IN THE SUPREME COURT OF MISSOURI

SC 90085

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

STEVE RITCHIE AND ANITA RITCHIE,

Respondents.

APPEAL FROM THE
CIRCUIT COURT OF JASPER COUNTY, MISSOURI
HONORABLE DAVID B. MOUTON, JUDGE

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

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INTEREST OF AMICUS CURIAE

The issues presented by this case are of importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent the citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members will be directly affected by the Court's decision in this case.

As a result of its substantial collective experience litigating cases against large corporate defendants, MATA supports Plaintiff-Respondent's position that injured plaintiffs should be able to collect their purchased underinsured coverage when injured by an underinsured driver. Whether an insurance agency can reduce or preclude purchased underinsured motorist coverage by amounts paid by or on behalf of the underinsured driver is an issue of considerable interest to MATA and its members.

On behalf of the citizens of the State of Missouri, MATA urges this court to affirm the ruling of the trial court – that is to find the exclusionary language in Allied's policy illusory, against the reasonable expectations of the insured, and thus, contrary to public policy in Missouri.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Respondents, Steve and Anita Ritchie, to file this brief. MATA sent a request for consent for the filing of this brief to counsel for the Appellant, Allied Property and Casualty Insurance Company, on June 23, 2009; however, counsel for the Appellant has not consented to the filing of this brief. Therefore, MATA is seeking an order from this Court pursuant to Rule 84.05(f)(3) granting leave to file this *Amicus Curiae* brief. (*See* Motion of Missouri Association of Trial Attorneys for Leave to File Brief as Amicus Curiae in Support of Respondent).

STATEMENT OF FACTS

MATA hereby adopts the Statement of Facts of Respondent.

ARGUMENT AND AUTHORITY

I. Denying an Insured the Full Amount of Purchased Underinsured Motorist Coverage Violates the Public Policy of Missouri in that it Defeats the Reasonable Expectations of the Insured by Providing Only Illusory Coverage.

Public policy in Missouri requires that every insured receives the full amount of coverage purchased through an underinsured motorist policy. Insurance policies which purport to provide coverage but also contain clauses which ultimately result in a substantial deprivation of the purchased coverage are contrary to the reasonable expectations of the insured, illusory in nature, and should be against public policy.

Unlike statutorily mandated uninsured motorist coverage, Missouri law does not require drivers to procure UIM coverage by statute; it is purely optional coverage available for purchase by Missouri consumers. *Hempen v. State Farm Mutual Automobile Ins. Co.*, 687 S.W.2d 894, 894-95 (Mo. banc 1985). The purpose of "underinsured motorist coverage" (UIM) is to compensate the victim of an underinsured motorist's negligence where the third party's liability limits are not adequate to fully compensate the victim for her injuries. Missouri insureds purchase UIM to protect themselves from those drivers who fail to adequately insure against accidents. *Marshall v. Northern Assurance Co. of Am.*, 854 S.W.2d 608, 611 (Mo. Ct. App. 1993)); I Mo. Insurance Practice § 6.26 (MoBar 4th ed. 1995).

The ordinary expectations of a consumer who contracts for UIM coverage is that he is purchasing excess insurance to cover that margin between his total damages and the underinsured driver's liability limits, and he pays premiums for this additional coverage

with the expectation that this insurance will be available in the event of an accident. The normal purchaser of insurance would understand the term "underinsured coverage" to mean that he would be compensated, up to the limit of coverage, if injured by a driver carrying liability insurance insufficient to meet his or her losses. *Krombach v. Mayflower Ins. Co. Ltd.*, 785 S.W.2d 728, 733 (Mo. Ct. App.1990). This expectation is perfectly reasonable; to think otherwise contradicts the common sense of consumers. The *Krombach* Court concluded that to construe the policy in any other way would result in rendering the language meaningless and providing illusory coverage. "The principle of reasonable expectations insures that '[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'" *Tegtmeyer v. Snellen,* 791 S.W.2d 737, 740 (Mo. Ct. App. 1990) (quoting R. Keeton, Basic Text on Insurance Law § 6.3(a), at 351 (1971)).

