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Case No. SC 95844

IN THE SUPREME COURT OF MISSOURI

JEFFERY D. SWADLEY et. al.,
Respondent,

v.

SHELTER MUTUAL INSURANCE COMPANY,
Appellant

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

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY,
AT JOPLIN, MISSOURI, TWENTY-NINTH JUDICIAL CIRCUIT
HONORABLE DAVID B. MOUTON, JUDGE

Theresa A. Appelbaum, #45706
PADBERG CORRIGAN & APPELBAUM, P.C.
1926 Chouteau Ave.
St. Louis, MO 63103
314-621-2900
taa@padberglaw.com

Attorney for *Amicus Curiae* Missouri Association of Trial Attorneys

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INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization consisting of approximately 1,300 trial attorneys in Missouri and other states. For more than half a century, MATA members have advanced the interests and protected the rights of individuals throughout the State of Missouri. MATA members have dedicated themselves to promoting the administration of justice, preserving the adversary system and ensuring that those citizens of our State with a just cause will be afforded access to our courts.

MATA members represent individuals injured in auto collisions and individuals seeking to collect coverage under their insurance policies. MATA members are interested in this case because they are concerned that many individuals believe, based on the wording of their policy documents and assurances from their insurance agents, that they have insurance coverage should they be injured by a driver with insufficient insurance; however, the insurance provider may have written the policy in such a way that, when all the provisions are put together, the coverage does not actually exist. The decision handed down by this court will affect the interpretation of insurance policies.

This brief *amicus curiae* is submitted in support of the Plaintiff (Respondent) and addresses the issues presented for review in a broader and different perspective than the perspectives presented by the parties. In particular, MATA wishes to supplement Respondent's arguments by emphasizing and underscoring the significant policy considerations concerning the question of whether the declarations page of an insurance policy makes promises of coverage and whether the permanent reduction of the coverage

promised therein constitutes an ambiguity in the insurance policy as a whole. For these reasons, MATA members, on behalf of their clients, have a compelling interest in this case.

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CONSENT OF PARTIES

Counsel for Respondent Jeffery D. Swadley has consented to the filing of this brief; however, counsel for Appellant Shelter Mutual Insurance Company has not consented. A motion for leave to file an amicus brief pursuant to Rule 84.05(f)(3) has been filed simultaneously with this brief.

JURISDICTIONAL STATEMENT

MATA adopts Respondent's jurisdictional statement.

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STATEMENT OF FACTS

MATA adopts Respondent's Statement of Facts.

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POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT THE INSURANCE POLICY AT ISSUE IS AMBIGUOUS WITH REGARD TO UNDERINSURED MOTORIST (UIM) COVERAGE.

Jones v. Mid-Century Ins. Co., 287 S.W.3d 687 (Mo. 2009).

Seeck v. Geico General Ins. Co., 212 S.W.3d 129 (Mo. banc 2007).

II. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT DUE TO THE AMBIGUITY PRESENT IN THE POLICY AS A WHOLE THE COURT SHOULD CONSTRUE THE POLICY IN FAVOR OF COVERAGE AND TO PROVIDE THE COVERAGE LISTED ON THE DECLARATIONS PAGE.

Jones v. Mid-Century Ins. Co., 287 S.W.3d 687 (Mo. 2009).

III. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT THE COURT WAS NOT IGNORING PRECEDENT BECAUSE THE CASES RELIED UPON BY THE APPELLANT ARE NOT APPLICABLE TO THIS SET OF FACTS

Jones v. Mid-Century Ins. Co., 287 S.W.3d 687 (Mo. 2009).

Miller v. Ho Kun Yun, 400 S.W.3d 779 (Mo. Ct. App. 2013).

Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. 2009).

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ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT THE INSURANCE POLICY AT ISSUE IS AMBIGUOUS WITH REGARD TO UNDERINSURED MOTORIST (UIM) COVERAGE.

As with the other similar cases that have come before the Court, the primary question on appeal is whether the policy at issue is ambiguous. Specifically, whether the Declarations page contains promises of coverage, and, if so, were those promises taken away by later provisions.

A. Standard of Review

"The interpretation of an insurance policy is a question of law that this Court determines de novo. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). "In construing the terms of an insurance policy, this Court applies 'the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.'" *Id.*; *Martin v. United States Fid. & Guar. Co.*, 996 S.W.2d 506, 508 (Mo. banc 1999). "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. *Seeck*, 212 S.W.3d at 132. The policy must be read as a whole to determine if an ambiguity exists. *Ritchie v. Allied Prop. & Cas. Ins.*

Co., 307 S.W.3d 132 (Mo. 2009). Specifically, "[i]f a contract promises something at one point and takes it away at another, there is an ambiguity." Id. at 133.

If the Court finds the policy is unambiguous, it will be enforced according to its terms. *Rodriguez v. General Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991). If, however, "policy language is ambiguous, it must be construed against the insurer." *Seeck*, 212 S.W.3d at 132. The Court must give such a meaning to all policy provisions so that promised coverage is not illusory. *Manner v. Schiermeier*, 393 S.W.3d 58, 66 (Mo. 2013). Illusory insurance coverage is coverage that is promised in exchange for premiums paid but under other provisions of the policy will never be actually provided. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687 (Mo. 2009); *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43 (Mo. 2009). In other words, any ambiguity in the policy must be construed in favor of coverage. *Jones*, 287 S.W.3d at 690.

When a policy is found to be ambiguous, the Court should construe the provisions not only in favor of the insured but also to fulfill the public policy purpose of the coverage. The purpose of UIM coverage is "to provide insurance coverage for insureds who have been bodily injured by a negligent motorist whose own automobile liability insurance coverage is insufficient to pay for the injured person's actual damages" (*Wasson v. Shelter Mut. Ins. Co.*, 358 S.W. 3d 113, 117 (Mo. Ct. App., 2011)) and "to provide the insured with the coverage the insured purchased when the excess amount is necessary to cover damages." (*Manner*, at 64).

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B. Appellant made coverage promises of a maximum of $100,000 in UIM coverage throughout the policy.

The Respondents argue that they were promised coverage in several places, including the Declarations page, throughout the policy, but that the full amount of that coverage would never be paid because of other provisions in the policy.

Shelter promised to pay the coverage amounts listed in the Declarations Page and in the following places throughout the policy:

- The "General Agreements on Which Insuring Agreements are Based" section directs insured to "check the Declarations each time you receive one to make sure that: …(2) The limit of our liability for each of those coverages is the amount you requested."
- The "Premium Payments" section states that when the insured pays the premiums due "this policy provides the insurance coverages in the amounts shown in the Declarations."
- In the "Introductory Note" of the UIM Endorsement the policy states "This coverage provides a monetary benefit that **supplements** the amount paid to an insured when he or she sustains covered bodily injury." (emphasis added)
- The "Entire Agreement" clause of the policy specifically lists the Declarations page as being a part of the agreement.

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- Promotional materials describe uninsured motorist coverage sold by Shelter as coverage that applies when "the other driver's available insurance limits are less than the full amount owed for your damages." (see Appellant's Substitute Brief Appendix)

Construing the terms with "the meaning which would be attached by an ordinary person of average intelligence," as mandated by *Seeck*, there is no question that an ordinary person of average understanding purchasing this policy would believe that he has purchased $100,000 of UIM coverage to supplement amounts paid by a driver who did not have sufficient insurance to cover the damages. *Seeck*, 212 S.W.3d at 131.

C. The policy permanently reduces the maximum liability of the insurer through the operation of the definitions and set-off language in the policy.

The definition of "Underinsured Motor Vehicle" combined with the set-off provisions in the "Limits" section creates an ambiguity in the policy in that it necessarily means the coverage amounts promised elsewhere in the policy will never be reached. If the Appellant's interpretation of the definition of "Underinsured Motor Vehicle" is correct, the coverage listed in the Declarations and under the Underinsured Motorist Endorsement is illusory.

The definition of "Underinsured Motor Vehicle" in the policy at issue states:

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(51) **Underinsured motor vehicle** means a **motor vehicle** covered by a liability bond, governmental liability statute, or insurance policy, applicable to the **occurrence**; but the monetary limits of the bond, statutory coverage, or policy, are less than the limits of the underinsured motorist coverage shown in the **Declarations**. The following vehicles and types of vehicles are excluded from the definition of **underinsured motor vehicle:**

(a) The **described auto;**

(b) **Motor vehicles owned** by an **insured, spouse,** or a **resident** of any **insured's** household; and

(c) **Motor vehicles** being **used** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household, with **general consent.**

The policy also contains a set-off provision which states:

(3) The limits stated in the **Declarations** are reduced by the amount paid, or payable, to the **insured** for **damages** by:

All **persons** who are, or may be, legally liable for the **bodily injury** to that **insured**; and

(b) All liability insurers of those **persons.** (see Appellant's Substitute Brief Appendix)

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According to the policy's definition of "Underinsured Motor Vehicle," it specifically only applies to a driver with insurance coverage. Missouri's Motor Vehicle Financial Responsibility law requires a minimum of $25,000 in liability coverage per person. Therefore, the underinsured motorist provisions would only apply if there was some liability coverage applicable. The set-off provision in the "Limits of Our Liability" section then deducts any payments made by other persons to the insured from the coverage amount. Therefore, if such policy language is to be enforced, the insurer would never have to pay the limits of its underinsured coverage provided under the policy because said limits would always be offset by payments made from the underinsured driver. However, the Declarations page tells the insured he has purchased $100,000 in UIM coverage, not $100,000 less the amounts paid by the underinsured driver as set forth in other provisions in the policy. If such language in the policy is to be enforced, there would be no foreseeable claims in which the full amount of the UIM coverage of the $100,000 policy limits promised in the Declarations Page will be paid.

