

SC 89728

IN THE SUPREME COURT OF MISSOURI

KARRI KINNAMAN-CARSON and RANDY CARSON,
Appellants,

v.

WESTPORT INSURANCE CORPORATION,
Respondent.

**Appeal from Circuit Court of Jackson County, Missouri on Transfer
After Opinion by the Missouri Court of Appeals, Western District**

RESPONDENT'S SUBSTITUTE BRIEF

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PRELIMINARY STATEMENT

An auto owned by ABC, driven by Norton, hit the Karri Kinnaman-Carson auto. Norton and her passenger, Hopkins, were killed. Plaintiffs, Karri Kinnaman-Carson and Randy Carson, sued ABC claiming the auto it owned was taken from a lot owned by separate defendant, Falco, where Hopkins, a claimed employee of ABC Tow, lived. ABC told Westport that Hopkins did not and never had worked for ABC, but ABC agreed that the vehicle had been stolen from Falco's lot where ABC had transferred it to be crushed.

Westport had issued a CGL policy which excluded coverage if ABC was liable for damages arising from the use of an auto ABC owned. Westport also issued an auto policy to ABC covering described autos. ABC had not reported the auto involved in the accident, nor was the auto newly acquired. Westport offered to defend under a reservation of rights to deny coverage, and requested additional information from plaintiffs' counsel. The requested information was not forthcoming, and ABC rejected the offered defense.

ABC settled with the plaintiffs without advising Westport. As part of the settlement, ABC consented to a default judgment up to \$1.7 million pursuant to §537.065 RSMo. A "bench trial" was then arranged without notice to Westport. ABC's attorneys made no argument, made no objections to evidence offered, and offered no evidence. Plaintiff Randy Carson testified he heard a tow truck driver who worked for an unrelated tow truck company say at the accident scene that the tow truck driver recognized Hopkins

as a man who worked for ABC. Plaintiff also offered hearsay evidence that the vehicle was stolen from ABC's lot (as opposed to taken from Falco's lot as claimed in the Petition and as reported to Westport by ABC). Although the issues raised by the Petition involved liability and damages, Plaintiffs had the court approve the settlement as fair and reasonable. ABC waited until after the judgment became final to notify Westport of the settlement and judgment. The Carsons filed this equitable garnishment, and have tried to claim that factual issues of liability, damages and reasonableness of the settlement were conclusively established by the proceedings at the "bench trial." Westport, in defending the equitable garnishment, seeks to adjudicate that the settlement and proceedings based on the settlement are fraudulent, collusive, and unreasonable. Westport also denied, and continues to deny, coverage for the claims.

Westport moved for summary judgment on its coverage denial. Based on Plaintiffs' failure to raise their claims of coverage under the auto policy or their claims of waiver and estoppel in their response to Westport's Summary Judgment Motion as to coverage, Plaintiffs have abandoned these claims.

The trial court granted Westport summary judgment, and Carsons appealed, raising the following four points: In Point I of their Appellate Brief, Appellants claimed that coverage was not excluded by reason of the first paragraph of Westport's Exclusion G; In Points II and III of their Appellate Brief, Appellants claimed that coverage was similarly not excluded by reason of the second paragraph of Exclusion G; and in Point IV of their Appellate Brief, Appellants claimed waiver and estoppel by Westport to assert a coverage denial.

The Court of Appeals determined there was no coverage for Appellants' claims based on the first paragraph of Exclusion G in the Westport policy, but did not decide whether coverage was also excluded under the second paragraph of Exclusion G. The Court of Appeals also determined that Appellants had abandoned their claims of waiver and estoppel against Westport. After the decision by the Court of Appeals, Appellants filed a request for transfer to this court. In their transfer motion, Appellants essentially asked this court to reconcile apparent differences with the Eastern District opinion in *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98 (Mo. App. E.D. 1995), and later decisions handed down from the Eastern District Court of Appeals, the Southern District Court of Appeals, the Western District Court of Appeals, and the United States District Court and Eighth Circuit of the United States Federal Courts.

Point I of Appellants' Substitute Brief filed with this Court claims that the trial court and the Court of Appeals erred in determining that the first paragraph of Westport's Exclusion G excludes coverage for Appellants' claims. Appellants' Substitute Brief does not challenge the second paragraph of Westport's Exclusion G, although Appellants' argument supporting Point I does raise some challenges that were raised in the Court of Appeals regarding the second paragraph of Exclusion G. These arguments/"challenges" were not considered by the Court of Appeals based on its holding that Appellants' claims were excluded by the first paragraph of Exclusion G, so it was not necessary to consider the application of the second paragraph of Exclusion G. Appellants also continue to attempt to assert their waiver and estoppel claim, which Appellants improperly raised for

the first time to the Court of Appeals, after abandoning these claims in Appellants' response to Westport's Summary Judgment that was granted by the trial court.

STATEMENT OF FACTS

On or about August 27, 2005, Plaintiffs Karri Kinnaman-Carson and Randy Carson (hereinafter “Carsons”) commenced an action in the Circuit Court of Jackson County, Missouri, styled *Karri Kinnaman-Carson and Randy Carson, Plaintiffs v. ABC Specialty, Inc., d/b/a ABC Tow, a/k/a ABC Tow, Frank Falco, Frank Falco, d/b/a Falco’s Truck and Auto Salvage a/k/a Falco East Truck and Auto Parts Hold Service and Sharon Norton, (deceased), Defendants*, Case Number 0516-CV29901 (L.F. 148). Carsons’ Petition was amended to assert claims against the same Defendants on June 12, 2006 (L.F. 157). This is referred to as the “underlying action.”

The underlying action filed by Carsons against defendants ABC, Falco and Norton arose out of an automobile accident that occurred on August 28, 2004, in Independence, Missouri, involving a vehicle owned by Karri Kinnaman-Carson and a Honda Civic owned by ABC Specialty, Inc. (hereinafter “ABC”). At the time of the accident, ABC’s Honda Civic was being used and driven by Shannon K. Norton, and Wallace Hopkins was a passenger in the Honda Civic. Both Norton and Hopkins died as a result of the accident. Mrs. Carson claimed she sustained personal injury and Mr. Carson claimed to have sustained loss of consortium caused by the automobile collision with the Honda Civic owned by ABC, and allegedly negligently used by Norton (L.F. 159, Count I).

