

IN THE SUPREME COURT OF MISSOURI

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

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

**SUBSTITUTE REPLY BRIEF OF APPELLANT
TAMARA SEECK**

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TABLE OF CONTENTS

Table of Contents..... 1

Table of Authorities..... 2

Introduction 4

Argument..... 7

Conclusion..... 25

Certificate of Service and Compliance..... 27

TABLE OF AUTHORITIES

American Family Mutual Insurance Co., v. Ragsdale, 2006 WL 1888698 (Mo.App.W.D. 2006).....4, 9-10, 14

American Family Mutual Insurance Company v. Turner, 824 S.W.2d 19 (Mo.App. 1992)..... 6

American Standard Ins. Co. v. May, 972 S.W. 2d 595 (Mo.App.W.D. 1998) 5, 8

Andes v. Albano, 853 S.W.2d 936 (Mo. 1993)..... 24

Farm Bureau Town & Country Ins. Co. of Missouri v. Baker, 150 S.W.3d 103 (Mo.App. W.D. 2004) 13

Goza v. Hartford Underwriters Ins. Co., 972 S.W. 2d 371 (Mo.App.E.D. 1998)..... 5,10

Harris v. Shelter Mutual Insurance Company, 141 S.W.3d 56 (Mo.App. W.D. 2004)..... 11, 19

Haulers Ins. Co. v. Wyatt, 172 S.W.3d 880 (Mo.App.S.D. 2005) 5, 8

Hinshaw v. Farmers and Merchants Insurance Company, 912 S.W.2d 70 (Mo.App. E.D. 1995)..... 11

Melton v. Country Mutual Insurance Company, 75 S.W.3d 121 (Mo.App. E.D. 2002)..... 11, 15, 16

Niswonger v. Farm Bureau Town and Country, 992 S.W.2d 308 (Mo.App. E.D. 1999)..... 5

Nixon v. Life Investors Insurance Co., 675 S.W.2d 676 (Mo.App. W.D. 1984) 5

<i>Rodriguez v. General Accident Insurance Company</i> , 808 S.W.2d 379 (Mo. Banc 1991)	
.....	11-14, 19
<i>Sanders v. Wallace</i> , 884 S.W.2d 300 (Mo.App. E.D).....	8
<i>Shahan v. State Farm Mutual Automobile Insurance Company</i> , 141 F.3d 819 (8 th Cir. 1998)	20
<i>Tapley v. Shelter Ins. Co.</i> , 91 S.W.3d 755 (Mo.App.S.D. 2002)	5, 11, 19
<i>Trapf v. Commercial Union Insurance Company</i> , 886 S.W.2d 144 (Mo.App. E.D. 1994)	
.....	11, 19
<i>Traveler's Indemnity Co. v. Chumbley</i> , 394 S.W.2d 418 (Mo.App.1965).....	22, 23
<i>Ware v. Geico General Insurance Company</i> , 84 S.W.3d 99 (Mo.App. 2002)	4, 5, 7, 8, 11-14, 15, 19
Widiss, <i>Uninsured and Underinsured Motorist Insurance</i> , 3d Ed. § 13.2	18

INTRODUCTION

The primary issue before the Court is whether the decisions of the Missouri Court of Appeals, Eastern Division, in *Ware v. Geico General Insurance Company*, 84 S.W.3d 99 (Mo.App. 2002) and in the opinion issued in this case, as well as the decision of the Missouri Court of Appeals, Western Division, in *American Family Mutual Insurance Co., v. Ragsdale*, 2006 WL 1888698 (Mo.App.W.D. 2006) represent sound legal precedent and declared law in holding that an ambiguity and inconsistency exists in both the Geico insurance policy at issue in this case, and the American Family policy with the same policy language at issue in *Ragsdale*. On the one hand, Geico defines an underinsured vehicle as one where the limits for bodily injury liability are less than the limits for underinsured coverage. On the other hand, Geico's "Other Insurance" clause in the policy explicitly states that when the insured is an occupant of a non-owned vehicle, the underinsured coverage purchased is excess. In this case, there is no escaping this simple fact. Five appellate judges in Missouri have found the language of this Geico policy ambiguous.¹

¹ The opinion in *Ware* and the opinion below in this case were both unanimous. Judge Sheri Sullivan, Missouri Court of Appeals, Eastern District sat on the panels for both *Ware* and this case. Thus, five judges rather than six. The *Ragsdale* decision out of the Western District was also unanimous. Thus, eight judges have found an ambiguity in policies involving claims of underinsured benefits by occupants of non-owned vehicles when challenged by the definition of an underinsured vehicle.

