IN THE SUPREME COURT OF MISSOURI

TAMARA SEECK,	)	
	)	**No. SC87995**
Appellant,	)	
	)	
vs.	)	
	)	
GEICO GENERAL INSURANCE CO.,	)	
	)	
Respondent.	)	

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

SUBSTITUTE BRIEF OF RESPONDENT GEICO GENERAL INSURANCE CO.

KEVIN B. BEHRNDT, #33118
DANIEL G. TOBBEN, #24219
DANNA MCKITRICK, P.C.
150 North Meramec, Fourth Floor
St. Louis, MO 63105-3907
(314) 726-1000/(314) 725-6592 fax
E-mail: kbehrndt@dmfirm.com
E-mail: dtobben@dmfirm.com
ATTORNEYS FOR GEICO GENERAL INSURANCE COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This case is on transfer by Order of the Missouri Court of Appeals, Eastern District, in light of the general interest and importance of the issues presented, pursuant to Rule 83.02.

STATEMENT OF FACTS

Plaintiff Tamara Seeck was a passenger in a motor vehicle which was involved in a motor vehicle accident with a vehicle operated by Kelli Whitmore on December 10, 1999 (LF 009, LF 011). Whitmore was insured by Farmers Insurance Company under a liability policy of $50,000.00 (LF 009). Plaintiff Seeck entered into a settlement agreement with Farmers for the policy limit of $50,000.00 and executed a Release in Full of All Claims on August 19, 2002, which released John Whitmore, Jr., Kelli Yacyk Whitmore and Farmers Insurance Group in consideration for the sum of $50,000.00 (LF 099). The Release in Full of All Claims was executed without GEICO's knowledge or consent (Request for Admission No. 8, LF 092).

The Release in Full of All Claims contained the following provision:

> I hereby agree to **reimburse** and **indemnify** all released parties for any amounts which any insurance carrier, government entities, hospitals or other persons or organization may recover from them in **reimbursement** for amounts paid to me or on my behalf as a result of this accident by way of **contribution**, **subrogation**, **indemnity**, or **otherwise** (LF 099).

The release contained a handwritten provision preserving Plaintiff Seeck's claim against GEICO for underinsured motorist benefits which stated, "Release excludes Tamara Seeck's own underinsured motorist coverage carrier" (LF 099).

At the time of the collision, Seeck was insured with Defendant GEICO General Insurance Company for underinsured motorist coverage (sometimes referred to herein as

UIM) in the amount of $50,000.00 (LF 063- 088). The GEICO General Insurance Company's underinsured motorist policy issued to Plaintiff Seeck contained the following definition:

> **Underinsured Motor Vehicle** means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage (UIM coverage, paragraph 5 under DEFINITIONS, LF 085).

GEICO's policy issued to Tamara Seeck also contained an offset provision which stated under LIMIT OF LIABILITY:

> However, the limit of liability shall be reduced by all sums:
>
> 1. paid because of the bodily injury by or on behalf of the persons or organizations who may be legally responsible (LF 086).

Contrary to the Statement of Facts in Appellant's Brief, Kelli Whitmore was not an underinsured motorist as defined in GEICO's policy. See Request for Admission No. 5, LF 089-093. Seeck also admitted not seeking GEICO's prior written consent to settle before accepting the Farmers policy limits of $50,000.00 (Request for Admission No. 8, LF 089-093). Since Kelli Whitmore's vehicle did not constitute an underinsured motor vehicle as defined in the GEICO policy, GEICO denied Seeck's claim for underinsured motorist coverage. Seeck filed suit against GEICO to recover under the policy. GEICO filed a Motion for Summary Judgment and on August 19, 2005, and after oral argument and

briefing, the Circuit Court for the County of St. Charles, State of Missouri, granted summary judgment on behalf of Defendant GEICO (LF 151).

Plaintiff filed a Notice of Appeal from the summary judgment order on September 20, 2005, and this appeal followed.

The Missouri Court of Appeals, Eastern District, following ***Ware v. GEICO General Insurance Company***, 84 S.W.3d 99 (Mo.App. E..D. 2002), found that the GEICO policy's "OTHER INSURANCE" clause could reasonably be interpreted to mean Seeck was entitled to UIM coverage over and above that available from tortfeasor Whitmore, creating an ambiguity. However, because of the general interest and importance of the issues raised, the Court of Appeals transferred this case to this Court, pursuant to Rule 83.02.

POINTS RELIED UPON

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THE TORTFEASOR'S VEHICLE WAS NOT AN "UNDERINSURED MOTOR VEHICLE" AS CLEARLY AND UNAMBIGUOUSLY DEFINED IN THE GEICO POLICY.

Rodriguez v. General Accident Insurance Company, 808 S.W.2d 379 (Mo. banc 1991)

Melton v. Country Mutual Insurance Company, 75 S.W.3d 321 (Mo.App. E.D. 2002)

Harris v. Shelter Mutual Insurance Company, 141 S.W.3d 56 (Mo.App. W.D. 2004)

Nolen v. Country Mutual Insurance Co., 2005 WL 3133506 (E.D. Mo.)

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT BECAUSE THE GEICO POLICY DOES NOT PROVIDE UNDERINSURED MOTORIST BENEFITS IN EXCESS OF THE TORTFEASOR'S POLICY LIMITS WHERE THE VEHICLE IS NOT AN UNDERINSURED MOTOR VEHICLE IN THE FIRST PLACE, AND THE OFFSET PROVISION IN THE POLICY REQUIRES THAT ANY LIABILITY PAYMENTS RECOVERED BE REDUCED FROM THE UIM LIMIT OF LIABILITY, THUS RESULTING IN PLAINTIFF'S HAVING NO RIGHT TO RECOVER FROM DEFENDANT.

Rodriguez v. General Accident Insurance Company, 808 S.W.2d 379 (Mo. banc 1991)

Melton v. Country Mutual Insurance Company, 75 S.W.3d 321 (Mo.App. E.D. 2002)

Lang v. Nationwide Mutual Insurance Company, 970 S.W.2d 828, 830 (Mo.App. E.D. 1998)

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THE OTHER INSURANCE CLAUSE CONTAINED IN THE GEICO UNDERINSURED MOTORIST POLICY IS NOT AMBIGUOUS AND SHOULD NOT BE READ TO PROVIDE UNDERINSURED MOTORIST BENEFITS IN EXCESS OF THE LIABILITY POLICY LIMITS PLAINTIFF RECOVERED FROM THE TORTFEASOR. THE OTHER INSURANCE CLAUSE REFERS TO OTHER UNDERINSURED MOTORIST COVERAGE EXISTING ON THE VEHICLE IN WHICH PLAINTIFF WAS AN OCCUPANT.

