IN THE MISSOURI SUPREME COURT

CASE NO. S.C. 93904

REBECCA FLOYD-TUNNELL and DORIS J. FLOYD,
Plaintiffs/Appellants

v.

SHELTER MUTUAL INSURANCE COMPANY,
Defendant/Respondent.

Appeal from the Circuit Court of Jackson County, Missouri, 16th Judicial Circuit
The Honorable W. Brent Powell, Judge (Division 11)

Jackson County Case No. 1116CV34635

Transferred from Missouri Court of Appeals Western District Case No. WD75725

APPELLANTS' SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

A. Cases

B. Statutes and Constitutional Provisions

C. Missouri Court Rules

D. Other Sources

III. JURISDICTIONAL STATEMENT

The question in this appeal is whether the Circuit Court of Jackson County, Missouri, The Honorable W. Brent Powell, Presiding, (hereinafter referred to as the "Trial Court") erred in entering summary judgment (hereinafter referred to as the "Judgment") on September 18, 2012, in favor of Defendant/Respondent Shelter Mutual Insurance Company, (hereinafter referred to as "Respondent") and against Plaintiffs/Appellants Rebecca Floyd-Tunnell and Doris J. Floyd (hereinafter collectively referred to as "Appellants"), as to the claims set forth in Appellants' *Petition*. *See Appellants' Legal File Volume VI* (hereinafter abbreviated "L.F.VI") 788-790. *See also Appellants' Legal File Volume I* (hereinafter abbreviated L.F.I) 11-83. *Appellants' Legal File Volumes II, III, IV* and *V* are hereinafter abbreviated "L.F.II, L.F.III, L.F.IV and L.F.V, respectively.

The Missouri Court of Appeals, Western District, had jurisdiction to hear Appellants' appeal of the Judgment, and it exercised that jurisdiction and issued its decision on November 12, 2013. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 2013 Mo. App. LEXIS 1346, 2013 WL 5978452 (Mo.App.W.D. Nov. 12, 2013). This Court has jurisdiction to hear the appeal pursuant to Mo.R.Civ.P. 83.04 because, after Appellants timely filed their *Application for Transfer* to this Court and paid the prescribed filing fee on January 7, 2014, this Court, on February 25, 2014, ordered the case transferred after the opinion of the Missouri Court of Appeals, Western District.

IV. STATEMENT OF FACTS

This case involves a claim for uninsured motor vehicle benefits arising out of a motor vehicle accident that resulted in the wrongful death of Jerry Floyd caused by the negligence of Eric Krugler, an uninsured motorist. L.F.I 11-83. Prior to the Trial Court's Judgment, Appellants and Respondent entered into the following *Stipulation of Undisputed Facts:*

1. Jurisdiction and venue properly lie in this Court; the parties hereby submit to its jurisdiction.

2. On October 8, 2011, Eric M. Krugler (hereinafter "Krugler") negligently killed Decedent Jerry L. Floyd (hereinafter "Decedent"), in that Krugler was driving westbound on Missouri Highway 38 in Dallas County, MO, when he crossed the centerline and struck Decedent's car, which was driving eastbound on Missouri Highway 38.

3. Krugler owed to Decedent the duty to exercise the highest degree of care while operating or driving the motor vehicle at the time and place referred to in Paragraph 2 above.

4. Krugler was negligent at the time and place of the collision, and his negligence directly and proximately caused, or contributed to cause, the death of Decedent.

5. Pursuant to RSMo. §537.080.1(1), the Class I beneficiaries entitled to bring actions arising out of the wrongful death of Decedent, and to share in the proceeds of such actions, are: 1) Plaintiff Rebecca Floyd-Tunnell (the

sole child of Decedent); 2) Plaintiff Doris J. Floyd (the wife of Decedent); and Rose Ann "Geraldine" Floyd (the mother of Decedent). The father of Decedent, Leonard Floyd, predeceased Decedent in 1996. Moreover, Rose Ann "Geraldine" Floyd has, via a writing filed herein, voluntarily waived her right to recover any uninsured motorist benefits payable by Defendant [Respondent] Shelter Mutual Insurance Company on account of the wrongful death of Decedent. Therefore, the Class I beneficiaries of this action are Plaintiff Rebecca Floyd-Tunnell and Plaintiff Doris J. Floyd.

6. Plaintiffs' damages arising out of the wrongful death of Decedent, which was directly and proximately caused by the negligence of Krugler, are at least Four Hundred Thousand Dollars ($400,000.00).

7. At the time of the collision that is the subject of this case, Plaintiff Doris J. Floyd and Decedent were the named insureds under three automobile insurance policies issued by Defendant Shelter Mutual Insurance Company, Policy Nos. 24-1-5033006-5, 24-1-5033006-3, and 24-1-5033006-6.

8. Shelter Policy No. 24-1-5033006-5 insured a 1996 Chevrolet Cavalier LS 2D CONV car that was owned by Decedent and Plaintiff Doris J. Floyd, which vehicle was occupied by Decedent at the time of the collision; the Uninsured Motorists coverage limit on said Policy No. 24-1-5033006-5 was $100,000 each person/$300,000 each accident; the named insureds under said Policy No. 24-1-5033006-5 were Jerry Floyd (Decedent)

and Doris Floyd (Plaintiff). A true and accurate copy of Policy No. 24-1-5033006-5 is attached hereto as "Exhibit A".

9. Shelter Policy No. 24-1-5033006-3 insured a 2011 Chevrolet Silverado 2500 4W LT pickup that was owned by Decedent and Plaintiff Doris J. Floyd, which vehicle was not occupied by Decedent at the time of the collision; the named insureds under said Policy No. 24-1-5033006-3 were Jerry Floyd (Decedent) and Doris Floyd (Plaintiff). A true and accurate copy of Policy No. 24-1-5033006-3 is attached hereto as "Exhibit B".

10. Shelter Policy No. 24-1-5033006-6 insured a 2000 Toyota Camry Solara SLE CN car that was owned by Decedent and Plaintiff Doris J. Floyd, which vehicle was not occupied by Decedent at the time of the collision; the named insureds under said Policy No. 24-1-5033006-6 were Jerry Floyd (Decedent) and Doris Floyd (Plaintiff). A true and accurate copy of Policy No. 24-1-5033006-6 is attached hereto as "Exhibit C".

11. The motor vehicle driven by Krugler was an uninsured motor vehicle as that term is defined in Policy Nos. 24-1-5033006-5, 24-1-5033006-3, and 24-1-5033006-6.

…

/s/ David Tunnell for James Corbett … Attorneys for Plaintiffs

…

/s/ James P. Maloney … Attorney for Defendant.

L.F.III 239-241; Exhibits mentioned therein appear at L.F.III 242-285 (Exhibit A), L.F.III 286-339 (Exhibit B) and L.F.III 340-383 (Exhibit C).

The only non-stipulated issue of fact before the Court below was Appellants' claim for damages for vexatious refusal to pay. L.F.I 14-15; L.F.III 239-241.

On March 8, 2012, Appellants and Respondent entered into a partial settlement of Appellants' claims against Respondent for the amount Respondent did not dispute that it owed for uninsured motorist benefits, which was $100,000.00 under the Shelter Policy 24-1-5033006-5 (which covered the Chevrolet Cavalier Decedent was driving at the time of the collision) and $25,000.00 under each of the two Shelter Policies (Nos. 24-1-5033006-3 and 24-1-5033006-6) covering the two vehicles Appellant Doris J. Floyd and Decedent owned but which were not occupied by Decedent at the time of the collision. L.F.III 387-398. The total partial settlement was $150,000.00. L.F.III 389; 395-398. After the partial settlement, the remaining issues in the case were 1) Appellants' claims for the additional $75,000.00 they claimed Respondent owed under each of two Policies and 2) Appellants' claims for penalties and attorney's fees for vexatious refusal to pay those benefits pursuant to RSMo. §375.420. L.F.III 397; L.F.I 14-15.