Carsons claimed Falco (a separate defendant who was never served) agreed to store ABC’s Honda at Falco’s storage yard. Carsons also alleged that Hopkins was ABC’s employee and that he lived on Falco’s premises. Further, it was alleged that Falco knew of Hopkins’ criminal past, and that this knowledge created a duty by Falco to keep

all vehicles, including ABC's Honda, away from Hopkins' use. Carsons claimed that Falco breached this duty by giving Hopkins keys to the Honda, which ultimately led to Hopkins obtaining use of the vehicle and then giving use of it to Norton (L.F. 164-165, Count III).

Carsons claimed that ABC knew of Hopkins' criminal past but failed to prevent him from using or entrusting ABC's Honda to Norton. As a result of ABC's claimed negligent hiring of Hopkins, Hopkins was trained and supervised in procedures related to ABC's autos which, combined with Hopkins' alleged criminal propensities, led to Hopkins obtaining the unauthorized use of ABC's vehicle, which Hopkins then gave to Norton for her use, which was unrelated to ABC's business (L.F. 160-164, Count II and Count III).

On August 1, 2006, Carsons settled all of their claims against ABC and entered into a settlement agreement pursuant to §537.065 RSMo. Carsons agreed not to levy execution or garnishment to collect the settlement, or to otherwise try to hold ABC financially responsible for the settlement. Carsons agreed to limit their recovery only to that from any insurer which insured the legal liability of the defendant ABC in regard to the Carsons' claims. ABC agreed to allow Carsons to take a default judgment against it for \$1.7 million, finding liability against ABC (L.F. 174-176, §537.065 RSMo Settlement Agreement).

On August 15, 2006, Westport offered to defend ABC in Case No. 0516-CV29901 under a reservation of rights (L.F. 4, ¶ 16). On August 16, 2006, ABC refused Westport's offer to defend under a reservation of rights (L.F. 4, ¶ 17). On August 29,

2006, a judgment was entered pursuant to the settlement and pursuant to §537.065 RSMo in favor of Karri Kinnaman-Carson for \$1,074,128.00, and in favor of Randy Carson for \$300,000.00 (L.F. 178-184). On October 15, 2006, Carsons initiated an equitable garnishment proceeding against Westport pursuant to §379.200 RSMo, seeking to collect the proceeds of an insurance policy Westport issued to ABC (L.F. 1). ABC was also named in that action but, at Carsons' request, was never served (L.F. 1).

Carsons' Petition in their garnishment action fails to assert claims that Westport is estopped to deny coverage or claims that Westport has knowingly waived its coverage defenses (L.F. 1).

Westport's Summary Judgment Motion, Carsons' Response to the Motion, and Westport's Reply contain no facts or arguments claiming that Westport is estopped to assert coverage defenses or has waived coverage defenses (L.F. 405-469).

Westport specifically denied that its insurance policy insured ABC for Carsons' claims, and/or for the Carsons' settlement and judgment entered against ABC pursuant to §537.065 RSMo. Westport also asserted affirmative defenses of fraud and collusion (Hopkins was not and never had been an employee of ABC and ABC had not been in possession of the vehicle after it was transferred to separate Defendant Falco's storage facility). Westport also asserted the affirmative defense that the settlement agreement of \$1.7 million, reduced to judgment for \$1,374,128.00, was unreasonable (L.F. 188). The defenses of unenforceability of the settlement agreement because of fraud, collusion and unreasonableness were not considered by the trial court because the trial court found,

without considering those defenses, that there was no insurance coverage for the claims asserted by the Carsons in Carsons' Amended Petition against ABC.

Westport had denied that the automobile section of its insurance policy issued to ABC provided coverage for Carsons' claims because the Honda was not a described auto identified in the policy as required by the automobile section of the policy (L.F. 195). This was not contested by Carsons at the trial court, nor was this contested on appeal (L.F. 411, 440).

Westport also denied that the comprehensive general liability section of its insurance policy issued to ABC provided coverage for the claims for bodily injury or property damage made, settled and reduced to judgment against ABC, because only claims to which this insurance applies are insured and Exclusion G states this insurance does not apply to:

g. Aircraft, Auto or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury”

or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

(L.F. 57, 59).

Westport moved for summary judgment on the coverage issues at the trial court level (L.F. 408), and Westport’s Motion for Summary Judgment, based on its denial that there was coverage for the claims asserted by the Carsons, was sustained (L.F. 474). The trial court sustained the Motion for Summary Judgment by Westport. [Summary Judgment Motion (L.F. 408); Trial Court Order sustaining Summary Judgment Motion (L.F. 474)]. The Carsons appealed (L.F. 470).

The Missouri Court of Appeals for the Western District affirmed the trial court’s grant of summary judgment to Westport (Missouri Court of Appeals, Western District Case No. WD68761, A-13). In affirming, the Court of Appeals did not address the concurrent cause doctrine because it held Carsons had not pled viable concurrent cause facts. ABC’s alleged negligence as pled by Carsons as a matter of law was not a concurrent cause of Carson’s injuries (Court of Appeals Opinion, p. 6, fn. 4, A-18.) The Court of Appeals concluded there was no coverage for the claims made because of the exclusionary language of the first paragraph of Exclusion G of Westport’s policy. The Court of Appeals did not address the effect of the alleged exclusion of coverage for Carsons’ claims resulting from the exclusionary language contained in the second paragraph of Exclusion G of Westport’s policy, since the Court of Appeals held there was

no coverage under the exclusion under the first paragraph (Court of Appeals Opinion, p. 9, fn. 5, A-21).

Per the Carsons' request, the Court of Appeals entered its Order transferring these proceedings to the Supreme Court.

POINTS RELIED ON

(*Respondent's Points I and II are in Response to Appellants' Points I and II contained in the Substitute Brief submitted to the Supreme Court; Respondent's Points III and IV are additional Points as allowed by M.R.C. P. 84.04(f) and 83.08(b))

- I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT CARSONS' CLAIMS AGAINST ABC ARE EXCLUDED FROM COVERAGE BY THE FIRST PARAGRAPH OF EXCLUSION G OF WESTPORT'S POLICY.**

American States Ins. Co., v. Porterfield, 844 S.W.2d 13, 15, 16

(Mo. App. W.D. 1992)

Gateway Hotel Holding, Inc., et al. v. Lexington Insurance Company,

2008 WL 4205055 (Mo. App. E.D. 2008)

Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Mo., Inc., 864 S.W.2d 5

(Mo. App. W.D. 1993)

In Re Estate of Murley, 250 S.W.3d 393 (Mo. App. S.D. 2008)

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT CARSONS' CLAIMS AGAINST ABC WERE NOT COVERED BY WESTPORT'S INSURANCE POLICY AND WESTPORT HAS NOT WAIVED ITS DEFENSES TO COVERAGE, NOR IS IT ESTOPPED TO ASSERT THESE DEFENSES, AS: (A) CARSONS DID NOT PLEAD THAT WESTPORT HAD WAIVED ITS POLICY DEFENSES; (B) NO FACTS OR ARGUMENTS WERE PRESENTED IN OPPOSITION TO WESTPORT'S MOTION FOR SUMMARY JUDGMENT RAISING SUCH A CLAIM; AND (C) AS A MATTER OF LAW BASED ON THE RECORD, WESTPORT INSURANCE DID NOT WAIVE ITS COVERAGE DEFENSES NOR IS IT ESTOPPED TO ASSERT SAID DEFENSES.

