

IN THE MISSOURI SUPREME COURT

SC87995

TAMERA SEECK,

Seek,

vs.

GEICO GENERAL INSURANCE CO.,

Geico.

**ON TRANSFER FROM THE
MISSOURI COURT OF APPEALS EASTERN DISTRICT**

**BRIEF OF MISSOURI ORGANIZATION OF
DEFENSE LAWYERS AS *AMICUS CURIAE*
IN SUPPORT OF GEICO**

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INTEREST OF AMICUS CURIAE

MODL is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and to optimizing the quality of the services that the legal profession renders to society. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MODL supports the position that insurers may provide for a contractual right of subrogation for underinsured motorist benefits. Allowing such a right of subrogation is in accordance with the public policy of encouraging freedom of contract and enforcing the parties' agreement. On behalf of Missouri attorneys who represent and advise individuals and businesses and defend individuals and businesses in tort claims, MODL urges the court to reject Seek's argument that an underinsured motorist carrier cannot have a right of subrogation included in the insurance policy.

CONSENT OF THE PARTIES

Amicus Curiae Missouri Organization of Defense Lawyers (“MODL”) files its Brief pursuant Rule 84.05(f)(2) as MODL has received written consent of all parties.

STATEMENT OF FACTS

For purposes of its Brief, *Amicus Curiae* MODL adopts and incorporates Geico’s Statement of Facts.

INTRODUCTION

The Missouri Court of Appeals for the Eastern District transferred this case pursuant to Rule 83.02 which states “[t]ransfer may be ordered because of the general interest or importance of a question involved in the case or for the purpose of reexamining existing law.” In its opinion, the Eastern District found that the term “excess” in the “Other Insurance” provision of the Underinsured Motorist section of Geico’s policy created an ambiguity. However, because other cases appeared to be in conflict or did not consistently address the “Other Insurance” issue, the Eastern District transferred the case to this Court. The Missouri Association of Trial Attorneys filed an *amicus curiae* brief on a different issue—whether insurers may provide for a contractual right of subrogation for underinsured motorist benefits. MODL presents to this court its *amicus curiae* brief on the issue addressed by MATA and MODL incorporates the “Other Insurance” issue as adequately briefed by Geico.

ARGUMENT

Subrogation of underinsured motorist benefits does not constitute an assignment of a personal injury claim and a statutory grant of a subrogation right is not required in light of the parties' contractual agreement (addressing Point IV of the brief of *Amicus Curiae* Missouri Association of Trial Attorneys).

In Missouri, underinsured motorist coverage is optional and is not required by law or by any public policy. Jackson v. SafeCo Insurance Co., 949 S.W.2d 130, 133 (Mo.App. S.D. 1997). Thus, the analysis of whether an insurer has a subrogation right for underinsured motorist benefits centers on the language of the insurance policy. The policy issued to Seek contains a provision that requires Seek to obtain prior consent of Geico before settling an underinsured motorist claim. The policy also contains a provision that entitles Geico to be reimbursed for payments made under the policy from the proceeds of any settlement or judgment. (L.F. 087). In pertinent part, the Trust Agreement contained in the Geico policy states that Geico is “entitled to repayment of [the amount of underinsured benefits] out of any settlement or judgment the insured recovers from any person or organization legally responsible for the bodily injury.” (L.F. 087)

Amicus curiae for Seek argues that the Trust Agreement provision gives Geico a right of subrogation which constitutes an invalid assignment of a personal injury claim under Missouri law and public policy. This argument fails because the Trust Agreement does not transfer Seek's entire cause of action to Geico. This court has previously

