

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC89844

MORRIS JONES and PAMELA BROWN,

Plaintiffs/Appellants

vs.

MID-CENTURY INSURANCE COMPANY

Defendant/Respondent

Appeal from the Circuit Court of Scott County, Missouri

Case No: 05 SO-CV00320

Honorable David A. Dolan, Circuit Judge

**SUBSTITUTE BRIEF OF RESPONDENT MID-CENTURY INSURANCE
COMPANY**

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TABLE OF CONTENTS

Table of Authoritiesii

Jurisdictional Statement1

Statement of Facts2

Point Relied on in Response to Appellant’s Brief6

Standard of Review7

Argument8

Conclusion16

Table of Authorities

Cases

<i>Melton v. Country Mutual Insurance Company</i> , 75 S.W.3d 321 (Mo. App. E.D. 2002).....	11
<i>Noll v. Shelter Insurance Co.</i> , 774 S.W.2d 147 (Mo. banc 1989)	8
<i>Robin v. Blue Cross Hospital Services, Inc.</i> , 637 S.W.2d 695, 698 (Mo. banc 1982).....	9
<i>Rodriguez v. General Accident Ins. Co. of America</i> , 808 S.W.2d 379, 382 (Mo. banc 1991).....	8, 9, 11, 13
<i>Seeck v. Geico General Ins. Co.</i> , 212 S.W.3d 129 (Mo. banc 2001).....	14
<i>State Farm Mutual Automobile Insurance Company v. Sommers</i> , 954 S.W.2d 18 (Mo. App. E.D. 1997).....	10, 14
<i>Tapley v. Shelter Insurance Company</i> , 91 S.W.3d 755 (Mo. App. S.D. 2002).....	11
<i>Ware v. Geico General Insurance Co.</i> , 184 S.W.3d 99, (Mo. App. S.D. 2002).....	14
<i>Zemelman v. Equity Mut. Ins. Co.</i> , 935 S.W.2d 673, 679 (Mo. App. W.D. 1996).....	14

JURISDICTIONAL STATEMENT

On January 27, 2009, this Court entered an order sustaining the Appellants/Cross-Respondent's application to transfer this case from the Missouri Court of Appeals, Southern District. This Court has jurisdiction to finally determine all cases coming to it from the Court of Appeals pursuant to Mo. Const. Article V, Section 10.

STATEMENT OF FACTS

The Statement of Facts submitted by the Appellants omits a relevant policy provision, misstates the arguments made by the Respondent, and also misstates the basis for the rulings by both the Trial Court and Southern District Court of Appeals. Therefore, where necessary the Respondent, Mid-Century, will supplement with the omitted and correct factual statements.

The Underinsured Motorist (“UIM”) provisions found in Endorsement E1179j of the Mid-Century policy control the issues before the Court. The policy defines what is considered an underinsured vehicle:

“Underinsured Motor Vehicle – means a land motor vehicle to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability are less than the limits of liability for this coverage.” (Appellant, Br. Appendix A7)

The Appellants state on page 8 of their brief that Mid-Century argued in the court below that it was entitled to a set-off and credit in the total amount of \$100,000 based upon the single payment of \$50,000 by the tortfeasor’s insurance company. In addition, the Appellants state on page 9 and 10 that the Trial Court ruled that Mid-Century could apply the single \$50,000 payment under two separate provisions of the policy to reduce the coverage available to Appellants by \$100,000. According to the Appellants, the Trial Court held that Mid-Century was entitled to a \$50,000 set-off against damages under section a.1, and a \$50,000 set-off under subsection f.i. of the Limits of Liability provision in the policy.

These statements are factually incorrect. The Respondent never argued that it was entitled to a set-off and credit of \$100,000 against each Appellant. Instead, the Respondent argued that since the maximum UIM benefits payable were \$100,000, a single set-off of the \$50,000 paid on behalf of the tortfeasor was proper. Consistent with this interpretation, Mid-Century paid both Appellants \$50,000.

In addition, the Trial Court never ruled that the policy reduced the coverage available to the Appellants by \$100,000 or that Mid-Century was entitled to two set-offs under sections a.1 and f.i of the Limits of Liability provision. The Trial Court's findings were, in relevant part, as follows:

“3. Based on the plain language of the policy, the maximum Mid-Century Insurance could possibly be liable to pay to Plaintiffs would be \$100,000 per claim.

4. However, the plain language of the policy also contains a set-off provision allowing for the total amount of benefits to be reduced by the amount paid by Sarah McGee's insurance carrier” (Appellant, Br. Appendix A2)

Applying the set-off provision, the Court then ruled that each Plaintiff was entitled to receive \$50,000 from Mid-Century since they had already received \$50,000 from the other insurance carrier.

The Southern District affirmed the Trial Court's ruling but not on the basis suggested by the Appellants. After analyzing the Limits of Liability language in the policy, the Court agreed with the Trial Court and Mid-Century:

“The purpose of UIM coverage is to compensate an insured for those damages which have not already been paid by a tortfeasor via liability insurance, self-insurance or some other means. See Zemelman v. Equity Mut. Ins. Co., 935 S.W.2d 673, 679 (Mo. App. 1996); Wendt v. General Acc. Ins. Co., 895 S.W.2d 210, 217 (Mo. App. 1995). Subsection a. of the Limits of Liability provision accomplishes that purpose by limiting the amount Mid-Century will pay to the lesser of : (1) the amount of the insured’s damages that have not already been paid; or (2) the UIM coverage’s limit of liability. The first clause in subsection a.1 mathematically quantifies the amount by which the claimant is underinsured. To the extent the claimant has already been compensated for his or her damages, this prevents a double recovery for the same loss. For example, if a claimant has sustained damages of \$100,000 and has been paid \$25,000 by the tortfeasor’s liability carrier, the most Mid-Century would pay is \$75,000 because the claimant is only underinsured by that amount. The second clause in subsection a.2 caps Mid-Century’s liability at the UIM coverage’s limits of liability. For example, if a claimant has sustained damages of \$250,000 and has been paid \$25,000 by the tortfeasor’s liability carrier, the claimant would be underinsured by \$225,000. Nevertheless, the most Mid-Century would pay is the per person limit of \$100,000. Applying subsection a. to Jones and Brown, each of them sustained damages of at least \$150,000 due to McGee’s negligence. Therefore, whether subsection a.1 or a.2 is used, each claimant is underinsured by \$100,000.

After a claimant's underinsured damages have been quantified pursuant to subsection a., subsections b. and f. determine the actual amount Mid-Century is required to pay. Subsection b. plainly states the amount the carrier will pay is "[s]ubject to subsections a. and c. –h. in this Limits of Liability section..." Subsection f. plainly states that "[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 ... by or for any person or organization who is or may be held legally liable for the bodily injury to an insured person ..." (Bold in original) Mid-Century argues that these subsections are not ambiguous and do not give the insurer an improper double credit for the claimants' recovery from McGee's liability carrier. This Court agrees." (Appellant, Br. Appendix A22, A23)

Based upon the decisions of the Trial Court and Southern District, the Respondent, Mid-Century, has paid each Appellant \$50,000 of underinsured benefits under the policy.

POINT RELIED ON IN RESPONSE TO THE APPELLANTS' BRIEF

The Trial Court and the Southern District Court of Appeals did not commit error in holding that each of the Appellants were entitled to recover \$50,000 of underinsured motorist benefits because the plain and unambiguous language of the Limits of Liability provision quantified the maximum amount that was payable in subsections a.1 and a.2, which was \$100,000 and subsection f.i. reduced the amount payable by \$50,000, the amount paid by the tortfeasor's insurer.

Noll v. Shelter Insurance Co., 774 S.W.2d 147 (Mo. banc 1989)

Robin v. Blue Cross Hospital Services, Inc., 637 S.W.2d 695, 698 (Mo. banc 1982)

Rodriguez v. General Accident Ins. Co. of America, 808 S.W.2d 379, 382 (Mo. banc 1991)

Seeck v. Geico General Ins. Co., 212 S.W.3d 129 (Mo. banc 2001)

STANDARD OF REVIEW

The Respondent agrees with the standard of review as stated by the Plaintiffs/Appellants in their brief.

