NO. 02-0843

IN THE SUPREME COURT OF TEXAS

OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY,
Petitioner,
v.
ZEFERINO SANCHEZ,
Respondent.

On Petition for Review from the Texas Court of Appeals, Third District, at Austin

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PETITIONER OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY'S BRIEF ON THE MERITS

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May 1, 2003

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the Case:	Declaratory suit to determine rights and obligations under an automobile liability insurance policy
Trial Judge Presiding:	The Honorable John K. Dietz
Trial Court:	250th District Court of Travis County, Texas
Disposition by the Trial Court:	Summary judgment granted in favor of Old American based on stipulated facts
Parties in the Court of Appeals:	Old American County Mutual Fire Insurance Company (Plaintiff/Appellee/Cross-Appellant/Petitioner) ("Old American") Zeferino Sanchez (Defendant/Appellant/Cross-Appellee/Respondent) ("Sanchez")
Court of Appeals:	Third Court of Appeals, Austin, Texas
Participating Justices:	Puryear, J., joined by Aboussie, C.J., and Smith, J.
Opinion:	Puryear, J.; June 27, 2002; writing for the Court withdrawing its prior Opinion at 2001 WL 1422581 issued on November 15, 2001
Published:	81 S.W.3d 452 (Tex. App.—Austin 2002).
Disposition by the Court of Appeals:	In its initial opinion, the Court of Appeals modified and affirmed the summary judgment of the trial court on the grounds that the rejection of PIP and UM coverages by the spouse of the named insured precluded recovery of those benefits. Upon rehearing, the Court of Appeals reversed summary judgment of the trial court.

STATEMENT OF JURISDICTION

This Court has jurisdiction under sections 22.001(a)(3) and 22.001(a)(6) of the Texas Government Code, respectively, because this case involves the construction of statutes necessary to the determination of the case and because the Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

ISSUES PRESENTED

1. In a case of first impression in Texas, did the Court of Appeals misconstrue Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code by holding that the named insured's spouse—who was the applicant for and an insured under the policy and who was included in the policy definition of "you"—was not competent to reject Personal Injury Protection ("PIP") and Uninsured Motorist ("UM") coverages?

2. Did the Court of Appeals err by holding that Respondent, who was grasping the gas-tank hose of his uninsured pickup at the time of his injuries, was not "upon" and therefore not "occupying" the owned but unlisted vehicle within the meaning of the unambiguous policy exclusion?

3. Did the Court of Appeals err by holding that Respondent, who sustained injuries when his uninsured pickup came into contact with him, was not "struck by" the owned but unlisted vehicle within the meaning of the unambiguous policy exclusion?

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STATEMENT OF FACTS

A. Factual Background.

This case was heard on stipulated facts in the trial court, and thus presents only questions of law. Central to the case are three unambiguous provisions of an Old American automobile insurance policy:

- First, the definition of the insureds with full authority under Old American policy at issue provides that:

  Throughout this policy, "you" and "your" refer to:

  1. The "named insured" shown in the Declarations, and
  2. The spouse if a resident of the same household.

  (CR 39, Appendix E at 5).

- Second, the exclusions of PIP coverage in the Old American policy at issue provide that:

> We do not provide Personal Injury Protection Coverage for any person for bodily injury sustained:
>
> * * *
>
> 4. While **occupying**, or when struck by, any motor vehicle (other than **your covered auto**) which is owned by you.

(CR 42, Appendix E at 8 (emphasis in original)) "Occupying," in turn, was defined for purposes of the policy as "in, upon, getting in, on, out or off." (CR 39, Appendix E at 4).

- Third, the policy exclusions for UM coverage provide, similarly:

> We do not provide Uninsured/Underinsured Motorists Coverage for any person:
>
> 1. For bodily injury sustained while **occupying**, or when struck by, any motor vehicle or trailer of any type owned by you or any **family member** which is not insured for this coverage under this policy.
>
> * * *

(CR 43, Appendix E at 9 (emphasis in original)).

On January 8, 1999, Old American issued Texas Personal Automobile Insurance Policy No. AGA606056-01 ("the Policy") to Zeferino Sanchez, which contained the above-quoted provisions. (CR 68, Appendix G ¶ 1). The parties stipulated that Zeferino Sanchez and his wife Margarita Sanchez were both insureds under the Policy. (CR 68, Appendix G ¶ 2). Because Zeferino and Margarita Sanchez were husband and wife and

lived in the same house, Mrs. Sanchez fell within the Policy definition of "you." (CR 87, Appendix F at 1; CR 39, Appendix E at 5).

Margarita Sanchez was the applicant for the Policy. (CR 68, Appendix G ¶ 3). She signed the application form where indicated to reject PIP and UM coverages under the Policy. (CR 68, Appendix G ¶ 3). In applying for the Policy, Mrs. Sanchez affirmed that "I apply to Old American County Mutual Fire Insurance Company for an insurance policy based on the statements contained in this application." (CR 88, Appendix F at 2). Mrs. Sanchez also affirmed that the rejections of PIP and UM coverages "shall apply on this policy and on all future renewals of such policy." (CR 88, Appendix F at 2). Accordingly, the Sanchezes were never charged and did not pay premiums for PIP or UM coverage for any vehicle under the Policy. (CR 68, Appendix G ¶ 5).

At the time Mrs. Sanchez applied for the Policy, Zeferino Sanchez owned a 1984 Chevrolet pickup truck ("the Pickup"). (CR 68-69, Appendix G ¶ 6). However, the Sanchezes did not identify the Pickup on the Application and it was not a "covered auto" under the Policy. (CR 87, Appendix F at 1; CR 69, Appendix G ¶ 7). As a result, they were never charged and did not pay premiums for any type of insurance coverage for the Pickup under the Policy. (CR 69, Appendix G ¶ 9).