distinguished between a right of subrogation versus an assignment of a claim. Keisker v. Farmer, 90 S.W.3d 71, 74-75 (Mo. banc 2002). See Kroeker v. State Farm Mutual Automobile Ins. Co., 466 S.W.2d 105, 109 (Mo.App. W.D. 1971). This court has correctly recognized that in an assignment, the assignor gives all rights to the assignee and by an assignment; the insurer receives legal title to the claim and the exclusive right to pursue the tortfeasor. 90 S.W.3d at 74. In subrogation, the insured retains legal title to the claim. 90 S.W.3d at 74. By paying the insured, the insurer has a right to subrogation but the exclusive right to pursue the tortfeasor remains with the insured. 90 S.W.3d at 74. With an assignment, the claim continues to be in existence and the assignment “vests legal title in the assignee, together with the right to maintain an action in his own name as the real party in interest.” Kroeker, 466 S.W.2d at 110. The Trust Agreement does not purport to give Geico a right to the insured’s entire cause of action nor does it vest legal title in Geico, which would allow Geico to sue the tortfeasor in its own name. Instead, the agreement only gives Geico the right to be reimbursed from the proceeds of any settlement or judgment that the insured obtains from the tortfeasor. This is the extent of Geico’s right and, therefore, does not fall within the classification of an assignment of a personal injury cause of action.

There is a distinction between an assignment of a personal injury cause of action and a contractual entitlement to payment from the proceeds of a settlement of a personal injury cause of action. For example, in Ford Motor Credit Co. v. Allstate Insurance Co., 2 S.W.3d 810, 811 (Mo.App. W.D. 1999), the injured party entered into a Lien Agreement and Assignment granting Ford Motor Credit a lien on any proceeds from an

expected personal injury settlement in order to pay off the unpaid balance of an auto loan. The court of appeals rejected the argument that this agreement amounted to an unenforceable assignment of a claim for personal injuries. *Id.* at 812. Instead, the appellate court found that the agreement was a lien on the claim and not an assignment of a claim and was, therefore, enforceable. *Id.* (emphasis in original). The court found that the lien did not violate public policy. *Id.* at 813. Specifically, the court found that the case did “not involve a barter or trade by Ford Motor Credit for Clerkley’s (the injured party) claim. There was no indication Ford Motor Credit had the power to do anything further or to pursue Clerkley’s claim. If Clerkley had chosen to abandon his claim, Ford Motor Credit would have been powerless to stop him.” *Id.* The court concluded that what the injured party had granted was a lien on proceeds not an assignment of the property itself. *Id.* The same analysis applies to Geico’s right to repayment from the proceeds of Seek’s settlement with the underinsured tortfeasor.

In addition, Geico’s right to be reimbursed to the extent of its payment under the policy from the proceeds paid by the tortfeasor does not raise the public policy concerns that serve as the basis for Missouri’s ban on assignments of personal injury causes of action. The reason for Missouri’s prohibition on the assignment of personal injury causes of action is the concern that “unscrupulous people would purchase causes of action and thereby traffic in lawsuits for pain and suffering.” Marshall v. Northern Assurance Co., 854 S.W.2d 608, 610 (Mo.App. W.D. 1993). In Marshall, the court of appeals held that this rationale does not apply where a cause of action is reduced to a judgment. *Id.* Where the action is reduced to a judgment there is not attempt to “traffic” in pain and suffering

but “rather for the insurer to be reimbursed by the wrongdoer who caused the pain and anguish.” Id. The Marshall court noted that if the insurance company paid the underinsured benefits, then the insured “would have been made whole and would also have been relieved of any collection efforts against the tortfeasor. Under those circumstances, the court held that the insurer should have a right to recover what it can from the wrongdoer and the wrongdoer should not benefit from his victim’s foresight.” Id. The same rationale applies to the situation in this case where the parties’ contract contains a consent to settle clause and indicates that the insurer has a subrogation right with regard to underinsured motorist benefits. The fact that this case involves a settlement as opposed to a judgment should not be dispositive given that the policy reason behind barring assignment of a personal injury action does not apply as in either instance the insurer is not “trafficking” in the insured’s lawsuit.

Seek’s *Amicus* contends that Missouri courts have consistently struck down subrogation clauses, citing Travelers Indemnity Co. v. Chumbley, 394 S.W.2d 418 (Mo.App. S.D. 1965); Reese v. Preferred Risk Mutual Ins. Co., 457 S.W.2d 205 (Mo.App. E.D. 1970) and Jones v. Aetna Casualty & Surety Co., 497 S.W.2d 809 (Mo.App. W.D. 1973). In those cases, however, the contract provisions are distinguishable and the public policy concerns enunciated by the courts are not present in the case at bar. Thus, they should not be considered persuasive authority on the issue of whether an insurance company may have subrogation rights in the underinsured motorist scenario.