ARGUMENT

I. The Trial Court and Southern District Court of Appeals did not commit error in holding that each of the Appellants were entitled to receive \$50,000 of underinsured motorist benefits because the plain and unambiguous language of the Limits of Liability provision quantifies the maximum amount that is payable in subsections a.1 and a.2, which was \$100,000 and subsection f.i reduced the amount payable by \$50,000, the amount paid by the tortfeasor’s insurer.

The Appellants’ sole point on appeal is that the Trial Court and Southern District Court of Appeals erred in finding that the UIM coverage was unambiguous and in allowing a set-off of the \$50,000 for the payment on behalf of the tortfeasor. Both the Trial Court and the Southern District properly rejected the contention by the Appellants that a double credit or set-off was being given to Mid-Century under the policy language.

In Noll v. Shelter Insurance Co., 774 S.W.2d 147 (Mo. Bank. 1989), this court determined that in the absence of public policy considerations, an insured and insurer are free to define and limit coverage by their agreement, and since there are no statutory requirements in Missouri for underinsured motorist coverage, the extent of such coverage is determined by the contract entered into between the parties.

A. The “Limits of Liability Provision” is unambiguous

An ambiguity arises when the meaning of contract language is uncertain, indistinct or duplicitous. Rodriguez v. General Ace Ins. Co. of America, 808 S.W.2d 379, 382 (Mo. banc 1991). A court may not create an ambiguity in order to distort the language of an unambiguous agreement, or, in order to enforce a particular construction, which it might

feel is more appropriate. Id. Absent an ambiguity, an insurance policy must be enforced according to its terms. Robin v. Blue Cross Hospital Services, Inc., 637 S.W.2d 695, 698 (Mo. banc. 1982).

In this case, the Appellants misinterpret the language in the Limits of Liability UIM coverage in an effort to create an ambiguity where none exists. The record establishes that the Appellants were clearly underinsured since the tortfeasor had a liability policy with limits of \$50,000, while the Mid-Century policy provided the greater benefit of \$100,000. Under the definition in the policy, Brown and Jones qualified as being underinsured. As the court recognized in Rodriguez v. General Accident Insurance Company of America, 808 S.W.2d 379 (Mo. banc 1991), if the tortfeasor's liability limits had been \$100,000 in this case, then by definition the Appellants would not have been underinsured even through they each claim total damages in excess of \$150,000.

Once the definition of underinsured is met, the Limits of Liability provision must be addressed to determine the maximum amount of benefits payable under the policy and how much the company will pay. Subsections a.1 and a.2 in the Limits of Liability provision sets forth the maximum amount Mid-Century will pay in plain and certain terms:

“Limits of Liability

- a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of UNDERinsured Motorist Coverage stated in this policy, and the most we will be will be the lesser of:

1. The difference between the amount of an insured person's damages for bodily injury, and the amount paid to that insured person by or for any person or organization who is or may be held legally liable for the bodily injury; or
2. The limits of liability of this coverage.”

(Appellant, Br. Appendix A5)

In this case, the Appellants are each claiming that their total damages are \$150,000 and they were paid \$50,000 by the tortfeasor, so under a.1 the most Mid-Century would pay is \$100,000. Under a.2, the limits of liability under the Mid-Century policy is also \$100,000. Since both the calculations under a.1 and a.2 reach the same amount, the maximum Mid-Century would pay to either Appellant is \$100,000. The Trial Court and the Southern District found the language in subsection a.1 was plain and certain and rejected the Appellants strained interpretation that a credit or set-off was being taken.

The Southern District was correct when it concluded that this subsection, a.1, was meant to mathematically quantify the maximum amount of benefit payable under the policy. In State Farm Mutual Automobile Insurance Company v. Sommers, 954 S.W.2d 18 (1997), the Eastern District reached the same result while interpreting the identical language contained in subsection a.1 of the Mid-Century policy.

Once the maximum payable amount is quantified, then subsection b. of the Limits of Liability provision determines what amount will actually be paid by Mid-Century:

“b. Subject to subsections a. and c.-h. in this Limits of Liability Section, we will pay up to the limits of liability shown in the schedule below as show in the Declarations.

Coverage Designation	Limits
...	...
U9	100/300
...	

- f. The amount of UNDERinsured Motorist coverage we will pay shall be reduced by any amount paid or payable to or for an insured person;
- i. by or for any person or organization who is or may be held legally liable for the bodily injury to an insured person...”

(Appellant, Br. Appendix A6)

The set-off provision in subsection f.i. is virtually identical to that considered by this Court in Rodriguez. In Rodriguez, the contract provided that the “limits of liability shall be reduced by all sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible.” This Court found such language to be clear and unambiguous. The Trial Court and Southern District reached the same conclusion after examining the Limits of Liability provisions in the Mid-Century policy and finding no “duplicity, indistinctness or uncertainty in the meaning of the language in this policy.” Courts of Appeal in the Eastern and Southern Districts have reached the same conclusion. Melton v. Country Mutual Insurance Company, 75 S.W.3d 321 (Mo. App. 2002). Tapley v. Shelter Insurance Company, 91 S.W.3d 755 (Mo. App. 2002).

The examples provided by the Appellants in an attempt to illustrate how the Mid-Century policy creates a double credit or set-off distorts the plain language of the Limits of Liability provision. Appellants were underinsureds as defined in the policy but the plain language of subsection a.1. and a.2. states that the maximum benefit is either the difference between the insured's damages and amounts paid by others legally responsible or the policy's limit of liability. In this case, the maximum benefit was \$100,000, the policy's Limits of Liability, despite the fact that the Appellant claimed total damages of \$150,000. Accordingly, they were paid \$50,000 by Mid-Century, which is the amount they were entitled to receive after the tortfeasor's payment was deducted under subsection f.i. This is not a double credit as the Southern District also recognized:

“The first clause in subsection a.1 mathematically quantifies the amount by which the claimant is underinsured. To the extent the claimant has already been compensated for his or her damages, this prevents a double recovery for the same loss. For example, if a claimant has sustained damages of \$100,000 and has been paid \$25,000 by the tortfeasor's liability carrier, the most Mid-Century would pay is \$75,000 because the claimant is only underinsured by that amount. The second clause in subsection a.2 caps Mid-Century's liability at the UIM coverage's limits of liability. For example, if a claimant has sustained damages of \$250,000 and has been paid \$25,000 by the tortfeasor's liability carrier, the claimant would be underinsured by \$225,000. Nevertheless, the most Mid-Century would pay is the per person limit of \$100,000. Applying subsection a. to Jones and Brown, each of them sustained damages of at least \$150,000 due to McGee's negligence.

Therefore, whether subsection a.1 or a.2 is used, each claimant is underinsured by \$100,000.” (Appellant, Br. Appendix A23)

In conclusion, subsection a.1 when reasonably read, does not reduce the benefits for which Mid-Century is ultimately required to pay but rather calculates the maximum benefit payable. This subsection also does not promise to pay the Appellants \$100,000 but merely sets the maximum they may be paid under the policy. The Appellants interpretation invents an ambiguity which does not exist.

B. The Trial Court and Southern District Correctly Followed this Court’s Holding in Rodriguez.

The Appellants argue that the Trial Court and Southern District failed to recognize critical distinctions between this case and the Court’s decision in Rodriguez.

First, the Appellants concede that they are not claiming that Mid-Century is not entitled to a set-off for the \$50,000 paid on behalf of the tortfeasor. Since the language of the policy compels this conclusion, along with the court’s decision in Rodriguez, the Appellants cannot justifiably claim more than the amount already paid by Mid-Century since there is no dispute that the maximum benefit payable under subsections a.1 and a.2 is \$100,000, and the reduction under subsection f.i. is not being challenged.

