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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Nancy Bono,  
Plaintiff,  
vs.  
State Farm Mutual Automobile  
Insurance Company, a foreign  
corporation,  
Defendant.

No. CV 15-548-TUC-CKJ (LAB)

**ORDER**

On December 22, 2016, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation (Doc. 31) in which she recommended the Motion for Summary Judgment (Doc. 23) filed by Plaintiff Nancy Bono (“Bono”) be denied and the Motion for Summary Judgment (Doc. 25) filed by State Farm Mutual Automobile Insurance Company (“State Farm”) be granted. Bono has filed an objection (Doc. 32) and State Farm has filed a response (Doc. 33). Bono has requested oral argument. The Court finds it would not be assisted by oral argument and declines to set this matter for hearing.

*Standard of Review*

The standard of review that is applied to a magistrate judge’s report and recommendation is dependent upon whether a party files objections – the Court need not review portions of a report to which a party does not object. *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 472-73, 88 L.Ed.2d 435 (1985). However, the Court must “determine de novo any part of the magistrate judge’s disposition that has been properly objected to.

1 The district judge may accept, reject, or modify the recommended disposition; receive further  
2 evidence; or return the matter to the magistrate judge with instruction.” Fed. R. Civ. P.  
3 72(b)(3); *see also* 288 U.S.C. § 636(b)(1) (“A judge of the court shall make a de novo  
4 determination of those portions of the report or specified proposed findings or  
5 recommendations to which objection is made.”).

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7 *Report and Recommendation – Background and Standard of Review: Summary Judgment*

8 The parties stipulated to the facts summarized in the Report and Recommendation  
9 (“R&R”). *See also* Stipulated Statement of Facts RE Motions for Summary Judgment (Doc.  
10 24). The Court adopts the facts stated by the magistrate judge.

11 Additionally, the Court adopts that portion of the R&R that states the standard of  
12 review when the Court considers a motion for summary judgment.

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14 *Statutory Definition*

15 Bono objects to the magistrate judge’s conclusion that the applicable Arizona statutes  
16 defines Underinsured Motorist (“UIM”) “coverage, in pertinent part, as ‘coverage for a  
17 person’ for ‘bodily injury . . . resulting from the accident’ where ‘total damages’ exceed the  
18 liability limits. It does not explicitly state whether bodily injury must be suffered by the  
19 covered person. “[T]he statute’s language is subject to different interpretations . . . .” (Doc.  
20 31 at 5) (citations omitted). Bono asserts there is no need to analyze the legislative intent,  
21 as the magistrate judge did, because the statute is clear and unambiguous. Indeed, Bono  
22 asserts the statute only requires an injury and damages and the “broad language does not  
23 contain exceptions.” *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 314, 9 P.3d 1049,  
24 1053 (2000).

25 However, the Court agrees with the magistrate judge’s reliance on *Lowing v. Allstate*  
26 *Ins. Co.*, 176 Ariz. 101, 859 P.2d 724 (1993). *Lowing* stated that “[e]xceptions to coverage  
27 are not generally permitted unless expressly allowed by statute.” 176 Ariz. At 106. As  
28 pointed out by the magistrate judge, “the *Lowing* court did not limit itself to analyzing the

1 language of the statute.” (R&R , p. 6). The *Lowing* court recognized that the statute defines  
2 UIM “coverage for a person” for “bodily injury . . . resulting from the accident” where “total  
3 damages” exceed the liability limits. 176 Ariz. At 103-04 (citation omitted). However, as  
4 stated by the magistrate judge, the statute “does not explicitly state whether the bodily injury  
5 must be suffered by the covered person. (R&R, p. 5). The Court agrees with the magistrate  
6 judge that the language of the statute is not clear and unambiguous and, therefore,  
7 interpretation is not limited to the language of the statute.