Austin v. Pickett, 87 S.W.3d 343 (Mo. App. W.D. 2002)

Charron v. Holden, 111 S.W.3d 553, 555 (Mo. App. W.D. 2003)

Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588 (Mo. banc 2007)

Savory v. Hensick, 143 S.W.3d 712, 719 (Mo. App. E.D. 2004)

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT BOTH THE SECOND PARAGRAPH OF EXCLUSION G AND THE FIRST PARAGRAPH OF EXCLUSION G EXCLUDE COVERAGE FOR CARSONS' CLAIMS AGAINST ABC.

American States Ins. Co. v. Porterfield, 844 S.W.2d 13 (Mo. App. W.D. 1992)

Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Mo., Inc., 864 S.W.2d 5

(Mo. App. W.D. 1993)

In Re Estate of Murley, 250 S.W.3d 393 (Mo. App. S.D. 2008)

Savory v. Hensicki, 143 S.W.3d 712, 719 (Mo. App. E.D. 2004)

IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE POLICY DOES NOT APPLY TO CARSONS' CLAIMS AGAINST ABC AS: (A) COVERAGE IS EXPRESSLY EXCLUDED BY THE SECOND PARAGRAPH OF EXCLUSION G; (B) THE CLAIMS ARE NOT INDEPENDENT FROM THE OWNERSHIP, USE OR MAINTENANCE OF AN AUTO OWNED BY ABC AND THUS ARE EXCLUDED BY THE FIRST PARAGRAPH OF EXCLUSION G; AND (C) THE CLAIMS ARE NOT INDEPENDENT FROM THE SUPERVISION, HIRING, EMPLOYMENT, TRAINING OR MONITORING OF OTHERS, AND THE OCCURRENCE WHICH CAUSED THE CLAIMED BODILY INJURY INVOLVED THE OWNERSHIP, MAINTENANCE, USE OR ENTRUSTMENT OF AN AUTO OWNED BY ABC, AND THUS ARE EXCLUDED BY THE SECOND PARAGRAPH OF EXCLUSION G.

American Family Mut. Ins. Co. v. Co Fat Le, 439 F.3d 436 (8th Cir. 2006)

American States Ins. Co. v. Porterfield, 844 S.W.2d 13 (Mo. App. W.D. 1992)

Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Missouri., Inc., 864 S.W.2d 5

(Mo. App. W.D. 1993)

In Re Estate of Murley, 250 S.W.3d 393 (Mo. App. S.D. 2008)

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT CARSONS' CLAIMS AGAINST ABC ARE EXCLUDED FROM COVERAGE BY THE FIRST PARAGRAPH OF EXCLUSION G OF WESTPORT'S POLICY.

Carsons' Amended Petition asserts claims against three separate persons or entities (Falco, Norton and ABC) in four counts. In Count I, Carsons seek to recover damages because of bodily injury caused by Norton's alleged negligent use of a Honda owned by ABC. In Count II and Count III, Carsons seek to recover damages for bodily injury they claim was caused by ABC's allegedly negligent hiring of Hopkins. Carsons claim that ABC's negligent hiring of Hopkins, combined with ABC's negligent supervision, training or monitoring of Hopkins as to procedures which may have prevented the unauthorized use of the Honda owned by ABC and ultimately driven by Norton, occurred as the result of Hopkins obtaining the unauthorized use of ABC's Honda. Hopkins then gave Norton access to the Honda, which resulted in Norton's unauthorized use and negligent driving, which caused Mrs. Carsons' alleged bodily injury.

In Count IV of their Amended Petition, Carsons seek to recover damages for this bodily injury which they claim was caused by separate defendant Falco's negligence in storing ABC's Honda at his salvage yard, where he allowed Hopkins to live, and in

negligently giving Hopkins a key to ABC's Honda, when Falco knew or should have known of Hopkins' criminal propensities. Carsons allege that this combination of acts by Falco allowed Hopkins to obtain the unauthorized use of the Honda, which Hopkins then gave to Norton, who negligently drove the automobile resulting in the collision with the Carsons. Norton and Falco were never served.

Westport's policy of insurance issued to ABC states in relevant part:

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies . . . (L.F. 56).
2. Exclusions. This insurance does not apply to: (L.F. 57)
 - g. Aircraft, Auto or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the "occurrence" which caused

the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured. (L.F. 59).

The Court of Appeals’ Opinion also summarizes these relevant facts in the portion of its Opinion titled “Factual Background” (A-13 through A-15). It appears that Carsons (“Appellants”) have combined Points I – III set forth in their appellate Brief as “Point I” in their Substitute Brief submitted to the Supreme Court.¹ Westport’s argument submitted to the Court of Appeals in response to Appellants’ “Point I” submitted in its Substitute Brief to the Supreme Court is contained in the Appendix to this Brief (A-1 through A-12). The Court of Appeals’ Opinion similarly addresses Appellants’ Substitute Supreme Court Brief “Point I” under the portion of its Opinion titled “Analysis,” attached hereto (A-16 through A-25).

The Court of Appeals denied Appellants’ argument that the first paragraph of Exclusion G of Westport’s policy was not intended to apply to stolen vehicles, but would only exclude coverage if the auto owned by the insured was used with permission. The Court of Appeals also denied Appellants’ argument that Exclusion G in Westport’s policy applied only when an insured was using the auto for a business purpose of the insured. Appellants’ arguments set forth in their Appellate Court brief that the policy exclusion only applied if the auto use was permissive or for a business purpose have been

¹ This is improper pursuant to M.R.C.P. 83.08(b), though Respondent will attempt to respond accordingly.

abandoned by Appellants in their Substitute Brief submitted to the Supreme Court (*M.R.C.P. Rule 83.08(b)*). However, should Appellants attempt to raise these abandoned issues to the Supreme Court in oral arguments, Westport's response to the abandoned issues are attached hereto at A-12.

