In the Missouri Court of Appeals
Western District

REBECCA FLOYD-TUNNELL, et al., Appellants,	)	
v.	)	**WD75725**
	)	**FILED: November 12, 2013**
SHELTER MUTUAL INSURANCE COMPANY, Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE W. BRENT POWELL, JUDGE

BEFORE THE COURT EN BANC
JAMES E. WELSH, CHIEF JUDGE, PRESIDING, JOSEPH M. ELLIS, VICTOR C. HOWARD, THOMAS H. NEWTON, LISA WHITE HARDWICK, ALOK AHUJA, MARK D. PFEIFFER, KAREN KING MITCHELL, CYNTHIA L. MARTIN, GARY D. WITT AND ANTHONY REX GABBERT, JJ.

Rebecca Floyd-Tunnell and Doris Floyd ("Appellants") appeal the circuit court's grant of summary judgment in favor of Shelter Mutual Insurance Company ("Shelter") on their claim to recover up to the uninsured motorist ("UM") coverage limits on two insurance policies for the wrongful death of Jerry L. Floyd. The court determined that a partial exclusion in both policies limits Shelter's liability for UM benefits to Missouri's statutory minimum. Because Shelter has already paid the statutory minimum, the court also granted summary judgment in favor of Shelter on Appellants' vexatious refusal to pay claim. On appeal, Appellants contend the partial exclusion does not apply or,

alternatively, is unenforceable because it renders the policies ambiguous. For reasons explained herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying this appeal are undisputed. In October 2011, Jerry Floyd, who was Rebecca Floyd-Tunnell's father and Doris Floyd's husband, died from injuries sustained in an automobile collision. Eric Krugler was driving the other vehicle involved in the collision. The collision occurred when Krugler, traveling on Missouri Highway 38 in Dallas County, negligently crossed the center line and struck the Chevrolet Cavalier that Jerry Floyd was driving. Krugler did not have insurance covering his liability for Floyd's death.

At the time of the accident, Jerry and Doris Floyd were the named insureds on three automobile insurance policies issued by Shelter for three vehicles they owned. One policy insured the Cavalier that Jerry Floyd was driving at the time of the collision; the second policy insured their Chevrolet Silverado; and the third policy insured their Toyota Camry.

All three policies provided UM coverage. The policies' insuring agreement for UM coverage states: "If the **owner** or **operator** of an **uninsured motor vehicle** is legally obligated to pay **damages**, **we** will pay the **uncompensated damages**; but this agreement is subject to all conditions, exclusions, and limitations of **our** liability, stated in this policy."[1] The declarations page on each of the policies states that the limit of UM coverage is $100,000 per person.

Appellants filed suit against Shelter, seeking the full $100,000 UM coverage limit on each of the three policies, for a total of $300,000. Shelter agreed that Appellants

[1] The boldface is in the original policies and indicates the policy defines the terms.

had sustained damages of at least $400,000 as a result of Jerry Floyd's wrongful death; that Krugler's negligence had caused those damages; and that Krugler's vehicle was an "uninsured motor vehicle" as defined in the three policies. Because those particular facts were not disputed, Shelter agreed to pay and did pay $150,000 to Appellants. Of that payment, $100,000 was paid under the Cavalier policy and $25,000 was paid under each of the Silverado and Camry policies.

The parties agreed that Shelter had paid the full UM coverage limit of $100,000 on the Cavalier policy and that payment under the Cavalier policy was no longer at issue. The parties disputed whether Shelter owed any additional UM coverage under the Silverado and Camry policies. Specifically, Appellants argued that Shelter owed $75,000 more under each of those policies. Appellants asked the court for a judgment against Shelter for $150,000, plus penalties and attorney's fees for Shelter's vexatious refusal to pay.

Shelter filed a motion for summary judgment asserting that the two $25,000 payments satisfied its obligation under the Silverado and Camry policies. Shelter explained that those policies contain a partial exclusion from UM coverage that is applicable when the insured is injured while occupying a vehicle he owns, but which is not the auto described in the policy's declarations page. The language of the applicable partial exclusion in both policies states:

> PARTIAL EXCLUSIONS FROM COVERAGE E
>
> In **claims** involving the situations listed below, **our** limit of liability under Coverage E [UM coverage] is the minimum dollar amount required by the **uninsured motorist insurance law** and **financial responsibility law** of the state of Missouri:
>
> . . . .

(3) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household; unless it is the **described auto**.

Shelter contended that, because Jerry Floyd was occupying the Cavalier, which he owned, when the accident occurred and the Cavalier is not the "described auto" in the Silverado and Camry policies, the partial exclusion applies to limit its liability for UM coverage under each of those policies to the statutory minimum of $25,000.[2] As it had already paid Appellants $25,000 under each of the Silverado and Camry policies, Shelter asserted that it was entitled to summary judgment on Appellants' claim to recover additional benefits under those policies and their claim of vexatious refusal to pay.

Appellants filed a cross-motion for summary judgment alleging that the partial exclusion in the Silverado and Camry policies does not apply because Doris Floyd, and not Jerry Floyd, is the insured who is asserting the claim for UM coverage and Doris Floyd was not occupying any vehicle when she sustained her damages due to Jerry Floyd's wrongful death. Alternatively, Appellants argued that the partial exclusion creates an ambiguity because it takes away coverage that is promised in the declarations page of each policy.

The court granted Shelter's motion for summary judgment and denied Appellants' cross-motion. In its judgment, the court found that the partial exclusion in the Silverado and Camry policies limiting Shelter's liability on those policies to the statutory minimum is applicable and unambiguous. Because Shelter had already paid the $25,000

[2] The $25,000 minimum for bodily injury to or death of one person in any one accident is set forth in Section 303.030.5, RSMo 2000.

statutory minimum under both policies, the court also granted summary judgment for Shelter on Appellants' vexatious refusal to pay claim. Appellants appeal.

STANDARD OF REVIEW

Appellate review of summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 380.

The interpretation of an insurance policy is also a question of law that we review *de novo*. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). In interpreting an insurance policy, we read the policy as a whole to determine the parties' intent. *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 839-40 (Mo. App. 2011). In an insurance contract, "the risk insured against is made up of both the general insuring agreement as well as the exclusions and definitions." *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007). We give the policy language its plain and ordinary meaning. *Thiemann*, 338 S.W.3d at 840. "'If, giving the language used its plain and ordinary meaning, the intent of the parties is clear and unambiguous, we cannot resort to rules of construction to interpret the contract.'" *Id*. (citation omitted). "Disagreement over the interpretation of the terms of a contract does not create an ambiguity." *Id*.

ANALYSIS

In Point I, Appellants contend the partial exclusion in the Silverado and Camry policies does not apply to their claim for UM coverage for Jerry Floyd's wrongful death.

The partial exclusion provides that Shelter's liability for UM coverage is limited to the statutory minimum amount in the following circumstance:

> (3) If any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle owned** by any **insured**, the **spouse** of any **insured**, or a **resident** of any **insured's** household; unless it is the **described auto**.

The policies define "damages" in the context of UM claims to mean "money owed to an **insured** for **bodily injuries**, sickness, or disease, sustained by that **insured** and caused, in whole or in part, by the **ownership** or **use** of an **uninsured motor vehicle**." The policies' definition of "bodily injury" includes a physical injury or a death that directly results from a physical injury. "Occupying" means being in physical contact with a vehicle while in it, getting into it, or getting out of it. Lastly, the policies define the "described auto" as "the vehicle described in the **Declarations**." Applying these definitions to the partial exclusion, the plain language of the exclusion limits UM coverage where any part of the damages, that is, the money owed to an insured for a death that was sustained by that insured and caused by the ownership or use of an uninsured motor vehicle, is sustained while the insured is in a vehicle that is owned by any insured but is not the vehicle listed on the declarations page.

The dispute in this case centers on to whom the term "the insured" refers in the partial exclusion. If "the insured" refers to Jerry Floyd, then, pursuant to the partial exclusion's plain language, Appellants' damages claim is for money owed for the death of Jerry Floyd caused by Krugler's use of an uninsured motor vehicle, and the damages were sustained while he was in his Cavalier, which was not listed on the declarations page of the Silverado or Camry policies. Appellants concede that, if the term "the

insured" refers to Jerry Floyd, the circuit court correctly interpreted the partial exclusion as limiting their UM coverage to the statutory minimum.

Appellants assert that the term "the insured" refers not to Jerry Floyd, however, but to Doris Floyd, who was also an insured under the policies. They note that the UM coverage agreement in the policies contains a severability clause that says: "The insurance under Coverage E [UM coverage] applies separately to each **insured**. The presentation of **claims** by more than one **insured** will not increase **our** limit of liability for any one **occurrence**." In *Baker v. DePew*, 860 S.W.2d 318, 320 (Mo. banc 1993), the Supreme Court interpreted a similar severability clause to mean that, "when applying the coverage to any particular insured[,] the term 'insured' is deemed to refer only to the insured who is claiming coverage under the policy with respect to the claim then under consideration."

Appellants contend that Doris Floyd is "the insured" claiming coverage under the policies because a cause of action for damages for wrongful death does not belong to the decedent or the decedent's estate but, rather, to the class of persons authorized by Section 537.080.1,[3] to bring such actions. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. banc 2009). Therefore, Appellants propose that "the insured" in the partial exclusion refers to Doris Floyd. Because Doris Floyd was not occupying any car when she sustained her damages for Jerry Floyd's wrongful death, Appellants argue that the partial exclusion does not apply to limit her UM coverage under the policies. We disagree.

[3] All statutory references are to the Revised Statutes of Missouri 2000, as updated by the Cumulative Supplement 2012.

That Doris Floyd is among the class of persons authorized by statute to assert a cause of action for Jerry Floyd's wrongful death does not transform her into "the insured" for purposes of determining the extent of the UM coverage for his wrongful death. The language of the insurance policies determines who is "the insured" and the extent of the UM coverage for that insured and that particular occurrence. The insurance policies state that they provide UM coverage for the uncompensated damages *that an uninsured motorist is legally obligated to pay*. "Damages" are defined, in pertinent part, as "money owed to an **insured** for **bodily injuries** . . . *sustained by that* ***insured***." (Italics added.) The definition of "bodily injury" in the policies includes a physical injury *or a death that directly results from a physical injury*. The insured who sustained bodily injuries (death) in this case is Jerry Floyd. Thus, Jerry Floyd is "the insured" for purposes of determining the extent of the UM coverage available for his wrongful death under the policies.

Appellants emphasize that Shelter's UM coverage defines "damages" to impose two conditions: "[1] *money owed to an insured* [2] *for bodily injuries*, sickness, or disease, *sustained by <u>that</u> insured* . . ." (Italics and underlining added.) Appellants argue that, if conditions [1] and [2] are read literally (and without reference to other provisions of the Shelter policies), they could never both be satisfied with respect to a Missouri wrongful-death claim, because the person who actually sustains bodily injury (the decedent) is not the person to whom money is "owed" for the death. Instead, Doris Floyd and her daughter Rebecca Floyd-Tunnell are authorized by Section 537.080 to recover all statutorily prescribed damages, as set forth in Section 537.090, for Jerry Floyd's death.

We are unpersuaded. First, the Shelter policies plainly contemplate that the "damages" recoverable under the UM coverage include payments to persons like Doris Floyd and Rebecca Floyd-Tunnell on account of physical injuries suffered by insured Jerry Floyd. Thus, the policies' "Payments" provision states that "**[w]e** will pay any amount due under [the UM coverage] to . . . [a]ny **person** legally authorized to maintain and settle a **claim** for the **insured's** death, if **our** payment is for **damages** resulting from the **insured's** death." The "Limits of Liability" provision similarly specifies that the policies' UM coverage limits "appl[y] to all **claims** made by others resulting from that **insured's bodily injury**, whether direct or derivative in nature."

Thus, while the "Damages" provision -- read in isolation -- may suggest that the policies cover only monies owed directly to an insured, other provisions make it unmistakably clear that the policies cover monies *owed to others* on account of the death of an insured. As the dissenting opinion explains, allowing non-insureds to recover for the death of an insured caused by an uninsured motorist is consistent with Missouri's UM coverage statute, Section 379.203.1, and with prior Missouri decisions interpreting UM coverage under policies which -- like Shelter's -- contemplate payments to others on account of an insured's injuries. *Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726, 736-37 (Mo. banc 1979); *Arnold v. Am. Fam. Mut. Ins. Co.*, 987 S.W.2d 537, 541-42 (Mo. App. 1999); *Livingston v. Omaha Prop. & Cas. Ins. Co.*, 927 S.W.2d 444, 446 (Mo. App. 1996); *Ashcraft v. Ashcraft*, 689 S.W.2d 693, 695 (Mo. App. 1985).

Despite the reference to "money owed *to an insured*" in the definition of "damages," it is plain -- based on the policies construed as a whole, the governing statutes, and Missouri caselaw -- that Doris Floyd and Rebecca Floyd-Tunnell are

entitled to recover their damages under Jerry Floyd's uninsured motorist coverage because those damages result from Jerry Floyd's death.[4] Appellants' right to recover under the policies is not a function of Doris Floyd's status as a separately named insured; it is solely a function of *Jerry Floyd's* status as a named insured.[5] Doris Floyd's status as a named insured on the same policies is irrelevant.

There is a second reason for rejecting Appellants' reading of the policies: no reasonable person would have expected the policies to be interpreted in that manner. Under a severability clause like the one contained in the Shelter policies, the name of one insured must be consistently substituted everywhere a reference to the "insured" appears. *Baker*, 860 S.W.2d at 320 ("One simple method of visibly demonstrating the impact of the severability clause is to insert the name of the applicable insured immediately following the term 'insured' in the relevant provisions."). According to Appellants' argument, Doris Floyd is the relevant "insured" in this case, and the "damages" definition must be read to require only that she *sustained damages*, but not

[4] Consistent with this conclusion, Shelter stipulated in the circuit court that the damages subject to Jerry Floyd's uninsured motorist claim were all of the damages recoverable under Section 537.090, including those for the death and loss of Jerry Floyd; the past, present and future pecuniary losses suffered by reason of Jerry Floyd's death; funeral and burial expenses; the loss of household contributions; and the loss of services, consortium, guidance, companionship, comfort, instruction, counsel, training, and support of Jerry Floyd.

[5] To hold otherwise would be to require a wrongful death claimant to be a named insured on a decedent's policy as a condition to recovery of the amounts an uninsured motorist is legally obligated to pay on account of a decedent insured's death. Clearly, that is not the law.
We also note that, based on Appellants' argument, if Doris Floyd happened to have been riding in the vehicle with Jerry Floyd at the time of the fatal accident, she would have been entitled to recover only the reduced UM coverage limits, since she would have been occupying an owned vehicle, other than the described auto, at the time she sustained her damages. On the other hand, because she was not riding in the vehicle, Appellants argue that she is entitled to recover the full $100,000 limits. Appellants offer no explanation for this anomalous result, and we can conceive of none: whether Doris Floyd was riding with her husband or not, the relevant circumstances surrounding Jerry Floyd's death would remain unchanged.

that she *sustained bodily injuries*. On that reading, Jerry Floyd's status as an insured becomes irrelevant.

Appellants' argument would have the effect of allowing Doris Floyd to recover under the Shelter policies for any wrongful-death damages to which she was entitled, *whether or not the decedent was insured under the policies*. We have previously rejected similar attempts to recover under UM coverage for the death of a non-insured, holding that this construction of a policy is simply unreasonable:

> The purpose of § 379.203 is to provide coverage to an insured who is injured as a result of the tortious act of a motorist operating an uninsured motor vehicle. As it applies to wrongful death claims, uninsured motorist coverage is intended to provide indemnity for damages resulting from *an insured's* wrongful death payable to whatever person or persons may be entitled to bring an action under § 537.080. Given this purpose, we do not believe that plaintiff's construction is a reasonable one. We presume that the legislature intended a logical result, not an unreasonable result. The public policy contention has not extended coverage under the parent's insurance policy to a son who was a member of his parent's household and who owned his own vehicle, or to a son who was not a resident of his father's household under his father's uninsured motorist coverage. To accept plaintiff's interpretation, would permit plaintiff to recover under her uninsured motorist policy for the death of any person from whom she is legally entitled to bring a claim under the wrongful death statute, such as the death of her children, any lineal decedents, her brothers and sisters, her parents, or any other descendant. It would provide coverage by plaintiff's insurance company for hazards associated with the operation of the vehicles of all of these individuals, none of whom are insured under her policy. While uninsured motorist coverage is to be given a liberal interpretation, coverage should not be created where there is none.
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> In a situation such as the one presented here, the legislature contemplated that the survivors of a person killed in an accident with an uninsured motorist would pursue a claim under the *decedent's* uninsured motorist coverage, rather than the survivors' policy.

Livingston, 927 S.W.2d at 446 (citations omitted). See also *Stewart v. Royal*, 343 S.W.3d 736, 742-44 (Mo. App. 2011); *Lavender v. State Auto. Mut. Ins. Co.*, 933 S.W.2d 888, 890-92 (Mo. App. 1996).[6] We will not adopt a reading of the Shelter policies that prior decisions have labeled illogical and unreasonable. *Kennedy v. Safeco Ins. Co.*, No. SD32345, 2013 WL 3227500, at *4 (Mo. App. June 24, 2013) ("While ambiguity exists if the term is reasonably open to different constructions, an unreasonable alternative construction will not render the term ambiguous." (Internal quotation marks and citation omitted)); *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 784 (Mo. App. 2013); *Grissom v. First Nat'l Ins. Agency*, 371 S.W.3d 869, 874 (Mo. App. 2012).[7]

Given that Jerry Floyd is the relevant "insured," and that the policies must be construed to cover the damages Appellants suffered as a result of his death, application of the partial exclusion in the Shelter policies is straightforward. Although Appellants may not themselves have been riding in the vehicle at the time of the fatal accident, it is undeniable that some "part of the damages" for which Appellants seek to recover were "sustained while the insured [*i.e.*, Jerry Floyd] [was] occupying a motor vehicle [he] owned," but which was not the "described auto" under either the Silverado or Camry policies. The partial exclusion, therefore, applies to Appellants' claims, and the UM

[6] We recognize that, in *Lambert v. State Farm Mutual Automobile Insurance Co.*, 820 S.W.2d 602 (Mo. App. 1991), the court permitted recovery under UM coverage by an insured, for the death of a non-insured person. In that case, however, the relevant insurance policy defined "bodily injury" to mean "bodily injury *to a person*," without requiring that *an insured* suffer the bodily injury. *Id*. at 603. In contrast, multiple provisions of the Shelter policies in this case make it clear that the bodily injuries for which coverage is provided must be sustained by an insured person, even if others may be entitled to recover "damages" stemming from those injuries.

[7] Even if the "damages" definition were deemed ambiguous, we would not adopt Appellants' reading of that provision, since it is inconsistent with the expectations of a reasonable insured. *Mendota Ins. Co. v. Ware*, 348 S.W.3d 68, 74 (Mo. App. 2011); *Estrin Constr. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 420 (Mo. App. 1981).

coverage under each policy is limited to the $25,000 that Shelter has already paid. Point I is denied.

In Point II, Appellants contend the partial exclusion renders the policies ambiguous and is, therefore, unenforceable because it takes away the UM coverage limits promised in the declarations page of each policy. Appellants note that the declarations page of the Silverado and Camry policies provide that the UM coverage limits are $100,000 per person and $300,000 per accident. Each declarations page also contains a statement that, for persons who become insureds under the policy solely because they have permission or general consent to use the described auto, the policy provides only the statutory minimum limits, which are $25,000 bodily injury for each person, $50,000 bodily injury for each accident, and $10,000 property damage for each accident. Appellants argue that, because the reference in the declarations page to limiting coverage to the statutory minimum applies to only permissive users, and Shelter emphasizes the importance of the declarations page throughout the policies, the partial exclusion takes away promised UM coverage and renders the policies ambiguous.

"While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent." *Todd*, 223 S.W.3d at 163. "Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies. If they are clear and unambiguous within the context of the policy as a whole, they are enforceable." *Id*.

Within the context of each policy as a whole, the partial exclusion in the Silverado and Camry policies is clear and unambiguous. First, we note that Part IV, the section of

each policy that discusses UM coverage, immediately notifies the policyholder that the coverage is subject to exclusions and limitations. The first sentence in the section reads: "The following coverage is provided under the policy only if it is shown in the **Declarations** and is subject to all conditions, exclusions, and limitations of **our** liability, *stated in this policy*." (Italics added.) Second, the insuring agreement for UM coverage reiterates the existence of exclusions and limitations, as it provides that UM coverage is "subject to all conditions, exclusions, and limitations of **our** liability, *stated in this policy*." (Italics added.) The italicized language notifies the policyholder that the exclusions and limitations are found "in the policy" and not merely in the declarations page. Third, the partial exclusion is contained within the UM coverage section and clearly states that, in the situations listed, Shelter's limit of liability for UM coverage is the statutory minimum.[8]

When the Silverado and Camry policies are read as a whole, the partial exclusion to UM coverage is not susceptible to different interpretations and does not cause the meaning of the policies to be uncertain.[9] The policies are not ambiguous and, therefore, the partial exclusion is enforceable. Point II is denied.

CONCLUSION

We affirm the circuit court's grant of summary judgment in favor of Shelter.

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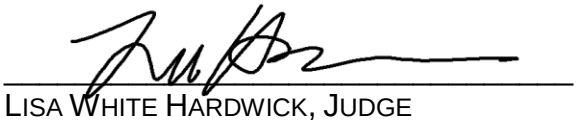
[8] The fact that the partial exclusions are not listed in the declarations page does not render the policies ambiguous. If that were the case, then every exclusion and limitation applicable to a policy's coverage would have to be listed in the declarations page to be effective. That is not the law in Missouri.

[9] The clarity of the UM coverage provisions and partial exclusion in this case is in sharp contrast to the UM coverage and exclusions deemed ambiguous in *Rice v. Shelter Mutual Insurance Co.*, 301 S.W.3d 43 (Mo. banc 2009). In *Rice*, the UM coverage provision started with a reference to providing coverage up to the limit of liability in the declarations page, followed by provisions excluding coverage in certain circumstances, followed by provisions stating that the exclusion does not apply to UM coverage amounts mandated by statute, followed by provisions stating that the UM coverage that exceeds the statutorily-mandated amount is fully enforceable. *Id*. at 48. The Court found these provisions to be "entirely inconsistent" and irreconcilable. *Id*. Unlike in *Rice*, the Silverado and Camry policies contain no provisions indicating that the UM coverage in excess of the statutory minimum amount is fully enforceable despite the partial exclusion.



LISA WHITE HARDWICK, JUDGE

Welsh, C.J., and Newton, Ahuja, Mitchell and Martin, JJ., concur;
Pfeiffer, J. dissents in separate opinion filed;
Howard, Witt and Gabbert, JJ., concur in Judge Pfeiffer's dissenting opinion;
Ellis, J., concurs in part in Judge Pfeiffer's dissenting opinion in separate opinion filed.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

REBECCA FLOYD-TUNNELL, et al.,	)	
	)	
Appellants,	)	
	)	**WD75725**
	)	
v.	)	**OPINION FILED:**
	)	**November 12, 2013**
SHELTER MUTUAL INSURANCE COMPANY,	)	
	)	
	)	
Respondent.	)	

DISSENTING OPINION

Because the analysis of the majority opinion serves to *liberally* construe an exclusion clause from an insurance policy *in favor* of the drafter of the insurance policy instead of *strictly* construing the exclusion clause *against* the drafter of the insurance policy (as required by our Missouri Supreme Court), I respectfully dissent.

Standard of Review

"[W]hen analyzing an insurance contract, *the entire policy* and not just isolated provisions or clauses *must be considered*." *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009) (emphasis added) (internal quotation and citations omitted).[1] In an insurance

[1] In *Rice*, though the trial court had exclusively framed the issue in its judgment as whether the Uninsured Motorist ("UM") coverage partial exclusion clause was void against public policy, *Rice v. Shelter Mut. Ins. Co.*, 301

contract, "the risk insured against is made up of both the general insuring agreement as well as the exclusions and definitions." *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007). "Absent an ambiguity, an insurance contract must be enforced according to its terms." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). Conversely, "[i]t is black-letter law that: 'An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions.'" *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010) (quoting *Seeck*, 212 S.W.3d at 132). "Moreover, '[i]n 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, and resolves ambiguities in favor of the insured.'" *Id.* (quoting *Seeck*, 212 S.W.3d at 132). In Missouri, this rule is more rigorously applied in insurance contracts than in other contracts. *Id.* "**Missouri also *strictly* construes exclusionary clauses against the drafter**, who also bears the burden of showing the exclusion applies." *Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. banc 2013) (internal quotation omitted) (italics in original) (emphasis added).

Analysis

Although the majority opinion frames this case as a question of "who is the insured" for purposes of Uninsured Motorist ("UM") coverage and the corresponding UM coverage exclusion clause, I initially submit that issue is less relevant to the discussion when, as here, it is undisputed that UM coverage is provided under the terms of the policy or policies for the

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S.W.3d 43, 45-46 (Mo. banc 2009), and the parties likewise framed the issue on appeal as evaluating whether the exclusion clause was void against public policy and expressly sought the Supreme Court's opinion on that topic, *id.* at 47 n.3, the Supreme Court instead first *de novo* reviewed *the entire policy*, concluded that certain provisions in the insurance policy were "entirely inconsistent and [could not] be reconciled," *id.* at 48, and found that the policy ambiguity was required to be construed in favor of coverage for the insured—refusing to address the issue that had been framed by the trial court below and the parties on appeal—the public policy consideration issue. *Id.* at 49. I emphasize this merely to illustrate the unique nature of appellate *de novo* review of insurance contract coverage cases.

occurrence in question. Here, *under any interpretation*, there is no dispute that the two Shelter policies in question both provide UM coverage for damages arising from Jerry Floyd's[2] death. To understand the significance of this undisputed contractual conclusion, I briefly turn to the history, purpose, and application of UM coverage in Missouri for wrongful death claims.

WRONGFUL DEATH UM COVERAGE CLAIMS IN MISSOURI

In 1967, Missouri's General Assembly, via section 379.203, first mandated that every automobile liability insurance policy in Missouri contain UM coverage in at least the statutory minimum amount as set forth in section 303.030.5 (presently $25,000 "because of bodily injury to or death of one person in any one accident"). Though the legislature has modified section 379.203 numerous times over the years, the basic statutory framework has always contemplated and required UM coverage in each policy:

> for the protection of persons insured thereunder *who are legally entitled to recover damages* from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, *including death*, resulting therefrom.

§ 379.203.1, RSMo 2000 (emphasis added).

Since section 379.203 contemplates UM coverage for those "legally entitled to recover damages" as a result of the negligent operation of a vehicle that causes "death," one must look to Missouri's Wrongful Death Act to ascertain those persons "legally entitled" to make a wrongful death claim, and one must similarly look to Missouri's Wrongful Death Act to determine what "damages" those "legally entitled" to sue are entitled to, as the right to pursue a wrongful death claim is a creature of statute, not the common law of Missouri. *See Sullivan v. Carlisle*, 851 S.W.2d 510, 516 (Mo. banc 1993). For our purposes in this litigation, the statutorily authorized

[2] It is undisputed that Jerry Floyd and Doris Floyd are the named insureds under the Shelter policies and Rebecca Floyd-Tunnell is their daughter. Throughout this dissenting opinion: Mr. Floyd may interchangeably be referred to as "Jerry Floyd" or "Decedent"; Mrs. Floyd may interchangeably be referred to as "Doris Floyd" or "Wife"; Ms. Floyd-Tunnell may interchangeably be referred to as "Rebecca Floyd-Tunnell" or "Daughter"; Mrs. Floyd and Ms. Floyd-Tunnell, collectively, will be referred to as "Appellants." No disrespect is intended.

persons entitled to pursue a wrongful death claim arising from the death of Jerry Floyd are "the spouse or children . . . or . . . the father or mother" of Jerry Floyd.[3] § 537.080.1(1), RSMo 2000. In pertinent part, Missouri's Wrongful Death Act describes the damages that those "legally entitled" to bring a wrongful death claim are entitled to recover:

> In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death . . . . In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued.

§ 537.090, RSMo 2000.

As the Missouri Supreme Court explained in *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. banc 2009) (internal quotation omitted): "[T]he wrongful death claim does not belong to the deceased or even to a decedent's estate." "The wrongful death statute and the precedent cases clearly consider wrongful death to be *a cause of action separate and distinct from the underlying tort*." *Id.* at 528. "[N]ot only are the parties who may bring wrongful death distinct from those who may bring a suit for an underlying tort, *but the measure of damages is also different.* The damages under section 537.080 are *different than the damages Decedent would have been entitled to in a personal injury action*." *Id.* at 528-29. The damages recoverable in a wrongful death action are the damages owing to the wrongful death statutory beneficiaries, for *their* losses arising from the decedent's death, based on the nature of their

[3] Jerry Floyd's parents have previously indicated their preference that Mr. Floyd's wife and daughter alone be apportioned any damages collected through the pursuit of a wrongful death claim.

relationship to the decedent. *See, e.g., Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 304-06 (Mo. App. S.D. 2011).[4]

And, where insurers have attempted to reduce UM coverage, our Supreme Court has, in its words,

> been liberal in applying the uninsured motorist statute to invalidate attempts by insurers to reduce benefits under applicable coverage . . . . Thus, we have invalidated clauses that would have prevented "stacking" of coverage under uninsured motorist provisions,[5] *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. banc 1976), clauses that would have reduced benefits to the extent of payments received under the workmen's compensation law, *Douthet v. State Farm Mut. Auto Ins. Co.*, 546 S.W.2d 156 (Mo. banc 1977), and clauses that would have reduced benefits by the amounts due under the medical payment coverage of the same policy, *Webb v. State Farm Mut. Auto. Ins. Co.*, [479 S.W.2d 148 (Mo. App. 1972)], cited with approval in *Douthet, supra*.

Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137, 147 (Mo. banc 1980).

In discussing the purpose of UM coverage, our Supreme Court has not minced words:

> An insured under uninsured motorist coverage is entitled by the statute to the full bodily injury protection that he purchases and for which he pays premiums. 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. The premium rates are standard and uniform on a per car basis.
>
> . . . .
>
> Cases 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.

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[4] Section 537.090 *does* permit the wrongful death claimants to recover "such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued." Despite this right to recover damages for which the decedent could have maintained an action, the Supreme Court in *Beverly Manor* specifically held that "these potential damages do not render wrongful death a derivative claim, nor would such damages be awarded to the plaintiffs on [decedent's] behalf." *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 529 n.4 (Mo. banc 2004).

[5] Notably, auto liability coverage is not treated similarly in Missouri, demonstrating that UM coverage, plainly and simply, is treated differently than liability auto insurance coverage in certain instances, and appellate courts should be cognizant of that when comparing precedent interpreting application of exclusion clauses to *liability* coverage in a *UM* coverage dispute.

Cameron Mut. Ins. Co. v. Madden, 533 S.W.2d 538, 543-44 (Mo. banc 1976) (numerous internal quotations omitted).

Ultimately, because section 379.203.1 provides that no automobile liability insurance shall be issued unless coverage is provided "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of . . . death," the question of who is an insured is relevant only to the extent that, for example: (1) at least one defined insured under the relevant policy language suffered wrongful death caused by an uninsured motorist, *Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726, 736-37 (Mo. banc 1979) (biological daughter, who suffered wrongful death caused by uninsured motorist, was insured under biological father's policy as a relative residing with biological father; though biological mother was not an insured under biological father's policy, she was entitled to pursue a claim for wrongful death as daughter's legal representative within the terms of UM coverage under biological father's policy); (2) at least one insured is lawfully entitled to recover for the wrongful death of another insured under the policy, *id.* at 732 n.5 (biological father and daughter—who suffered wrongful death caused by an uninsured motorist—were both defined insureds under biological father's policy, and as such, biological father "has a right to recover [UM coverage] under the [insurance] contract"); or, (3) in some instances, at least one insured is otherwise a person lawfully entitled to recover for the wrongful death of another—even if that decedent is *not* an insured under the policy language, *Lambert v. State Farm Mut. Auto. Ins. Co.*, 820 S.W.2d 602, 603-04 (Mo. App. S.D. 1991) (grandparents' policy defined grandson living with them as an insured; grandson's father suffered wrongful death caused by an uninsured motorist; even though grandson's father was not a defined insured under grandparents' policy, grandson—as insured—was entitled to UM coverage under grandparents' policy).

The most important principle from these cases is not "who is an insured"; rather, it is that once it is determined that UM coverage is available for wrongful death pursuant to an automobile insurance policy, all persons with a right to recover for the wrongful death pursuant to Missouri's Wrongful Death Act, § 537.080, are entitled to recover damages authorized by the Wrongful Death Act, § 537.090, under the insurance policy's UM coverage. *Cobb*, 576 S.W.2d at 736.

UM Coverage Under the Shelter Policies

Here, Shelter does not dispute that the relevant automobile liability insurance policies provide UM coverage for the fatal car wreck in question that took the life of Jerry Floyd. Here, Shelter does not dispute that all persons with a right to recover for the wrongful death of Jerry Floyd pursuant to Missouri's Wrongful Death Act, including Daughter and Wife, are entitled to payments pursuant to UM coverage under the relevant Shelter policies. Here, Shelter does not dispute that the UM coverage of its Shelter policies provides compensation for section 537.080 statutory claimants for damages as defined by Missouri's Wrongful Death Act at section 537.090.

We agree, but only by operation of law. The Shelter policies themselves are contrary to Missouri's Wrongful Death Act. For example, UM coverage under the Shelter policies is provided under Coverage E, wherein the insuring agreement states:

> If the **owner** or **operator** of an **uninsured motor vehicle** is legally obligated to pay **damages**, **we** will pay the **uncompensated damages**; but this agreement is subject to all conditions, exclusions, and limitations of **our** liability, stated in this policy.
>
> **Damages** means *money owed to an* **insured** for **bodily injuries**, sickness, or disease, *sustained by that* **insured** and caused, in whole or in part, by the **ownership** or **use** of an **uninsured motor vehicle**.

> **Bodily injury** means . . . a physical injury [or] death that directly results from [personal injury] . . .
>
> **We** will pay any amount due under Coverage E to . . . the **insured** [or] [a]ny **person** legally authorized to maintain and settle a **claim** for the **insured's** death, if **our** payment is for **damages** resulting from the **insured's** death . . . .[6]

While this UM coverage insuring agreement and the corresponding definitions make sense in a factual scenario in which an insured defined by the policy suffers damages as defined by the policy and that insured *survives* the occurrence caused by an uninsured motorist, these provisions simply do not make sense when the occurrence causes *death*.[7]

In a *death* claim, money is never owed to the decedent for the death-producing bodily injuries sustained by the decedent.

In a *death* claim, the section 537.080 statutory beneficiaries, who are the ones owed death benefits, are never the persons who have actually sustained physical injury or death.

In a *death* claim, the damages contemplated by section 537.090 are not *physical* losses suffered by the section 537.080 statutory beneficiaries; rather, they are *pecuniary* losses suffered by the statutory beneficiaries by reason of the death: funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which the statutory beneficiaries have been deprived by reason of decedent's death.

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[6] The boldface is in the original policies and indicates that the policy defines the terms. The italicized emphasis is added.

[7] The majority opinion minimizes Shelter's flawed definition of "damages" as the same is applied to wrongful death claims by stating we must not ignore the "Payments" provision of the policy that requires payments to be made to "any person legally authorized to maintain and settle a claim for the insured's death." First, while I agree that the insurance policy must be interpreted in the context of the policy as a whole, I fail to see how the term "payment" is synonymous with the word "owed." And, in this Shelter policy, before money may be "paid" (irrespective to whom it may be paid), it must first be "owed." Second, before one can substitute the "Payments" provision for the damages definition, as the majority opinion suggests we do, one has to perform the act of doing that which the majority opinion recognizes is prohibited in the first place—ignore the plain, ordinary, and unambiguous definition of "damages" in the UM coverage section of the policy. Simply put, there is no precedent in the State of Missouri—if anywhere—authorizing such contract construction in favor of the drafter of an insurance policy, particularly in reference to the applicability of an exclusion clause.

Simply put, as written, the Shelter policy treats UM coverage death claims as derivative claims for the statutory beneficiaries. And, simply put, that is not the law in Missouri. Likewise, as the policies are written, the damages contemplated for a death claim are physical injury losses owed to the decedent, not section 537.090 damages owed to the section 537.080 statutory beneficiaries.

Conversely, section 379.203 provides that no auto policy shall be issued unless coverage is provided "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of . . . death."

"Under Missouri law, contracting parties are presumed to know the law and have it in mind when they enter into an agreement." *Evergreen Nat'l Corp. v. Killian Constr. Co.*, 876 S.W.2d 633, 635 (Mo. App. W.D. 1994) (citing *Zirul v. Zirul*, 671 S.W.2d 320, 324 (Mo. App. W.D. 1984)). And, where statutory provisions have been found to be in conflict with a contract's terms then, by operation of law, Missouri courts have superseded any contractual provisions that conflict with such statutory provisions. *See id.*; *Nat'l Equity Res. Corp. v. Montgomery*, 872 S.W.2d 533, 536 (Mo. App. S.D. 1994); *Hoff v. Sander*, 497 S.W.2d 651, 652 (Mo. App. 1973). *See also Buatte v. Gencare Health Sys., Inc.*, 939 S.W.2d 440, 442 (Mo. App. E.D. 1996) ("Insurance policies which attempt to do [what is prohibited by public policy] are, therefore, invalid under state law."). Here, the Shelter policies themselves contain language recognizing that if the policy language conflicts with Missouri law, "[c]onflicting policy language is superseded by the requirements of those laws."[8]

Thus, in a *death* claim for UM coverage benefits under the Shelter policies, by operation of law, the insuring agreement for UM coverage must be superseded to reflect that the section

[8] In fact, this conflicts provision is in direct reference to the interpretation of the policy's insurance coverage that is mandated by financial responsibility laws.

537.080 statutory beneficiaries—not the decedent—are owed damages; and the damages owed to the statutory beneficiaries are not *physical* losses sustained by the statutory beneficiaries, but instead, *pecuniary* losses as expressly itemized by section 537.090.[9]

Upon doing so, it is undisputed that: (1) UM coverage is provided under the Shelter policies for the death-producing occurrence involving one of its named insureds under the policies; (2) Daughter and Wife are both members of the statutory class of beneficiaries pursuant to section 537.080 that are authorized to pursue a death claim for UM coverage benefits under the Shelter policies; and (3) Daughter and Wife, as members of the wrongful death class of statutory beneficiaries, are entitled to seek damages for UM coverage benefits under the Shelter policies as authorized by section 537.090 (which Shelter has stipulated to be in excess of $400,000).[10]

Shelter's Exclusion Clause[11]

Next, we turn our attention to Shelter's partial exclusion, which states, in pertinent part:

[9] Though "contracting parties are presumed to know the law and have it in mind when they enter into an agreement," *Evergreen Nat'l Corp. v. Killian Constr. Co.*, 876 S.W.2d 633, 635 (Mo. App. W.D. 1994), it is somewhat disconcerting that Shelter, an insurance company headquartered in the State of Missouri, expects its insureds to go outside the four corners of the insurance policy, perform statutory legal research, and know that they must supersede offending policy language with correct statutory coverage language in order to understand what UM coverage Shelter's insureds have actually purchased.

[10] The majority opinion minimizes the discussion of *why* there is UM coverage for the claim in question by simply stating that Shelter has not disputed it. But if we are to evaluate the applicability of Shelter's UM coverage exclusion clause, we must do so in the context of "both the . . . insuring agreement as well as the exclusions and definitions." *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007). I find it rather compelling that, in the first instance of understanding the applicability of UM coverage to a death claim, this insurance policy requires its insureds to perform statutory research in order to be able to rely upon an insurance policy conflicts provision in the insurance contract to modify the terms of the policy to comply with UM coverage and wrongful death statutory requirements in the State of Missouri. And, it is in this contorted UM insuring agreement context that Shelter asserts application of its UM exclusion clause.

[11] On appeal, Appellants have focused their arguments for UM coverage on Wife's coverage arguments. As Wife is both a separately named insured (i.e., Daughter is not a named or defined insured under the Shelter policies—instead, she is a legal representative entitled to pursue a death claim for the death of her father) *and* a legal representative member of the wrongful death class entitled to pursue a death claim for her husband, this makes sense. Nonetheless, *both* Appellants remain parties to the appeal and are represented by the same counsel. Appellants' counsel has *not* conceded that Daughter is subject to Shelter's partial exclusion; and, as clarified at oral argument, Appellants' counsel represented on behalf of *both* of his clients, that *both* would be entitled to assert apportionment of damages claims for any additional UM coverage that Shelter owes. This, of course, is consistent with counsel's ethical obligation to *both* of his clients—Wife *and* Daughter. *See* Rule 4-1.7.

> In **claims** involving the situations listed below, **our** limit of liability under [UM coverage] is the minimum dollar amount required by the **uninsured motorist insurance law** . . . of the state of Missouri . . . if any part of the **damages** are sustained while the **insured** is **occupying** a **motor vehicle owned** by any **insured** . . . unless it is the **described auto**.

Wife argues that, because the Shelter policies contain a severability clause, the policies' reference to the "insured" must be read to refer to her, since she is the one asserting a claim. Because she was not occupying *any* motor vehicle at the time she sustained damages, Wife argues that the exclusion does not apply to her claim.

Shelter responds by emphasizing the definition of "damages" in the policy—though as explained previously herein, reliance upon the "damages" definition is fraught with other problems. Thus, more accurately stated, Shelter relies upon that portion of the "damages" definition that it likes, the part requiring that the damages are for "bodily injuries, sickness, or disease, *sustained by that insured*." Because Wife did not herself "sustain" any bodily injury, Shelter argues that she cannot be the relevant "insured" for purposes of applying the exclusion clause. Instead, Jerry Floyd (Decedent) must be the relevant insured, because he was the one who "sustained" bodily injury; and because he was occupying a vehicle he owned, but which was not insured under the policies, at the time of the fatal accident, the exclusion clause applies.

Wife counters that, under Missouri law, no money was "owed" to Jerry Floyd (Decedent) resulting from his death. Instead, under Missouri's wrongful death statute, *she* and other wrongful death beneficiaries identified in the statute possess the right to recover for Decedent's death in their own right—their claims are not derivative of Decedent's rights, nor asserted on his behalf. Wife argues that, under Missouri's wrongful death statute, "Mr. Krugler, the negligent driver, not only owes money for wrongful death damages, he owes said money to the Appellants, not to Jerry Floyd, and not to Jerry Floyd's estate." Wife contends that, if Shelter's arguments were adopted, it would not owe any money to anyone for Jerry Floyd's death, because under

Missouri law the person to whom money is owed on account of a wrongful death will *always* be someone other than the deceased.

Wife's argument has merit. First, as Wife correctly notes, due to the presence of a severability clause in the Shelter policies,[12] we must read "the insured" in the policies to refer solely to her, since she is the one asserting a claim. As the Missouri Supreme Court has explained:

> Under the standard automobile policy, a number of different people may be an "insured." . . . The severability clause provides that the term "insured" refers to any person or organization who qualifies as an insured but that the policy is applied separately to each such insured who is seeking coverage and against whom a claim for damages is brought. This has been construed to mean that when applying the coverage to any particular insured the term "insured" is deemed to refer only to the insured who is claiming coverage under the policy with respect to the claim then under consideration. The severability clause applies to the meaning of the term "insured" anywhere in the policy except in the provisions that specify the limits of liability; i.e., the severability clause does not operate to increase the limits of the policy.
>
> . . . One simple method of visibly demonstrating the impact of the severability clause is to insert the name of the applicable insured immediately following the term "insured" in the relevant provisions.

Baker v. DePew, 860 S.W.2d 318, 320 (Mo. banc 1993) (citations omitted); *see also, e.g., Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369, 380 n.12 (Mo. App. W.D. 2011).

Second, it is *Wife* (and the other wrongful death beneficiaries), *not her husband (Decedent)*, who has incurred and who is owed "damages" as a result of her husband's wrongful death. As previously noted from the precedent of our Missouri Supreme Court in *Lawrence v. Beverly Manor*, the wrongful death claim does not belong to the deceased or the decedent's estate; wrongful death is a cause of action separate and distinct from the underlying tort; both the

[12] The severability clause states: "The insurance under [UM coverage] applies separately to each **insured**. The presentation of **claims** by more than one **insured** will not increase **our** limit of liability for any one **occurrence**."

parties who may bring a wrongful death suit and the measure of damages that may be claimed are different from a suit arising from the underlying tort. 273 S.W.3d at 527-29. Simply put, the damages recoverable in a wrongful death action are the damages *owing* to the wrongful death beneficiaries, for *their* losses arising from the decedent's death, based on the nature of their relationship to the decedent. *See, e.g., Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 304-06 (Mo. App. S.D. 2011).

Third, while there are numerous provisions of the Shelter policies that contemplate payments to compensate for the death of an insured, when each of these provisions are read in the context of the whole policy, they simply do not lend themselves to a construction that recognizes Missouri wrongful death claims.

For example, the definition of "damages" upon which Shelter relies cannot be read to unambiguously require that Jerry Floyd be treated as the "insured" for purposes of Wife's claim. The policy provisions applicable to UM coverage provide that "[d]amages means [1] ***money owed to an insured*** [2] ***for bodily injuries***,[13] sickness, or disease, ***sustained by that insured*** and caused, in whole or in part, by the ownership or use of an uninsured motor vehicle." Under Missouri law, however, a single person will *never* simultaneously satisfy conditions [1] and [2] with respect to a wrongful death claim, because the person who actually sustains bodily injury (the decedent) is *not* the person to whom money is "owed" for the death.

The majority opinion purports to solve the "damages" definition dilemma by citing to the "Payments" provision of the Shelter policies, which contemplates *payments* to persons other than the insured for the insured's bodily injuries. The "Payments" provision states that "[Shelter] will pay any amount due under [the UM coverage] to . . . *[a]ny person legally authorized to maintain and settle a claim for the insured's death, if our payment is for damages resulting from the*

[13] "Bodily injuries" is defined in the Shelter policies to include death.

insured's death." But, as we are required to review the "Payments" provision in the context of the whole policy, this provision cannot be squared with the definition of "damages," because the *payments* contemplated by the "Payments" provision must first be *owed* pursuant to the terms of the UM coverage insuring agreement. Here, although the "Payments" provision contemplates that money will be owed to others for an insured's wrongful death, the "damages" definition requires that monies be owed to *the same person who sustained the injury*. Thus, in the context of the *whole* policy, the "damages" definition simply does not permit money to be *owed* to those whom the "Payments" provision contemplates the possibility of making payments *to*. The only way one can make sense of these two provisions is to do as the majority opinion suggests—ignore the "damages" definition—an act clearly prohibited by decades of Missouri precedent on the topic of insurance contract construction.

Further confusing the topic is Shelter's definition of "uncompensated damages," which, like the "damages" definition, contemplates payments only to the "insured," since it specifies that recovery under the policies will be reduced only for amounts "paid, or payable, *to the insured*."

