IN THE SUPREME COURT OF MISSOURI

SC90139

JASON L. RICE,

PLAINTIFF/RESPONDENT

vs.

SHELTER MUTUAL INSURANCE COMPANY,

DEFENDANT/APPELLANT

SUBSTITUTE REPLY BRIEF OF APPELLANT SHELTER MUTUAL INSURANCE COMPANY

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RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

Respondent states in his substitute Statement of Facts that, "Shelter acknowledges Rice sustained damages of at least $600,000 because of injuries in a motor vehicle collision caused by an uninsured motorist." [Resp. Substitute Brief, p. 18] In fact, there was never a stipulation as to the amount of Mr. Rice's alleged damages. The references in the Legal File and in Respondent's substitute Appendix simply state that he is entitled to all uninsured motorist benefits available under the applicable policies and Missouri law pending the outcome of this appeal.

Respondent states in his substitute Statement of Facts that, "…Shelter refused to pay Rice the additional $525,000 of purchased coverage because unspecified workers' compensation benefits were payable (and paid) to Rice." [Resp. Substitute Brief, p. 18] To the contrary, Shelter did not "refuse" to pay Mr. Rice anything. Shelter relied upon the Exclusion language of the uninsured motorist coverage and determined it applied to Mr. Rice's claim. [LF p. 63, ¶ 7] Per the Stipulated Statement of Uncontroverted Facts, the parties agreed to litigate the coverage issue. [LF p. 63, ¶ 7]

ARGUMENT

The trial court erred in entering summary judgment in favor of respondent Jason L. Rice because the uninsured motorist provision excluding coverage for damages sustained by an insured if benefits are payable to the insured under a workers' compensation law is valid and enforceable under Missouri law, in that the language of the exclusion does not violate §303.030 RSMo. of the Missouri Motor Vehicle Financial Responsibility Law or §379.203 RSMo., which collectively require automobile liability insurance policies to include uninsured motorist coverage in the amount of $25,000 per person.

I. REPLY TO RESPONDENT'S POINT RELIED ON I

There is no ambiguity between any provision of the policy and the section cited by Respondent, "EFFECT OF UNINSURED MOTORIST INSURANCE LAWS OR FINANCIAL RESPONSIBILITY LAWS." Respondent attempts to create an ambiguity where none exists. An insurance policy is only construed under contractual rules of construction if its terms are ambiguous. Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co., 852 S.W.2d 396, 399 (Mo.App. 1993).

The Missouri Supreme Court in Todd v. Missouri United School Ins. Council, 223 S.W.3d 156, 160 (Mo. banc 2007) set forth the essential provisions of an insurance policy, which include the identity of the insured, the insuring agreement, policy period, etc. The court discussed other categories of terms usually contained in policies, such as definitions, conditions and exclusions. Id. "'Exclusions' are usually stated that limit risks that otherwise might have been covered…." Id.

Respondent asserts an ambiguity exists because the policy "promises something at one point and takes it away at another," citing Behr v. Blue Cross Hosp. Serv., Inc. of Mo., 715 S.W.2d 251,256 (Mo. banc 1986). Respondent incorrectly argues the policy initially grants full uninsured coverage to him, then "takes it away" completely per the exclusion, then partially gives it back by virtue of the required minimum statutory limits of $25,000 per policy, then finally gives it all back per the section entitled, "EFFECT OF UHINSURED MOTORIST INSURANCE LAWS OR FINANCIAL RESONSIBILITY LAWS." Respondent's position is creative, but not persuasive.

The plaintiffs in Todd also cited Behr in their attempt to persuade the court an ambiguity existed because the contract granted something at one point and took it away at another. Todd at 162. The Supreme Court responded, as follows:

> Taken out of context, the language used by the Court in Behr may be confusing. Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks. While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent. Todd at 162-163.

The court further stated that exclusions and other provisions are necessary provisions in insurance policies, and if they are clear and unambiguous within the context of the policy as a whole, they are enforceable. Id. at 163.

Insurance policies must be read as a whole. Id. The risk insured against consists of both the general insuring agreement and the exclusions and definitions. Id. When read as a whole, there is no ambiguity in the uninsured motorist coverage provisions of the applicable policies. There is an insuring agreement, which is an essential part of the policy. There are exclusions limiting a risk that might otherwise be covered, which are common policy provisions. The exclusion at issue states in EXCLUSIONS, subparagraph (3), that uninsured motorist coverage does not apply to damages sustained by an insured if benefits are payable to the insured under any compensation law, defined by the policy to include workers' compensation benefits. (Appendix, pp. A1-A2)

Also part of subparagraph (3) is Shelter's explicit agreement that the exclusion does not apply to amounts mandated by an applicable financial responsibility law, but does apply to any amounts exceeding any statutory mandate. Thus, Shelter's agreement to pay $25,000 per policy to Respondent exemplifies this provision.

The section entitled, EFFECT OF UNINSURED MOTORIST INSURANCE LAWS OR FINANCIAL RESPONSIBILITY LAWS, does nothing more than reiterate Shelter's obligations when any uninsured motorist law or financial responsibility law applies. The entire section reads as follows:

> If an applicable uninsured motorist law or financial responsibility law renders any provision of this Part of the policy unenforceable, we will provide only the minimum limits mandated by such law. However, if other insurance covers an insured's claim and provides those required minimum limits, the provisions of this policy are fully enforceable.

> All provisions of this Part of the policy which exceed the requirements of any applicable uninsured motorist insurance law or financial responsibility law, or are not governed by it, are fully enforceable.
>
> (Appendix, p. A2)

The section is simply a more detailed restatement of the second paragraph of the exclusion in subparagraph (3). If there is an applicable law rendering a provision under the uninsured coverage unenforceable, Shelter will provide the minimum limits provided by such law. Otherwise, all provisions of the uninsured coverage – including exclusions - which exceed the legal requirements are, as in this case, fully enforceable. The second paragraph of the above-referenced section cannot be read in isolation from the entire section or entire uninsured coverage provisions. When read as a whole, there is nothing in the coverage or exclusions that would give Respondent the expectation of full coverage, in light of his receipt of workers' compensation benefits. Todd at 165.

As stated in Windsor Ins. Co. v. Lucas, 24 S.W.3d 151, 154 (Mo.App. E.D. 2000):

> We recognize there is no prohibition under Missouri law for an insurance contract to set forth the maximum amount the insurer will pay in one part, then stipulate the circumstances under which the insurer may lower the maximum amount it will pay, so long as all considered sections contain plain and unambiguous terms, and reading them together does not create an ambiguity.

The recent opinion in Jones v. Mid-Century Insurance Co., 2009 WL 1872113 (Mo.) does not aid Respondent's argument. The ambiguity at issue in Jones is not

comparable to the alleged ambiguity asserted by Respondent. Jones involved very specific "Limit of Insurance" provisions related to underinsured motorist coverage. Respondent appears to be simply trying to make a connection, however tenuous, to a very recent Supreme Court opinion involving the alleged ambiguity of an insurance policy provision. Respondent extrapolated "give and take" analysis could be done with any liability policy that contained exclusions. However, exclusions in liability policies are not prohibited by Missouri law.

II. REPLY TO RESPONDENT'S POINT RELIED ON II

In the Stipulated Statement of Uncontroverted Facts submitted by the parties, paragraph 5, the parties stipulated and agreed that "benefits were payable and were also required to be paid to Jason Rice under a compensation law, as defined in the Shelter policies", and in paragraph 6, "Jason Rice did receive benefits under a compensation law, as defined in the Shelter policies." (LF, p. 000063) Respondent now presents his argument that the exclusion was excessively broad and provided only illusory coverage.

None of the cases cited by Respondent support his assertion. Respondent's receipt of workers' compensation benefits triggered application of the exclusion at issue. There is no basis for Respondent's conclusion that the definition of "compensation law" would include benefits paid pursuant to private contract, other than it fits Respondent's position. The examples provided by the policy definition include benefits paid pursuant to statute: workers' compensation laws, disability laws, FELA and the Jones Act. (Appendix, p. A3) There is no example that contemplates benefits paid under private contract, such as health insurance or accidental death benefits from a life insurance policy. An insured

would receive the benefit of the coverage above the minimum statutory limits in other situations, and therefore, adequate consideration for the purchased coverage exists. American Standard Ins. Co. of Wis. v. Bracht, 103 S.W.3d 281, 292 (Mo.App. 2003). The application of an exclusion that reduces the uninsured coverage if certain facts exist does not make coverage illusory.

The cases cited by Respondent also do not aid his position. In fact, none of the cases involve an exclusion that a court determined was so excessively broad such that no consideration existed for the purchased coverage. For example, the issue in Krombach v. Mayflower Ins. Co., Ltd. involved the meaning of "underinsured" motorist as that term was used in the uninsured coverage provisions, which directly affected the insured's coverage. Krombach, 785 S.W.2d 728 (Mo.App. 1990). In Krombach, the insureds sought underinsured motorist coverage from their insurer following an accident with an insured tortfeasor. Id. at 729-730. The only definition of an "underinsured motor vehicle" in the policy was in the sentence: "The term "uninsured motor vehicle" also includes an underinsured motor vehicle." Id. at 730. The insurer argued there was only uninsured coverage as defined in the policy and that underinsured vehicles were to be considered uninsured per the policy terms. Id. at 731-732. The insureds argued an ambiguity existed because "underinsured motor vehicle" was not defined in the policy, and the addition of the word "also" in the above-quoted sentence could be construed to add additional coverage. Id. at 731.

The court concluded there was an ambiguity because "underinsured motor vehicle" was not defined in the sentence: "[t]he term 'uninsured motor vehicle' also

includes an underinsured motor vehicle." Id. at 734. The court continued: "This construction in favor of an ambiguity in the policy results because to do otherwise would render the sentence meaningless and provide illusory [underinsured] coverage." Id.

In Webb v. State Farm, the court determined that the effect of the uninsured motorist Insuring Agreement was to reduce the uninsured motorist liability below the statutory minimum, in violation of public policy. Webb, 479 S.W.2d 148, 150 (Mo. App. W.D. 1972). There is no attempt by Shelter to reduce the uninsured motorist liability below the statutory minimum in this case. Similarly, Respondent's citation to Cordell v. American Family Mut. Ins. Co. is misplaced and again taken out of context: [Missouri public policy "forbids impairment of uninsured motorist coverage by a policy provision" Cordell, 677 S.W.2d 415, 416 (Mo.App. E.D. 1984)]. [Resp. Substitute Brief, p. 42, ¶ 2] In Cordell, two insurers had policies with uninsured motorist coverage. One insurer claimed its policy was excess under an "other insurance" clause and should not be applied pro rata to pay plaintiff's judgment. The court cited its opinion in Steinhaeufel v. Reliance Ins. Cos. and State Farm, in which State Farm had attempted to avoid liability under an excess provision. "We held that Section 279.203 RSMo. 1982 *specifying minimum insurance coverage* contained 'no allowance for limitation or restriction on the insurer's liability.' And the court added that our statutory policy 'forbids impairment of uninsured motorist coverage by a policy provision." Cordell at 415-416, citing Steinhaeufel, 495 S.W.2d 463 [2,3] (Mo. App. 1973) (emphasis added).

None of the other cases cited by Respondent involve the exclusion at issue in this case.

Respondent's hypotheticals are not relevant as to the effect of other provisions in the exclusion, which Shelter does NOT agree are excessively broad. In Green v. Federated Mut. Ins. Co., plaintiff/insured claimed a phrase in the insurance policy was inherently ambiguous, but made no specific argument the clause was ambiguous as applied to the facts of the case. The court stated, "There is no ambiguity in the language of the clause as applied in this specific factual situation. We decline to address Insured's hypothetical arguments, because these issues are not ripe for determination under the facts presented. Green, 13 S.W.3d 647, 649 (Mo.App. 1999); See also, Sanders v. Wallace, 884 S.W.2d 300, 302 (Mo.App. 1994)("We have no doubt there are scenarios which would render the "incidental farming" clause" ambiguous; this, however, is not such a situation.")

