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**SUPREME COURT No. 84638**

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**IN THE MISSOURI SUPREME COURT**

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**JENNIFER DIMMITT,**

**Appellant,**

**v.**

**PROGRESSIVE CASUALTY INSURANCE COMPANY,**

**Respondent.**

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**Appeal from the Circuit Court of Morgan County, Missouri  
Associate Judge Division, The Honorable Peggy Richardson**

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**SUBSTITUTE REPLY BRIEF OF APPELLANT JENNIFER DIMMITT**

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**H. RALPH GAW #20910  
GAW & TEEPLE  
Attorneys at Law**

**P.O. Box 240  
Tipton, MO 65081  
(660) 433-5566  
FAX: (660) 433-2858**

**ATTORNEYS FOR  
APPELLANT  
JENNIFER DIMMITT**

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## **JURISDICTIONAL STATEMENT**

This action involves whether or not appellant had an insurable interest in a mobile home given that the title was delivered to a person financing the purchase and not appellant and was indorsed in blank. The Circuit Court of Morgan County, Missouri, Associate Division, granted summary judgment to the respondent. Appellant appealed to the Western District Court of Appeals. Oral arguments were heard by a three judge panel on January 23, 2001. Prior to issuing a decision, the court ordered that the case be argued en banc on July 10, 2001. On May 28, 2002, the Court issued a 6-5 majority decision ruling that the case be reversed and remanded to the trial court for a determination of whether an insurable interest exists, and if so, for the determination of damages within the policy limits on the loss of the manufactured home.

Respondent sought and was granted transfer by this Court. Accordingly, jurisdiction is proper in this court by virtue of Article V Section 3 of the Missouri Constitution.

## **STATEMENT OF FACTS**

Jennifer Dimmitt (“Appellant”) purchased a 1971 Grant mobile home, serial #2191918382, on April 12, 1997, and took physical possession of the home at that time. (L.F. 30). The owners of the mobile home, Ralph and Shirley Schwartz, signed the back of the title. (L.F. 29). Appellant arranged financing through Wayne Decker, the owner of the park where the mobile home was located. (L.F. 30 & 38). The financing consisted of monthly payments on the purchase price of \$5,500.00. (L.F. 30). Mr. Decker held the title until Appellant paid the entire loan for the home. (L.F. 30).

In October 1997, appellant was issued a policy of insurance on the 1971 Grant mobile home by Progressive Insurance (“respondent”). The policy was renewed on October 24, 1998 for a period of one (1) year. Appellant paid respondent \$259.00 yearly as premium for the policy coverage.

The policy specifically states “In return for your premium payment, we will provide insurance subject to the terms of this policy. (L.F. 11). The policy issued to appellant specifically covered “the mobile described on the Declarations page...” which was the 1971 Grant Mobile home, serial # 2191918382. (L.F. 11, 4).

The perils insured against included accumulations of ice or snow when it is sudden and accidental. (L.F. 13). It also provided for living expense coverage if the insured could not live in the mobile home because of a covered loss (L.F. 9,11) and personal property (L.F. 11).

On January 1, 1999, an ice storm of extraordinary intensity occurred in the area including appellant's mobile home, causing an accumulation of ice and snow on the roof which led to its collapse. (L.F. 2). The mobile home suffered structural damage in addition to extensive damage to personal property inside the mobile home (L.F. 2) and for additional living expenses (L.F. 2A).

Respondent denied coverage under the policy. (L.F. 26). The appellant filed a Petition for Damages in the Circuit Court of Morgan County, Missouri. (L.F. 2). After some discovery was conducted in the case, including the deposition of the appellant, the respondent filed an amended answer claiming that appellant did not have an insurable interest in the mobile home. (L.F. 25).

Soon thereafter, the respondent filed a motion for summary judgment with accompanying suggestions. (L.F. 31-35). Appellant filed suggestions in opposition to the motion. (L.F. 43-48). Judge Richardson sustained respondent's motion for summary judgment. (L.F. 53-55).

Appellant appealed to the Western District Court of Appeals, which first heard the before a three judge panel and later by the court en banc. By a 6-5 majority, the court of appeals reversed the trial court's granting of summary judgment holding that the case should proceed to trial for a determination of whether an insurable interest exists and then, if so found, for the determination of damages within the policy limits on the loss of the manufactured home.

