

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

JORY GESSNER and RUTH GESSNER,
individually and the marital community
composed thereof,

Plaintiff,

v.

GMAC INSURANCE, a Foreign Corporation,
f/d/b/a NATIONAL GENERAL INSURANCE
COMPANY,

Defendant.

CASE NO. CV-01-06591

MEMORANDUM OPINION
AND ORDER IN RE:
MOTION FOR
SUMMARY JUDGMENT

Insureds seek to collect from their insurer on underinsured motorist coverage after Plaintiff Jory Gessner was injured in a motorcycle-automobile accident. Defendant GMAC moved for Summary Judgment. Motion granted in part and denied in part.

Stephen D. Phillabaum and Mary Ellen Gaffney-Brown, PHILLABAUM, LEDLIN, MATHEWS & GAFFNEY-BROWN, attorneys for Plaintiffs.

Christopher C. Burke and Eric R. Bjorkman, COSHO, HUMPHREY, GREENER & WELSH, attorneys for Defendant.

I

GENERAL BACKGROUND

On October 14, 1999, Trina Bacca pulled onto Atlas Road in Kootenai County, Idaho, and attempted to make a U-turn. In the process, her vehicle struck the 1994 Kawasaki motorcycle operated by Jory Gessner.

At the time of the accident, Trina was insured by State Farm. Before a lawsuit was filed, State Farm settled with Jory Gessner and his wife, Ruth Gessner, for the policy limits of \$50,000.00.

Also, at the time of the accident, Jory was covered by a policy for motorcycle insurance through National General Insurance Company (now GMAC and hereinafter referred to as "GMAC"). Gessners made a claim for underinsured motorist ("UM") coverage under the policy. GMAC rejected the claim on grounds that Gessners did not have such coverage. Gessners filed the instant lawsuit seeking a declaratory judgment for coverage under the UM provision of the insurance policy.

II

FACTUAL AND PROCEDURAL BACKGROUND

Jory and Ruth Gessner reside in Otis Orchards, Washington. Jory Gessner was employed in Idaho. He regularly commuted to work on the 1994 Kawasaki motorcycle that he was riding at the time of the accident. All of the motorcycles owned by Gessners were titled and registered in Washington. Jory was licensed to drive in the state of Washington and his driver's license contained an endorsement to ride motorcycles.

GMAC is a Missouri insurance company. Gessners first purchased a policy of motorcycle insurance from GMAC after viewing an advertisement in a motorcycle magazine. In March of 1990, Ruth Gessner placed a call to a representative of GMAC from her residence in Washington. GMAC issued a motorcycle insurance policy to Jory Gessner for the policy period of March 13, 1990 to March 13, 1991. The initial policy provided insurance coverage for the two motorcycles then in Gessners' possession – a 1973 Kawasaki and a 1983 Kawasaki.

The initial Gessner insurance policy did not provide either uninsured motorist or underinsured motorist coverage. GMAC sent a form titled "Rejection of Underinsured Motorists Coverage" to Gessners. Gessners specifically rejected the UM coverage and Jory signed the form.

Gessners' motorcycles were insured by GMAC continuously between March of 1990 and March of 2000. Each year, Gessners entered into coverage for a new policy period. Each year – usually in early March shortly before the annual renewal date on March 13th – GMAC mailed a renewal notice to Gessners at their home in Washington. These Declarations Pages contained a statement of the types of coverages, the limits of coverages, the deductibles applicable, and the premiums due for insurance coverages for the upcoming year.

At least until April of 1998, the Declarations Pages did not include UM coverage. Gessners acknowledge that they did not have UM coverage under the policies in existence prior to that time.

