

2010

Maria Lopez, individually and on behalf of all
similarly situated persons v. United Automobile
Insurance Company, and El Sol Insurance Agency,
LLC, a Utah corporation : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Lopez v. United Automobile Insurance Company*, No. 20100054 (Utah Court of Appeals, 2010).
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IN THE UTAH SUPREME COURT

MARIA LOPEZ, individually and on
behalf of all similarly situated persons,

Plaintiff and Appellee,

vs.

UNITED AUTOMOBILE
INSURANCE COMPANY, and EL
SOL INSURANCE AGENCY, LLC, a
Utah corporation,

Defendants and Appellants.

Supreme Court No.: 20100054-SC

Court of Appeals Case No.: 20080846-
CA

BRIEF OF APPELLANTS

ON REVIEW BY WRIT OF CERTIORARI, THE UTAH COURT OF APPEALS'
DECISION REVERSING SUMMARY JUDGMENT ENTERED IN THE THIRD
JUDICIAL DISTRICT COURT BY THE HONORABLE TERRY L.
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**FILED
UTAH APPELLATE COURTS**

JUN 29 2010

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals entered its decision on December 24, 2009. Pursuant to Utah Code Ann. §78A-3-102(3)(a), and in accordance with Utah Code Ann. §78A-3-102(5) and Rules 45 and 46 of the Utah Rules of Appellate Procedure, this Court has jurisdiction to review the decision rendered by the Court of Appeals. The Utah Court of Appeals opinion is reported at Lopez v. United Auto. Ins. Co., 222 P.3d 1192 (Utah App. 2009). A copy of the opinion is attached in the addendum and marked as Exhibit A.

STATEMENT OF THE ISSUES ON APPEAL

Pursuant to Rule 45 of the Utah Rules of Appellate Procedure, The Utah Supreme Court granted United Automobile Insurance Company (UAIC) and El Sol Insurance Agency, LLC's (El Sol.) Petition for Writ of Certiorari as to the following issues:

1. Whether the court of appeals erred in its construction and/or application of the meaning of the "reasonable explanation" required by Utah Code. Ann. § 31A-22-305.3(2) (g).
2. Whether the court of appeals erred in failing to remand for ascertainment of the amount of damages.

STANDARD OF REVIEW

On certiorari, this court reviews the court of appeals' decision for correctness, focusing on whether that court correctly reviewed the trial court's decision under the appropriate standard of review. Pratt v. Nelson, 164 P.3d 366, ¶ 12 (Utah 2007). When performing this review, this court reviews the lower court's legal decisions for correctness, without deference. See Rawson v. Conover, 20 P.3d ¶ 25 (Utah 2001).

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES AND REGULATIONS

The following subsections of Utah Code § 31A-22-302 (2006) are controlling in this appeal:

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement of Section 41-12a-301 shall include:

(c) underinsured motorist coverage under Section 31A-22-305.3, unless affirmatively waived under Subsection 31A-22-305.3(2)

Additionally, Utah Code § 31A-22-305.3(2) (g) (i) and (ii) (2006) are controlling in this appeal. These subsections provide:

(g)(i) A named insured may reject underinsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) This written rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

STATEMENT OF THE CASE

Plaintiff/Appellee Maria Lopez (Lopez) individually and on behalf of a purported class sued Defendants/Appellees UAIC and El Sol for breach of contract and negligence. (R. 1). After stipulations were filed, UAIC and El Sol filed a motion for summary judgment. (R. 39 -51). In response, Lopez filed a motion for partial summary judgment with affidavits of Maria Lopez and non-party, Miriam Salazar, the named insured under the applicable policy issued by UAIC, along with a Rule 56(f) affidavit of her counsel. (R. 52-82). In her motion for summary judgment Lopez did not request that damages be awarded to her. Instead, Lopez requested the Court to rule that she had \$25,000 in underinsured motorist coverage available to her. Id. UAIC and El Sol filed a reply memorandum in support of their motion for summary judgment, a memorandum opposing Lopez's motion for

summary judgment, a motion to strike the affidavits of Lopez and Salazar and a motion to strike the Rule 56(f) affidavit. (R. 83-107 and 116-127).

On September 4, 2008, following briefing and oral argument, the trial court issued a memorandum decision and order granting UAIC and El Sol's motions to strike the affidavits of Lopez and Salazar. The court also struck the Rule 56(f) affidavit and granted UAIC and El Sol's motion for summary judgment on all 3 counts of Maria Lopez's complaint. The court also denied Maria Lopez's motion for partial summary judgment. (R. 147).

Maria Lopez timely filed an appeal of the trial court's decision. The Court of Appeals on December 24, 2009 issued a decision affirming in part, reversing in part and remanding the case to the trial court. (Ex. A).

UAIC and El Sol subsequently filed a petition for writ of certiorari with the Utah Supreme Court that was granted May 13, 2010. In this appeal, UAIC and El Sol are asking this Court to rule that the Court of Appeals incorrectly reversed the trial court's entering of summary judgment in their favor.

STATEMENT OF FACTS

Non-party Miriam Salazar purchased a UAIC policy through the independent insurance agent El Sol on February 1, 2007. (R. 36). On February 8, 2007 Salazar was driving the automobile covered by the policy with Lopez as her passenger and they were involved in an accident. In her complaint, Lopez alleges that she is

entitled to underinsured motorist coverage. (R. 1-12). However, the named insured, Salazar, signed a form complying with Utah law rejecting underinsured motorist coverage. (R. 36-38, UAIC 00030, Exhibit B).

Utah law permits a named insured to completely reject underinsured motorist coverage. Utah Code Ann §31A-22-305.3(2) provides:

- (g) (i) A named insured may reject underinsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).
- (ii) This written rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

The requirements for a rejection of underinsured motorist coverage are that the rejection be in writing and on a form provided by the insurer that includes a reasonable explanation of underinsured motorist coverage. That statute does not define “a reasonable explanation of underinsured motorist coverage” but the Insurance Code does define “underinsured motorist coverage”.

Utah Code Ann. § 31A-22-305.3(2)(a)(i) reads:

Underinsured motorist coverage under Subsection 31A-22-302(1)(c) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death.

The term “underinsured motorist coverage” is not defined anywhere else in the Insurance Code. UAIC utilized the definition found at 31A-22-302(1) to supply its own explanation of “underinsured motorist coverage”, which UAIC advances reasonably explained the purposes of underinsured motorist coverage and when it would be applicable. Thus, there is no dispute that Salazar signed a written form provided by UAIC. It is also clear that the form contained a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

As an out-of-state insurer UAIC looked to the Utah Insurance Code for a reasonable explanation of underinsured motorist coverage. UAIC’s form read:

**AGREEMENT DELETING UNINSURED/UNDERINSURED MOTORISTS
BODILY INJURY COVERAGE**

Utah Insurance Code Section 31A-22-305 requires that every automobile policy include Uninsured/Underinsured Motorists Bodily Injury Coverage with limits equal to the Bodily Injury limit, unless you select a different limit than your Bodily Injury Coverage or reject the Uninsured/Underinsured Motorists Bodily Injury Coverage entirely. Uninsured/Underinsured Motorists Bodily Injury Coverage provides payment of certain benefits for damages caused by the owner or operator of uninsured/underinsured motor vehicles because of bodily injury, sickness, disease or death.

(See Exhibit B).

The definition provided by UAIC on its form is nearly identical to the definition of the term provided by the Utah Insurance Code.

On this form, Miriam Salazar selected uninsured motorist coverage equal to her bodily injury liability limits and rejected underinsured motorist coverage entirely. Id. Miriam Salazar signed the form confirming that she understood and agreed to the selection of these limits. Id.

SUMMARY OF ARGUMENT

The trial court correctly held that the rejection form signed by Miriam Salazar clearly incorporated statutory language to reasonably explain the purpose of underinsured motorist coverage and when underinsured motorist coverage would be applicable as required by Utah Code Ann. § 31A-22-305.3(2)(g). Accordingly, the trial court correctly granted UAIC and El Sol summary judgment because no genuine issues of material fact existed that UAIC and El Sol met the statutory requirements of Utah Law for an insured to affirmatively waive underinsured motorist coverage.

The Utah Court of Appeals erred when it reversed the trial court's decision. The Court of Appeals erred in its construction and/or application of the meaning of the "reasonable explanation" required by the statute. The Court of Appeals, without citation or reasoning, summarily concluded that the explanation of underinsured motorist coverage contained on the UAIC form was not a reasonable explanation. The Court of Appeals made this conclusion even though the explanation contained on the form was nearly identical to the definition of

underinsured motorist coverage contained in the Insurance Code and was on a form filed for use with the Utah Department of Insurance. This conclusion was in error and violated proper statutory construction.