As this Court held in *Jones*, when an insurance policy would never actually be required to pay to its insureds the full amount of underinsured motorist coverage its policy ostensibly provides, the policy is ambiguous. *Jones*, 287 S.W.3d at 689. In the instant matter, because the policy's "set-off" provision applies in all foreseeable claims, it ceases to be a "set-off" and becomes a permanent reduction in the previously promised coverage. As such, the policy is ambiguous pursuant to *Jones* and must be construed in favor of the insured. *Jones*, 287 S.W.3d at 689.

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D. The declarations page is not only a part of the policy, it is the primary source of information for the insured about said policy.

Appellants argue that the Declarations page should not be relied upon by insureds as anything more than a basic summary of their policy coverages and cannot be used as evidence of a promise of coverage. However, the policy at issue directs insureds to read the Declarations page to determine the provisions of their policy, including coverage amounts, in the "General Agreements on Which Insuring Agreements are Based" section. Appellants have in fact made it a part of the insured's promises under the contract that the insured will review each Declarations page they receive to determine the policy contains the provisions they have purchased. When the policy incorporates the Declarations page into the document, the Declarations page becomes more than a simple table of contents or a basic summary, it becomes part of the contract. Such is the case in the instant matter.

The policy itself directs the insured to look to the Declarations page to determine coverage levels; therefore, the Declarations page contains promises of coverage and is an essential part of the contract for insurance. Any significant exceptions and limitations, such as a provision that permanently reduces the amount of coverage purchased, should be placed on the Declarations page. *Simmons v. Farmers Ins. Co.*, 479 S.W.3d 671, 675-676 (Mo. Ct. App. 2015); *Wasson*, 358 S.W. 3d at 118; *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 791 (Mo. Ct. App. 2013).

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II. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT DUE TO THE AMBIGUITY PRESENT IN THE POLICY AS A WHOLE THE COURT SHOULD CONSTRUE THE POLICY IN FAVOR OF COVERAGE AND TO PROVIDE THE COVERAGE LISTED ON THE DECLARATIONS PAGE.

There is a clear conflict between the promised UIM coverage listed on the Declarations page and the amount actually provided in the remainder of the policy. The issue with the language is not that the definition of "Underinsured Motor Vehicle" only applies to vehicles with less insurance coverage than what is provided in the UIM endorsement. The reason the definition is invalid is because it directly conflicts with the coverage promised on the Declarations page and elsewhere in the policy. The Declarations page lists $100,000 in coverage, but that amount will never be paid because of the definition of Underinsured Motor Vehicle and the set-off provisions.

The fact that the coverage listed in the Declarations page will never be reached in any foreseeable set of circumstances means that the set-off provision becomes a permanent reduction in the coverage provided by the policy. When the policy contains provisions which necessarily mean the coverage levels listed elsewhere in the policy will never be reached, the Declarations page fails to contain essential terms and is at best ambiguous and at worst purposefully misleading. Under either scenario, the policy must be construed against the insurer and in favor of the insured. *Jones*, 287 S.W.3d at 689. The Declarations page in this instant matter carries even more weight than in other cases

because the provisions of this policy continually refer back to the amounts listed in the Declarations page when promising coverage.

Each time the policy language refers to the Declarations page, the policy is promising the insured UIM coverage in the amount of $100,000 per person and $300,000 per occurrence. The language in the policy endorsement then reduces those maximum amounts by the amount paid by other persons, which, due to the nature of the coverage, means the coverage paid will always be reduced by some number. Therefore, according to *Jones*, the policy is ambiguous and must be construed in favor of the insured and against the insurer. *Jones*, 287 S.W.3d at 689.

III. THE TRIAL COURT DID NOT ERR IN DENYING SHELTER'S MOTION FOR SUMMARY JUDGMENT IN THAT THE COURT WAS NOT IGNORING PRECEDENT BECAUSE THE CASES RELIED UPON BY THE APPELLANT ARE NOT APPLICABLE TO THIS SET OF FACTS

The Appellant relies primarily on two cases in arguing that its policy is not ambiguous. Specifically, the Appellant argues that *Rodriguez v. General Accident Ins. Co. of America*, 808 S.W.2d 379 (Mo. Banc 1991) and *Floyd-Tunnell v. Shelter Mutual Insurance*. 439 S.W.3d 215 (Mo. 2014) hold the Declarations page does not make coverage promises. However, these cases do not apply here.

