IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

PAUL LERO & CAROLYN LERO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 09CA-CV00669**
	)	
ADAM P. MACE, and	)	
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY

Pursuant to Mo. R. Civ. P. 74.04, Plaintiffs Paul and Carolyn Lero (hereinafter the "Leros") respectfully move this Court for an order entering summary judgment in their favor and against Defendant State Farm Fire and Casualty Company ("Defendant State Farm") finding that Umbrella Policy 25-BB-N742-4 (hereinafter the "Umbrella Policy") provides for uninsured motorist coverage since uninsured motorist coverage falls within the definition of coverage contained in the Umbrella Policy. If anything, the Umbrella Policy is ambiguous which also supports a finding in favor of the Leros.

INTRODUCTION

The Leros and defendant State Farm have already briefed the issue of coverage in Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment and Plaintiffs' Opposition to Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment. The Leros are filing their own motion asking the Court to recognize that the Umbrella Policy provides for uninsured motorist coverage and offer the following summary

of where the case is at.

Paul and Carolyn Lero filed a claim against defendant State Farm to recover monies under the umbrella policy it sold their daughter, Denise Greene. Statement of Uncontroverted Facts ¶ 1, 2 (hereinafter "SOF"). Denise Greene died after her car collided with a gold colored Toyota driven by Adam Mace. SOF ¶ 3. The Toyota had been negligently entrusted to Adam Mace by Robert Lyons who was uninsured for a negligent entrustment claim. SOF ¶ 4. On January 7, 2010, a judgment was entered against Robert Lyons for the negligent entrustment of a dangerous instrumentality for $2,000,000. Defendant Robert Lyons was not insured for a negligent entrustment claim, and the judgment exceeded the policy limits of Denise Greene's uninsured motorist coverage. SOF ¶ 32, 33. Paul and Carolyn Lero requested defendant State Farm to cover the remainder of the judgment under the Umbrella Policy. SOF ¶ 6.

Defendant State Farm has denied coverage under the Umbrella Policy based solely on uninsured motorist coverage not being listed on the declarations page. SOF ¶ 7, 8. Defendant relied on the declarations page in both its denial letter dated May 29, 2009, and its motion for summary judgment. SOF ¶ 7, 8. The Leros pointed out in their opposition to defendant State Farm's motion for summary judgment that coverage does not depend on what the declarations page says. This Court should decide whether uninsured motorist coverage exists based on the definition of coverage in the Umbrella Policy. Looking at the definition of coverage in the Umbrella Policy, the policy clearly provides for uninsured motorist coverage. Defendant State Farm, knowing full and well that Missouri law mandates uninsured motorist coverage, failed to specifically exclude uninsured motorist coverage.

In its motion for summary judgment, Defendant State Farm relies on two provisions of the Umbrella Policy and the declarations page to support its position that there is no uninsured

motorist coverage under the umbrella policy. These provisions, however, do not meet defendant State Farm's burden for excluding mandatory coverage. If anything, the provisions make the policy ambiguous which supports a finding in favor of the Leros.

DISCUSSION

A. Summary Judgment Standard

The purpose of summary judgment is to identify claims where there is no issue of material fact and the moving party has a legal right to judgment. ITT Commercial Finance v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Unless contradicted by the non-moving party, the facts used to support the motion are considered true. Id. The non-moving party receives the benefit of all reasonable inferences. Id. Insurance coverage is a question of law, not fact, and is therefore an appropriate consideration on summary judgment. Heringer v. American Family Mutual Ins. Co., 140 S.W.2d 100, 102 (Mo. App. W.D. 2004).

B. The Leros are entitled to summary judgment since the definition of coverage in the Umbrella Policy provides for uninsured motorist coverage.

Uninsured motorist coverage exists based on the definition of coverage contained within the Umbrella Policy, and Defendant State Farm failed to specifically exclude coverage. If anything, the "Automobile Liability" provision and the "Required Underlying Insurance" provision make the Umbrella Policy ambiguous on the issue of uninsured motorist coverage since it treats uninsured motorist coverage like it is optional even though it is mandated by Missouri law. This ambiguity must be construed against defendant State Farm. Finally, the

declarations page of the Umbrella Policy provides no guidance on clearing up the ambiguity and actually makes the ambiguity worse.

1. Uninsured motorist coverage fits within the definition of coverage under the Umbrella Policy.

The Umbrella Policy defined coverage under the heading "Coverage-L." "The general rule is that definitions in an insurance policy are controlling as to the terms used within the policy. If a term is defined in a policy, the court will look to that definition rather than looking elsewhere." Shelter Mut. Ins. Co. v. Sage, et al., 273 S.W.3d 33, 38 (Mo. App. W.D. 2008) (internal citations omitted).

Based on Missouri law, the Court should look no further than defendant State Farm's own definition of coverage contained under the heading "Coverage-L." "Coverage-L," which is listed on the declaration page, states:

> If a claim is made or suit is brought against an **insured** for damages because of a **loss** for which the **insured** is legally liable and to which this policy applies, **we** will pay on behalf of the **insured**, the damages that exceed the **retained limit**.

Plaintiffs' Statement of Uncontroverted Facts ¶ 9, 10.

The policy defines the bolded terms as follows:

1. "insured" means "you and your relatives whose primary residence is your household."

2. "loss" means "an accident, including accidental exposure to conditions, which first results in bodily injury or property damage during the policy period."

3. "retained limit" means the sum of:

    a. the amount paid or payable by any other insurance policy for the loss;
    b. the amount the insured is required to pay for the loss as provided in the MAINTAINING REQUIRED UNDERLYING INSURANCE section of this policy; and

c. the amount shown on the declarations page as the "Self-Insured Retention". This amount only applies if an insured has no required underlying insurance or an insured's required underlying insurance does not provide any coverage for the loss.

SOF ¶ 11, 12, 13.

There is no question that Denise Greene met the definition of "insured" or that she suffered bodily injury that resulted in a "loss." The Umbrella Policy provided coverage over the Automobile Policy, and pursuant to Missouri law the Automobile Policy required Denise Greene to carry uninsured motorist coverage. SOF ¶ 26, 27, 28, 29, 31. Finally, the $2,000,000.00 judgment exceeded the retained limits of uninsured motorist coverage, which was mandated coverage under the Automobile Policy and in turn the Umbrella Policy. SOF ¶ 5, 27, 28, 29, 30, 33. Based on the definition laid out under "Coverage-L" in the Umbrella Policy, the policy provided for uninsured motorist coverage absent an express exclusion.

2. There is no express exclusion in the Umbrella Policy for uninsured motorist coverage.

Defendant State Farm must expressly exclude uninsured motorist coverage, which it failed to do. "[T]he insurer has the burden of proving that an exclusionary clause bars coverage. Because an insured purchases coverage for protection, the policy will be interpreted to grant coverage rather than defeat it. Consequently, [courts] construe exclusionary clauses strictly against the insurer and in favor of the insured." Penn-Star Ins. Co. v. Griffey, 306 S.W.3d 591, 596 (Mo. App. W.D. 2010).

There is no express exclusion of uninsured motorist coverage in the Umbrella Policy. SOF ¶ 14, 15. Defendant State Farm mentions uninsured motorist coverage at least twice, but never as an exclusion. SOF ¶ 18. In its motion for summary judgment, defendant State Farm tried to exclude uninsured motorist coverage by reyling on the "Required Underlying Insurance"

and "Automobile Liability" provisions of the Umbrella Policy. Suggestions in Support of Motion for Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment at pg. 3-6.

The "Automobile Liability" and "Required Underlying Insurance" provisions state:

> 1. "**Automobile Liability**" means a policy which provides coverage for the insured for that insured's liability arising out of the ownership, operation, maintenance or use of any automobile. That policy must include **UNINSURED** and/or Underinsured Motor Vehicle coverage if **UNINSURED** and/or Underinsured Motor Vehicle coverage is shown on the declarations page of this policy.
>
> 2. **Required underlying insurance** must be maintained at all times in an amount at least equivalent to the Minimum Underlying Limits shown on the declaration page.

SOF ¶ 19, 20.

Although this language mentions uninsured motorist coverage, it does not meet the burden placed on defendant State Farm when an insurer excludes coverage. Defendant State Farm contends these provisions exclude uninsured motorist coverage if it is not listed on the declarations page of the Umbrella Policy. This argument to exclude coverage fails since it completely ignores that Missouri law mandates uninsured motorist coverage for every automobile policy and it ignores Missouri law which strictly construes exclusionary clauses in favor of coverage. SOF ¶ 26, 27.

By requiring Denise Greene to purchase the Automobile Policy, defendant State Farm knew Denise Greene would be required to purchase the mandatory uninsured motorist coverage. SOF ¶ 25, 28, 31. Denise Greene not only carried uninsured motorist coverage, but she carried more uninsured motorist coverage than the State of Missouri required her to. SOF ¶ 30.

Defendant State Farm then tried to exclude coverage of the mandated uninsured motorist coverage based on the two provision cited above. Neither the "Automobile Liability" provision nor the "Required Underlying Insurance" provisions contain language which expressly excludes uninsured motorist coverage. SOF ¶ 14, 15, 19, 20. If the anything, the two provisions expose an ambiguity in the Umbrella Policy which would still result in the Umbrella Policy providing for uninsured motorist coverage.

3. *At best, the Umbrella Policy is vague and should be construed against defendant State Farm.*

If anything, the Umbrella Policy is ambiguous due to the "Automobile Liability" provision, the "Required Underlying Insurance" provision, and the declarations page. "An ambiguity arises when there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the policy." Rodriguez v. Gen. Accident Ins. Co. of America, 808 S.W.2d 379, 382 (Mo. Banc 1991). If an ambiguity exists in a policy, the court must construe it in favor of the insured. Chamness v. American Family Mutual Ins. Co., 226 S.W.3d 199, 202 (Mo. App. E.D. 2007). Courts construe policies against the insurer since insurance is meant to provide protection for the insured, and the company is best suited to remove ambiguity from a policy. Krombach., 827 S.W.2d at 210-11. "When there is an ambiguity, insureds are entitled to a resolution of that ambiguity consistent with their objective and reasonable expectations as to what coverage would be provided." Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri, 992 S.W.2s 308, 316 (Mo. App. E.D. 1999). Moreover, the language of the policy should not be viewed in light of what the insurer, who has superior knowledge, intended it to mean, "but rather what a reasonable layperson in the position of the insured would have thought [the language] meant." Id.

As explained above, Uninsured motorist coverage fits into the definition of "Coverage-L," and "Coverage-L" is the only coverage listed underneath the heading "Coverage(s)" on the declarations page. SOF ¶ 9. Relying on the "Automobile Liability" and "Underlying Required Insurance" provisions, defendant State Farm has acted like the mandatory uninsured motorist coverage was excluded.

Looking at the definition of **"Automobile Liability,"** an average lay person like Denise Greene would have thought the provision was imposing an obligation telling her when she had to carry uninsured or underinsured motorist coverage. The language does not explain or define when coverage applies. SOF ¶ 19, 21. The provision did not state in explicit terms that "this policy will not provide coverage for uninsured or underinsured coverage if uninsured or underinsured coverage is not listed on the declaration page." SOF ¶ 19. Instead, the Umbrella Policy told Denise Greene that she had to carry uninsured motorist coverage if it was on the declaration page of the umbrella policy. SOF ¶ 29. Defendant State Farm knew that by requiring Denise Greene to purchase an automobile policy to maintain the Umbrella Policy meant that Denise Greene would also have to maintain uninsured motorist coverage to maintain the Umbrella Policy. SOF ¶ 25, 28, 31. Based simply on the language of the "Automobile Liability" provision, the umbrella policy is unclear whether or not it covers uninsured motorist coverage creating an ambiguity.

The "**Required underlying insurance**" provision does not clear up this ambiguity. The "Required underlying insurance" provision again placed an obligation on Denise Greene. The provision placed a contractual obligation on Denise Greene to maintain underlying insurance "equivalent to the Underlying Limits" shown on the declarations page of the Umbrella Policy. SOF ¶ 20. Similar to the "Automobile Liability" provision, the "Required underlying

insurance" provision did not explicitly deny or affirm coverage. SOF ¶ 20, 21. It simply placed another contractual obligation on Denise Greene. The "Required underlying insurance" provision did nothing with regards to clearing up the ambiguity of whether the umbrella policy provided coverage over the limits of Denise Greene's uninsured motorist coverage. Because the Umbrella Policy is vague, it should be construed against defendant State Farm, and reliance on the declarations page is misplaced. Krombach., 827 S.W.2d at 210-11.

4. The declarations page of the Umbrella Policy does not clear up the ambiguity.

The declarations page of the Umbrella Policy is also vague and supports the plaintiffs' position that coverage exists. Under Missouri law, a declarations page defines coverage "if it clearly communicates the coverage provided by the insurance contract, and the other policy provisions neither expressly change the coverage nor 'reflect a different intention than that clearly expressed on the declaration page.'" Christensen v. Farmers Ins. Co., Inc., 307 S.W.3d 654, 658 (Mo. App. E.D. 2010).

In Christensen, the declarations page in question clearly defined the coverage provided by the policy it was attached to. Id. at 656. The plaintiff was arguing that her policy contained underinsured motorist coverage. Id. On the declarations page there was a heading which stated "Coverage Designations." Under the heading were the notations "NC" or "NOT COV" which stood for Not Covered. Id. The trial court noted that "the declarations page clearly stated that the policy did not provide UIM coverage. In the 'Coverages' section of the declarations page, under the heading 'UNDERinsured motorist' appeared the notation 'NC,' indicating that UIM was not covered." Id. at 658.