In April of 1998, Gessners purchased the 1994 Kawasaki motorcycle. On April 27, 1998, Ruth telephoned GMAC for the purpose of advising GMAC that Gessners had a new motorcycle and wanted insurance coverage for it. Ruth spoke with David Snyder, who was a GMAC customer service representative at the time.¹ Ruth said that Gessners wanted “full coverage” on the 1994 Kawasaki motorcycle. Ruth understood the term “full coverage” to mean whatever coverage GMAC offered, including UM coverage. Ruth advised Snyder that the 1994 Kawasaki would be used to commute to Jory’s employment in Idaho. Ruth also changed the coverage for the 1983 Kawasaki motorcycle to delete comprehensive collision and motorcycle accessories coverage and retain only liability coverage.

At the time of the change in April of 1998, GMAC required every customer service representative to record information about the telephone communication with a policyholder in an electronic message file under the customer’s name and insurance policy number. While Snyder does not remember his conversation with Ruth, his electronic message indicates that the coverage for the 1994 Kawasaki was to be “full coverage.” Snyder understood “full coverage” to be liability coverages plus comprehensive, collision, and motorcycle accessories coverage, but not UM coverage.

After changes were made to policies, it was customary for GMAC to send a new Declarations Page to the policyholder. Accordingly, a Declarations Page for the policy period of April 28, 1998 to March 13, 1999 was sent to Gessners.

¹ Snyder is no longer employed by GMAC. At the time of the changes, Ruth was involved in all of the conversations with GMAC; Jory did not have any conversation with GMAC about the insurance coverage.

That Declarations Page set forth the new coverages. A copy of that Declarations Page is attached hereto as Exhibit "A" and incorporated herein. Because the coverages had changed, the amount to be paid also changed to reflect an increase in the amount of the premium. At the time of the change, GMAC did not send a "Rejection of Underinsured Motorists Coverage" form and, consequently, Jory did not sign such a form.

In March of 1999, Gessners again renewed the policy for another year. A Declarations Page was sent to them and they remitted the premium payment for the coverages stated on the Declarations Page. Thereafter, Jory was involved in an accident in October of 1999.

After the accident, Gessners attempted to collect on UM coverage under their policy. According to Gessners, they believed that "full coverage" included UM coverage. Gessners' claims were rejected by GMAC. According to GMAC, "full coverage" does not include UM coverage.

On October 15, 2001, Gessners filed the instant lawsuit. After GMAC filed its Answer, it moved for Summary Judgment. In support of the Motion for Summary Judgment, GMAC has filed affidavits and submitted a statement of undisputed facts and legal briefs. In opposition to the Motion, Gessners have filed an affidavit and have submitted a reply to the statement of undisputed facts and a brief. At a hearing on the Motion, both parties presented oral argument.

III

STANDARDS FOR SUMMARY JUDGMENT

Rule 56(c), Idaho Rules of Civil Procedure provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In order to make that determination, the court looks to “the pleadings, depositions, and admissions on file, together with the affidavits, if any”

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. If the court will be the ultimate trier of fact and if there are no disputed evidentiary facts, the judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment; rather, the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. ***Bonz v. Sudweeks***, 119 Idaho 539, 808 P.2d 876 (1991); ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 758 P.2d 406 (Ct.App. 1987), *rev. denied* (1988).

According to ***Berg v. Fairman***, 107 Idaho 441, 444, 690 P.2d 896 (1984), the “purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.”

In the instant case, the facts in the record must be liberally construed in favor of the Plaintiffs, who are the non-moving parties here. Inferences may be drawn, however, from the uncontroverted evidence.

IV

QUESTION PRESENTED

Did the Gessners request and reasonably expect to receive underinsured motorist coverage on the 1994 Kawasaki motorcycle under the insurance policy issued to them by GMAC?

V

THE STATE LAW TO BE APPLIED

The first issue that must be addressed is the law that should be applied. In this case, Gessners were residents of Washington, but the accident occurred in Idaho. When reaching substantive determinations in this case, GMAC contends that the law of Washington should apply while Gessners contend that the law of Idaho should apply.

A. The Choice of Laws for Contract Interpretation Apply

In the instant case, Gessners seek “a declaratory judgment for full coverage under the GMAC Insurance Underinsured Motorist Coverage policy” Complaint for Declaratory Judgment, p. 3. Although this case arose as a result of injuries sustained in a vehicle/motorcycle collision, it is clearly not a tort case. Rather, this case concerns the coverage provided under the insurance contract.