Travelers Indemnity Co. v. Chumbley is distinguishable based on the contract provision at issue, the type of benefits paid, and the policy concerns raised by the court. In Travelers, the insurance company, in a direct action against the tortfeasor, sought to recover the amount paid to the insured under medical payments coverage. 394 S.W.2d at 420. The insurance company relied on a provision in its policy designated “Subrogation.” Id. at 420. The provision stated that “in the event of any payment under the policy, the company shall be subrogated to *all* the insured’s rights of recovery therefore against any person or organization” Id. (emphasis added). The court of appeals noted that the insured’s medical expenses were “special damages which flowed from and were an integral element of a personal tort” and his cause of action “embraced and included” the right to recover medical expenses. Id. at 422-423. The court concluded that the effect of the subrogation clause was to make the insurance company an assignee of a portion of the insured’s cause of action for personal injury, which was not permissible under Missouri law. Id. at 423. The court stated that to allow such an assignment would lead to a splitting of the cause of action by severing the claim for medical expenses. Id. at 423-424. In addition, the court expressed its concern that the “nurturing of subrogation as to medical payments” would give rise to multiple subrogation claims given that “many, if not most, of those who carry automobile medical payments coverage also have coverage of some other character . . . to provide funds for payment of all or some of the expenses payable under automobile medical payments coverage.” Id. at 424.

In comparison, the provision in Geico's policy does not purport to give Geico subrogation to *all* the insured's rights of recovery. The underinsured benefits at issue are different from medical payments coverage. The underinsured benefits are not an element of damages of a cause of action for personal injury. To the contrary, the underinsured benefits provide a "total amount of protection" to be paid if the tortfeasor has lesser liability limits than those provided by the underinsured motorist coverage. See Rodriguez v. General Accident Ins. Co., 808 S.W.2d 379, 382 (Mo. banc 1991). Thus, there is no concern over splitting a cause of action. Furthermore, the concern over multiple subrogation claims is not present as it was in the Travelers case where the court listed multiple examples of other sources of medical payments coverage including hospital and medical service plans, accident or hospitalization insurance, burial policies and double indemnity benefits under life insurance policies. 394 S.W.2d at 424. See also Jones v. Aetna Casualty & Surety Co., 497 S.W.2d 809, 812 (Mo.App. W.D. 1973) (relying on Travelers for the proposition that an insurer may not acquire part of the insured's rights against a tortfeasor by reason of payment of medical expense.)

Reese v. Preferred Risk Mutual Ins. Co. is a suit addressing subrogation in the context of uninsured motorist coverage. 457 S.W.2d at 206. The injured party did not obtain a settlement or judgment from the tortfeasor. Instead, after learning that the tortfeasor was uninsured, the injured party dismissed the tortfeasor with prejudice and proceeded against the insurance company based on the uninsured motorist clause of the policy. Id. The trial court granted a directed verdict in favor of the insurance company finding, inter alia, that the insured breached the Trust Agreement of the policy by

dismissing the tortfeasor with prejudice thereby preventing the insurance company from pursuing any rights of subrogation against the tortfeasor. Id. at 207.

The Trust Agreement at issue in Reece stated that the company was “entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made.” Id. at 209-210. The appellate court found it clear that the agreement only gave the insurer “the right to be reimbursed from the proceeds of any settlement or judgment which the insured obtained from the uninsured motorist.” Id. at 210.

The legislature had enacted the Uninsured Motorist Statute, §379.203, RSMo, after the date of the policy at issue in Reece; however, the court discussed the statute in comparison with the policy provision. Id. at 209 n.2. The court noted that neither the Uninsured Motorist Statute nor the agreement used the word subrogation. Id. The court then stated “[n]or could the insurer have proceeded against the uninsured motorist on the basis of an assignment or on the basis of subrogation” because an action for personal injury or wrongful death is not assignable. Id. The court held that the dismissal of the tortfeasor did not prejudice the insurer’s right of subrogation for the reason that the insurer “had no right of subrogation and any attempt to provide for an assignment or subrogation in favor of the [insurer] in the Trust Agreement would be invalid.” Id.

