NO. 129895
IN THE
SUPREME COURT OF ILLINOIS

MARK KUHN and KAREN KUHN, Plaintiffs-Appellants, v. OWNERS INSURANCE COMPANY, Defendant-Appellee, B. MCLEAN ARNOLD, Special Representative of RYAN HUTE, deceased; JASON FARRELL, Individually; JASON FARRELL, d/b/a JASON FARRELL TRUCKING; 3 GUYS AND A BUS, INC., KATHLEEN CRABTREE, Executor of the Estate of Charles C. Crabtree, deceased; STEVEN B. PRICE, JESS O'BRIAN; MONTINIQUE HOWARD; HALEY WILLAN; GRACE STORM, ABBY HOEFT, OLIVIA REED; KIRSTEN LELLELID, and JORIANA BISCHOFF, Defendants-Appellants.	Appeal from the Appellate Court, Fourth District Case No. 4-22-0827 There On Appeal from the Circuit Court for McLean, Illinois, Eleventh Judicial, Circuit, Case No. 2019 MR 000643, The Honorable Scott Kording, Presiding

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS AND
STATEMENT OF POINTS AND AUTHORITIES

Page

Page

Page

I. INTRODUCTION

At the end of its "Introduction" in its Response Brief, Owners rhetorically asked: "To put it most starkly: would an insured entering into this Policy believe that if she got into an accident with one of the seven autos insured under the Policy . . . she was entitled to the coverage limit of not only the vehicle involved in the accident but the six other autos?" (Appellee's Response Brief, p 3). If, as here, the declaration pages list $1 million liability limits for each of the seven insured vehicles with seven separate premiums for each, the Supreme Court has emphatically answered this question "Absolutely, Yes":

> There would be little to suggest in such a listing that the parties intended the coverage was to be limited to that provided for only one of the two [vehicles]. It ***would be more reasonable*** to assume that the parties intended that, in return for the two premiums, two $100,000 coverage amounts were afforded.

Bruder v. Country Mutual Insurance Co., 156 Ill. 2d 179, 192; *see also Hess v. Estate of Klamm*, 2020 IL 12649, ¶22 ("it would not be difficult to find an ambiguity arising from a declarations page that lists the liability limits separately for each covered vehicle") and *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 21 (2005) (same). This is not just a "reasonable interpretation," but is in fact the "more reasonable" interpretation of the policy. *Bruder*, at 192. And this is true despite an "anti-stacking" clause which expressly seeks to limit its payment in "any one accident " to the limit "shown in the declarations . . . regardless of the number of autos insured." *Bruder*, at 194.

Owners never, we repeat, never acknowledges this fact in its forty-seven-page Response. It fails to acknowledge that its declaration pages fall directly within the *dicta* enunciated by this Court in *Bruder* and reaffirmed in *Hobbs* and *Hess*. It further fails to acknowledge that there are no less than eight subsequent Appellate Court Decisions that have expressly followed the *Bruder dicta* and held that where the declarations clause lists

limits of liability separately for each of several insured vehicles, the policy can reasonably be interpreted to provide multiple limits of liability which can be aggregated, notwithstanding an anti-stacking provision. *See*, *Pekin Ins. Co. v. Est. of Goben*, 303 Ill. App. 3d 639, 647 (5th Dist. 1999); *Yates v. Farmers Auto. Ins. Ass'n*, 311 Ill. App. 3d 797 (5th Dist. 2000); *Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 425 (5th Dist. 2001); *Johnson v. Davis*, 377 Ill. App. 3d 602, 609 (5th Dist. 2007); *Progressive Premier Ins. Co. of Illinois v. Kocher,* 402 Ill. App. 3d 756, 761 (5th Dist. 2010); *Bowers v. Gen. Cas. Ins. Co*., 2014 IL App (3rd) 130655, ¶11; *Cherry v. Elephant Ins. Co., Inc*., 2018 IL App (5th) 170072 ¶¶14-16, 21; *Barlow v. State Farm Mut. Auto. Ins,* 2018 IL App. (5th) 170484, ¶17.

Owners fails to address these undeniable facts because it cannot refute them. Without a doubt, the Owners' Policy lists $1 million liability limits seven times for each of the seven vehicles insured under the policy. Its anti-stacking provision, like all of those in the appellate court decisions allowing stacking, refers the reader to the declarations sections to determine the limit of insurance. Under this language, this Court has unambiguously stated it is "more reasonable" to assume that the parties intended that, in return for the seven premiums, seven $1 million coverages are afforded.

Illinois law of insurance interpretation has long followed the benevolent rule that all doubts regarding coverage shall be resolved in favor of the insured. *Squire v. Economy Fire & Casualty Co*., 69 Ill. 2d 167, 179 (1997)("limitations [to coverage] must be construed liberally in favor of the insured, and most strongly against the insurer"). It is up to the insurer to "draft intelligible contracts," *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 396 (2005), and the fault for a poorly written insurance clause falls upon the drafter. *Cherry v. Elephant Insurance Co*., 2018 IL App (5th) 170072 at ¶12.

