

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DWIGHT MILLER

v.

HO KUN YUN A/K/A KUN Y HO, ET AL.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY

RESPONDENT,

DEFENDANT,

APPELLANT.

**DOCKET NUMBER WD74890
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: February 5, 2013

Appeal From:

Jackson County Circuit Court
The Honorable Charles Emmert Atwell, Judge

Appellate Judges:

Division One: James M. Smart, Jr., P.J., Lisa White Hardwick and Gary D. Witt, JJ.

Attorneys:

Joseph A. Cambiano, Kansas City, MO, for **respondent**.

David Ryan Frye, Overland Park, KS, for **appellant**.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD74890

Jackson County

Before Division One: James M. Smart, Jr., P.J., Lisa White Hardwick and Gary D. Witt, JJ.

Plaintiff was injured as a result of the recklessness of a driver whose liability was insured by Geico up to \$100,000 per person. Plaintiff's bodily injury damages exceeded \$200,000. The American Family ("AmFam") policy providing coverage to plaintiff had an Underinsured Motorist ("UIM") endorsement, and the declaration sheet specified that the "coverage" was \$100,000 per person. Plaintiff received the \$100,000 due from Geico. Plaintiff then demanded \$100,000 from AmFam. AmFam contended no payment was due in that the tortfeasor was not driving an "underinsured motor vehicle." Also, American Family contended that its limit of UIM liability was reduced to zero when plaintiff received the \$100,000 payment from Geico. Plaintiff brought an action as to the \$100,000 coverage purportedly provided by the AmFam policy. The trial court, upon consideration of stipulated facts and review of the policy, granted summary judgment for plaintiff. AmFam appeals.

AFFIRMED.

Division One holds:

1. The definition of "underinsured motor vehicle" is not ambiguous, but that fact is not the end of the inquiry as to whether the policy is ambiguous.
2. Because of contradictory language in the endorsement, and due to the lack of clarification in the declaration sheet, the policy as a whole is ambiguous in that it is not clear whether the set-off for previous payments is to be applied to the purported coverage limit of \$100,000, or to the total uncompensated bodily injury damages.
3. Accordingly, the trial court did not err in finding an ambiguity that must be resolved in favor of the insured. Judgment affirmed.

Opinion by James M. Smart, Jr., Judge

February 5, 2013

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