The two Policies relevant to this appeal are Policy No. 24-1-5033006-3 and Policy No. 24-1-5033006-6. Policy No. 24-1-5033006-3 appears in the Legal File at L.F.III 286-339 and is incorporated herein by this reference. Policy No. 24-1-5033006-6 appears in the Legal File at L.F.III 340-383 and is incorporated herein by this reference. For the convenience of the Court, the Declarations Page of Policy No. 24-1-5033006-3 is set forth

in the *Appendix to Appellants' Substitute Brief* at Pages A5-A6, and the Declarations Page of Policy No. 24-1-5033006-6 is set forth in said Appendix at Pages A7-A8.

The two policies are identical, except for the vehicles insured thereunder and the premiums charged. These two policies are hereinafter sometimes referred to collectively as the "Policies". As noted on the Declarations pages of the Policies, Jerry and Doris Floyd paid $534.84 for the coverage amounts listed on the Silverado policy (L.F.III 287, Appendix at A5) and $421.29 for the coverage amounts listed on the Camry policy (L.F.III 341, Appendix at A7). [1] Respondent's position throughout this case has been that it owed only $25,000 under each of the Policies (the minimum required under RSMo. §§ 379.203.1 and 303.030.5), and not the limit of liability of $100,000 set forth on the Declarations pages of each of the Policies, because of the following policy language located on Page 26 of each of the Policies:

> PARTIAL EXCLUSIONS FROM COVERAGE E
>
> In **claims** involving the situations listed below, **our** limit of liability under Coverage E is the minimum dollar amount required by the **uninsured**

[1] The Floyds also paid a premium of $229.21 for the coverages listed in Policy No. 24-1-5033006-5, which insured the Cavalier Decedent was driving at the time of his death. L.F.III 243. However, this policy is not at issue in this case because Respondent has already paid its full limit of $100,000.00 in uninsured motorist coverage under that policy. L.F.III 389-390.

motorist insurance law and **financial responsibility law** of the state of Missouri:

…

(3) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household; unless it is the **described auto**.

(4) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle** that any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household, has **general consent** to **use**; unless it is the **described auto**.

L.F.III 315, 369; L.F.II 94-95, 98-101; L.F.IV 402, 409-413; L.F.VI 739-743,745-756, 785-786.

Respondent filed its *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company*, statement of uncontroverted facts, and suggestions in support thereof, claiming entitlement to judgment in its favor on all issues because it owed no additional uninsured motorist benefits. L.F.IV 401-562. Appellants filed their own *Plaintiffs' Motion for Summary Judgment*, statement of uncontroverted facts, and suggestions in support

thereof, claiming entitlement to judgment in their favor for the additional $150,000.00. L.F.V 577-726.

On September 18, 2012, the Trial Court entered its *Summary Judgment* (hereinafter referred to as the "Judgment") granting Respondent's motion for summary judgment and denying Appellants' motion for summary judgment, finding, in relevant part:

> Pursuant to partial exclusions in the policies for the Silverado [Policy No. 24-1-5033006-3] and Camry [Policy No. 24-1-5033006-6], which apply when the policy holder is injured while occupying a vehicle he owns but which is not described in the declarations of the particular policy, the limit of the uninsured motorist coverage provided by each of those policies is $25,000. Defendant [Respondent] has paid those limits and cannot be held liable for additional benefits claimed by Plaintiffs [Appellants]. The Court finds that the partial exclusion provisions are enforceable and comply with the minimum statutory amount required by Missouri's uninsured motorist law and financial responsibility law. The partial exclusions provided in the insurance policy unambiguously state when they apply and that they limit Defendant's [Respondent's] liability to $25,000, the statutory minimum required by the state of Missouri. … Defendant [Respondent] has not refused without just cause or excuse to pay any money it owes to Plaintiffs [Appellants] as provided by the insurance policies. Therefore, Defendant [Respondent] is also entitled to summary judgment on Plaintiffs' [Appellants'] vexation [(sic)] refusal to pay claim.

L.F.VI 788-790.

The Judgment disposed of all of Appellants' claims remaining in the case. L.F.VI 788-790; L.F.I 11-16, 84. Appellants timely appealed from the Judgment. L.F.VI 791-801.

V. POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S *MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SHELTER MUTUAL INSURANCE COMPANY* AND DENYING APPELLANTS' *PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT* BECAUSE MO.R.CIV.P. 74.04 DOES NOT PERMIT THE RELIEF GRANTED BY THE TRIAL COURT, IN THAT, MO.R.CIV.P. 74.04(c) PERMITS THE ENTRY OF SUMMARY JUDGMENT ONLY IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, BUT RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE "PARTIAL EXCLUSIONS FROM COVERAGE E" ARE NOT APPLICABLE TO APPELLANTS' CLAIMS AGAINST RESPONDENT.

***Baker v. DePew*, 860 S.W.2d 318 (Mo.banc 1993)**

***Lawrence v. Manor*, 273 S.W.3d 525 (Mo.banc 2009)**

***Shepherd v. American States Ins. Co.*, 671 S.W.2d 777 (Mo.banc 1984)**

Mo.R.Civ.P. 74.04

POINT II

THE TRIAL COURT ERRED IN GRANTING THE *MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SHELTER MUTUAL INSURANCE COMPANY* AND DENYING APPELLANTS' *PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT* BECAUSE MO.R.CIV.P. 74.04 DOES NOT PERMIT THE RELIEF GRANTED BY THE TRIAL COURT, IN THAT, MO.R.CIV.P. 74.04(c) PERMITS THE ENTRY OF SUMMARY JUDGMENT ONLY IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, BUT RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE "PARTIAL EXCLUSIONS FROM COVERAGE E" ARE NOT ENFORCEABLE UNDER MISSOURI LAW BECAUSE THEY RENDER THE POLICIES AMBIGUOUS AND MUST BE CONSTRUED AGAINST RESPONDENT.

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

***Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo.banc 2009)**

***Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43 (Mo.banc 2009)**

Mo.R.Civ.P. 74.04

VI. ARGUMENT

Point I

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S *MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SHELTER MUTUAL INSURANCE COMPANY* AND DENYING APPELLANTS' *PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT* BECAUSE MO.R.CIV.P. 74.04 DOES NOT PERMIT THE RELIEF GRANTED BY THE TRIAL COURT, IN THAT, MO.R.CIV.P. 74.04(c) PERMITS THE ENTRY OF SUMMARY JUDGMENT ONLY IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, BUT RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE "PARTIAL EXCLUSIONS FROM COVERAGE E" ARE NOT APPLICABLE TO APPELLANTS' CLAIMS AGAINST RESPONDENT.

A. Standard of Review

The applicable standard of appellate review of the Trial Court's Judgment, which granted Respondent's *Motion* and entered summary judgment in favor of Respondent and against Appellants, is "essentially *de novo*. *E.O. Deorsch Electric Co. v. Plaza Const. Co.*, 413 S.W.2d 167, 169 (Mo. 1967). As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's judgment. *Elliott v. Harris*, 423 S.W.2d 831, 834 (Mo. banc 1968); *Swink v. Swink*, 367 S.W.2d 575, 578 (Mo.1963)." *ITT Commercial Finance Corp. v. Mid-America Marine*

Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). *See also Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*, 304 S.W.3d 112, 116 (Mo. banc 2010).

