IN THE SUPREME COURT OF MISSOURI

SC 87995

TAMARA SEECK,

Appellant,

vs.

GEICO INSURANCE,

Respondent.

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DIVISION ONE

THE HONORABLE MARY K. HOFF, JUDGE

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANT

LELAND F. DEMPSEY MO #30756
DEMPSEY & KINGSLAND, P.C.
1100 Main Street, Suite 1860
Kansas City, Missouri 64105
Telephone (816) 421-6868
Fax (816) 421-2610

Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases:

Statutory Authority:

INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens. Whether an underinsured motorist insurer has a right of subrogation under Missouri law and public policy is an important issue in many personal injury cases. Accordingly, this issue is of considerable interest to MATA and its members.

As discussed herein, MATA supports plaintiff/appellant Tamara Seeck's position that the subrogation right of uninsured motorist carriers does not extend to underinsured motorist carriers. Underinsured Motorist carriers, such as Geico should be required to pay the policy benefits to insured for any coverage over and above that available from the tortfeasor for his or her personal injury. Allowing underinsured motorist carriers, such as Geico to deny any coverage and effectively subrogate Plaintiff's personal injury claims is against the longstanding Missouri law and public policy. On behalf of the citizens of the State of Missouri, MATA urges this court to reverse the trial court's decision—that is to allow coverage under Tamara Seeck's Geico underinsured motorist policy, and reject Defendant's claim of its' right of subrogation under the underinsured motorist policy, which is non-existent under Missouri law.

CONSENT OF THE PARTIES

MATA has received written consent from all parties to file this brief. Therefore, MATA is filing this brief pursuant to Rule 84.05(f)(2).

STATEMENT OF FACTS

MATA hereby adopts the statement of facts set forth in Appellant's Brief.

ARGUMENT

I-III. MATA believes that Plaintiff has well briefed points I-III in the appellant brief of Tamara Seeck and hereby incorporates Plaintiff's argument on points I-III accordingly.

IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF IS ENTITLED TO HER UNDERINSURED MOTORIST BENEFITS IN THAT DEFENDANT'S CLAIM OF PREJUDICE FOR PLAINTIFF'S FAILURE TO OBTAIN PRIOR WRITTEN CONSENT RESTS ON A NON-EXISTENT SUBROGATION RIGHT.

Plaintiff Tamara Seeck has filed summary judgment against Defendant Geico for her $50,000.00 in underinsured motorist benefits under the terms of her insurance policy with Defendant Geico.

Geico argues that Plaintiff breached her underinsured motorist policy by failing to obtain prior consent and thereby prejudicing Geico's "subrogation"

rights. Defendant's claim of prejudice rests on a non-existent right of subrogation and is insufficient to deny Plaintiff her long-overdue insurance benefits. Subrogation rights pursuant to underinsured motorist coverage constitute an assignment of a personal injury claim, and therefore any such subrogation rights are invalid under the law and public policy of Missouri.

A. MISSOURI COURTS HAVE CONSISTENTLY HELD THAT AN ASSIGNMENT OF A CAUSE OF ACTION FOR PERSONAL INJURY IS INVALID IN MISSOURI.

Missouri public policy prohibits the assignment of a personal injury claim in whole or in part. Hays v. Mo. Highways & Transp. Comm'n, 62 S.W.3d 538, 540 (Mo. App. W.D. 2001). "For example, an attempt by an insurer providing medical pay coverage in an automobile insurance policy to obtain a subrogation interest in the insured's personal injury claim against a third party tortfeasor was held void as against public policy." *Id.* "Further, this court has held that an insurer cannot require an insured to sign an agreement under which the insured agrees to reimburse the insurer if the insured obtains a settlement or judgment against the third party tortfeasor. *Id.* These aforementioned holdings are "premised on the longstanding policy prohibiting the assignment, forced or otherwise, of a personal injury claim," whether named in the policy as a right to assignment, subrogation, or simply an agreement to reimburse. *Id.*

B. UNLIKE UNINSURED MOTORIST CARRIERS, WHO HAVE BEEN SPECIFICALLY GRANTED SUBROGATION RIGHTS BY MISSOURI STATUTE AS

AN EXCEPTION TO THE COMMON LAW RULE AGAINST THE ASSIGNMENT OF PERSONAL INJURY CLAIMS, UNDERINSURED MOTORIST CARRIERS HAVE BEEN GRANTED NO SUCH RIGHT AND THUS, ANY "CONSENT" REQUIREMENT IN SUPPORT OF SUCH RIGHTS ARE INVALID