The general principles governing the resolution of this case are well known, but bear repeating. First, there are no statutory requirements in Missouri for underinsured motorist coverage. Therefore, the existence of underinsured motorist coverage is determined by the contract entered into between the parties. *Niswonger v. Farm Bureau Town and Country*, 992 S.W.2d 308, 313 (Mo.App. E.D. 1999). Second, an ambiguity arises in an insurance policy when there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract. *Nixon v. Life Investors Insurance Co.*, 675 S.W.2d 676, 679 (Mo.App. W.D. 1984). Third, the language (and resolution of any issue regarding ambiguity) is not to be measured from the standpoint of one who has expertise in the special terminologies and intricacies of insurance law. Rather, the language is to be viewed in the light that would ordinarily be understood by the layman who bought and paid for the policy. *Haulers Ins. Co. v. Wyatt*, 172 S.W.3d 880, 884 (Mo.App.S.D. 2005), quoting *Tapley v. Shelter Ins. Co.*, 91 S.W.3d 755, 757 (Mo.App.S.D. 2002). Language in an insurance policy must be given its plain meaning – the meaning that would ordinarily be understood by the layperson who bought and paid for the policy. *Goza v. Hartford Underwriters Ins. Co.*, 972 S.W. 2d 371, 374 (Mo.App.E.D. 1998). Fourth, if the policy language is ambiguous, then Missouri courts construe the policy in favor of the insured. *American Standard Ins. Co. v. May*, 972 S.W. 2d 595, 601 (Mo.App.W.D. 1998); *Ware v. Geico General Insurance Company*, 84 S.W. 3d 99, 102 (Mo.App.E.D. 2002). Fifth, whether a clause or clauses in an insurance policy is ambiguous is not considered in isolation, but rather in the context of the entire policy. *Haulers Ins.*, 172 S.W.3d at 884. Finally, and as a corollary, because an insurance

contract is designed to furnish protection, it will be interpreted by the courts to grant coverage, rather than to defeat it. *American Family Mutual Insurance Company v. Turner*, 824 S.W.2d 19, 21 (Mo.App. 1992). Thus, the issue for the Court is whether the Geico policy, read as a whole, created an ambiguity in defining how underinsured coverage would be available for an insured, occupying a non-owned vehicle at the time of injury. The precise factual setting of this case is as follows:

1. Geico's insured – Plaintiff Tamara Seeck – was a passenger in a vehicle driven and owned by Kelli Whitmore at the time of injury.
2. Whitmore – Plaintiff's host driver – was the tortfeasor. Her insurance company, Farmers, paid policy limits on the liability portion of the policy, which was \$50,000.00.
3. Geico sold Plaintiff a policy of automobile insurance with \$50,000.00 of underinsured motorist coverage.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE GEICO POLICY HAS AN INTERNAL CONFLICT (AND THUS AMBIGUITY) BETWEEN COVERAGE AFFORDED TO AN INSURED WHO IS AN OCCUPANT OF A NON-OWNED VEHICLE AND THE DEFINITION OF AN UNDERINSURED VEHICLE.

In the Geico policy, an underinsured motor vehicle was defined as a vehicle whose limit for bodily injury liability was less than the limit of liability for UIM coverage (L.F. 085). The “Other Insurance” clause in the same Geico policy provided that if the insured was occupying a non-owned vehicle, the UIM coverage was excess over any other insurance. Specifically, the Other Insurance clause provided:

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. 086).

The inherent conflict is obvious. As the Court in *Ware, supra*, instructed:
. . . A reasonable layperson in the position of Appellants may have understood the “Other Insurance” provision to provide coverage over and

above that furnished by the tortfeasor's insurance under the circumstances laid out in the provision. Further, reading the "Other Insurance" provision in conjunction with the "Limit of Liability" provisions creates an ambiguity. The method for calculating Geico's limit of liability is in conflict with the "Other Insurance" provision because it is uncertain how the term "excess" in the provision applies to the calculation of coverage. *Ware*, 84 S.W.3d at 102, 103.

