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

MICHAEL PAYNE, a minor, through MARK J. THEUT, his Guardian ad litem, and CINDY PAYNE,	)	1 CA-CV 09-0559
	)	DEPARTMENT B
Plaintiffs/Appellants,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, a legal entity,	)	
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-006983

The Honorable Richard J. Trujillo, Judge

AFFIRMED

Warnock MacKinlay & Carman PLLC — Prescott
By Brian R. Warnock
And Krista M. Carman
Attorneys for Appellants

Allen & Lewis PLC — Phoenix
By Lynn M. Allen
Attorneys for Appellee

G E M M I L L, Judge

¶1 Plaintiffs/appellants Cindy Payne and Mark Theut, guardian ad litem for Michael Payne, appeal from the decision granting summary judgment to defendant/appellee American Standard Insurance Company. Payne and Theut contend that the trial court erred in ruling that an exclusion in Payne's automobile insurance policy was valid and excluded underinsured motorist coverage in excess of the policy's liability limits, when the driver of the vehicle and the injured party are both insureds under the same policy. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Payne was the named insured on an automobile insurance policy issued by American Standard that insured her 1996 Pontiac Sunfire ("the Sunfire" or "the vehicle"). The policy provided bodily injury liability coverage with limits of $25,000/$50,000 and uninsured/underinsured motorist ("UM/UIM") coverage with limits of $25,000/$50,000.

¶3 On October 19, 2006, Payne's son Travis was driving the Sunfire when it was involved in a one-vehicle accident. Payne's other son Michael, who was a passenger in the vehicle, was seriously injured, requiring hospitalization and medical treatment that cost more than $96,000.

¶4 American Standard agreed to pay the liability limits of $25,000 to settle Michael's claim against Travis. Payne then

made a claim on behalf of Michael for UIM coverage. American Standard denied the UIM claim on the basis that it was excluded under the policy because the vehicle was insured for liability under the same policy. The policy stated in part:

> We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**.
>
> . . . .
>
> **Underinsured motor vehicle** means a land motor vehicle which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the amount an **insured person** is legally entitled to recover. **Underinsured motor vehicle**, however, does not mean a land motor vehicle:
>
> > a. owned by or furnished or available for the regular use of **you** or a **relative** unless there is no liability coverage available under this policy to respond to damages sustained by an **insured person**.

(Emphasis in original.)

¶5 Payne and Theut, on behalf of Michael, filed suit against American Standard seeking $25,000 in UIM benefits and alleging the following theories of recovery: declaratory relief establishing that Michael was entitled to UIM benefits under the policy, negligence of the agent who sold Payne the policy and failed to advise her of the restriction under the policy, reasonable expectations or estoppel on the ground that the

exclusion was concealed and not drawn to her attention, and reformation of the policy to comport with Payne's reasonable expectations. Payne and Theut also sought attorneys' fees and costs.

¶6 American Standard filed a motion for summary judgment, arguing that the language of the policy excluded the coverage Payne was seeking because the vehicle was insured under the liability coverage of the policy. American Standard also argued that under *Taylor v. Travelers Indemnity Co. of America*, 198 Ariz. 310, 9 P.3d 1049 (2000), the Arizona Supreme Court had held that an insurer could lawfully exclude UIM coverage to an insured who is injured while a passenger in the insured vehicle, provided the insured has recovered the full amount of liability limits applicable to that vehicle. American Standard noted that in *Taylor*, the court had carved out a narrow exception for named insureds in concluding that the underinsured motorist statute required payment of UIM coverage where necessary to "fill the gap" between the amount actually recovered under the liability coverage and the full amount of the liability policy limits when the insured or the insured's family member is injured in the family car and recovers less than the actual liability limits. *Id*. at 315, ¶ 14, 9 P.3d at 1054. American Standard also argued that Payne did not have a reasonable expectation of coverage or a claim for negligence, asserting that the agent who sold her

the policy explained the coverage to her and that no evidence existed to show negligence.