On April 11, 1999, this Pickup was parked on the shoulder of Interstate 35 in Kyle, Hays County, Texas. (CR 68-69, Appendix G ¶ 6). Zeferino Sanchez was lying beneath the Pickup grasping and changing over the gas-tank hose when the Pickup was struck from the rear by an uninsured motorist. (CR 69,Appendix G ¶ 10). The Pickup then struck Mr. Sanchez causing him injury. (CR 69, Appendix G ¶ 11).

B. Procedural Background.

Old American filed suit seeking a declaration that it had no obligation to pay PIP or UM benefits under the Policy. Old American moved for summary judgment based on the stipulated facts, relying on three grounds: (1) Sanchez sustained his injuries while "upon" and thus "occupying" the uncovered Pickup, thus implicating the Policy's exclusions of PIP and UM coverage; (2) Sanchez was "struck by" the uncovered Pickup, which also invoked the PIP and UM exclusions; and (3) Margarita Sanchez's rejection of PIP and UM coverage precluded recovery of those benefits. (CR 55). The trial court granted summary judgment in favor of Old American on the first ground. (CR 98, Appendix A at 1).

On appeal, after oral argument, the Court of Appeals issued an opinion on November 15, 2001, modifying and affirming summary judgment. Although the Court of Appeals held that Sanchez was not "occupying" his unlisted vehicle, the court concluded that his wife's rejection of PIP and UM coverages precluded recovery of those benefits. It did not reach the third ground regarding the "struck by" language. Following Sanchez's motion for reconsideration, the court issued another opinion on June 27, 2002 withdrawing its prior opinion and reversing summary judgment on all three asserted grounds (the "Opinion"). 81 S.W.3d 452 (Tex. App.—Austin 2002).

SUMMARY OF THE ARGUMENT

The Court of Appeals erred not only in construing the unambiguous Policy definitions and exclusions but—in a matter of first impression—in interpreting and applying 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code. Under the clear and plain

language of these Insurance Code provisions, PIP and UM coverages are <u>not</u> available under an automobile insurance policy when "any insured named in the policy" rejects those coverages in writing. This statutory language necessarily requires courts, when evaluating the validity of a waiver of PIP or UM coverage, to look to the policy to determine whether an individual is an "insured" "named" therein who is capable of rejecting coverage. In this case, Mrs. Sanchez is an "insured named in the policy" who validly rejected PIP and UM coverages under the Policy.

The Policy, which no one has alleged is ambiguous, plainly defined "you" as "the 'named insured' shown in the Declarations, **and the spouse** if a resident of the same household" (emphasis added), giving the spouse the <u>same</u> rights as the named insured who is listed on the declarations page. Mrs. Sanchez is thus "named" as an insured under the Policy, and, indeed, the parties stipulated that she was an insured. Furthermore, this Court has held that a policy application becomes part of an insurance policy when it expressly refers to or is incorporated by the policy. In this case, Mrs. Sanchez's application referred to, and was incorporated into, the Policy. For all of these reasons, Mrs. Sanchez was an "insured named under the policy" whose rejection of PIP and UM coverages was valid under articles 5.06-1(1) and 5.06-3(a) of the Insurance Code. By concluding otherwise, the Court of Appeals ignores both the plain meaning of Texas statutes and the plain language of an unambiguous contract.

Furthermore, the Court of Appeals' Opinion is at odds with the law of every other state that has considered the issue. Its practical implications are also troubling. The Opinion would suggest that a woman who has the power to apply for and obtain

insurance for herself and her husband might nonetheless be barred by Insurance Code articles 5.06-1(1) and 5.06-3(a) from determining the level of coverage to be afforded by the policy. Also, the Opinion, if left uncorrected, will have serious and wide-spread consequences in the Texas insurance market for personal injury protection and uninsured motorist coverage. Accordingly, this Court should grant Old American's petition for review and correct the Court of Appeals' error.

Additionally, the Court of Appeals erred by misapplying the unambiguous exclusions for personal injuries sustained "while occupying or when struck by" an automobile that the insured owned but chose not to insure. Those valid and unambiguous exclusions preclude the recovery of benefits for personal injuries sustained during any manner of use of an automobile that the insured owned but did not insure. Under their plain language, the provisions exclude coverage if either the insured sustained his injuries while conducting activities related to operating the vehicle or if the insured was outside the vehicle and injured by its movement.

However, Respondent has succeeded in circumventing these clear exclusions in an attempt to obtain insurance benefits in spite of a conscious decision not to purchase any insurance coverage for the Pickup. Because Respondent was in contact with and supporting himself upon the underside of his vehicle he sustained his injuries while "occupying" it. Further, because the vehicle's propulsion was the direct and immediate cause of his injuries, Respondent was "struck by" the vehicle.

Nearly every automobile insurance policy issued in Texas contains these standard exclusions. Especially during this era of troubled insurance markets, insureds and

insurers alike should be held to the plain and unambiguous policy terms, thus assuring predictability in determining their relative rights and duties. If permitted to stand, the Court of Appeals' Opinion will invite other insureds throughout the state to claim insurance benefits that they did not request or purchase, further destabilizing the automobile insurance market. This Court should grant Old American's petition for review and correct the Court of Appeals' impermissible narrowing of these clear and unambiguous exclusions.

ARGUMENT

A. The Court of Appeals Ignored the Plain Language of Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code By Failing to Recognize the Rejection of PIP and UM Coverages By the Named Insured's Spouse.