**POINT RELIED ON**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT IN THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER THE APPELLANT RECEIVED A PROPERLY ASSIGNED TITLE AND THUS AN INSURABLE INTEREST IN A MOBILE HOME INSURED BY RESPONDENT AND DAMAGED BY AN ICE STORM.**



## **ARGUMENT**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT IN THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER THE APPELLANT RECEIVED A PROPERLY ASSIGNED TITLE AND THUS AN INSURABLE INTEREST IN A MOBILE HOME INSURED BY RESPONDENT AND DAMAGED BY AN ICE STORM.**

The issue in this case is whether or not the trial court erred in granting summary judgment in favor of Respondent on grounds that appellant did not have an insurable interest in the manufactured home she insured with Respondent.

### **Standard of Review**

The standard of review for summary judgment is de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). In reviewing the granting of summary judgment in favor of respondent, the Court must review the record in the light most favorable to the appellant. *Id.* Summary judgment is regarded as “an extreme and drastic remedy and great care should be exercised in utilizing the procedure.” *Id.* at 377.

Summary judgment is appropriate only when the record discloses no theory that would permit recovery. *Meier v. Boatman’s Bank of Rolla*, 846 S.W.2d 254, 257 (Mo.App.S.D. 1993). A genuine issue of material fact exists where the record contains evidence that two plausible but contradictory accounts of essential facts exist. *Northland Insurance Co. v. Russo*, 929 S.W.2d 930, 931 (Mo.App.S.D.

1996). The slightest dispute as to the facts is sufficient to establish that a genuine issue of fact exists and summary judgment must be denied. *Kostelac v. Triangle Transfer Co.*, 668 S.W.2d 621, 622 (Mo.App. 1984).

### **Summary Judgment was Erroneously Granted to Respondent**

The trial court erred in granting summary judgment to respondent in that (1) the facts asserted by respondent in its motion, even uncontroverted, do not give it the undisputed right to judgment as a matter of law; and (2) the appellate court was correct in ruling that the appellant be allowed to proceed to trial and be given the opportunity to prove that she had an insurable interest in the manufactured home on equitable grounds.

#### ***1. Respondent did not establish undisputed right to summary judgment***

In order to prevail on its motion for summary judgment, respondent must establish that appellant cannot show under any facts that she had an insurable interest in the manufactured home, i.e. that the appellant never had title to the home. To the contrary, at the very least, the facts in the record create a genuine dispute as to whether or not appellant had an insurable interest.

Under Section 301.210.4, the sale of a motor vehicle or trailer registered in Missouri will be legal only if an assignment of the certificate of title to the vehicle is made at the time the vehicle is delivered. Simply put, the appellant must show assignment and delivery of the certificate of title to be the owner of the mobile home.

The record currently shows that the previous owners of the mobile home, Ralph and Shirley Schwartz, signed the certificate of title and that Wayne Decker had physical possession of the title until it was given to appellant in April 1999. The record indicates that Wayne Decker financed the purchase of the mobile home for appellant. Additionally, appellant never presented the certificate of title to the Department of Revenue. Respondent concludes from these facts, as set apart in its motion for summary judgment, that an assignment was not made. Inexplicably, the respondent fails to connect these facts to the law.

A properly assigned title is one endorsed by the holder and delivered to the buyer at the time of delivery. *Copelco Leasing Corp. v. Eyerman*, 855 F.Supp. 1049 (E.D. 1994). The title was endorsed by the Schwartzs, which complies with the statute. Although the buyer designation was left blank, the respondent has provided no case law indicating that such an omission is fatal to a proper assignment. In fact a review of the assignment law provided only a handful of cases which involved a blank assignment, none of which disallowed a sale on those grounds.<sup>1</sup> To the contrary, in *Pearl v. Interstate Securities, Co.*, 206 S.W.2d 975, 978 (en banc 1947) the court held that a blank assignment could be filled-in by the assignee, i.e. a blank assignment by the seller is not unlawful or void

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<sup>1</sup> *In re Crewse*, 5 B.R. 391, 393 (1980)(assignee designation left blank and later filled-in by owner with secondary buyer's names was fraudulent and void because owner failed to fill in his name as first assignee); *Case v. Universal Underwriters Ins. Co.*, 534 S.W.2d 635 (Mo.App.S.D. 1976); *Fawley v. Bailey*, 512 S.W.2d 477, 478-479 (Mo.App.S.D. 1974)(Assignment invalidated on grounds that owner did not sign title; blank purchaser discussed in dictum).