Geico now raises three separate, but intertwined arguments in favor of overruling *Ware* and denying Plaintiff her underinsured motorist coverage. First, Geico posits that this Court should ignore the direct conflict within its policy and focus only on the definition of an underinsured motor vehicle. (Res. Sub. Br. p. 12-18). Such a position is untenable and violates the fundamental principle that in judging the clarity and conciseness of a policy, the Court must look to the entire policy. Reference to simply one clause or one phrase is disallowed. *Haulers Ins.*, 172 S.W. 3d at 884 ("An ambiguous phrase is not considered in isolation, but rather in the context of the entire policy"); *American Standard Ins. Co.*, 972 S.W. 2d at 602 ("However, an ambiguous phrase is not considered in isolation, but by reading the policy as a whole with reference to the associated words"); *Sanders v. Wallace*, 884 S.W.2d 300, 303 (Mo.App. E.D. 1994) ("In construing an insurance policy, the words must be given their plain meaning, consistent with the reasonable expectations, objectives and intent of the parties . . . one must also look at the contract as a whole").

Geico would certainly like for this Court to declare that based solely on its definition of an underinsured vehicle, the policy's sins of ambiguity are forgiven (Res. Sub. Br. p. 18). However, Geico's hope in this regard is without support in any case precedent. Defendant fails to cite one case in support of such a position and indeed, there is no support for such a hypothesis. To adopt Geico's position in this regard would not only violate longstanding and accepted principles, but would grant to insurance companies a carte blanche to include inconsistent, confusing and ambiguous clauses with impunity as long as there was one clause or definition that supported its policy interpretation. There is simply no valid reason – in policy or precedent – for the highest Court in Missouri to adopt such a position.

In fact, a competitor of Geico, American Family, presented the same argument in the recent case of *American Family Mutual Insurance Co. v. Ragsdale, supra*. In that case, the Plaintiff was driving his employer's vehicle and was injured as a result of the negligence of another driver. 2006 WL 1888698. The tortfeasor had \$100,000.00 of liability coverage. Plaintiff had underinsured motorist coverage with American Family of \$100,000.00 on each of two vehicles. *Id.* American Family refused to pay the claim. Its first contention (mirroring that of GEICO here), was that the first job of the Court was to decide whether the tortfeasor's vehicle was underinsured, since the limits of liability coverage equaled the limits of UIM coverage. American Family argued that the Court need not even review other policy language, such as the "other insurance" clause. The Court of Appeals, in a well reasoned analysis, rejected that contention, stating:

. . . By doing so, this Court would be reviewing the policy’s definition of underinsured motor vehicle in a vacuum. (citing *Goza v. Hartford Underwriters Ins. Co.*, 972 S.W.2d 371, 373 (Mo.App. 1998). Determining whether the definition of an underinsured motor vehicle is met is not a threshold issue to determine whether the insured is entitled to underinsured coverage. *Id.* at 375. “Where the definition of underinsured was identical to the one in the insurer’s policy and was found to be unambiguous . . . the insured can still be entitled to underinsured motor vehicle benefits even though that definition is not met if the policy’s underinsured motor vehicle provisions, when read together, give rise to such an ambiguity. *Id.* Therefore this Court declines to perform an isolated examination of the definition of underinsured motor vehicle, and instead views all relevant provisions of the underinsured motorist endorsement to determine whether the Trial Court correctly concluded that the Ragsdales were entitled to coverage . . . *Id.* The Court held that the “other insurance” clause of the policy was ambiguous and allowed stacking of the two policies.² *Id.*

²The ambiguity in the *Ragsdale* “other insurance” clause is essentially the same as Geico’s. It provided that UIM for an insured occupying a non-owned vehicle was excess over any other similar insurance. As discussed here, the Geico policy at issue did not contain the word “similar”. It defined coverage for a passenger in a non-owned vehicle as excess over “any” insurance.