Interpretation of the Insurance Code provisions at issue begins with their plain language. *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). The same is true for insurance policies, which are simply contracts. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). Courts do not construe insurance policies against the insurer and in favor of coverage unless the policy terms are ambiguous. *State Farm Fire & Cas. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998); *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 633 (Tex. 1992). An insurance policy is not ambiguous when parties dispute only the effect of certain policy provisions and not their meaning. *State Farm Mut. Auto. Ins. Co. v. Brown*, 984 S.W.2d 695, 698 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Further, ambiguity is an affirmative defense that must be specifically pleaded. *Gulf & Basco Co. v. Buchanan*, 707 S.W.2d 655, 656 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Respondent has not plead that any

Policy provisions are ambiguous. Based on the unambiguous Policy provisions, the plain language of the Insurance Code, and the stipulated facts, Respondent's spouse validly rejected the coverages the Respondent now seeks.

The Texas Insurance Code expressly permits insureds to reject UM, underinsured motorist ("UIM"), and PIP coverages in Texas automobile insurance policies. TEX. INS. CODE arts. 5.06-1(1) and 5.06-3(a). The Insurance Code requires no special procedure or special language for the rejection. *Ortiz v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 353, 357 (Tex. App.—San Antonio 1997, writ denied). In fact, "[e]xecution of a satisfactory written rejection requires only minimal effort by the insured." *Ortiz*, 955 S.W.2d at 357; *Howard v. INA County Mutual Ins. Co.*, 933 S.W.2d 212, 218 (Tex. App.—Dallas 1996, writ denied). A valid rejection of PIP and UM occurs when "*any insured named in the policy* [rejects] the coverage in writing…." TEX. INS. CODE arts. 5.06-1(1) and 5.06-3(a) (emphasis added).

"A fundamental rule of statutory construction requires the court to ascertain the intent of the legislature as expressed in the language of the statute." *Ortiz*, 955 S.W.2d at 357. Moreover, "every word excluded from a statute must be presumed to have been excluded for a reason." *Id.*; *see also Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985). "When the Legislature employs a term in one section of a statute and excludes it in another section, the term should not be implied where excluded." *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)). While the Legislature knows how to limit the authority for certain policy decisions to only the

named insured, the Legislature did not limit a valid rejection of PIP and UM coverages to the named insured under an insurance policy. Instead, the statute provides that any insured named in the policy can reject the coverages. By contrast, "named insured" is a term of art that generally refers to those persons listed as such in the declarations. 81 S.W.3d at 459. Indeed, the Legislature chose not to require a valid rejection to be made by "the named insured" or even "a named insured." The Legislature chose to require rejection by "any insured named in the policy"—a much broader phrase.

As the undisputed facts reveal, Margarita Sanchez applied for automobile insurance through Old American for herself and her husband. (CR 87, Appendix F at 1; CR 68, Appendix G ¶ 3). Both Zeferino and Margarita Sanchez were listed as applicants and drivers on the Application and were insureds under the Policy. (CR 87, Appendix F at 1; CR 68, Appendix G ¶ 2-3). The Policy defined "you"—the persons with full rights as the insureds under the Policy—as "the 'named insured' shown in the Declarations, and the spouse if a resident of the same household." (CR 39, Appendix E at 5 (emphasis added)). As indicated by the Application, Zeferino and Margarita Sanchez lived in the same house. (CR 87, Appendix F at 1). The Policy provides lesser rights to "covered persons," who include additional insureds such as "family members." (CR 39, Appendix E at 5). Therefore, the Policy treated Margarita Sanchez the same as the named insured. Because Sanchez's spouse, who was specifically identified in and given the same rights and authority as the named insured in the Policy, rejected PIP and UM coverages in writing, the rejection complied with the requirements of the Texas Insurance Code.

1. As Directed by the Insurance Code, the Policy Determines Who May Reject PIP and UM Coverages.

Respondent argued, and the Court of Appeals agreed, that the Policy terms should not determine whether the rejection met the statutory requirements. But this is precisely what the Texas Insurance Code requires. First, Articles 5.06-1(1) and 5.06-3 **require** insurers and courts alike to examine the applicable insurance policy to determine who is authorized to reject those coverages. Because the Insurance Code permits a valid rejection by "any insured named *in the policy*," any determination of a valid rejection necessarily requires an examination of the policy itself to determine who has the authority to effect changes in coverage.

Further, the Texas Department of Insurance ("TDI" or the "Department")—not Old American—gave a named insured's spouse the same rights as the named insured by including the spouse in the policy definition of "you." *See* TEX. INS. CODE art. 5.06 (West 2003); TEX. INS. CODE § 31.007 (West 2003); *Urrutia v. Decker*, 992 S.W.2d 440, 443 (Tex. 1999). The Texas Legislature expressly delegated the authority to adopt the policy form to TDI and the form the Department adopted included spouse in the definition of "you." Therefore, TDI consciously chose to include spouse in the policy's definition of "you" with full knowledge that the Legislature required an examination of the policy to determine who has authority to reject PIP and UM coverages.

The Policy, by its clear and express terms, gives Margarita Sanchez the same rights and authority as the persons identified as the named insureds on the Declarations page. (CR 39, Appendix E at 5). Permitting an insured with authority to apply for the

policy and with the same rights as the "named insureds" to reject UM and PIP coverages is consistent with the intent of the Texas Legislature. It is inconceivable that the Texas Legislature intended to grant someone authority to apply for and obtain insurance yet strip her of the authority to determine the level of coverage afforded by the policy. Thus, the Court of Appeals' Opinion imposes a far stricter requirement than that intended by the Legislature. Margarita Sanchez, an insured named in the Policy, rejected PIP and UM coverages at the time of application.