It is important to note that *Rodriguez* has been repeatedly distinquished by this Court. See *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007);

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Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. 2009); *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 689 (Mo. Banc 2009). *Rodriguez* is a 1991 case decided by reviewing a policy definition in a vacuum. The Court never addressed the question of ambiguity of the policy as a whole – it looked solely at one provision of the policy to determine if it was ambiguous on its own. The *Rodriguez* court was never asked to address the policy as a whole to look for ambiguities. *Rodriquez*, 808 S.W.2d at 382. However, the law in Missouri is clear is that the Court must evaluate an insurance policy as a whole, and further, even when a provision in isolation is unambiguous, a conflicting provision in the same policy renders the policy as a whole ambiguous. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. 2009). In explaining the "current significance" of the *Rodriguez* decision, the Court in *Miller* held, "Subsequent decisions have made clear that the fact that a definition is clear and unambiguous does not end the inquiry as to the existence of an ambiguity…" *Miller*, 400 S.W.3d at 786. Consequently, *Rodriguez* has no application to this matter.

Floyd-Tunnell is also distinguishable from this case. The policy portions at issue in *Floyd-Tunnell* address the step-down provisions of an uninsured motorist policy provision. *Floyd-Tunnell v. Shelter Mutual Insurance*. 439 S.W.3d 215 (Mo. 2014). Unlike the policy at issue in this matter, the policy provision addressed in *Floyd-Tunnell* would not reduce coverage levels in every foreseeable circumstance, but only when certain specific facts were present. The step-down provision addressed by the *Floyd-Tunnell* court simply reduced coverage to the statutory minimum only those damages

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incurred when the insured is occupying a vehicle owned by the insured but not listed on the policy. *Id.* There are numerous circumstances where the "step-down" provision in *Floyd-Tunnell* would not apply and the full amount of the coverage promised would be paid by the insurer. As such, the policy provision addressed by the *Floyd-Tunnell* court did not violate the principles held in *Jones* that an insurance policy is ambiguous if it would never actually be required to pay the full amount of the coverage promised. *Jones*, 287 S.W.3d at 689. Of course, as set forth above, the policy at issue in this matter does violate the principles held in *Jones* as there is no foreseeable circumstance where the insurer would ever be obligated to pay the entire amount of the coverage promised. As such, the analysis in *Floyd-Tunnell* has no application to the instant matter.

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CONCLUSION

When an insurance policy promises a level of coverage that will never be paid due to the operation of other policy provisions, an ambiguity exists in the policy as a whole. The Declarations page is an essential part of any insurance policy, particularly where, in this case, the policy repeatedly directs insureds to the Declarations page to verify policy coverage. Consequently, because the Declarations page in the instant matter promises coverage which will never be paid due to other policy provisions, the policy as a whole is ambiguous. As such, the policy must be construed to provide the coverage promised to accomplish the public policy purpose for the coverage. Therefore, the Court should reverse the opinion of the Southern District Court of Appeals, affirm the Trial Court ruling and remand the matter.

Respectfully Submitted,

/s/ Theresa A. Appelbaum
Theresa A. Appelbaum, #45706
PADBERG CORRIGAN & APPELBAUM, P.C.
1926 Chouteau Ave.
St. Louis, MO 63103
314-621-2900
taa@padberglaw.com

Attorney for *Amicus Curiae*
Missouri Association of Trial Attorney

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 3,837 words (as determined by Microsoft Office Word software);

/s/ Theresa A. Appelbaum
Theresa A. Appelbaum, #45706
PADBERG CORRIGAN & APPELBAUM, P.C.
1926 Chouteau Ave.
St. Louis, MO 63103
314-621-2900
taa@padberglaw.com

Attorney for *Amicus Curiae* Missouri Association of Trial Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Rachel Anne Riso, Attorney for the Appellant
1901-C S. VENTURA AVE
SPRINGFIELD, MO 65804
(417) 887-0133

Lauren Peterson, Attorney for the Respondent
The Hershewe Law Firm
431 S. Virginia Ave.
Joplin, MO 64801
417-782-3790
Lauren.Peterson@h-law.com

/s/ Theresa A. Appelbaum

Theresa A. Appelbaum MO # 45706

PADBERG CORRIGAN & APPELBAUM, P.C.
1926 Chouteau Ave.
St. Louis, MO 63103
314-621-2900
taa@padberglaw.com

Attorney for *Amicus Curiae* Missouri Association of Trial Attorney