Moreover, defendant relies on several cases in this portion of its brief, namely, *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), *Tapley v. Shelter Mutual Insurance Company*, 91 S.W.3d 755 (Mo.App. S.D. 2002), *Trapf v. Commercial Union Insurance Company*, 886 S.W.2d 144 (Mo.App. E.D. 1994), *Harris v. Shelter Mutual Insurance Company*, 141 S.W.3d 56 (Mo.App. W.D. 2004) and *Hinshaw v. Farmers and Merchants Insurance Company*, 912 S.W.2d 70 (Mo.App. E.D. 1995). Each of these cases is clearly distinguishable. None of the cases relied on by Geico presented a conflict between a definition of underinsured vehicle and the provisions of the other insurance clause, which provides UIM benefits as excess when occupying a non-owned vehicle. Defendant has failed to cite one case which conflicts with *Ware, supra*, which is, as noted throughout the materials in the case, directly controlling. Reliance on *Rodriguez* does not equate with overturning *Ware*. The cases present different factual scenarios and, therefore, mandate different outcomes.

In *Rodriguez*, the Plaintiff brought suit seeking to recover underinsured motorist benefits. The issue in *Rodriguez* was whether the tortfeasor's vehicle qualified as an underinsured vehicle under the terms of the General Accident policy, which defined an underinsured vehicle as a vehicle whose limits for bodily injury liability are less than the limit of liability for this coverage. 808 S.W.2d at 382. The Plaintiff in *Rodriguez* argued that the term "underinsured motorist" was inherently ambiguous and therefore meaningless. The Court held that the policy definition of underinsured motorist was clear

and enforced the definition so as to exclude the tortfeasor's vehicle as an underinsured vehicle and, therefore, denied coverage. *Id.* at 383-384.

The case at bar (and *Ware v. Geico*) are totally different cases, not controlled by *Rodriguez*. First, the Plaintiff here was a passenger in a non-owned vehicle whereas the Plaintiff in *Rodriguez* was the driver of an owned vehicle, specifically covered by the policy. As a result, the provisions of the "Other Insurance" clause in the Geico policy come into play. As the Court succinctly pointed out in *Ware* and in the opinion below, the Geico policy here is ambiguous because of the duplicity, indistinctness and ambiguity between the definition of underinsured vehicle and the provisions of the "Other Insurance" clause. Because *Rodriguez* involved an owned (and scheduled) vehicle, the "Other Insurance" clause was not applicable. Quite simply, it is the conflict between Geico's definition of underinsured vehicle and how the policy treats UIM coverage when a non-owned vehicle is involved that creates the ambiguity.³

Geico's reliance on *Rodriguez* is misplaced, because it focuses solely on the definition of "underinsured motor vehicle" contained in the policy at issue. In Geico's brief, the analysis stops here. Relying on *Rodriguez*, Geico argues that there is no valid

³ Geico could have cured or addressed this ambiguity after *Ware*, but chose not to. The policy sold to Plaintiff Seeck still contained a 1993 version of UIM coverage (L.F. 085). The "Other Insurance" clause could not be clearer. When an insured (here, Plaintiff Seeck) occupies a non-owned vehicle, underinsured coverage is excess over any other insurance available to the insured. The facts here are directly on point with *Ware*.

underinsured motorist claim because the sums paid by the underlying tortfeasor exceed or are at least equal to the underinsured motorist policy limits of the policy at issue. As discussed above, by making this argument, Geico ignores one of the most fundamental principles of insurance law, by viewing this definition in an isolated vacuum and failing to evaluate the policy as a whole. See *Farm Bureau Town & Country Ins. Co. of Missouri v. Baker*, 150 S.W.3d 103, 105 (Mo.App. W.D. 2004) (the plain meaning of the words and phrases used in an insurance policy is not determined in isolation, but with reference to the policy as a whole).

Unlike *Rodriguez*, the *Ware* court examined an identical factual situation and identical policy language, and found that the “Other Insurance” provision of the Geico policy, when compared to the UIM provision, resulted in the policy being ambiguous! 84 S.W.3d at 102, 103. Specifically, the Court found that the method for calculating Geico’s limit of liability was in conflict with the “Other Insurance” provision, because it was uncertain how the term “excess” in the provision applies to the calculation of coverage. *Id.* at 102, 103. Simply stated, the facts of this case fall squarely within the “Other Insurance” clause of the policy. In *Ware*, Plaintiff was an occupant of a vehicle that was not owned by her or a relative. As a result, the policy was excess. According to the Court, this created an ambiguity. Since the policy was ambiguous it was interpreted against Geico and the Court ordered payment of the underinsured coverage up to the policy limits of \$100,000.00. *Id.* The exact same issue is before the Court, featuring analogous facts and identical policy language.

The Western District, in *Ragsdale*, *supra*, also addressed this exact issue, and its analysis completely supports Plaintiff:

. . . In support of its position that the Davis vehicle does not meet the definition of an underinsured motor vehicle, American Family primarily relies on *Rodriguez v. General Accident Insurance Co. of America*, which held that the tortfeasor's vehicle insured for \$50,000.00 was not an underinsured motor vehicle within the meaning of the policy, when the Rodriguez's policy provided underinsured coverage for the equal amount of \$50,000.00. (citation omitted). In reaching that decision, the Court in *Rodriguez* found the Underinsured Motor Vehicle definition and the Limit of Liability, both similar to those respective clauses in this case, to be unambiguous . . . Significantly, however, *Rodriguez* did not involve an other insurance clause, as this case does, and, therefore, the portion of *Rodriguez* that enforced the policy against the insured without considering an other insurance clause is distinguished. 2006 WL 1888698.

The *Ragsdale* court's analysis is directly on point with the issue here. *Rodriguez* does not control this case. In this case, it is clear that all of the applicable provisions must be construed together, and when read in conjunction with the UIM provision and "Limits of Liability" provision, the policy's "Other Insurance" clause results in the policy being ambiguous. *Ware* supports this result. *Ragsdale* supports this result. The Western District, in *Ragsdale*, got it right and Plaintiff urges this Court to adopt this rationale (as well as the rationale of *Ware* and the opinion of the Court below in this case) as the declared and settled law in Missouri.

In further support of its position, Geico relies on the case of *Melton v. Country Mutual Insurance Company*, 75 S.W.3d 121 (Mo.App. E.D.2002). Unlike *Rodriguez*, the *Melton* case involved a Plaintiff who was a passenger in a non-owned vehicle. Like *Ware* and the case at bar, these facts trigger the application of the “Other Insurance” clause, which is to be read in conjunction with the other provisions of the policy, including the policy’s UIM provisions. Once this analysis is performed, the *Melton* case is clearly distinguishable.

In *Melton*, the “Other Insurance” clause provided as follows:

Other Insurance. If there is other applicable uninsured-underinsured motorists insurance that covers a loss, we will pay our proportionate share of that loss. Our share is the proportion our limits of liability bear to the total of all applicable limits. However, 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 after all other applicable limits have been paid. 75 S.W.3d at 324.

Unlike the provisions in *Ware* and the case at bar, this carefully-drafted clause speaks directly to other UM or UIM insurance that covers a loss. Such language is notably absent from both *Ware* and Plaintiff’s policies, and according to the *Melton* Court, this additional language prevented the *Melton* policy from being ruled ambiguous. *Id.*, at 326. In fact, the *Melton* Court stated that this additional language contained in the “Other Insurance” clause, by itself, and when read in conjunction with the entire policy is

unambiguous because it limits excess payment to the situation where the limits of liability of all other applicable insurance (which is either UM or UIM) are less than the limits of liability for the UIM coverage issued to Appellant. *Id.*

In its brief, Geico states that *Melton* is “clearly on point.” (Res. Sub. Br. p. 16). But how could *Melton* be “clearly on point”? Not only does the policy construed in *Melton* contain different language than the policy at issue on appeal – this particular language is exactly what the *Melton* court cited in ruling that the policy was unambiguous. *Melton* does not support Geico’s argument – in fact, it provides a shining example of how an “Other Insurance” provision could or should be drafted in order to avoid an ambiguity. If Geico had drafted its policy in similar fashion, then *Melton* would control and Geico would prevail in this case. Any reader would know that the excess referred to is excess over other underinsured coverage and only in the amount that the UIM coverage exceeds the other UIM coverage on the car. However, Geico did not draft such a policy. In addition, *Melton* illustrates that when the Plaintiff is a passenger in a non-owned vehicle, the Court should analyze the UIM provisions of a policy in conjunction with any applicable “Other Insurance” clause. Ironically, Geico cites *Melton* while at the same time arguing that the “Other Insurance” clause should not be construed by this Court.