B. Introduction—Standard Required for Entry of Summary Judgment

This issue is whether, under the Policies, the Trial Court erred in when it entered summary judgment in favor of Respondent and against Appellants on Appellants' suit for $150,000.00 ($75,000.00 under each of the two Policies that remain at issue) in uninsured motorist benefits arising from the wrongful death of Decedent Jerry L. Floyd in an automobile accident.

There is no disputed issue of fact relevant to the issue in this appeal.[2] Therefore, in order for the Trial Court's summary judgment for Respondent to be proper, Respondent must be entitled to judgment as a matter of law. Mo.R.Civ.P. 74.04(c)(6). *ITT Commercial Finance*, 854 S.W.2d at 381. The Trial Court improperly entered summary judgment in favor of Respondent and against Appellants, because Respondent was not entitled to judgment as a matter of law because the "Partial Exclusions From Coverage E" set forth in the Policies simply do not apply to Appellants' claims under the Policies. Accordingly, this Court should reverse the Judgment, remand this case with

[2] The facts concerning Appellants' claims for vexatious penalties and attorney fees remain disputed issues of fact. However, these claims are immaterial to the issue presented herein, which is whether the Partial Exclusions from Coverage E apply to limit Appellants' recovery to $25,000 under each of the Policies.

instructions to deny Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company* and grant Appellants' *Plaintiffs' Motion for Summary Judgment* in part by entering partial summary judgment in favor of Appellants and against Respondent in the amount of $150,000.00 for the coverage owed under the Policies, and remand the case for further proceedings on the issue of vexatious penalties and attorney fees.

C. The "Partial Exclusions from Coverage E" Do Not Apply

Respondent agrees that, but for two partial exclusions in the Uninsured Motorists coverage (Coverage E) of the Policies, Respondent would owe Appellants $75,000.00 under each of the two Policies under which Appellant Doris Floyd was a named insured for damages on account of the wrongful death of Jerry Floyd. L.F.III 239-241, 287, 315, 341, 369; L.F.IV 402, 562-575; L.F.II 97-103.

The two "Partial Exclusions from Coverage E" relied on by Respondent are found at page 26 of the Policies. L.F.III 315, 369. The first exclusion is found at subparagraph (3) and provides, in pertinent part, the following:

> In **claims** involving the situations listed below, **our** limit of liability under Coverage E is the minimum dollar amount required by the **uninsured motorist insurance law** and **financial responsibility law** of the state of Missouri:
>
> …

(3) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household; unless it is the **described auto**.

L.F.III 315, 369.

To determine the applicability of the Partial Exclusions from Coverage E, the ultimate question is who is "the **insured"** that Respondent is referring to in the Partial Exclusions. Clearly, "the **insured**" is Doris Floyd. It simply makes no sense for "the **insured**" to be Jerry Floyd in a claim brought by Doris Floyd for Doris's damages due to the wrongful death of Jerry Floyd. This interpretation conforms to Missouri law, as is required by the Policies.[3] Missouri law does not permit "the **insured**" to be Jerry Floyd

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[3] Page 11 of the Policies contains the following provision:

"OWNERS' POLICY AS DEFINED BY APPLICABLE **FINANCIAL RESPONSIBILITY LAWS**

The provisions of this policy that are subject to the **financial responsibility laws** of the state of Missouri will comply with those laws in all respects. Conflicting policy language is superseded by the requirements of those laws."

L.F.III 300, 354.

Uninsured Motorist coverage is subject to the financial responsibility laws of the state of Missouri. RSMo. § 379.203.

because Jerry Floyd has no claim for damage due to his own wrongful death. As is discussed in detail below, Doris Floyd is "the **insured**" and, therefore, the Partial Exclusions have no applicability to this case. This interpretation is supported by RSMo. §§ 379.203 and 537.080, as well as *Baker v. DePew,* 860 S.W.2d 318 (Mo. banc 1993), *Lawrence v. Manor*, 273 S.W.3d 525, 527 (Mo. banc 2009),and *Shepherd v. American States Ins. Co.*, 671 S.W.2d 777 (Mo. Banc 1984).

The question of "Who is 'the **insured**'?" is answered by the Opinion of this Court in *Baker v. DePew,* 860 S.W.2d 318 (Mo.banc 1993) and the Opinion of the Eastern District Court of Appeals in *Bituminous Casualty Corp. v. Aetna Life and Casualty Co.*, 599 S.W.2d 516 (Mo.App.E.D. 1980).

First, we know that when an insurance policy has a separation of insureds clause and we are addressing the coverage available to any particular insured, the term "insured" is deemed to refer **only** to the insured who is claiming coverage under the policy and with respect to the particular claim then under consideration. *Baker,* 860 S.W.2d at 320. *See also Bituminous Casualty Corp.*, 599 S.W.2d at 520. The uninsured motorist coverage set forth in the Policies does contain, on Page 27, a separation of insureds clause, which provides, in relevant part, that "The insurance under Coverage E applies separately to each **insured**." L.F.III 316, 370.

When the term "insured" is preceded by the definite article "the", the policy refers to a single insured, not to "all" of the insureds, "any" of the insureds, or to a different insured who is not making the claim under consideration. In this case, Appellant Doris

Floyd is "the **insured**" who is making the claim under the Policies. The other "insured", Decedent Jerry Floyd, has no claim under either Missouri Law or the Policies for uninsured motorist benefits on account of his own wrongful death. "As it applies to wrongful death claims, uninsured motorist coverage is intended to provide indemnity for damages resulting from *an insured's* wrongful death payable to whatever person or persons may be entitled to bring an action under [RSMo.] §537.080." *Livingston v. Omaha Property and Casualty Ins. Co.,* 927 S.W.2d 444, 446 (Mo.App.W.D. 1996), (*citing Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726, 736 (Mo.banc 1979)), (*citing Sterns v. M.F.A. Mut. Ins. Co.*, 401 S.W.2d 510, 517 (Mo.App. 1966)). A wrongful death action exists only because RSMo. §537.080 created it; the statute created "'a *new cause of action* where none existed at common law and did not revive a cause of action belonging to the deceased. … (emphasis added). The right of action thus created is neither a transmitted right nor a survival right'." *Lawrence v. Manor*, 273 S.W.3d 525, 527 (Mo.banc 2009), (*quoting O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. banc 1983)). The decedent, therefore, has no pecuniary or proprietary interest in a wrongful death cause of action. *Sennett v. National Health Care Corp.*, 272 S.W.3d 237, 244-245 (Mo. App. S.D. 2008). Rather, that interest belongs only to those entitled to bring the action under RSMo. §537.080. *Id.* Therefore, because Appellant Doris Floyd is the only "**insured**" who is statutorily entitled to make a claim for the wrongful death of Jerry Floyd, it is Appellant Doris Floyd who is claiming the benefit of the uninsured motorists coverage in the Policies, not Jerry Floyd.

Using the same device as specified in *Baker v. DePew*, *supra*, at 320, and inserting Doris Floyd's name into the applicable partial exclusion, we end up with the following:

> "If any part of the **damages** are sustained while [Doris Floyd] is **occupying** a **motor vehicle**...".

