

**IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI**

<b>PAUL LERO &amp; CAROLYN LERO,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Case No.: 09CA-CV00669</b>
	)	
<b>ADAM P. MACE, and</b>	)	
	)	
<b>STATE FARM FIRE AND CASUALTY</b>	)	
<b>COMPANY,</b>	)	
	)	
<b>Defendants.</b>	)	

**PLAINTIFFS’ MOTION TO STRIKE ADDITIONAL DEFENSES ASSERTED BY  
DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY**

COMES NOW plaintiffs Paul and Carolyn Lero and move this Court for an order granting their motion to strike the additional defenses asserted in Defendant State Farm Fire and Casualty’s Reply to Plaintiffs’ Opposition to Defendant State Farm Fire and Casualty Company’s Motion for Summary Judgment. Defendant State Farm Fire and Casualty Company (hereinafter “State Farm”) has asserted new defenses in its reply which violates Missouri’s denial letter rule.” Shahan v. Shahan, 988 S.W.2d 529, 533-34 (Mo. banc 1999).

Both parties have extensively briefed the issues in this case. This case centers on defendant State Farm’s refusal to pay monies under Umbrella Policy 25-BB-N742-4 to Paul and Carolyn Lero for the death of their daughter Denise Greene. When the Leros made their initial demand, defendant State Farm sent a denial letter. The denial letter stated that defendant State Farm refused to cover the death of Denise Greene because the declarations page of the Umbrella Policy did not list uninsured motorist coverage.

After the Leros commenced this action, defendant State Farm filed a motion for summary judgment. In its motion for summary judgment, defendant State Farm again relied solely on the

argument that uninsured motorist coverage was not listed on the declarations page of the Umbrella Policy so it was not covered. The Leros filed an Opposition to Defendants Motion for Summary Judgment and defendant State Farm filed a reply. Defendant State Farm has asserted reasons other than uninsured motorist coverage not being listed on the declarations page of the Umbrella Policy for the first time in its reply. As explained below, this violates Missouri's denial letter rule.

### **PLAINTIFFS' STATEMENT OF FACTS**

1. On May 14, 2009, plaintiffs Paul and Carolyn Lero sent a demand letter to defendant State Farm outlining why they were entitled to uninsured motorist benefits under the Umbrella Policy. May 14, 2009, Letter from Steve Bough, **Exhibit A**.

2. On May 29, 2009, counsel for defendant State Farm sent a letter which read:

State Farm has advised that under the provisions of the personal liability umbrella policy issued to Denise N. Greene, Policy #25-BB-N742-4, Ms. Greene did not have any uninsured motorist coverage. I enclosed a copy of the Declarations [sic] page of her policy which confirms that there was no uninsured motor vehicle coverage purchased.

May 29, 2009, Letter from James Sanders, **Exhibit B**.

3. The Leros filed suit against defendant State Farm on February 2, 2010.

4. In Defendant State Farm's Second Amended Answer, it admitted "Plaintiffs through their attorney have made demand for uninsured motorist coverage under such policy, and that State Farm has advised Plaintiffs through their attorney as to the basis for payment not being made." First Amended Answer to Amended Petition ¶ 3, **Exhibit C**.

5. The Leros served requests for admissions on defendant State Farm and it responded on May 10, 2010. State Farm's Responses to Plaintiffs' First Request for Admissions to Defendant State Farm Fire and Casualty Company, **Exhibit C**.

6. Request No. 14 asked defendant State Farm to "[a]dmit that Defendant State Farm has refused to pay any monies out of the umbrella policy; although they have paid \$50,000 in uninsured motorist coverage. State Farm's Responses to Plaintiffs' First Request for Admissions to Defendant State Farm Fire and Casualty Company, No. 14, **Exhibit C**.

7. Defendant State Farm responded in part that:

State Farm would admit that Plaintiffs, through their attorney, have made demand for uninsured motorist coverage under policy #25-BB-N742-4, and that State Farm has advised Plaintiffs, through their attorney, as to the basis for a payment not being made under such policy.

State Farm's Responses to Plaintiffs' First Request for Admissions to Defendant State Farm Fire and Casualty Company, No. 14, **Exhibit C**.

8. On May 10, 2010, the only reason defendant State Farm had advanced for denying coverage under the Umbrella Policy was that uninsured motorist coverage was not listed on the declarations page of the Umbrella Policy.

9. On July 1, 2010, defendant State Farm filed a motion for summary asserting the following reason for denying coverage, "[t]he umbrella policy does not include uninsured motor vehicle coverage because such coverage is now [sic] shown on the policy's declarations page." Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment, pg. 3-6.

10. Defendant's motion for summary judgment relied on the same reasoning as the denial letter dated May 29, 2009.

11. On September 2, 2010, defendant State Farm filed its Reply to Plaintiffs' Opposition to Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment.

12. Defendant State Farm's reply asserted the following new reasons for denying coverage:

- a. Uninsured motorist coverage is not included in the Umbrella Policy's definition of coverage;
- b. The only coverage listed on the declarations page of the Umbrella Policy is Coverage-L;
- c. Plaintiffs inappropriately attempt to shift the burden of proof by arguing uninsured motorist coverage was not excluded; and
- d. The Umbrella Policy expressly excluded uninsured motorist coverage.

Reply to Plaintiff's Opposition to Defendant State Farm Fire and Casualty Company's Motion for Summary Judgment, pg. 5-12.

13. The reasons for denying coverage listed in ¶¶ 7a-d were not asserted by defendant State Farm in its May 29, 2009, denial letter; its response to plaintiffs' requests for admission or defendant State Farm's motion for summary judgment.

### **ARGUMENT**

Defendant State Farm's reply has asserted reasons for denying coverage outside of the reasons given in its denial letter and its own motion for summary judgment. These new reasons violate Missouri's denial letter rule and thus defendant State Farm is now estopped from asserting them.

In general, an insurer who has denied liability based on a specified ground cannot later deny liability on a different ground. Burns Nat'l Lock Installation Co. v. Am. Family Mut. Ins. Co., 61 S.W.3d 262, 267 (Mo. App. E.D. 2001) (affirming trial court's ruling that insurer was estopped from bringing new and inconsistent defenses on the grounds that insurer maintained the same defenses in original denial, answer, and second amended answer, and insured was prejudiced beyond the mere filing of the suit because insured relied on the initial defenses for more than two years); see also Mauer v. Bd. of Trs. of Mo. State Ret. Sys., 762 S.W.2d 517 (Mo. App. W.D. 1988) (affirming in part trial court's ruling of summary judgment in favor of insured because insurer was estopped from alleging a new basis for denial of insured's claim). "Estoppel . . . requires that the insurer 'first announce a specific defense and subsequently seek to rely instead on an inconsistent theory.'" Shahan v. Shahan, 988 S.W.2d 529, 533-34 (Mo. banc 1999). In order to apply estoppel, the insured must show (1) the insurer announced a specific defense and then sought to rely on an inconsistent defense; (2) action by the insurer induced the insured to rely on the original defense to his detriment; and (3) the insurer's actions caused injury to the insured. Id. (finding insurer was not barred from relying on a household exclusion in a garnishment action because the insurer asserted the exclusion as a defense in the underlying personal injury action). The Missouri Supreme Court explained that the reason behind the denial letter rule is that:

It is the announcement of the specific defense which lulls the insured into relying to his detriment and subsequent injury on the insurer's stated position. Thus "the rationale of these cases is that the plaintiff has relied to his detriment on the assertion of the defense by preparation to meet that issue and that the defendant may not shift the grounds of the defense after the fact."

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 389 (Mo. banc 1989) (internal citations omitted).

In Burns, the Missouri Supreme Court held that the insurer was barred from asserting new defenses based on the doctrine of estoppel. Id. at 268. The insurer sent a denial letter asserting that an insurance policy did not provide coverage based on two exclusions. Burns, 61 S.W.3d at 268. As the case progressed, the plaintiff sent the insurer interrogatories asking for any reason the insurer was denying coverage and the insurer again turned to the same two exclusions it had asserted in its denial letter. Id. The insurer relied on the exclusionary clauses referenced in its denial letter as affirmative defenses in its Second Amended Answer. Id. Finally, the insurer filed a stipulation asserting that the basis for denying coverage was the exclusionary clauses cited in the denial letter. Id. The Supreme Court held that the insurer was barred from later asserting new reasons for denying coverage at trial because the plaintiff “reasonably relied on the assertion of this specific defense by preparation to meet this issue at trial.” Id. at 269.

Like the plaintiff in Burns, the Leros have relied on defendant State Farm’s original reason for denying coverage to their detriment. The Leros can show 1) defendant State Farm’s new reasons for denying coverage are inconsistent with its original reason for denying coverage; 2) they relied on the old reason for denying coverage to their detriment, and 3) allowing defendant State Farm to now change its reason for denying coverage would horribly prejudice the Leros.

1. *Defendant State Farm’s new reasons for denying coverage are inconsistent with its original reason for denying coverage.*

The first prong listed under Shahan to estop an insurer from asserting a new defense to coverage is that the insurer announces a specific defense and then relies on an inconsistent defense. Defendant State Farm initially denied coverage under the Umbrella Policy solely

because uninsured motorist benefits were not listed on the declarations page of the policy. Plaintiffs' Statement of Facts ¶¶ 2, 4, 5, 6, 7, 8, 9, 10. (hereinafter "SOF"). Defendant State Farm Defendant State Farm denied coverage based on the absence of uninsured motorist benefits from the declarations page of the Umbrella Policy for the first time in May of 2009. SOF ¶¶ 1, 2. Defendant State Farm then relied on the denial letter in its Second Amended Answer. SOF ¶ 4. Like the insurer in Burns that used the same defense in responding to discovery, defendant State Farm also reiterated the absence of uninsured motorist coverage from the declarations page in its discovery responses. SOF ¶¶ 5, 6, 7, 8. It asserted the same reason for denying coverage in its motion for summary judgment. SOF ¶¶ 9, 10. Defendant State Farm has now asserted four inconsistent reasons for denying coverage from its original position that coverage does not exist because uninsured motorist coverage was not listed on the declarations page of the Umbrella Policy. SOF ¶¶ 11, 12, 13. For the first time in this litigation, defendant State Farm has tried to say that the Umbrella Policy does not provide uninsured motorist coverage because it does not fit within the definition of coverage under the Umbrella Policy. This reason forms the basis for the other three newly asserted reasons for denying coverage.

Based on its new interpretation of coverage under the Umbrella Policy, defendant State Farm has changed how it uses the declarations page. In its reply, defendant State Farm points to the declarations page and says that "Coverage-L" is the only coverage listed on the declarations page. SOF ¶ 12. As outlined by the Leros in their response to the defendants' motion for summary judgment, the Umbrella Policy defines coverage under the heading "Coverage-L". Relying on its new argument that uninsured motorist benefits do not fit into the definition of "Coverage L", defendant State Farm has revised its use of the declarations page. Interestingly, defendant State Farm completely abandons its original position that uninsured motorist benefits

are not covered by the Umbrella Policy since uninsured motorist coverage is not listed on the declarations page.

Defendant State Farm then asserts that the Leros are inappropriately trying to shift the burden of proof, which is not the case. SOF ¶ 12. The Leros have laid out specific evidence showing the Umbrella Policy provided for uninsured motorist coverage in their motion for summary judgment and their opposition to defendants' motion for summary judgment.

Defendant State Farm never once argued that coverage did not apply because of an exclusion. Defendant State Farm knew that this litigation centered around coverage, but it has not pointed to any exclusion in the policy until sixteen months after the initial denial letter was mailed.

Each of the new reasons explained above are inconsistent with defendant State Farm's original reason for denying coverage; that the Umbrella Policy does not provide for uninsured motorist coverage since it is not listed on the declarations page. Based on everything defendant State Farm had told the Leros, they were under the impression that the only reason defendant State Farm had for denying coverage was the absence of uninsured motorist coverage from the declarations page of the Umbrella Policy. Defendant State Farm has completely changed its position sixteen months later, which is prohibited under the denial letter rule.

2. *The Leros relied on defendant State Farm's original reason for denying coverage to their determent.*

Under the second prong under Shahan, the insurer's actions had to induce the insured to rely on the original defense to their determent. Again, the Leros can establish their reliance. Defendant State Farm first asserted that the Umbrella policy did not provide for uninsured motorist coverage because it was not listed on the declarations page sixteen months ago. SOF ¶ 1, 2. The Leros filed there lawsuit on February 2, 2010, and proceeded to conduct discovery

against defendant State Farm with the belief that the only reason for denying coverage was the absence of uninsured motorist coverage from the declarations page. SOF ¶ 3, 4, 5, 6, 7, 8.

Defendant State Farm reiterated that the only reason for denying coverage was the absence of uninsured motorist coverage from the declarations page again in its motion for summary judgment. SOF ¶ 9, 10. The Leros showed that defendant State Farm's original position was contrary to Missouri law and the evidence in its response. Defendant State Farm has now completely abandoned its original position and has asserted new reasons for denying coverage. Allowing defendant State Farm to assert new reasons for denying coverage at the last minute would essential let it "shift the grounds of [their] defense after the fact." Brown, 776 S.W.2d at 389. This shift would occur after the Leros have prepared for the last sixteen months to face defendant State Farm's original position based on the declarations page.

3. *Allowing defendant State Farm to assert new reasons for denying coverage would horribly prejudice the Leros.*

The final prong under Shahan is a showing of actual prejudice, and the Leros will be horribly prejudiced if defendant State Farm is allowed to assert these new defenses. This case will be determined by summary judgment. The Leros have already conducted discovery, filed their motion for summary judgment, and responded to the defendant's motion for summary judgment. The hearing on the cross motions for summary judgment is set for October 15, 2010. For the past sixteen months, the Leros have been preparing their case under the belief that the only reason defendant State Farm was denying coverage was due to the absence of uninsured motorist coverage from the declarations page of the Umbrella Policy. Allowing defendant State Farm to suddenly discard its old reason for denying coverage and assert four completely new and inconsistent reasons for denying coverage would greatly prejudice the Leros. This prejudice is

more than merely filing a lawsuit but impacts months of preparation in this litigation. Defendant State Farm's last minute assertion of new reasons for denying coverage is exactly why Missouri has the denial letter rule.

WHEREFORE Plaintiffs Paul and Carolyn Lero respectfully request that this Court grant their Motion to Strike the New Defenses Asserted by Defendant State Farm Fire and Casualty Company since the new defense violate Missouri's "denial letter" rule.

Respectfully submitted,

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

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