

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

(St. Louis City)

Nicholas Fritchey

FILED
JUN 10 2009

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

VS

Shelter Mutual Insurance Company

CASE NO. 0622-CC06697

DIVISION 11

June 10, 2009

JUDGMENT AND ORDER

The pertinent facts and trial proceedings are stipulated or are undisputed. Defendant drivers Nguyen and Huskic were involved in an auto collision on Highway 55 in the City of St. Louis. They cleared one car from the highway, but left a second car stopped in a through lane on the highway. Plaintiff and an uninsured motorist then collided with the stopped car.

Plaintiff sued Defendants Nguyen and Huskic for personal injury for their negligence. Plaintiff also sued his own insurance carrier, Defendant Shelter Mutual Insurance Company, for the negligence of the uninsured motorist.

Plaintiff settled with the two individual Defendants before trial for a total of \$40,000. Plaintiff proceeded to trial against Defendant Shelter on the uninsured motorist claim. Plaintiff's uninsured motorist policy coverage limit is \$50,000.

The jury assessed Plaintiff's damages at \$40,000 (roughly the amount of his medical specials), assessed Plaintiff's fault at eighty percent and assessed the uninsured motorist's fault at twenty percent, leaving a net verdict of \$8,000 against Defendant Shelter.

Defendant Shelter had pleaded, as an affirmative defense, that it should be entitled to set off against its uninsured motorist liability the \$40,000 already paid to Plaintiff by the two settling Defendants. Shelter pleaded the offset "pursuant to Section 537.060 [RSMo., concerning contribution and release among joint tort-feasors], subject to the terms of [Plaintiff's insurance] policy."

After the trial the parties briefed and argued the setoff issue to the Court. The Court took the matter under submission, and now enters its judgment and order.

The UM coverage in the insurance policy issued by Shelter to Plaintiff provides that "Any amount ... payable under [UM coverage] will be reduced by any amount paid ... for the same damage to ... an insured, by ... any person ... who is legally liable for the bodily injury to such insured [or] who may be held legally liable for the bodily injury to such insured."

In *Hunt v. Everett*, 181 S.W.3d 248 (Mo. App.W.D. 2006), the trial court found an ambiguity

in a Shelter insurance UM setoff clause similar to that in the present case. The trial court construed the ambiguity against Shelter and refused to enforce the setoff. The appeals court affirmed. Defendant Shelter asserts that it has now eliminated the ambiguity from its standard policy language such that the setoff provision in the present case is clear and unambiguous and is therefore enforceable.

Plaintiff counters that any setoff against the first \$25,000 of UM coverage (the statutory minimum coverage required) would violate public policy as provided for in the Motor Vehicle Financial Responsibility Law, Chapter 303 RSMo., and Section 379.203 RSMo. (In *Hunt*, the court found the setoff unenforceable solely because of ambiguity and said specifically that the court was not addressing the public policy argument that Plaintiff makes here.)

After consideration of the parties' arguments and legal briefs the Court finds that the setoff allowed in tort actions to a trial defendant for damages paid by settling defendants under Section 537.060 RSMo. is not available to Defendant Shelter. The UM action against Shelter is based on its insurance contract with Plaintiff, and Shelter is not a joint tort-feasor with the settling defendants in this case as required by the statute.

The Court further finds, however, that the setoff provision of Defendant Shelter's UM coverage in this case is clear and unambiguous. The ambiguity that was fatal in *Hunt* is not present here. The policy clearly claims the right to set off against Shelter's UM liability any damages paid by the settling Defendants Nguyen and Huskic.

This leaves only Plaintiff's argument that, since Missouri law requires Shelter to provide \$25,000 minimum UM coverage to Plaintiff as an auto insurance policyholder, and since Plaintiff paid his policy premiums, any setoff against the minimum required coverage is void as against public policy.

Plaintiff relies on several cases, all of which recite that "It is the public policy of Missouri established by the uninsured motorist statute ... that each insured under such coverage have available the full statutory minimum to exactly the same extent as would have been available had the tort-feasor complied with the minimum requirements of the financial responsibility Law." *Webb v. State Farm Mut. Auto. Ins. Co.*, 479 S.W.2d 148, 152 (Mo. App. W.D. 1972).

Although many appellate cases recite the public policy statement relied upon by Plaintiff, none has been cited to this Court that reaches the conclusion advocated by Plaintiff that a UM carrier can never contract with a policyholder to offset any payments by settling defendants against the statutory minimum coverage.

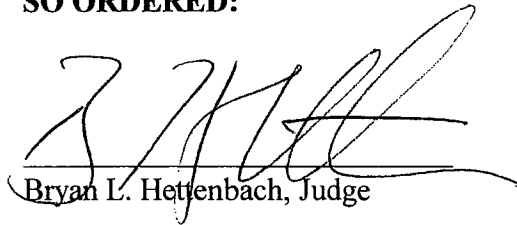
In the present case, if the uninsured tort-feasor had insurance he would have been allowed at trial, under Section 537.060 RSMo., to "reduce the claim [against him] by the ... amount of consideration paid [by the settling Defendants]." Thus, in this case, application of the contractual setoff claimed by Defendant Shelter leaves Plaintiff in exactly the same position he would have been in had the tort-feasor been insured and claimed the statutory setoff.

The purpose of UM coverage is not to provide coverage for the uninsured motorist but to protect the insured from inadequate compensation in the event of an accident involving an uninsured motorist. *Gordon v. Maupin*, 469 S.W.2d 848, 851 (Mo. App. E.D. 1971). Here Plaintiff is compensated as adequately as he would have been if the uninsured motorist had been insured. On

these facts, under the existing appellate cases, this Court cannot void the contractual setoff in Defendant Shelter's UM policy coverage.

The jury awarded Plaintiff \$40,000 in damages, and assessed eighty percent fault to Plaintiff and twenty percent fault to the uninsured motorist. The Court, having accepted the jury's verdict, accordingly hereby enters judgment in favor of Plaintiff and against Defendant Shelter Mutual Insurance Company in the sum of \$8,000, which sum is hereby reduced to zero by operation of the offset of the monies previously paid by settling Defendants Nguyen and Huskic. Since the jury returned a verdict for Plaintiff, despite the resulting offset, costs are taxed against Defendant Shelter Mutual Insurance Company.

SO ORDERED:



Bryan L. Hettenbach, Judge

cc: Todd I. Muchnick and Aaron D. Haber, attorneys for Plaintiff
Seth G. Gausnell, attorney for Defendant Shelter Mutual Insurance Company