The exclusion at issue as applied to this case is not excessively broad and does not violate public policy. Shelter and its insured were free to contract under Missouri law, and that contract should not be avoided because Respondent does not like the result of the agreed contract terms.

III. REPLY TO RESPONDENT'S POINT RELIED ON III

A. Respondent's Point Relied On III, B(1)

Respondent argument in Point III, B(1) of its Substitute Brief that he is entitled to the full $600,000 limits of the applicable uninsured motorist coverage based on the stated purpose of §379.203 RSMo. to "establish a level of protection equivalent to the liability coverage the insured would have received had the insured been involved in an accident

with an insured tortfeasor" does not find support in Missouri law. (Resp. Substitute Brief, p. 46; citing Kuda v. American Family Mut. Ins. Co., 790 S.W.2d 464, 467 (Mo. banc 1990). Respondent's quote from Kuda does not say or mean that a valid policy exclusion cannot limit uninsured benefits in specified situations.

The facts in Kuda v. American Family Mut. Ins. Co. are distinguishable from our facts. 790 S.W.2d 464 (Mo. banc 1990). Kuda involved a limitation of liability contained in a medical payments coverage provision that was only implicated if the insured was involved in an accident with an uninsured motorist. Id. at 466. The court held the provision was ambiguous in its application and that under no interpretation of the provision would the plaintiff/insured be entitled to collect medical payments coverage benefits under an uninsured motorist claim. Id. On the other hand, had the insured been involved in a single-car accident or *with an insured tortfeasor*, she would have been entitled to the full medical payments benefits. Id. at 466 (emphasis added) The question decided by the court was whether the insurer's freedom to define the scope of medical payments coverage was to be restricted when uninsured motorist coverage was implicated. Id. at 467. The court held that *the purpose of §379.203* [establishing a level of protection equivalent to the liability coverage the insured would have received had the insured been involved in an accident with an insured tortfeasor] *was defeated by the restriction in the medical payments coverage provision at issue* in American Family's policy. Id. (emphasis added) This is because plaintiff would not receive the same benefits (MPC) than if she had been involved in an accident with an insured tortfeasor.

By creating a statutorily-imposed minimum liability and uninsured motorist limit, the Missouri legislature made certain that insureds could recover a set amount from uninsured and minimally insured drivers. The Missouri legislature has not, however, mandated that all insureds recover the stated limits of uninsured motorist coverage in their respective policies under all circumstances, regardless of the agreement between the insurer and insured. For further discussion of this issue as related to the applicable exclusion, please see Appellant's Brief.

The other cases cited by Respondent in support of his contention that he is entitled to the full amount of uninsured coverage based solely on §379.203 do not support his position. The decision cited by Respondent in Dawson v. Denney-Parker, 967 S.W.2d 90 (Mo.App. 1998) is not applicable to our case. In Dawson, the applicable policy issued by Farm Bureau contained a definition of "hit and run motor vehicle," which excluded uninsured motorist coverage if there was no contact between the insured and the uninsured vehicle. Id. at 91-92. The court of appeals determined that the "no contact" definition was in direct violation of §379.203 RSMo., because the statute had been amended in 1982 to expressly provide that the "legal entitlement" to uninsured motorist benefits existed regardless of whether there was physical contact with the uninsured vehicle. Id. at 92-93. The court held that "Farm Bureau's attempt to limit coverage exceeding the statutory minimum by imposing a physical contact requirement violates section 379.203 and is ineffective and void." Id. at 93. Therefore, the court determined the insureds were entitled to the full amount of uninsured coverage in their policy. Id.

There is no express provision in §379.203 prohibiting an uninsured policy exclusion for damages sustained by an insured if benefits are payable to the insured under a workers' compensation law. Therefore, Respondent's position that he is entitled to the full uninsured coverage based solely on the language of §379.203 is without merit.

B. Respondent's Point Relied On III, B(2)

Respondent urges that §379.203 RSMo. **requires** insurance companies to provide the full uninsured motorist limits under all circumstances. The statute is not that broad and interpretation of the statute has been taken out of context by Respondent in reference to the cases cited and upon which he relies in his brief – Cameron Mutual v. Madden, Douthet v. State Farm and Barker v. Palmarin.

i. Cameron Mutual v. Madden, 533 S.W.2d 538 (Mo. banc 1976)

In Cameron, the insured (Madden) had a single policy that covered two vehicles with separate medical payment and uninsured motorist coverages for each. Id. at 538. The insured's wife was involved in a fatal accident with an uninsured motorist while driving one of the vehicles listed in the policy. Id. The insured claimed he was entitled to the stacked coverages for both vehicles, rather than only the separate coverage for the involved vehicle.

The court first noted that it accepted the premise of prior case law that the public policy of §379.203 mandates that when an insured has two separate policies containing uninsured motorist clauses, effect is given to both coverages *in the statutory amount* without reduction or limitation by policy provisions. Id. at 542; citing Galloway v. Farmers Ins. Co., Inc., 523 S.W.2d 339, 342 (Mo.App. 1975)(emphasis added). The real

issue in Cameron was whether or not it should make a difference under §379.203 RSMo. for purposes of stacking uninsured motorist coverage that the insurer could take away uninsured coverage for the non-involved vehicle(s) simply by the insurer's election to write the insurance for multiple vehicles in a consolidated policy versus separate policies. The holding in Cameron was stated as follows:

> [W]e hold that the public policy expressed in §379.203 prohibits the insurer from limiting an insured to only one of the uninsured motorist coverages provided by a policy and that in this case both of such coverages, written on the two automobiles, are available to Madden, provided, of course, that insured is limited to recovery of damages suffered. Id. at 544-545.

It is important to note that the quote offered by Respondent from Cameron at p. 51 of his Substitute Brief ("the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by [a limiting] clause …) was made in the context of the insurer attempting to prohibit stacking and restrict recovery to a single uninsured motorist coverage when the applicable policy provided separate uninsured motorist coverage for other vehicles, thereby completely taking away uninsured motorist coverage under the policy for the non-involved vehicle. Our case does not involve an exclusion or other provision that attempts to prohibit stacking of uninsured motorist coverage.

ii. Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156 (Mo. banc 1977)

Respondent's analysis of Douthet is inaccurate. The issue in Douthet involved reduction of the insured's recovery of uninsured benefits by workers' compensation

benefits, when the insured's uninsured benefits recovery already was below the statutorily required limits. Id. at 157-158. At the time Douthet was decided, Missouri's Safety Responsibility Law (now the MVFRL) provided for not less than $10,000 of minimum uninsured benefits per person. See Appellant's Brief, p. 11. The policy provision at issue in Douthet provided for a reduction of uninsured motorist benefits by those amounts paid or payable under a workmen's compensation law, without a provision for compliance with uninsured coverage amounts required by Missouri law. Douthet at 157. The insurer's argument that its policy provision was not inconsistent with Missouri's Safety Responsibility Law was based on an illustration that had plaintiff recovered the amount awarded by the jury from an *insured* tortfeasor, she would have been required under Missouri's workers' compensation law to reimburse the comp carrier for payments received, thus reducing her uninsured motorist benefits. Id. The court found the insurer's position was not consistent with the purpose of §379.203:

> The holdings in Cameron, Galloway and Webb that §379.203 requires that *coverage in the amounts required by the Safety Responsibility Law not be diminished by contractual limitation*, absent express statutory authority therefor, *govern the outcome of this case*. Id. at 159 (emphasis added).

Shelter does not assert the same analysis as the insurer in Douthet. Shelter's policy exclusion does not diminish the minimum uninsured coverage required by §379.203 and the MVFRL.

iii. Cano v. Travelers Ins. Co., 656 S.W.2d 266 (Mo. banc 1983)

Shelter briefed in detail the decision in Cano and its application to this case. See Appellant's Brief, pp. 10-12. Respondent's analysis of Cano again is misleading. One of the issues in Cano involved a provision similar to the provision at issue in Douthet, which resulted in the insured receiving *no* uninsured motorist benefits due to a complete offset of workers' compensation benefits. Cano at 269-270. As discussed previously, this is not the issue in our case.