The explanation of underinsured motorist coverage contained on the UAIC form was a reasonable explanation because (1) it utilized a nearly identical definition of underinsured motorist coverage contained in the statute, (2) was in plain English, (3) was unambiguous and (4) was on a form that was accepted for use in this State by the Department of Insurance.

Additionally, the Court of Appeals erred when it remanded the case to the trial court to enter judgment in favor of Lopez in the amount of \$25,000. Lopez only filed a motion for partial summary judgment. Lopez' motion for summary judgment only sought an order that the waiver was insufficient as a matter of law by failing to comply with the applicable statute. (R. 114). She did not seek damages. In her memorandum of points and authorities in support of her motion for partial summary judgment Lopez merely requested that she be given coverage in the amount of her bodily injury liability limit of \$25,000; not that she be awarded \$25,000. (R. 106).

UAIC and El Sol request that the decision of the Court of Appeals be reversed and that the trial court's granting of summary judgment be affirmed. If this Court affirms the Court of Appeals' decision by deciding partial summary judgment for

Lopez was correct, UAIC and El Sol then ask that the case be remanded to the trial court to decide the issue of damages, if any.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION AND/OR APPLICATION OF THE MEANING OF THE “REASONABLE EXPLANATION” REQUIRED BY UTAH CODE ANN. § 31A-22-305.3(2)(g).

Section 31A-22-305.3(2)(g) governs the complete rejection of underinsured motorist coverage. This section provides, in relevant part, as follows:

- (g)(i) A named insured may reject underinsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).
- (ii) This written rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

Therefore, to constitute a valid rejection of underinsured motorist coverage, Miriam Salazar’s rejection had to be in writing, on a form provided by UAIC and contain a “reasonable explanation” of the purpose of underinsured motorist coverage and when it would be applicable. There is no issue that the rejection was written and on a form provided by UAIC. At issue is whether UAIC provided Ms. Salazar with a “reasonable explanation” of underinsured motorist coverage.

The rejection form read in relevant part:

AGREEMENT DELETING UNINSURED/UNDERINSURED MOTORISTS BODILY INJURY COVERAGE

Utah Insurance Code Section 31A-22-305 requires that every automobile policy include Uninsured/Underinsured Motorists Bodily Injury Coverage with limits equal to the Bodily Injury limit, unless you select a different limit than your Bodily Injury Coverage or reject the Uninsured/Underinsured Motorists Bodily Injury Coverage entirely. Uninsured/Underinsured Motorists Bodily Injury Coverage provides payment of certain benefits for damages caused by the owner or operator of uninsured/underinsured motor vehicles because of bodily injury, sickness, disease or death.

(R. 36-38, UAIC 00030, Exhibit B).

It is UAIC's position that the waiver form complies with Utah law. First, UAIC's definition of underinsured motorist coverage closely mirrors the statutory definition of the term. Second, the language of the form is plain and clear. No complex or complicated language is used. If the Court of Appeals had correctly construed and/or applied the meaning of the "reasonable explanation" required by Utah Code Ann. §31A-22-305.3(2)(g) it would have found that the form contained a reasonable explanation, and affirmed the trial court's decision granting summary judgment to UAIC and El Sol.

A. BY UTILIZING THE VIRTUALLY IDENTICAL DEFINITION OF UNDERINSURED MOTORIST AS THE ONE CONTAINED IN THE INSURANCE CODE, THE REJECTION FORM PROVIDED A REASONABLE EXPLANATION OF UNDERINSURED MOTORIST COVERAGE AS A MATTER OF LAW.

The form utilized by UAIC contained nearly the identical definition of underinsured motorist coverage as the one contained in the Utah Insurance Code. This virtually identical definition constitutes a “reasonable explanation” as required by the Utah Code Ann. §31A-22-305.3(2)(g). The Court of Appeals erred in its construction and/or application of the meaning of “reasonable explanation” when it held that the form at issue did not meet the requirements in that statute.

This rejection form contains a reasonable explanation of underinsured motorist coverage and when it would be applicable because it tracks the statutory language in the Utah Code and is simple, direct and easy to understand. The Utah Code defines “underinsured motorist coverage” as follows:

Underinsured motorist coverage under Subsection 31A-302(1)(c) provides coverage for covered persons who are entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury sickness or death.

See Utah Code Annotated § 31A-22-305.3(2)(a)(i). The language explaining underinsured motorist coverage on the rejection form is virtually identical to the definition contained in the applicable statute. Accordingly, the written form signed by Miriam Salazar rejecting underinsured motorist coverage contains a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable. It seems impossible to argue that an explanation is not reasonable when it is virtually identical to the explanation provided by the Insurance Code.

Moreover, the definition is simple, direct and contains no words or language that an ordinary lay person would not understand.

The Court of Appeals believed that UAIC did not provide a reasonable explanation of underinsured motorist coverage because the definition tracked by UAIC referenced another section of the code. According to that court, this meant that the legislature intended the definition of underinsured motorist coverage given in the statute be read in the “context of the entire statutory scheme.” (Exhibit A, p. 6). That analysis is flawed. First, the reference within the definition of underinsured motorist coverage was merely referring to 31A-22-302(1)(c) which requires every policy of insurance purchased to satisfy the owner’s or operator’s security requirement of Section 41-12a-301, unless affirmatively waived. The Insurance Code’s reference to that subsection does not offer a more detailed explanation of underinsured motorist coverage, and its omission by UAIC does not make its explanation of underinsured motorist coverage less reasonable. Second, it is illogical to require a carrier to include a copy of the entire insurance code. The definition in the Insurance Code stands alone and plainly sets forth the purpose of underinsured motorist coverage. UAIC deliberately relied upon the Utah Insurance Code to provide its reasonable explanation of Underinsured Motorist Coverage. UAIC’s incorporation of nearly identical language from the Insurance Code

provides a “reasonable explanation” of the purpose of underinsured motorist coverage and when it would be applicable.

B. THE PLAIN LANGUAGE UTILIZED IN THE REJECTION FORM CONSTITUTES A REASONABLE EXPLANATION OF UNDERINSURED MOTORIST COVERAGE AS REQUIRED BY THE STATUTE.

The term “reasonable explanation” is not defined by case law, statute or regulation. Although it is not defined in the statute, it is not ambiguous, for the legislative meaning can be gleaned from the definition of the individual words comprising the phrase. See State Ex. Rel. A.C., 97 P.3d 706, ¶13 (Utah App. 2004). Additionally, this Court has a long history of relying on dictionary definitions to determine plain meaning. See State v. Redd, 992 P.2d 986, ¶ 11 (Utah 1999).

“Reasonable” is commonly defined to mean “not extreme or excessive” or “fair”. State Ex. Rel. A.C. at ¶ 14. “Reasonable” is defined as “sensible, not excessive”. See Webster’s New World Dictionary, 2nd Edition (2002). In the area of law, “reasonable” is defined as “fair, moderate, and suitable under the circumstances.” See Black’s Law Dictionary, Sixth Edition (1991). “Explanation” means “the act or process of explaining”. See Merriam-Webster Online Dictionary. “Explain” means “to give the meaning of”. See Webster’s New World Dictionary, 2nd Edition (2002).

Accordingly a “reasonable explanation” of underinsured motorist coverage is a sensible, fair, not excessive process of explaining or giving the meaning of underinsured motorist coverage. Therefore, a “reasonable explanation” is not a rigorous standard to meet. The purpose of underinsured motorist coverage is to provide payment of certain benefits for damages caused by underinsured persons. Underinsured motorist coverage is applicable when damages are caused by owners or operators of underinsured motorist vehicle. The purpose of underinsured motorist coverage and when it would be applicable are simple and plainly explained in the definition utilized by UAIC.

Despite the seemingly easy burden of providing a “reasonable explanation” the Court of Appeals, without any case law citation, other than non-applicable dicta contained in General Sec. Indem. Co. of Ariz. V. Tipton, 158 P.3d 1121, (Utah App. 2007), cert. Denied, 168 P.3d 819 (Utah 2007)), concluded that the explanation of underinsured motorist coverage provided by UAIC was not a reasonable explanation. UAIC did provide a “reasonable explanation” with its use of unambiguous language that mirrored the language of the Insurance Code, especially because a “reasonable explanation” does not denote a rigorous standard.

The explanation supplied by UAIC on its rejection form used ordinary words and provides that Underinsured Motorist Bodily Injury Coverage provides payment of benefits for damages caused by the owner or operator of an underinsured motor

coverage. It is difficult to determine how this does not meet the requirement of a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.