8 Further, “every provision of a statute must be read in conjunction with the other  
9 provisions, giving meaning, if possible, to ‘each word, clause or sentence, considered in the  
10 light of the entire act itself and the purpose for which it was enacted into law.’” *Doty-Perez*  
11 *v. Doty-Perez*, 241 P3d 372, 376-77, 388 P.3d 9, 13-14 (App. 2016) (citation omitted). In  
12 other words, the definition of UIM coverage, as stated in A.R.S. § 20-259.01(G), must be  
13 read in conjunction with A.R.S. § 20-259.01(B), which requires UIM to extend to and cover  
14 all persons insured under a policy. While § 20-259.01(G) does not include exceptions, the  
15 reading of §§ 20-259.01(B) and (G) together arguably does limit the coverage. It is not clear  
16 if § 20-259.01(B) is intended to limit the coverage for bodily injury to a covered person.  
17 Indeed, it is arguably § 20-259.01(B) that covers the parameters of the coverage while § 20-  
18 259.01(G) simply provides a definition. The Court agrees with the magistrate judge,  
19 therefore, that the statute is subject to different interpretations.

#### 20 21 *UIM Supplemental Coverage - Bodily Injury*

22 Bono objects to the magistrate judge’s inference that, because UIM coverage does not  
23 provide protection if the tortfeasor merely damages property, UIM coverage is not required  
24 where bodily injury is suffered by a non-insured, but where there is a pecuniary loss to the  
25 insured. Bono asserts this inference is illogical because A.R.S. § 28-4009 requires different  
26 liability coverage for bodily injury and property damage (i.e., liability vs. property damage  
27 portions of policies). Bono asserts, “It does not follow from the fact UIM coverage does not  
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1 apply to property damage, payable under the property-damage limit of the liability policy,  
2 that wrongful-death damages, payable from the injury-liability limit of the liability policy,  
3 would not be included in UIM coverage.” (Doc. 32 at 3).

4 The Court agrees with the magistrate judge that an inference can be made that  
5 Arizona’s UIM coverage is designed to protect an insured’s bodily integrity, rather than a  
6 pecuniary loss. *See e.g. State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 255, 782  
7 P.2d 727, 731 (1989) (UIM coverage is required for bodily injury or death; it does “not even  
8 compensate the victim for the total loss (property as well as personal injury) suffered).  
9 (1989). Although Bono argues this does not mean that coverage does not apply to property  
10 damage, the Court finds there is no legislative intent to expand the coverage. Rather, the  
11 Arizona statutes provide protection “for each person actually injured or killed and not for  
12 each person with a damage claim.” *Herring v. Lumbermen’s Mut. Cas. Co.*, 144 Ariz. 254,  
13 256, 697 P.2d 337, 339 (1985); *Bartning v. State Farm Fire & Casualty*, 164 Ariz. 370, 793  
14 P.2d 127 (App. 1990) (the gap in protection closed by the applicable statute “related to  
15 injuries to the insured, and not injuries to third persons”).

#### 16 17 *Express Terms of the Statute*

18 The magistrate judge concluded the “statute does not clearly state whether the insured  
19 must be the person who suffers the bodily injury.” (Doc. 31 at 9). Bono asserts that, because  
20 a limitation of UIM coverage to the bodily injury sustained by an insured is not expressly  
21 allowed by the statute, the magistrate judge should not have determined the statute did not  
22 permit it. Indeed, exclusions and limitations that are not included in the statute are void.  
23 *Taylor*, 198 Ariz. at 315, 9 P.3d at 1054. Specifically, Bono asserts the magistrate judge’s  
24 reliance on the word generally in *Lowing v. Allstate Insurance Co.*, 176 Ariz. 101, 104, 859  
25 P.2d 724, 727 (1993) (“Exclusions and limitations on coverage are generally invalid unless  
26 contemplated by the statute.”), fails to recognize that subsequent decisions do not qualify the  
27 statement with “generally.” Bono asserts that, because the statute does not specifically  
28 exclude this situation, it is permitted.