Further, an application for insurance becomes part of the insurance policy when it expressly refers to or is incorporated by the policy. *See Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex. 1999) (rental agreement became part of automobile insurance policy because the policy expressly referenced the agreement); *Fidelity Union Life Ins. Co. v. Methven*, 346 S.W.2d 797, 800 (Tex. 1961); *Odom v. Ins. Co. of the State of Pennsylvania*, 455 S.W.2d 195, 199 (Tex. 1970) (application for automobile insurance became part of the policy because it was referenced and incorporated by the policy). Indeed, this Court has held that documents incorporated into an automobile insurance policy may even enlarge the class of insureds that have rights under the policy. *Urrutia*, 992 S.W.2d at 443 (additional insureds identified in the rental agreement referenced in the automobile insurance policy had rights as insureds under the policy).

Mrs. Sanchez applied to Old American "for an insurance policy based on the statements in [the] application" and "agree[d] that such policy shall be null and void if such information is false or misleading…or would materially affect the acceptance of the risk by [Old American]." (CR 88, Appendix F at 2). She also affirmed that her rejections

of coverages "shall apply to this policy and on all future renewals of such policy." *Id*. Therefore, the Application referred to, was incorporated into, and became part of the Policy. *See Odom*, 455 S.W.2d at 199 (insured was bound by misstatements in the automobile insurance application because the policy provided that it would have no force if statements in the application were false). It is undisputed that Margarita Sanchez is specifically identified by name on the Application. (CR 87, Appendix F at 1). For this additional reason, PIP and UM coverages were rejected by an insured named in the Policy.

Respondent contends that his spouse's unequivocal written rejection of PIP and UM coverages was not valid because the Policy at issue was a renewal policy. Respondent contends that only "the named insured" may reject PIP and UM coverages for a renewal policy. However, Respondent has misconstrued the Insurance Code provisions relating to the rejection of PIP and UM coverages. Specifically, the statutes relating to rejection of both PIP and UM benefits provide:

> The coverages required under this Article shall not be applicable where any insured named in the policy shall reject the coverage in writing; ***provided that unless*** the named insured ***thereafter*** requests such coverage in writing, such coverage need not be provided in a supplemental or renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer or an affiliated insurer.

TEX. INS. CODE art. 5.06-1(1) (emphasis added). Article 5.06-3(a) contains nearly identical language.

In other words, PIP and UM coverages do not apply when rejected by any insured named in the policy. A rejection of PIP and UM coverages under the original policy

applies to all renewals of that policy. *See Berry v. Texas Farm Bureau Mut. Ins. Co.*, 782 S.W.2d 246, 249 (Tex. App.—Waco 1989, writ denied). The portion of the statutes following the words "provided that unless," describes the process for requesting or rejecting PIP or UM coverage after the original policy is issued. There is no support for the position that a valid rejection of PIP and UM coverages under the original policy does not equally apply to all renewals. Similarly, there is no support for the position that an insured must re-reject PIP and UM coverages after having validly rejected those coverages under the original policy. Nevertheless, it is undisputed that Respondent's spouse had the same rights as the named insured identified on the declarations page. And at least one court has held that a spouse who is not listed on the declarations page but is included in the policy definition of "you" is a "named insured" who may reject UM coverage. *Daniels v. Colonial Ins. Co.*, 857 S.W.2d 162, 164 (Ark. 1993).

Further, Respondent's spouse's unequivocal written rejection states that it "shall apply to this policy and on all future renewals of such policy…unless I notify the Company in writing that thereafter Uninsured / Underinsured Motorists Coverage is desired." (CR 88, Appendix F at 2). The rejection of PIP coverage contains a similar statement. (CR 88, Appendix F at 2). It is undisputed that neither Respondent nor his wife **ever** requested PIP or UM coverage. Indeed, Respondent's spouse unequivocally rejected those coverages for the Policy and all renewals. Thus, the rejections apply to all renewal policies issued after the application. *Cf. Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 216 (Tex. App.—Dallas 1996, writ denied) (holding that written

rejection with similar language did not apply but only because the policy was issued before the rejection was signed).

2. The Court of Appeals' Opinion Contradicts the Overwhelming Authority From Other Jurisdictions.

While no Texas court has addressed this specific issue, the Court of Appeals' Opinion is inconsistent with the cases from other jurisdictions interpreting similar statutory and policy language. For example, in *Oncale v. Aetna Cas. & Sur. Co.*, the Louisiana Court of Appeals addressed this very issue. 417 So. 2d 471 (La. Ct. App. 1982). In *Oncale*, a spouse who was not listed on the declarations page as the named insured completed the form to reject UM coverage. *Id.* at 474. Louisiana's UM statute is nearly identical to the Texas statute and likewise permits rejection of UM coverage in writing by "any insured named in the policy." *See id.* The court held that the wife's rejection of coverage was valid because the policy defined the named insured as the person identified on the declarations page "and also includes his spouse, if a resident of the same household." *Id.*; *see also Bonnette v. Robles*, 740 So. 2d 261 (La. Ct. App. 1999) (selection of lower UIM limits by spouse who was not designated as named insured on the policy was valid).

Respondent contends that only two other jurisdictions—Louisiana and Arkansas—permit rejection of PIP or UM coverages by a spouse not listed on the declarations page. Respondent's survey of the law in other jurisdictions relating to the rejection of PIP and UM coverages is both incomplete and incorrect.