In finding that the form did not comply with the statutory requirements, the Court of Appeals violated the rules of statutory interpretation by inferring and adding additional terms or requirements that are not present in the Insurance Code.

Courts must not read into statutes terms the legislature could have included but did not. When interpreting statutes courts look first to the statute's plain language with the primary objective of giving effect to the legislature's intent. See Savage v. Utah Youth Vill., 104 P. 3d 1242, ¶ 18 (Utah 2004). Courts presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. See State v. Barrett, 127 P.3d 682, ¶ 29 (Utah 2005). In performing statutory interpretation courts refrain from reading additional terms into the statute. See Martinez v. Media-Paymaster Plus, 164 P.3d 384, ¶ 53 (Utah 2007).

The statute only requires a "reasonable explanation." In its decision, the Court of Appeals, without any direct citation, requires the form to include information that goes beyond a reasonable explanation. The Court of Appeals in finding that the explanation was not reasonable conclusively notes that to be reasonable the insurer must demonstrate that a meaningful offer of coverage was made and that

that goes beyond a reasonable explanation. The Court of Appeals in finding that the explanation was not reasonable conclusively notes that to be reasonable the insurer must demonstrate that a meaningful offer of coverage was made and that offer was sufficient to permit the insured to make an intelligent, informed decision on desired or desirable coverages. Lopez at ¶ 15. Additionally, the Court of Appeals concludes that the form does not give that reasonable explanation using language that would be understood by an ordinary consumer. Id. at ¶ 20. Although, the Court of Appeals concedes that a lengthy treatise on underinsured motorist coverage was not required, it provides no further explanation as to the requirement for a reasonable explanation, or why UAIC's explanation was not reasonable.

Since the rejection form is virtually identical to the statutory definition of underinsured motorist coverage, for a court to hold that the rejection form does not contain a reasonable explanation of underinsured motorist coverage, it would also have to declare that the statute defining underinsured motorist coverage is vague and ambiguous. No court has found that statute vague or ambiguous.

The Court of Appeals' claim that UAIC failed to provide a reasonable explanation because it combined its discussion of underinsured motorist and uninsured motorist coverages is equally unpersuasive. Until recently, those explanations were combined in the Insurance Code and with separate places to

party Salazar clearly understood the explanation that there were two different coverages, because she selected uninsured motorist coverage and rejected underinsured motorist coverage. See Ex. B.

In addition to utilizing the statutory definition of underinsured motorist coverage, and writing the explanation in unambiguous language, the form utilized by UAIC was filed for use with the Utah Department of Insurance pursuant to Utah Code Ann. §31A-21-201. See Exhibit C. Pursuant to that Insurance Code subsection, the Insurance Commissioner may prohibit the use of a form at any time upon a finding that the form is inequitable, unfairly discriminatory, misleading, deceptive, obscure, unfair, encourages misrepresentation, or not in the public interest. See §31A-21-201(3). The Department of Insurance was authorized to prohibit the use of the form if it was misleading or deceptive. The fact that the State of Utah did not prohibit the use of this form supports the conclusion that the form contained a reasonable explanation of underinsured motorist coverage.

Virtually every form utilized by an insurer is similar if not identical to the form utilized by UAIC in this case. The Court of Appeals, without any real explanation or guidance, has decided the explanation utilized by UAIC was not reasonable, invalidating the signed waiver of underinsured motorist coverage. If this erroneous decision without case law, statutory or regulatory support is allowed to stand,

virtually every automobile insurance policy in the state will come under scrutiny. The legal and financial impact will be immense.

Additionally, the Court of Appeals exercised an improper interpretation of insurance policy language. An insurance policy is a contract between two parties. See Benjamin v. Amica Mut. Ins. Co., 140 P.3d 1210, ¶ 14 (Utah 2007). If the language within the four corners of the policy is unambiguous, the parties' intent should be surmised from the plain meaning of the contractual language. Id. Unambiguous language is given its ordinary meaning. See Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1275 (Utah 1993). Insurance policy language is considered ambiguous if it is unclear, it omits terms, or the terms used to express the intentions of the parties may be understood to have two or more plausible meanings. See Saleh v. Farmers Ins. Exch., 133 P. 3d 428, ¶15 (Utah 2006).

Accordingly, to find that UAIC did not provide a reasonable explanation of underinsured motorist coverage, the Court of Appeals would be required to find that the language utilized by UAIC in its explanation was ambiguous. The Court of Appeals did not make such a finding. The explanation as cited above, is in plain English, is clear, does not omit terms and may not be understood to have two meanings. The Court of Appeals erred in holding the explanation not to be reasonable.

meanings. The Court of Appeals erred in holding the explanation not to be reasonable.

II. THE CASE SHOULD BE REMANDED TO THE TRIAL COURT TO DECIDE THE ISSUE OF DAMAGES

The Court of Appeals remanded the case to the trial court with instructions to award Appellee damages in the amount of \$25,000. The issue of damages was never addressed in the trial court or the appeal. The amount of damages allegedly suffered by Appellee Lopez needs to be supported by evidence and is a jury question. Damages are a question of fact, and questions of fact are distinctly within the jury's province. See Judd v. Drzega, 103 P.3d 135, ¶ 34 (Utah 2004).

Summary judgment should be granted only if there has been a showing, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Utah R. Civ. P. 56(C). When reviewing a Court of Appeals decision to reverse a trial court's decision granting summary judgment to a Defendant and remanding for summary judgment to be entered in favor of the Plaintiff, this court reviews the Court of Appeals' legal decisions for correctness, without deference. See Rawson at ¶ 25. Additionally, this Court reviews the facts and inferences to be drawn there from in the light most favorable to the nonmoving party. Id.

Lopez has not made a showing that there is no genuine issue of material fact that she is entitled to judgment in the amount of \$25,000 as a matter of law. Lopez only filed a motion for partial summary judgment, and did not request the trial court award damages. Further the record does not contain any evidence of the amount of damages allegedly suffered by her as a result of this accident. In her motion for partial summary judgment, Lopez only sought an order that the waiver was insufficient to comply with the applicable statute. (R. 114). In her memorandum of points and authorities in support of her motion for partial summary judgment Lopez merely requested that she be given coverage in the amount of her bodily injury liability limit of \$25,000 (R. 106). Lopez's motion was a motion for partial summary judgment because she only sought an order on the liability issues and not damages.

Accordingly, if this Court affirms the decision of the Court of Appeals reversing the trial court's granting of summary judgment to El Sol and UAIC it still should correct the clear error of the Court of Appeals instructing the trial court to enter judgment in favor of Lopez in the amount of \$25,000 and remand the case for ascertainment of the amount of damages.

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in its construction and/or application of the meaning of the “reasonable explanation” required by Utah Code Ann. §31A-22-305.3(2)(g). Additionally, assuming that the Court of Appeals did not err on that issue, it erred in failing to remand the case for ascertainment of the amount of damages. Accordingly, UAIC and El Sol respectfully request that the Court of Appeals’ decision be reversed and that the trial court’s granting of summary judgment to them be affirmed. In the alternative, UAIC and El Sol respectfully request that the Court of Appeals’ decision be reversed in part, so that an ascertainment of the amount of damages can be conducted in the trial court.

DATED this 29 day of June 2010.

DUNN & DUNN, P.C.


MICHAEL J. COLLINS
*Attorneys for Appellants UAIC and
El Sol Insurance Agency*

CERTIFICATE OF SERVICE

Pursuant to UTAH R. CIV. P. 5, the undersigned hereby certifies that on the date indicated below a true and correct copy of the foregoing **BRIEF** was served by the method indicated below to the following:

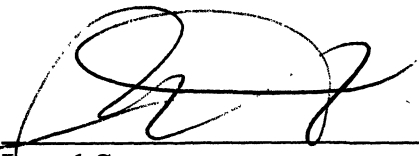
Daniel F. Bertch
Kevin K. Robson
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, UT 84121

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Attorneys for Appellees

DATED this 29 day of JUNE 2010.

DUNN & DUNN, P.C.



Legal Secretary

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This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Maria Lopez,)	OPINION
)	(For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20080846-CA
v.)	
)	
United Automobile Insurance)	F I L E D
Company; and El Sol Insurance)	(December 24, 2009)
Agency, LLC,)	
)	2009 UT App 389
Defendants and Appellees.)	

Third District, West Jordan Department, 070422402
The Honorable Terry L. Christiansen

Attorneys: Daniel F. Bertch and Kevin K. Robson, Salt Lake City,
for Appellant
Tim Dalton Dunn and Michael J. Collins, Salt Lake
City, for Appellees

Before Judges Greenwood, Orme, and McHugh.

