

IN THE CIRCUIT COURT OF CLAY COUNTY, LIBERTY, MISSOURI

CAROL J. LONG,

Plaintiff,

v.

LUCAS W. DRAY,

and

SHELTER INSURANCE COMPANIES,

Defendants.

Case No. 09CY-CV01134

Div. No. III

**PLAINTIFF CAROL J. LONG'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANT SHELTER INSURANCE COMPANIES**

Pursuant to Mo. R. Civ. P. 74.04, Plaintiff Carol J. Long respectfully moves the Court for an order granting summary judgment in her favor and against Defendant Shelter Insurance Companies ("Shelter"). No genuine issue of material fact exists as to whether Plaintiff Long is entitled to a total of \$350,000 in underinsured motorist benefits under seven (7) insurance policies issued to Plaintiff Long and her deceased husband, Vernie Ray Long, by Shelter. The policies, which each contain identical language, are unquestionably ambiguous with respect to whether an insured may stack underinsured motorist coverage and, as a result, must be construed against the insurance company, Shelter. *Chamness v. American Family Mutual Ins. Co.*, 226 S.W.3d 199, 202 (Mo. App. E.D. 2007). In addition, the policies treat underinsured and uninsured motorist coverage (a mandated coverage) the same in that a single premium was charged for both coverages. Such impermissible mixing of "apples and oranges" provides an additional and independent legal basis for stacking underinsured motorist benefits under the seven policies.

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

1. Plaintiff Carol Long has filed a wrongful death lawsuit on behalf of herself and all other Tier I Beneficiaries, and filed a claim to receive underinsured motorist coverage for the death of her husband Vernie Ray Long. See Plaintiff's Petition.

2. On or about January 5, 2009, Defendant Lucas Dray's vehicle collided with the vehicle driven by Vernie Ray Long. See Plaintiff's Petition, No. 9.

3. On or about January 21, 2009, and as a result of the accident, Vernie Ray Long passed away. See Plaintiff's Petition, No. 10.

4. At the time of the accident, Vernie Ray Long was driving a black 2003 Ford F350. See Plaintiff's Petition, No. 18.

5. Vernie Ray Long and Plaintiff Carol Long insured the black 2003 Ford F350 with Defendant Shelter under form A-20.5-A and policy number 24-1-4530272-20. The Declaration Page for policy number 24-1-453272-20 is attached and incorporated herein as **Exhibit A**. The Automobile Insurance Policy A-20.5-A issued by Defendant Shelter is attached and incorporated herein as **Exhibit B** (hereinafter "the Policy").

6. The Declaration Page indicates the Longs paid a single, lump sum premium of \$296.03 for policy number 24-1-453272-20. **Exhibit A**.

7. Policy number 24-1-4530272-20 included endorsement A-577.5-A, which provided \$100,000 per person and \$300,000 per accident in underinsurance coverage. (hereinafter "the Endorsement"). The Endorsement is attached and incorporated herein as **Exhibit C**.

8. All the definitions regarding underinsured coverage are found in the Endorsement (A-577.5-A). **Exhibit C**.

9. There is no definition of “underinsured motorist” in the Policy. **Exhibit**

B.

10. The Endorsement provides the following coverage:

If:

(a) an insured sustains bodily injury as a result of an accident involving the use of an underinsured motor vehicle; and

(b) the owner or operator of that underinsured motor vehicle is legally obligated to pay some or all of the insured’s damages, we will pay the uncompensated damages, subject to the limit of our liability stated in this coverage.

Exhibit C.

11. Plaintiff Carol Long and Vernie Ray Long are “insureds” under the Policy.

12. Vernie Ray Long, now deceased, suffered bodily injury as a result of the accident caused by Defendant Lucas Dray.

13. The Endorsement (A-577.5-A) defines “underinsured motor vehicle” as “a motor vehicle that is covered by a liability policy bond or insurance policy applicable to the accident, but its available limits are less than the full amount owed by the owner or operator of that motor vehicle for the insured’s damages.” **Exhibit C.**

14. The Endorsement (A-577.5-A) defines “uncompensated damages” as “the portion of damages that exceeds the total amount paid or payable to an insured by, or on behalf of, all persons legally obligated to pay those damages.” **Exhibit C.**

15. Plaintiff Carol Long and Vernie Ray Long suffered more than \$400,000 in damages as a result of the accident caused by Defendant Dray.

16. Defendant Lucas Dray’s liability under his American Family policy is for \$50,000, and the underinsured motorist benefits under the Endorsement exceed Defendant Dray’s liability coverage.

17. Defendant Lucas Dray was operating an underinsured motor vehicle as defined in the Endorsement at the time Dray's vehicle collided with the vehicle of Vernie Ray Long resulting in Vernie Ray Long's death.

18. Defendant Shelter is entitled to a \$50,000 credit because of Defendant Lucas Dray's American Family Policy.

19. There is at least \$350,000 in uncompensated damages at issue in this case.

20. Under the Endorsement on the F350, Shelter owes at least \$50,000 in underinsured motorist benefits.

21. In addition to policy 24-1-4530272-20, plaintiff Carol Long and her husband, Vernie Ray Long, now deceased, had six other policies with Defendant Shelter.

22. Each policy providing underinsured motorist benefits also contained forms identical to the Endorsement attached as **Exhibit C**. None of the six Endorsements contain anti-stacking language. **See Exhibits D – I**.

23. Plaintiff Carol Long and her husband, Vernie Ray Long, contracted with Defendant Shelter for the following underinsured motorist benefits:

a. 24-1-4530272-30, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit D**);

b. 24-1-4530272-26, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit E**);

c. 24-1-4530272-28, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit F**);

d. 24-1-4530272-10, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit G**);

e. 24-1-4530272-14, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit H**); and

f. 24-1-4530272-4, with \$50,000 per person underinsured coverage (Declaration page attached and incorporated herein as **Exhibit I**).

24. The Endorsement (A-577.5-A) has a section titled "Other Insurance" which states "[i]f an insured suffers bodily injury for which benefits are payable under this coverage, it applies as **excess** insurance over all other underinsured motorist insurance available to that insured." **Exhibit C.** (Emphasis added)

25. All exclusions from underinsurance coverage are found in the Endorsement (A-577.5-A). **Exhibit C.**

26. The Endorsement (A-577.5-A) does not contain any anti-stacking language. **Exhibit C.**

27. The only anti-stacking language is located in the standardized form in the Policy. **Exhibit B.**

28. The anti-stacking language in the Policy is titled "Other Insurance in the Company." **Exhibit B.**

29. The anti-stacking language states:

If more than one policy we issued to you covers a claim, this policy covers only the proportion of our ultimate liability that its limits bear to the total limits of all our policies that cover the claim. Our total liability under all our policies will not exceed the highest limit of any one policy. This limitation does not apply to benefits payable under Parts III or IV. The Policy (A-20.5-A). **Exhibit B.**

30. This anti-stacking language treats all coverages (mandated or not), except Parts III (Accidental Death Benefits) and IV (Uninsured Motor Vehicle Liability Coverage), the same.

31. This anti-stacking language does not specifically mention underinsurance coverage.

32. The anti-stacking language is identical in each policy.

WHEREFORE, for the foregoing reasons and for the reasons stated in the contemporaneously filed Memorandum in Support of Plaintiff Carol J. Long's Motion for Summary Judgment Against Defendant Shelter Insurance Companies, Plaintiff Carol Long respectfully requests that the Court enter an order granting summary judgment in her favor and directing that the underinsured motorist benefits in the seven insurance policies at issue be stacked such that Defendant Shelter is obligated to pay a total of \$350,000 in underinsured motorist benefits to Plaintiff Carol Long.

Respectfully Submitted,

THE LAW OFFICES OF
STEPHEN R. BOUGH

By 

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

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

Copies of the foregoing were mailed this 1st day of May, 2009, to:

Ben T. Schmitt
Schmitt, Manz, Swanson & Mulhern, PC
1000 Walnut, Suite 800
Kansas City, Missouri 64106
(816) 472-5310 Phone
(816) 472-5320 Fax

ATTORNEY FOR DEFENDANT
SHELTER INSURANCE COMPANY

Edward F. Ford
Ford & Cooper, P.C.
201 Commerce Bank Bldg.
110 N.W. Barry Rd.
Kansas City, MO 64155
(816) 436-9550 Phone
(816) 436-9667 Fax

ATTORNEY FOR
DEFENDANT LUCAS W. DRAY

David R. Frye
Lathrop & Gage, LLP
Building 82, Suite 1000
10851 Mastin Blvd.
Overland Park, KS 66210-1669
(913) 451-5100 Phone
(913) 451-0875 Fax

ATTORNEY FOR
DEFENDANT LUCAS W. DRAY

FILED

IN THE CIRCUIT COURT OF CLAY COUNTY, LIBERTY, MISSOURI MAY 04 2009

CAROL J. LONG,)
)
 Plaintiff,)
)
 v.)
)
 LUCAS W. DRAY,)
 and)
 SHELTER INSURANCE COMPANIES,)
)
 Defendants.)

Clay County Circuit Court

Case No. 09CY-CV01134
Div. No. III

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF CAROL J. LONG'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANT SHELTER INSURANCE COMPANIES**

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.

No genuine issues of material fact exist as to whether Plaintiff Long is entitled to \$350,000 in underinsured motorist benefits for which she and her now deceased husband Vernie Ray Long contracted with Defendant Shelter. Each of the seven insurance policies at issue 1) contain identical Underinsured Motorist Endorsements that create an ambiguity when considered in conjunction with the underlying policies and must be construed against Defendant Shelter; and 2) intertwine underinsured and uninsured motorist benefits by charging one premium for both coverages. As a result, Plaintiff Long is entitled to judgment as a matter of law under either of the preceding theories. 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).

In addition to policy 24-1-4530272-20, the Longs had six other insurance policies with Defendant Shelter. (Plt. SOF 23). Each of these policies also had separate endorsements that provide underinsured motorist coverage. (Plt. SOF 23). None of the endorsements have any provisions or language that prohibits stacking of underinsured motorist coverage. (Plt. SOF 26). In fact, Endorsement A-577.5-A contains an "Other Insurance" provision that states, "[i]f an insured suffers bodily injury for which benefits are payable under this coverage, it applies as **excess** insurance overall other underinsured motorist insurance available to that insured." (Plt. SOF 24, *emphasis added*). Though

Defendant Dray was driving an underinsured motor vehicle at the time of the accident and there is at least \$350,000 in uncompensated damages at issue in this case, Defendant Shelter is attempting to utilize a clause in the form Policy, not the Endorsement, to prevent Plaintiff Carol Long from stacking her underinsured motorist coverage. Missouri law prohibits Defendant Shelter from denying Plaintiff Carol Long the coverage for which she contracted.

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 stack her underinsured motorist coverages under either of two legally-sufficient bases: 1) policy 24-1-4530272-20 is ambiguous and must be construed against Defendant Shelter; and 2) Defendant Shelter treated uninsured and

underinsured motorist coverage the same under the policy, including charging only one premium for both coverages and mixing mandatory and optional coverages. Insurance is not meant to defeat protection, but instead provide protection to the insured. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992). Both uninsured motorist coverage and underinsured motorist coverage follow the insured individual, and are not limited to a particular vehicle. *Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308, 313 (Mo. App. E.D. 1999). Missouri public policy flowing from Mo. Rev. Stat. § 379.203 prevents insurers from including provisions that prevent stacking of uninsured motorist coverage. *Niswonger*, 992 S.W.2d at 313. This same policy is applicable to underinsured motorist coverage when the insurance policy is ambiguous or the insurer treats uninsured (or other mandated coverages) and underinsured coverage the same. *Id.*

1. Ambiguities Exist in Policy 24-1-4530272-20

Plaintiff Carol Long is entitled to stack her underinsured motorist coverage because policy 24-1-4530272-20 is ambiguous. “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. Furthermore, “[a]mbiguous provisions of a policy designed to cut down, restrict or limit insurance coverage already granted, or

introducing exceptions or exemptions must be strictly construed against the insurer.” *Id.* at 211.

In *Chamness*, the Eastern District Court of Appeals allowed the plaintiff to stack underinsured motorist coverage due to an ambiguity that arose between an “excess insurance” clause and an anti-stacking provision. 226 S.W.3d at 208. Terms for the underinsured motorist coverage were not in the form policy, but rather in a separate endorsement. *Id.* at 201. Moreover, the endorsement defined underinsured motorist, and the main form policy did not have a definition for underinsured motorist. *Id.* The relevant portions of the endorsement read:

Other Insurance

If there is other similar insurance on a loss covered by this endorsement [American Family] will pay our share according to this policy’s proportion of the total limits of all similar insurance. But, any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is ***excess over any similar insurance.*** *Id.* (emphasis added).

The main form policy had a provision titled “Two or More Cars Insured,” which stated: “The total limit of our liability under all policies issued to you by us shall not exceed the highest limit of liability under any one policy.” *Id.* at 202. American Family relied on the language of this provision to prevent stacking of the policies, and the lower court agreed. *Id.*

On appeal, the Eastern District reversed the lower court’s decision and held that the preceding clauses created an ambiguity because the first clause granted certain coverage while the second clause attempted to take that coverage away. *Id.* at 204. The *Chamness* court held:

Where an insurance policy promises the insured something at one point but then takes it away at another there is an ambiguity. . . . Specifically, if “an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured.” . . . An other insurance clause appears to provide coverage when it would be interpreted by an ordinary person of average understanding to provide coverage over and above that furnished by the tortfeasor’s insurance.

Id. (internal citations omitted). Because the two clauses created an ambiguity and ambiguities are construed in favor of the insured, the *Chamness* court allowed the plaintiff to stack underinsured motorist coverage from two separate insurance policies.

Id. at 208.

Here, the same internal inconsistency exists between Policy 24-1-4530272-20 and the Endorsement (A-577.5-A), which is almost identical to the inconsistency found in *Chamness*. The Endorsement (A-577.5-A) has a section titled “Other Insurance.” *See Exhibit C.* (Plt. SOF 24). The anti-stacking language is located in the main form Policy under the title “Other Insurance in the Company.” *See Exhibit B.* (Plt. SOF 28). Based on the similar titles, these two provisions would address the same coverage since the phrase “other insurance” is broad enough to encompass other insurance in the company.

The Endorsement (A-577.5-A) states, “If an insured suffers bodily injury for which benefits are payable under this coverage, it applies as **excess** insurance over all other underinsured motorist insurance available to that insured.” *See Exhibit C.* (Plt. SOF 24, emphasis added). The “Other Insurance in the Company” provision reads “Our total liability under all our policies will not exceed the highest limit of any one policy.” *See Exhibit B.* (Plt. SOF 29). The same two clauses appear in each of the other six insurance policies and corresponding underinsured motorist endorsements at issue. (Plt. SOF 22 & 32).

While the anti-stacking provision appears to cap Defendant Shelter's liability at the highest limit of any one of the seven insurance policies issued by Defendant Shelter to Plaintiff Carol Long, the language of the Endorsement does not. The Endorsement states that the underinsured motorist benefits are "excess . . . over all other underinsured motorist insurance available to that insured." (Plt. SOF 24). As Plaintiff Carol Long contracted for a total of \$350,000 in underinsured motorist benefits under the seven endorsements, each of which applies "as excess insurance" over the others, the Endorsement clearly grants coverage that the Policy attempts to take away, thereby creating an ambiguity. In other words, Defendant Shelter appears to allow stacking based on the language of the Endorsement's "Other Insurance" provision, and then attempts to prohibit stacking under the main form policy creating an ambiguity. Additionally, the anti-stacking language doesn't even specifically mention underinsurance coverage. (Plt. SOF 20).

Defendant Shelter, the party in the best position to remove any ambiguity, could have easily remedied the situation by inserting an anti-stacking provision in the Endorsement. Defendant Shelter, for whatever reason, chose not to insert such an anti-stacking provision in the endorsement (Plt. SOF 26). Because the "Other Insurance" section does not prohibit stacking, and the "Other Insurance in the Company" does, the policy is ambiguous. Therefore, the policy must be strictly construed against the insurer, and this Court should allow Plaintiff Long to stack the \$350,000 in underinsured motorist coverage for which she contracted with Defendant Shelter.

2. Shelter has mixed "Apples and Oranges"

Defendant Shelter insurance has treated uninsured (and other mandated coverages) and underinsured motorist coverage the same and Plaintiff Carol Long can stack her underinsured motorist coverages. "In some policies, however, underinsured coverage and uninsured motorist coverage are lumped into the same provisions of the policy. Where the insurance carrier lumps apples and oranges together and calls the entire class 'apples,' the courts have treated it as such." *Krobach*, 827 S.W.2d at 212. A significant factor in determining if an insurer has treated uninsured and underinsured coverage the same is whether the insurer has charged a single premium for both coverages. *Niswonger*, 992 S.W.2d at 321. "The preparer of the insurance contract may not collect premiums for mandated insurance coverage and then by anti-stacking provisions deny multiple coverage." *Krobach*, 827 S.W.2d at 212. Charging a single premium and then denying coverage would frustrate the insured's objective reasonable expectations. *See Niswonger*, 992 S.W.2d at 320 (discussing how lumping uninsured and underinsured coverage together on a declaration page and charging a single premium frustrates an insured's objective and reasonable expectation).

Like in *Niswonger*, the insurer has charged the insured a single premium for both uninsured (mandated coverage) and underinsured motorist coverage. The Declaration Page for policy number 24-1-4530272-20 lists \$296.03 as the total price paid by the Longs for both uninsured and underinsured coverages. (Plt. SOF 6). Defendant Shelter did not indicate what portion of that price was going to uninsured or underinsured coverage and is mixing "apples and oranges." Additionally, Shelter mixes underinsured coverage with other types of mandated coverages. The Endorsement defines all

underinsured definitions and underinsurance exclusions. (Plt. SOF 25). However, Shelter mixes that with the anti-stacking language in the Policy. (Plt. SOF 30). The anti-stacking language treats all coverages (except accidental death and uninsured coverage) the same, including mandated liability coverage and optional underinsured coverage. (Plt. SOF 30). Therefore, Plaintiff Long is entitled to stack her underinsured motorist coverage; a finding to the contrary would frustrate the plaintiff's reasonable expectations.

III. CONCLUSION

An inherent contradiction exists between the Endorsement (A-577.5-A) and form Policy of 24-1-4530272-20. The "Other Insurance" provision in this Endorsement gives the plaintiff the right to stack her underinsured motorist coverage, because it is "excess insurance", while the form anti-stacking language in the Policy attempts to take this right away. This contradiction creates an ambiguity which must be strictly construed against Defendant Shelter. Moreover, Defendant Shelter has mixed apples and oranges by treating uninsured (and other mandated coverages) and underinsured coverage the same through billing practices and mixing of definitions. Because of the ambiguity and the mixing of uninsured (and other mandated coverages) and underinsured motorist coverage, Plaintiff Carol Long respectfully requests that this Court grant her motion for summary judgment.

Respectfully Submitted,

THE LAW OFFICES OF
STEPHEN R. BOUGH

By 

Stephen R. Bough, #46239
917 W. 43rd Street, Suite 100
Kansas City, MO 64111

(816) 931-0048 Phone
(816) 931-4803 Fax
stephen@boughlawfirm.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

Copies of the foregoing were mailed this 1st day of May, 2009, to:

Ben T. Schmitt
Schmitt, Manz, Swanson & Mulhern, PC
1000 Walnut, Suite 800
Kansas City, Missouri 64106
(816) 472-5310 Phone
(816) 472-5320 Fax

ATTORNEY FOR DEFENDANT
SHELTER INSURANCE COMPANY

Edward F. Ford
Ford & Cooper, P.C.
201 Commerce Bank Bldg.
110 N.W. Barry Rd.
Kansas City, MO 64155
(816) 436-9550 Phone
(816) 436-9667 Fax

ATTORNEY FOR
DEFENDANT LUCAS W. DRAY

David R. Frye
Lathrop & Gage, LLP
Building 82, Suite 1000
10851 Mastin Blvd.
Overland Park, KS 66210-1669
(913) 451-5100 Phone
(913) 451-0875 Fax

ATTORNEY FOR
DEFENDANT LUCAS W. DRAY