¶7 Payne and Theut responded and filed a cross-motion for summary judgment. They argued that the exclusion claimed by American Standard was not permitted by statute. They further argued that an opinion more recent than *Taylor*, *Cundiff v. State Farm Mutual Automobile Insurance Co.*, 217 Ariz. 358, 174 P.3d 270 (2008), confirmed the rule that exclusions and offsets not specifically allowed by the legislature were not permitted. Payne further argued that, when she purchased the policy she understood that if an at-fault driver had insufficient insurance, her UIM coverage would apply. She contended that her agent never qualified that coverage in any way, and that she expected she would have coverage.

¶8 The court granted summary judgment in favor of American Standard, explaining:

> IT IS ORDERED granting the Defendant's Motion for Summary Judgment based upon the holding in Taylor v. Traveler's Indem. Co., 198 Ariz. 310 (2000) for the reason there is no "gap to fill" in this case.
>
> The Court believes it has no choice but to agree with the legal argument and rationale included in the Defendant's Reply Memorandum in support of this ruling; however, to paraphrase George Bernard Shaw, ". . . the persistent, the unreasonable are often the most responsible for our progress. . ."

¶9 The court ultimately entered judgment against Payne and Theut and in favor of American Standard. Payne and Theut appeal.

DISCUSSION

¶10 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶11 Arizona law requires an insurer writing motor vehicle liability policies to offer "underinsured motorist coverage that extends to and covers all persons insured under the policy in any amount authorized by the insured up to the liability limits for bodily injury or death contained within the policy." Ariz. Rev. Stat. ("A.R.S.") § 20-259.01(B) (Supp. 2010).[1] By statute:

[1] We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.

> "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.

A.R.S. § 20-259.01(G) (Supp. 2010). The statutes are to be construed liberally in favor of coverage. *Taylor,* 198 Ariz. at 314, ¶ 11, 9 P.3d at 1053. Exceptions to coverage not permitted by the statute are void. *Id*. at 315, ¶ 13, 9 P.3d at 1054.

¶12 In *Taylor*, Mrs. Taylor was a passenger in a vehicle driven by her husband, who caused an accident that killed him and injured Mrs. Taylor and others in another vehicle. The Taylors had a $300,000 liability policy with a $300,000 UIM coverage limit. Mrs. Taylor and the others injured shared the $300,000 paid from the liability policy, resulting in a payment to Mrs. Taylor of $183,500. Because her damages far exceeded the amount received, she made a claim against her UIM policy. The insurer denied the claim on the basis of a policy provision that excluded coverage for bodily injury sustained by a person who had received any payment for bodily injury under the liability coverage. 198 Ariz. at 312, ¶¶ 2-3, 9 P.3d at 1051.

¶13 The *Taylor* court recognized that A.R.S. § 20-259.01 entitled an insured to UIM coverage if the sum of the limits of applicable liability policies was less than the total damages from the accident. *Id*. at 315, ¶ 14, 9 P.3d at 1054. The court noted that the total amount of liability coverage available to Mrs. Taylor was less than her total damages and that under such circumstances she would ordinarily be entitled to seek recovery under her own UIM policy. Because the policy could not override the statute, the court concluded that the policy exclusion should be construed to limit duplication of recovery, but should still permit recovery to fill the gap between the amount recovered and the liability limits under the policy. *Id*. The court further explained:

> 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 and by the negligence of another insured 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. The court reasoned that to deny UIM coverage to fill the gap would provide less coverage for an insured's family members than for others and less than the insured had purchased. *Id*. at 318, ¶ 23, 9 P.3d at 1057. However, the court also held that the insured should not receive more than was purchased.

> [W]hen . . . 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 (discussing 3 A. Widiss, Uninsured and Underinsured Motorist Insurance § 41.8, at 305-06 (2d ed. 1987)).

¶14 Payne and Theut argue that the exclusion contained in the American Standard policy should be found void as a violation of public policy. Under the provision, American Standard agreed to compensate an injured insured for damages the injured insured was entitled to recover from the owner of an underinsured motor vehicle. The policy excludes from the definition of an underinsured motor vehicle, a vehicle owned by the insured for the use of the insured and the insured's family if liability coverage is available to an injured insured under the same policy.

