American Family Mutual Insurance Co. v. Sharp*, 229 Ariz. 487, 277 P.3d 192 (2012), decided after the superior court's ruling in this matter and addressed by the parties on appeal in supplemental briefing, an otherwise similarly situated insured who holds *multiple* policies for *multiple* vehicles is treated differently.

¶13 In *Sharp*, Sharp was injured in a single-vehicle accident while riding as a passenger on a motorcycle driven by her husband. 229 Ariz. at 489, ¶ 4, 277 P.3d at 194. The Sharps had purchased two separate policies from the same insurer: one for the motorcycle, with Sharp's husband as the named insured; and one for a car, with Sharp as the named insured. *Id.* After the accident, the insurer paid Sharp the full limit of the liability insurance under the policy for the

motorcycle but denied her claim for UIM recovery under the policy for the car. *Id.* The insurer then brought an action in federal court seeking a declaratory judgment that it had validly denied Sharp's UIM claim under the Act and the policies' anti-stacking provisions. *Id.* at 488, ¶ 2, 277 P.3d at 193. Sharp counterclaimed for breach of contract and bad faith. *Id.*

¶14 In answering certified questions, our supreme court considered whether subsection (G) of the Act required the insurer to provide UIM coverage for Sharp under the policy for the car or whether subsection (H) of the Act allowed the insurer to refuse to provide such coverage. *Id.* at 488-89, ¶ 2, 277 P.3d at 193-94. The court held that subsection (H) prohibits stacking only "when an insured obtains coverages for several vehicles and then attempts to claim multiple UIM coverages for the same accident[,]" and "does not permit an insurer to deny UIM coverage under a policy merely because the insured was partially indemnified as a claimant under the *liability* coverage of a different policy issued by the same insurer." *Id.* at 491-92, ¶¶ 15-16, 277 P.3d at 196-97. The court concluded that "[u]nder the circumstances here, Subsection (G) requires an insurer to provide UIM coverage, '[t]o the extent that the total damages exceed the total applicable liability limits.'" *Id.* at 492, ¶ 16, 277 P.3d at 197.

¶15 *Sharp* distinguished *Duran I* and *Taylor* on the ground that those cases did not involve different coverages under multiple policies and did not apply subsection (H), acknowledging that Sharp could not have received UIM coverage under the policy for the motorcycle because she recovered the full liability limits under that policy. *Id.* at ¶ 19 & n.4. But the court cited with approval *Taylor*'s "disagree[ment] with the notion that 'the legislature intended that an insured injured in her own car by another insured could be denied the UIM coverage she had purchased[,]'" and held:

> That point is even more pronounced if, as occurred here, the UIM claimant is injured on a spouse's vehicle that is insured under its own policy, from which she received the liability limit, but no UIM coverage, and then seeks UIM coverage under a separate policy for which she paid a premium.

Id. at 493, ¶ 20, 277 P.3d at 198. The court concluded that "[b]y claiming UIM coverage under the [car] [p]olicy, from which she received no liability or other payment, Sharp is not seeking to duplicate recovery or receive more than she purchased." *Id.* at 493, ¶ 20, 277 P.3d at 198.

¶16 GEICO contends that the denial of Hoelbl's UIM claim is supported by the supreme court's holdings in *Duran I* and *Taylor*, and distinguishes *Sharp* on the grounds that Sharp involved two separate policies whereas Hoelbl purchased only one policy. We are unpersuaded that this distinction is legally

significant. We see no dispositive difference between *Sharp* and this case that would allow us to affirm, and we have no discretion to ignore *Sharp*. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) ("[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them.").

¶17 To be sure, *Sharp* involved two separate policies issued by a single insurer. Here, we have multiple coverages on multiple vehicles issued under the same policy. But *Sharp*'s holding hinged not on the multiplicity of the policies, but rather on the court's construction of subsection (H) of the Act. *See Sharp*, 229 Ariz. at 491-92, ¶¶ 15-16, 277 P.3d at 196-97. Subsection (H) is not exclusively limited to circumstances where multiple policies exist -- it applies to "multiple policies *or* coverages."[1] A.R.S. § 20-259.01(H) (emphasis added). We therefore cannot distinguish *Sharp* based on the fact that Sharp had two policies and Hoelbl had one policy. Nor can we distinguish *Sharp* based on the fact that Sharp, unlike Hoelbl, was a "named insured" with respect to her claim for UIM coverage only. Sharp was an insured with respect to both of her claims, and neither liability nor UIM coverage discriminate between "named insureds" and other insureds. *See* A.R.S. § 28-4009(A)(2)

[1] Similarly, the anti-stacking section of Hoelbl's policy applies to "policies *or* coverages." (Emphasis added.)

(providing that liability insurance must extend to all permissive drivers); *Duran II*, 163 Ariz. at 3, 785 P.2d at 572 (holding that UIM coverage applies to the insured and family members).

¶18 In sum, we see no reason why *Sharp* does not control here. *Sharp* allows a claimant who purchased coverages for two vehicles, and was injured by a co-insured's negligence while occupying one of the vehicles, to receive liability coverage from the accident vehicle's insurance and UIM coverage from the uninvolved vehicle's insurance. We can discern no basis for holding that the application of *Sharp*'s rule hinges on whether the multiple coverages were memorialized in one policy or several policies. Under *Sharp*, Hoelbl is entitled to a judgment declaring that she may collect UIM benefits under the coverage she purchased for one of the vehicles not involved in the accident that caused her injuries. To the extent that Hoelbl's policy provides otherwise, the conflicting provisions are void and are deemed amended to conform to *Sharp*'s construction of the Act. *See Cundiff*, 217 Ariz. at 360, ¶ 9, 174 P.3d at 272.

¶19 Having found that *Sharp* is dispositive, we consider GEICO's request that we limit our decision to prospective-only application. To determine whether a decision in a civil appeal should be limited to prospective-only application, we must balance three factors: "(1) whether we establish 'a new legal

principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed,' (2) whether '[r]etroactive application would adversely affect the purpose behind the new rule,' and (3) whether '[r]etroactive application would produce substantially inequitable results.'" *Cundiff*, 217 Ariz. at 362, ¶ 18, 174 P.3d at 274 (citation omitted). Here, none of the three factors weigh in favor of prospective-only application.

¶20 We are not overruling the existing precedent -- we are following *Sharp*, and *Sharp* did not profess to change the law. Indeed, it left *Duran I* and *Taylor* intact. *See Sharp*, 229 Ariz. at 493 n.4, ¶ 19, 277 P.3d at 197 ("There is no occasion today to revisit either *Duran I* or *Taylor* . . . ."). Further, retroactive application of our decision would not produce substantially inequitable results -- indeed, prospective-only application would produce such results by depriving insureds of coverage to which they are entitled. *Cf. Cundiff*, 217 Ariz. at 362, ¶ 18, 174 P.3d at 274 ("[L]imiting this decision [prohibiting insurers from reducing UIM coverage based on the insured's receipt of workers' compensation benefits] to prospective application would produce inequitable results, because such a limitation could deprive insureds of UIM coverage to which they are entitled."). We decline GEICO's request to limit our decision to prospective application.

CONCLUSION

¶21 We reverse the grant of summary judgment in favor of GEICO, and remand for entry of judgment in favor of Hoelbl. Both parties have requested attorney's fees on appeal pursuant to A.R.S. § 12-341.01(A). We deny GEICO's request because GEICO is not the prevailing party. We award Hoelbl her reasonable attorney's fees and costs pursuant to A.R.S. §§ 12-341.01(A) and 12-341, subject to her compliance with ARCAP 21(c).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge