STATE OF MISSOURI
CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT
City of Saint Louis

ELISE L. WIDAMAN and NATALIE JANE WIDAMAN,
by and through their Next Friend, CHRISTINE HUGHEY,
Plaintiffs,

v.

CINCINNATI INSURANCE CO.
and
SAFECO INSURANCE COMPANY OF ILLINOIS,
Defendants.

Cause No. 0722-CC00684	Division 13	April 2, 2010

JUDGMENT AND ORDER GRANTING MOTION OF DEFENDANT SAFECO INSURANCE COMPANY OF ILLINOIS FOR SUMMARY JUDGMENT AS TO COUNT III, AND GRANTING MOTION OF DEFENDANT CINCINNATI INSURANCE COMPANY TO DEEM ADMITTED CERTAIN FACTS STATED IN CINCINNATI'S REPLY, AND DENYING MOTIONS OF DEFENDANT CINCINNATI INSURANCE COMPANY TO STRIKE "CERTAIN ADDITIONAL FACTS IN PLAINTIFFS' RESPONSE TO ITS MOTION FOR SUMMARY JUDGMENT" AND PLAINTIFFS' SURREPLY, AND DENYING MOTION OF DEFENDANT SAFECO INSURANCE COMPANY OF ILLINOIS FOR SUMMARY JUDGMENT AS TO COUNT I, AND DENYING MOTION OF DEFENDANT CINCINNATI INSURANCE COMPANY FOR SUMMARY JUDGMENT AS TO COUNT II

Summary

Defendant Safeco Insurance Company's motion for summary judgment as to Count III, in which Plaintiff seeks to recover from Safeco under the underinsured motorist (UIM) coverage provisions of its policy, is granted because its insurance policy is not ambiguous in its provisions which define underinsured motorists coverage; therefore, Plaintiffs cannot recover any further sum under this policy provision.

Defendant Cincinnati Insurance Company's motions to strike "certain additional facts in Plaintiffs' response to its motion for summary judgment" and to strike Plaintiffs' surreply to its motion for summary judgment are denied because the additional facts stated in Plaintiffs' response are material and properly supported by references to appropriate documentation; and Plaintiffs' surreply is not improper, nor did its filing prejudice Defendant.

Defendant Cincinnati Insurance Company's motion to deem admitted the additional facts stated in Cincinnati's reply is granted, because Plaintiff did not deny those additional facts.

The motions for summary judgment as to Count I relating to Safeco's policy, and Count II relating to Cincinnati Insurance Company's policy, both regarding Plaintiffs' claims for the injuries to and death of their father under the uninsured motorists (UM) coverage provisions of the policies, are denied because there is a disputed issue of fact whether Plaintiffs' father was engaged in a rescue at the time he suffered the injuries which led to his death, and Missouri's "rescue doctrine" allows recovery when the person was injured when a rescue was occurring. In addition, there is also a disputed issue of fact whether the injuries to Plaintiffs' father were caused by the operation of the uninsured motor vehicle.

Nature of the Dispute

Plaintiffs are the children of Lee Widaman, who was killed after he was struck by a car driven by an underinsured driver, Patricia Barry. Plaintiffs contend that when he was struck by Barry's car, he was attempting to rescue Tara Thomas, an uninsured motorist who negligently had run her vehicle off the roadway. Plaintiffs seek to recover benefits under insurance policies for uninsured motorist coverage of both Defendants (Counts I and II), and under the policy of Defendant Safeco for underinsured motorist coverage (Count III). Plaintiffs' claim against Defendant Cincinnati's policy for underinsured motorist coverage (Count IV), was settled.

Both Defendants moved for summary judgment and deny coverage under various policy provisions. They dispute that Mr. Widaman's actions at the time of the incident were part of a rescue; and also they maintain that Plaintiffs' injuries did not arise from the use, maintenance, or ownership of an uninsured motor vehicle. Safeco denies coverage under the UIM provisions of its policy because it contends that under the plain language of those provisions, any recovery to which Plaintiff might be entitled from Safeco for UIM coverage would be reduced to zero by operation of the limit-of-liability language contained within the policy, which has a UIM policy limit of $50,000.

Defendant Cincinnati, in presenting its motion for summary judgment, also has moved to strike "certain additional facts in Plaintiffs' response to its motion for summary judgment" and to strike Plaintiffs' surreply, and has asked the Court to deem admitted certain other facts.

Factual and Procedural Background

The following facts are not disputed. On August 22, 2006, Tara Thomas (formerly known as Tara Fodor) lost control of her vehicle and drove off Zumbehl Road in St. Charles County, Missouri, running down the embankment off to the right side of the roadway. Her nine-year-old son, Gaven, was a passenger in her car at the time. Plaintiffs' father, Lee Widaman (decedent), stopped his vehicle in the right traffic lane of Zumbehl Road, above the area where Ms. Thomas's vehicle came to rest, to offer help and assistance to Ms. Thomas and her son.

There was no shoulder on Zumbehl Road where decedent parked. Ms. Thomas and her son climbed the embankment to Zumbehl Road and spoke to decedent near his vehicle. Decedent told Ms. Thomas that the police were on the way. Ms. Thomas asked Gaven to stand by decedent while she returned to her vehicle to recover her purse and keys. While returning to her vehicle, Ms. Thomas fell down the embankment. She eventually retrieved her purse and keys. At some point after Ms. Thomas began to go down the embankment to return to her vehicle, decedent was fatally struck by a vehicle operated by Ms. Barry.

Plaintiffs previously filed a petition for approval and apportionment of a wrongful death settlement in the Circuit Court of St. Charles County.[1] In that settlement, which the Court in Saint Charles County approved, codefendant Cincinnati Insurance Company, Mr. Widaman's UIM carrier, agreed to settle Plaintiffs' UIM claim for its full UIM limit of $450,000. Plaintiffs also previously settled their claim with Ms. Barry and her automobile liability insurer, American Family Mutual Insurance Company, for the liability policy limit of $50,000.

On February 23, 2007, Plaintiffs filed their lawsuit.

On March 30, 2007, Plaintiffs and Defendant Cincinnati announced settlement of Count IV between Plaintiffs and Cincinnati under the UIM provisions of Cincinnati's policy. On April 18, 2007, the Court approved the settlement in the amount of $450,000.

On May 17, 2007, Cincinnati filed its motion for summary judgment as to Count II, which was heard by the Hon. Donald McCullin, denied on August 27, 2007.

On October 10, 2007, Judge McCullin denied Cincinnati's "motion for clarification."

On April 16, 2009, Safeco filed its motion for summary judgment as to Count III.

On June 29, 2009, Cincinnati again filed a motion for summary judgment as to Count II.

On July 21, 2009, Plaintiffs filed their response to Cincinnati's motion for summary judgment.

On July 28, 2009, Cincinnati filed its motion to strike Plaintiffs' statement of new facts in Plaintiffs' response, and its motion to deem its statement of uncontroverted material facts admitted.

On August 10, 2009, Cincinnati filed its reply memorandum to Plaintiffs' response.

On August 11, 2009, Plaintiffs filed their surreply to Cincinnati's reply.

[1] Cause No. 0611-CV07222.

On August 18, 2009, Cincinnati filed its motion to strike Plaintiffs' surreply, and its motion to deem admitted the additional material facts set forth in Cincinnati's reply.

On September 15, 2009, Safeco filed its motion to strike Plaintiffs' supplemental memorandum of law filed in opposition to Safeco's motion for summary judgment.[2]

Also on September 15, 2009, this Court heard the motions of Safeco and Cincinnati for summary judgment, Cincinnati's motion to strike Plaintiffs' surreply to Cincinnati, and Safeco's motion to strike Plaintiffs' supplemental memorandum responding to Safeco.

In its order of September 15, 2009, this Court denied Safeco's motion to strike Plaintiffs' supplemental memorandum, and granted Safeco fourteen days to file a written response to the memorandum. The Court indicated in the order that the Court was taking the other motions under submission with the understanding that the parties were to provide the Court with copies of documents relating to Safeco's motion as to Count I that were missing from the Court file.

Safeco and Plaintiffs filed copies of the missing documents, although the date such documents were filed is unclear from discrepancies among the Clerk's various file-stamps on the documents and minute entries. However, it is clear that on or shortly after September 30, 2009, this Court had all of the missing documents.

With regard to Safeco's response to Plaintiffs' supplemental memorandum, this Court cannot find any memorandum filed by Safeco as a response. The Court has considered that motion to also be under submission. Because this Court rules in favor of Safeco with regard to its motion for summary judgment as to Count III, the fact that any memorandum Safeco may have filed in accordance with the Court's order of September 15, 2009, granting Safeco time to file such a response memorandum cannot be located is of no consequence.

The Court now has considered the pleadings, the record, the arguments of the parties, and the applicable law.

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[2] As the parties know from the discussion on the date of the hearing on the motions, this Court searched the documents in the Court file and the Clerk's minute entries, and could not find Safeco's motion for summary judgment as to Count I, or its statement of uncontroverted facts or its memorandum of law in support of such motion, or a minute entry recording the filing of any of these documents up to and including the date of the hearing. In addition, this Court could not find in the Court file Plaintiffs' response to Safeco's motion as to Count I, or memorandum of law relating to that response, or a minute entry indicating such were filed prior to the date of the hearing. The parties did not dispute that such documents were filed, and graciously re-filed copies of the documents after the hearing was held, so that – at least according to the Clerk's file-stamp dated September 30, 2009, on Safeco's documents, and by a different Clerk's file-stamp on other copies of the documents indicating such were "entered" [into the minutes] on September 16, 2009 [although there is no corresponding minute entry dated September 16, 2009] – by September 30, 2009 or shortly thereafter, the Court did have copies of all of those documents. In addition, the Court was provided a copy of Plaintiffs' response and memorandum; however, there is no Clerk's file-stamp on those documents indicating the date they were received. However, there is a minute entry, dated September 30, 2009, indicating that Plaintiffs' documents were also filed on that date.

Count III – Safeco's motion for summary judgment relating to UIM coverage

Issue

The issue presented by Safeco's motion for summary judgment as to Count III is whether Ms. Barry's vehicle is an underinsured motor vehicle under the policy definition of Safeco's policy. A further issue is whether the policy is ambiguous in its provisions regarding "other insurance" relating to reduction of coverage as a result of payments made. The question is whether the payment of Ms. Barry's liability limit of $50,000 reduces the available UIM coverage under Safeco's policy to zero, by operation of the limit-of-liability language contained within the policy, and by operation of Safeco's UIM policy limit of $50,000; or whether the provision is ambiguous and therefore inapplicable. Plaintiffs contend an ambiguity is created by the other-insurance clause.

Discussion

Safeco contends that the under the provisions of its policy relating to UIM coverage, the Barry vehicle is not an underinsured motor vehicle. Safeco maintains that its policy language is unambiguous, citing Rodriguez v. General Accident Ins. Co. of America, 808 S.W.2d 379 (Mo.banc 1991); Hinshaw v. Farmers and Merchants Ins. Co., 912 S.W.2d 70 (Mo.App. E.D. 1995); Trapf v. Commercial Union Ins. Co., 886 S.W.2d 144 (Mo.App. E.D. 1994); and Tapley v. Shelter Ins. Co., 91 S.W.3d 755 (Mo.App. S.D. 2002), where similar policy provisions were held to be unambiguous.

Plaintiffs contend that the policy language is ambiguous, and must be construed against Safeco. Plaintiffs argue that the other-insurance clause, read together with the limit-of-liability language in the UIM policy language, gives rise to an ambiguity that must be resolved in their favor so as to afford UIM coverage. Plaintiffs assert that the policy lacks consistent adjectives to modify what is meant by "other insurance," giving rise to an ambiguity as to the meaning of "underinsured" and whether "other insurance" refers to UIM or tortfeasor liability. Plaintiffs maintain that the policy language is substantially similar to that found to be ambiguous in the following UIM cases: Zemelman v. Equity Ins. Co., 935 S.W.2d 673 (Mo.App. W.D. 1996); Goza v. Hartford Underwriters Ins. Co., 972 S.W.2d 371 (Mo.App. E.D. 1998); Ware v. GEICO Gen'l Ins. Co., 84 S.W.3d 99 (Mo.App. E.D. 2002); and Seeck v. GEICO Gen'l Ins. Co., 212 S.W.3d 129 (Mo.banc 2007).

Standard for Review of a Motion for Summary Judgment

When ruling on a motion for summary judgment, the Court must determine whether the moving party has "the undisputed right to judgment as a matter of law," on the basis of the facts about which there is no genuine dispute. ITT Commercial Finance v. Mid-America Marine

Supply Corp., 854 S.W.2d 371, 380 (Mo.banc 1993). The party moving for summary judgment bears the burden of establishing a right to judgment as a matter of law. Any evidence in the record presenting a genuine dispute as to the material facts defeats the moving party's prima facie showing. Id. at 382; Friedman v. Marshall, 876 S.W.2d 745 (Mo.App. 1994).

Where the movant is a defending party, the movant may establish a right to judgment by negating any one or more of the essential elements of the claimant's cause of action, or by showing that the non-movant after an adequate period of discovery has not been able to produce or will not be able to produce evidence sufficient to allow the trier to find the existence of any one of these elements, or that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ITT at 381; Tresner v. State Farm Ins. Co., 913 S.W.2d 7, 9 (Mo.banc 1995); Thwing v. Reeder, 987 S.W.2d 347, 348 (Mo.App. E.D. 1998).

Once the moving party has met the burden imposed by Rule 74.04(c) by establishing the right to judgment, the non-movant's only recourse is to show by affidavit, depositions, answers to interrogatories, or admissions on file, that one or more of the material facts shown by movant is in fact genuinely disputed. ITT at 381.

Disputes arising from the interpretation and application of insurance contracts are matters of law for the court, where the underlying facts are not in dispute. Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 638 (Mo.App. 1998).

Analysis

To maintain a UIM claim, an insured must demonstrate that (1) he has received bodily injuries; (2) the injuries resulted from an incident involving an underinsured vehicle; and (3) that he is legally entitled to collect from the owner of the underinsured vehicle. Lewis v. State Farm Mut. Auto. Ins. Co., 857 S.W.2d 465 (Mo.App. E.D. 1993). The limits of all applicable policies must be exhausted by payment or settlement before liability arises under UIM coverage. State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 528 (Mo.banc 1994); State ex rel. Sago v. O'Brien, 827 S.W.2d 754 (Mo.App. 1992).

Unlike UM coverage, UIM coverage is not mandatory in Missouri.[3] Therefore, whether such coverage exists and the extent of coverage are generally determined by the language of the contract. Rodriguez v. General Accident Ins. Co., 808 S.W.2d 379, 383 (Mo.banc 1991). In the absence of public policy considerations, an insured and an insurer may freely define and limit coverage by their agreement. Noll v. Shelter Ins. Co., 774 S.W.2d 147, 151 (Mo.banc 1989).

Missouri courts have rejected the notion that an insured is entitled to UIM coverage only if the definition of an underinsured motor vehicle is met under the policy. Chamness v.

[3] Section 379.204 RSMo, however, provides that UIM coverage with less than twice the statutory liability limit shall be construed to provide coverage in excess of any UIM motor vehicle in the accident.

American Family Mut. Ins. Co., 226 S.W.3d 199 (Mo.App. E.D. 2007). Therefore, the Court must look to the policy to determine whether the language at issue gives rise to an ambiguity with respect to other insurance that entitles Plaintiffs to coverage. An insurance policy is ambiguous where there is duplicity, indistinctness, or uncertainty in the meaning of words used in the contract. Krombach v. Mayflower Ins. Co., Ltd., 829 S.W.2d 208, 210 (Mo.banc 1992).

However, courts may not create an ambiguity where none exists or distort the language of an unambiguous insurance policy to provide for coverage for which the parties never contracted, absent a statutory or public policy requirement. Ware v. GEICO Gen. Ins. Co., 84 S.W.3d 99 (Mo.App. E.D. 2002).

Plaintiffs state generally that the other-insurance clause is a "complicated and verbose" modification of the UIM coverage and lacks consistent adjectives to modify "other insurance," thereby giving rise to an ambiguity similar to that found in Zemelman, Goza, and Seeck. In those cases, other-insurance clauses referring to "other similar insurance" in the context of limit-of-liability clauses and anti-stacking provisions were reviewed. The courts found the UIM policies at issue to be ambiguous. Specifically, the courts stated that the term "similar coverage" could be reasonably construed to mean other liability insurance collected from a tortfeasor, not just other UIM coverage.

The other-insurance clause in Safeco's UIM coverage agreement, read together with the limit-of-liability clause, contains no such ambiguity. Safeco's other-insurance clause in the policy here clearly refers to other collectible ***UIM*** insurance, and cannot be construed to mean liability coverage subject to the setoff clause. The Safeco clause does not refer generally to "other collectible insurance" but resembles the language in the clause at issue in cases such as Green v. Federated Mut. Ins. Co., 13 S.W.3d 647 (Mo.App. E.D. 1999), in which the policy at issue stated that UIM insurance provided with respect to a non-owned vehicle "shall be excess over *any other collectible underinsured motorist insurance* " (emphasis added). Such specific language readily distinguishes the present case from the facts of Seeck. *See,* 212 S.W.3d at 132.

Safeco's policy language, taken as a whole, provides that UIM coverage is excess over other primary UIM coverage and cannot be construed to mean other liability coverage. Safeco modifies its other-insurance clause to state that other insurance specifically refers to other UIM coverage. Here, Plaintiffs have recovered the liability policy limit of $50,000 from Ms. Barry's automobile liability insurer, as well as $450,000 from Cincinnati, which also issued to decedent a policy providing UIM coverage in an amount in excess of that provided under Safeco's policy. The definition of an underinsured motor vehicle is satisfied, and the other-insurance clause unambiguously states that recovery is limited where there is other applicable, available UIM coverage, such as that provided by Cincinnati's policy. This sum was paid in connection with the settlement. Therefore, Safeco is entitled to summary judgment as to Count III.

Defendant Cincinnati Insurance Company's motion to strike certain facts stated in Plaintiffs' response to Cincinnati's motion for summary judgment, and motion to strike Plaintiffs' surreply

TO ITS MOTION FOR SUMMARY JUDGMENT, AND MOTION TO DEEM CERTAIN FACTS ADMITTED

The Court has reviewed Cincinnati Insurance Company's motion to strike "certain additional facts in Plaintiffs' response to its motion for summary judgment," filed on August 10, 2009, as well as Cincinnati's motions to strike Plaintiffs' surreply and to deem certain facts admitted, filed on August 18, 2009. The Court has also considered the factual record submitted by the parties.

First, with regard to the motion to strike Plaintiffs' surreply, this Court finds the surreply is not improper, nor did its filing prejudice Defendant. The Court finds that the issues presented by the parties' pleadings and exhibits are sufficiently clear that Cincinnati's motion should be denied. See Agribank FCB v. Cross Timbers Ranch, Inc., 919 S.W.2d 263 (Mo.App. S.D. 1996). Moreover, even if the surreply were struck, the Court would reach the same result as it does below in considering Cincinnati's motion for summary judgment. The surreply consists of a grand total of two pages, the second of which is devoted to the signature of the Plaintiffs' attorney and the certificate of service. On the one page which contains any substance, Plaintiffs merely state their disagreement with Cincinnati's argument as to the import of certain precedents cited by Cincinnati, and then Plaintiffs refer the Court's attention back to a portion of Plaintiffs' original memorandum in response. Cincinnati's motion to strike the surreply borders on being frivolous.

Second, Plaintiffs' response filed July 21, 2009, to Cincinnati's motion for summary judgment, states a number of additional facts which establish that Mr. Widaman stopped his vehicle solely because he saw Ms. Thomas's vehicle go off the roadway, and in order to be of assistance to her.[4]

These facts include that Mr. Widaman was in a position to observe Ms. Thomas's vehicle go airborne after hitting a curb and then travel "very fast" down the steep embankment on the side of the roadway, coming to rest at a point some twelve feet below the roadway; that Ms. Thomas's son suffered cuts on his face from being struck by tree branches as the vehicle traveled down the embankment, and was hysterical even after emerging from the vehicle; that Mr. Widaman activated his emergency flashers when he stopped his vehicle to assist; that Ms. Thomas asked her son to stand by Mr. Widaman before she began her descent down the embankment to retrieve her keys and purse from her vehicle; and that she fell down the embankment as was knocked unconscious. Plaintiffs supported these statements with exhibits, in particular with the deposition testimony of Ms. Thomas, as well as the deposition of the police officer who responded to the scene, and the police report which includes the officer's rough

[4] Plaintiffs' response unnecessarily causes confusion, in that in setting forth in numbered paragraphs admitting or denying Cincinnati's factual statements, Plaintiffs intermingle their admissions of certain facts stated by Cincinnati with Plaintiffs' assertions of additional facts. However, it is clear from the response that Plaintiffs have asserted additional facts. In addition, Plaintiffs have supported their assertions of those additional facts with references to appropriate documentation such as depositions and other exhibits attached to Plaintiffs' response.

diagram of the scene/ reconstruction of the path of Ms. Thomas's vehicle as it left the roadway and came to rest down the embankment.

Cincinnati's arguments that the additional facts asserted by Plaintiffs are immaterial to the issues before the Court are not persuasive. These additional facts all contribute to the circumstances surrounding the events, upon which depends the determination whether or not the rescue doctrine applies. The Court denies Cincinnati's motions to strike the additional facts stated in Plaintiffs' response.

This Court grants Cincinnati's motion to deem as admitted the additional facts stated by Cincinnati in its reply to Plaintiffs' response. Plaintiffs did not include in their surreply any denial of the additional facts stated by Cincinnati. However, none of those additional facts is of any consequence in the determination of Cincinnati's motion for summary judgment. See discussion below as to that motion.

Counts I and II – Defendants' motions for summary judgment as to UM coverage

Issues

There are two issues presented by Defendants' motions as to UM coverage. The first is whether Missouri's "rescue doctrine" applies to the facts relating to the circumstances surrounding the injuries to decedent.

The second question is whether UM benefits are recoverable from Safeco and Cincinnati on the basis of their UM policies, which provide coverage for bodily injury to the insured where the owner's or operator's liability arises out of the "ownership, maintenance or use of the uninsured motor vehicle." Defendants contend that Mr. Widaman's injuries did not result from the "ownership, maintenance or use of [Ms. Thomas's] uninsured motor vehicle." Therefore, Defendants contend that Plaintiffs cannot recover under the UM provisions of their policies. Defendants argue they are entitled to judgment as a matter of law because intervening acts on the part of decedent and Ms. Barry make the rescue doctrine inapplicable to the situation.

Discussion and Analysis

To recover under a UM policy, an insured must show that the other motorist was uninsured, that the other motorist is legally liable to the insured, and damages. Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 715 (Mo.banc 1979). Here, the motions for summary

judgment are based on the Defendants' contention that the uninsured motorist, Ms. Thomas, is not legally liable to the insured, Mr. Widaman. Plaintiffs allege, and Defendants dispute, that Ms. Thomas is legally liable to Plaintiffs under the rescue doctrine. At issue is whether Mr. Widaman was engaged in a rescue at the time he was injured; and whether Mr. Widaman's injuries and death resulted from the "operation" of Ms. Thomas' vehicle.

Applicability of Missouri's "Rescue Doctrine"

This Court notes that there is a legitimate public policy that underlies the rescue doctrine. When persons are in peril, the law should encourage other persons to offer assistance and attempt rescue, so long as the attempt is not so rash or reckless as to imperil either the rescuer, the person or persons in peril, or others.

As famously stated by Justice Cardozo:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."
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> Wagner v. International R. Co., 133 N.E. 437, (N.Y. 1921)

Missouri courts recognized the rescue doctrine more than thirty years before Judge Cardozo's decision in the Wagner case. In Donahoe v. Wabash, St. L. & P. Ry. Co., 83 Mo. 560 (1884), the Missouri Supreme Court's decision discussed the logical premises underlying the doctrine, which is sometimes referred to as the "imminent peril" doctrine. See Robert F. Dierker and Richard J. Mehan, Personal Injury and Torts Handbook, 34 Mo.Prac. §49:10.

A "person who is injured in the course of undertaking a rescue may recover from the person whose negligence created the peril necessitating the rescue so long as the rescuer's conduct is not rash or reckless." Lowrey v. Horvath, 689 S.W.2d 625, 626 (Mo. 1985). A plaintiff may invoke the doctrine to establish that the defendant's negligence in creating the peril was the proximate cause of the injury. Id. at 627. The rationale behind the doctrine is that the victim/defendant's negligence not only imperils the life of the victim but also endangers the defendant's rescuer. Id. (and compare with Justice Cardozo's reasoning in Wagner.) The right of action under the doctrine depends on "the wrongfulness of the defendant's conduct in its tendency to cause the rescuer to take the risk involved in the attempted rescue." Lowrey at 628. The focus is therefore on whether the defendant's negligence reasonably invites the rescue and its corresponding risks.

Defendants argue that Mr. Widaman was not engaged in a rescue attempt at the time of the injury, because Ms. Thomas and her son sustained no serious injuries when her vehicle went off the road and came to rest at the bottom of the embankment, and that because Ms. Thomas and her son were able to get out of their car and climb the embankment, that ended the rescue attempt.

The Court finds this argument to be completely unpersuasive. Whether or not persons in a position of peril actually sustained injury is not a consideration in determining the applicability of the rescue doctrine. This Court does note that an exception would lie when observation of the effects of injuries, such as an observation that a person is bleeding profusely, could be considered as part of the circumstances that are weighed in determining whether the person who attempts a rescue is acting reasonably or recklessly. The greater the observed injury to the person in a position of peril, the more immediate the need for quick action and therefore the less that a rescuer's actions could be considered to be rash or reckless.

Defendants here cannot seriously contend that because Ms. Thomas and her son were successful in getting out of their vehicle and climbing the embankment to the side of the roadway, they were then in a position of safety and no longer in a position of peril. At the very least, that would be a disputed fact for a jury to determine. This Court is confident that if a jury were to find those facts to be true, any jury would certainly find that Ms. Thomas and her son clearly were still in a position of peril even after they climbed up the embankment to where Mr. Widaman had stopped to assist them, because they were then still on the side of a road with no shoulder, with traffic continuing in both directions.

It is also abundantly clear that when Ms. Thomas's vehicle went off the road and down the embankment, her predicament placed her and her child in peril, and it reasonably appeared to Mr. Widaman that she and her son were in a position where they needed help and assistance.

This Court finds that, at the very least, there is a disputed question of material fact as to whether Mr. Widaman's attempt to rescue Ms. Thomas and her son was in still in progress when Mr. Widaman suffered the injuries that resulted in his death. Therefore, summary judgment for the Defendants on the grounds that the rescue was over is denied.

Was Ms. Thomas's operation of her vehicle a cause of Mr. Widaman's injuries and death?

Defendants further argue that, even if the rescue doctrine applies, Ms. Barry's actions in negligently operating her vehicle constituted an intervening cause of Plaintiffs' injuries, such that any causal connection between Ms. Thomas's negligence and Plaintiffs' injuries was severed.

This argument completely misses the point of the rescue doctrine. The elements of the rescue doctrine are: 1) The defendant's negligence creates a condition that endangers the safety of another person; 2) the plaintiff (here, the plaintiffs' decedent) attempts to or does rescue the

endangered person or persons; and 3) as a result of the rescue effort, the plaintiff sustains injuries. See Robert F. Dierker and Richard J. Mehan, Personal Injury and Torts Handbook, 34 Mo.Prac. §49:2, citing Allison v. Sverdrup & Parcel and Associates, Inc., 738 S.W.2d 440 (Mo.App., E.D. 1987). Also, see 7 Am.Jur. Proof of Facts 3d 414 ff., "Imminent Peril Inviting Rescue," an article with a compilation of cases involving the rescue doctrine and similar matters from state and federal courts; and 57A Am.Jur.2d, "Negligence," §§ 649, 652 and 654.

The fact situations in the cases cited by Defendants in support of their arguments can be easily distinguished from the fact situation presented in this case. Defendants cite cases in which the owner or operator of a vehicle was not liable for an injury caused by the discharge of a firearm, even though the firearm was resting in or upon or held by someone in a vehicle. Those cases are concerned with the question of proximate cause of the injury. None of those cases involved the rescue doctrine.

Defendants would have this Court seize on language in those opinions which discusses how the vehicle was not the instrumentality that caused the injury, and would have this Court then find that since Ms. Thomas's vehicle was not the instrumentality that caused the injuries to Mr. Widaman, Ms. Thomas cannot be liable to Mr. Widaman.

This argument is absurd. The discussion of what instrumentality caused the injuries is concerned with the question of proximate cause of the injuries. But the rescue doctrine is a special elaboration on the issue of proximate cause. The logic of the doctrine is that when a person such as Ms. Thomas here, by negligent acts or omissions, causes herself to be in a position of peril, society's interest in encouraging others to take action to assist her results in a recognition that a person such as Mr. Widaman who undertakes to assist a person in peril necessarily puts himself also in a position of peril. Because of that societal interest, the law further recognizes that the negligence that created the condition of peril is itself a proximate cause of any injury to the person attempting a rescue.

The person who attempts the rescue, thereby engaging in actions that expose that person to peril, is allowed to recover for injuries suffered during the course of the attempt at rescue, because society wants to encourage such attempts. It is clear in reading the many cases where the rescue doctrine has been invoked that there is no element included that the injury to the rescuer be caused by the "instrumentality" used by the person who got into the position of peril.

Defendants' entire argument about proximate cause is completely irrelevant to the applicability of the rescue doctrine here.

In addition, even if one were to consider the question whether Ms. Thomas's negligent operation of her vehicle was the proximate cause of Mr. Widaman's injuries, or whether the intervening negligence of Ms. Barry acted to sever the causal relation between Ms. Thomas's negligence and Mr. Widaman's injuries, the motion for summary judgment would still be denied because the question of whether there has been an efficient, intervening cause that serves to sever

the causal relation between the injury complained of and a prior negligent act is a fact question for the jury.

When two or more individuals engage in negligent conduct closely related in time, and another individual suffers injury as a result, the proximate cause question arises as to whether the initial act of negligence was a proximate cause of the injury, or whether the second act of negligence constitutes an intervening cause that terminates the causal relation between the injury and the first act of negligence. See Buck v. Union Elec. Co., 887 S.W.2d 430, 434 (Mo.App. E.D. 1994). The question of proximate cause and efficient, intervening cause is usually a question for the jury, and requires each case to be decided on its own facts. Buchholz v. Mosby-Year Book, Inc., 969 S.W.2d 860, 862 (Mo.App. E.D. 1998). One case seldom controls another. Schaffer v. Bess, 822 S.W.2d 871 (Mo.App. 1991). Negligent conduct ceases to be the proximate cause of an injury only when the intervening act constitutes such a new and independent cause that it interrupts, rather than contributes to, the chain of events set in motion by the original negligence. Plummer v. Dace, 818 S.W.2d 317, 321 (Mo.App. E.D. 1991) (emphasis added).

Because it is a jury question as to whether an intervening act has severed the causal relation between the first act of negligence and the injury, the motion for summary judgment must be denied, because that question alone is a disputed issue of material fact.

However, even when one considers the intervening negligence of Ms. Barry as a contributing cause to Mr. Widaman's injuries, the mere fact that Ms. Barry's negligence came after Ms. Thomas's does not sever the causal connection between Ms. Thomas's negligence and Mr. Widaman's injuries. In order for Ms. Barry's negligence to be considered to be a superceding cause, her actions must not be a foreseeable consequence of the original negligent act. Buchholz, 969 S.W.2d at 862; Vintila v. Drassen, 52 S.W.3d 28, 41-2 (Mo.App. 2001).