In addition to Louisiana and Arkansas, Florida, Kansas, Ohio, Tennessee and Washington all have reached the same conclusion when determining the validity of a rejection of insurance coverage by a spouse not listed as the named insured on the declarations page. *See Daniels v. Colonial Ins. Co.*, 857 S.W.2d 162 (Ark. 1993) (rejection of UIM coverage by applicant spouse who was not listed as a named insured on the policy was effective because the policy defined "you" as the policyholder in the declarations page and spouse if living in the same household); *St. Paul Mercury Ins. Co. v. MacDonald*, 509 So.2d 1139, 1140-41 (Fla. Dist. Ct. App. 1987) (the named insured's spouse and applicant who was not listed as a named insured effectively rejected UM coverage); *Goode v. Daugherty*, 694 S.W.2d 314 (Tenn. Ct. App. 1985) (selection of lower UM coverage limits by spouse who was not listed as a named insured on the policy was valid); *Frost v. Department of Labor and Industries of State of Wash.*, 954 P.2d 1340 (Wash. Ct. App. 1998) (stating that Washington law permits the rejection of UIM coverage by the named insured or a spouse); *Ridgway v. Shelter Ins. Co.*, 913 P.2d 1231 (Kans. Ct. App. 1996) (rejection of PIP and UM coverages by the named insured's girlfriend was effective); *Johnson v. Great American Ins. Co.*, 541 N.E.2d 100 (Ohio Ct. App. 1988) (reduction of UIM coverage by husband was effective as to spouse who was later added to policy).

The Court of Appeals attempted to distinguish some of the cases from other states on the basis that Old American failed to argue agency in the trial court. However, Old American *did* assert—in both the trial court and the Court of Appeals—that Mrs. Sanchez was authorized to apply for the Policy and therefore should be authorized to reject PIP

and UM coverages. *See* Old American's Appellate Brief at 11; Old American's Motion for Summary Judgment at 8-10. More importantly, the holding in *Oncale*, a case with nearly identical facts, was not dependent on agency principles. In fact, the court noted that the applicant wife "was herself empowered to reject UM coverage in the policy, not as the agent of her husband, but in her own right." 417 So. 2d at 475. Therefore, this case is indistinguishable from *Oncale* and other cases throughout the nation.

Respondent has also attempted to distinguish *Aquesta v. Industrial Fire & Cas. Co.*, 467 So.2d 284 (Fla. 1985) by failing to completely describe the facts. Mrs. Aquesta applied for the automobile insurance policy and listed her husband as the named insured. While it is true that the insurer scratched through the husband's name and issued the policy in the applicant wife's name, Mrs. Aquesta asked the insurer to reissue a corrected policy in her husband's name. For purposes of summary judgment, the trial court accepted the Aquestas' position that the policy should have been issued in the husband's name alone. 467 So.2d at 285. Therefore, the court reached the same issue we face here and held that the applicant spouse who was not listed as a named insured could reject PIP and UM coverages. *Id.*

Notably, by contrast, neither the Court of Appeals nor Respondent has cited a *single* case that supports the Court of Appeals' holding on this issue. Further, Respondent also failed to address the cases from other states such as Florida, Kansas, Ohio, Tennessee and Washington—that permit a spouse who is not listed as a named insured to reject PIP or UM coverages. *See, e.g., Goode v. Daughterty*, 694 S.W.2d 314 (Tenn. Ct. App. 1985) (holding that the wife, who was not identified on the policy as a

named insured, could effect a valid rejection of UM coverage when the statute required rejection by "any named insured"). Indeed, the states with similar statutory language construing similar policy definitions have enforced written rejections of PIP and UM coverages by a spouse who is not listed on the policy as a named insured. *See, e.g., Oncale v. Aetna Cas. & Sur. Co.*, 417 So. 2d 471 (La. Ct. App. 1982); *Daniels v. Colonial Ins. Co.*, 857 S.W.2d 162 (Ark. 1993). As a result, the Court of Appeals' Opinion is inconsistent with the majority of states that have decided this issue and this Court should grant Old American's petition for review.

3. The Court of Appeals' Opinion Precludes a Spouse's Valid Rejection of PIP and UM Coverages.

The Policy expressly gives Margarita Sanchez the same rights and authority as the persons identified as the named insured on the Declarations page. The Court of Appeals' Opinion takes those rights away. In effect, the Court of Appeals' Opinion holds that a spouse is not competent to determine whether or not PIP and UM coverages are included under the same policy for which she is competent to apply.

The Policy defines "you" as "the 'named insured' shown in the Declarations, and the spouse if a resident of the same household." Margarita Sanchez clearly falls within the Policy's definition of "you." Moreover, it is also undisputed that Margarita Sanchez applied for the Policy and was competent to obtain insurance coverage and decide the policy limits.

Although the Court of Appeals agreed that "named insured" is a term of art that is narrower than "any insured named in the policy," its holding contradicts that distinction.

Instead, the Court of Appeals' holding effectively limits a valid rejection to a "named insured." Indeed, the Court of Appeals noted that "Old American could have avoided this result by simply listing Margarita Sanchez on the declarations page as a named insured or including her by name somewhere in the policy." Op. at 13. However, the *only* place for the inclusion of an insured's name in the policy *is the declarations page*. This Court should grant Old American's petition for review to correct this error.

Respondent asks this Court to alter the Insurance Code by construing it more restrictively than the language that the Legislature chose. In his response to Old American's petition for review, for the first time Respondent argues that "any insured named in the policy" is the equivalent of a "named insured." *See* Response at 5. Respondent relies on this argument throughout his response to support the opinion of the Court of Appeals. Notably, however, the 3rd Court of Appeals disagreed with Respondent's approach:

> We agree with Old American that 'named insured' is a term of art that refers specifically to the insured listed on the declarations page of the insurance policy. Under the statute, 'any insured named' may reject UM and PIP, indicating that the legislature did not intend to limit the class of persons that may reject coverage to a 'named insured,' i.e., an insured listed on the declarations page.

Old American County Mut. Fire Ins. Co. v. Sanchez, 81 S.W.3d 452, 459 (Tex. App.—Austin, pet. filed). If the Legislature meant "any named insured," it could and would have used that language. Accordingly, "any insured named in the policy" is a broader class of insureds than the term "named insured" that Respondent asks this Court to imply into the Insurance Code.

4. The Court of Appeals' Opinion Will Invalidate Rejections of PIP and UM of Numerous Policies Already in Force.

If the Court of Appeals' Opinion is permitted to stand, an inequitable loophole will exist that will invalidate PIP and UM rejections of many policies already in force. If only the named insured can effect a valid rejection, the applicant and insured under an automobile insurance policy can reject PIP and UM coverages and either list his or her spouse as the "named insured" or hope that the insurer lists only the spouse as the "named insured." Then, after avoiding paying premiums for PIP and UM coverages, the insureds can collect benefits by simply asserting that their rejections of those coverages were not valid. Respondent does not contend that his spouse did not intend to reject PIP and UM coverages. Respondent does not contend that she did not understand that she had the option of accepting PIP and UM coverages. Respondent in no way suggests that he bargained for or even wanted the benefits to which he now claims he is entitled.

In fact, the Court of Appeals' Opinion provides a disincentive for a spouse to accept and pay for PIP and UM coverages. Surely the Legislature did not intend this absurd result, yet that is exactly what happened here. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 888 S.W.2d 921, 927 (Tex. App.—Austin 1994, writ denied) (courts should not attribute to the Legislature an intention to work an injustice or to produce an absurd or unreasonable result). Mrs. Sanchez had authority to apply for the insurance policy for Sanchez and herself. Her rejection of PIP and UM coverages should also be given effect.

Every Texas automobile insurance application includes a form for the rejection of

PIP and UM coverages. Therefore, there are undoubtedly hundreds, if not thousands, of other policies now existing in Texas where the spouse who applied for the policy is not listed as the named insured. For each of these policies, insureds will be able to obtain PIP and UM benefits without paying premiums for those coverages by simply asserting that the rejection of those coverages was not effective, citing the Court of Appeals' Opinion as support. Further, the Opinion will cause great confusion over, if not give an argument for the resurrection of, the thousands of past claims that have already been adjusted based on a spouse's rejection of coverage. These far-reaching ramifications of the Court of Appeals' holding demand this Court's attention and review.

5. Public Policy Supports Neither the Court of Appeals' Reasoning Nor the Outcome it Reached.

The Court of Appeals contends that its Opinion is supported by the Insurance Code's public policy to protect "conscientious drivers." 81 S.W.3d at 459; *see also Howard*, 933 S.W.2d at 218. However, public policy does **not** support invalidating the written rejection of UM coverage in this case. It is undisputed that Sanchez did not insure the Pickup involved in the collision. Indeed, Sanchez neither listed the Pickup as an automobile to be covered by the Policy nor did he obtain or pay for insurance coverage of *any kind* for the Pickup. Therefore, the Insurance Code's public policy of protecting conscientious drivers from those who have not obtained insurance does not support the Court of Appeals' Opinion.

6. The Error in the Court of Appeals' Opinion Will Perennially Evade Review.

If the Court does not grant Old American's petition for review, it is unlikely that the error in the Court of Appeals' Opinion will ever be corrected. Typically, the relatively small value of the benefits at issue under PIP or UM coverage will preclude many parties from appealing a trial court's decision, much less to this Court. Therefore, if this Court does not grant Old American's petition for review, the Court of Appeals Opinion will likely be the sole authority on whether a spouse may reject PIP and UM coverages. This Court should seize this potentially rare chance to correct a profound misinterpretation of an important Texas statute. Although individual claims may have relatively low dollar values taken alone, their large aggregate value—and the opportunities for fraud by insureds that the Court of Appeals' Opinion will create if permitted to stand—will cause serious harm and make this case worthy of this Court's review.

B. The Court of Appeals Erred by Holding that Respondent Was Not "Occupying" His Uninsured Vehicle.

The same rules of construction that are applicable to contracts generally apply to insurance policies. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). Courts should only construe exclusionary language against the insurer when the policy language is ambiguous. *State Farm Fire & Cas. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998); *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 633 (Tex. 1992). Contract language is not ambiguous merely because parties urge different constructions or disagree about the effect of the provisions. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100

(Tex. 1999); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). Neither Respondent nor Old American has alleged that any of the Policy's provisions are ambiguous, as required to raise that issue by the Rules of Civil Procedure. *See Gulf & Basco Co. v. Buchanan*, 707 S.W.2d 655, 656 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Therefore, whether the language at issue is contained in an exclusion or insuring provision is irrelevant to the analysis.

The Policy expressly excludes the recovery of PIP benefits "for bodily injury sustained while **occupying**…any motor vehicle (other than your **covered auto**) which is owned by you." (CR 42, Appendix E at 6 (emphasis in original)). The Policy contains a nearly identical exclusion for UM benefits. (CR 43, Appendix E at 7). Exclusion of coverage for injuries sustained while "occupying or when struck by" an automobile that is owned by the insured but not listed on the policy are valid and enforceable. *See Conlin v. State Farm Mut. Auto Ins. Co.*, 828 S.W.2d 332, 337 (Tex. App.—Austin 1992, writ denied) (interpreting and applying identical exclusionary language). More importantly, provisions excluding coverage when occupying or struck by an unlisted vehicle are not ambiguous. *See Frazer v. Wallis*, 979 S.W.2d 782 (Tex. App.—Houston [14th Dist.] no writ) (holding that an exclusion identical to those at issue was not ambiguous); *Reyes v. Texas All Risk General Agency, Inc.*, 855 S.W.2d 191, 192 (Tex. App.—Corpus Christi 1993, no writ) (same). As shown by the stipulated facts, the plain language of the Policy excludes Respondents' claim for benefits.

1. The Stipulated Facts Show that Respondent Sustained His Injuries While "Occupying" His Uninsured Vehicle Within the Scope of the Plain Language of the Unambiguous Exclusions.