Here, Owners could have easily avoided any issue of stacking by simply following the thirty years of precedent from *Bruder, Hobbs* and *Hess:* only list the liability limits one time in the declarations section. Instead, it chose to list its limits multiple times for each of the vehicles insured despite the thirty years of precedent warning against it. It must accept the consequences of its poor drafting. As the trial court here noted:

> *Bruder* was . . . a very clear warning flag to the unwary insurer. In the caselaw that has emerged since *Bruder*, the fundamental principle of its *dicta* has been repeatedly stressed: For an antistacking clause to have effect, the declarations in automobile insurance policies must not be structured in a way that could be read as separately listing insurance limits on a per-vehicle basis. (A.63; Opinion at p.38).

Owners' anti-stacking clause refers the reader to the declaration pages for its "limits of liability." The declaration pages contain multiple sections, refers to additional coverages, and list limits of liabilities seven times each for the seven vehicles insured. The Supreme Court has said, and thirty years of appellate courts have so ruled, that such creates the reasonable expectation of seven separate limits that may be aggregated. Any other conclusion ignores this controlling precedent.

II. OWNERS CANNOT AVOID *BRUDER* AND ITS PROGENY

In its response, Owners constantly asserts that Appellants are championing - contrary to Supreme Court pronouncement - a "*per se*" rule for applying *Bruder's dicta*. Of course, nowhere in Appellants' Brief do we assert that *Bruder* created a "*per se*" rule of ambiguity. Indeed, Appellants' Brief sets out in quotes this Court's discussion in *Hess* and *Hobbs* that there is no *per se* rule. (Appellants' Brief at p.33). Likewise, Appellants in no way suggest, as Owners asserts, that this Court should only look at the declarations page in isolation and not in conjunction with the anti-stacking clause. Indeed, it is the anti-stacking clause in Owners policy that refers the reader to the declarations pages to

determine what the "limit of insurance" is. (A122). It is reading these two sections of the policy together which causes the ambiguity - one listing seven separate $1 million limits of insurance and the other stating that those "combined liability limits" are the most it will pay regardless of the number of vehicles, accidents or insured involved.

To state it plainly, there is no *per se* rule of ambiguity. The terms of every policy must be analyzed and read as a whole as it applies to the facts of each case. However, the Court cannot ignore clear precedent or ignore the application of factually analogous cases that have ruled on the issue. In *Hess*, this Court reviewed the thirty years of precedent on this issue and summarized the current state of the law:

> Thus, according to *Bruder*, if the liability limit is listed only once, it is reasonable to conclude that the policy provides only that amount of coverage per person, regardless of how many vehicles are listed and how many separate premiums are paid. *Id*. at 194. . . . "[However] . . . [i]t would not be difficult to find an ambiguity" if the policy listed individual liability limits for each covered vehicle. *Id.* at 192. We reasoned that, if there were a separate limit listed for each vehicle on the declarations page, there would be little to suggest that the parties intended to limit coverage to the amount provided for only one of the vehicles. *Id.* Rather, "[i]t would be more reasonable to assume that the parties intended that, in return for the two premiums, two $100,000 coverage amounts were afforded." *Id.*
> . . .
> [In *Hobbs*] this Court reiterated that it would not be difficult to find an ambiguity arising from a declarations page that lists the liability limits separately for each covered vehicle. *Id. Hess, supra*, 2020 IL 124649 ¶¶20, 22.

This Court then went on to note that appellate courts have specifically allowed stacking in just that circumstance set forth in the *Bruder dicta:*

> Both [*Cherry v. Elephant Insurance Co.*, and *Johnson v. Davis*] allowed stacking of underinsured motorists coverage in a multivehicle policy. *Cherry*, 2018 IL App (5th) 170072, ¶¶ 20, 31; *Johnson*, 377 Ill. App. 3d at 609. In contrast to the policy in this case, . . . the policies in *Cherry* and *Johnson* listed the liability limits separately for each covered vehicle. *See Cherry*, 2018 IL App (5th) 170072, ¶ 20; *Johnson*, 377 Ill. App. 3d at 609. Based on this fact, the courts concluded that a reasonable person could believe that the policy provided coverage in an amount totaling the limits listed for all covered vehicles. *See Cherry*, 2018 IL App (5th) 170072, ¶ 31 ("we find that the plaintiffs could reasonably conclude that Richard

> Cherry had purchased $50,000 of underinsured benefits four times, resulting in $200,000 of underinsured motorist coverage for each plaintiff"); *Johnson*, 377 Ill. App. 3d at 610 ("the circuit court's decision granting Johnson $200,000 in underinsured-motorists coverage, a figure arrived at by aggregating the $50,000 limit for underinsured-motorists coverage on each of the four vehicles carrying that coverage in Johnson's insurance policy, was correct"). *Hess,* 2020 IL 124649 ¶26.