The Reece court did not declare the insurer had no rights pursuant to the Trust Agreement. The Trust Agreement specifically granted the insurer rights to “the proceeds of any settlement or judgment” to the extent of any payment by the insurer under the

policy. What the court decided was that the insurer did not have a right of subrogation against the tortfeasor for plaintiff's claim because in a situation where the insured had dismissed the claim against the tortfeasor, the right of subrogation would amount to an assignment of the claim. See Kroeker v. State Farm Mutual Automobile Ins. Co., 466 S.W.2d 105, 109 (Mo.App. W.D. 1971) (discussing Reece). The critical fact is that the insured did not enter into a settlement with or obtain a judgment against the tortfeasor. In contrast, where the insured has reached a settlement or has a judgment against the tortfeasor, the policy considerations preventing the assignment of personal injury claims are not applicable, as discussed above.

Moreover, a statutory grant of a subrogation right for underinsured motorist benefits is not required when a subrogation provision is contained in the parties' insurance contract. Seek's Amicus argues that uninsured motorist carriers have not specifically been granted subrogation rights by Missouri statute as compared to uninsured motorist carriers who have been granted such rights by statute. However, in Reece, which was decided before the Uninsured Motorist Statute was effective, the court held that an uninsured carrier had a right to reimbursement of uninsured benefits pursuant to a Trust Agreement with very similar language to the Trust Agreement contained in Geico's policy.¹ 457 S.W.2d at 210. Thus, the contractual right of an uninsured motorist carrier

¹ The Trust Agreement in Reece stated: "the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization

to a right of reimbursement was recognized without reliance on the Uninsured Motorist Statute. The fact that a statutory right of subrogation now exists for uninsured motorist carriers should not operate as a bar to contractual subrogation for underinsured motorist carriers. Given that underinsurance is optional, there is no reason that the parties' contract should not be upheld. See Geneser v. State Farm Mutual Automobile Ins. Co., 787 S.W.2d 288, 291 (Mo.App. W.D. 1989).

The Trust Agreement included in Geico's policy is supported by the fundamental proposition that it is unjust to allow a tortfeasor to enter into a settlement to limit his own liability and allow him to receive "the benefit of the insurance he purchased plus the benefit of that purchased by the injured party." Marshall, 854 S.W.2d at 611. Instead of constituting an attempt to barter or trade an injured party's cause of action, the Trust Agreement intends to prevent a tortfeasor from "benefiting from his victim's foresight" in procuring underinsured motorist coverage. Id. at 610. A Trust Agreement like the one set forth above permits an insurance company to pursue a subrogation claim against the tortfeasor with recovery limited, however, to the amount paid in underinsured motorist benefits. This Court should uphold the parties' agreement and affirm the judgment of the trial court.

legally responsible for the bodily injury because of which such payment is made; . . ."

457 S.W.2d at 209-210.

CONCLUSION

Based on the foregoing, *Amicus Curiae* Missouri Organization of Defense Lawyers respectfully suggests that this Court affirm judgment in favor of Geico.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(C) AND (G)

Susan Ford Robertson, the undersigned attorney of record for *Amicus Curiae* Missouri Organization of Defense Lawyers in the above-referenced appeal, certifies pursuant to Rules 84.06(c) and (g) of the Missouri Supreme Court that:

1. The Brief complies with the limitations contained in Rule 84.06(c);
2. The Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 3, 150 words, as determined by the word count tool contained in Microsoft Word software with which this Brief was prepared; and
3. The diskette accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 20th day of October, 2006, to: Mr. Kevin B. Behrnt, Dana McKitrick, P.C., Attorneys for Geico General Insurance Company, 150 N. Meramec, 4th Floor, St. Louis, Missouri 63105; Mr. Gary A. Growe, Blumenfeld, Kaplan & Sandweiss, P.C., Attorneys for Seek, 168 N. Meramec Ave., Ste 400, St. Louis, Missouri 63105; and Mr. Leland F. Dempsey, Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys, Dempsey & Kingsland, P.C., 1100 Main Street, Suite 1860, Kansas City, Missouri 64105.

APPENDIX

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