Gessners seek coverage under the underinsured motorist provision of the GMAC policy. Jory rejected underinsured motorist coverage, but that was prior to the time when Gessners added insurance coverage for the 1994 Kawasaki motorcycle.

Gessners urge this Court to apply the doctrine of promissory estoppel so that “full coverage” will include underinsured motorist coverage. According to Gessners, it is not necessary to consider the choice of law issue because this case is simply a question of whether or not promissory estoppel applies. They contend that this is not a question of contract interpretation or construction.

The basic question that is presented in this case is whether or not there is coverage under the underinsured motorist provision of the insurance contract. In reaching a determination, promissory estoppel must be considered. While there may be a question of promissory estoppel, the ultimate question is whether the insurance policy included UM coverage and whether Gessners are entitled to UM payment. The final decision involves interpreting an insurance contract and the coverage afforded to the insured under that contract. Therefore, the choice of law for cases involving contract interpretation applies here.

B. The Washington Law Applies in this Case

The GMAC insurance policy did not contain a choice of law provision. In the absence of a choice of law provision in the contract, the Idaho law with regard to choice of law will govern since the case was brought in Idaho.

In cases where there is a question of contract interpretation and where the parties have not set forth a choice of law in the contract, the Idaho courts have

adopted the “most significant relationship” test set forth in the Restatement Second of Conflict of Laws, Ch. 8, § 188, to determine which state’s law will apply in a particular case. ***Unigard Insurance Group v. Royal Globe Insurance Co.***, 100 Idaho 123, 594 P.2d 633 (1979). ***See also Ryals v. State Farm Mutual Automobile Insurance Co.***, 134 Idaho 302, 1 P.3d 803 (2000).

The determination and application of the appropriate choice of law to be applied in a case is a question of law. ***Ryals v. State Farm Mutual Automobile Insurance Co.***, *supra*.

In ***Unigard Insurance Group v. Royal Globe Insurance Co.***, the Idaho Supreme Court set forth the following test:

Law Governing in Absence of Effective Parties’ Choice. (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the State which, as to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The A.L.I. Conflicts Restatement Second (proposed official draft) § 6 provides in part as follows

“Choice of Law Principles.

...
(2) When there is no [statutory] directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,

- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Unigard Insurance Group v. Royal Globe Insurance Co., 100 Idaho at 126.

The standards set forth above must now be applied to the facts of this case. The particular issue in this case involves coverage under an insurance policy. All of the contacts are important and all of the contacts are in the State of Washington. For example, the Gessners are residents of Washington, the GMAC insurance policy was negotiated and agreed to by the Gessners in Washington, and the motorcycles that were the subject of the insurance policy are titled and registered in Washington. In negotiating and executing the insurance contract, both Gessners and GMAC reasonably and justifiably expected that the laws of Washington, where Gessners resided and the motorcycles were titled and registered, would apply. Furthermore, the State of Washington has an interest in the determination of insurance issues regarding its insured citizens and policies issued to its citizens. When the contacts and factors are considered, the conclusion is that Washington has the most significant relationship with the transaction and the parties in this case. Therefore, Washington law must be applied.

C. The Insurance Policy does not include UM Coverage on its Face

Under Washington law, interpretation of an insurance policy is a matter of law. ***Allstate Insurance Co. v. Raynor***, 143 Wash.2d 469, 21 P.3d 707 (2001);

American Star Insurance Co. v. Grice, 121 Wash.2d 869, 854 P.2d 622 (1993).

An insurance contract must be interpreted as an average insurance purchaser would understand it and the terms in the policy must be given their plain and ordinary meaning. The language of an insurance policy must be interpreted in accordance with the way it would be understood by the average person, rather than in a technical sense. ***Allstate Insurance Co. v. Raynor, supra***. If the language of an insurance policy is clear and unambiguous, the court may not modify the contract or create an ambiguity. ***American Star Insurance Co. v. Grice, supra***.

The GMAC insurance policy issued to Gessners consisted of an Insurance Policy and Declarations Pages. The Declarations Pages were issued by GMAC to Gessners on an annual renewal basis.

The Insurance Policy contained a Part C, which was an “uninsured Motorists Coverage” section. That part does not apply in this case because of a policy amendment.²

The Declarations Pages did not list underinsured motorist coverage or charge for such coverage. The only coverages listed on the Declarations Page renewal notice for the policy period of 03/13/99 to 03/13/00 are: bodily injury liability; property damage liability; passenger liability; comprehensive; collision; and accessory coverage.

The Insurance Policy and the Declarations Pages are not ambiguous. On its face, the insurance policy issued to the Gessners, which included the

² An endorsement to the policy was entitled “Amendment of Policy Provisions – Washington.” It specifically stated that “Part C does not apply.”

Insurance Policy and the Declarations Pages, does not provide for UM coverage. To the extent that there may be any issue regarding the coverage provided for pursuant to the language of the GMAC insurance policy issued to Gessners, GMAC is entitled to Summary Judgment.

D. Estoppel cannot be used to Extend or Broaden Coverage

Under Washington law, equitable estoppel is precluded where an insured attempts to broaden coverage to protect against risks not included in the insurance policy. *Shows v. Pemberton*, 73 Wash.App. 107, 868 P.2d 164 (1994); *Carew, Shaw and Bernasconi, Inc. v. General Casualty Co. of America*, 65 P.2d 689 (Wash. 1937). According to *Shows v. Pemberton*,

The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the Doctrine of Waiver or Estoppel.

The rationale underlying *Carew* is that an insurer should not be required to pay for a loss for which it received no premium. In those situations where the insured attempts to broaden coverage to protect against risks not included in the policy or expressly disclaimed therein, such rationale precludes estoppel. (Citations omitted.)

Shows v. Pemberton, 868 P.2d at 166. There are some exceptions when the general rule does not apply, but those exceptional circumstances are not present here.³

³ The exceptions include, but are not limited to, such situations as where the insurer accepts premiums for which no coverage is provided or where an adjustor fails to file a proof of loss after representing that he would. In such cases, the insured relied on statements or conduct of the agent subsequent to issuance of the policy and, but for the estoppel, the policy would have been forfeited. *Shows v. Pemberton, supra*.

In this case, Gessners are seeking to extend the coverage under their insurance policy with GMAC to include UM coverage. This case does not involve a forfeiture of an insurance policy. Under the Washington law, Gessners cannot rely upon the Doctrine of Equitable Estoppel. Therefore, to the extent that Gessners may be relying on the Doctrine of Equitable Estoppel, GMAC is entitled to Summary Judgment.

E. A Genuine Issue of Material Fact Exists on Promissory Estoppel

Washington law recognizes a claim for promissory estoppel. “Promissory estoppel” must be distinguished from “estoppel” or “equitable estoppel” as it has been addressed in the section above. **See** BLACK’S LAW DICTIONARY, 7th ed., pp. 570-71.

The elements of promissory estoppel are:

(1) a promise (2) the promisor should reasonably expect to cause the promisee to change his position, and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise in such a manner that (5) injustice can be avoided only by enforcement of the promise.

Jones v. Best, 134 Wash.2d 232, 950 P.2d 1 (1998); **S. A. Weitman v. Grange Insurance Association**, 370 P.2d 587 (Wash. 1962) (citing **Hill v. Corbett**, 204 P.2d 845 (1949)); **Spooner v. Reserve Life Insurance**, 287 P.2d 735 (Wash. 1955); **Irwin Concrete, Inc. v. Sun Coast Properties, Inc.**, 33 Wash.App. 190, 653 P.2d 1331 (1982).