The irony (and indeed fallacy) in Geico’s position is that Geico created its own problem here. Geico had the opportunity to craft an “Other Insurance” clause with respect to non-owned vehicles which would be clear, concise and unambiguous. One example of unambiguous drafting is of course cited in *Melton*. Ironically, another

example can be found in the actual Geico policy at issue here. Geico has a separate “Other Insurance” clause for its uninsured and underinsured coverage. They are quite different. In the uninsured motorist provision of the policy, Geico drafted this clause:

OTHER INSURANCE

When an insured occupies an auto not described in this policy, this insurance is excess over any other similar insurance available to the insured and the insurance which applies to the occupied auto is primary. . . .
(emphasis supplied) (L.F. 080).

In the context of uninsured motorist coverage, Geico explicitly provided that if the insured was occupying a non-owned vehicle, the uninsured motorist benefit was excess to any other similar insurance, namely uninsured coverage. When Geico drafted its underinsured motorist coverage provision, it used entirely different language. Geico omitted a critical word – similar. The “Other Insurance” clause of the underinsured motor coverage is as follows:

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 and the insurance which applies to the occupied motor vehicle is primary. (L.F. 086).

Plaintiff urges the Court to examine this difference. In the context of uninsured benefits, if occupying a non-owned vehicle, the Geico coverage is excess over other uninsured benefits which may exist on the occupied car. That is what the word “similar” would refer to – similar uninsured coverage. Although the meaning of similar is not

defined, it is uniformly understood to mean other uninsured motorist insurance and in this context, it does not include any other type of insurance that may indemnify an injured person. Widiss, *Uninsured and Underinsured Motorist Insurance*, 3d Ed. § 13.2. In stark contrast, in the context of underinsurance coverage, Geico deleted the word “similar” and inserted the word “any.” In the context of occupying a non-owned vehicle, UIM is excess over any insurance, which obviously would include liability insurance. The word “similar” does not appear, as it does in the uninsured coverage section.

Geico argues that the intent of the “Other Insurance” clause is to proscribe payments when there is other underinsured coverage on the vehicle. (Res. Sub. Br. p. 24). The problem with that position is that the policy did not say that. The policy stated that the underinsured coverage is excess over any other insurance. If Geico intended this clause to apply only to other underinsured coverage, it should have so stated. It is not the policyholder’s job to read the mind of the policy drafter and insert words where none exist. In fact, Geico misstates the underlying facts of the case. It states that 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. (Res. Sub. Br. p. 24). Therefore, Geico argues, the “Other Insurance” clause is not relevant to the inquiry. (Res. Sub. Br. p. 24).

This is a complete distortion of the facts. Plaintiff was a passenger in the Whitmore vehicle. The occupied vehicle was in fact a non-owned vehicle. Therefore, the “Other Insurance” clause was very much at play in this case. As a result, it clearly governs the analysis of whether Plaintiff is entitled to UIM benefits.

Geico has cited a few other authorities in support of its position. Like *Rodriguez* and *Melton*, these cases are all clearly distinguishable. *Tapley v. Shelter Mutual Insurance Company*, for instance, is a case like *Rodriguez*, where the Plaintiff insured was a driver in a vehicle she owned. 91 S.W.3d 755, 756 (Mo.App. S.D. 2002). As a result, construction of UIM provisions in conjunction with any applicable “Other Insurance” clause was not at issue. The same can be said for *Trapf v. Commercial Union Insurance Company*, 886 S.W.2d 144 (Mo.App. E.D. 1994), and *Harris v. Shelter Mutual Insurance Company*, 141 S.W.3d 56 (Mo.App. W.D. 2004). All of these cases cite *Rodriguez*, and they focus primarily on the definition of “underinsured motor vehicle” contained in each policy at issue in these cases. The facts of these cases do not trigger the applicability of an “Other Insurance” provision, to be read in conjunction with a policy’s UIM provisions. As a result, these cases are distinguishable, and they fail to support Geico’s claim that Plaintiff is not entitled to underinsured motorist coverage in this case. In contrast, the *Ware* case dealt with similar facts and the exact policy language at issue. On these facts, the *Ware* Court analyzed the policy as a whole, construing the UIM provisions in conjunction with the “Limit of Liability” and “Other Insurance” provisions. Based on the language of the “Other Insurance” clause, the *Ware* Court ruled that the policy was ambiguous. The Eastern District followed suit below. This Court should do the same.