Missouri courts have long recognized that "although customers typically adhere to standardized agreements … they are not bound to unknown terms which are beyond the range of reasonable expectation." *Estrin Construction Co., Inc. v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413, fn. 3 (Mo. Ct. App. 1982). Even though insurance companies argue that questions concerning the enforceability of underinsured motorist policies are determined solely on contractual construction or ambiguity due to the fact that the underinsured coverage is not statutorily mandated, the Court's decision making authority is not limited to the contractual interpretation of these policies. The Court may also consider whether the insurance policy in question defeats the reasonable

expectations of Missouri's insured. Moreover, considerations of public policy are not dependant on the presence of some ambiguity. Public policy concerns can result in even clear and unambiguous policy provisions being declared void and unenforceable. "'[C]ases should not and will not turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be.'" *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 545 (Mo. 1976) (quoting *Great Central Ins. Co. v. Edge*, 298 So. 2d 607 (Ala. 1974)). "It is useless and meaningless and uneconomic to pay for additional bodily injury insurance and simultaneously have this coverage cancelled by an insurer's exclusion." *Cameron Mut. Ins. Co.*, 533 S.W.2d at 543.

The Court's inquiry into the reasonable expectations of the insured requires the Court to view the policy through the eyes of a reasonable lay person, and based upon that perspective, to determine what coverage the reasonable insured believes and expects the policy to provide. *See Niswonger v. Farm Bureau Town & County Ins. Co.*, 992 S.W.2d 308, 320 (Mo. Ct. App. 1999). The Allied Insurance policy fails to adequately inform a reasonable insured that UIM liability will be reduced, or even precluded, by the amounts paid by or on behalf of the underinsured driver. In the present case, the Court should look beyond the language in Allied's exclusions to determine whether the insurance policy as a whole was illusory, contrary to the reasonable expectations of insureds in Missouri, and hence, contrary to public policy.

Allied's UIM policy creates an unfair illusion of coverage that cannot be ignored. The Ritchies paid for their daughter to be covered by three UIM policies in the event she was damaged by an underinsured tortfeasor, and they paid consideration to Allied for each policy with that simple expectation in mind. When tragedy struck, and their deceased daughter's damages were assessed at over one million dollars, Allied subtracted the $60,000 paid by the underinsured tortfeasor's liability from one of the $100,000 policies and erroneously deemed that payment sufficient. The purpose of UIM coverage is to compensate the victim of an underinsured motorist's negligence where the third party's liability limits are not adequate to fully compensate the victim for her injuries. The reasonable expectation of the Ritchies when they contracted for UIM coverage was that they were purchasing excess insurance to cover that margin between total damages and the underinsured driver's liability limits. Contrary to Allied's actions, the Ritchies reasonably expected to recover damages up to the limit of all three policies under which their daughter was an insured and for which separate premiums had been paid.

Ultimately, we believe the Missouri Supreme Court would not tolerate policy provisions that would, in any situation, allow UIM coverage to be precluded because of a partial recovery received from the negligent underinsured. Allowing exclusionary policies such as this opens the door for insurance companies to exclude away purchased coverage and creates an injustice the citizens of Missouri cannot afford. Missouri citizens should have a reasonable expectation that when they purchase separate policies for underinsured motorist coverage, they will receive adequate compensation for losses

caused by an underinsured motorist, up to the aggregate limits of the policies they have purchased.

Allied would have this Court hold that the reasonable insured expects to have her purchased UIM coverage reduced, or even precluded, by the amounts paid by or on behalf of the underinsured driver. Would it ever be reasonable for an insured to expect to pay a premium for insurance benefits that could never be collected? Obviously not, for if that were the case, the conscientious insured that expects excess coverage would simply be paying something for nothing. Thus, enforcing Allied's exclusionary provisions renders the insured's expected coverage **meaningless and extraneous** and would completely eliminate any insured's incentive to protect themselves and their loved ones by purchasing excess coverage. The result advocated by Allied is inconsistent with laypeople's understanding of the nature and purposes of UIM coverage. Allied offers UIM coverage knowing its insureds believe it provides something it does not. Allied's policy language violates the purpose of UIM coverage and operates as a hidden reducing clause by decreasing the coverage below that specified in the language of the provision, and thus, it should be held invalid as a matter of public policy. For Allied to represent $100,000 of UIM coverage when, in fact, that figure is not attainable and will likely be reduced, is inequitable and contrary to the reasonable expectations of Missouri insureds.

CONCLUSION

For the reasons stated above, the Court should affirm the opinion of the trial court.

Respectfully submitted,

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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 1,866 words, as calculated by the Microsoft Word software used to prepare this brief.

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed on this 23rd day of July, 2009, to:

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