iv. Williams v. Casualty Reciprocal Exchange, 929 S.W.2d 802 (Mo.App. 1996)

Barker v. Palmarin, 799 S.W.2d 117 (Mo.App. 1990)

Respondent appears to have cited to Williams primarily to stress its discussion of Barker v. Palmarin. The Williams' opinion's author, Judge Stith, first stated that neither Cano nor Douthet required that the offset provision at issue be held unenforceable above the $25,000 statutory minimum. Williams at 809. That said, the court noted that the only Missouri case found – Barker v. Palmarin – appeared to reach the result that an offset provision would be unenforceable above the statutory minimum. Id. at 810. As indicated by Respondent, the Williams court did not finally resolve the issue one way or the other. However, as discussed below, the Barker court did not reach the conclusion urged by Respondent.

Barker addressed the ability of a workers' compensation carrier (American) to subrogate its claim against its employee/insured's uninsured motorist carrier (Northland). The court based its holding that the compensation carrier was not entitled to subrogation on a majority of states' rulings that such subrogation was not allowed and the public

policy stated in Cano v. Travelers Ins. Co. Barker at 118. In reviewing the public policy issue, the court relied on Cano and found that a favorable result to the compensation carrier, American, would result in a diminution of uninsured benefits via the Northland policy to the employee/insured. American had paid $57,000 in workers' compensation benefits to the employee/insured. Northland's uninsured motorist policy provided $50,000. The court simply noted that if American recouped from Northland the amount it paid, the employee/insured's benefits would be reduced.

The Williams court noted Barker's reliance on certain language from the Arkansas decision of Travelers Ins. Co. v. National Farmers U. Prop. & C. Co., 262 Ark. 624, 480 S.W.2d 585, 588 (1972). Williams at 810. Barker cited specific language from Travelers regarding a workers' compensation carrier's rights and the Travelers court's pronouncement of the purpose of uninsured motorist statutes, which is to provide "'*a basic minimum coverage* against the actions of financially irresponsible motorists, and to have the employer's rights under that statute taken away by the compensation subrogation statutes, makes no sense.'" Barker at 118-119; citing Travelers at 589-590 (emphasis added). The Williams court quoted entirely different language from Travelers than what was relied upon in Barker. Williams at 810.

There was no discussion of the actual effect of the statutory minimum uninsured benefits required by §379.203 in Barker. In fact, the court stated, "the Safety Responsibility Law, and the policy expressed in §379.203, RSMo 1986 is to disallow a diminution in benefits to motorists injured by uninsured drivers" and cited Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137, 147 (Mo. banc 1980) and Douthet v. State Farm.

As previously discussed, Cano and Douthet do not forbid enforcement of the exclusion at issue in excess of the $25,000 minimum limits per Missouri statute. Harrison makes no pronouncement on this issue. In Harrison, the wife and daughter of the insured driver in a one-vehicle accident attempted to collect uninsured motorist benefits from the driver's liability carrier. Id. at 139-140. In fact, the Harrison court cited with approval prior decisions that "have uniformly concluded that uninsured motorist coverage extends exactly to the same extent as would have been available, no more and no less, if the tortfeasor had complied with the minimum requirements of the motor vehicle safety responsibility law. Id. at 144.

The exclusion in Shelter's policy does not violate Missouri statute or the public policy behind the statute. Shelter's policy complied with §379.209 and §303.030 by providing that the exclusion applied only above the minimum statutory uninsured limits. Missouri case law does not support Respondent's position that enforcement of the exclusion above the minimum statutory limits violates public policy. "While §379.203 dictates the minimum requirements for uninsured motorist coverage in motor vehicle liability policies, the parties to an insurance contract are always free to implement policies which exceed the statutory requirements. So long as policy provisions meet the minimum requirements of the law and do no conflict with it, the parties remain free to create the insurance contract of their choice." Ezell v. Columbia Ins. Co., 942 S.W.2d 913 (Mo.App. 1996) (citations omitted).