In sum, it is impossible to reconcile these provisions with respect to a Missouri wrongful death claim asserted by a claimant who is herself an "insured." The definitions of "damages" and "uncompensated damages" would suggest that *Wife* is the relevant "insured," since she is the one to whom money is owed and to whom money would be "paid, or payable." In the words of the insuring agreement, it is *to Wife* that the uninsured motorist "is legally obligated to pay damages." Yet, looking to the second half of the "damages" definition, it is equally clear that Wife did not "sustain" bodily injury.[14]

[14] I recognize that in three cases appellate courts of this state have held that policy language providing that bodily injury must be "sustained by an insured" is unambiguous and enforceable, and prevents a wrongful death

Notably, other automobile liability insurance policies issued in Missouri have avoided many of the interpretive difficulties presented by Shelter's policies, by defining the "insured" to include any person entitled to recover compensatory damages as a result of bodily injury to an insured, and by specifying that bodily injury must be sustained by "an insured," rather than (as in the Shelter policies) that bodily injury must be sustained by *the same person to whom money is owed*.[15]

The provisions of the Shelter policies could be read to refer *either* to Wife or to her husband, Decedent, as the relevant "insured" for purposes of Wife's current claim. As we have previously noted, our Supreme Court has recognized that a wrongful death claim pursuant to UM coverage may be invoked when the "insured" under the policy is the person who suffers death caused by an uninsured motorist, *Cobb*, 576 S.W.2d at 736, but it may also be pursued by another defined "insured" under the policy who suffers damages as contemplated by the Wrongful Death Act as a result of the wrongful death of another defined "insured" under the policy, *id.* at 732 n.5.[16]

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claimant from invoking UM coverage based simply on the claimant's status as an insured. *Stewart v. Royal*, 343 S.W.3d 736, 742-44 (Mo. App. W.D. 2011); *Lavender v. State Auto. Mut. Ins. Co.*, 933 S.W.2d 888, 890-92 (Mo. App. S.D. 1996); *Livingston v. Omaha Prop. & Cas. Co.*, 927 S.W.2d 444, 445-46 (Mo. App. W.D. 1996). But perhaps the reason Shelter did not cite any of these cases in its briefing to this Court is due to the fact that the language of the Shelter policies is importantly different than these cases. Here, and even though other provisions of the Shelter policies appear to contemplate payments to others on account of bodily injury sustained by an insured, the definition of "damages," which is a central provision of Shelter's UM coverage, quite clearly specifies that bodily injury must have been sustained by *the same person to whom compensation is payable* in order for the policies to provide coverage. While Shelter *could have* specified that its UM coverage only applied to bodily injury "sustained by an insured" (even though others would be entitled to recover damages for that bodily injury), that is not what its policies say. *Stewart*, *Lavender*, and *Livingston* are distinguishable.

[15] Standard form automobile liability policies used by Missouri insurers are available at the Department of Insurance's website, at http://insurance.mo.gov/consumers/auto/auto_policies.php (last visited October 7, 2013). *See* State Farm Car Policy Booklet, Missouri Policy Form 9825A, at 13; American Family Mutual Insurance Company, Uninsured Motorist Coverage—Missouri, at 1; Farmers Insurance Company, Personal Auto Policy, at 7. According to the Department of Insurance's website, State Farm, American Family, and Farmers together represent over 40% of the Missouri automobile liability insurance market.

[16] Specifically, the Missouri Supreme Court stated:

> [Insurer] contends that both [Father—named insured] and [Mother—not defined as insured under the policy] must possess both rights of being an insured and being able to maintain a wrongful

Accordingly, pursuant to *Cobb*, Wife—as a policy-defined insured—is separately entitled to pursue a claim for UM coverage benefits for the wrongful death of her husband—Decedent—also a policy-defined insured.

And, if Wife is substituted as "the insured" in the exclusion clause, the clause could not possibly apply to her UM coverage claim, because she never "occupied a motor vehicle" in sustaining wrongful death damages as a result of the death of her husband.[17]

Therefore, upon my *de novo* review of the entire policy, I agree with Appellants that a plain and ordinary reading of the exclusion clause reflects that the exclusion clause is not applicable to Wife's UM coverage claim. Alternatively, at bare minimum, construction of the UM exclusion clause, when read in the context of the whole policy, is reasonably susceptible to multiple constructions, at least one of which dictates that the exclusion clause is inapplicable, rendering the clause ambiguous and requiring that it be construed against the insurer. *See Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009); *Mendenhall v. Prop. & Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 92 (Mo. banc 2012). Under either scenario, the exclusion clause does not apply to defeat UM coverage.

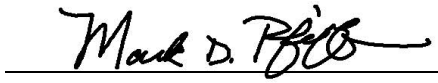
> death action [for the death of daughter/decedent—a separately defined insured]. We do not agree. It is sufficient if [Father] *is an insured* and [Mother] has a right to recover as a legal representative of [daughter/decedent]. The wrongful death action is relevant only as to whether *the father* [or, in our case, Wife] *has a right to recover under the contract*.

Cobb v. State Sec. Ins. Co., 576 S.W.2d 726, 732 n.5 (Mo. banc 1979) (emphasis added).

[17] If Wife's husband, Decedent, is substituted as "the insured" in the exclusion clause, it is likewise inapplicable because the exclusion would contemplate that Decedent is "owed money" for Decedent's injuries—i.e., death—while occupying the motor vehicle. We know, however, that in Missouri, wrongful death damages are *not* owed to the decedent or the decedent's estate, *Beverly Manor*, 273 S.W.3d at 527-29, so the exclusion could not apply to the statutory damages asserted in a wrongful death claim. Additionally, I note that in the majority opinion at footnote 5, it is suggested that Appellants' argued construction of the policy could lead to anomalous results depending on whether Wife happened to be riding in the same motor vehicle as her husband at the time of the fatal wreck. However, the majority opinion offers no explanation for the anomalous result that would occur with the majority opinion's construction of the policy if Decedent happened to suffer fatal injuries by being struck by a vehicle while he had been a pedestrian as opposed to being an occupant of a vehicle. In short, insurance contract coverage stands or falls on the language of the contract applied to the facts of the case, and speculation about anomalous or conflicting results does little to address the fact pattern and issues at hand.

Conclusion

Accordingly, I would reverse the circuit court's judgment.



Mark D. Pfeiffer, Judge

In the Missouri Court of Appeals
Western District
En Banc

REBECCA FLOYD-TUNNELL, et al., Appellants,	)	
v.	)	**WD75725**
	)	**FILED:**
SHELTER MUTUAL INSURANCE COMPANY, Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE WESLEY B. POWELL, JUDGE

Before the Court en banc: James Edward Welsh, Chief Judge, Presiding, and Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, Lisa White Hardwick, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, and Anthony Rex Gabbert, Judges

CONCURRING IN PART IN DISSENTING OPINION

I cannot concur in all aspects of the analysis and conclusions contained in the dissenting opinion. However, I do concur in that part of the opinion holding that the UM exclusion clause is ambiguous, in that, in the context of the whole policy, it is reasonably and fairly open to different constructions. ***Mendenhall v. Property & Cas. Ins. Co. of Hartford***, 375 S.W.3d 90, 92 (Mo. banc 2012). "Ambiguities in the meaning of an insurance policy are resolved in favor of the insured, and exclusionary clauses are strictly construed against the drafter." ***Id.*** For that reason, I concur in the dissenting opinion's conclusion that the circuit court erred in granting Shelter's motion for summary

judgment and in denying Appellants' cross-motion for summary judgment, and that the case should be reversed and remanded for further proceedings.

Joseph M. Ellis, Judge