Respondent concedes that he sustained his injuries while attempting repairs on a vehicle that he owned but that was not listed as a covered automobile under the Policy. (CR 69, Appendix G at ¶ 7). The stipulated facts also show that Respondent was "occupying" that vehicle.

Parties to a contract have the right to stipulate the meaning given to a particular word or phrase used in their contract. *Hart v. Traders & General Ins. Co.*, 487 S.W.2d 415, 417 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.). Where parties agree that a phrase shall be given a certain meaning, then that meaning must prevail over even the ordinary and usual meaning of the words. *Id.*

Here, the Policy provides that "'**occupying**' means in, upon, getting in, on, out, or off." (CR 39, Appendix E at 5 (emphasis in original)). Courts construe the term "occupying" broadly when the injuries result from a motor vehicle accident. *Compare Shulz v. State Farm Auto. Ins. Co.*, 930 S.W.2d 872, 874 (Tex. App.—Houston [1st Dist.] 1996, no writ) (a person who was shot and killed while standing outside of a vehicle was not occupying the vehicle because the injuries were not the result of a motor vehicle accident); *with Hart*, 487 S.W.2d at 420-21 (a person who was in front of and leaning on a vehicle attempting repairs at the time of the automobile collision was upon the vehicle and thereby occupying it).

Respondent was beneath the Pickup with his hands and body up in and supporting himself by holding on to the underside of the vehicle attempting repairs. (CR 69,

Appendix G ¶ 10). Thus, Respondent was "upon" his owned but uninsured vehicle at the time of impact.

Hart, the only other Texas case to address this issue, contradicts the Court of Appeals' Opinion. That court held that an insured who was leaning on the fender of an automobile was "upon" and therefore "occupying" the vehicle. 487 S.W.2d at 421. The *Hart* court stated that "upon" meant "[i]ndicating contiguity or independence: (a) contact and support from elsewhere than beneath; as, **a fly on the ceiling**; hanging on the wall." 487 S.W.2d at 418 (emphasis added). The court went on to state that "we do not think that the meaning of the word 'upon' is restricted to 'on top of,' as when the weight of a person's body is resting upon or supported by the vehicle." *Id.* at 419. Thus, a person may be "upon" a vehicle without being supported from beneath. Indeed, the discussion by the court in *Hart* illustrates that the term "occupying" encompasses the facts presented.

2. The Court of Appeals' Opinion Contradicts Authority From Other Jurisdictions Construing Similar Exclusions.

Cases from other jurisdictions also contradict the Court of Appeals' Opinion. For example, a Florida court relied on *Hart* in deciding a case with facts nearly identical to those of this case. *See Industrial Fire & Cas. Ins. Co. v. Collier*, 334 So. 2d 148 (Fla. Ct. App. 3d Dist. 1976). In *Collier*, the insured was injured when he was struck by his unlisted vehicle after it was struck by another vehicle as the insured was changing a flat tire. At the time of the accident, the insured was standing outside the vehicle while it was jacked up, removing the spare tire from the vehicle. *Id.* at 149. The insurance policy

contained a provision excluding coverage for injuries sustained while occupying an unlisted vehicle and a similar definition of "occupying." *Id.* The court cited *Hart* in holding that because the insured was "occupying" his unlisted vehicle, the insured could not recover benefits under the policy as a matter of law. *Id*. at 150.

The Court of Appeals stated that Respondent could not have been "upon" the vehicle at the time of the accident because he was "under" the vehicle. The *Hart* and *Collier* decisions do not construe the word "upon" nearly as narrowly as the Court of Appeals did. Like the fly-on-the-ceiling example in *Hart*, Respondent was beneath and in contact with his unlisted Pickup by holding and changing over the fuel line. Like the insured in *Collier*, the Respondent was contiguous with and therefore "upon" the vehicle.

Additionally, a number of courts from other jurisdictions have held that a party was "occupying" a vehicle when they were in contact with or in close proximity to their vehicle and their activities were still "vehicle-oriented" at the time they sustained their injuries. *See Moherek v. Tucker*, 230 N.W.2d 148 (Wis. 1975) (a person who was standing behind an automobile, holding the spare tire up against its rear bumper to protect the rear bumper of the car from the front bumper of a second car that was about to push it when the second car was struck by an uninsured motorist, was "occupying" the first automobile); *see also Cocking v. State Farm Mut. Auto. Ins. Co.*, 86 Cal. Rptr. 193 (Cal. App. 1st 1970) (driver who was a short distance behind the vehicle preparing to put on snow chains was "upon" that vehicle); *Madden v. Farm Bureau Mut. Auto. Ins. Co.*, 79 N.E.2d 586 (Ohio App. 1st 1948) (person placing a tire in the trunk of the automobile was "in" or "upon" that vehicle). For example, one court held that a tow truck driver

who was inspecting a tow connection to a vehicle that he was about to tow when struck by another automobile was "occupying" the vehicle to be towed. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901 (Ky. Ct. App. 1994). The court reasoned that there was a causal connection between the injury and the use of the vehicle, he was in close proximity to the vehicle, his activities were vehicle oriented, and he was engaged in a transaction that was essential to the future use of the vehicle. *Id.* Similarly, another court held that a person who was holding jumper cables and leaning on a vehicle to jump-start a neighbor's vehicle at the time of the accident was "occupying" that vehicle. *Pope v. Stolts*, 712 S.W.2d 434 (Mo. Ct. App. 1986). As these cases demonstrate, the overwhelming majority of cases from other jurisdictions contradict the Court of Appeals' Opinion.

Respondent was in close proximity to and in contact with the Pickup when injured. Additionally, his activities were vehicle oriented and essential to the immediate future use of the Pickup. In fact, Respondent was attempting to repair the Pickup to make it operable. Finally, Respondent was a passenger immediately before the accident and intended to return to the vehicle upon completion of the repairs. Therefore, Respondent sustained his injuries while "occupying" the Pickup.