Uninsured motorist claims of subrogation are highly distinguishable from an underinsured motorist carrier's claim of subrogation. Unlike uninsured motorist carriers, who have been specifically granted subrogation rights by Missouri statute as an exception to the common law rule against the assignment of personal injury claims, underinsured motorist carriers have been granted no such right and thus, any "consent" requirement in support of such rights are invalid. As illustrated in the Missouri Revised Statutes, uninsured motorist claims of subrogation are highly distinguishable from an underinsured motorist carrier's claim of subrogation. Uninsured motorist coverage is a created by statute, while underinsured motorist coverage is a creature of contract. Mo. Rev. Stat. § 379.203 was enacted and carved out a specific statutory exception to the above-mentioned common law rule against the subrogation of personal injury claims. Mo. Rev. Stat. § 379.203 is titled "Automobile liability policy, required provisions--**uninsured motorist coverage required**--recovery against tortfeasor, how limited," and this statute is clearly restricted the right of subrogation to "uninsured" motorist carriers and does not mention the possibility of any subrogation rights for "underinsured"

motorist coverage. *See* Kroeker v. State Farm Mutual Automobile Insurance Co., 466 S.W. 2d 105, 111 (Mo. Ct. App. 1971) ("Section 379.203(4) amounts to a clear legislative declaration that the uninsured motorist carrier's right of subrogation arises in favor of the insurer under the conditions therein prescribed.").

It should be noted that, before Mo. Rev. Stat. § 379.203 was enforced, the Missouri courts routinely denied uninsured motorist carriers claims of any subrogation right against the uninsured motorist even though the insured had dismissed the claim with prejudice. Reese v. Preferred Risk Mutual Insurance Co., 457 S.W.2d 205 (Mo. Ct. App. 1970). It was only after Mo. Rev. Stat. § 379.203 was enacted in 1986 that an uninsured motorist carrier could claim any right of subrogation.

Neither Section 379.203 nor Kroeker disturbed the intact Missouri common law rule prohibiting subrogation or assignment of a part of an insured's rights against a tortfeasor; they simply established a **single exception** for cases involving an *uninsured* motorist. See Jones v. Aetna Casualty & Surety Co., 497 S.W.2d 809, 812 (Mo. Ct. App. 1973) ("[Kroeker] in no way disturbed the established Missouri rule that an insurer may not acquire part of the insured's rights against a tortfeasor [other than an uninsured motorist] by reason of payment of medical expense, either by assignment or by subrogation.") In short, notwithstanding the explicit recognition of subrogation rights for uninsured motorist carriers under Mo. Rev. Stat. § 379.203, such rights would be invalid under Missouri common law. Therefore, any other type of subrogation right involving the splitting of a personal injury claim, including the underinsured motorist carrier in the case at bar, is invalid under Missouri without a statutory exception to the common law rule and public policy of Missouri.

C. MISSOURI HAS NOT ADOPTED A STATUTORY EXCEPTION TO THE COMMON LAW RULE AGAINST THE ASSIGNMENT OR SUBROGATION OF A PLAINTIFF'S PERSONAL INJURY CLAIMS FOR UNDERINSURED MOTORIST CARRIERS, AND THEREFORE DEFENDANT'S SUCH AS GEICO HAVE NO RIGHT OF SUBROGATION UNDER MISSOURI LAW

Geico claims it was prejudiced of its subrogation rights when Tamara Seeck did not obtain the consent of Geico before accepting the settlement from Farmers Insurance. Geico's claim of prejudice is based on a right of subrogation which would only arise out of the underinsured motorist policy with the plaintiffs. However, **under Missouri law Geico has no right of subrogation which could be prejudiced by Tamara Seeck's failure to sign a subrogation clause**. There is simply no statutory exception to the Missouri prohibition against assigning causes of action involving underinsured motorist coverage.

Missouri courts have expressly ruled that underinsured motorist coverage does not fall within the scope of Section 379.203. In Krombach v. Mayflower Insurance Co., 785 S.W.2d 728, 732 (Mo. Ct. App. 1990), the court held that a driver who neither lacked nor possessed insurance in an amount less than the statutory minimum was not an uninsured driver under Section 379.203. Even if an insurance policy defines "uninsured motorist" in such a way that an underinsured motorist meets the definition, the underinsured motorist still does not meet the terms of Section 379.203.

Underinsured motorist coverage is distinct from uninsured motorist coverage, thus excluding underinsurance from the scope of Section 379.203's exception to Missouri's prohibition against subrogation of personal injury claims. Thus,

defendant has no valid claim of prejudice.