McHUGH, Judge:

¶1 Plaintiff Maria Lopez appeals from the trial court's order granting Defendants United Automobile Insurance Company (United Auto) and El Sol Insurance Agency, LLC's (El Sol) motion for summary judgment, which resulted in the dismissal of Lopez's claims. We affirm in part, and reverse and remand in part.

BACKGROUND¹

¶2 On February 1, 2007, nonparty Miriam Salazar purchased an automobile insurance policy (the policy) from El Sol, acting as United Auto's agent. As part of her application for coverage, Salazar signed a form provided by El Sol that waived underinsured motorist (UIM) benefits.

¹Because summary judgment was entered by the trial court, we recite the facts in the light most favorable to the nonmoving party. See Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600.

¶3 One week after Salazar's insurance policy took effect, she was driving the insured automobile with Lopez as her passenger and was struck by another car. Although Salazar was not injured by the accident, Lopez sustained several serious injuries. The other driver was at fault for the accident, and his insurer tendered its policy limits of \$25,000 to Lopez. However, that amount was insufficient to pay the costs associated with Lopez's injuries. Lopez subsequently demanded UIM benefits from United Auto, which refused to pay based on the form Salazar executed rejecting those benefits.

¶4 Lopez brought suit against Defendants, alleging that they failed to comply with the requirements of the UIM coverage statute, see Utah Code Ann. § 31A-22-305.3 (Supp. 2009)² (providing for mandatory availability of UIM benefits and setting forth the obligations of the insurer before such benefits may be effectively rejected); that Defendants breached their duty of good faith and fair dealing by failing to explain and offer UIM benefits adequately to Salazar; and that Defendants were negligent because they failed to explain UIM benefits adequately to Salazar and because they did not provide the relevant forms in Spanish.³ In response, Defendants filed a counterclaim, seeking a declaratory judgment that the form waiving UIM benefits complied with the UIM coverage statute and, therefore, Lopez was not entitled to receive UIM benefits under Salazar's policy.

¶5 After conducting discovery, both parties filed motions for summary judgment. The trial court denied Lopez's motion and granted Defendants' motion in part,⁴ which resulted in the dismissal of Lopez's claims. The trial court concluded that Lopez lacked standing to reform the contract to include UIM benefits where Salazar had rejected UIM coverage. The trial court also determined that the duty of good faith and fair dealing does not extend to third parties and that, in any event,

²As a convenience to the reader, we cite to the current version of the code. The relevant statutes have been renumbered and amended, but there have been no substantive changes to the pertinent sections of the statutes since the time of the accident.

³Salazar's first language is Spanish; she speaks very little English. El Sol caters to the Spanish-speaking community.

⁴Because the trial court denied Lopez's claims, it also denied Defendants' counterclaim for summary judgment, stating that there was no longer "a justiciable controversy between the parties," and that, therefore, a declaratory judgment "would be advisory and would exceed the Court's jurisdiction." That ruling is not challenged on appeal.

the form provided by El Sol "clearly incorporates statutory language to reasonably explain the purpose of [UIM] . . . coverage." Finally, the trial court held that Defendants were not negligent because they did not owe any duty to Lopez. Lopez appeals these decisions.

ISSUES AND STANDARD OF REVIEW

¶6 Lopez argues that the trial court erred in granting summary judgment in favor of Defendants on her contract and negligence claims. We "review[] a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and view[] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted).⁵ Thus, we do not accord any deference to the trial court regarding its "resolution of the legal issues presented[,] and [we] determine only whether the trial court erred in applying the governing law." Ervin v. Lowe's Cos., 2005 UT App 463, ¶ 8, 128 P.3d 11 (internal quotation marks omitted); see also General Sec. Indem. Co. of Ariz. v. Tipton, 2007 UT App 109, ¶ 7, 158 P.3d 1121 ("In an appeal from a grant of summary judgment, . . . we give no deference to the trial court's decision."), cert denied, 168 P.3d 819 (Utah 2007).

ANALYSIS

I. The Trial Court Was Correct in Entering Judgment in Favor of Defendants on Lopez's Negligence Claim.

¶7 Defendants challenge Lopez's standing to assert negligence claims against them.⁶ Typically, we would consider this issue before turning to the parties' substantive arguments. See Salt Lake City Corp. v. Property Tax Div., 1999 UT 41, ¶ 9, 979 P.2d 346 (stating that standing is a threshold issue that must be addressed before proceeding to further inquiries on the merits). However, Defendants' challenge to Lopez's standing is intertwined with the more substantive question of whether the Defendants owed a duty to persons, like Lopez, who were unidentified at the time

⁵Both parties concede that there are no genuine issues of material fact in dispute relevant to this appeal.

⁶On appeal, Defendants do not contest Lopez's standing in connection with her contract claim and the UIM coverage statute. Rather, they argue that she lacks standing to pursue her negligence claim because any duty they had was to Salazar and did not extend to Lopez.

that Salazar purchased the automobile insurance. Consequently, we discuss these concepts together.

¶8 "The issue of whether a duty exists is entirely a question of law to be determined by the court," which determination we review for correctness. Ferree v. State, 784 P.2d 149, 151 (Utah 1989). To recover under a negligence theory, "a plaintiff must . . . establish a duty of care owed by the defendant to the plaintiff," which requires a showing that the "defendant is under an[] obligation for the benefit of a particular plaintiff." Id. (emphasis added) (quoting Prosser & Keeton on the Law of Torts § 53, at 356-57 (W. Page Keeton et al. eds., 5th ed. 1984)). To determine whether a duty exists, we "analyz[e] the legal relationship between the parties, the foreseeability of injury, the likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations. Legal duty, then, is the product of policy judgments applied to relationships." Normandeau v. Hanson Equip., Inc., 2009 UT 44, ¶ 19, 215 P.3d 152 (citation and internal quotation marks omitted).

¶9 On appeal, Lopez argues that Defendants had a duty to explain UIM coverage fully to Salazar, including providing insurance forms to Salazar in Spanish. Even assuming that Defendants owed such a duty to Salazar, it does not necessarily follow that the duty extended to Lopez. While recognizing that Defendants likely owed Salazar a duty to inform her adequately about UIM coverage, the trial court held that this duty did not extend to unidentified future passengers like Lopez. The trial court explained that fulfilling a duty to inform future passengers "would be difficult, if not impossible, to do," elaborating on these difficulties as follows:

For example, an insured rejects [UIM] coverage. A week later, the insured offers a ride to a new co-worker the insured just met. If they were involved in an accident, the new co-worker would be a statutory third party beneficiary to the insured's policy. However, the new co-worker would not have received information that the insured rejected [UIM] coverage until he or she made a claim to the insurer and such claim was denied. At the time of contracting, neither the insured nor the insurer could have anticipated that a [particular] "stranger" would be riding in the insured's vehicle and therefore, would be a statutory third party beneficiary entitled to notice of the insured's waiver of [UIM] coverage. Under [Lopez's] theory, the insurer would have had

a duty to inform the new co-worker without the ability to do so and [Lopez's] theory would require the insurer to provide the waived . . . [UIM] coverage. The Court does not agree that the insurer's statutory duty to inform extends this far.

¶10 We agree with the trial court's reasoning and legal conclusion that the duty to inform does not extend so far as to reach unknown third parties who may later be passengers in an insured's vehicle. Therefore, as a matter of law, Lopez is not within the group of persons who can assert a negligence claim against Defendants, and we affirm the trial court's entry of judgment in favor of Defendants on the negligence claim.

II. Lopez Is Entitled to Judgment on the Contract Claim.

¶11 Lopez next argues that the trial court incorrectly concluded that the form provided by El Sol complied with the UIM coverage statute.⁷ See generally Utah Code Ann. § 31A-22-305.3(2)(b) (Supp. 2009) (detailing the requirements for an insured to purchase UIM coverage that is less than the policy's liability limits); id. § 31A-22-305.3(g) (detailing the requirements for an insured to waive UIM coverage). The trial court's "interpretation of [the] statutory provision is a question of law that we review for correctness." General Sec. Indem. Co. of Ariz. v. Tipton, 2007 UT App 109, ¶ 7, 158 P.3d 1121, cert. denied, 168 P.3d 819 (Utah 2007).

¶12 Lopez argues that the form is deficient because it "fails to 'reasonably explain[] the purpose of [UIM] coverage'" and "[d]oes [n]ot [d]isclose the additional premiums required to purchase UIM coverage." (Quoting Utah Code Ann. § 31A-22-305.3(2)(b).) In response, Defendants argue that the form's language "contains a reasonable explanation of the purpose of [UIM] coverage" because it mirrors the statutory language defining "[UIM] coverage." See Utah Code Ann. § 31A-22-305.3(2)(a)(i). Defendants also argue that disclosure of the additional premiums is not required under the statute's waiver provision, see id. § 31A-22-305.3(2)(g), but instead is only required under the statute's provision for selecting UIM benefits in an amount less than the policy's liability limits, see id. § 31A-22-305.3(2)(b).

¶13 We first address Defendants' contention that the form provided a reasonable explanation of the purpose of UIM coverage, as required by the statute. "When presented with questions of

⁷Although the trial court partly based its ruling on Lopez's lack of standing to seek reformation of the policy, Defendants conceded at oral argument that Lopez has standing to do so.

statutory interpretation, our aim is to discover the true intent and purpose of the [l]egislature," and we look to the statute's plain language to determine "the statute's meaning [and to] clarify the intent and purposes behind its enactment." Tipton, 2007 UT App 109, ¶ 17 (internal quotation marks omitted). Therefore, we begin our analysis of the form's compliance by looking to the language of the waiver provision of the UIM coverage statute. It provides, in pertinent part: "(i) A named insured may reject [UIM] coverage by an express writing to the insurer that provides liability coverage (ii) This written rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of [UIM] coverage and when it would be applicable." Utah Code Ann. § 31A-22-305.3(2)(g).

¶14 The form Salazar signed states: "Uninsured/Underinsured Motorists Bodily Injury Coverage provides payment of certain benefits for damages caused by the owner or operator of uninsured/underinsured motor vehicles because of bodily injury, sickness, disease or death." As Defendants note, the form tracks portions of the language of the statute, which provides that "[UIM] coverage . . . provides coverage for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death." Id. § 31A-22-305.3(2)(a)(i). According to Defendants, the fact that the form's language is taken from the statutory definition of UIM coverage conclusively demonstrates that the form's explanation was reasonable. We do not agree.

¶15 Turning first to the statute, we see nothing in Utah Code section 31A-22-305.3(2)(a)(i) that indicates that this section was intended to constitute the reasonable explanation to a consumer of insurance products required by section 31A-22-305.3(2)(g). To the contrary, the definition is placed at the beginning of the UIM coverage section along with the definitions of the other terms used in the statute. See Utah Code Ann. § 31A-22-305.3(1), (2)(a)(ii). Furthermore, the definition itself refers to another section of the statute, 31A-22-202(1)(c), to further illuminate the meaning of UIM coverage. By the placement of and cross-reference used in the definition, it is apparent that the legislature anticipated that the definition would be used in the context of the entire statutory scheme--provisions which may not be readily available to the average consumer. Consequently, we see nothing in the statute that would create a safe harbor for Defendants due to their inclusion of some of the statutory definition in the form.

¶16 Because there is no presumption of compliance, we now consider the reasonableness of the explanation provided to Salazar. In doing so, we are guided by this court's prior

decision in General Security Indemnity Co. of Arizona v. Tipton, 2007 UT App 109, 158 P.3d 1121, cert. denied, 168 P.3d 819 (Utah 2007). In Tipton, the insured claimed that her selection of uninsured motorist (UM) coverage at a level lower than the statutory minimum was invalid where the application form did not attempt to explain the purposes of UM coverage or provide any information regarding the different premiums for higher levels of UM coverage as required by the applicable statute. See id. ¶¶ 2, 8. We agreed that the application did not comply with the statute, making the plaintiff's waiver of higher UM coverage invalid. See id. ¶ 23.

¶17 In reaching that conclusion, we relied on the legislative history of the UM and UIM statutes, see id. ¶ 11 n.6, noting that the "statutes are designed to protect insureds by providing compensation to those who are injured or killed by uninsured motorists or other financially irresponsible motorists" and that the "statutes are designed for the benefit of insureds and not insurers. [They are] adopted to benefit the insured motorist, and [are] not intended to relieve . . . insurers of primary responsibility . . . or to benefit them in any way." Id. ¶ 13 (emphases added) (alterations and omissions in original) (internal quotation marks omitted). Accordingly, the statute places the burden on the insurer to show that the form provided a reasonable explanation of the purposes of UM coverage. See id. ¶ 15. To meet that burden, the insurer must demonstrate that "a meaningful offer" of coverage was made and that the offer was "sufficient to permit the insured to make an intelligent, informed decision on desired or desirable coverages." Id. Thus, "[t]he insurer has an affirmative duty to notify the insured in a manner reasonably calculated to place necessary information in the insured's hands." Id.

¶18 Although Tipton addressed the issue in the context of the selection of lower UM coverage, rather than the complete rejection of UIM coverage, the Tipton court relied on the legislative history of the UIM provisions in its analysis, stating that it was "comfortable being guided by" the legislative history and policy of the closely analogous UIM provision. See id. ¶ 11 n.6. In light of our previous statements in Tipton and the nearly identical language of the UM and UIM coverage statutes, we are similarly comfortable relying on the Tipton court's analysis of the UM statute in our analysis of the UIM statute here.

¶19 The central policy underlying Tipton is that the statute imposes an "affirmative duty" on insurers to provide consumers of insurance products with information in a clear, understandable way that will empower them to make informed decisions regarding UM and UIM coverage. See id. ¶ 15. The form provided by El Sol states that UIM coverage "provides payment of certain benefits

for damages caused by the owner or operator of uninsured/underinsured motor vehicles." We agree with Lopez that this language fails to provide consumers like Salazar with the information needed to make an informed decision regarding insurance coverage. Indeed, the form's language omits information in a way that makes it less understandable than the statute defining UIM coverage. While the statute provides separate definitions for "uninsured motorist coverage", see Utah Code Ann. § 31A-22-305(3)(a) (Supp. 2009), and "underinsured motorist coverage," see id. § 31A-22-305.3(2)(a)(i), thereby highlighting their distinct purposes, the explanation in the form combines the two into a single definition, referring to them collectively as "Uninsured/Underinsured Motorists Bodily Injury Coverage." Likewise, there is nothing in the form that explains the differences in the "certain benefits" provided by UIM coverage as compared with UM coverage or "when it would be applicable," as required by the UIM coverage statute, see id. § 31A-22-305.3(2)(g)(ii). In contrast, the legislature separately addressed each type of insurance, compare id. § 31A-22-305 (UM coverage), with id. § 31A-22-305.3 (UIM coverage),⁸ and included the definition of UIM coverage among other defined terms in the UIM coverage section, see id. § 31A-22-305.3(1)-(2)(a).

¶20 The UIM statute provides a definition that can be used in connection with its other provisions to determine the obligations of insurers with respect to UIM coverage. One of those obligations is to provide consumers electing whether, and in what amount, to purchase coverage a "reasonable explanation of the purpose of [UIM] coverage and when it would be applicable." Id. § 31A-22-305.3(2)(g)(ii). The definition in the form provided to Salazar does not give that reasonable explanation using language that would be understood by an ordinary consumer. Although Defendants were not required to provide Salazar with a lengthy treatise explaining UIM coverage, they had an affirmative duty to use a form that provided Salazar with a reasonable and understandable explanation of the purpose of UIM benefits that would enable her "to make an intelligent, informed decision" regarding the selection of UIM coverage. Tipton, 2007 UT App 109, ¶ 15; see also Utah Code Ann. § 31A-22-305.3(2)(g)(ii). Because the form provided by Defendants did not provide a reasonable explanation, Salazar's waiver of UIM coverage was invalid. See Utah Code Ann. § 31A-22-305.3(2)(g)(ii).

⁸Although the earlier version of the statute dealt with both UM and UIM in a single section of the Utah Code, see Utah Code Ann. § 31A-22-305 (2005) (current version as amended at Utah Code Ann. §§ 31A-22-305, -305.3 (Supp. 2009)), UM coverage was addressed in subsections (2)-(7), while UIM coverage was separately covered by subsections (8)-(11).

Therefore, Lopez is entitled to UIM benefits under the policy, which the statute requires to be in an amount "equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum UIM coverage limits available by the insurer under the insured's motor vehicle policy," id. § 31A-22-305.3(b)." In this case, the parties agree that amount is \$25,000.

CONCLUSION

¶21 We affirm the trial court's entry of summary judgment in favor of Defendants on the negligence claim because they owed no duty to Lopez to explain UIM coverage to Salazar. The trial court was incorrect, however, in granting summary judgment in favor of Defendants on the contract claim. Because the form provided by Defendants did not reasonably explain the purposes of UIM coverage and when it would be applicable as required by the UIM coverage statute, Salazar's waiver of coverage was invalid and Lopez is entitled to receive UIM benefits. We therefore reverse the trial court's order granting Defendant's summary judgment motion and remand for entry of judgment in favor of Lopez in the amount of \$25,000.

Carolyn B. McHugh, Judge

¶22 WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Gregory K. Orme, Judge

⁹Because we conclude that the form did not provide a reasonable explanation of the purposes of UIM benefits, we decline to address Lopez's contention that Defendants were required to disclose the additional premiums for UIM coverage. However, we noted in General Security Indemnity Co. of Arizona v. Tipton, 2007 UT App 109, ¶ 9 n.5, 158 P.3d 1121, cert. denied, 168 P.3d 819 (Utah 2007), that there are different statutory requirements for waiver of all UM benefits and waiver of a higher level of coverage. See id.

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LIST ALL ACCIDENTS AND VIOLATIONS FOR ALL DRIVERS BELOW

Driver#	Driver Name	Date	Description of Accident or Violation	Location
1	MIRIAM	2005-06-01	SPEEDING OVER 01-10 MPH ABOVE LIMIT	
1	MIRIAM	2006 02 01	SPEEDING OVER 01-10 MPH ABOVE LIMIT	
1	MIRIAM	2004 09-01	DRIVING W/O VALID DL, OR WHILE SUS/REVOK	

AGREEMENT DELETING UNINSURED MOTORISTS PROPERTY DAMAGE COVERAGE

Utah Insurance Code Section 31A-22-305(4) requires that every automobile policy which does not provide insurance for collision damage shall provide coverage for property damage to the motor vehicle(s) described in the policy, to the extent that you are legally entitled to recover from the owner or operator of an uninsured motor vehicle. This coverage shall not exceed the motor vehicle's actual cash value or \$3,500, whichever is less, and is subject to a \$250 deductible. I have read the above, and agree to the deletion of Uninsured Motorists Property Damage Coverage.

I have read & understand this waiver. Signature of Applicant X _____ Date 02/01/2007

AGREEMENT DELETING UNINSURED/UNDERINSURED MOTORISTS BODILY INJURY COVERAGE

Utah Insurance Code Section 31A-22-305 requires that every automobile policy include Uninsured/Underinsured Motorists Bodily Injury Coverage with limits equal to the Bodily Injury limit, unless you select a different limit than your Bodily Injury Coverage or reject the Uninsured/Underinsured Motorists Bodily Injury Coverage entirely. Uninsured/Underinsured Motorists Bodily Injury Coverage provides payment of certain benefits for damages caused by the owner or operator of uninsured/underinsured motor vehicles because of bodily injury, sickness, disease or death. Please indicate your desire to entirely reject Uninsured/Underinsured Motorists Bodily Injury Coverage or whether you desire this coverage at limits other than the Bodily Injury limits of your policy.

- ☐ a I hereby reject Uninsured Motorist Coverage
- ☒ b I hereby reject Underinsured Motorist Coverage
- ☒ c I hereby select Uninsured Motorists Coverage limits of 25000/50000 which equals my Bodily Injury liability limits
- ☐ d I hereby select Underinsured Motorists Coverage limits of _____ which equals my Bodily Injury liability limits

I understand and agree to the selection of any of the above options to my liability insurance policy. Future renewals or replacements of this policy will be issued at the same Uninsured/Underinsured Motorist limits. If I decide to select another option at some future time, I must let the Company or my agent in writing.

Signature of Applicant X Miriam Salazar Date 02/01/2007

AGREEMENT WAIVING PIP LOSS OF GROSS INCOME BENEFITS

Utah Insurance Code Section 31A-22-307 requires that every automobile policy include Personal Injury Protection Insurance. Code Section 31A-22-307(4) also allows you to waive loss of gross income benefits under Personal Injury Protection Coverage, subject to the following requirement: The Named Insured must certify in writing that for the previous 31 days and for at least the next 180 days, neither the insured nor the insured's spouse will receive earned income from regular employment. I have read the above, and agree to the waiving of loss of gross income benefits under Personal Injury Protection Coverage.

Date 02/01/2007 Signature of Applicant X _____

NAMED DRIVER EXCLUSION ENDORSEMENT
WARNING - READ THIS ENDORSEMENT CAREFULLY!

This acknowledgement and rejection is applicable to all renewals issued by any affiliated insurer or us. In consideration of the premium charged for this policy, it is agreed we shall not be held liable and no liability or obligation of any kind shall attach to us for bodily injuries, losses or damages under any of the coverages of the policy while any motor vehicle is operated by an Excluded Driver.

EXCLUDED DRIVER(S) NAMES	RELATIONSHIP	BIRTHDATE	SEX
FRANCISCO ASCENCIO	Spouse	04/15/1980	M

Date 02/01/2007

Signature of Applicant X Miriam Salazar

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Disposition for USPH-6TUQGT925/00-00/00-00/00

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SERFF Tracking Number:	USPH-6TUQGT925/00-00/00-00/00	State:	Utah
Filing Company:	United Automobile Insurance Company	State Tracking Number:	59381
Company Tracking Number:	UT-14		
TOI:	19.0 Personal Auto	Sub-TOI:	19.0001 Private Passenger Auto (PPA)
Product Name:	UT Form Filing		
Project Name:	Policy, Application, & Forms		

Disposition Date: 12/05/2006**Effective Date (New):****Effective Date (Renewal):****Status:** FILED FOR USE (Pursuant to U.C.A. 31A-21-201)**Comment:**

The specific provision(s) prohibited in the Order NOVEMBER 13, 2006 have been reviewed and FILED FOR USE as of NOVEMBER 30, 2006 - UTAH INSURANCE DEPARTMENT

Schedule Items

Item Type	Item Name	Item Status	Public Access
Supporting Document	Amendatory Endorsements (P)		Yes
Supporting Document	Property & Casualty Transmittal - Read the Long Description (P)		Yes
Supporting Document	Filing Memoranda, Exhibits & Documents (P)		Yes
Supporting Document	Endorsement/Rider (P)		Yes
Supporting Document	Application (P)		Yes
Supporting Document	Policy or Contract (P)		Yes
Supporting Document	Declaration Page (P)		Yes
Form	Automobile Policy, UAIC UT 10/06, 10/06, Policy/Coverage Form		Yes

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COPY

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

MARIA LOPEZ, individually and on behalf
of all similarly situated person,

Plaintiff,

vs.

UNITED AUTOMOBILE INSURANCE
COMPANY, a Florida corporation, EL SOL
INSURANCE AGENCY, LLC, a Utah
corporation,

Defendants.

**MEMORANDUM DECISION
AND ORDER RE:
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT,
PLAINTIFF'S FOR PARTIAL
SUMMARY JUDGMENT,
DEFENDANTS' MOTION TO STRIKE
AFFIDAVITS AND
PLAINTIFF'S MOTION TO STRIKE
AFFIDAVITS**

Case No. 070422402

Judge Terry L. Christiansen

This matter came before the Court on August 4, 2008, for hearing on Defendants United Automobile Insurance Company and El Sol Insurance Agency, LLC's (jointly referred to as "Defendants" or individually as "UAIC" and "ESIA") Motion for Summary Judgment, Maria Lopez' ("Plaintiff") Motion for Partial Summary Judgment, Defendants' Motion to Strike Affidavits of Salazar and Lopez and Plaintiff's Motion to Strike Rule 56(f) Affidavit of Bertch. Daniel F. Bertch appeared on behalf of Plaintiff, Michael J. Collins appeared on behalf of Defendants. The Court took the matter under advisement.

Having considered the parties arguments, briefs and the applicable law, the Court GRANTS both Defendants' Motions to Strike Affidavits of Salazar and Lopez and Plaintiff's Motion to Strike Rule 56(f) Affidavit of Bertch and DENIES Plaintiff's Motion for Partial Summary Judgment and GRANTS in part and DENIES in part Defendants' Motion for Summary Judgment based upon the

BACKGROUND

On February 8, 2007, Plaintiff was a passenger in a vehicle driven by non-party Miriam Salazar ("Salazar") when non-party Abie Martinez ("Martinez") rear-ended the vehicle operated by Salazar and occupied by Plaintiff. Plaintiff alleges that she suffered severe injuries in the accident, including injuries to her head, neck, back, legs and other parts of her body.

UAIC issued a motor vehicle policy, policy number UTS 000611667, to Salazar with a policy period of February 1, 2007 through August 1, 2007, that did not include underinsured coverage, but did include uninsured coverage as reflected by Salazar's signed application.¹

¹ A week before the accident, on February 1, 2007, Salazar signed an application for insurance with Defendants that included the following language:

**AGREEMENT DELETING UNINSURED/UNDERINSURED MOTORISTS
BODILY INJURY COVERAGE**

Utah Insurance Code Section 31A-22-305 requires that every automobile policy include Uninsured/Underinsured Motorists Bodily Injury Coverage with limits equal to the Bodily Injury limit, unless you select a different limit than your Bodily Injury Coverage or reject the Uninsured/Underinsured Motorists Bodily Injury Coverage entirely. Uninsured/Underinsured Motorists Bodily Injury Coverage provides payment of certain benefits for damages caused by the owner or operator of uninsured/underinsured motor vehicles because of bodily injury, sickness, disease or death. Please indicate your desire to entirely reject Uninsured/Underinsured Motorists/Bodily Injury Coverage or whether you desire this coverage at limits other than the Bodily Injury limits of your policy.

- ☐ a. I hereby reject Uninsured Motorist Coverage.
- ☒ b. I hereby reject Underinsured Motorist Coverage.
- ☒ c. I hereby select Uninsured Motorists Coverage limits of 25000/50000 which equals my Bodily Injury liability limits.
- ☐ d. I hereby select Underinsured Motorists Coverage limits of _____ which equals my Bodily Injury liability limits.

I understand and agree to the selection of any of the above options to my liability insurance policy. Future renewals or replacements of this policy will be issued at the same Uninsured/Underinsured Motorist limits. If I decide to select another option at some future time, I must let the Company or my agent in writing.

Martinez was insured by Progressive Insurance Company ("Progressive") with liability limits of \$25,000. Progressive tendered its limits to Lopez and UAIC consented to the settlement and waived its rights of subrogation against Martinez.

Thereafter, Plaintiff made a claim to Defendants for underinsured motorist benefits. Defendants rejected Plaintiff's claim because Salazar did not have underinsured coverage.

On December 26, 2007, Plaintiff filed the present law suit against Defendants alleging three causes of action: Count I for Individual Contract Claim by Lopez, Count II for Class Breach of Contract Claim, and Count III for Individual Negligence Claim.

Defendants filed their joint answer and counterclaim for Declaratory Judgment on January 23, 2008.

Thereafter, the parties filed the cross motions for summary judgment and cross motions to strike.

CROSS MOTIONS TO STRIKE

Upon reviewing Defendants' Motion to Strike Affidavits of Salazar and Lopez and Plaintiff's Motion to Strike Rule 56(f) Affidavit of Bertch, the Court concludes that the information in those affidavits are not necessary for the Court to render a decision. The Court's decision is partially based upon Defendants duty to Plaintiff and standing to bring a claim, which are a matter of law. Further, the parol evidence rule bars extraneous evidence that attempts to contradict or vary the terms of a written document. For these reasons, the Court summarily

Signature of Applicant: x /s/ Miriam Salazar Date: 02/01/2007

GRANTS both Defendants' Motion to Strike Affidavits of Salazar and Lopez and Plaintiff's Motion to Strike Rule 56(f) Affidavit of Bertch.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In considering cross motions for summary judgment, the trial court is not bound to grant it to one side or another. *Diamond T. Utah, Inc. V. Travelers Indem. Co.*, 441 P.2d 705 (1968).

PLAINTIFF'S COUNT I - Individual Contract Claim by Lopez

Plaintiff claims that Defendants owed non-party Salazar a duty to explain underinsured motorist coverage, to set forth the option to accept or decline underinsured motorist coverage, and if desired, to select one of various limits or amounts of coverage according to respective premiums. Plaintiff claims that Defendants failure to offer underinsured motorist benefits constituted a breach of good faith and fair dealing required of them as a first party insurance provider. Plaintiff claims Defendants duty to non-party Salazar extended to her as an occupant of Salazar's car. The Court disagrees that Defendants duty to non-party Salazar extended to Plaintiff.

"The covenant of good faith and fair dealing is an implied contractual provision, and a cause of action for its breach sounds in contract." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 798 n.8. "Utah law clearly limits the duty of good faith to first parties to insurance contracts. Consequently, only a first party can sue for breach of that duty." *Sperry v. Sperry*, 990 P.2d 381, ¶ 7 (Utah 1999). In Utah, the term "first party" is used to refer to an insurance agreement where the insurer agrees to pay claims submitted to it by the insured for losses suffered by the insured.

In contrast, a “third party” situation is one where the insurer contracts to defend the insured against claims made by third parties against the insured and to pay any resulting liability, up to the specified dollar limit. *Liberty Mutual Insurance Company v. Shores*, 147 P.3d 456, 461-62 ¶ 25 (Utah Ct. App. 2006)(citing *Sperry v. Sperry*, 990 P.2d at ¶¶ 7-8); see also *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 748 (Utah Ct. App. 1991)(concluding there is no duty of good faith and fair dealing imposed upon an insurer running to a third-party claimant seeking to recover against the company's insured). “[A]n action for breach of the covenant of good faith and fair dealing may be brought only by a party to the insurance contract.” *Savage v. Educators Ins. Co.*, 908 P.2d 862, 865 (Utah 1995); see also Bad Faith Claims Against Insurers: The State of Utah Law Fifteen Years after *Beck v. Farmers Insurance Exchange*, 15 BYU J. Pub. L. 53 (2000).

Given the clear rule in Utah that a third party beneficiary of an insurance contract does not have standing to sue for the breach of duty of good faith and fair dealing, Plaintiff, as a third party beneficiary of the insurance contract, cannot bring a cause of action for the breach of duty of good faith and fair dealing against Defendants.² Plaintiff and Defendants share no privity of contract for the duty of good faith and fair dealing to attach; rather that privity runs between Defendants and non-party Salazar. The Court concludes that no genuine issues of material fact exist on the breach of contract claim and Defendants are entitled to summary judgment on Count I.

² The Court notes that there are situations where a third party beneficiary of an insurance contract may have standing to sue the insurer, but the situation in the case at bar is not one of them.

As an alternative basis for granting summary judgment in favor of Defendants, the Court concludes that even if Plaintiff had standing to sue Defendants for the breach of duty of good faith and fair dealing, there is no genuine issue of material fact that Defendants met the requirements of Utah law for Salazar to reject underinsured motorist coverage. Utah law requires that every automobile insurance policy shall include underinsured coverage, unless affirmatively waived under Section 31A-22-305.3(2) of the Utah Code. Utah Code § 31A-22-302(1)(c). A named insured may reject underinsured motorist coverage by an express writing on “a form provided by the insurer that includes a reasonable explanation of the purpose of underinsured motorist coverage and when it would be applicable.” Utah Code § 31A-22-305.3(2)(g). For an effective rejection of underinsured coverage in its entirety, the statute imposes a duty on the insurer to provide a form that reasonably explains the purpose of underinsured motorist coverage and when underinsured motorist coverage would be applicable for a rejection of the underinsurance coverage to be valid.³ In reviewing Defendants’ form in footnote 1 signed by

³ In *General Security Indemnity Company of Arizona v. Tipton*, 158 P.3d 1121, n.5 (Utah Ct. App. 2007), *cert denied*, *Fulcrum v. Tipton*, 2007 Utah LEXIS 127 (UT 2007), the Utah Court of Appeals distinguished two subsections of the uninsured statute. This Court applies the same distinction to the underinsured statute. Specifically, subsection 2(b) of § 31A-22-305.3 states:

For new policies written on or after January 1, 2001, the limits of underinsured motorist coverage shall be equal to the lesser of the limits of the insured’s motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured’s motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgement form that:

- (i) is filed with the department;
- (ii) is provided by the insurer;
- (iii) waives the higher coverage;
- (iv) reasonably explains the purpose of underinsured motorist coverage;
- and

Salazar, the Court concludes that the form clearly incorporates statutory language to reasonably explain the purpose of underinsured motorist coverage and when underinsured motorist coverage would be applicable. The fact that Salazar selected uninsured motorist coverage and rejected underinsured motorist coverage reflects a rational decision on her part to select certain coverage and reject other coverage. The breach of contract claim fails because Plaintiff cannot establish there was a breach of the duty of good faith and fair dealing. Non-party Salazar rejected underinsured motorist coverage so the policy does not contain the coverage Plaintiff seeks. Accordingly, Defendants are entitled to summary judgment even if the Plaintiff had standing to sue for the breach of duty of good faith and fair dealing because no genuine issues of material fact exist that the Defendants met the statutory requirements of Utah law.

PLAINTIFF'S COUNT II - Class Action Breach of Contract Claim

Plaintiff, on behalf of herself and a purported class, alleges a breach of contract action against Defendants. The basis of Plaintiff's purported class action claims are based on the implied contractual duty of good faith and fair dealing. As stated above, *supra* Count I, Defendants owed no implied duty of good faith and fair dealing to Plaintiff. Therefore, Plaintiff has no breach of contract cause of action for the implied covenant of good faith and fair dealing against Defendants. To represent a class of people, Plaintiff should be in a same or similar

(v) discloses the additional premiums required to purchase underinsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum undersinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

Subsection 2(b) specifically relates to the situation when an insurance consumer is choosing to waive a higher level of underinsured motorist coverage, but is not rejecting such coverage entirely. Whereas, in this case before the Court, Salazar rejected underinsured coverage in its entirety, the Court applies subsection 2(g) of § 31A-22-305.3, rather than subsection 2(b).

position as those in the class. Since there is no class of litigants like Plaintiff that would have a claim against Defendants, Plaintiff does not have an adequate interest to have standing to represent the class. Accordingly, the Court concludes that Defendants are entitled to summary judgment on Count II.

PLAINTIFF'S COUNT III - Individual Negligence Claim by Lopez

Plaintiff claims Defendants were negligent in their statutory duty to inform her and Salazar of the meaning, and the purposes of underinsured motorist coverage, together with premiums charged for that coverage, at a minimum in a form that correctly complied with these duties in English, as well as in Spanish, the language spoken by the class of consumers that Defendants specifically market.

To support a negligence claim, a plaintiff must establish a prima facie case that defendant owed plaintiff a duty, defendant breached the duty, and the breach of the duty was the proximate cause of plaintiff's injury and damages. *Rose v. Provo City*, 67 P.3d 1017, 1020 (Utah Ct. App. 2003). The issue of whether there is a duty requires an analysis of the legal relations between the parties. *Loveland v. Orem City Corp.* 746 P.2d 763, 778 (Utah 1987). Legal duties are often found to exist in the context of contractual, fiduciary, and filial relationships. *AMS Salt Industries, Inc. v. Magnesium Corporation of America*, 942 P.2d 315, 321 (Utah 1997).

The Utah Supreme Court has recognized that in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 n.3. For example, a duty to refrain from intentionally causing severe emotional distress to others, breach of duty to

bargain in good faith could amount to fraudulent activity, or under various unfair practices acts, there may be statutory requirements that give rise to independent torts. *Id.*

Plaintiff claims that Defendants' statutory duty to inform Salazar on the underinsured coverage extended to her as an occupant of non-party Salazar's car. The Court disagrees that Defendants statutory duty to inform applied to Plaintiff. The statutory duty was owed to Salazar, not Plaintiff. Plaintiff was not a party to the insurance contract between Salazar and Defendants. Accordingly, she cannot claim there was a breach of the statutory duty to inform her. To extend the statutory duty to inform to a statutory third party beneficiary of an insurance contract would be difficult, if not impossible, to do. At the time of contracting for an insurance policy, the insurer and insured would have to determine who the statutory third party beneficiaries of the insurance contract are, who that would include in the context of the insured and then somehow inform those statutory third party beneficiaries of the insured's decision to reject underinsured motorist coverage. This would be extremely difficult, if not impossible, to do.

For example, an insured rejects underinsured motorist coverage. A week later, the insured offers a ride to a new co-worker the insured just met. If they were involved in an accident, the new co-worker would be a statutory third party beneficiary to the insured's policy. However, the new co-worker would not have received information that the insured rejected underinsurance coverage until he or she made a claim to the insurer and such claim was denied. At the time of contracting, neither the insured nor the insurer could have anticipated that a "stranger" would be riding in the insured's vehicle and therefore, would be a statutory third party beneficiary entitled to notice of the insured's waiver of underinsured motorist coverage. Under the Plaintiff's theory, the insurer would have had a duty to inform the new co-worker without the

ability to do so and the Plaintiff's theory would require the insurer to provide the waived coverage for underinsured motorist coverage. The Court does not agree that the insurer's statutory duty to inform extends this far. Utah law imposes a duty on the insurer to inform the insured of coverages that the insured may waive, so that an insured can make an informed decision on the insurance coverage they are contracting for. To impose the statutory duty to inform to statutory third party beneficiaries would be extending the insurer's duty too far and interfere with the insurer and insured's ability to contract for insurance coverage. If the Plaintiff's rule were adopted, the impact would be to null the insurer and insured's ability to contract because even if an insured properly waived their statutory right to underinsured motorist coverage and did not pay a premium for it, an insurer would still be required to pay underinsured motorist coverage to statutory third party beneficiaries because the insurer did not give them notice of the insured's exercised right to waive the statutory underinsured motorist coverage. The Court concludes that there is no such duty for an insurer to inform third party beneficiaries of an insured's waiver of the statutory underinsured motorist coverage.

Plaintiff also claims there was a duty for Defendants forms to be in Spanish. However, Plaintiff fails to cite a statute, case law or insurance department regulation requiring that such forms and explanation be provided in Spanish. Therefore, Plaintiff failed to show that there is a duty to do so.

In summary, Plaintiff lacks standing to pursue a negligence claim because there is no legal duty for an insurer to inform a passenger in an insured's vehicle of the insured's waiver of statutory underinsured motorist coverage and there was no legal duty to provide the forms in

Spanish. Without a legal duty to Plaintiff, there can be no prima facie showing of a negligence claim and the Court concludes that Defendants are entitled to summary judgment on Count III.

DEFENDANT’S COUNTERCLAIM FOR DECLARATORY JUDGMENT

Defendants request the Court declare the (1) the waiver of underinsured motorist coverage by Miriam Salazar complied with the relevant provisions of the Utah Code, and therefore is valid, (2) UAIC Policy Number UTS 000611667 issued to Miriam Salazar does not contain underinsured motorist coverage, (3) Plaintiff is not entitled to underinsured motorist benefits under UAIC Policy Number UTS 000611667, and (4) that each party shall bear their own costs of suit, including paying their own attorneys fees and costs.

“Generally, courts have held that the conditions which must exist before a declaratory judgment action can be maintained are: (1) a justiciable controversy; (2) the interests of the parties must be adverse; (3) the party seeking such relief must have a legally protectible interest in the controversy; and (4) the issues between the parties involved must be ripe for judicial determination.” *Baird v. State*, 574 P.2d 713, 715 (Utah 1978). The declaratory judgment statute does not remove the keystone from “our judicial framework--the presence of a justiciable controversy--and reconfigure our courts into forums where the curious or the confused may acquire legal guidance.” *Id.* at 716. “A Declaratory Judgment Statute cannot be so construed as to authorize the courts to deliver advisory opinions or pronounce judgments on abstract questions, but there must be the invariable justiciable controversy present in such cases.” *Id.* “The courts have no jurisdiction to render a declaratory judgment in the absence of a justiciable or actual controversy” *Id.*

The Court's decision pertaining to Counts I, II and III reflect that Plaintiff claims against Defendants fail. The effect of the Court's decision is to grant summary judgment in favor of Defendants. No longer is there a justiciable controversy between the parties. Accordingly, this Court lacks jurisdiction to make further declarations on additional issues. A decision on issues, other than those addressed above, would be wholly advisory. "When it is ascertained that there is no jurisdiction in the court because of the absence of a justiciable controversy, then the court can go no further, and its immediate duty is to dismiss the action, and jurisdiction cannot be conferred by consent or any other act of the parties." *Id.* To make a declaratory judgment on additional issues would exceed this Court's jurisdiction, therefore, the Court DENIES Defendants counterclaim for declaratory judgment.

ORDER

The Court hereby ORDERS:

Plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, DENIED,

Defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED IN PART AND DENIED IN PART, specifically, the Court:

GRANTS summary judgment in favor of Defendants and against Plaintiff on Plaintiff's Counts I, II and III, and

DENIES summary judgment on Defendants Counterclaim for Declaratory Judgment because such declaration would be advisory and would exceed the Court's jurisdiction.

DATED this 4 day of September, 2008.


The Honorable TERRY L. CHRISTIANSEN
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070422402 by the method and on the date specified.

METHOD NAME

Mail	DANIEL F BERTCH Attorney PLA 1996 E 6400 S STE 100 SALT LAKE CITY, UT 84121
Mail	TIM D DUNN Attorney DEF 505 E 200 S 2ND FLR SALT LAKE CITY UT 84102

Dated this 4 day of Sept, 2008.



Deputy Court Clerk