Promissory estoppel renders a promise made without consideration enforceable. **King v. Riveland**, 125 Wash.2d 500 (1994); 886 P.2d 160 (1994). While equitable estoppel is available only as a shield or defense, promissory

estoppel can be used as a sword. **Klinke v. Famous Recipe Fried Chicken**, 94 Wash.2d 255, 616 P.2d 644 (1980).

The first prerequisite of promissory estoppel is a promise. **Irwin Concrete, Inc. v. Sun Coast Properties, Inc., supra**. In order for the rule of promissory estoppel to apply, there must be a real promise to be enforced. An action in reliance upon a supposed promise creates no obligation on an individual whose only promise is wholly illusory. A supposed promise may be illusory because it is so indefinite that it cannot be enforced. **Spooner v. Reserve Life Insurance Co., supra**.

Another element of promissory estoppel is justifiable reliance.⁴ Under Washington law, the insured has the duty to instruct his agent. The instructions must be clear, explicit, and positive. If the instructions are ambiguous or obscure and are subject to different interpretations, the agent is justified in acting in good faith upon either of two reasonable constructions. **American States Insurance Co. v. Breesnee**, 49 Wash.App. 642, 745 P.2d 518 (1987).

Washington courts have also held that, where the facts are known to both parties of the alleged promise or both parties have the same means of ascertaining the truth, there can be no promissory estoppel. Justifiable reliance does not exist when the party seeking estoppel has knowledge of contrary facts. **S. A. Weitman v. Grange Mutual Association, supra**. Otherwise stated, the party asserting estoppel must show both the lack of knowledge and the absence of any convenient and available means of acquiring such knowledge. **Overhulse**

⁴ The cases addressing “justifiable reliance” often arise in the context of equitable estoppel, but they apply as well in cases involving that element of promissory estoppel.

Neighborhood Association v. Thurston County, 94 Wash.App. 593, 972 P.2d 470 (1999).

The facts in this case must be viewed most favorably to the non-moving parties, who are the Gessners. This Court is permitted, however, to draw inferences from any undisputed facts.

Ruth requested “full coverage” when she added the 1994 Kawasaki motorcycle to the insurance policy. Furthermore, Ruth understood that term to mean that Gessners were obtaining all of the coverage that GMAC had to offer. The agent’s electronic message file confirms that Ruth requested and obtained “full coverage.” The agent had been trained, however, to understand that “full coverage” did not include UM coverage. Gessners signed a rejection form for UM coverage when they originally obtained insurance coverage from GMAC. When the 1994 Kawasaki was added, they were not asked to sign a rejection form; from this, Gessners believed that their request for “full coverage” included UM coverage because, on the previous occasion, GMAC required a written rejection form to exclude UM coverage from the policy. When the Declarations Page arrived, there was an increase in the premium amount. From the increase, Gessners could have believed that they were obtaining additional coverage for the newly purchased motorcycle, including UM coverage.

When the foregoing facts are considered, it can be determined that there is a genuine issue of material fact as to whether or not there was a promise by GMAC to insure Gessners for full coverage, including underinsured motorist coverage. Furthermore, there is a genuine issue of material fact as to whether or

not Gessners could justifiably rely upon the promise by GMAC to provide full coverage.

This is a close case and Gessners may not be able to prevail at trial. When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested in court before the trier of fact. ***Argyle v. Slemaker***, 107 Idaho 668, 691 P.2s 1283 (Ct.App. 1984). Because there are genuine issues of material fact with regard to promissory estoppel, GMAC is not entitled to Summary Judgment on this issue.

VI

CONCLUSION AND ORDER

Based on the foregoing discussion, it is hereby ORDERED that the Motion for Summary Judgment by Defendant, GMAC Insurance, be and the same is hereby granted in part and denied in part as set forth herein.

DATED this _____ day of September, 2003.

John Patrick Luster
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing
MEMORANDUM OPINION AND ORDER IN RE: MOTION FOR SUMMARY
JUDGMENT was mailed, postage prepaid, sent by facsimile transmission, or
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ALL FIRST DISTRICT COURT JUDGES

The Honorable Don L. Swanstrom
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By: _____
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