(Assignment was disallowed due to lack of acknowledgement). Thus, given that the owners of record (Ralph and Shirley Schwartz) signed the certificate of title and that contemporaneous to that appellant took possession of the mobile home and title was transferred to Wayne Decker, who financed the purchase, these facts, viewed in the light most favorable to appellant, indicate that a valid assignment took place.

Delivery of a certificate of title may be either actual or constructive. *National Indemnity Company v. Liberty Mutual Insurance Co.*, 513 S.W.2d 461, 464-466 (Mo.1974); *Galemore v. Mid-west National Fire & Casualty Ins. Co.*, 443 S.W.2d 194, 199 (Mo.App.1969). Constructive delivery occurs when, without actual transfer, the conduct of the parties is such as to be inconsistent with any supposition other than there has been a change in the nature of the holding. *Galemore*, 443 S.W.2d at 199.

Here, the respondent asserts that because the appellant did not receive physical possession of the title that delivery did not occur. To the contrary, as stated above, actual or physical delivery is not required. Missouri law provides for constructive delivery of the title and under the facts currently presented, it is reasonable to conclude that delivery of the title from the sellers to the appellant's lender, Wayne Decker, qualifies as delivery. See *National Indemnity Company v. Liberty Mutual Insurance Co.*, 513 S.W.2d 461, 464-466 (Mo.1974); *Galemore v. Mid-west National Fire & Casualty Ins. Co.*, 443 S.W.2d 194, 199 (Mo.App.1969)

and *Fluker v. Lynch*, 938 S.W.2d 659 (Mo.App.W.D. 1997). Reviewing the facts in the light most favorable to the appellant, the facts indicate that constructive delivery took place.

The respondent also emphasizes in its summary judgment motion that the appellant failed to present an application for title to the Department of Revenue. Although this failure is in violation of Section 301.210.2,<sup>2</sup> it does not void the sale. *In re Church*, 206 B.R. 180 (S.D.Ill. 1997). Section 301.210.2 “contains no legislative penalty voiding the sale when the buyer disregards the requirement of applying for a new certificate of title.” *Id.* at 184. (Emphasis added). Vesting of title to a motor vehicle is not deferred until the title is issued by the Missouri Department of Revenue, but takes place upon the delivery of a properly assigned existing title. *Id.* In fact, the Court in *Church* went on to say that it was “aware of no provision under the laws of Missouri....which would invalidate the sale to the debtor based on her failure, after completion of the sale, to pay the ....tax and obtain a new title for the vehicle.” *Id.* As such, this assertion by respondent has absolutely no bearing on whether or not a transfer of ownership in the mobile home occurred here and is not relevant in the granting or denial of summary judgment.

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<sup>2</sup> Section 301.210.2 reads “The buyer shall then present such certificate, assigned as aforesaid, to the director of revenue, at the time of making application for the registration of such motor vehicle or trailer, whereupon a new certificate of ownership shall be issued to the buyer, the fee therefore being that prescribed in subsection 5 of section 301.190.”

**2. *Appeals Court was within its power to reverse trial court decision on equitable grounds.***

The appeals court did not err in reversing the decision of the trial court in holding that the appellant be given the opportunity to prove at trial that she had an insurable interest in the mobile home. Instead, the appeals court simply held that the common law determination of what an insurable interest is should be expanded to include the appellant's unique fact pattern.

Contrary to the argument presented by respondent, the appeals court opinion did not attempt to legislate or create a statutory exception to Section 301.210.4, RSMo. In fact, the majority opinion readily admits that the appellant did not meet the title requirements of the statute.<sup>3</sup> Instead, the court considered, for the first time, whether an individual as a contract purchaser with a special property interest or equitable interest could have an insurable interest in a motor vehicle under Missouri common law while not complying with the statutory titling law. The court concluded, on the basis of common law, that the appellant should have the opportunity to prove, through equitable means, that she has an insurable interest in the mobile home, absent the fact that she did not meet the titling requirements of Section 301.210.4.