The question is not whether the tortfeasor could have foreseen the injury at the time of the accident but "whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the defendant's act or omission." Esmond v. Bituminous Cas. Corp., 23 S.W.3d 748, 752-3 (Mo.App. W.D. 2000). Here, Ms. Thomas and her son were in a position of peril when Ms. Thomas's car went off the road and down the embankment. Why a position of peril? Because the fact that her car went off the road and down the embankment made it obviously foreseeable that another car might do the same; and if such happened while Ms. Thomas and her son were still in the car at the bottom of the embankment, or getting out of the car, or climbing back up the embankment, or having reached the top being in a position on the side of the roadway with traffic passing and no protection and not even a shoulder of the road, the result would likely be serious injury or death of either or both Ms. Thomas and her son. The fact that persons who stop to assist others on the side of the roadway are struck by other vehicles is sadly far from a rare occurrence.

Therefore, the negligence of Ms. Barry in operating her vehicle, though a contributing cause to the injuries of Mr. Widaman, was not an efficient, intervening cause that severed the causal relationship between Ms. Thomas's negligence and the injuries to Mr. Widaman. Both Ms. Barry and Ms. Thomas are liable to Mr. Widaman for his injuries and death as a result of their negligent acts.

This Court finds, as a matter of law, that it is foreseeable that a person who stops and gets out of a vehicle in order to provide assistance to another person in a position of peril on the side of the roadway can be struck by another vehicle; and therefore, the negligent acts of the person operating the vehicle that strikes the person who stops do not sever the causal relationship between the negligent acts that caused the other person to be in a position of peril.

This Court finds that summary judgment for the Defendants based on the argument that Ms. Thomas's negligence was not foreseeable, and therefore not a proximate cause of Mr. Widaman's injuries, is not merited.

The remaining issue is whether Ms. Thomas is the owner or operator of an uninsured motor vehicle as defined in Defendants' policies, such that Plaintiffs can recover UM benefits. CIC's policy (No. CPA0889600) provides as follows:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or operator of an "uninsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or operator's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".

Similarly, Safeco's policy (No. Z4008880) provides:

> We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury:**
>
> 1. Sustained by an **insured;** and
> 2. Caused by an accident.
>
> The owners' or operators' liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle.**

Defendants contend that decedent's death did not arise out of or result from the ownership, maintenance or use of Ms. Thomas's vehicle because there is no connection between the use of her vehicle and the accident involving Ms. Barry's vehicle, in which decedent was struck. Plaintiffs counter that the language "arise out of" and "result from" should be broadly construed and that any causal connection is sufficient.

In the context of UM coverage, the word "use" is interpreted by Missouri courts to require that the uninsured automobile be more than the "situs" of the injury. Ward v. International Indemn. Co., 897 S.W.2d 627, 628 (Mo.App. E.D. 1995). Defendants rely on language in opinions in which the courts have stated that the automobile must be the instrumentality that caused the injury. Id.

This is merely a re-working of Defendants attempt to confuse principles relating to the determination of proximate cause with the principles underlying the rescue doctrine.

It is clear that under the plain language of the UM provisions of both Defendants' policies, it was Ms. Thomas's use of her vehicle which resulted in her and her child being in a position of peril, such that Mr. Widaman stopped his vehicle to attempt to rescue them; and that the liability of Ms. Thomas to Mr. Widaman and his survivors arose out of such use.

Clearly, when viewed in that context, Ms. Thomas's vehicle was the "instrumentality" that caused the injuries to Mr. Widaman. It is true that Ms. Barry's vehicle was also an instrumentality that caused the injuries to Mr. Widaman, but as discussed above the mere fact that one tortfeasor's negligence contributed to cause injury does not automatically relieve another tortfeasor from liability. Both vehicles were "instrumentalities" that contributed to cause Mr. Widaman's injuries. The drivers of both vehicles are liable to Mr. Widaman. The liability of Ms. Thomas is not relieved by the liability of Ms. Barry.

ORDER AND JUDGMENT

WHEREFORE, the Court grants the motion of Defendant Safeco Insurance Company of Illinois for summary judgment as to Count III, and that Count is dismissed.

The Court denies the motions of Defendant Cincinnati Insurance Company to strike "certain additional facts in Plaintiffs' response to its motion for summary judgment" and to strike Plaintiffs' surreply.

The Court grants Defendant Cincinnati's motion to deem admitted certain facts stated in its reply to Plaintiffs' response.

The Court denies the motion for summary judgment as of Defendant Safeco Insurance Company of Illinois to Count I of Plaintiffs' petition; and denies the motion for summary judgment of Defendant Cincinnati Insurance Company as to Count II.

SO ORDERED:

Edward Sweeney, MBE #24064
Circuit Judge

The Clerk shall mail or deliver copies of this Order to:

1. John A. Lally, Attorney for Plaintiffs
   1401 S. Brentwood Blvd.
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2. Lee Karge, Attorney for Defendant CIC
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3. Michael Kornblum, Attorney for Defendant Safeco
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