The second paragraph of Exclusion G in Westport's policy clearly and plainly excludes coverage for the claims pled in Plaintiffs' Amended Petition. Westport's argument in support of this statement is contained in Points III and IV of this Brief being submitted to the Supreme Court. Based on the Court of Appeals' determination that Westport's policy excluded coverage for the claims pled in Plaintiffs' Amended Petition under the first paragraph of Exclusion G, the Court of Appeals found it unnecessary to determine whether the second paragraph of Exclusion G of Westport's policy also excluded coverage. Appellants' Substitute Brief does not include a separate Point Relied On to challenge Westport's claim that the second paragraph of Exclusion G also excludes coverage for Carsons' claims. This is important since the trial court's decision granting Westport's Motion for Summary Judgment is also correct and should be sustained because of Westport's argument to the trial court that the second paragraph of Exclusion G also excludes coverage for the Carsons' claims. While Carsons responded to this argument in the trial court and challenged the trial court's ruling by raising two Points in the Court of Appeals, they have not included in their Substitute Brief to this Court a Point to advance Carsons' arguments why the second paragraph of Exclusion G should not be interpreted to exclude coverage for their claims also. However, even though the Points Relied On submitted by Appellants in their Substitute Brief to the Supreme Court do not

address the second paragraph of Exclusion G, in their Substitute Brief beginning at page 41 through 49, Appellants do argue that the trial court's decision is unsupported based on the language of the second paragraph of Exclusion G. If the Supreme Court elects to entertain Appellants' arguments in this regard, Westport's response is asserted in Points III and IV of this Substitute Brief. There is no coverage for Carsons' claims under the plain language of the second paragraph of Exclusion G, which states:

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

It appears to Respondent that the Supreme Court's interest in this case is created in whole or in part by the comments in Footnote 6 of the Appellate opinion².

² Footnote 6 of the Court of Appeals' decision reads as follows: "Although we find the Eastern District's decisions in *Centermark*, *Neal* and *Bowan* to be distinguishable for the reasons discussed in the text, we note that Westport raises colorable challenges to those cases' interpretation of the automobile exclusion, and their consistency with decisions of this court which we are bound to follow. See *Capital Indem. Corp. v. Haverfield*, 218 F.3d 872, 875 (8th Cir. 2000) (citing *Centermark*, and noting "split" between Eastern and Western District cases concerning similar coverage question arising under assault and battery exclusion). In particular, it may be difficult to reconcile this Court's decision in *Budget Rent-A-Car* – which found no coverage for the insured's allegedly negligent failure to prevent unauthorized use of a vehicle – with *Centermark*, which found coverage for a claim that could generally be described in the same way.

Further, the Supreme Court’s interest in this case was likely linked to the recent requests, and ultimate denials by the Supreme Court, to accept transfer of *In Re Estate of Murley*, 250 S.W.3d 393 (Mo. App. S.D. 2008) and *Gateway Hotel Holding, Inc., et al. v. Lexington Ins. Co.*, WL 4205055 (Mo. App. E.D. 2008). Both *Murley and Gateway Hotel Holding* are inconsistent with the Eastern District decision in *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98 (Mo. App. E.D. 1995).

“We also note that in *Centermark* and *Neal*, the courts found an automobile exclusion inapplicable because the particular *claim* or *theory of liability* asserted against an insured did not (necessarily) require attendant automobile usage to cause injury. *See Centermark*, 897 S.W.2d at 101 (“we find coverage based on the fact that there are *allegations of negligence* that appear independent” of automobile ownership or use (emphasis added); *Neal*, 922 S.W.2d at 209 (noting that “[t]he liability of grandparents in this case will not be founded on the ownership and use of the vehicle” (emphasis added)). But the automobile exclusion at issue in those cases like the exclusion at issue here – is triggered if the claimant’s “[b]odily injury’ or ‘property damage’ aris[es] out of [automobile] ownership [or] use.” As Westport notes, “[t]he exclusion is not about theories of the claim – it is about causes of bodily injury.” Whatever the liability theory, it could plausibly be argued that in *Centermark* and *Neal* – as here – the bodily injury “ar[os]e out of” an automobile’s use; but for the operation of an automobile, no injury would have occurred.

“Finally, there is a legitimate question whether *Centermark*, *Neal* and *Bowan* properly invoked the “concurrent causation” doctrine. At least according to Eighth Circuit decisions applying Missouri law, a “concurrent cause” is one which “could have independently brought about the injury.” *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007) (citing *Co fat Le*, 439 F.3d at 439); *but see Byars v. St. Louis Pub. Serv. Co.*, 66 S.W.2d 894, 900 (Mo. 1933) (“concurrent causes are defined to be ‘causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either’ (citation omitted)). Although *Centermark*, *Neal* and *Bowan* observed that the insured’s alleged negligence *could have* caused injury independent of automobile usage, the injury in which case *in fact* occurred only because the insured’s allegedly negligent acts *were combined with* automobile use.”

Should the Supreme Court desire, the case at hand presents an opportunity to address the following issues:

(1) Did *Braxton v. USF&G*, 651 S.W.2d 616 (1983) introduce a “concurrent cause doctrine” into the law of Missouri?

(2) If so, is the “concurrent cause doctrine” the law of Missouri? So stated in *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007), quoting *American Family Mut. Ins. Co. v. Co Fat Le*, 439 F.3d 436, at 439 (8th Cir. 2006). However, the existence of the doctrine was questioned, though not decided, in both *Green v. Penn-American Insurance Co.*, 242 S.W.3d 374 (Mo. App. W.D. 2007) and in Footnote 4 of the Appeals Court Opinion in the case at hand.

(3) What is a “concurrent cause” in the context of an insurance coverage exclusion? Is a “concurrent cause” one which “could have independently brought about the injury,” as discussed in *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007), citing *Co Fat Le*, 439 F.3d at 439, *Centermark Properties, Inc. v. Home Indem. Company*, 897 S.W.2d. 98 (Mo. App. E.D. 1995), *In Re Estate of Murley*, 250 S.W.3d. 393 (Mo. App. S.D. 2008), and *Gateway Hotel Holding, Inc., et al. v. Lexington Insurance Co.*, 2008 WL 4205055 (Mo. App. E.D. 2008)? Or is a “concurrent cause” simply one or two or more causes acting contemporaneously which together cause the injury and which the injury would not have resulted in the absence of either, as defined in *Byars v. St. Louis Pub. Service Co.*, 66 S.W.2d 894, 900 (Mo. 1933)?

(4) If a “concurrent cause” is a cause that could have independently brought about the injury, how is such a cause recognized so as to differentiate a dependent cause

from an independent cause? Is the differentiation based on legal theories? Is the differentiation based on elements in legal theories? Is the differentiation based on an analysis of what is a remote or intervening cause as opposed to a direct proximate cause? Is it based on the inter-related facts relied on?

(5) If the “concurrent cause doctrine” does exist, was the doctrine properly invoked in *Centermark Properties, Inc. v. Home Indem. Company*, 897 S.W.2d 98 (Mo. App. E.D. 1995), *Columbia Mut. Ins. Co., v. Neal*, 992 S.W. 2d 204 (Mo. App. E.D. 1999), and *Bowan ex rel. Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W. 3d 1 (Mo. App. E.D. 2005)?

(6) If the “concurrent cause doctrine” was properly invoked in *Centermark*, *Neal* and *Bowan*, can those decisions be distinguished and reconciled with the decisions of the Courts of Appeals in *Hartford Casualty Ins. Co. v. Budget Rent-A-Car Mo., Inc.*, 864 S.W.2d 5 (Mo. App. W.D. 1993), *American States Ins. Co. v. Porterfield*, 844 S.W.2d 13, 15, 16 (Mo. App. W.D. 1992), *Hunt v. Capital Indem. Co.*, 26 S.W.3d 341 (Mo. App. E.D. 2000), *In Re Estate of Murley*, 250 S.W.3d 393 (Mo. App. S.D. 2008), *Gateway Hotel Holding, Inc., et al. v. Lexington Ins. Co.*, 2008 WL 4205055 (Mo. App. E.D. 2008), and with the Eighth Circuit opinion in *Am. Family Mutual Ins. Co. v. Co Fat Le*, 439 F.3d 436, at 439 (8th Cir. 2006), and *Allstate Ins. Co. v. Blount*, 491 F.3d 903 (8th Cir. 2007)?

(7) If the Courts of Appeals' decisions cannot be reconciled, what should the Supreme Court do?

Respondent does not presume to add new insight to the insights and observations recently made by the Western District Court of Appeals in the case at hand, by the Southern District Court of Appeals in *In Re Estate of Murley*, or by the Eastern District Court of Appeals in *Gateway Hotel v. Lexington Ins.* It is Respondent's position that each of these referenced Opinions handed down by the various Missouri Appellate Courts correctly determined that coverage did not exist under the relevant exclusions, based on the facts that were presented in each of those cases.

In comparison, the *Centermark* case should be disapproved and/or overruled by the Supreme Court, as it has been generally disagreed with or distinguished as is shown by its citation history. The *Centermark* case did not correctly invoke the concurrent cause doctrine, and therefore, was wrongfully decided. Simply stated, *Centermark* cannot be reconciled with the decisions in *Hartford v. Budget-Rent-A Car*, *In Re Estate of Murley*, or the Western District Court of Appeals decision in the case at hand.³

³ The *Neal* opinion [*Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204 (Mo. App. 1998)] can be reconciled. The grandparents negligently allowed their two-year-old grandson to end up in the driveway while they should have been supervising him. He then was run over by someone driving an auto the grandparents owned. The use of the grandparents' auto was not a foreseeable consequence of their negligent supervision of the grandchild. The use of the auto in the *Centermark* case, however, was a foreseeable consequence of the negligent policies and practices related to confining prisoners in an auto owned by Centermark, because it was foreseeable that if the prisoners got away they would use the insured's auto to escape. The *Neal* claims are similar to the Kinnamon-Carson claims against ABC. Kinnamon-Carson's claims are simply that ABC's negligence foreseeably resulted in the use of ABC's auto, and plaintiffs' damages arose out of the use of that auto.

Appellants' Brief first argues that the first paragraph of Exclusion G does not exclude Carsons' claims because Carsons contend Exclusion G only applies to permitted auto usage. Appellants' argument, in a nutshell, is that the Westport general liability policy applies to automobiles owned by ABC which are stolen. However, ABC's actual liability for damages arising as a result of the use of a stolen automobile is not raised by Appellants in the appeal of this case. If coverage for such claims had been asserted by Appellants, Westport intended to challenge the position that ABC has liability for the negligent use of an automobile stolen from it. Should this case ultimately be remanded by the Supreme Court or the Appellate Court, Westport's challenge in this regard will arise on remand and Westport will raise the defenses of fraud, collusion and unreasonableness of the settlement. However, it does seem somewhat ironic to be arguing over coverage for a claim that may not state a cause of action, before the validity of an owner's liability claim for negligence in allowing an automobile to be stolen, which is then negligently used to injure a tortfeasor, is determined. *See, e.g. Dix v. Motor Market, Inc.*, 540 S.W.2d 927 (Mo. App. 1976), which holds that no such claim exists.

Appellants' next argument why the first paragraph of Exclusion G does not exclude coverage for Carsons' claims is an argument that Carsons' claims are an independent and separate negligence claim from claims arising out of the ownership, maintenance or entrustment to others of ABC's automobile. As such, Carsons contend the concurrent cause doctrine applies. In its Opinion, the Court of Appeals explained why the Carsons' claims are not independent and separate claims within the meaning of the concurrent cause doctrine. The Court of Appeals' analysis and explanation in this

regard is incorporated by reference herein. In Appellants' Substitute Brief submitted to the Supreme Court on p. 29-31, Appellants assert claims labeled A-J, all of which add up to claims of negligence related to the control of an automobile owned by ABC. As a result of these acts of alleged negligence, all of which related to preventing the foreseeable use of autos in ABC's control, an auto ABC owned was used by a thief who then negligently collided with Plaintiff Karri Kinnaman-Carson. Appellants' claims in this regard do not equate to independent and distinct allegations of negligence as opposed to claims of liability for damages arising out of the use of ABC's auto. The concurrent cause doctrine does not apply to these claims.

On pages 35-40 of Appellants' Substitute Brief submitted to the Supreme Court, Appellants set forth their argument as to why the Court of Appeals erred in determining that the concurrent cause doctrine applied to the Carsons' claims. The Appellants argue that 1) *Centermark* got the issue right without addressing the substantive legal points raised in the Court of Appeals decision questioning *Centermark*; and 2) that the *Murley* case is distinguishable somehow because the insured was the person operating the pickup truck when the injury occurred. After much thought, it escapes Respondent why Appellants find this *Murley* distinction to be relevant. Appellants then go on to apparently admit at p. 38 of their Substitute Brief that there is a conflict between the *Centermark* case and *Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Mo., Inc.*, 864 S.W.2d 5 (Mo. App. 1993). However, on the very next page of their Substitute Brief on p. 39, Appellants seem to say that the Carsons' case is somehow distinguishable.

However, Respondent fails to see any actual distinction raised in the Appellants' Brief to distinguish *Budget Rent-A-Car*.

Westport summarizes by saying that the Carsons' damages arose out of the use of an auto owned by ABC. Based on the policy's unambiguous language stating it excludes coverage when ABC has alleged liability arising out of the use of an auto it owns, it does not matter why ABC has alleged liability for the use of its auto. What difference does it make if ABC negligently allowed the use of its auto, negligently hired employees who were likely to use its auto without permission, had negligent procedures for storage of its autos, or negligently supervised its employees in regard to storage of its autos? The policy specifically and unambiguously states that none of these issues/facts matter, and the policy also clearly states that if ABC is liable for damages arising out of the use of an auto it owns, there is no coverage.

In conclusion, the decisions of the various Missouri Courts of Appeals in *American Family Mut. Ins. Co. v. Co Fat Le*, 439 Fed.3d 436 (8th Cir. 2006); *Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Missouri, Inc.*; 864 S.W.2d 5 (Mo. App. W.D. 1993); *Gateway Hotel Holding, Inc., et al. v. Lexington Ins. Co.*, 2008 WL 4205055 (Mo. App. E.D. 2008); and *In Re Estate of Murley*, 250 S.W.3d 393 (Mo. App. S.D. 2008) are correct. The Eastern District's decision in *Centermark* is incorrect. The decision of the Court of Appeals and the trial court in the Respondent's favor in the case at hand should be sustained by this Supreme Court.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT CARSONS' CLAIMS AGAINST ABC WERE NOT COVERED BY WESTPORT'S INSURANCE POLICY AND WESTPORT HAS NOT WAIVED ITS DEFENSES TO COVERAGE, NOR IS IT ESTOPPED TO ASSERT THESE DEFENSES, AS: (A) CARSONS DID NOT PLEAD THAT WESTPORT HAD WAIVED ITS POLICY DEFENSES; (B) NO FACTS OR ARGUMENTS WERE PRESENTED IN OPPOSITION TO WESTPORT'S MOTION FOR SUMMARY JUDGMENT RAISING SUCH A CLAIM; AND (C) AS A MATTER OF LAW BASED ON THE RECORD, WESTPORT INSURANCE DID NOT WAIVE ITS COVERAGE DEFENSES NOR IS IT ESTOPPED TO ASSERT SAID DEFENSES.

Carsons' Equitable Garnishment Petition (L.F. 1) fails to state a claim to establish coverage by estoppel and/or waiver. A pleading must plead ultimate facts to state a claim. This requires a short concise statement of material facts to establish the elements of the claim. *See* M.R.C.P. 55.05, as discussed, for example in *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App. W.D. 2003).

The elements to establish coverage by promissory estoppel are: (1) a promise; (2) on which a party relies to his detriment; (3) in a way the promissor expected or should have expected, and (4) resulting in an injustice that only the enforcement of the promise

could cure. *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588 (Mo. banc 2007). Carson's Petition does not plead material facts to establish a claim of estoppel (L.F. 1-9).

Waiver requires an intentional relinquishment of a known right. The conduct must be so manifestly consistent with and indicative of an intention to remove a particular right or benefit that no other reasonable expectation of the conduct is possible. *Austin v. Pickett*, 87 S.W.3d 343 (Mo. App. W.D. 2002). Similarly, Carsons' Petition does not plead facts to establish a waiver by Westport (L.F. 1-9).

Appellants are improperly attempting to add new claims to their action on appeal that were not preserved for appeal. *See Savory, supra*. This is not permitted since the appeal is a review of the trial court's proceedings – not a new proceeding.

In their Response to Westport's Motion for Summary Judgment, Carsons failed to raise or establish the facts necessary to assert theories of waiver and/or estoppel. M.R.C.P. 74.04(c)(2) requires a party responding to a summary judgment motion to make an appropriate response to the material facts offered in support of the motion. That procedure allows the respondent to raise additional material facts that remain in dispute, or that are necessary issues needed to resolve the claims by consecutively numbered paragraphs, in addition to the facts set forth by the movant. The Rule also calls for those additional facts to be supported as required by M.R.C.P. 74.04(c)(1) – with specific references to the pleadings, discovery and exhibits or an affidavit that demonstrates the material facts asserted.

Westport's Summary Judgment Motion set forth supporting material facts as required by Rule 74 (L.F. 408-411), which do not contain facts related to estoppel and/or

waiver. Carsons' Response to Westport's uncontroverted facts did not raise additional facts material to waiver or estoppel (L.F. 438-440). No argument was made by Carsons to the trial court that Westport's Motion for Summary Judgment should have been denied on the grounds of estoppel or waiver (L.F. 438-452).

While the standard of review on appeal in regard to an Order granting summary judgment is a *de novo* review of the record to see if the Order granting summary judgment is proper, the review is *de novo* only as to matters raised properly in the court below. *See Savory, supra*. Here, in essence, Carsons seek, in effect, to amend their Petition on appeal to assert claims of estoppel and waiver. Then, on appeal, they bring up new alleged facts as a defense to Westport's Motion for Summary Judgment without complying with M.R.C.P. 74.04(c)(1). Carsons go even further and, in effect, ask this Court to grant summary judgment in their favor that there is coverage because of waiver and/or estoppel, without ever having raised these claims in the trial court.

The appeal is a *de novo* review of the proceedings below, not a new proceeding. This point is improperly raised and is not a basis to reverse the trial court's summary judgment granted to Westport.

On the merits, as a matter of law, Westport is entitled to summary judgment against Carsons and ABC on waiver/estoppel claims. Carsons and ABC settled all claims between themselves August 1, 2006 (L.F. 174-177), pursuant to §537.065 RSMo. When Westport (unaware of the settlement) offered to defend the Carsons' claims against ABC under a reservation of rights on August 15, 2006 (L.F. 171), ABC refused the offer the next day on August 16, 2006 (L.F. 172).

The Carsons and ABC then reduced their settlement to judgment as contemplated by §537.065 RSMo on August 29, 2006 (L.F. 178-184). On September 22, 2006,⁴ Westport advised ABC's attorney that it had agreed to defend ABC without a reservation of rights in the lawsuit brought by the Carsons, and that it looked forward to working with ABC in regard to the same (L.F. 173). At that time, there were no claims to be defended because of the settlement. There was no lawsuit to defend because the insured had agreed to a settlement consenting to a judgment by default for an amount in excess of the insured's policy limits, which was then reduced to judgment in an amount arguably equal to the insured's policy limits with an agreement that there would be no financial responsibility to pay anything on these claims, nor would there be any judgment lien in regard to these claims, all pursuant to §537.065 RSMo.