1           While the Court does not disagree with Bono that Arizona courts have not repeated  
2 “generally” in most subsequent cases discussing *Lowing*, the Court recognizes that no  
3 Arizona court has held that “generally” does not still apply in some cases.<sup>1</sup> Rather, the fact  
4 that no Arizona court has discussed the non-use of “generally” and/or overruled that portion  
5 of *Lowing* in any subsequent case indicates the Arizona courts recognize that phrase  
6 including “generally” may yet be presented to them in a future case. The Court agrees with  
7 the magistrate judge’s conclusion that the “statute does not clearly state whether the insured  
8 must be the person who suffers the bodily injury.” (Doc. 31 at 9). Further, Arizona law  
9 continues to recognize that “[e]xclusions and limitations on coverage are generally invalid  
10 unless contemplated by the statute.”

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12 *Amended Statute*

13           The magistrate judge concluded the amended UIM, rather than casting doubt on  
14 *Bartning* arguably supports a conclusion that the amendment supports the continued validity  
15 of the holding in *Bartning*. Bono argues, however, that not only does the principle of  
16 legislative acquiescence not apply because *Bartning* was decided by the Court of Appeals  
17 rather than the Supreme Court of Arizona, but the legislature has not “declined to reject the  
18 relevant judicial interpretation.” *Sw. Paint & Varnish Co. v. Arizona Dept. of Env’tl. Quality*,  
19 194 Ariz. 22, 25, 976 P.2d 872, 875 (1999). The amended statute removed the portion  
20 interpreted in *Bartning* – therefore, no Arizona opinion addresses the relevant question as  
21 applied to the relevant statute.

22           However, the Court does not completely agree with Bono. Although the statute has  
23 been amended and the principles discussed in *Bartning* do not offer precedential value, the

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25           <sup>1</sup>Addressing whether students waiting for a school bus were covered by the applicable  
26 UIM policy, the Court of Appeals of Arizona has cited to *Lowing* for the phrase including  
27 “generally.” *Chavez v. Arizona Sch. Risk Retention Trust, Inc.*, 227 Ariz. 327, 330, 258 P.3d  
28 145, 148 (App. 2011). In *Chavez*, the court found the insurer’s interpretation of the policy’s  
statement of coverage for the occupants of the bus (which included while getting in and out  
of the bus) to preclude coverage for the waiting students.

1 Court finds *Bartning* may provide some persuasive value. See e.g. *NASD Dispute*  
2 *Resolution, Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007) (noting  
3 that a vacated district court opinion would “not be ripped from Federal Supplement 2d,” and  
4 thus would “still be citable for its persuasive weight”); *Benavides v. Jackson Natl. Life Ins.*  
5 *Co.*, 820 F. Supp. 1284, 1289 (D. Colo. 1993) (“Their precedential value can be diminished  
6 by an appellate court’s vacation, but [[opinions] can never be erased and their reasoning may  
7 continue to be followed.”). Moreover, the Court agrees with State Farm that the Arizona  
8 Supreme Court has held that A.R.S. § 20-259.01 requires coverage for “victims” not persons  
9 with derivative claims. Indeed, the *Herring* Court specifically stated that “[t]here is no  
10 requirement that such a fund be available to each person with a derivative damage claim.”  
11 144 Ariz. at 257. In fact, the Arizona Supreme Court has discussed that the legislature  
12 intended such statutes to protect insured individuals:

13 “The Legislature intended the Financial Responsibility Act to protect the  
14 general public against the individual, financially irresponsible motorist. On  
15 the other hand the Uninsured Motorist law compels the carriers to provide  
16 economic *protection for the insured individual* against the financially  
irresponsible segment of the driving public. The former is for the public in  
general and the latter for the individuals who have the foresight to protect  
themselves against the public.” (emphasis added)

17 . . . . The insured and family members insured are covered not only when occupying  
18 an insured vehicle, but also when in another automobile, when on foot, when on a  
bicycle or when sitting on a porch.

19 *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 296, 697 P.2d 684, 689 (1985)  
20 (citations and footnote omitted). These cases indicate the Arizona Supreme Court has  
21 interpreted the financial responsibility statutes as requiring coverage for insureds, but not for  
22 derivative claims . . . including those based on the bodily injury or death of third persons.  
23 In light of this authority, *Bartning* does provide some persuasive value.

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25 *Bono’s UIM Policy*

26 Bono objects to the magistrate judge’s conclusion that “the Arizona legislature did not  
27 intend for UIM coverage to apply to an insured’s claim for damages resulting from bodily  
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1 injury or death of an uninsured third person. The language in Bono’s policy that excludes  
2 this coverage is not contrary to the intent of the legislature.” (Doc. 31 at 9.) Bono asserts the  
3 cited authority establishes that UIM insurance is remedial and that the UIM statute is to be  
4 liberally construed to protect persons from underinsured motorists. Further, Bono asserts the  
5 question is whether the statute allows the limitation, not whether the legislature intended to  
6 provide the coverage.

7 The Court agrees with Bono that Arizona’s UIM statute is remedial and is to be  
8 liberally construed to protect persons from underinsured motorists. The Court also agrees  
9 that the question is whether the statute allows for the limitation. However, in *Herring*, the  
10 Arizona Supreme Court made clear that the financial responsibility statutes do not include  
11 derivative claims.

12  
13 *Conclusion*

14 Bono argues that A.R.S. § 20-259.01(G) does not expressly allow an insurer to limit  
15 the coverage to bodily injury or death suffered by an insured. If an exclusion is not expressly  
16 allowed in the statute, it is void. *Lowing*, 176 Ariz. at 107, 859 P.2d at 730. This statute is  
17 remedial in nature and is to be liberally construed in favor of coverage. *Taylor*, 198 Ariz. at  
18 314.

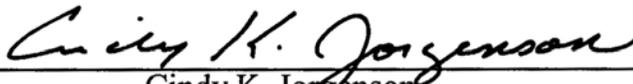
19 While the statute does not clearly state whether an insurer may limit the coverage to  
20 bodily injury or death suffered by an insured, Arizona case law requires a conclusion that the  
21 statute does allow an insurer to so limit the coverage. *Herring*, 144 Ariz. at 257 (A.R.S. §  
22 20-259.01 requires coverage for "victims" not persons with derivative claims; *Bartning*, 164  
23 Ariz. at 372 (the language in the statute was not intended to give an insured the right to  
24 recover damages for injuries to a third person); *Campbell v. Farmers Ins. Co. of Arizona*, 155  
25 Ariz. 102, 745 P.2d 160 (App.1987) (rejecting argument that the term bodily injury included  
26 injuries for loss of a family member; survivors’ injuries were not bodily injury caused by a  
27 vehicle accident). Indeed, in *Lowing*, the Arizona Supreme Court recognized that the  
28 purpose of the similar uninsured motorist statute is to “allow a prudent person to protect

1 himself or herself against the universe of risks.” 176 Ariz. at 106. This is consistent with  
2 the Arizona case law that limits coverage to insured persons; i.e., finding derivative claims  
3 or claims based on the bodily injury or death of third persons are excluded from the statute  
4 does not diminish the purpose of allowing persons to protect themselves (by purchasing  
5 insurance) against the universe of risks.

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7 Accordingly, after an independent review, IT IS ORDERED:

- 8 1. The Report and Recommendation (Doc. 31) is ADOPTED.
- 9 2. Bono’s Motion for Summary Judgment (Doc. 23) is DENIED.
- 10 3. State Farm’s Motion for Summary Judgment (Doc. 25) is GRANTED.
- 11 4. Summary Judgment is awarded in favor of State Farm Mutual Automobile  
12 Insurance Company and against Nancy Bono.
- 13 5. The Clerk of Court shall enter judgment and shall then close its file in this  
14 matter.

15 DATED this 22nd day of March, 2017.

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19 Cindy K. Jorgenson  
20 United States District Judge  
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