In this case the damages were *not* sustained while Doris Floyd was occupying a motor vehicle. Doris Floyd (not Jerry Floyd) has the claim. Doris Floyd is "the **insured**". Doris Floyd incurred damage. Because Doris Floyd sustained damage when she was *not* occupying a motor vehicle, the Partial Exclusion (3), very simply, is not applicable to Appellants' claims *on its face*.

The same analysis holds true for the second "Partial Exclusion" relied on by Respondent. The second exclusion is found at paragraph 4 on page 26 of the Policies and provides, in pertinent part, as follows:

> In **claims** involving the situations listed below, **our** limit of liability under Coverage E is the minimum dollar amount required by the **uninsured motorist insurance law** and **financial responsibility law** of the state of Missouri:
>
> …
>
> (4) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle** that any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household, has **general consent** to **use**, unless it is the **described auto**.

L.F.III 315, 369.

Just as in Partial Exclusion (3) discussed above, "the **insured**" referred to in Partial Exclusion (4) is Doris Floyd because she sustained damages, she is making the claim, and she is seeking the benefits of the uninsured motorist coverage. Just as in the analysis regarding the applicability of Exclusion (3), this exclusion is not applicable because Doris Floyd was not occupying an auto at the time of Jerry Floyd's death. Partial Exclusion (4) is, on its face, not applicable. There are no other exclusions relied upon by Respondent.

It is the long-standing black-letter law in Missouri that a named insured widow can stack uninsured motorist coverage available to her for the death of her husband. *Shepherd v. American States Ins. Co.*, 671 S.W.2d 777 (Mo. banc 1984); *Adams v. King*, 356 S.W.3d 326, 329 (Mo. App. S.D. 2011). Further, the limits of that uninsured motorist coverage cannot be reduced, no matter how "clear" or "unambiguous" an insurer's attempt at limiting coverage may be; "'[cases] should not and will not turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be'." *Cameron Mutual Insurance Co. v. Madden*, 533 S.W. 2d 538, 545 (Mo. banc 1976), (*quoting Great Central Insurance Co. v. Edge*, 298 So.2d 607, 610 (Ala. 1974)). Even if "the **insured**" is interpreted to mean Jerry Floyd, the uninsured coverage bought and paid for by the Floyds is not subject to reduction regardless of how clear or unambiguous the Partial Exclusions may be found to be. *Id.* With no exclusion applicable, the coverage available to Appellants is the full amount of $100,000.00 as stated on the Declarations pages of each of the Policies, and Appellants

can stack the coverage available under both policies. Giving credit to Respondent for the $50,000 previously paid ($25,000.00 under each of the two Policies), Appellants are, in accordance with Missouri law, entitled to payment by Respondent of an additional $75,000.00 under each Policy, $150,000.00 total.

D. Construing Decedent as "The Insured" Removes Wrongful Death Coverage From The Policies

This case represents yet another ploy by an insurance company to pay out less in uninsured motorist coverage than its insureds thought they had bought and paid for. There is no shortage of cases in which insurers have attempted to collect premiums for certain coverage and then, through exclusions, either take away or reduce this coverage, and Missouri Courts routinely strike down such attempts.[4] Respondent included the above-quoted partial exclusions in its policies to minimize the amount of uninsured motorist coverage its insureds can stack. The Trial Court's interpretation of those partial

[4] *See e.g., Jones v. Mid-Century Ins. Co*, 287 S.W. 3d 687 (Mo. banc 2009) (addressing underinsured coverage); *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43 (Mo. 2009) (addressing uninsured coverage); *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129) (Mo. banc 2007) (addressing underinsured coverage); *Fanning v. Progressive Northwestern Ins. Co.*, 412 S.W.3d 360 (Mo.App.W.D. 2013) (addressing underinsured coverage); *Kuda v. American Family Mut. Ins. Co.*, 790 S.W.2d 464 (Mo. banc 1990) (addressing medical payments coverage); and *Cameron Mut. Ins Co. v. Madden*, 533 S.W.2d 538 (Mo. banc 1976) (addressing uninsured coverage).

exclusions (finding that the "insured" referred to therein is Decedent Jerry Floyd), allows Respondent to take it a step farther by actually allowing Respondent to avoid paying *anything* for wrongful death claims (other than the minimum $25,000 required by RSMo. §379.203.1), regardless of the limits of coverage paid for by the insured, and regardless of which vehicle an insured happens to be riding in when he is killed in an automobile collision.

As is discussed above, under Missouri law, neither a decedent nor his estate has any right to assert a claim for damages arising out of the wrongful death of that decedent. *Lawrence*, 273 S.W.3d at 527. Rather, the right to bring an action for wrongful death vests exclusively in the beneficiaries provided for in RSMo. §537.080. *See Sennett.*, 272 S.W.3d at 244-245. Appellants are those wrongful death beneficiaries in this case. Decedent Jerry Floyd does not, and cannot, have a claim for his own wrongful death.

Respondent's Uninsured Motor Vehicle Insuring Agreement on Page 25 of the Policies promises that "If the **owner** or **operator** of an **uninsured motor vehicle** is legally obligated to pay **damages**, **we** will pay the **uncompensated damages**; but this agreement is subject to all conditions, exclusions, and limitations of **our** liability, stated in this policy." Respondent goes on to define the term "Damages" as follows: "**Damages** means money owed to an **insured** for **bodily injuries,** sickness, or disease, sustained by that **insured** and caused, in whole or in part, by the **ownership** or **use** of an **uninsured motor vehicle**." L.F. Vol. V 656, 700.

The Trial Court's acceptance of Respondent's argument that "the **insured**" referred to in the policy in this case refers to Decedent Jerry Floyd, has the effect of

totally eliminating any coverage whatsoever under the Policies for the damages arising out of Jerry Floyd's wrongful death. "Damages" can never be owed to the decedent in a wrongful death claim, because Missouri law does not permit a decedent to make a wrongful death claim. Under the Trial Court's construction of the Policies, the Policies simply do not cover wrongful death. The only reason Respondent would ever have to pay any uninsured motorist benefits at all on a wrongful death claim is because RSMo. §379.203.1 requires automobile insurance policies to provide for the "protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of … death, resulting therefrom." RSMo. §379.203.1. However, that statute only requires coverage in an amount not less than the minimum limits set forth in RSMo. §303.030 (currently $25,000 per person, $50,000 per accident).

The majority Opinion of the Missouri Court of Appeals, Western District, put its stamp of approval on the Trial Court's interpretation of "the **insured**" as Decedent Jerry Floyd. If the Western District majority's Opinion stands, Respondent will NEVER AGAIN have to pay full limits in an uninsured motorist wrongful death claim on any policy that carries limits above the statutory minimum, because its policies do not cover wrongful death, except by operation of RSMo. §379.203. It does not matter what limits of liability the insureds pay premiums for.[5] It does not matter which Respondent-insured

[5] Jerry and Doris Floyd actually paid more in premiums for the two Policies for which the Trial Court found only $25,000 in UM coverage available than they paid for the $100,000

vehicle a decedent is riding in when an accident occurs. Under that majority Opinion, the maximum liability Respondent will ever have in an uninsured motorist wrongful death case is $25,000 per person/$50,000 per accident, only because RSMo. §§ 379.203 and 303.030 require Respondent's policies to provide that much uninsured motorist coverage in wrongful death cases, not because the Policies provide the coverage within their four corners. Under the majority's reading of the Policies, the fact that Respondent paid its full limit of $100,000 on the vehicle Jerry Floyd was killed in must be viewed as a gratuitous payment of $75,000 more than Respondent owed pursuant to RSMo. §§ 379.203 and 303.030.

The result of Trial Court's Judgment, and the Western District's majority Opinion, is in direct defiance of long-standing Missouri Supreme Court precedent. Decades ago, this Court unequivocally declared that "'Public policy as declared in §379.203 mandates that when an insured has two separate policies containing uninsured motorist clauses, effect shall be given to both coverages without reduction or limitation by policy provisions, and that both coverages are available to those insured thereby'." *Shepherd v. American States Ins. Co.*, 671 S.W.2d at 778, (*quoting Cameron Mut. Ins. Co.*, 533

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in UM coverage on the vehicle Decedent was driving (which limit Respondent fully paid). The total annual premium for the Cavalier Decedent was killed in was $229.21 (L.F. Vol. V Page 587) whereas the total annual premiums on the non-occupied vehicles insured by the Policies were $534.84 and $421.29, respectively (L.F. Vol. V Pages 629 and 673).

S.W.2d at 542). It does not matter which vehicle an insured is driving when an accident occurs; all of the uninsured motorist coverage the insured has covers the accident, because "'[u]ninsured motorist protection inures to an individual insured for bodily injury inflicted by the tortious act of an uninsured motorist, rather than to a particular vehicle.'" *Blumer v. Auto. Club Inter-Insurance Exch.*, 340 S.W.3d 214, 219 (Mo.App.W.D. 2011), (*quoting Adams v. Julius,* 719 S.W.2d 94, 96 (Mo. App. 1986)). Although Missouri precedent clearly holds that insureds are entitled to stack the full value of applicable uninsured motorist coverages, regardless of what vehicle the insured is driving, the Judgment and the majority Opinion completely gut that legal precedent in wrongful death cases, because their construction of "the **insured**" as Decedent Jerry Floyd removes all coverage for wrongful death from Respondent's Policies. The effect of the majority Opinion is that the only available uninsured motorists coverage for wrongful death claims under Respondent's policies is the minimum limits mandated in RSMo. §§ 379.203 and 303.030., regardless of what policy limit the policyholder bought and paid premiums for.

That effect is not merely limited to the facts of this case, either. It will apply to all future wrongful death claims asserted under Respondent's policies. If Respondent's argument is accepted, as it was by the Western District in its majority Opinion, future trial courts will be bound to reach the same conclusion the majority and the Trial Court did, and future wrongful death claimants who have bought uninsured motorist coverage from Respondent will be stripped of the coverage they bought and paid for, just as Appellant Doris Floyd has been stripped of the coverage she paid for in this case. The effect of the Western District majority's Opinion does not die with this case, but will live

on to affect all future wrongful death uninsured motorist claims under Respondent's policies. This Court should not allow that to happen. This Court should reverse the Trial Court's Judgment and remand the case to the Trial Court for further proceedings on the issue of vexatious penalties and attorneys' fees.

E. Missouri Law, Public Policy, and Respondent's Policies Forbid Construing "The Insured" as Decedent

As is discussed above, the interpretation by the Trial Court and the Western District majority of "the **insured**" as referring to Decedent Jerry Floyd causes Respondent's policies not to provide uninsured motorist coverage for wrongful death, because Jerry Floyd has no claim for his own wrongful death. Respondent's Policies, on Page 11, contain the following provision:

> OWNERS' POLICY AS DEFINED BY APPLICABLE **FINANCIAL RESPONSIBILITY LAWS**
>
> The provisions of this policy that are subject to the **financial responsibility laws** of the state of Missouri will comply with those laws in all respects. Conflicting policy language is superseded by the requirements of those laws.

L.F.III 300, 354.

Missouri law and public policy, as expressed in RSMo. §379.203, *mandates* uninsured motorist coverage for wrongful death. In interpreting an insurance contract, courts are "to read the contract as a whole and determine the intent of the parties, giving effect to

that intent by enforcing the contract as written, unless to do so would violate public policy." *East Attucks Community Housing, Inc. v. Old Republic Surety Company*, 114 S.W.3d 311, 319 (Mo.App.W.D. 2003), *citing Kyte v. Am. Family Mut. Ins. Co.*, 92 S.W.3d 295, 298-299 (Mo.App. 2002). Missouri's public policy is set forth in RSMo. §379.203, which REQUIRES uninsured motorist coverage for wrongful death. Moreover, "Public policy as declared in §379.203 mandates that when an insured has two separate policies containing uninsured motorist clauses, effect shall be given to both coverages without reduction of limitation by policy provisions, and that both coverages are available to those insured thereby. …" *Cameron Mut. Ins. Co.*, 533 S.W.2d at 542. Respondent's interpretation violates public policy as declared in RSMo. § 379.203 in its reduction and limitation of Appellants' uninsured motorist claims. Further, to interpret the exclusions as Respondent suggests completely removes uninsured motorist coverage from its Policies in wrongful death cases, which is directly contrary RSMo. § 379.203. Per Respondent's Policies, this provision, if Respondent's interpretation is accepted, is superseded by RSMo § 379.203. L.F.III 300, 354. However, this result can easily be avoided, and the Policies can be reconciled with Missouri law, if "the **insured**" is simply interpreted to mean Doris Floyd. This interpretation harmonizes the Policy language with RSMo. §§ 379.203 and 537.080, and should therefore be adopted by this Court.

Accordingly, this Court should reverse the Trial Court's Judgment, and remand this case to the Trial Court with instructions to deny Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company*, grant Appellants' *Plaintiffs' Motion for Summary Judgment* in part by entering partial summary judgment in favor of

Appellants and against Respondent in the amount of $150,000.00 for the coverage owed under the Policies, and conduct further proceedings regarding the remaining factual issues of vexatious penalties and attorney fees.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE *MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SHELTER MUTUAL INSURANCE COMPANY* AND DENYING APPELLANTS' *PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT* BECAUSE MO.R.CIV.P. 74.04 DOES NOT PERMIT THE RELIEF GRANTED BY THE TRIAL COURT, IN THAT, MO.R.CIV.P. 74.04(c) PERMITS THE ENTRY OF SUMMARY JUDGMENT ONLY IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, BUT RESPONDENT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE "PARTIAL EXCLUSIONS FROM COVERAGE E" ARE NOT ENFORCEABLE UNDER MISSOURI LAW BECAUSE THEY RENDER THE POLICIES AMBIGUOUS AND MUST BE CONSTRUED AGAINST RESPONDENT.

A. Standard of Review

The applicable standard of appellate review of the Trial Court's Judgment, which granted Respondent's *Motion* and entered summary judgment in favor of Respondent and against Appellants, is "essentially *de novo*. *E.O. Deorsch Electric Co. v. Plaza Const. Co.*, 413 S.W.2d 167, 169 (Mo. 1967). As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's judgment. *Elliott v. Harris*, 423 S.W.2d 831, 834 (Mo. banc 1968); *Swink v. Swink*, 367 S.W.2d 575, 578 (Mo.1963)." *ITT Commercial Finance Corp. v. Mid-America Marine*

Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). *See also Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*, 304 S.W.3d 112, 116 (Mo. banc 2010).

B. Introduction—Standard Required for Entry of Summary Judgment

The issue in this Point II, as in Point I above, is whether, under the Policies, the Trial Court erred in when it entered summary judgment in favor of Respondent and against Appellants on Appellants' suit for $150,000.00 ($75,000.00 under each of the two Policies that remain at issue) in uninsured motorist benefits arising from the wrongful death of Decedent Jerry L. Floyd in an automobile accident.

There is no disputed issue of fact relevant to the issue in this appeal (except for the irrelevant issues concerning Appellants' claim for vexatious penalties and attorney fees mentioned in Footnote 2 on Page 19 above) Therefore, in order for the Trial Court's summary judgment for Respondent to be proper, Respondent must be entitled to judgment as a matter of law. Mo.R.Civ.P. 74.04(c)(6). *ITT Commercial Finance*, 854 S.W.2d at 381. The Trial Court improperly entered summary judgment in favor of Respondent and against Appellants, because Respondent was not entitled to judgment as a matter of law because the "Partial Exclusions From Coverage E" are, at the very least, ambiguous, and therefore must be construed in favor of coverage. Accordingly, this Court should reverse the Judgment, remand the case with instructions to deny Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company* and grant Appellants' *Plaintiffs' Motion for Summary Judgment* in part by entering partial summary judgment in favor of Appellants and against Respondent in the

amount of $150,000.00 for the coverage owed under the Policies, and remand the case for further proceedings on the issue of vexatious penalties and attorney fees.

C. Application of Either of the Partial Exclusions Would Create an Ambiguity In The Policies, By Providing Coverage in One Place and Taking It Away In Another

To accept Respondent's argument, and apply Partial Exclusion (3) or (4) to make minimum limits of $25,000.00 available under each of the two Policies (instead of the $100,000.00 promised in the Declarations of each Policy and paid for by Doris and Jerry Floyd), allows Respondent to provide coverage in one part of each of the Policies and then take it away in another part. As set forth in *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43 (Mo. banc 2009), discussed below, this renders the Policies ambiguous, making the Partial Exclusions unenforceable. *Rice*, 301 S.W.3d at 48. *See also Cameron Mutual Insurance Company v. Madden*, 533 S.W.2d 538 (Mo. banc 1976). Under Missouri law, the drafters of insurance contracts are responsible for ambiguities. *Krombach v. Mayflower Ins. Co., Ltd*. 827 S.W.2d 208, 210 (Mo. banc 1992). Accordingly, such ambiguities are construed against the insurer in favor of coverage. *Id*.

> Ambiguities are construed in favor of the insured because:
>
> (1) insurance is designed to furnish protection to the insured, not defeat it; ambiguous provisions of a policy designed to cut down, restrict, or limit insurance coverage already granted, or which introduce exceptions or exemptions, must be *strictly construed* against the insurer; and

(2) as the drafter of the policy, the insurance company is in the better position to remove the ambiguity from the contract.

Fanning, 412 S.W.3d at 364-65, (*citing Golden Rule Ins. Co. v. R.S.*, 369 S.W.3d 327, 334 (Mo.App. 2012)). (Emphasis in original).

First, we must determine exactly what the Policies promise. To do this, we must examine the Policies, looking first to the Declarations page, followed by "The Index", the definition of "Declarations", the very duties placed upon the insured by Respondent through terms of the policy itself, and the promises of the "Premiums" clause.

The Declarations page of each of the Policies (set forth in the Appendix at A5-A6 and A7-A8) identifies the vehicle insured and the named insureds. L.F.III 287-288, 341-342. It goes on to list in table format the available coverages and the "Limits and Deductibles" for each coverage. L.F.III 287, 341. Among the coverages provided is "E. Uninsured Motorists", which has a stated limit of "$100,000 Each Person $300,000 Each Accident". L.F.III 287, 341. At the end of the Declarations page the following statement is found:

This policy provides only those limits required by law for **persons** who become **insureds** solely because they have **permission** or **general consent** to **use** the **described auto**. ...

L.F.III 288, 342.

Although the Declarations declare that there is uninsured motorist coverage with limits of $100,000 each person/$300,000 each accident, from the very beginning Respondent clarifies that this amount is reduced when the claimant is an insured by virtue of being a

permissive user of an insured vehicle instead of a named insured. This is clearly and unambiguously stated on the Declarations page.[6] The average person buying a policy would understand that "persons who become insureds solely because they have permission or general consent to use the described auto" are not getting the same coverage as a named insured. However, the reduced coverage for permissive users has no application to this case. Appellant Doris Floyd would not fall into this excepted-out, stepped-down, category of insured on the Declarations page, because she is a "named insured". L.F.III 287, 341. Looking solely at the Declarations page, there is $100,000 each person/$300,000 each accident in uninsured motorist coverage for Appellant Doris Floyd, a named insured. The step down applies only to those that are insured because of permissive use. Nowhere on the Declarations Page is there a step down for a named insured that is not occupying the "described auto" at the time of the loss.

Respondent emphasizes the importance of the Declarations page throughout the Policies. It refers to the Declarations page almost immediately in its table of contents of the Policies, which is called "The Index". L.F.III 290, 344. At the top of "The Index", Respondent states that "The **Declarations** shows the **named insured**, additional listed

[6] The step-down for permissive users is listed right on the Declarations page, thus indicating that it *is* possible for Respondent to make its Policies unambiguous by listing exceptions and exclusions on the Declarations page, rather than burying them deep in the policy, and that Respondent knows how to do so.

insureds, insured vehicle, policy period, types of coverage, *and amount of insurance **you** have*." (Italics added). L.F.III 290, 344.

"The Index" tells Doris Floyd that the Declarations page sets forth the amount of uninsured motorist coverage that she purchased (as well as the corresponding amount of coverage Respondent has promised in exchange for Doris Floyd's money that Respondent so willingly took). The Declarations page, with the sole stated exception or step down being only for a person who becomes an insured because of permission or general consent to use the vehicle, reflects limits of $100,000 each person/$300,000 each accident for uninsured motorist's coverage for Doris Floyd. L.F.III 287, 341. In direct contradiction to Respondent's position in the instant case, "The Index" tells Doris Floyd that the Declarations page correctly states the amount of insurance she purchased. L.F.III 290, 344.

Further emphasizing the importance of the Declarations page, Respondent does not stop with its statement in "The Index". It actually defines the term "**Declarations**" early in the Policies. At page 4, paragraph 10 of the Policies, the following is stated:

> **Declarations** means the part of this policy titled "Auto Policy Declarations and Policy Schedule". It sets out many of the individual facts related to **your** policy including the dates, types and dollar limit of the various coverages.

L.F.III 293, 347.

Once again, Respondent tells Doris Floyd, its named insured, that the Declarations page, by DEFINITION, contains the types *and* dollar limit of the various coverages. This is

consistent with "The Index" of the Policies. The definition of **Declarations** does not tell Doris that she might not have $100,000/$300,000 in uninsured motorist coverage. Rather, as mentioned above, the dollar limit of the uninsured motorist coverage is declared to be $100,000 each person/$300,000 each accident. There is nothing else found on the Declarations page that would lead Doris to believe that she really did not buy $100,000 of coverage. By the fourth page of the Policies, Doris Floyd has been told three separate times to look to the Declarations page to determine what coverages she has. The Declarations page unequivocally states that she has $100,000 each person/$300,000 each accident in uninsured motorist coverage available to her under each of the Policies. Nowhere does the Declarations page, "The Index", or the definition of **Declarations** give Doris Floyd the slightest hint that the coverage she bought to protect herself against the negligence of uninsured motorists would be reduced by Partial Exclusions buried on page 26 of the Policies.

Moreover, the Declarations pages of the Policies indicate that the Policies are not the initial policies, but rather are "Reissue[s]". L.F.III 287, 341. That being the case, it is notable that Respondent actually *places a duty on its own insured* to make sure the coverages provided are correct. To meet that duty, Respondent requires the insured to read the Declarations page, as directed on page 10 of the Policies by the following language:

> **YOUR** DUTY TO MAKE SURE **YOUR** COVERAGES ARE CORRECT
>
> **You** agree to check the **Declarations** each time **you** receive one, to make sure that:

(1) All the coverages **you** requested are included in this policy; and

(2) The limit of **our** liability for each of those coverages is the amount **you** requested.

You agree to notify **us** within 10 days of the date **you** receive any **Declarations** if **you** believe the coverages, or amounts of coverage, it shows are different from those **you** requested. If **you** do not notify **us** of a discrepancy, **we** will presume the policy meets **your** requirements.

L.F.III 299, 353.

From the above stated duties, it is clear that Respondent requires the named insured ("**you**") (L.F.III 299, 353) to check the Declarations page each time the named insured receives a new Declarations page to make sure that the coverages requested are included in the policy and that "the limit of [Respondent's] liability for each of these coverages is the amount [Jerry Floyd or Doris Floyd] requested". There is no duty placed upon the insured to look anywhere other than the Declarations page. Consistent with the previous three parts of the policy, Respondent tells the insured that it is the Declarations page that determines what coverage is available and the amount available. This provision associated with the duty imposed on the insured by Respondent is consistent with the definition of Declarations, The Index statement and the Declarations page itself.

The importance of the Declarations page is once again emphasized by Respondent at page 10 of each of the Policies, where the following is stated:

PREMIUM PAYMENTS

We agree to insure **you** based on **your** promise to pay all premiums when due. If **you** pay the premium when due, this policy provides the insurance coverages in the amounts shown in the **Declarations**. ...

L.F.III 299, 353.

By this provision, Jerry Floyd and Doris Floyd promised to pay their premiums, a promise that the Floyds kept. Respondent, in return, promised to provide "...the insurance coverages in the amounts shown in the **Declarations**." L.F.III 299, 353. Jerry and Doris Floyd could look to the Declarations page for the "amounts" and then determine if the premium was fair. The amount shown in the Declarations page is $100,000 each person/$300,000 each accident. The Floyds kept their promise and paid their premium for coverage "...in the amounts shown in the Declarations." Respondent failed to keep its promise. Respondent ignores its own Declarations page, its Index, its definition of "**Declarations**", its own duties placed upon its insureds and the promises of the "Premium Payments" clause. Instead, Respondent relies upon two "Partial Exclusions" exclusions hidden in the Policies on page 26. L.F. 315, 369. As Appellants urge in Point I above, neither of the two "Partial Exclusions" is applicable to this case. However, if this Court decides for some reason that one or both of the "Partial Exclusions" do apply, then application of either "Partial Exclusion" means that Respondent provides coverage in one place in the Policies (in fact, multiple places), and then tries to take it away at another. This is improper under Missouri law.

In *Rice*, 301 S.W.3d 43, Respondent tried to do this very thing, based on a different exclusion, and was prevented from doing so by this Court. In that case, Jason Rice a passenger in a truck while on the job. *Rice*, 301 S.W.3d at 44. The accident was caused by the operator of an uninsured motor vehicle. *Id*. Respondent had issued three automobile policies to Michael and Connie Rice, Jason's parents, and Jason qualified as an insured within the meaning of the uninsured motorist coverage of the three policies. *Id*.

Jason received benefits under the workers' compensation law in Missouri. *Id*. at 45. He then sought recovery from Respondent for payment of the per person limits of all three policies, totaling $600,000. *Id*. Respondent offered and paid $25,000 per policy, totaling $75,000 for the three policies, relying upon a provision that allowed it to reduce uninsured motorist coverage to the statutorily mandated minimum required under Missouri law in situations where benefits are payable under "any compensation law", Respondent's definition of which includes workers' compensation. *Id*.

This Court found that Respondent's policies issued to the Rices contained inconsistent provisions, with one part guaranteeing coverage above the minimum coverage mandated by RSMo. §379.203 and another part limiting coverage to the minimum amount required by that statute. *Id*. at 47. This Court found that under the Shelter policy before it, the uninsured motorist provision started with a reference to providing coverage up to the limit of liability in the Declarations provisions, but followed with provisions excluding coverage when benefits were provided to an insured under any compensation law, but then again followed by provisions providing the exclusion did not

apply to amounts of coverage mandated by any uninsured motorist law, followed yet again by provisions providing that the uninsured motorist part of the policy exceeding the requirements of any applicable uninsured motorist insurance law for financial responsibility were not fully enforceable. *Id.* at 48. The Court held that the provisions "are entirely inconsistent and cannot be reconciled." *Id.* The Court therefore determined that Rice was entitled to the full coverage amount stated in the Declarations, because "Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage." *Id.*, *quoting Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo.banc 2009).

Likewise, in the case at bar, Appellant Doris Floyd, a "named insured", was saddled by Respondent with a duty to check the Declarations page each time she received one to make sure the coverages she requested, and the desired limits of liability, were included in the Policies. Whenever Doris Floyd complied with this duty to check her coverages on the Declarations page, she would have found, very simply, that she had $100,000 each person/$300,000 each accident in coverage under each of the Policies. Unlike the step-down for permissive users, there is ABSOLUTELY NO MENTION in the Declarations page of any reduction in uninsured motorist coverage for the named insureds.

The Respondent's emphasis on the Declarations page is unmistakable. The Declarations page is made a part of the Policies. It replaces all prior Declarations pages. It does contain an exception or step-down to allow for the reduction of coverage by

Respondent when there is a person who becomes an insured solely by being a permissive user of an insured auto, but that exception has no bearing on this case. The fact that the Declarations page contains the amount of coverage is re-emphasized in "The Index". It is emphasized yet again by the very definition of "Declarations" in the Policies themselves. It is again reaffirmed in the Premium Payments section; the premiums are based upon the amount stated in the Declarations, not some lesser amount hidden in some "partial exclusion" of the policy.

Jerry and Doris Floyd promised to pay all premiums when due, and the Floyds did pay their premiums. When the Floyds paid the premiums, then the Policies were issued by Respondent, each of which, as promised in the "Premium Payments" clause, "...provides the insurance coverages in the amount shown in the **Declarations**." L.F.III 299, 353. The amount shown in the Declarations is $100,000 each person/$300,000 each accident. This is true in each of the two Policies. As is demonstrated in *Rice, supra*, Respondent cannot provide for coverage in one (or multiple) parts of the Policies and then take refuge in some partial exclusion hidden deep in the Policies in an attempt to take away the very coverage it has promised its insured it would provide, which promise is the very basis upon which the insured determines whether the premium is fair. This tactic, giving coverage in one place and taking it away in another place, has been repeatedly rejected by Missouri courts, especially in the context of uninsured motorist coverage. (See, *e.g.*, the cases listed in Footnote 4 on Page 26 above).

There is $100,000.00 in uninsured motorists coverage available under each of the two Policies for the claim asserted by Appellants. Respondent has already paid

$25,000.00 under each of the Policies. Respondent owes $75,000.00 more under each of the Policies, for a total of $150,000.00. Even if the "Partial Exclusions from Coverage E" are not downright inapplicable to this case as urged in Point I above, the "Partial Exclusions" are unenforceable under Missouri law as stated in *Rice, supra*.

