IN THE CIRCUIT COURT OF CLAY COUNTY, LIBERTY, MISSOURI

CAROL J. LONG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 09CY-CV01134**
	)	**Div. No. III**
	)	
LUCAS W. DRAY,	)	
and	)	
SHELTER INSURANCE COMPANIES,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF LONG'S PARTIAL MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT SHELTER ON SETOFF OF UNDERINSURANCE COVERAGE

Pursuant to Mo. R. Civ. P. 74.04, Plaintiff Carol J. Long respectfully moves this Court for an order entering summary judgment in her favor and against Defendant Shelter Insurance Companies ("Defendant Shelter") on Plaintiff Carol Long's claim to recover underinsured motorist coverage in the amount of $100,000, the amount listed on the declaration sheet.

No genuine issues of material fact exist as to whether Plaintiff Long is entitled to $100,000 in underinsured motorist benefits for which she and her now deceased husband Vernie Ray Long contracted with Defendant Shelter. Shelter will argue it is entitled to a $50,000 setoff for a liability payment by Lucas Dray. That argument, however, flies on the face of the recent Missouri Supreme Court opinion in Jones v. Mid-Century Ins. Co, 2009 WL 1872113 (June 30, 2009) (attached as exhibit A). The Plaintiff offers the following suggestions in support of her motion:

I. SUMMARY OF FACTS

On January 21, 2009, Plaintiff Carol Long's husband, Vernie Ray Long, died as the result of a car accident. (Plt. SOF 1). Plaintiff Carol Long and Vernie Ray Long were insureds of defendant Shelter. (Plt. SOF 11). The driver of the other vehicle, Defendant Lucas Dray, had an insurance policy with American Family Insurance Companies. (Plt. SOF 16). Defendant Lucas Dray's insurance policy had liability coverage with limits of $50,000 per person and $100,000 per occurrence. (Plt. SOF 16). Under policy 24-1-4530272-20, Defendant Shelter insured the black Ford F350 Vernie Ray Long was driving at the time of the accident. (Plt. SOF 5). Attached to policy 24-1-4530272-20 was a separate endorsement, Endorsement A-577.5-A, which provided for underinsured motorist coverage. (Plt. SOF 7). The Longs contracted with Defendant Shelter for underinsured motorist coverage with limits of $100,000 per person and $300,000 per occurrence. (Plt. SOF 7). The Declaration Page of policy 24-1-4530272-20 charged the Longs a single, lump sum premium for both underinsured and uninsured motorist coverage. (Plt. SOF 6).

The declaration page promises $100,000 in underinsurance coverage. (Plt. SOF 7). Then the definition of uncompensated damages promises payment for those "damages that exceeds the total amount paid." (Plt. SOF 14). The "insuring agreement" promises Shelter "will pay the uncompensated damages, subject to the limit of our liability stated in this coverage." (Plt. SOF 10). After those three promises, Shelter attempts to reduce the promised $100,000 in coverage by reducing the amount to be paid; "the limits are reduced by the amount paid, or payable, to the insured for damages by, or for, any person who is legally liable for the bodily injury to that insured." (Plt. SOF 18).

The Missouri Supreme Court has flatly rejected insurance contracts that "promises something at one point and takes it away at another." Jones v. Mid-Century Ins. Co, 2009 WL 1872113 (June 30, 2009) (citing to Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129, 133 (Mo. banc 2007)).

II. 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). "Summary judgment is particularly appropriate if the issue to be resolved is construction of a contract that is ambiguous on its face." *Lang v. Nationwide Mutual Fire Ins. Co.*, 970 S.W.2d 828, 830 (Mo. App. E.D. 1998).

B. Argument

Plaintiff Long is entitled to the full $100,000 in underinsured motorist coverage. This is a straightforward analysis; is the Shelter policy ambiguous.

> An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." Seeck, 212 S.W.3d at 132. Moreover, "[i]f a contract promises something at one point and takes it away at another, there is an ambiguity." Id. at 133.Absent an ambiguity, an insurance policy must be enforced according to its terms. Rodriguez v.

> General Accident Ins. Co., 808 S.W.2d 379, 382 (Mo. banc 1991). If, however, "policy language is ambiguous, it must be construed against the insurer. Seeck, 212 S.W.3d at 132.
>
> Jones v. Mid-Century Ins. Co, 2009 WL 1872113 (June 30, 2009).

The Supreme Court examined the Limit of Liability language in the Mid-Century policy.

> "Limit of Liability" (a) of the Mid-Century policy expressly states that "the most it will pay" is the lesser of the $100,000 per person policy limit or the difference between the damages and the payments already made. A reasonable construction of this language is that the insurer will pay the full policy limits of $100,000 per person if that is the lesser of the two damage amounts listed. This is also what "Limit of Liability" (b) states, for it says that the insurer "will pay up to the limits of liability shown in the schedule" and on the declarations page, which the policy specifically recites is $100,000 per person.

In the Shelter policy the "insuring agreement" promises Shelter "will pay the uncompensated damages, subject to the limit of our liability stated in this coverage." (Plt. SOF 10). The amount stated in this coverage is on the declaration page, which promises $100,000 in underinsurance coverage. (Plt. SOF 7). Though the words are not identical between Shelter and Mid-Century, both insurance companies promised to pay the $100,000 off the declaration page.

The Supreme Court next examined the setoff provision. In Mid-Century, the setoff language read "[t]he amount of UNDERinsured Motorist Coverage we will pay shall be reduced by any amount paid or payable to or for an insured person …" In the Shelter policy, the setoff language is "the limits are reduced by the amount paid, or payable, to the insured for damages by, or for, any person who is legally liable for the bodily injury to that insured." (Plt. SOF 18). Again, while not identical words, both provisions reduce the amount paid to the insured. "Such a construction [of the setoff provision] is, at best, in conflict with the clear intent of [the limit of liability and

declaration page], and is, at worst, misleading." Jones v. Mid-Century Ins. Co, 2009 WL 1872113 (June 30, 2009).

The Supreme Court also found that the Mid-Century underinsurance policy would never pay the full $100,000. "This is so because Mid-Century never would be called on to pay its total limit of liability shown on the schedule if it were entitled first to deduct any amounts received from the tortfeasor, for in the case of *underinsured* motorist coverage, *some* amount *always* will have been received from the tortfeasor-that is why the insured is seeking to collect *under* insured rather than *un* insured motorist coverage." Id. (emphasis in original). The Shelter policy also has the same horrific result. Since there is a statutory minimum of $25,000, the most Shelter would ever have to pay is $75,000.

In short, the exact same analysis from Jones v. Mid-Century can be applied to the Shelter policy. Shelter promises $100,000 in coverage in at least three places, set seeks to renege on that promise with the setoff provision. It didn't work for Mid-Century, and it can't work for Shelter, either.

III. CONCLUSION

In three places, Shelter promises to pay $100,000 in underinsured coverage. In one place, Shelter takes away that promise. Such a result is prohibited under Jones v. Mid-Century Ins. Co, 2009 WL 1872113 (June 30, 2009). As such, Plaintiff respectfully requests that this Court grant her Motion for Partial Summary Judgment on Setoff of Underinsurance Coverage.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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