¶15 We agree the statutory definition of "underinsured motorist coverage" in A.R.S. § 20-259.01(G) does not include the exclusionary language in American Standard's policy that eliminates from the definition of an "underinsured motor vehicle" the car Michael was occupying at the time of the accident. We also recognize Payne and Theut's argument that exclusions to UM and UIM coverage not authorized by the

legislature are not valid. *See State Farm Mut. Auto. Ins. Co. v. Duran*, 163 Ariz. 1, 3, 785 P.2d 570, 572 (1989) (explaining that public policy "precludes an insurer from voiding coverage by an exclusion not permitted by the statute"). We are unable to address this public policy argument, however, because we are bound by our supreme court's analysis in *Taylor*.[2]

¶16 American Standard's policy limitation is similar to the provision in *Taylor*, which excluded UIM coverage for bodily injury sustained by a person who had received any payment under the liability coverage of the same policy. The *Taylor* court concluded that the policy should be read to limit duplication of benefits and authorized payment of UIM benefits despite the exclusion to fill the gap between the amount of liability coverage paid and the liability limit. 198 Ariz. at 315, ¶ 14, 9 P.3d at 1054.

¶17 Here, Michael has already received the full amount to which he was entitled under the liability coverage of the policy. The trial court correctly found that no gap existed to fill with an additional payment from the UIM coverage.

¶18 Payne and Theut further contend that *Cundiff* eliminated the "cap" imposed in *Taylor* in this situation.

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[2] "[W]e do not, of course, have the authority to overrule or disregard our supreme court." *Green v. Garriott*, 221 Ariz. 404, 413, ¶ 36, 212 P.3d 96, 105 (App. 2009).

¶19 In *Cundiff*, the vehicle Cundiff was driving was struck by another vehicle resulting in Cundiff being injured. 217 Ariz. at 359, ¶ 2, 174 P.3d at 271. Cundiff received payment of the limit of the other driver's liability coverage as well as workers' compensation benefits. *Id*. at 359, ¶ 3, 174 P.3d at 271. When she made a claim under her own UIM coverage, her insurer asserted that her recovery should be reduced by the amount of workers' compensation benefits received based on an offset provision in her policy. The offset provision stated that any amount payable under the UIM coverage would be reduced by any amount paid to or for the insured under any workers' compensation law. *Id*. at 359, ¶ 4, 174 P.3d at 271.

¶20 The court found that the "limit of the total applicable liability insurance is the only factor [A.R.S. § 20-259.01(G)] permits to be used in calculating UIM coverage." *Id*. at 358, 361, ¶ 10, 174 P.3d at 273. Because workers' compensation benefits do not constitute "liability insurance" in this context, the court found that the exclusion was not permitted by the statute and was therefore invalid. *Id*. at 361, ¶ 11, 174 P.3d at 273. The court explained that *Taylor* supported its decision, noting that *Taylor* had disallowed an offset not permitted by the statute. *Id*. at 361, ¶ 13, 174 P.3d at 273. As a consequence, Cundiff was permitted to recover

under her UIM policy despite having received benefits through workers' compensation.

¶21 Payne and Theut argue that *Cundiff* eliminated the cap imposed in *Taylor* because it permitted Cundiff to collect the separate policy limits of both the liability and UIM coverages as damages. This argument fails, however, because *Cundiff* involved two different automobile insurance policies while *Taylor* involved only one. Mrs. Taylor sought recovery of UIM benefits from the same policy -- her own policy -- from which the insurer had already paid liability benefits. Under those circumstances, recovery was limited to the liability limits so that the insured would not receive more coverage than was actually purchased. Cundiff, in contrast, received payment under the liability policy of the other driver and sought recovery of UIM benefits from her own policy. The concern that an insured would receive more or less than the coverage purchased was not present. The issue in *Cundiff* was whether an insurer could reduce the amount of UIM coverage by payments from a third source, workers' compensation. *Cundiff* did not affect *Taylor's* conclusion that the named insured or spouse seeking UIM benefits under the same policy that paid liability benefits is entitled to recover under the UIM policy up to the liability limits of the policy.

¶22 Payne and Theut also argue that Payne had a reasonable expectation that the UIM coverage she purchased would fully cover her family and that the exclusion therefore should not apply. Given that "most insureds develop a 'reasonable expectation' that every loss will be covered by their policy, . . . the reasonable expectation concept must be limited by something more than the fervent hope usually engendered by loss." *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 390, 682 P.2d 388, 395 (1984).

¶23 An insurance policy is a contract most of whose terms are standard boilerplate, "neither read nor understood by the buyer, and often not even fully understood by the selling agent." *Id.* In *Darner*, Arizona adopted the Restatement (Second) of Contracts ("Restatement") § 211 (1981) for dealing with standardized contracts. *Id*. at 391, 682 P.2d at 396. Restatement § 211 states:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

Restatement § 211. Under this section, the court will enforce boilerplate terms unless the drafter had reason to believe that the other party would not have assented to a particular term had he or she been aware of it. *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 272, 742 P.2d 277, 283 (1987).

> [Reason to believe] may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.

Darner, 140 Ariz. at 392, 682 P.2d at 397 (quoting Restatement § 211 cmt. f).

¶24 Under these principles, the exclusion in Payne's policy precluding UIM coverage from a vehicle that had liability coverage under the same policy would be enforceable unless Payne could show that American Standard had reason to believe that Payne would not have accepted the term had she known of it.

¶25 Payne testified at deposition that she would have sought insurance elsewhere without the restriction had she known

about the term in the policy, but when asked what information she had that American Standard had reason to believe that she would not have agreed to the term, she responded "I don't know." She testified that her belief that the UIM coverage should apply was not based on anything in the policy or anything her agent, Firth, had said. She agreed that Firth had explained to her that uninsured and underinsured coverage applied if another driver caused an accident and had no insurance or insufficient insurance to cover the damages. She also testified that she had never contemplated circumstances where she would be making a claim under both the liability and UIM coverage. Given Payne's testimony, she has not shown that anything in the negotiations demonstrate that American Standard had reason to believe that she would not agree to the term had she known about the exclusion.

¶26 Payne has not argued that the term is "bizarre or oppressive." She does assert that the exclusion is "counterintuitive to purchasing an insurance policy designed to protect oneself and family members." To the extent that she may be arguing that the exclusion "eviscerates the non-standard terms" or "eliminates the dominant purpose of the transaction," we disagree. "If . . . all that was required to defeat the operation of a policy exclusion under the reasonable expectation doctrine was a provision attempting to qualify or limit the

scope of policy coverage, then every policy exclusion would be invalid as contrary to the insured's reasonable expectation of coverage." *Millar v. State Farm Fire & Cas. Co.*, 167 Ariz. 93, 97-98, 804 P.2d 822, 826-27 (App. 1990). The exclusion here applies to limit underinsured coverage only with respect to vehicles for which liability coverage is available under the same policy for an injured insured and, based on *Taylor*, only with respect to amounts in excess of the liability limits. Underinsured coverage is otherwise unaffected by this exclusion and would still apply to the circumstances Payne discussed with Firth -- that is, when Payne's vehicle is struck by another vehicle that has insufficient insurance to cover her damages. Finally, Payne acknowledged that she received a copy of her policy, but did not read it.

¶27 Payne has not provided evidence under the *Darner* factors that American Standard had reason to believe that she would not have agreed to the term had she known about it. We therefore find that the reasonable expectation doctrine does not apply.

¶28 American Standard requests an award of attorneys' fees pursuant to A.R.S. § 12-341.01 (2003), which authorizes an award of reasonable attorneys' fees to the successful party in any contested action arising out of contract. In our discretion, we deny American Standard's request for fees. American Standard

is, however, entitled to its taxable costs on appeal, upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶29 The judgment in favor of American Standard is affirmed.

___/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
PATRICIA K. NORRIS, Judge

___/s/_____
MAURICE PORTLEY, Judge