C. Respondent's Point Relied On III, B(3)

In this section, Respondent claims Shelter's position is inconsistent with Missouri law regarding stacking uninsured motorist coverage, citing Cameron Mutual v. Madden. As discussed above in subsection B(i), Cameron involved an insurer denying stacked uninsured benefits under a combined, single policy covering multiple vehicles. The court held the insurer could not get around the stacking requirement by writing a single policy insuring multiple vehicles instead of writing separate policies for each vehicle. Respondent's citation, multiple times, to the language in Cameron that "the law does not permit insurers to collect a premium for certain coverage, then take that coverage away" (Cameron at 545) refers to Cameron's attempt to deny any amount of uninsured benefits from the non-involved vehicle under the combined policy.

Respondent misrepresents and misinterprets Shelter's position by seeming to suggest it is Shelter's position that §379.203 allows only $25,000 per person in uninsured coverage. Shelter agrees that coverage is available under each of the three policies under which Respondent is an insured. Shelter's position has no effect on Missouri's stacking rules. The statutory minimum coverage of $25,000 under all three policies issued to Mr. Rice's parents "stack" for a total of $75,000 of uninsured benefits in this case.

D. Respondent's Point Relied On III, B(4)

Respondent makes much of Shelter's choice of words as to the requirement of §379.203 to provide uninsured coverage "in the amount of" $25,000. Shelter does not see a significant difference in its choice of words versus the wording of the statute. Shelter understands the statute requires "not less than" $25,000 minimum uninsured motorist limits in an automobile liability policy. The fact an insured obtains higher

uninsured limits does not require payment of the full limits, without regard to the policy terms, pursuant to §379.203. See also, Shelter's argument in response to Respondent's Point Relied On III, B(1).

Shelter also is not entirely clear on the point of Respondent's subsection B(4). The insurer is given a statutory right of reimbursement of the amount it pays in uninsured benefits, which is made clear in Shelter's policy under Coverage E, TRUST AGREEMENT, (1) – "Our right extends only to the extent of our payment." (LF, p. 000086). Respondent is entitled to $75,000 of uninsured benefits; therefore, if he recovered a settlement or judgment from the "person or organization legally responsible" in the amount of $75,000 or greater, Shelter potentially could recover $75,000. If Shelter had to pay uninsured benefits of $600,000 as advocated by Respondent, it potentially could recover $600,000 if Respondent recovered that much or more in a settlement of judgment against a tortfeasor. However, Shelter would not be entitled to reimbursement of $600,000 if it paid Respondent $75,000. The statutory right of reimbursement has no application to an alleged "public policy" in §379.203 that an insured is entitled to the full amount of a policy's uninsured motorist benefits, regardless of the effect of enforceable policy exclusions. Respondent's argument in this section has no application to the issues in this case.

E. Respondent's Point Relied On III, B(5)

Respondent's argument in this section is that the cases relied upon by Shelter do not support Shelter's position. Shelter incorporates by reference its Brief and argument

in this Substitute Reply, as they relate to the cases cited by Respondent, in response to his Point Relied On III, (B)(5).

F. Respondent's Point Relied On III, B(6)

The fact that Missouri courts have permitted insurance clauses restricting uninsured motorist coverage to the statutory minimum, and were not considered violative of §379.203, directly supports Shelter's contention in this case. For example, in American Standard Ins. Co. of Wis. v. Bracht, the court determined that set off provisions in the liability insurance coverage and the uninsured motorist coverage were valid above the mandatory minimum liability and uninsured limits of $25,000/$50,000 provided by statute. "To the extent [the trial court] held that any reduction of the uninsured motorist coverage which would not infringe on such minimum coverage was void as against public policy, we reverse." Bracht, 103 S.W.3d 281, 290-291 (Mo.App. S.D. 2003); *See also*, Ezell v. Columbia Ins. Co., 942 S.W.2d 913 (Mo.App. S.D. 1996).

The Missouri Supreme Court decision in Ragsdale v. Armstrong and the 8th Circuit Court of Appeals' analysis of Ragsdale in Tatum v. Van Liner Ins. Co. are illustrative of the inaccuracy of Respondent's position. In Ragsdale, the insureds were involved in an accident with an out-of-state driver who carried $10,000 per person in liability limits, which was below Missouri's statutory minimum limits of $25,000 per person. Ragsdale, 916 S.W.2d 783, 784 (Mo. banc 1996). The tortfeasor's insurer paid its per person limits to Mr. Ragsdale for his injuries. Id. In determining the amount the uninsured carrier owed for uninsured benefits, the court first determined the tortfeasor was an uninsured motorist under Missouri law because her liability policy did not meet

the statutory minimum limits. Id. at 785. The insured had full uninsured benefits under two policies totaling $150,000. Id. at 784. The court held that the insured was entitled to have the uninsured policies stack and that he was entitled to the statutory minimum of each policy, for a recovery of $50,000, less the $10,000 already paid by the tortfeasor. In its analysis of Ragsdale, the 8th Circuit in Tatum stated, "The focus in Ragsdale and the UM provision of Mo.Rev.Stat. §379.203 is to ensure that an injured motorist has available at least the statutory minimum amount of recovery required by the [MVFRL, §303.030.5]." Tatum, 104 F.3d 223, 225 (8th Cir. 1997).

The insured in Ragsdale clearly did not receive the full amount of the uninsured benefits in his policy. There is no practical difference between the insured in Ragsdale and Respondent. If public policy disallows enforcement of the exclusion at issue above the statutory minimum limits, Missouri courts would not have allowed enforcement of other set off provisions or exclusions for amounts in excess of the statutory minimum limits in the multitude of case cited by Shelter and Respondent. This Court also has permitted policy exclusions applicable to liability coverage, for which the MVFRL also requires $25,000/$50,000 in minimum bodily injury limits, for amounts higher than the statutory minimum. Halpin v. American Family Mut. Ins. Co., 823 S.W.2d 479 (Mo. banc 1992)(The Court upheld the household exclusion clause as applied to amounts above the minimum statutory liability limits.)

Respondent's pronouncement that "§379.203 RSMo. permits recovery to the extent of the damages sustained, as if the uninsured motorist had applicable liability insurance coverage, limited only by the amount of applicable uninsured motorist

coverage" (Resp. Substitute Brief, p. 65) is incredibly overbroad and, as a blanket statement, is not supported in Missouri law. If Respondent's position was true, no limitation provision or exclusion related to uninsured motorist benefits would be upheld. Further, the exclusion at issue does not "thwart" the purpose of uninsured motorist coverage simply because a tortfeasor would not be entitled to reduce his/her liability because of the injured person's receipt of workers' compensation benefits. Section 379.203 states it is for the "protection of persons insured [under an automobile liability policy] who are legally entitled to recover damages from owners or operators of uninsured motor vehicles …." The statute does not say, or remotely imply, that the applicable uninsured motorist coverage must be fully substituted in all circumstances for the non-existent liability insurance of the tortfeasor.

It does not follow, as suggested by Respondent, that because a workers' compensation carrier is not entitled to subrogate an uninsured motorist policy, that an uninsured carrier cannot exclude uninsured coverage in amounts in excess of the statutory minimum. The Barker court stated that most states base their refusal to extend such subrogation rights to a compensation carrier on the fact that subrogation is allowed for actions in tort, not actions based on uninsured policies, which sound in contract. Id. at 118. Because uninsured policies sound in contract, as long as the policy provisions meet the minimum requirements of the law and do not conflict with it, the parties are free to create the insurance contract of their choice. Ezell, 942 S.W.2d at 919.

CONCLUSION

For the foregoing reasons, Appellant Shelter Mutual Insurance Company respectfully requests this Court reverse the trial court's Final Judgment granting Respondent's Motion for Summary Judgment and direct the trial court to enter summary judgment in favor of Shelter Mutual Insurance Company.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Substitute Reply Brief, along with a diskette containing the brief, were mailed on this 20th day of July, 2009, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This certificate includes below the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, facsimile number, and electronic mail address.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. This brief contains 6,320 words, according to the word-processing system used to prepare the brief.

4. Microsoft Word 2002 was used to prepare this Brief of Appellant.

5. The floppy disk provided with this brief has been scanned for viruses and is virus free.

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APPENDIX

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