No prejudice resulted to either Carsons or ABC as a result of Westport's initial offer to defend under a reservation of rights. Carsons took this as an opportunity to reduce their claims to judgment pursuant to the settlement they had made, before the offer to defend under a reservation of rights, which allowed them to take a judgment pursuant to §537.065 RSMo. Carsons were thereby able to enforce a settlement as long as the settlement was reasonable and free of fraud and collusion, and to proceed to litigate the insurance coverage issues. In addition, Carsons claim that because they "had a trial" in the underlying action, they are allowed to foreclose any review of the reasonableness

⁴ ABC and the Carsons first advised Westport of the settlement and judgment after the appeal time ran when Carsons demanded payment of the judgment. This fact was not put in the record because the estoppel/waiver issue was never raised by the pleadings or Westport's Summary Judgment motion. It is not a necessary fact for determining, however, that the alleged waiver has not been proven.

of the settlement or fraud and/or collusion in the coverage dispute – a misunderstanding of the applicable Missouri law related to a review of a §537.065 RSMo settlement and the applicable Missouri law related to the doctrines of *res judicata* and collateral estoppel (L.F. 388-402).⁵

ABC has benefited as it was able to settle the Carsons' claims without any possible risk of exposure in excess of the limits of their policy, or exposure to claims not insured by their policy. As a matter of law, there are no facts in this case that support a conclusion that Westport has coverage by estoppel or has waived its policy defenses.

In conclusion, Carsons failed to state claims to establish coverage by estoppel or waiver, and cannot raise these claims for the first time on appeal. Carsons also failed to

⁵Hopkins was not and never had been an employee of ABC. Carsons' claim that Hopkins was a former or past employee was supported by false testimony of Mr. Carson based on alleged hearsay statements made to him by a person who was not an agent or employee of ABC. ABC had reported to Westport and has given sworn deposition testimony in this case that it never employed Hopkins. Contrary to Carsons' contentions, Hopkins has not been established as a present or past employee of ABC in this garnishment by the doctrine of either *res judicata* or collateral estoppel. Nor has it been established by either of those doctrines that the Honda was at ABC's storage facility when stolen as opposed to being stolen from Falco's storage facility. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810 (Mo. banc 1997) makes it clear that issues of fraud and/or collusion following a §537.065 RSMo settlement are defenses to the enforcement of a judgment entered pursuant to the settlement and also makes it clear that the reasonableness of the settlement is part of the analysis to determine the enforceability of the judgment entered pursuant to a §537.065 RSMo settlement. Collateral estoppel precludes parties from re-litigating an issue or fact, as opposed to a claim, only when it has been previously adjudicated between the same parties or parties in privity. The four requirements of collateral estoppel, *see Stine v. Warford*, 18 S.W.3d 601 (Mo. App. W.D. 2000), do not apply to uncontested proceedings where an agreement has previously been made to allow a judgment by default as to both liability and damages. Should this appeal be sustained, those issues must be litigated in the action in the Circuit Court of Jackson County, Missouri, which would then again be pending between these parties despite Carsons' perception to the contrary.

raise facts or arguments regarding any alleged claim of estoppel or waiver in response to Westport's Motion for Summary Judgment, and cannot raise these issues on appeal when they failed to comply with M.R.C.P. 74.04 in the underlying proceedings.

Further, Carsons were not damaged by Westport's offer to defend the claim under a reservation of rights, which ultimately led the Carsons to reduce to judgment the settlement they had previously made with ABC. ABC was not prejudiced by resolving all the claims against it, insured or otherwise, without any financial responsibility.

Westport was not notified of the §537.065 settlement agreement between Carsons and ABC until after the appeal time ran. Westport did not knowingly and intentionally waive its coverage defenses by offering to defend a lawsuit involving claims already settled. For all of these reasons, Westport was properly entitled to summary judgment, as granted by the trial court, as no coverage exists for the Carsons' claims against ABC. Carsons' claims that Westport is estopped to deny coverage or has waived coverage defenses was not pled or raised in response to Westport's Motion for Summary Judgment, and is not supported by the alleged facts offered by Appellants in this appeal. Accordingly, this Supreme Court should affirm both the trial court and Western District Court of Appeals rulings in favor of Westport on these issues.

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT BOTH THE SECOND PARAGRAPH OF EXCLUSION G AND THE FIRST PARAGRAPH OF EXCLUSION G EXCLUDE COVERAGE FOR CARSONS' CLAIMS AGAINST ABC.

(*Respondent's Point III is an additional Point that was not raised by Appellants in their Substitute Brief Submitted to the Supreme Court).

This additional Point Relied On set forth by Respondent is not relevant unless the first paragraph of Exclusion G did not exclude coverage for Carsons' claims seeking damages for bodily injury arising out of the use of the auto owned by ABC (as addressed in Appellants' First Point Relied On in its Substitute Brief submitted to the Supreme Court).

Exclusion G in Westport's policy states:

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property

damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

Appellants’ argument to avoid the plain meaning of the second paragraph of Exclusion G is to assume that the first paragraph of Exclusion G does not exclude coverage for Carsons’ claims. Next, Carsons claim the second paragraph of Exclusion G also does not exclude coverage because the second paragraph does not even mention failure to have proper security in place, which Appellants now describe as the main thrust of their claims. A corporation cannot have improper security or other wrongdoing without involving supervision, hiring, employment, training, or monitoring of others in policies and procedures on how to provide security. Appellants are also simply wrong in suggesting there is ambiguity caused by having both a first paragraph and a second paragraph in Exclusion G. There is redundancy, not ambiguity. There is clarification, if necessary - not ambiguity. If a court were to hold that the first paragraph of Exclusion G does not exclude coverage for claims like Carsons’ claims, then the second paragraph simply clarifies that it is the insuring intent not to insure such claims.