D. The Partial Exclusions Are Ambiguous

In The Context Of A Wrongful Death Claim

In its affirmance of the Trial Court's Judgment, the Western District majority Opinion went to great lengths in its effort to read the term "insured" to refer to the Decedent Jerry Floyd. In the context of the instant wrongful death claim, the majority Opinion resorted to the "Payments" provision of the policies (L.F. 659, 703) to cause the UM benefits to be paid to those authorized under RSMo. §537.080. However, this does not fix the problem with the Policies, because "Damages" can never be owed to the Decedent in this case under Missouri law. The majority's reading of the Decedent as the "insured" defeats ALL coverage under the Policies in the context of a Missouri wrongful death claim.[7]

The majority's reading, which bars wrongful death claims under the Policies, causes the Policies to be in flagrant disobedience of Missouri's mandatory uninsured motorist coverage law. RSMo. §379.203.1 requires automobile insurance policies to

[7] Clearly, Appellants disagree with the majority Opinion. Absolutely no disrespect to the Western District or the author of any part of the Opinion is intended. Nor is any disrespect to the Trial Court intended.

provide uninsured motorist benefits for wrongful death. Only because statutory requirements supersede conflicting contractual provisions (*National Equity Resources Corp. v. Montgomery*, 872 S.W.2d 533, 536 (Mo.App.S.D. 1994)) is there any uninsured motorist coverage for wrongful death at all under the Policies, under the majority's interpretation. Such a strained construction of the Policies is unnecessary. It makes more sense, in light of RSMo. §379.203.1's wrongful death coverage requirements, to read "insured" as "Doris Floyd", which causes the policies to comply with RSMo. §379.203.1, but which also causes the partial exclusions not to apply. The Policies are, in the context of this wrongful death claim, open to two different constructions: construing "the **insured**" as Doris Floyd as urged by Appellants, and construing "the **insured**" as Decedent, as urged by Respondent and adopted by the Trial Court and the Western District majority. The Polices are, therefore, ambiguous in this respect. It is black-letter law in Missouri that, when policy provisions are ambiguous and open to different constructions, ambiguous language must be construed against the insurer. *Krombach,* 827 S.W.2d at 210. The fact that the Western District issued three separate opinions (a majority opinion, a dissenting opinion, and a concurrence in the dissent) underscores the fact that there is an ambiguity. Shockingly, the Trial Court and the Western District majority construed this ambiguity against the Appellants and in favor of Respondent, the insurer. This construction is contrary to Missouri law, because c*ontra proferentem* is the law in Missouri, not *contra emptor*. *Krombach*, 827 S.W.2d at 210.

E. The Partial Exclusions Render The Uninsured Motorist Coverage Illusory

Jerry and Doris Floyd bought and paid for $100,000.00 in uninsured motorist coverage from Respondent. However, if the partial exclusions at issue herein are found to be applicable and enforceable, then the Floyds could never possibly collect the full uninsured motorist benefits they paid Respondent for if they have the audacity to be injured or killed in a car they own. Under Respondent's construction, the partial exclusions would kick in and knock the limits down to $25,000.00 with respect to the cars they own but are not occupying at the time of the accident. As noted above, this construction is contrary to Missouri law because uninsured motorist coverage inures to the person, not to a particular vehicle. *Blumer*, 340 S.W.3d at 219, (*quoting Adams,* 719 S.W.2d at 96). Regardless, the operation of the partial exclusions renders the Policies' promise of $100,000.00 in uninsured motorist benefits illusory. "A construction which may render a portion of the policy illusory should not be indulged in." *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266, 271 (Mo. 1983). The Floyds paid for $100,000.00 in coverage, but Respondent did not provide what it was paid for. If Respondent's interpretation is accepted the Floyds bought a bill of goods.

The law does not require any particular level of education in order to buy automobile insurance. Anybody who drives a car is required (by RSMo. §303.025) to buy automobile liability insurance, and that coverage must also include uninsured motorist coverage, as required by RSMo. 379.203. It should not take a fancy law degree and experience with the finer points of insurance contract interpretation to determine how much uninsured motorist coverage a person has purchased. It should not be the case that

the Judge of the Trial Court, eleven Judges from the Western District Court of Appeals, and a host of attorneys for Appellants and Respondent cannot agree on how much coverage is available under the Policies. Respondent's Policies *do* tell its insureds how much coverage they have, right on the Declarations page. Respondent's taking that coverage away by use of partial exclusions hidden deep in the Policies is simply another version of the old "pig-in-a-poke"[8] fraudulent sales technique, where a seller leads a buyer into believing they are buying a certain product (in this case, $100,000.00 in

[8] The phrase "pig-in-a-poke" refers to:

> An object offered in a manner that conceals its true value, especially its lack of value. For example, Eric believes that buying a used car is buying a pig in a poke . This expression alludes to the practice of substituting a worthless object, such as a cat, for the costly suckling pig a customer has bought and wrapping it in a poke, or sack. It dates from a time when buyers of groceries relied on a weekly farmers' market and, unless they were cautious enough to check the poke's contents, would not discover the skullduggery until they got home. The word poke dates from the 13th century but is now used mainly in the southern United States. The idiom was first recorded in John Heywood's 1562 collection of proverbs.

Christine Ammer, *The American Heritage Dictionary of Idioms*, Houghton Mifflin Company. Entry for "pig in a poke", located at Dictionary.com . http://dictionary.reference.com/browse/pig in a poke (accessed: March 12, 2014).

uninsured motorists coverage), but what the buyer ends up with is something of lesser value ($25,000.00 in uninsured motorist coverage). This is forbidden under Missouri law, because "'[cases] should not and will not turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be'." *Cameron Mutual Insurance Co.*, 533 S.W. 2d at 545, (*quoting Great Central Insurance Co.*, 298 So.2d at 610).

This Court has a responsibility to protect the insurance buying public from unscrupulous practices like the one Respondent committed in this case—selling $100,000.00 in uninsured motorist coverage then refusing to deliver it when it became due. Therefore, Appellants pray that this Court reverse the Trial Court's Judgment, and remand this case to the Trial Court with instructions to deny Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company*, grant Appellants' *Plaintiffs' Motion for Summary Judgment* in part by entering partial summary judgment in favor of Appellants and against Respondent in the amount of $150,000.00 for the coverage owed under the Policies, and conduct further proceedings regarding the issue of vexatious penalties and attorney fees.

VII. CONCLUSION

The Trial Court erred when it entered the Judgment granting Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company*, and denying Appellants' *Plaintiffs' Motion for Summary Judgment*. In doing so, the Trial Court granted judgment in favor of Respondents even though Respondent was not entitled to judgment as a matter of law, because the "Partial Exclusions From Coverage E" did not apply to the situation presented in this case or, at the very least, were unenforceable because they rendered the Policies ambiguous. Appellants, therefore, respectfully request that this Court reverse the Trial Court's Judgment, and remand this case to the Trial Court with instructions to deny Respondent's *Motion for Summary Judgment by Defendant Shelter Mutual Insurance Company*, grant Appellants' *Plaintiffs' Motion for Summary Judgment* in part by entering partial summary judgment in favor of Appellants and against Respondent in the amount of $150,000.00 for the coverage owed under the Policies, and conduct further proceedings regarding the issue of vexatious penalties and attorney fees.

Respectfully submitted,

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MO.R.CIV.P. 84.06(c) AND (g) CERTIFICATE

The undersigned hereby certifies that the foregoing *Appellants' Substitute Brief* complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 11,612 words and 1,190 lines in the foregoing brief, according to the Word Count tool in Microsoft Word for Windows, the word processing software used to prepare the foregoing brief. The brief shall be filed electronically with the Missouri Supreme Court. The files filed in the Court and the files served on attorneys for Respondent have been scanned for viruses and those files are virus-free.

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