Rodriguez v. General Accident Insurance Company, 808 S.W.2d 379 (Mo banc 1991)

Melton v. Country Mutual Insurance Company, 75 S.W.3d 321 (Mo.App. E.D. 2002)

City of Washington v. Warren County, 899 S.W.2d 863,868 (Mo banc 1995)

Shelter Mutual Insurance Company v. Williams, 9 S.W.3d 545 (Ark.App. 2000)

IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANT GEICO BECAUSE THE RELEASE OF THE TORTFEASOR WHICH PLAINTIFF EXECUTED WAS CIRCULAR IN THAT IT OBLIGATED PLAINTIFF TO REIMBURSE OR INDEMNIFY THE TORTFEASOR FOR ANY SUMS OWED TO DEFENDANT IN SUBROGATION, THUS MAKING GEICO A THIRD PARTY BENEFICIARY TO THE RELEASE, AND RESULTING IN NO RECOVERY BY PLAINTIFF. MOREOVER, GEICO HAS VALID RIGHTS OF SUBROGATION UNDER ITS POLICY.

Marshall v. Northern Assurance Co. of America, 854 S.W.2d 608 (Mo.App. W.D. 1993)

Andes v. Albano, 853 S.W.2d 936, 942 (Mo. banc 1993)

Anison v. Rice, 202 S.W.2d 497 (Mo. 1955)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THE TORTFEASOR'S VEHICLE WAS NOT AN "UNDERINSURED MOTOR VEHICLE" AS CLEARLY AND UNAMBIGUOUSLY DEFINED IN THE GEICO POLICY.

STANDARD OF REVIEW

The decision of the trial court judge, granting GEICO summary judgment, will not be disturbed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo. banc 1976).

Appellate review of a summary judgment is *de novo.* ***ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.***, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. ***Id.*** at 377. The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. ***Id.*** at 376. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. ***Id.***

ARGUMENT

In order to determine if Plaintiff Seeck qualified for underinsured motorist benefits under the policy issued by GEICO to Seeck, the first step in that analysis begins with looking

at the definition of underinsured motor vehicle. GEICO provided UIM coverage in the policy issued to Tamara Seeck of $50,000.00 per person/ $100,000.00 per occurrence, and defined "underinsured motor vehicle" as:

> Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage (copy of certified policy, paragraph 5, Underinsured Motorist Coverage, LF 085).

The most blatant and glaring omission of Appellant's argument is that she has completely skipped over the analysis of whether the tortfeasor's vehicle constitutes an underinsured motor vehicle under the policy in the first place. It does not, by the clear and unambiguous definition of UIM vehicle in the policy.

It is undisputed that tortfeasor's vehicle was insured by Farmers for $50,000.00, and that is what Plaintiff Seeck recovered from the tortfeasor in settlement (Request for Admission No. 1, LF 053; see also LF 052). Thus, clearly and unambiguously, by definition under the policy, the $50,000.00 Farmers policy is not less than the limit of liability of Seeck's UIM coverage of $50,000.00. Thus, the Whitmore vehicle was not underinsured, and Seeck is not entitled to recover underinsured motorist benefits under the policy.

Underinsured motorist coverage is not mandated by statute, unlike uninsured motorist coverage. It is purely optional and governed by the rules of contract. ***American Family Mutual Insurance Co. v. Turner***, 824 S.W.2d 19, 21 (Mo.App. 1991). The existence and

scope of coverage is determined by the terms of the contract between the insurer and insured. ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379 (Mo. banc 1991). A court is not, however, permitted to create an ambiguity to distort the language of an unambiguous policy or to enforce a particular construction that it feels is more appropriate. ***Rodriguez***, at 382.

The Missouri Supreme Court has determined that a liability policy on a motor vehicle which is not less than the limit of the UIM coverage is not an underinsured motor vehicle by definition. ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379 (Mo. banc 1991). ***Rodriguez*** has not been overturned or questioned, and constitutes the prevailing law in the State of Missouri. The underinsured motorist coverage establishes a total amount of protection which assures the insured of receiving coverage for the contracted amount to the extent that the tortfeasor's coverage is less than the contracted amount. ***Rodriguez, id.*** at 382-383.

The underinsured motor vehicle definition in ***Rodriguez*** states that an underinsured motor vehicle "means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit to bodily injury liability is less than the limit of liability for this coverage." ***Id.*** at 381. This language is nearly identical to the language in the GEICO policy. Accordingly, the vehicle here, like the vehicle in ***Rodriguez***, is not an underinsured motor vehicle.

The precedential value of ***Rodriguez*** as to what constitutes an underinsured motor vehicle is evident in ***Melton v. Country Mutual Insurance Company***, 75 S.W.3d 321

(Mo.App. E.D. 2002). The Missouri Court of Appeals, Eastern District, in ***Melton*** found ***Rodriguez*** to be controlling on the definition of underinsured motor vehicle. In ***Melton***, the UIM policy also defined Underinsured Motor Vehicle as one "for which the sum of all liability policies at the time of the accident are less than the limit of this insurance." ***Id.*** at 323.

In ***Melton***, the Court of Appeals stated:

> In ***Rodriguez***, our Supreme Court found that the language of the insurance policy in that case clearly stated that an underinsured motor vehicle is one whose limits for bodily injury liability are "less than the limit of liability for this coverage" and that the other party's vehicle was not underinsured because the policy limits on that vehicle were equal to the underinsured limits on Rodriguez's vehicle. ***Rodriguez***, 808 S.W.2d at 382.
>
> Also, in ***Rodriguez***, the Court found the language of the policy concerning the limit of liability to be unambiguous. ***Id.*** at 383. Under the type of policy in ***Rodriguez***, if the other motorist pays as much or more to the insured for bodily injury as the insured has underinsured coverage, then the insured is not permitted to recover under the underinsured coverage. ***Zemelman v. Equity Mutual Insurance Co.***, 935 S.W.2d 673, 676 (Mo.App. W.D. 1996). . .
>
> Here, "underinsured motor vehicle" is defined under the uninsured-underinsured motorist section of the policy as "any type of motor vehicle . . .

for which the *sum of all liability . . . policies* at the time of the accident are less than the limit of this insurance" (emphasis added). The sum of the liability policies of Rainey, Hughes' father, and Perschbacher totaled $350,000.00. Appellant had UIM coverage in the amount of $50,000.00 per person. The liability limits of the coverage on the negligent or allegedly negligent parties' vehicles were greater than the $50,000.00 liability limit for UIM coverage in Country's policy. We find the language in appellant's policy to be similar to the language in the policy in ***Rodriguez***. Therefore, since ***Rodriguez*** is controlling we find the policy terms in appellant's policy regarding the definition of "underinsured motor vehicle" and the "offset" of liability provisions to be unambiguous. ***Melton, supra,*** at 325. (emphasis added.)