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<sup>3</sup> As indicated in the preceding argument, the appellant disputes the court's opinion that she failed to comply with the titling requirements of Section 301.210.4

The court held that the failure of the appellant to meet the titling requirements of Section 301.210.4 should not create an irrebuttable presumption of no insurable interest. Rather the appellant should be able to rebut this presumption with facts, namely that she purchased the mobile home, had physical possession of the home throughout the period in questions, had the home financed through a third party who held the title as collateral, and purchased an insurance policy that repeatedly referred to her as owner. Obviously, the trial court would then determine whether all the facts, taken as a whole, rise to a level of insurable interest.

Interestingly, the titling statute never refers to ‘insurable interest’ nor does there appear to be any legislative intent that the statute correlate in some way to insurance. Instead, such a prerequisite is a common law creation by Missouri courts which has evolved over the last fifty to sixty years. As pointed out by the majority opinion, there have been exceptions to this common law principle. See *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo.App. 1952); *Smith v. G.F.C. Corp.*, 255 S.W.2d 69 (Mo.App. 1959). Here, the court was within its powers to invoke another exception to the general principle given the facts of this case. The court determined that equitable principles should play a role in determining whether or not appellant has an insurable interest.

This decision will have no effect on the enforcement of the titling laws in that the requirements of the statute remain unchanged. Instead, this limited decision allows the appellant, and perhaps several others with identical fact

patterns, the opportunity to establish an insurable interest in their mobile homes when financing considerations and other issues prevent them from fully complying with the titling statute. Summary judgment is inappropriate in this case.



## **CONCLUSION**

For the reasons set forth above, appellant respectfully requests that this court reverse summary judgment in this case and remand the case to the Morgan County Circuit Court for a trial on the merits. Based on the facts in the record, appellant complied with Section 301.210.4, RSMo when she received a properly assigned indorsed and delivered by the owners of record, Ralph and Shirley Schwartz, to the appellant's lender, Wayne Decker. This constructive delivery was concurrent with appellant gaining physical possession of the mobile home. Thus, the record contains issues of material fact that preclude a granting of summary judgment in this case.

Moreover, even if the court finds that the appellant failed to comply with the requirements of Section 301.210.4, the appellate court decision should be affirmed in that the opinion involved a matter of first impression within the jurisdiction of the court. Namely, that the appellant be given the opportunity to prove at trial that she was a contract purchaser with a special property interest or equitable interest equal to an insurable interest in the mobile home.

For these reasons, summary judgment should be denied and the case remanded to the circuit court for a trial on the merits.

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H. RALPH GAW  
GAW & TEEPLE  
P.O. Box 240  
Tipton, MO 65081

#20910

(660) 433-5566  
Fax: (660) 433-2858  
ATTORNEYS FOR APPELLANT  
JENNIFER DIMMITT

**CERTIFICATE OF SERVICE AND COMPLIANCE**

STATE OF MISSOURI                    )  
  )       SS.  
COUNTY OF MONITEAU                )

H. RALPH GAW, does hereby certify that on October 21, 2002, he served two (2) copies of the foregoing SUBSTITUTE REPLY BRIEF OF APPELLANT JENNIFER DIMMITT to Susan Ford Robertson, FORD, PARSHALL & BAKER, L.L.C., 609 East Walnut, P.O. Box 1097, Columbia, Missouri 65205-1097 by depositing same in the United States mail, first class postage prepaid. He also certifies that this brief complies with Rule 84.06(b) and contains 3,147 words excluding the title page, certificate of service and compliance and signature and that the brief contains words in 13-point Times New Roman and that a virus-free disk, scanned by Norton Anti-virus, has also been served on counsel and on the court.

\_\_\_\_\_  
H. RALPH GAW, Attorney

Subscribed and sworn to before me this 21<sup>st</sup> day of October, 2002, in my office in Tipton, Missouri.

\_\_\_\_\_  
NOTARY PUBLIC

(seal)

My Commission Expires:\_\_\_\_\_