Next, the Appellants seek to create a distinction where none exists by arguing that the policy language in Rodriguez is different. As the Southern District acknowledged, the variance in the language between “Limit of Liability” and “amount of UNDERinsured Motorist Coverage” in subsection a.1. is not a meaningful distinction because the “interpretation of the provisions in Rodriguez, and those in this case, reach a

similar result -- permitting a reduction of UIM benefits based upon payments made by the tortfeasor's insurer.

C. The Seeck, Zemelman and Ware Cases Do Not Support the Appellant's Contentions in this Case.

The Appellants argue that this case involves a conflict between two clauses in the same UIM policy and therefore the decisions in Seeck, Zemelman and Ware cases are instructive. This argument is a non-sequitor. This Court's decision in Seeck found an ambiguity in an UIM policy which had a set-off provision for payments received from a tortfeasor which conflicted with the "other insurance" provision that indicated that the UIM coverage was meant to be excess. Seeck v. Geico General Ins. Co., 212 S.W.3d 129 (Mo. banc 2001), Zemelman and Ware resolved the same issue and those decisions were discussed by this Court in Seeck. See Ware v. Geico General Ins. Co., 184 S.W.3d 99, (Mo. App. 2002); Zemelman v. Equity Mut. Ins. Co., 935 S.W.2d 673, 1996 (Mo. App. 1996).

This case, however, does not involve any suggestion that the "other insurance" provision in the Mid-Century policy somehow creates excess coverage. No such argument has been made and the Mid-Century policy clearly states otherwise. To the extent that the Appellant is suggesting that inconsistent provisions in a policy can create an ambiguity, the Respondent agrees.

Here, however, no such inconsistency exists. Subsection a.1 and a.2 does not promise to pay \$100,000 of UIM coverage to the Appellants. This section establishes the maximum amount Mid-Century will pay in plain, understandable terms. See State Farm

Mutual Automobile Insurance Company v. Sommers, 954 S.W.2d 18 (Mo. App. 1997).

The maximum amount that may be paid is then reduced by the tortfeasors payment under subsection f.i. Subsection a.1 and a.2 are not in conflict with subsection f.i., but when read together are consistent and not duplicitous.

Conclusion

This Court has held that an insured and insurer are free to define and limit coverage by their agreement and since there are no statutory requirements in Missouri for underinsured motorist coverage the extent of such coverage is determined by the contract between the parties. The Mid-Century policy is not ambiguous in this regard. The maximum amount that Mid-Century agreed to pay was plainly worded in the Limits of Liability subsection a.1 and a.2, i.e. either the difference between the insured's damages and amounts paid by others legally responsible or the policy's limit of liability. Subsections b. and f then determine the actual amount Mid-Century is required to pay. In this case, the plain language of the policy mandated that since the maximum payable was \$100,000, and the reduction of \$50,000 was admittedly proper, Mid-Century correctly paid each Appellant \$50,000 of benefits.

Respectfully, the Respondent, Mid-Century Insurance Company, requests that this Court affirm the judgment of the Trial Court and the decision of the Southern District Court of Appeals.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

Pursuant to Mo.R.Civ.Pro. 84.06(c), Respondent certifies to this Court that:

1. This brief contains the information required by Mo.R.Civ.Pro. 55.03.
2. This brief complies with the limitations contained in Mo.R.Civ.Pro. 84.06(a) and (b).
3. The number of words in this brief, according to the word processing system used to prepare the brief (Microsoft Word), is 3284, exclusive of the cover, certificate of service, this certificate, the signature block, and the appendix.
4. In compliance with Mo.R.Civ.Pro. 84.06(g) a CD-ROM is filed with the Respondent's brief that complies with Mo.R.Civ.Pro. 84.06(g) and said CD-ROM has been scanned for viruses and, according to the program used to scan for viruses (Norton), the CD-ROM is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the Substitute Brief of Respondent Mid-Century Insurance Company and one (1) CD-ROM was delivered via United States mail, postage prepaid, upon the following attorneys of record to the attorney's address of record, as set forth below, on this 6th day of March, 2009:

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