In Point III of its Substitute Brief, Geico devotes considerable time in a strained argument that the “Other Insurance” clause should be interpreted as applying only to other underinsured motorist coverage on the occupied vehicle and, therefore, has no role

in this case. As Plaintiff has already pointed out, it is not the job of the plaintiff or this Court to re-write the policy. Use of the word “similar” or even “underinsured” in the clause would have resulted in a policy that supports Geico’s argument. Moreover, there could be no UIM on the Whitmore vehicle. Whitmore was the tortfeasor! Although the record does not contain the Whitmore Farmers policy, it is highly unlikely that the Farmers’ policy would sanction liability payments and UIM benefits based on the same negligent driving.⁴ Defendant also mixes apples and oranges when attempting to distinguish between the words “available” and “collected.” (Res. Sub. Br. p. 32). Geico simply used the word any to describe the insurance to which its UIM coverage would be excess. Plaintiff cannot think of a word with broader, more encompassing meaning than the word “any.”

⁴ For example, see *Shahan v. State Farm Mutual Automobile Insurance Company*, 141 F.3d 819 (8th Cir. 1998), which disallowed a UIM claim against UIM coverage on an occupied vehicle when the driver of that non-owned, occupied car was the tortfeasor.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT, BECAUSE THE SETTLEMENT AND RELEASE WHICH WAS EXECUTED BY PLAINTIFF UPON SETTLEMENT WITH THE TORTFEASOR DID NOT DEFEAT COVERAGE.

In its substitute brief, Geico again addresses the point that the Release of the primary tortfeasor caused her UIM benefits to be extinguished.⁵ Geico argues that the Release which Plaintiff signed with Farmers Insurance Group somehow prejudices Geico’s rights of subrogation or reimbursement against the tortfeasor Kelli Whitmore. Geico cites the challenged Release language, which reads as follows:

I hereby 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. (L.F. 099).

Geico has argued that under the clear terms of this Release, Plaintiff would have to reimburse the tortfeasor for the amount the tortfeasor was obligated to pay Geico in

⁵ Geico chose not to address the issue of the consent to settle clause. Therefore, Plaintiff considers this point abandoned and will not discuss it further.

subrogation. According to Geico, this would result in a “financial wash,” making this litigation meaningless.

This argument is without merit, however, because the Release specifically excludes Geico. The Release clearly and unambiguously states, “Release excludes Tamara Seeck’s own underinsured motorist carrier.” That carrier is Geico. Pursuant to the unambiguous terms of the document, Geico was not released from liability for paying underinsured motorist benefits under the contracted-for policy with Seeck.

Although Geico claims that this language prevents it from exercising its rights of subrogation, this is not the case. Geico’s rights have not been effected, and Geico is free to pursue any subrogation claims it deems necessary after this appeal is decided. This is supported by Missouri case law – in *Traveler’s Indemnity Co. v. Chumbley*, the Court addressed this exact situation, stating that:

If a third-party tortfeasor, with knowledge of an insurer’s right of action as subrogee, and without the consent of the insurer, settles with the insured, the insurer’s right to proceed against such tortfeasor is not effected. In such a case, the primary, wrongdoer, and not the insured, should repay the insurer. Whatever rights the insurer had against the tortfeasor prior to the settlement, the insurer still has. 394 S.W.2d 418, 420 (Mo.App.1965).

This language is directly on point. Under the law in Missouri, Geico’s right to proceed against the tortfeasor after a settlement is reached between the tortfeasor and the insured is not effected. Whatever rights Geico had against Whitmore prior to the settlement, Geico still has.