Melton is clearly on point. Both ***Rodriguez*** and ***Melton*** hold that the definition of underinsured motor vehicle is not ambiguous and when the plaintiff receives as much or more from the tortfeasor's liability policy as she has in underinsured motorist limits, the vehicle is not an underinsured motor vehicle. See also ***Nolen v. Country Mutual Insurance Co.***, 2005 WL 3133506 (E.D. Mo.) which follows ***Melton*** in finding the definition of underinsured motor vehicle to be unambiguous. ("The Missouri Court of Appeals has considered the definition of underinsured motor vehicle in an insurance policy identical to this one, and found it to be unambiguous.")

Other cases that have analyzed identical or similar definitions of "underinsured motor vehicle" also support a finding that the GEICO policy in this case is unambiguous. See

Tapley v. Shelter Mutual Insurance Company, 91 S.W.3d 755 (Mo.App. S.D. 2002) (tortfeasor's vehicle did not meet unambiguous definition of "underinsured motor vehicle"); ***Trapf v. Commercial Union Insurance Company***, 886 S.W.2d 144 (Mo.App. E.D. 1994) (where policy that defined an underinsured motor vehicle as one whose limit for bodily injury liability is less than the limit of liability for the underinsured motorist coverage under the policy was unambiguous); and ***Harris v. Shelter Mutual Insurance Company***, 141 S.W.3d 56 (Mo.App. W.D. 2004) (Shelter policy was unambiguous because it defined an underinsured motor vehicle as one with coverage "less than the limits of the uninsured motorist coverage carried on this policy", ***Id.*** at 62).

In ***Harris***, the Court stated because the Shelter policy was unambiguous as to what constituted an "underinsured motor vehicle", no basis existed for application of an objective reasonable expectation doctrine to the policy. ***Id.*** at 60-61. The court in ***Harris*** also emphasized that because there is no public policy requiring UIM coverage, the insurance policy dictates its existence and application.

In ***Hinshaw v. Farmers & Merchants Insurance Company***, 912 S.W.2d 70 (Mo.App. E.D. 1995), the Court determined that no underinsured motorist coverage was due because the tortfeasor's vehicle was not an underinsured motor vehicle where the liability limits of the tortfeasor's vehicle "were identical to the liability limits on plaintiff's underinsured motorist coverage." ***Hinshaw v. Farmers & Merchants Insurance Company, supra*** at 72. This is exactly the situation with plaintiff Seeck's policy, which provides for $50,000 in underinsured motorist coverage which is identical to tortfeasor Whitmore's liability limits

of $50,000. Accordingly, because the Whitmore vehicle provides for coverage equal to defendant's underinsured motorist coverage, the Whitmore vehicle does not meet the definition of underinsured vehicle.

In sum, the clear and unambiguous definition of "underinsured motor vehicle" precludes recovery of any underinsured motorist benefits under the policy because the tortfeasor's vehicle in this case did not constitute an underinsured motor vehicle. That should be the end of the inquiry and the trial court correctly granted summary judgment in Defendant GEICO's favor.

Respondent GEICO submits that once it is unambiguously clear that the tortfeasor's vehicle does not constitute an underinsured motor vehicle by the clear definition in the policy, the remaining provisions about how any underinsured coverage is to be applied are completely irrelevant. Once it is determined that the tortfeasor's vehicle by definition is not an underinsured motor vehicle, the policyholder has no reasonable expectation of coverage for underinsured motorist benefits. Thus, inquiry into policy provisions beyond this is not warranted. For that reason, Respondent submits that the Missouri Court of Appeals, Eastern District, reached the wrong result in ***Ware v. GEICO General Insurance Company***, 84 S.W.3d 99 (Mo.App. E.D. 2002), when it held that the OTHER INSURANCE clause was ambiguous, because those sections of the policy determine how underinsured motorist benefits are to be applied if there exists an underinsured motor vehicle under the definition in the policy. Here, there is no underinsured motor vehicle and thus the OTHER INSURANCE clause should not be considered.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT BECAUSE THE GEICO POLICY DOES NOT PROVIDE UNDERINSURED MOTORIST BENEFITS IN EXCESS OF THE TORTFEASOR'S POLICY LIMITS WHERE THE VEHICLE IS NOT AN UNDERINSURED MOTOR VEHICLE IN THE FIRST PLACE, AND THE OFFSET PROVISION IN THE POLICY REQUIRES THAT ANY LIABILITY PAYMENTS RECEIVED BE REDUCED FROM THE UIM LIMIT OF LIABILITY, THUS RESULTING IN PLAINTIFF'S HAVING NO RIGHT TO RECOVER FROM DEFENDANT.

Plaintiff ignores the most basic policy analysis applicable to this case – whether the tortfeasor's vehicle constitutes an underinsured motor vehicle under the definition of the policy, and urges the Court to skip to a later section of the policy and determine that the GEICO policy is ambiguous because of the OTHER INSURANCE clause. Plaintiff cites an earlier GEICO case, ***Ware v. GEICO General Insurance Company***, 84 S.W.3d 99 (Mo.App. E.D. 2002) and argues that ***Ware*** is binding and requires that the UIM policy be interpreted to provide $50,000.00 underinsured motorist coverage on top of the $50,000.00 liability limits Plaintiff recovered.

The Missouri Court of Appeals, Eastern District, did examine GEICO's UIM policy language in ***Ware v. GEICO General Insurance Company***, 84 S.W.3d 99 (Mo.App. E..D. 2002) and held that the OTHER INSURANCE clause was ambiguous, and thus GEICO's UIM coverage is excess on top of the already recovered liability policy limits. In doing so,

the ***Ware*** court overturned the trial court's summary judgment in favor of GEICO on that issue. Defendant respectfully suggests that ***Ware*** was wrongly decided, for the following reasons.

First, in ***Ware***, the court did not address the first fundamental inquiry – whether the tortfeasor's vehicle was underinsured pursuant to the definition contained in the policy. As stated in Point I, this is the first essential fundamental inquiry in determine whether there is coverage. If the vehicle is <u>not</u> an underinsured motor vehicle, the inquiry need not go further. The OTHER INSURANCE clause applies to situations where the definition of UIM vehicle mandates coverage. It provides a method for determining priority of coverage when there exists an underinsured motor vehicle. If the vehicle is not an underinsured motor vehicle, the inquiry need not proceed further. The Court in ***Ware*** never did address whether the tortfeasor's vehicle was underinsured under the clear definition in the policy.

Second, the Court in ***Ware*** did not address the prevailing case authority in the State of Missouri on this issue, ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379 (Mo. 1991). In ***Rodriguez***, the Missouri Supreme Court found that the language of the policy concerning the definition of underinsured motor vehicle is unambiguous. ***Id.*** at 383. ***Rodriguez*** is still prevailing law in Missouri and the ***Ware*** decision does not overturn that case.

> By their own admission, the Rodriguezs' acknowledge that the Fruehwirths' liability coverage is $50,000.00. Since Fruehwirths' coverage is equal to the limit of liability under the Rodriguezs' policy, Fruehwirth was not

an underinsured motor as defined by the Rodriguezs' policy. ***Rodriguez*** at 382.

The same situation applies here. There is no ambiguity in that by definition, the Whitmore vehicle was not insured for less than GEICO's UIM policy limit. The OTHER INSURANCE clause should not have been relevant to the inquiry in ***Ware***, and it should not be relevant here.

The definition could not be clearer. As this Court stated in ***Rodriguez***, "Considering the clarity with which the UIM coverage is defined, we hold that it is neither ambiguous nor misleading." ***Id.*** at 383. The Court may not create an ambiguity where none exists or rewrite a policy to provide coverage for which the parties never contracted. ***Lang v. Nationwide Mutual Insurance Company***, 970 S.W.2d 828, 830 (Mo.App. E.D. 1998).

Third, the Court of Appeals in ***Ware*** not only did not address ***Rodriguez*** and the definition of underinsured motor vehicle, but also did not mention the decision in ***Melton v. Country Mutual Insurance Company***, 75 S.W.3d 321 (Mo.App. E.D. 2002), which as mentioned earlier, did follow the ***Rodriguez*** decision and was decided shortly before ***Ware.*** In that case, the Court of Appeals, Eastern District, found ***Rodriguez*** to be controlling on the definition of underinsured motor vehicle. ***Id.*** at 325. The Court of Appeals also ruled against a similar argument that the OTHER INSURANCE clause was ambiguous and held that it could not be read to provide coverage over and above the amount already collected from the liability policy carrier. ***Melton*** also involved a situation with a passenger in a non-owned vehicle. Although the policy in ***Melton*** had slightly different wording in its OTHER

INSURANCE clause than the GEICO policy, the policies are similar and refer to insurance existing on the non-owned vehicle, not liability insurance on the tortfeasor's vehicle. Defendant urges this Court to find that ***Ware*** was erroneously decided and to follow ***Melton*** and ***Rodriguez*** in holding that the clear definition of underinsured motor vehicle precludes coverage where the tortfeasor's vehicle is unambiguously not an underinsured motor vehicle.

Moreover, the clear and unambiguous terms of the GEICO policy require that the limit of liability of the UIM policy must be reduced by the amount of the Farmers liability policy, thus resulting in a net recovery of zero. GEICO does not concede that the UIM policy is even applicable, because of the unambiguous definition of underinsured motor vehicle as discussed previously, but even if it was, the policy requires an offset of the $50,000.00 liability settlement. The policy clearly states:

> However, the limit of liability shall be reduced by all sums:
>
> 1. paid because of the bodily injury by or on behalf of the persons or organizations who may be legally responsible (GEICO policy, page 2 of 4 under LIMIT OF LIABILITY, LF 086).

Thus, the $50,000.00 UIM policy limits, even if the tortfeasor's vehicle was somehow an "underinsured motor vehicle", would have to reduced by the $50,000.00 received from the Farmers liability policy anyway, thus resulting in no recovery for the Plaintiff. See ***Rodriguez***, ***supra.*** This offset provision is also clear and unambiguous, and results in no recovery for the Plaintiff.

Thus, Plaintiff's vehicle not only does not constitute an underinsured motor vehicle by the definition in the policy, but even if it were considered an underinsured motor vehicle, the offset provision in the GEICO policy requires that the $50,000.00 liability settlement be subtracted from the $50,000.00 UIM policy limit.

Under Plaintiff's analysis of the policy, only in situations where the Plaintiff is a passenger in a non-owned vehicle is the Plaintiff then allowed to recover the UIM policy benefits on top of the liability limits already recovered. When looking at the policy as a whole, this construction in this kind of limited situation is not logical and creates coverage where none is contemplated by the parties. The clear intent of the OTHER INSURANCE clause contained in the GEICO policy, is that in the situation where an insured is occupying a non-owned vehicle the underinsured motorist coverage is excess over the insurance which applies to the occupied motor vehicle, which is considered primary. The OTHER INSURANCE clause states specifically, "and the insurance which applies to the occupied motor vehicle is primary." (L.F. 86) The occupied motor vehicle in this case is the vehicle in which Tamara Seeck was riding, not the motor vehicle driven by the tortfeasor Kelli Whitmore. The OTHER INSURANCE clause is not relevant to the inquiry. By definition, there is no underinsured motor vehicle involved in this case, and this Plaintiff is not entitled to UIM benefits at all.

Respondent notes that the Court, in reviewing a summary judgment, if it can sustain the judgment under any theory, it must do so. ***Meyer v. Enoch***, 807 S.W.2d 156, 158 (Mo.App. E.D. 1991). Although the trial court did not specify a particular reason, this Court

must affirm the trial court's ruling upon any sustainable theory, including the fact that the vehicle was not underinsured, and that GEICO would be entitled to an offset even if it was, resulting in a net recovery of zero.

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT BECAUSE THE OTHER INSURANCE CLAUSE CONTAINED IN THE GEICO UNDERINSURED MOTORIST POLICY IS NOT AMBIGUOUS AND SHOULD NOT BE READ TO PROVIDE UNDERINSURED MOTORIST BENEFITS IN EXCESS OF THE LIABILITY POLICY LIMITS PLAINTIFF RECOVERED FROM THE TORTFEASOR. THE OTHER INSURANCE CLAUSE REFERS TO OTHER UNDERINSURED MOTORIST COVERAGE EXISTING ON THE VEHICLE IN WHICH PLAINTIFF WAS AN OCCUPANT.

The trial court below correctly entered summary judgment on behalf of Defendant GEICO, because as a matter of law Plaintiff Seeck was not entitled to recovery under the terms of the GEICO underinsured motorist policy. The tortfeasor's vehicle was not underinsured and the OTHER INSURANCE Clause is not ambiguous. If, as a matter of law, the judgment is sustainable under any theory, it must be sustained. ***City of Washington v. Warren County***, 899 S.W.2d 863, 868 (Mo. banc 1995). Even if this Court for some reason decides that the Whitmore vehicle constitutes an underinsured motor vehicle, the OTHER INSURANCE Clause is not ambiguous and the limit of liability section clearly requires any recovery from the tortfeasor to be offset, resulting in a net recovery of zero.