The Court of Appeals erred by permitting Respondent to circumvent the plain language of the exclusions. This Court should grant Old American's petition for review to correct this error.

C. The Court of Appeals Erred by Holding that Respondent Was Not "Struck By" His Uninsured Vehicle.

The Policy also expressly excludes the recovery of UM benefits "for bodily injury

sustained…when struck by any motor vehicle (other than your **covered auto**) which is owned by you." (CR 42, Appendix E at 6 (emphasis in original)). The Policy contains a nearly identical exclusion for UM benefits. (CR 43, Appendix E at 7). These exclusions are valid and enforceable for both PIP and UM coverage. *See Holyfield v. Members Mut. Ins. Co.*, 572 S.W.2d 672, 673 (Tex. 1978); *Conlin*, 828 S.W.2d at 336-37.

Unless the words used to describe the coverage afforded under an insurance policy are used in a technical sense, the meanings attributed to them must be the ordinary lay meanings understood by the general public. *Gallup v. St. Paul Ins. Co.*, 515 S.W.2d 249, 251 (Tex. 1974). "Terms used in an insurance contract are given their ordinary and generally accepted meaning unless the policy shows the words were meant in a technical or different sense." *Security Mut. Casualty Co. v. Johnson*, 584 S.W.2d 703, 704 (Tex. 1979). Here the Policy does not indicate that the words "struck by" should be given any meaning other than that used by the general public.

1. The Stipulated Facts Show that Respondent Sustained His Injuries When Struck By His Uninsured Vehicle Within the Scope the Plain Language of the Unambiguous Exclusions.

To be "struck by" an automobile, the vehicle must be "a moving or striking force." *Houston Fire & Cas. Ins. Co. v. Kahn*, 359 S.W.2d 892, 893 (Tex. 1962). For example, a person who runs into a parked or stationary vehicle is not "struck by" that vehicle. *Id.* at 893; *Gallup*, 515 S.W.2d at 250. The term "struck by" a vehicle necessarily means that the person is passive in the exchange and the movement and propulsion of the vehicle is a factor in the injury. *Gallup*, 515 S.W.2d at 250-51. The phrase "struck by" encompasses a situation where the vehicle impacts and comes into actual physical contact with the

injured person. *See Hale v. Allstate Ins. Co.*, 344 S.W.2d 430, 434 (Tex. 1961); *see also* 11 Couch on Ins. § 158.41 (3d ed. 1999). In fact, injuries caused by mere vibrations of a vehicle may be enough to satisfy the "struck by" requirement. *See Roberts v. Allstate Life Insurance Co.*, 612 N.E.2d 103 (Ill. App. Ct. 3d 1993).

At the time of the accident, Respondent was beneath and in contact with the Pickup attempting repairs. The Pickup was struck by the uninsured motorist propelling the Pickup forward and coming in to contact with the Respondent. Respondent was not struck by the uninsured motorist. The movement and propulsion of the Pickup caused it to strike the Respondent causing his injuries. Respondent's injuries were not sustained by him striking a stationary vehicle. Instead, he was the recipient of the force causing the injuries from the Pickup.

The Court of Appeals concluded that Respondent was not "struck by" his unlisted Pickup because the "truck was a passive vehicle when the uninsured motorist ran into it." 81 S.W.3d at 461. However, it is undisputed that the truck's movement after being struck by the uninsured motorist was the direct and immediate causative force in Respondent's injuries. If, at the time the Pickup was struck from the rear, Respondent was standing in front of his Pickup and the vehicle surged forward injuring Respondent, it would be uncontested that Respondent sustained his injuries from being "struck by" the Pickup. The result should not change simply because Respondent was beneath and in contact with the Pickup at the time of impact. Similarly, it would not be disputed that Respondent was "struck by" his vehicle if the Pickup slipped into gear, surged forward, and caused the

Respondent's injuries. Under the plain language of the exclusion, Respondent was "struck by" his uninsured Pickup.

Respondent's injuries fall squarely within the scope of the plain language of an exclusion to both PIP and UM benefits. Respondent should not be permitted to recover for personal injuries suffered while being struck by a vehicle for which he had no insurance. This Court should grant Old American's petition for review and correct the Court of Appeals' error of refusing to hold that Respondent's injuries are excluded from coverage.

2. The Court of Appeals' Opinion Will Further Destabilize an Already Troubled Insurance Market.

In determining the validity of claims, insureds and insurers alike should be able to rely on the plain language of the exclusions in an automobile insurance policy. When insureds choose not to obtain insurance for a particular vehicle, insurers should not be exposed to potential liability when an insured seeks benefits for personal injuries related to the operation of that vehicle. The Court of Appeals' Opinion, which fails to apply the plain language of the exclusions as written, will cause uncertainty in assessing claims which may complicate the insurance crisis in Texas. Further, it may encourage insureds to make claims even though their claim is excluded by the plain language of their policy.

Here, Respondent made the conscious decision not to seek or obtain insurance of any kind for the Pickup. These exclusions preclude an insured from recovering benefits for personal injuries sustained while using a vehicle for which he did not pay premiums. The Court of Appeals erred by permitting Respondent to circumvent the plain language

of the exclusions and this Court should grant Old American's petition for review and correct this error.

PRAYER

WHEREFORE, Old American prays that this Court grant Old American's Petition for Review, reverse the Court of Appeals' Opinion on any or all of the grounds discussed above, render judgment in favor of Old American and grant any and all further relief to which Old American is justly entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was forwarded to counsel of record by certified mail, return receipt requested on this _____ day of May 2003.

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