Even if Geico's ability to proceed against the tortfeasor has somehow been indirectly effected by the Release, that is an issue for another day, in another court. Geico is putting the proverbial cart before the proverbial horse by envisioning future actions and arguing that its right of subrogation or reimbursement against the tortfeasor creates a "financial wash" or "circularity." Geico's rights have not been effected, and Geico is free to seek recovery from the tortfeasor in another action commenced when this appeal is decided. The issue of how the tortfeasor, Geico, or anyone will proceed in this hypothetical action is not ripe for this particular Court to predict or analyze. Once Geico pays its coverage limits here, it can try to proceed against the tortfeasor. If in turn, the tortfeasor chooses to seek indemnity from Plaintiff here, another Court will have to decide the intent of this challenged language. It certainly does not void Geico's policy obligations.

Geico is free to seek recovery from the tortfeasor and this was contemplated by Farmers when the Release was executed. The fact that Plaintiff had a UIM claim to present to Geico was fully disclosed before the signing of the release. Under the rule of law as set forth in *Traveler's*, Geico's rights were not effected by Plaintiff entering into this Release 394 S.W.2d at 420. The parties intended the Release to protect the released parties in the event there were hospital liens, Medicare liens, Medicaid liens, and the like. The parties did not intend to include Geico, and this is made explicitly clear by the language "Release excludes Tamara Seeck's own underinsured motorist carrier." Geico was unambiguously excluded from the Release, Geico is free to proceed against the tortfeasor, and the Release does not defeat coverage in this case.

In addition, Geico argues that by signing the Release, Plaintiff created a third-party beneficiary contract making Geico a third-party beneficiary with standing to enforce the Release against Plaintiff as a defense to Plaintiff's claim under the UIM policy. In support of this proposition, Geico cites *Andes v. Albano*, 853 S.W.2d 936 (Mo. 1993), a case that has nothing to do with liability for UIM benefits. With respect to third-party beneficiary status, the law in Missouri is clear - only those third-parties for whose primary benefit the parties contract may maintain an action. *Andes*, at 941. In the case at bar, Geico was not the primary beneficiary of the Release at issue. In fact, the exact opposite is true – Geico was excluded entirely from the Release, which was intended to benefit the released parties, not a third party. It is somewhat disingenuous to argue that Geico was a third-party beneficiary of the Release when Geico did not benefit at all from the execution of the Release. The parties expressly carved out an exception to the Release reserving the right to pursue the underinsured motorist claim against Geico. Therefore, it is impossible for Geico to be a third-party beneficiary in this situation.

MATA has filed an amicus brief asserting that under this point this Court should deny Geico's position based on the fact that insurance companies have no right to subrogation in the underinsured motorist setting. Plaintiff concurs with that analysis and, therefore, will not repeat those arguments at this time. Plaintiff does want to emphasize, however, that she does not believe this case need be decided on whether UIM carriers have rights of subrogation. The Release in question did not, as a matter of law, defeat coverage or destroy any right of Geico to pursue subrogation. Should Geico choose to sue Ms. Whitmore for subrogation after paying Plaintiff her UIM benefits, Ms. Whitmore

could certainly challenge the claim on the basis that there is no right to subrogation. Alternatively, if Ms. Whitmore ever chooses to try and collect against Plaintiff (all speculative, hypothetical scenarios) then it would be incumbent upon Plaintiff to raise the defense of no subrogation rights at that time, or defend on the language of the Release. Therefore, even if the Court disagrees with Plaintiff and MATA regarding the insurance company's general right to subrogation in this context, Plaintiff is still entitled to coverage and Geico's ability to proceed against the tortfeasor has not been effected in this particular case.

To summarize, the Release executed by Plaintiff with the tortfeasor expressly excludes Geico. The Release has not effected Geico's rights of subrogation or reimbursement, and Geico is not a third-party beneficiary to this release. For these reasons, the arguments presented in point three of Geico's brief fail to defeat coverage in this case, and the Trial Court's order granting summary judgment should be overturned.

CONCLUSION

For the foregoing reasons, the Trial Court erred in granting Defendant's Motion for Summary Judgment and granting judgment in favor of Defendant, and the Trial Court's Order granting Summary Judgment should be reversed, and pursuant to the stipulation of the parties, this cause should be remanded with direction that judgment be entered in favor of the Plaintiff in the sum of \$50,000.00, plus costs of this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

By submitting this brief, the undersigned counsel for Appellant 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 5,421.
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By submitting this disk, the undersigned counsel for Appellant hereby certifies the following:

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