The Missouri Court of Appeals, Eastern District, transferred this case because of their earlier decision in ***Ware v. GEICO General Insurance Company***, 84 S.W.3d 99 (Mo.App. E.D. 2002), and concluded that the term "excess" in the "OTHER INSURANCE" provision

of the UIM section of GEICO's policy could reasonably be interpreted to mean Seeck was entitled to UIM coverage over and above that available from the tortfeasor Whitmore, thus creating an ambiguity. Respondent GEICO urges this Court to re-examine the underinsured motorist cases involving alleged ambiguous OTHER INSURANCE clauses, including the ***Ware v. GEICO*** case, and hold that the language contained in GEICO's OTHER INSURANCE clause is not ambiguous and does not thus entitle Appellant to underinsured motorist benefits in excess of the tortfeasor's liability limits.

GEICO's OTHER INSURANCE clause provides:

> OTHER INSURANCE
>
> When an insured is occupying a motor vehicle not owned by the insured or a relative and which is not described in the declarations of this policy, this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary. (L.F. 86)

The OTHER INSURANCE clause in GEICO's policy does not create an ambiguity as Appellant and the Missouri Court of Appeals in ***Ware*** contend.

A fair and reasonable reading of that clause in the context of the whole policy and the placement of that clause clearly indicates that the OTHER INSURANCE clause refers to other underinsured motorist coverage existing on the vehicle in which Plaintiff was an occupant. The phrase "any other insurance available to the insured" is modified and explained by the phrase "and the insurance which applies to the occupied motor vehicle is primary." A fair and reasonable reading of that clause would indicate that the insurance

available to the insured is insurance which would apply to the occupied motor vehicle, i.e. other underinsured motorist coverage. GEICO's OTHER INSURANCE Clause is not written the same as clauses the Court of Appeals compared the GEICO clause with in cases such as ***Zemelman v. Equity Mutual Insurance Company***, 935 S.W.2d 673 (Mo.App. W.D. 1996), and ***Goza v. Hartford Underwriters Insurance Company***, 972 S.W.2d 371 (Mo.App. E.D. 1998) and their progeny. In those cases the language in the Other Insurance clause which was claimed to be ambiguous stated "excess over any other collectible insurance". The ***Zemelman*** Other Insurance clause states:

> However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

The Other Insurance clause in ***Goza*** states:

> However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

And the Other Insurance clause in ***Jackson v. Safeco Insurance Company of America***, 949 S.W.2d 130 (Mo.App. S.D. 1997), states:

> Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing coverage on a primary basis.

The Missouri Court of Appeals, Eastern District, in ***Ware v. GEICO Insurance***, in finding GEICO's OTHER INSURANCE clause ambiguous, did not consider crucial differences in the wording of GEICO's OTHER INSURANCE clause, such as "occupying"

and the whole last phrase of the clause "and the insurance which applies to the occupied vehicle is primary" which does not appear in the ***Goza, Zemelman*** and ***Jackson*** cases.

In determining whether there is ambiguity in the policy, the Court must abide by certain rules of construction. Where insurance policies are unambiguous, the rules of construction are inapplicable and, absent a public policy to the contrary, the policy will be enforced as written. ***American Family Mutual Insurance Company v. Ward***, 789 S.W.2d 791, 795 (Mo. banc 1990). Courts will not create an ambiguity in order to distort the language of an unambiguous insurance policy. ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379, 382 (Mo. banc 1991). The Court also must not create an ambiguity or distort the language in an unambiguous policy in order to enforce a particular construction which it might feel is more appropriate. ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379, 382 (Mo. banc 1991). There is no public policy requirement in Missouri for underinsured motorist coverage. ***Id.*** Language is ambiguous that is reasonably open to two different constructions and the language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy. ***Robin v. Blue Cross Hospital Service, Inc.***, 637 S.W.2d 695, 698 (Mo banc 1982).

A crucial distinction between the GEICO "OTHER INSURANCE" clause and the three policies examined by the Court of Appeals in ***Zemelman***, ***Jackson,*** and ***Goza*** is that the GEICO clause specifically limits the application to a situation where the insured is occupying a motor vehicle not owned by the insured. This limitation of "occupying**"** an

unowned auto contrasts sharply with the much broader phrase, "Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." The GEICO clause clearly refers to situations where the insured is a passenger in another vehicle. The fact that the phrase is limited to situations where the insured is occupying a non-owned vehicle reinforces the concept of this clause concerns underinsured motor vehicle coverage which may exist on the occupied vehicle versus simply any other insurance on a vehicle the policyholder does not own. The policies in ***Jackson, Zemelman*** and ***Goza*** are much broader and do not contain the limiting word "occupying". Thus, those cases are distinguishable.

When read in context with the complete "OTHER INSURANCE" clause, the policy language "any other insurance available" logically refers to insurance available on the occupied motor vehicle. Since any underlying liability coverage would have already been exhausted and used up by the very terms of GEICO's underinsured motorist policy ("We will not pay until the total of all bodily injury liability insurance available has been exhausted." See LOSSES WE PAY, GEICO policy L.F. 086), the only logical and reasonable meaning this phrase can have read in the context of the policy is that "any other insurance available to the insured" means any underinsured coverage available on the occupied motor vehicle. In the context of the policy, clearly "any other insurance available" does not mean other liability policies.

There is another crucial distinction that contrasts the GEICO "OTHER INSURANCE" clause with those contained in ***Jackson, Zemelman*** and ***Goza***. The last phrase "and the

insurance which applies to the occupied motor vehicle is primary" was virtually ignored in the Court of Appeals opinion in ***Ware v. GEICO General Insurance Company***. This clause reinforces the conclusion that the OTHER INSURANCE Clause refers to the underinsured motorist coverage available on the occupied motor vehicle. Pursuant to the terms of GEICO's underinsured motorist policy, any underlying liability coverage would be exhausted in order for UIM coverage to ever be applicable. Thus the only logical and reasonable construction of this phrase would be that the available UIM coverage on the occupied motor vehicle, if such coverage exists, is primary and GEICO's underinsured motorist coverage is excess to that coverage. The GEICO "OTHER INSURANCE" clause clearly states that such available insurance coverage, i.e. UIM coverage on the occupied vehicle, is primary and the GEICO UIM coverage is excess. That is the only plain and logical meaning of the "OTHER INSURANCE" clause read as a whole. The function of the Court is to interpret and enforce an insurance policy as written, not to rewrite the contract. ***Krombach v. Mayflower Insurance Company Ltd.***, 785 S.W.2d 728, 731 (Mo.App. E.D. 1990). The GEICO policy thus cannot be read "by the average lay person to mean underinsured coverage was excess to amounts recovered from the tortfeasor." ***Goza, supra*** at 375.

This logical and reasonable reading of the policy is consistent with interpretations of similarly worded policies. For instance, in ***Shelter Mutual Insurance Company v. Williams***, 9 S.W.3d 545 (Ark. App. 2000), the Arkansas Court of Appeals held that a UIM policy that provided that it "shall apply only as excess insurance over any other similar insurance available to the insured as primary insurance" was not ambiguous, because "it has only one

reasonable construction - that, in the context of UIM coverage, the "primary" coverage is that provided for the automobile in which the insured was riding." ***Id.*** at 549. The Court went on to state that "as a fundamental principal of insurance law, under a standard automobile policy, primary liability is generally placed on the insurer of the owner of the automobile involved, and the policy providing the non-ownership coverage is secondary." ***Id.*** at 550. Thus a deceased passenger's UIM coverage is excess to the available UIM coverage on the occupied motor vehicle. ***Id.*** at 550.

The word "available" as contrasted with "collectible" clearly has a more narrow meaning in the context of the GEICO OTHER INSURANCE clause. Once the underlying liability coverage is exhausted, the only insurance available on the occupied vehicle (i.e. the vehicle the insured is occupying) which would exist would be any available underinsured motorist coverage. In order to even consider the underinsurance coverage of the GEICO policy, the bodily injury liability coverage must be first exhausted. Thus, the insurance available on the occupied vehicle cannot be liability coverage, so it must be available underinsured motorist coverage, if applicable. Thus, the GEICO policy clearly and unambiguously states that GEICO's UIM coverage is excess to the available coverage on the occupied vehicle, which is primary. The clause does not logically speak of insurance existing which is excess to other vehicles involved in the accident, only the occupied motor vehicle. Otherwise, the policy's clear instruction that the "insurance which applies to the occupied motor vehicle is primary" would become nonsensical.

The GEICO "OTHER INSURANCE" clause is not worded like those in ***Jackson, Zemelman*** and ***Goza*** which the Court of Appeals based the ***Ware v. GEICO General Insurance Company*** decision on.

GEICO's OTHER INSURANCE clause is more similar to the clause found in ***Melton v. Country Mutual Insurance Company***, 75 S.W.3d 321 (Mo.App. E.D. 2002), which followed the Missouri Supreme Court case ***Rodriguez v. General Accident Insurance Company***, 808 S.W.2d 379 (Mo banc 1991). Both of those cases hold that the tortfeasor's vehicle in question did not constitute an underinsured motor vehicle because the sum of all liability policies at the time of the accident were not less than the limit of the underinsured coverage. In ***Melton*** the Court found that the language in the underinsured policy to be similar to the language of the policy in ***Rodriguez*** and found ***Rodriguez*** to be controlling regarding the definition of underinsured motor vehicle. ***Id.*** at 325. The Court further found in ***Melton*** that the Other Insurance Clause was not ambiguous and could not be read to provide coverage over and above the amount the policyholder had already collected from the liability insurance policies. In ***Melton***, as in the instant case and is in ***Ware***, the Plaintiff was a passenger in a non-owned vehicle. Although GEICO's OTHER INSURANCE clause is not identical to the clause contained in the Country Mutual Insurance policy issued to Melton, the reasonable construction of both policies shows that they refer to similar available insurance existing on a non-owned vehicle, which is being occupied, and not liability insurance from the tortfeasor's vehicle.

In ***Melton***, the OTHER INSURANCE clause states: "If there is other applicable uninsured-underinsured motorists insurance that covers a loss, we will pay our proportionate share of that loss . . . In the case of motor vehicles you do not own, this policy will be excess and will apply only in the amount our limit of liability exceeds the sum of the applicable limits of liability of all other applicable insurance. We will pay only after all other applicable limits have been paid." ***Melton*** at 324. (emphasis added.) The Court of Appeals, Eastern District, held that the clause was distinguishable from the clauses found to be ambiguous in ***Goza*** and ***Zemelman*** because it limited payment to situations where the limits of liability of "all other applicable insurance are less then the limits of liability for the UIM coverage issued." ***Id.*** at 324. That is the same situation that existed in ***Ware***, and that exists in the instant case.

In sum, the language of the OTHER INSURANCE clause is not even applicable and should not even be reached in a situation where the policy is not applicable because the definition of underinsured motor vehicle clearly and unambiguously eliminates the possibility that the tortfeasor's vehicle can ever be considered underinsured. That is the situation in this case. There should be no reasonable expectation that UIM applies due to the definition. There is no underinsured motor vehicle present because the Whitmore vehicle had policy limits equal to the underinsured limits in Seeck's policy. By definition, the Whitmore vehicle was not an underinsured motor vehicle. Thus there can be no ambiguity created by the OTHER INSURANCE clause because the Whitmore vehicle is not an underinsured motor vehicle and thus no coverage is afforded to policyholder Seeck.

The language in the OTHER INSURANCE clause is not relevant, but even if this Court finds that it is, the OTHER INSURANCE clause in GEICO's case is not ambiguous because it refers to other available underinsured coverage on the occupied motor vehicle, and not to liability insurance coverage recovered from the tortfeasor. Respondent urges this Court to hold that ***Ware v. GEICO General Insurance Company*** was incorrectly decided and that GEICO's OTHER INSURANCE Clause (a) is not applicable, and (b) is not ambiguous and is distinguishable from the ***Goza, Zemelman*** and ***Jackson*** line of cases.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANT GEICO BECAUSE THE RELEASE OF THE TORTFEASOR WHICH PLAINTIFF EXECUTED WAS CIRCULAR IN THAT IT OBLIGATED PLAINTIFF TO REIMBURSE OR INDEMNIFY THE TORTFEASOR FOR ANY SUMS OWED TO DEFENDANT IN SUBROGATION, THUS MAKING GEICO A THIRD PARTY BENEFICIARY TO THE RELEASE, AND RESULTING IN NO RECOVERY BY PLAINTIFF. MOREOVER, GEICO HAS VALID RIGHTS OF SUBROGATION UNDER ITS POLICY.[1]

A. Plaintiff signed a circular release which results in a net recovery of zero if enforced.

The trial court below properly granted GEICO summary judgment for an additional reason not present in the previous ***Ware*** case. Plaintiff signed a circular release which obligates her to reimburse the tortfeasor and results in a financial wash.

---

[1]Respondent GEICO includes this point due to its inclusion in Appellant's brief on this issue and necessitated by the filing of the *Amicus* brief filed by Missouri Association of Trial Attorneys. Respondent is aware of the Court of Appeals' opinion granting Appellant's original points II and III and understands the transfer of this cause to this Court is due to the general interest and importance of the issues raised primarily in point I of Appellant's original brief.

The release which Plaintiff Seeck signed in exchange for the Farmers policy limit of $50,000.00 provides:

> Further I agree to **reimburse** and **indemnify** all released parties for any amounts which any insurance carriers, government entities, hospitals or other persons or organizations may recover from them in **reimbursement** for amounts paid to me or on my behalf as a result of this accident by way of **contribution**, **subrogation**, **indemnity**, or **otherwise**. See Answer to Request for Admissions No. 2 and Answer to Request for Admissions No. 3, L.F. 089 through 092. See also copy of the Release in Full of All Claims, L.F. 099.

The release clearly requires that if Plaintiff were to be paid money under the GEICO UIM policy, by virtue of GEICO's right of subrogation or reimbursement against tortfeasor Whitmore, GEICO would be entitled to recover the amount paid to Seeck from the tortfeasor. See ***Marshall v. Northern Assurance Co. of America***, 854 S.W.2d 608 (Mo.App. W.D. 1993). The release provides that the Plaintiff would then have to reimburse the tortfeasor for the amounts the tortfeasor was obligated to pay GEICO in subrogation. In essence, this results in a financial wash, making the release circular and thus this litigation meaningless. GEICO does not concede it owes Plaintiff any sums under the UIM policy for the reasons previously stated, but if GEICO was somehow obligated to pay UIM benefits under the policy, it could exercise its right of subrogation and then the Plaintiff would have an obligation to reimburse the tortfeasor for the subrogated payment. The net result is a recovery of zero for the Plaintiff.

Plaintiff created a third party beneficiary contract in signing the release. GEICO is a third party beneficiary to the release with standing to enforce the release against Seeck and plead the release as a defense to Seeck's claim under the UIM policy. See ***Andes v. Albano***, 853 S.W.2d 936, 942 (Mo. banc 1993).

In ***Andes***, the marriage dissolution ended with a settlement agreement which released the parties "from any claims, known or unknown, which involve the other party and/or their respective counsel." ***Id.*** at 941. After the settlement and release was entered, the wife discovered that her former husband's counsel previously participated in a wire-tapping of her home and she filed suit against him and others involved. The court looked at the terms of the release, along with wife's testimony conveying her intention not to pursue claims against attorneys. The Court stated it is not necessary that the parties to the release have as their primary object the goal of benefitting the attorneys, but only that the attorneys were "primary beneficiaries." ***Id.*** at 942. The ***Andes*** court held that the attorneys were third party beneficiaries of the release and had standing to not only enforce the release, but to raise it as a defense to the wife's lawsuit. ***Id.*** at 942. This was true even though the attorneys were not contemplated to be the primary beneficiaries of the release.

Plaintiff's argument is that the release specifically excludes GEICO and thus the circular reimbursement provision should not be enforced. Plaintiff claims that the release clearly and unambiguously states "release excludes Tamara Seeck's own underinsured motorist coverage carrier." (L.F. 099) This is written in handwriting underneath the circular

release provision. Plaintiff argues that that handwritten phrase excludes GEICO from the release and thus from the circular reimbursement provision contained in the release.

The problem with that argument is that while Plaintiff was attempting to preserve her underinsured motorist claim against GEICO by excluding GEICO from the release as a released party, that handwritten phrase does not then exclude GEICO from exercising its right of subrogation which is contained in every GEICO UIM policy. Page 3 of GEICO UIM policy contains the following clause:

> ASSISTANCE AND COOPERATION OF THE INSURED
>
> After we receive notice of claim, we may require the insured to take any action necessary to preserve his recovery rights against any allegedly legally responsible person or organization. We may require the insured to make that person or organization a defendant in any action against us. (L.F. 087)

The UIM policy issued to Seeck also contains the following provision under the section called TRUST AGREEMENT:

> When we make a payment under this coverage:
>
> 1. We will be entitled to repayment of that amount out of any settlement or judgment the insured recovers from any person or organization legally responsible for the bodily injury.
> 2. The insured will hold in trust for our benefit all rights of recovery which he may have against any person or organization responsible for these damages. He will do whatever is necessary

> to secure all rights of recovery. He will do nothing after the loss to prejudice these rights. (L.F. 087)

Thus, while Plaintiff may have intended to preserve any claim for underinsured motorist benefits she has against GEICO and thus specifically excluded GEICO from being released, Plaintiff signed the release which contains the clear provision obligating Plaintiff to reimburse the tortfeasor for any amounts which any insurance carrier may recover from the tortfeasor by way of subrogation. Plaintiff Seeck does not have the power, nor can she violate the terms of the GEICO UIM policy by prejudicing or compromising GEICO's right of subrogation. Thus, GEICO would have a right to recover in subrogation from tortfeasor Kelli Yacyk Whitmore any sums which GEICO may be obligated to pay to Plaintiff Seeck. The clear provisions of the release then obligate Plaintiff to reimburse tortfeasor Whitmore for those sums that Whitmore would have to pay back to GEICO as the legally responsible tortfeasor. Thus, the release clearly is circular and the fact that the UIM claim against GEICO was not released by the Plaintiff has no affect on the validity of the reimbursement obligation contained in the release.

B. GEICO has a clear and valid contractual right of subrogation.

GEICO's right of subrogation, which is clearly stated in the GEICO policy, is also judicially recognized. See ***Marshall v. Northern Insurance Company of America***, 854 S.W.2d 608 (Mo.App. W.D. 1993). In that case the court upheld the insurance company's right of subrogation in a UIM case. The Court in ***Marshall*** stated:

> It would be patently unjust to permit a third party tortfeasor, with knowledge of an insurer's subrogation intent, to settle with the insured for less than the wrongdoer's full liability and become thereby insulated against the insurer's right of action against the tortfeasor. ***Id.*** at 610, quoting ***Dickhans v. Missouri Property Insurance Placement Facility***, 705 S.W.2d 104, 106 (Mo.App. E.D. 1986).

The Court in ***Marshall*** went on to state that the UIM carrier could enforce its right of subrogation:

> If NACA is afforded no right of subrogation, the wrongdoer receives the benefit of the insurance he purchased plus the benefit of that purchased by the injured party. ***Id.*** at 611.

GEICO clearly has a right of subrogation or reimbursement against the tortfeasor, contrary to the argument advanced by MATA in its *amicus* brief.

The author of MATA's *amicus* brief has himself acknowledged a UIM carrier's subrogation right which is derived from the language in the insurance contract.

> The status of the UIM carrier's subrogation right in Missouri is also uncertain, but a recent case suggests the right may be valid. In ***Marshall v. Northern Insurance Company of America***, the Western District of the Missouri Court of Appeals held that a UIM carrier can recover from the underlying tortfeasor monies it has paid the insured. In ***Marshall***, an insured with UIM coverage settled with and released the tortfeasor prior to obtaining

> a judgment, which she then presented to her UIM carrier as a figure for her damages. The Court ruled that because the insured had reduced her claim against the tortfeasor to a judgment, the UIM carrier had a valid subrogation right since a judgment can be assigned in Missouri. The UIM carrier was then permitted to proceed against the tortfeasor for repayment because the tortfeasor had some knowledge of the UIM carrier's subrogation claim. If the tortfeasor had not possessed that knowledge, it appears from the facts that the UIM carrier's subrogation rights would have been prejudiced. 50 J.Mo.B 133, 134 (1994) "Settlement with Tortfeasor in the UIM Situation" by Leland F. Dempsey and Thomas R. Davis.

Contrary to what MATA argues in its *amicus* brief, the subrogation right is not the same as an assignment of a personal injury cause of action. Thus, the argument that subrogation somehow constitutes assignment of a personal injury claim is misplaced. Moreover, MATA's argument that because Missouri has not adopted a statutory annunciation of subrogation right as has been acknowledged for uninsured motorist coverage in Section 379.203 RSMo does not mean that a right of subrogation does not exist from the language in the contract. Underinsured motorist coverage is a matter of contract between the parties and the underinsured motorist policies commonly contain subrogation clauses. Although subrogation originated as a common law equitable doctrine "the right to invoke the doctrine of subrogation may be contractual." ***Anison v. Rice***, 282 S.W.2d 497, 503 (Mo. 1955). Respondent could find no cases which have struck down a right of subrogation or have

refused to enforce a right of subrogation contained in an underinsured motorist policy. Because the parties are free to contract, and because underinsured motorist coverage is not statutorily mandated, there is no case law which Appellant or its *amicus* MATA can point to which negate a right of subrogation in underinsured motorist policies. Moreover, the Missouri Court of Appeals, Eastern District, in the present case in its opinion transferring this case to the Supreme Court expressly acknowledged GEICO's right of subrogation. The Court of Appeals stated, "Further, regarding Seeck's third point, we find nothing in the limited record that demonstrates that GEICO would be denied the opportunity to collect from Whitmore, through subrogation, any benefits GEICO paid to Seeck under the policy." ***Seeck v. GEICO***, No. ED86973, page 7.

That right of subrogation creates the circularity in the release which Plaintiff executed. The fact that GEICO is not a released party so the Plaintiff could preserve her UIM claim has no right or bearing on GEICO's subsequent right of subrogation to collect any amounts paid to Plaintiff from the tortfeasor. And in this situation, because of its status as a third party beneficiary under the release contract, the tortfeasor's obligation to reimburse GEICO then creates Plaintiff's clear obligation to repay those sums back to the released tortfeasor. The release Plaintiff signed creates a financial wash which makes it unnecessary to enforce any UIM claim in this litigation. Any recovery by Plaintiff would end up having to repaid back by the Plaintiff pursuant to the clear provisions of the release. Thus this litigation is unnecessary and the release defeats the UIM claim by its own circularity and because of GEICO's right of subrogation or reimbursement to recover any sums paid to the Plaintiff.

Plaintiff's argument that the parties did not intend to include GEICO because of the added written exclusion language simply misses the point. The Plaintiff cannot compromise GEICO's right of subrogation. Plaintiff even acknowledges this right of subrogation by stating on page 12 of his brief, "GEICO is free to seek recovery from tortfeasor." That is certainly true, and when GEICO does seek that recovery from the tortfeasor, the language of the release Plaintiff signed obligates Plaintiff Seeck to repay any monies that the tortfeasor is obligated to pay GEICO via its subrogation rights. The attempt by *amicus* MATA to argue that there should be no subrogation rights in UIM cases is not supported by applicable case law and is misplaced. Moreover, MATA fails to address the circularity of the contractual obligations of the release.

Plaintiff is obligated to reimburse the tortfeasor for any subrogated amounts, which GEICO is clearly entitled to recover via common law right of subrogation and the unambiguous terms of the GEICO policy issued to Seeck. The release Plaintiff executed is circular and if enforced would result in a net recovery of zero by Plaintiff. GEICO has a valid subrogation right which exists by contract between the parties and by the form of the release itself, and as ***Marshall*** points out, the underinsured motorist carrier has a valid right of subrogation which must be enforced as a matter of law.

CONCLUSION

Under the clear and unambiguous definition of Underinsured Motor Vehicle contained in the policy, the tortfeasor's vehicle was not underinsured and thus Plaintiff has no claim for UIM benefits under the policy. The OTHER INSURANCE clause is not relevant, is not ambiguous and does not provide benefits in excess of the tortfeasor's liability policy which Plaintiff has already collected. Moreover, the circularity of the Release Plaintiff executed results in a financial wash, making any pursuit of benefits under the policy frivolous. Respondent submits this Court must affirm the Trial Court's granting of Defendant's Motion for Summary Judgment and affirm judgment in favor of Defendant.

DANNA MCKITRICK, P.C.

By: _____

Kevin B. Behrndt, #33118
Daniel G. Tobben, #24219
150 N. Meramec, 4th Floor
St. Louis, MO 63105
(314) 726-1000/(314) 725-6592 fax
E-mail: kbehrndt@dmfirm.com
E-mail: dtobben@dmfirm.com
ATTORNEYS FOR GEICO GENERAL INSURANCE COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of October, 2006, two copies of Respondent's Brief were served on Appellant via first-class United States Mail, postage pre-paid, to:

Gary A. Growe
Blumenfeld, Kaplan & Sandweiss, P.C.
168 N. Meramec Ave., Ste. 400
St. Louis, Missouri 63105

and one copy was served on the MATA attorney via first-class United States Mail, postage pre-paid, to:

Leland F. Dempsey
Dempsey & Kingsland, P.C.
1100 Main Street, Suite 1860
Kansas City, Missouri 64105

_____

CERTIFICATE OF COMPLIANCE

By submitting this brief, the undersigned counsel for Respondent hereby certifies the following:

1. This brief conforms with Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) relating to length;
3. The number of words used in this brief is 9,367;
4. The number of lines of proportional type in the brief is 877;
5. The disk conforms with Missouri Rule of Civil Procedure 84.06(a);
6. The disk is double-sided, high density and 1.44 mb, 3½" in size;
7. The disk is labeled with the file name of the WordPerfect 8.0 document;
8. The disk has been scanned for viruses and it is virus free.

_____

5974-83603: GEICO/Seeck, Tamara: SC87995 - Respondent Substitute Brief.wpd