As *Hess* states, the above is not a "*per se*" rule anytime the declarations pages list the limits "more than once." As set forth in our primary brief, *Hess* draws the distinction between listing limits "more than once" and "for each insured vehicle." It stated:

> [While in *Hobbs* we said] it would not be difficult to find an ambiguity arising from a declarations page that lists the liability limits separately ***for each covered vehicle***. . . . this should not be construed as "establishing a *per se* rule that an insurance policy will be deemed ambiguous as to the limits of liability anytime the limits are noted ***more than once*** on the declarations." *Hess* at ¶22 (emphasis added).

The crucial distinction the Supreme Court was making in *Hess* was that while the declarations in that case may have listed the limits "more than once," the limits ***were not*** listed separately "***for each car insured****":*

> [I]t is clear that the deciding factor in both [*Hobbs* and *Bruder*] was whether the liability limits were listed separately **for each of** the covered vehicles, **not** whether they were listed **"twice."** *Hess*, at ¶27 (emphasis supplied).

It was on this explicit basis that *Hess* approvingly distinguished the appellate court cases that allow stacking:

> [*Cherry* and *Johnson*] allowed stacking of underinsured motorists coverage in a multivehicle policy. ***In contrast to the policy in this case,*** however, the policies in *Cherry* and *Johnson* listed the liability limits ***separately for each*** covered vehicle. *Hess,* at ¶26 (emphasis supplied).

Hess stands as the example of when listing of limits "more than once" will not result in a reasonable expectation of multiple coverages. So, while each case must be assessed based on the specific policy language employed, the parties and the courts must do so in light of Supreme Court decisions on the issue as well as analogous appellate court

decisions. Here, the current state of the law is that listing the limits of liability and premiums for each vehicle insured, as in *Cherry* and *Johnson*, (and in *Goben, Yates, Skidmore, Kocher, Bowers* and *Barlow*) creates the reasonable expectation that multiple limits are available for a single loss.

III. THE PRE-*HOBBS* CASE OF *STRIPLIN* DOES NOT APPLY AND IS OF QUESTIONABLE VALIDITY

Owners cites the case of *Striplin v. Allstate Insurance Co*, 347 Ill.App.3d 700 (2nd Dist. 2004), to support its no "*per se*" rule of ambiguity. In this pre-*Hobbs* case (*i.e.*, cases decided before the Supreme Court reiterated the vitality of the *Bruder dicta*), the Second District held that a specific policy provision (not applicable here) prohibited the stacking of coverages. There, a passenger in the defendant's vehicle died in a crash. After the at-fault carrier paid its $50,000 liability limits to the passenger's estate, the estate sought to recover underinsured motorist coverage under a policy issued to the passenger's parents which insured two vehicles, each with $100,000 per person UIM limits. The policy had two separate declarations pages, one for each vehicle. Each separate declarations page apparently listed $100,000 per person in UIM limits for the vehicle listed in that declarations page. The estate sought to "stack" both $100,000 UIM limits listed in the two separate declarations pages. Again, neither auto was involved in the collision.

The court in *Striplin* reviewed the *Bruder dicta* and the decisions that had applied it to date. The court was critical of the *Yates* and *Goben* decision, suggesting that they appear to be creating a *per se* rule. *Striplin* 347 Ill.App.3d at 703, but approvingly cited to *Hall v. General Casualty Co. of Illinois*, 328 Ill. App. 3d 655 (5th Dist. 2002) suggesting it was the better application of *Bruder. Id.,* at 704. The irony of this, of course, is that the Supreme Court in *Hobbs* overruled *Hall* as the improper application of *Bruder* but affirmed

Yates as the proper application of *Bruder*. *Hobbs, supra*, 214 Ill.2d at 24-25, 27. While the court in *Striplin* conceded that under the caselaw "the listings of multiple liability limits may create an ambiguity," 347 Ill.App.3d at 704, it ultimately found that no stacking was allowed due to a specific policy provision not applicable here or in *Bruder*:

> The [anti-stacking] provision goes on to explain what happens in the precise situation that occurred here: "If none of the *autos* shown on the policy declarations is involved in the accident, the highest limits of liability shown on the policy declarations for any one *auto* will apply." *Striplin*, 347 Ill.App.3d at 705.

Accordingly, under this precise language of the policy, the court limited the plaintiff to the highest UIM limit as shown on the declarations for any one auto - $100,000. *Id*. There is no similar specific limitation in Owners policy. Owners policy could have but does not limit coverage to "only the limits listed for the automobile involved in the accident." Instead, it uses confusing terms like "combined liability limit" and "combined liability limits" and does ***not*** specify that no coverage is available to autos which are not involved in the accident.

Aside from this factual distinction from *Striplin*, it is fair to question the continued vitality of this early post-*Bruder* decision. As noted, *Striplin* took a limited view of the *Bruder dicta* and was critical of *Yates* and *Goben*. As we know, *Hobbs* re-affirmed the *Bruder dicta* and considered both *Yates* and *Goben* as proper applications of the *Bruder dicta*. This concept was re-affirmed yet again in *Hess*. On the other hand, *Striplin* has never been cited by the Supreme Court substantively on this issue of stacking. Hence, the continued vitality of the *Striplin* court's analysis of *Bruder* and its progeny is questionable.

IV. THE PRE-*HOBBS* CASE OF *RITTER* HAS BEEN EFFECTIVELY OVERRULED

Owners also cites to the pre-*Hobbs* case of *Pekin Ins. Co. v. Estate of Ritter*, 322 Ill. App. 3d 1004 (4th Dist. 2001). Perhaps nothing better shows the Trial Court's fair and sincere attempt at reaching the correct decision than its treatment of this early post-*Bruder* case. As the Trial Court noted, in the early period after the *Bruder dicta*, the Fourth District decided *Ritter* in a manner which openly disagreed with *Goben* and *Yates*, and implicitly if not explicitly disagreed with the *Bruder dicta*. (Opinion, pp 49-51; A74-76).

In *Ritter*, the declarations page was formulated in a grid pattern and showed UIM limits and premiums separately for each of two cars. It contained an anti-stacking clause not much different than that in *Bruder.* Plaintiffs relied on the *Bruder dicta* as adopted in *Goben* and *Yates* to assert the declarations should be reasonably be interpreted to include two limits that may be aggregated. The *Ritter* court summarily rejected this argument and criticized *Goben* and *Yates* for relying on the "*obiter dictum*" of *Bruder*. 322 Ill. App. 3d at 1005. The court stated, **in direct contradiction to *Bruder's dicta***, (without actually addressing the *Bruder dicta*), that listing the limits more than once in the declarations does not render the policy ambiguous or give rise to a reasonable anticipation of multiple coverages. *Id.* And, even if it did, the court in *Ritter* continued, the anti-stacking provisions cleared up any confusion. *Id*. In other words, *Ritter* simply disagreed with the Supreme Court's statement in *Bruder*, re-affirmed again in *Hobbs* and *Hess*, that when a declaration page lists more than one limit covering more than one auto, "it would not be difficult to find an ambiguity."

Even before the Supreme Court reaffirmed the *Bruder dicta* in *Hobbs*, the *Ritter* decision came under criticism. In *Moehring v. Allied Prop. & Cas. Ins. Co., 2001 U.S. Dist. LEXIS* (S.D.Ill.) *22367, ¶11,* the Court stated:

> *Ritter* is not persuasive to this Court, however, because it does not attempt to reconcile its decision with the *Bruder dicta* or other cases following that *dicta.* Instead, it dismisses it without substantive discussion. The *Bruder dicta* is a persuasive indication that the Illinois Supreme Court would differ from the *Ritter* court on this issue. Therefore, *Ritter* provides no guidance to this Court.

See also Bowers, supra, 2014 IL App (3d) 130655 ¶16 ("*Ritter* does not attempt to reconcile its decision with the *Bruder dicta* and fails to address language in the declarations page that lists more than one UIM coverage and more than one UIM premium. Accordingly, we are unpersuaded by its analysis"). Of course, as the Trial Court noted, since *Ritter* has been decided, *Hess* and *Hobbs* have both reaffirmed the vitality of the *Bruder dicta* as well as the soundness of the reasoning of *Yates, Cherry, Johnson* in adopting the *Bruder dicta.* That, and given the differences in both the declarations pages and the anti-stacking provisions of the Owners policy (as aptly described by the trial court, see Decision at 50-51; A75-76), all support the fact that *Ritter* does not accurately state the current law on the factual scenario stated in *Bruder dicta* and, at any, rate, is distinguishable from Owner's policy here.

Ironically, Owners' also cites the pre-*Hobbs* case of *Domin v. Shelby Ins. Co*, 326 Ill. App. 3d 688 (1st Dist. 2001) because the court there admitted, like *Ritter*, to having "some discomfort deciding a case on the basis of how many times the 'Limits of Liability' figure appears on a piece of paper – here the Declarations page." 326 Ill.App.3d at 697. Owners failed to include the very next sentence of the decision: "But that is where the cases, especially the *Bruder dicta,* take us. That is where we shall remain until instructed

otherwise." *Id*. So, that is where the current authority has "taken us," and, in contradiction to *Ritter*, that is where we remain.

V. OWNERS' CITES TO THE WRONG 7TH CIRCUIT DISCUSSION ON THIS ISSUE

Both the Fourth District and Owners cite at length to the inapposite decision of *Grinnell Select Ins Co v. Baker,* 362 F.3d 1005 (7th Cir. 2004) but never once cite the factually on-point decision of *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 465 (7th Cir 1995). In *Allen*, the 7th Circuit was faced with the exact factual scenario set forth in the *Bruder dicta*: the policy's declaration page listed limits multiple times for each insured vehicle in the face of an otherwise clear anti-stacking clause. The court held:

> The *Bruder dicta*, . . . addresses the precise factual scenario before us, in which we must consider the schedule in conjunction with the declarations page.
>
> As a court sitting in diversity, we have a duty to attempt to predict the actions of the Illinois Supreme Court. Accordingly, we must pay close attention to the *Bruder dicta*, as it persuasively indicates how the Illinois Supreme Court would rule in this case and as it is dispositive of this issue. **The *Bruder dicta* predicts that the Illinois Supreme Court would find the anti-stacking clause ambiguous when viewed in conjunction with the columnar arrangement of the declarations page and would therefore rule in favor of coverage**. *Allen*, 128 F.3d at 467, (emphasis added).

This succinct analysis was ignored by the Fourth District here as well as Owners in its brief. Instead, both rely on *Grinnell.* But *Grinnell* does not involve the scenario set forth in the *Bruder dicta*. The limits of liability were only listed one time in the auto policy. *See, Grinnell Select Ins. Co v. Baker*, 2003 U.S. Dist. LEXIS 28956 (S. D. Ill 2003). As such, the primary holding of *Bruder* controlled – the single listing of liability limits in the declaration page created no expectation of multiple coverages and therefore no ambiguity

and no conflict with the anti-stacking clause. Indeed, *Grinnell* did not cite the *Bruder dicta* at all.[1] As such, the holding of *Grinnell,* has no application to the facts of our case.

Grinnell is noteworthy for Judge Esterbrook's gratuitous jab at the Fifth District Illinois appellate court. In criticizing the Fifth District (e.g., "As far as we can tell, it stands alone among the 50 state judicial systems" in allowing stacking), the court boldly asserts that "we could not find any decision outside the Fifth District allowing stacking." 362 F.3d at 1007. Putting aside their failure to find Illinois Supreme decisions which have allowed stacking, such as *Squire*, *supra*, the *Grinnell* court failed to "find" its own Seventh Circuit precedent in *Allen*, *supra*, which expressly involved the *Bruder Dicta* and is directly on point here. Of course, after *Grinnell* was decided, the Illinois Supreme Court approved of the holdings in the very cases *Grinnell* criticized. (*See*, *Hobbs, supra*, and its favorable treatment of *Johnson* and *Yates)*. *Grinnell* is neither factually on point to our case nor is it an accurate statement of Illinois law on the issue of stacking.

VI. GRINNELL'S DISAMBUGATOR ARGUMENT IS NOT AN ACCURATE APPLICATION OF ILLINOIS LAW TO *BRUDER'S DICTA* AND ITS PROGENY

The reason Owners (and the Fourth District) cite *Grinnell* is that Judge Easterbrook sets forth his "disambugator" theory for anti-stacking clauses. 362 F.3d at 1007. This term is not from Illinois case law. It is of his own making. Judge Easterbrook asserts (without citing to any authority) that the anti-stacking clauses "clears up" any ambiguity created by the declaration page. The Fourth District here relied upon this descriptor, asserting that in this case the anti-stacking clause "clears up any possible confusion." 2023 IL.App. (4th)

[1] *Grinnell* also relied upon *Grzeszczak v. Illinois Farmers Ins* 168 Ill.2d 216 (1995) which, similarly, only involved the listing of limits one time in the declaration page. Hence, it likewise did not involve the scenario set forth in the *Bruder dicta*.

220827, ¶65; A21). However, in the context of the ambiguity created by the multiple listing of liability limits in the declarations (i.e., *Bruder's Dicta*), this is simply an erroneous statement. It is absolutely clear under *Bruder* and its progeny that an otherwise unambiguous anti-stacking clause which refers the reader to the declarations pages for the limits of liability can become ambiguous where the declarations list limits multiple times.

In *Bruder*, this Court specifically identified the issue was whether the declaration page ***renders*** the anti-stacking clause ambiguous:

> The declarations of Country Mutual's business auto policy include reference to both of the pickup trucks for which the policy was issued and for which separate premiums were paid. ***The question is whether the meaning of the provision limiting liability [i.e., the anti-stacking clause] is ambiguous in light of that fact.***
> . . .
> ***It would not be difficult to find an ambiguity created by such a listing of the bodily injury liability limit for each person insured.*** *Id.*, at 191, 194 (emphasis added).

The bolded language is absolutely crucial to this Court's analysis: the Court will look to the declaration page to determine if the anti-stacking clause is rendered ambiguous. And the question is answered, "yes" if the declaration page lists limits of liability multiple times for each insured vehicle. *Id*. This is precisely how the subsequent decisions addressed the issue. The anti-stacking clause in *Allen, supra,* was as follows:

> The limit of liability shown in the Schedule or in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Schedule or in the Declarations for each accident for Underinsured Motorists Coverage is our maximum limit of liability for all damages for "bodily injury" resulting from any one accident. This is the most we will pay regardless of the number of:
> 1. "Insureds;"
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident. *Allen*, 128 F.3d at 464.

The court noted that in isolation, the "anti-stacking" clause was unambiguous:

> There is no ambiguity in this language, read alone. Illinois courts have held similar provisions to be unambiguous and sufficient to prevent the stacking of coverage when one policy covers multiple vehicles. *Allen*, 128 F.3d at 465.

However, the court noted that, like Owner's policy here, the "anti-stacking" provision referred the reader to the declarations pages, hence requiring an inquiry into what limits were listed in the declarations. Given the declaration's multiple listing, in column-form, of separate liability limits for each of the two cars insured, the court concluded that the case fell factually directly within the scenario set forth in the *Bruder dicta*, which converted the otherwise clear anti-stacking clause into an ambiguous one:

> The *Bruder dicta* predicts that the Illinois Supreme Court would find the anti-stacking clause ambiguous when viewed in conjunction with the columnar arrangement of the declarations page and would therefore rule in favor of coverage. *Allen*, 128 F.3d at 467.

Yates reached a similar result. In *Yates*, two vehicles were listed in the declarations page with separate liability limits of $100,000 and premiums listed for each vehicle. The policy at issue contained the following anti-stacking language in its UIM endorsement:

> LIMIT OF LIABILITY
> a. The limit of liability *shown in the Declarations* for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:
> 1. 'Insureds,'
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident." *Yates*, 311 Ill.App.3d at 799-800.

Citing *Bruder*, the court concluded that the declarations and "anti-stacking" provisions were contradictory, rendering the policy ambiguous. Importantly, far from "clearing up" any ambiguity created by the declarations pages, the anti-stacking clause's inconsistency with the declarations is what rendered the policy ambiguous. *Yates* 311 Ill.App.3d at 800.

In *Domin, supra,* a case cited approvingly as correctly decided by *Hobbs*, the court recognized how in both *Allen* and *Yates* the declaration pages made an otherwise clear anti-stacking clause ambiguous:

> In *Allen*, and again in *Yates*, it was the Declaration page of the policy that turned a clear anti-stacking provision into ambiguity. That is, the Declarations page in each policy listed the amount of maximum liability coverage separately for each vehicle. *Domin*, 326 Ill. App. 3d at 696.

Subsequent appellate court decisions likewise have held that otherwise clear "anti-stacking" clauses are not sufficient to overcome the ambiguity created in a declarations page which list limits of liability more than once for each of the multiple insured autos:

> The ambiguity created by printing multiple limits on the declarations page is not cured by language prohibiting the combining of *coverages* and not the *limits of liability*. " *Cherry, supra*, 2018 IL App 170072, ¶22.

See also, *Barlow, supra* 2018 IL App. 170484 at ¶18 ("when the contents of the body of the policy conflict with the language on the declarations pages, an ambiguity exists that must be construed in favor of the insured"). *Cherry* was cited approvingly by the Supreme Court in *Hess*, indicating it is a proper application of the *Bruder dicta.*

Even *Kovach v. Nationwide Gen. Ins. Co,* 475 F.Supp.3d 890 (C.D.IL 2020), the federal district court case upon which the Fourt District here principally relied, recognized that *Grinnell* 's "disambugator" argument has turned out to be wrong:

> Since *Grinnell*, the Illinois Supreme Court has found that an identical wording of a limited liability clause is not enough, on its own, to dispel all ambiguity from a policy with certain constructions of a declaration page. *Kovach, supra,* at *896-897.*

Owners implies that this court in *Hess* and *Hobbs* adopted the disambugator argument. (Owners' Brief at 31, including fn 10). This misrepresents both *Hess* and *Hobbs*. Nowhere does either decision use that term. While *Hobbs* did cite *Grinnell*, it did so on a completely different issue than that involving the *Bruder dicta*. After concluding that the

declaration pages in *Hobbs* did not create an ambiguity of multiple coverages as set forth in the *Bruder dicta* (the declaration did not list limits separately for each vehicle insured, and hence no ambiguity as in *Bruder's dicta* and in *Yates*) (*Hobbs* at 19-21, 24-25), the court went on to analyze another argument for stacking raised by the plaintiffs: that the declarations page contained the following term: "COVERAGE IS PROVIDED WHERE A PREMIUM AND LIMIT OF LIABILITY ARE SHOWN." *Hobbs* at 22-27.

This Court in *Hobbs* ruled that such did not create an ambiguity, expressly overruling *Hall, supra*. *Hobbs* at 26-27. The Court cited *Grinnell* to support this finding (*Hobbs* at 27) because *Grinnell* likewise dealt with the issue of whether the clause "COVERAGE IS PROVIDED WHERE A PREMIUM AND LIMIT OF LIABILTY ARE SHOWN" rendered the anti-stacking clause ambiguous. *Grinnell, supra* at 1007. Similarly, *Hess* cites to *Hobbs'* treatment on this issue, (*Hess* at ¶28) when likewise rejecting the same argument that such provision creates an ambiguity which conflicts with the anti-stacking clause. *Id.* Neither *Hess* nor *Hobbs* stand for the proposition that the ambiguity addressed in the *Bruder dicta* is "cleared up" by an anti-stacking clause. (*See Hobbs* at 25, noting that the multiple listing of liability limits in *Yates* is what made the policy ambiguous and stackable, distinguishing it from *Hall* and *Hobbs*).

To be clear, where the declarations do not list the limits separately for each insured vehicle, the decisions are uniform that the declarations clause does not create an ambiguity and the clear anti-stacking clause is not rendered ambiguous. That was the situation in *Grinnell.* That is not the situation here. That was not the situation in *Allen, Goben, Yates, Skidmore, Johnson, Kocher, Bowers, Cherry* or *Barlow*. As set forth in the *Bruder dicta*, and in each of these decisions, where the anti-stacking clause refers the reader to the

declarations pages to determine the limit of coverage or insurance, and the declarations pages list the policy limits multiple times for each insured vehicle, the declarations clause creates an ambiguity with the anti-stacking clause requiring a construction that favors the insured. That is what these cases teach us and that is the current state of law.

VII. OWNERS MISAPPLIES THE EXPLICIT V. GENERAL ANTI-STACKING CLAUSES

In its Appellee's Brief, Owners adopts, for the first time, the point that its policy contains both a "traditional" anti-stacking provision, (Section II(C)(1)) and an "explicit" anti-stacking provision (Section II(C)(5)). This, obviously, is because the Fourth District interpreted its policy this way. (See A22, ¶66,67). The Fourth District did not cite any Illinois authority for this alleged dichotomy. Moreover, *Skidmore, supra,* (which allowed stacking of liability coverage), indicates that Owners and the Fourth District have it backwards. Because Section II(C)(1) and ***not*** II(C)(5) refers the reader to the declarations to determine the limit of liability, it is the more specific and controlling provision:

> Safeco also attempts to distinguish this case from all of the others on the basis that its policy contained a separate, more specific antistacking clause in . . . the policy. That clause reads as follows: "If this policy insures two or more autos or if any other auto insurance policy issued to you by us applies to the same accident, the maximum limit of our liability shall not exceed the highest limit applicable to any one auto." . . . [T]his is only a general provision, whereas the other antistacking clause, which incorporated the particular declarations sheet, is a more specific provision. When a contract contains both specific and general provisions relating to the same subject, the specific provision controls. *Skidmore* at 425-426

Moreover, what Owners and the Fourth District call the "explicit" anti-stacking clause - Section II(C)(5) - contains language but little different than those where the appellate courts have allowed stacking. (See Appellants' Brief, at 26-28). This dichotomy of "traditional" v. "explicit" anti-stacking clauses comes from Judge Easterbrook's discredited decision in *Grinnell* which described "explicit" anti-stacking clause as one

which states: ”This is the most we will pay regardless of the number of: 1. "Insureds"; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident.” *Grinnell,* 362 F.3d at 1006. Comparing this alleged “explicit” anti-stacking clause with Owners’ II(C)(5) and the anti-stacking cases which have allowed stacking, they all say the same thing: the limits of insurance coverage shown in the declarations will not be increased, stacked or added together regardless of the number vehicles insured, premiums paid etc. There might be slightly different ways of saying it, but they all say the same thing. Indeed, the anti-stacking clause in *Cherry, supra*, of “no combining” coverages language is similar to that in the Owners Policy. The decision in *Cherry* – a case cited approvingly by *Hess* as the proper application of the *Bruder Dicta* – could not have stated it more clearly:

> “[A]lthough we recognize that the policy has specific antistacking language stating that ‘[t]here will be no stacking or combining of coverage afforded to more than one auto under this policy,’ this clause does nothing to cure the ambiguity created by its limit of liability clause combined with the multiple listed limits on the declarations page.” *Cherry,* 2018 IL App 170072, ¶22.

VIII. OWNERS’ HAS FORFIETED THE ISSUE OF WHETHER LIABILITY COVERAGE IS STACKABLE

In its reply brief before the Fourth District, Owners raised the issue, for the first time, of whether principles of stacking should even apply to liability insurance (as opposed to UM and UIM coverage). While Owners explicitly conceded that it was not asserting a “*per se*” rule in this regard, its Reply brief in essence asserted that stacking has no application to liability insurance. (Owners Reply Brief, pages 12-20). Owners now asserts that it did not “forfeit” the “issue” because it was merely “argument” as to why stacking should not apply in this case. Supreme Court Rule 341(h)(7) specifically prohibits a party from raising “a point” in its Reply that was not address in its initial brief:

> Points not argued [in Appellant's Brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Moreover, in *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.* 2015 IL 118372, this court noted that "issues" not raised (as opposed to arguments) are forfeited:

> Issues not raised in either the trial court or the appellate court are forfeited. The purpose of this court's forfeiture rules is to encourage parties to raise issues in the trial court, thus ensuring both that the trial court is given an opportunity to correct any errors prior to appeal and that a party does not obtain a reversal through his or her own inaction. Defendant did not present any argument in the trial court challenging plaintiff's use of the forcible entry and detainer remedy under section 9.2 of the Act. In fact, the issue was never raised until after the appellate court issued its decision [when] defendant filed a petition for rehearing raising the question for the first time. The trial court did not have an opportunity to consider and rule upon this question. Defendant, therefore, forfeited this issue by failing to timely raise it in the trial court. *Id.* at ¶¶14-15 (citations omitted).

Likewise, here, Owners never raised this issue or "point" at the trial court level. The trial court never had an opportunity to address it. Indeed, Owners likewise failed to raise the issue or point in its Appellant Brief before the Fourth District. Hence, Plaintiffs never had an opportunity to address it before the appellate court. Instead, Owners impermissibly raised the issue for the first time in its reply brief in contradiction to Rule 341(h)(7). There can be no doubt that Owners has forfeited the issue. Even if it had not forfeited the issue, it expressly conceded the issue by stating "Owners does not ask this Court to adopt a *per se* rule that primary liability limits can never be stacked." (Appellant Owners Insurance Company's Reply Brief, Fourth Judicial District, p.12).

Aside from the forfeiture of the issue, Owners argument regarding the distinction between liability insurance and UM/UIM insurance rings hollow. The Illinois legislature mandates both types of coverage for any auto policy issued in Illinois, *See* 625 ILCS 5/7-601 and 215 ILCS 5/143a-2 and the public policy underlying both coverages are the same:

> [U]nder Illinois law, liability, [UM and UIM] coverage are "inextricably linked." Liability, uninsured motorist, and underinsured motorist coverages all "serve the same underlying public policy: ensuring adequate compensation for damages and injuries sustained in motor vehicle accidents." *Thounsavath v. State Farm Mut. Auto. Ins. Co*. 2018 IL 122558 ¶26, *quoting Schultz v. Illinois Farmers Ins,* 237 Ill.2d 391, 404 (2010).

Owners identifies no legitimate reason why stacking should be allowed for one type of coverage (UM/UIM) but not the other (liability). The dichotomy that coverage follows "the auto" verses "the person" does not hold up to analysis. Both liability coverage and UM/UIM coverage follow both the person *and* the auto. As for liability coverage, coverage follows the insured person whenever he or she operates any auto, be it a vehicle covered under the policy, a friend's vehicle or even a rental vehicle. Liability coverage also follows the autos insured under the policy, providing coverage for any person operating them. It is similar for UM/UIM coverage: coverage follows the insured person (wherever he or she is located), and follows the insured auto, providing UM/UIM coverage for all occupants.

Given the similar nature of both liability and UM/UIM coverage, there is no reason why the public mandate of one (UM/UIM) should allow for stacking but the public mandate of the other should not (liability). Owners has not articulated a reason why that should be the case. While Owners notes that there are jurisdictions which prohibit stacking of liability coverage on that basis, (Owners Appellee Brief at 45-46), other well-recognized authorities assert that this concept is "out molded," *See 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance,* §169.109. Moreover, Illinois is one of those states that has allowed stacking of liability coverage. *Skidmore, supra,* at 425. Other jurisdictions allow stacking of liability coverage. *Goodman v. Allstate Ins. Co*, 523 N.Y.S.2d 391 (NY App.Div. 1987); *Shelter Mut. Ins. Co. v. Lester, 544 S.W.3d 276* (Mo.App. 2018); *Karscig v. McConville*, 308 S.W.3d 499 (Mo. 2010). While this may be the "minority view",

Illinois courts are not averse to rejecting the "majority views" adopted by other jurisdictions. *See Glidden v. Farmers Auto. Ins. Ass'n,* 57 Ill. 2d 330, 335 (1974)(Illinois does not follow "majority view" on construing "other insurance" clauses in UM/UIM cases). Moreover, allowing stacking of both liability and UM/UIM coverage is consistent with Illinois' strong public policy of providing broad protection for parties injured by negligent motorists and the liberal construction to be given ambiguous insurance contracts.

Ultimately, whether the liability limits of a policy can be "stacked" or "aggregated" depends on the specific language of each policy, not whether its UM, UIM or Liability coverage involved. *Kopier v. Harlow*, 291 Ill. App. 3d 139, 143 (2nd Dist. 1997)("Nevertheless, we must still examine the policy language because each case turns on the particular language used"). Just as listing the dollar limits for each insured vehicle allows for the stacking of UM/UIM limits, so too does it for liability coverage. As the court in *Skidmore* stated:

> The reasoning of the Illinois Supreme Court in *Bruder* cannot be limited to [UM or UIM coverage] and must be applied in situations involving identical policy language located elsewhere in the policy. *Skidmore supra* at 425.

Bruder's Dicta controls this case. Owners' policy falls directly within the terms of the *Bruder dicta,* giving rise to the "reasonable interpretation" that for seven separate premiums, seven $1 million limits of liability coverages are provided.

CONCLUSION AND REQUESTED RELIEF

This Court should reverse the Fourth District Appellate Court decision and affirm the August 15, 2022 Decision and Order of the Trial Court in all respects, affirming that summary judgment be granted in Appellants' favor and against Owners.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315, 341(a) and (b) and 342. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 341(a) is 20 pages.

Date: January 9, 2024

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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned being first duly sworn, deposes and states that on January 9, 2024, there was electronically filed and served upon the Clerk of the above Court Appellants' Reply Brief of Appellants Mark and Karen Kuhn, Kathleen Crabtree, Executor of the Estate of Charles Crabtree, Steven B. Price, Jess O'Brian, Montinique Howard, Haley Willan, Grace Storm, Abby Hoeft, Olivia Reed and Joriana Bischoff. Service of Appellants Brief and Appendix will be accomplished through the filing manager, Odyssey eFileIL and via email to the following counsel of record on the 9th day of January, 2024.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersign certifies that the statements set forth in Notice of Filing and Proof of Service are true and correct.

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