The Missouri Bar Association Practice Series on Insurance, Section 10.13, pp. 1034-1036, has a discussion of Missouri cases involving issues related to auto use exclusions in general liability policies. The 2001 ISO form is discussed. Exclusion G to the CGL coverage in Westport’s policy is based on the 2001 ISO language. This means cases involving ISO forms decided before 2001 will not involve policy language that deals expressly with excluding negligent supervision, hiring, etc. claims where an auto is

involved in the injury to the Plaintiff. The only Missouri case with an exclusion for negligent supervision, etc. (a State Farm form policy with an exclusion similar to the exclusion in Westport's policy) is *Killian v. State Farm Fire & Casualty*, 903 S.W.2d 215 (W.D. Mo 1995).⁶

The balance of the Appellants' argument as to why the second paragraph of Exclusion G does not exclude coverage for Appellants' claims is an argument that the terms used are in some way ambiguous (Appellants' Substitute Brief, pp. 44-47). These alleged ambiguities were not raised or presented to the trial court (L.F. 438-452) in Carsons' Response in Opposition to Westport's Motion for Summary Judgment. This seems a new issue, raised for the first time on appeal, and should not, as such, be considered. *Savory v. Hensicki*, 143 S.W.3d 712, 719 (Mo. App. E.D. 2004). The fact that the alleged ambiguities were not recognized by Appellants' counsel prior to the appeals process is a strong argument against these claims of ambiguity.

Appellants' attempted argument is confusing, unnecessary and unwarranted. The plain language of Exclusion G refutes this argument raised for the first time on appeal. This should have been made as a separate Point and raising it now in this fashion is in direct conflict with M.R.C.P. 84.04(e).

⁶ It is worth saying that the Eastern District opinions in *Centermark* and *Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W. 3d 1 (Mo. App. E.D. 2005) both involve policy forms that do not have exclusions for negligent supervision unlike the policy form in the *Killian v. State Farm Fire & Casualty*, *supra*, and the policy form of Westport in this case. As such, they are easily distinguished on the policy language from the policy language involved in this case.

The trial court's decision granting summary judgment in favor of Westport and the Western District Court of Appeals' affirmation of the same are correct because the claims of ABC are excluded by both the second paragraph of Exclusion G and the first paragraph of Exclusion G.

IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTPORT INSURANCE BECAUSE WESTPORT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THE POLICY DOES NOT APPLY TO CARSONS' CLAIMS AGAINST ABC AS: (A) COVERAGE IS EXPRESSLY EXCLUDED BY THE SECOND PARAGRAPH OF EXCLUSION G; (B) THE CLAIMS ARE NOT INDEPENDENT FROM THE OWNERSHIP, USE OR MAINTENANCE OF AN AUTO OWNED BY ABC AND THUS ARE EXCLUDED BY THE FIRST PARAGRAPH OF EXCLUSION G; AND (C) THE CLAIMS ARE NOT INDEPENDENT FROM THE SUPERVISION, HIRING, EMPLOYMENT, TRAINING OR MONITORING OF OTHERS, AND THE OCCURRENCE WHICH CAUSED THE CLAIMED BODILY INJURY INVOLVED THE OWNERSHIP, MAINTENANCE, USE OR ENTRUSTMENT OF AN AUTO OWNED BY ABC, AND THUS ARE EXCLUDED BY THE SECOND PARAGRAPH OF EXCLUSION G.

(*Respondent's Point IV is an additional Point that was not raised by Appellants in their Substitute Brief Submitted to the Supreme Court).

Appellants' claims are not independent or distinct from claims of negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others where the occurrence which caused the claimed bodily injury involved the ownership, maintenance, use or entrustment of an auto owned by ABC. They are thus excluded by the second paragraph of Exclusion G.

At the Court of Appeals, Appellants argued in their third Point that while claims for negligent hiring, training and supervision made in the Petition were excluded by the second paragraph of Exclusion G, claims of negligence concerning improper security were not covered by the second paragraph of Exclusion G. Appellants went on to explain their claims in this regard in their Court of Appeals Brief by describing them as negligence “in failing to disable the auto, leaving it unlocked with the keys in the ignition, positioning it where it was not blocked and easily taken, failing to provide adequate warning of the danger, and failing to provide other security measures to protect the auto from unauthorized use.” (Appellants’ Brief, p. 55). While these facts were not pled in Count II of the Amended Petition (and should not be considered in regard to the coverage dispute at all), these claimed facts all involve policy or procedures to control auto usage. It is auto usage that caused bodily injury damages to Kinnamon-Carson. As such, the facts do not create claims or causes that are independent or distinct from the acts and causes excluded by both the first and second paragraph of Exclusion G.

The Westport policy does not apply to these claims for three separate reasons. First, Carsons’ claims (that ABC had defective procedures or policies to preclude the unauthorized use of its auto) are based on the same facts as Carsons’ claims that support their allegations that ABC negligently trained and supervised others in relation to the use of the auto that caused the damages. This is simply another way of claiming negligent supervision, and is expressly excluded by the second paragraph of Exclusion G since the auto involved in the occurrence is owned by ABC. It is in no way an independent and distinct claim.

Second, Carsons' claims that ABC's policies and procedures about auto usage are negligent are not separate and distinct independent claims from their claims for bodily injury arising from the ownership, maintenance, use or entrustment (excluded under the first paragraph of Exclusion G). These claims cannot occur without auto usage. Auto usage is not incidental to the alleged negligent procedures about auto usage. See *American States Ins. Co. v. Porterfield*, 844 S.W.2d 13 (Mo. App. W.D. 1992), *Hartford Cas. Ins. Co. v. Budget Rent-A-Car of Mo., Inc.*, 864 S.W.2d 5 (Mo. App. W.D. 1993), *American Family Mut. Ins. Co. v. Co Fat Le*, 439 Fed.3d 436 (8th Cir. 2006), as well as Respondents' arguments previously set forth in response to Appellants' First Point Relied On at the appellate level, which are incorporated herein by reference.

Third, Carsons' claims (that ABC's policies to provide security for autos it controls to prevent the unauthorized use of those autos are negligent policies) are not independent or distinct from the claims of negligent hiring, training, supervision, and monitoring of others. Proof of the same facts proves both claims. As such, the second paragraph of Exclusion G excludes coverage.

The trial court correctly determined that Westport's policy of insurance did not apply to the Carsons' claims against ABC, and summary judgment was properly granted. Similarly, the Western District Court of Appeals' Opinion properly affirmed the same.

CONCLUSION

The trial court's ruling that Westport was entitled to summary judgment and that its policy of insurance did not apply to the Carsons' claims against ABC was correct, and the Western District Court of Appeals properly affirmed the trial court's ruling. Accordingly, and for all of the reasons set forth above, these decisions should be affirmed by this Court.

Respectfully Submitted,

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I hereby certify that the enclosed CD-ROM has been scanned for viruses and is virus free and that I used Microsoft Office Word 2003 for word processing. I further certify that this Brief complies with Rule 84.06(b) word limitations and that this Brief contains 9,278 words, excluding the Appendix.

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Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy and CD-ROM of the above and foregoing Respondent's Substitute Brief were deposited in the United States mail, first class postage prepaid, on the 11th day of February, 2009, addressed to each of the following:

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