Unlike the declarations page in Christensen, the declarations page of the Umbrella Policy is not clear whether it covers uninsured motorist coverage because it only lists "Coverage-L"

under the "Coverage" heading and it charges a single lump sum premium. SOF ¶ 9, 22, 23. The heading "Coverage(s)" does appear on the declarations page of the Umbrella Policy, but the only coverage listed is "Coverage L-Personal Liability." SOF ¶ 9. The declarations page of the Umbrella Policy does not define what "Coverage L" is and it does not clearly define the exclusions like the declarations page in Christensen did. The declarations page of the Umbrella Policy does not even explain that it provides excess coverage over the Automobile Policy. SOF ¶ 9, 16, 17. The only portion of the declarations page of the Umbrella Policy which mentions the Automobile Policy is under the heading "Underlying Required Insurance." SOF ¶ 16. "Watercraft Liability" is also listed under the Underlying Required Insurance" heading. SOF ¶ 17. If the Court followed the logic in defendant State Farm's motion for summary judgment regarding the declarations page, Denise Greene would have coverage for boat accidents even though she did not maintain the required underlying insurance. Due to this lack of clarity, the declarations page of the Umbrella Policy is vague. The only way to understand what the Umbrella Policy covers is to apply the definition of "Coverage-L" as the Leros did above.

The premium charged by defendant State Farm on the declarations page is also vague. The declarations page of the Umbrella Policy simply listed a single policy premium of $122.00. SOF ¶ 22, 23. It does not delineate exactly what coverage that premium is purchasing. SOF ¶ 23. This is in stark contrast to the declarations page of the Automobile Policy drafted by defendant State Farm which identifies with particularity the dollar amount for the coverage provided for under the Automobile Policy. SOF ¶ 24. This lump some amount listed only as "Policy Premium" sheds absolutely no light on whether the Umbrella Policy provides uninsured motorist coverage.

The declarations page does not help determine if the Umbrella Policy provides coverage for uninsured motorist benefits. The declarations page of the Umbrella Policy is ambiguous since it failed "to clearly communicate[] the coverage provided by the insurance contract." Therefore, the declarations page does not control what coverage is provided by the Umbrella Policy and only adds to the ambiguity of the policy.

The Leros have established that uninsured motorist coverage fits within the definition of "Coverage-L," the definition of coverage drafted by defendant State Farm. Defendant State Farm failed to include an express exclusion of uninsured motorist coverage within the Umbrella Policy. Instead, defendant State Farm relied on the "Automobile Liability" and the "Required Underlying Insurance" provisions to argue the absence of uninsured motorist coverage from the declarations excluded coverage. The provisions cited by defendant State Farm does not meet the strict burden for excluding coverage and ultimately exposed the ambiguity which existed in the Umbrella Policy. This Court should construe that ambiguity against defendant State Farm and grant summary judgment in the Leros favor.

CONCLUSION

Plaintiffs Paul and Carolyn Lero respectfully request that the Court enter an order granting their motion for summary judgment and a finding that the Umbrella Policy does provide for uninsured motorist coverage. Umbrella Policy 25-BB-N742-4 does provide for uninsured motorist coverage based on its own definition for coverage. Defendant State Farm failed to expressly exclude uninsured motorist coverage under the Umbrella Policy. At best, the policy is ambiguous due to the "Automobile Liability" provision, the "Required Underlying Insurance" provision, and the declarations page, which also supports a finding that the Umbrella Policy provides for uninsured motorist coverage.

Respectfully submitted,

THE LAW OFFICES OF
STEPHEN R. BOUGH

By______________________________

Stephen R. Bough, #46239
M. Blake Heath, #61939
917 W. 43rd Street, Suite 100
Kansas City, MO 64111
(816) 931-0048 Phone
(816) 931-4803 Fax
stephen@boughlawfirm.com
blake@boughlawfirm.com

and

Kelly McCambridge #60839
McCambridge Law LLC
1308 NE Windsor Drive
Lee's Summit, MO 64086
(816) 875-2386 Phone
(816) 875-2388 Fax
kelly@mccambridgelaw.com

ATTORNEYS FOR PLAINTIFFS

Signature of this document certifies that a copy was served to the persons named below on the date and in the manner indicated:

Person Served	Date	Method
Allison G. Confer James L. Sanders Wallace, Saunders, Austin Brown, & Enochs, Chartered 2300 Main Stt., Suite 900 Kansas City, MO 64108 (913) 888-1000 phone (913) 888-1065 fax aconfer@wallacesaunders.com jsanders@wallacesaunders.com	**8/16/2010**	Mail/Email

ATTORNEYS FOR DEFENDANT
STATE FARM FIRE & CASUALTY COMPANY

Person Served	Date	Method
Philip Sumner Foland & Wickens, PC 3000 Commerce Tower 911 Main Street Kansas City, MO 64105 (816) 472-7474 Phone (816) 472-6262 Fax psumner@fwplaw.com	**8/16/2010**	Mail/Email

ATTORNEY FOR DEFENDANT