The public policies supporting uninsured motorist coverage and underinsured motorist coverage are distinct. Geneser v. State Farm Mutual Automobile Insurance Co., 787 S.W.2d 288, 29091 (Mo. Ct. App. 1989). Underinsurance coverage is optional for motorists while uninsurance coverage remains mandatory. Tegtmeyer v. Snellen, 791 S.W.2d 737, 740 (Mo. Ct. App. 1990). Thus, absent an insurance policy having a definition of an uninsured motorist that encompasses underinsured motorists, neither the subrogation rights nor the compulsory uninsurance coverage requirements of Section 379.203 have any applicability to a case involving underinsured coverage. Bergtholdt v. Farmers Insurance Co., 691 S.W.2d 357, 359 (Mo. Ct. App. 1985).

The case at bar involves only issues of underinsurance coverage and not uninsurance coverage. The aforementioned insurance policy contains separate definitions of uninsurance coverage and underinsurance coverage, of which the tortfeasor in this case only meets the definition of an underinsured motorist. Consequently, since Bergtholdt suggests that Section 379.203 has no bearing in a case such as this one, Geico cannot assert any rights stemming from the statute.

Absent a statutory exception for underinsured motorist coverage, no subrogation rights exist for Geico and, as such, no prejudice of those subrogation rights can exist. Because prejudice is the basis of Geico's refusal to pay Plaintiff's claims, the Court should reverse the trial court's grant of Defendant's Motion for Summary Judgment and enter summary judgment in favor of Plaintiff Tamara Seeck.

V. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE ANY

SUBROGATION CLAUSE PURPORTING TO GIVE DEFENDANT A SUBROGATION RIGHT IS INVALID.

The interpretation of insurance policy clauses and contracts mandates that any ambiguity must be construed in favor of the insured. Thus, Plaintiff's interpretation of Geico's policy should be given great weight.

Missouri courts have consistently struck down subrogation clauses. In Jones, 497 S.w.2d at 809, the court ruled that a subrogation clause entitling the insurance company "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" was in violation of public policy. In Reese, 457 S.W.2d at 209, the court ruled void a subrogation clause stating that "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." In Travelers, 394 S.W.2d at 420, the court held invalid a subrogation clause providing "in the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery."

The subrogation clause in this case states in part:[i]f

> we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.

(Stip. Ex., p. 9).

Clearly, the language in this policy clause purports to assign a cause of action and should be considered void by this Court consistent with Jones, Reese, and

Travelers.

Geico has no right of subrogation for two reasons, first, (as discussed above) the clause purporting to provide Geico with its subrogation right is invalid under Missouri law, and second, Missouri's prohibition against assigning causes of action also eliminates any subrogation right claimed by Geico. Consequently, Geico's claim that its right to seek repayment of Plaintiff Tamara Seeck's benefits through subrogation has no merit.

Any insurance policy purporting to assign subrogation rights, in a personal injury context, is disapproved by Missouri courts. Wave v. Bankers Multiple Line Ins. Co., 796 S.W.2d 660 (Mo. Ct. App. 1990). A judicial authorization by this Court of the assignment of such rights would lead to all insurers insisting upon subrogation, leading to serious public policy violations:

> [m]ultiple subrogation claims inevitably would lead to conflicts and disputes between subrogation claimants, would complicate and make more difficult the negotiation of voluntary settlements with third-party tortfeasors, and would encourage and promote suits and interpleaders, all running counter to the policy of the law.

Travelers, 394 S.W.2d at 425.

Geico is asking this Court to violate numerous precedent and rule against the accepted public policy of this state; this Court should refuse to do so.

CONCLUSION

For the above reasons, Plaintiff-Appellant's request that this Court reverse the decision of the trial court in granting Defendant's Motion for Summary Judgment and grant Plaintiff-Appellant's Motion for Summary Judgment.

Respectfully submitted,

By: _____
Leland Dempsey Mo #30756
Dempsey & Kingsland, P.C.
1100 Main Street
City Center Sq. 1860
Kansas City, MO 64105-2112
Telephone: (816) 421-6868
Fax: (816) 421-2610
Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 3,024 words, as calculated by the Microsoft Word software used to prepare this brief.

_____

Leland F. Dempsey #30756

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via First Class Mail, on this 28th day of September, 2006, to:

Kevin B. Behrndt
Attorney for Respondent
Danna McKitrick, P.C.
150 N. Meramec Ave., 4th Floor
St. Louis, MO 63105-3907
Counsel For Respondent

Gary A. Growe
168 N. Meramec Ave., Ste. 400
St. Louis, MO 63105
Counsel for Appellant

_____

Leland Dempsey #30756
ATTORNEY FOR *AMICUS CURIAE*
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS