SUPREME COURT NO. 88003

IN THE SUPREME COURT OF MISSOURI

MARK BARRON, Individually and as Next Friend for KENNADI BARRON, a Minor, SHAUNA DAVIDSON, CHRISTY BARRON, Individually and as Next Friend for CAMERON SMITH-BARRON, a Minor and RICHARD ALLEN

Respondents

vs.

SHELTER MUTUAL INSURANCE COMPANY

Appellant

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI, NO. 04CV75698

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, NO. 65947

RESPONDENTS' SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

On July 5, 2002, the Fourth of July weekend, Billy Hunt ("Hunt") and Rodney Oglesby ("Oglesby") were participating as a team in a cash prize night-time bass tournament on Lake Pomme De Terre in southwest Missouri. LF 0014 ¶ 19, 0109 ¶ 4, 0243 ¶ 1. Prior to the tournament, they agreed to split any award they received through their teamwork and to split the costs of the entry fee and fuel. LF 0014 ¶¶ 19–21, 0109 ¶ 5, 0243 ¶ 1. Hunt and Oglesby also decided together where to fish and how long to fish. LF 0109 ¶ 6, 0243 ¶ 6. They used Oglesby's G III 19 foot bass boat equipped with a 150 horsepower outboard engine. LF 0015 ¶ 24.

Hunt and Oglesby stopped fishing just in time to make it back to the weigh-in and were traveling at speeds in excess of 35 miles per hour as they raced back to the marina to make the deadline for the weigh-in. LF 0015 ¶ 26. Oglesby piloted the boat. LF 0015 ¶ 26. Hunt was seated in the front passenger seat of the boat looking ahead so he could warn Oglesby of anything in the path of the boat and tell Oglesby when to slow down. LF 0015 ¶¶ 27–29, 0109 ¶ 9, 0243 ¶ 1. At approximately 11:20 p.m., Oglesby's boat violently struck and catapulted over the top of a pontoon boat that was near the no-wake buoys as its occupants were enjoying fireworks shows on the shore. LF 0015 ¶ 30, 0109 ¶ 10, 0243 ¶ 1. As a result of this collision, Respondents, who were riding on the pontoon boat, were severely injured and two of their young children, Kain Barron (age 3) and Carissa

Barron (age 13), were killed. LF 0016 ¶¶ 31–32. The pontoon boat's occupants were not aware of the bass tournament. LF 0014 ¶ 12, 0243 ¶ 1.

Respondents filed a personal injury and wrongful death suit in the Circuit Court of Buchanan County, Missouri in February 2003, naming Oglesby and Hunt as defendants. At the time of the collision, Hunt had homeowners and boatowners policies with Shelter. LF 0016 ¶ 33. Both policies had liability limits of $100,000.00. LF 0016 ¶¶ 34–35. At the time of the collision, Oglesby also had homeowners and boatowners policies with Shelter. LF 0017 ¶ 39. Both of Oglesby's policies had liability limits of $300,000.00. LF 0017 ¶¶ 40, 42.

Respondents eventually reached a settlement with Oglesby and Hunt, whereby Shelter agreed to pay Respondents $100,000.00 under Hunt's homeowners policy and $300,000.00 under Oglesby's boatowners policy. LF 0018–0019. However, Respondents and Shelter disagreed about whether additional insurance coverage existed under Hunt's boatowners policy, Oglesby's boatowners policy and Oglesby's homeowners policy. LF 0017–0018. Therefore, as part of the settlement agreement, Shelter and Respondents agreed to pursue a declaratory judgment action asking for a judicial determination of whether additional coverage was available. LF 0018. Shelter also agreed that if a court of last resort affirmed a declaration that additional coverage exists it would pay Respondents the proceeds of such coverage without requiring them to obtain a finding of liability on the part of or judgment against Hunt and Oglesby. LF 0111 ¶ 20, 0243 ¶ 1, 0143. Shelter admitted Hunt's liability to Respondents for their

damages and that such damages exceeded the remaining disputed coverage. LF 0020 ¶ 61; 0022 ¶ 76; 0057 ¶ 61; 0058 ¶ 76; 0142 ¶ 5, 0143 ¶ 6. Additionally, Shelter agreed that a justiciable controversy existed between itself and Respondents and that Respondents had standing to pursue a declaratory judgment action against it. LF 0144 ¶ 8. In exchange for Shelter's agreements and its payment of proceeds from the undisputed coverage, Respondents dismissed their personal injury and wrongful death lawsuit with prejudice and released Hunt and Oglesby from personal liability for Respondents' damages. LF 0142 ¶ 4.

Respondents filed their Petition for Declaratory Judgment in the Circuit Court of Buchanan County on August 3, 2004. LF 0011. In the declaratory judgment action, the parties filed cross-motions for summary judgment. Respondents urged the circuit court to enter a judgment in their favor declaring that $100,000.00 of liability coverage was available under Hunt's boatowners policy and payable to them, $300,000.00 of liability coverage was available under Oglesby's homeowners policy and payable to them and $2,000 in medical payments coverage was available for each Respondent under Oglesby's boatowners policy. LF 0106. Shelter, on the other hand, urged the circuit court to declare that no further coverage remained available under Hunt's boatowners policy, Oglesby's homeowners policy and Oglesby's boatowners policy. LF 0243–0255.

On August 29, 2005, the circuit court granted Respondents' Motion for Summary Judgment and denied Shelter's Motion for Summary Judgment. LF

0487–0488. Specifically, the court declared that there was $100,000.00 of liability coverage available to Respondents under Hunt's boatowners policy, $300,000.00 of liability coverage was available to Respondents under Oglesby's homeowners policy and $4,000.00 of medical payments coverage was available to Respondents under Oglesby's boatowners policy. LF 0488.

Shelter appealed the circuit court's judgment to the Western District Court of Appeals and after briefing by the parties, oral arguments were heard on May 17, 2006. At the outset of the oral argument, the court of appeals asked counsel whether a justiciable controversy existed so as to give the circuit court jurisdiction over Respondents' Petition for Declaratory Judgment. Shelter and Respondents agreed that a justiciable controversy existed and that Respondents' Petition for Declaratory Judgment had no procedural deficiencies. However, the parties had not briefed the justiciable controversy issue, so the court of appeals, on its own motion, asked the parties to submit letter briefs to answer the following question: "In this declaratory judgment action, does the plaintiffs' petition present a justiciable controversy?" The parties submitted their respective letter briefs to the court of appeals in which they both agreed that Plaintiff's Petition for Declaratory Judgment presented a justiciable controversy to the circuit court which was ripe for adjudication.

On July 18, 2006, the court of appeals issued its opinion, reversing the circuit court's judgment and dismissing Respondents' Petition for Declaratory Judgment without reaching the merits of Shelter's appeal. The court held that

Respondents' petition failed for two procedural reasons. First, it held that Respondents' petition was defective because Hunt and Oglesby, as the named insureds under the insurance policies at issue, were indispensable parties who had to be joined in the action. Op. at 3. Second, the court held that Respondents' petition was defective because they did not have standing to pursue a declaratory judgment action against Shelter. Op. at 4. It reasoned that Respondents did not have standing because the court viewed Respondents as strangers to the insurance policies in that they were neither parties to the Shelter policies nor third-party beneficiaries. It interpreted Missouri law as requiring Respondents to obtain a judgment against Hunt and Oglesby before an action against Shelter could be maintained.

Respondents filed a Motion for Rehearing and/or Transfer in the court of appeals on August 1, 2006, which was overruled and denied on August 29, 2006. Respondents filed an application for transfer in this Court on September 11, 2006, which was sustained on September 26, 2006.

ARGUMENT

I. Respondents' Response to Appellant's First Point Relied On

The circuit court did not err in entering its judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Billy Hunt's boatowners policy is ambiguous and a reasonable layperson would read it and conclude that it provides excess insurance coverage when Billy Hunt's liability for damages arises because of bodily injury resulting from his use of non-owned property in that the "other insurance" provision in Billy Hunt's boatowners policy states that its liability coverage for "non-owned property shall be excess insurance over any other valid and collectible insurance," which indicates a contrary intent or exception to the policy's anti-stacking language and Shelter promises coverage in the liability portion of Hunt's boatowners policy and attempts to take it away in the policy's conditions section.

Niswonger v. Farm Bureau Town & Country Ins. Co., 992 S.W.2d 308 (Mo. Ct. App. 1999).

Ragsdale v. Brotherhood of Railroad Trainmen, 80 S.W.2d 272 (Mo. Ct. App. 1934).

MO. R. CIV. P. 74.04(c).

A. Standard of Review

Missouri Supreme Court Rule 74.04(c)(6) states that summary judgment is appropriate "[i]f the motion, the response, the reply and the surreply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." On appeal, a summary judgment ruling is reviewed de novo. *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 312 (Mo. Ct. App. 1999). If, as a matter of law, "the judgment is sustainable under any theory, it must be sustained." *Id.*

Ambiguous insurance policies are construed against the insurer. *Niswonger*, 992 S.W.2d at 316. "An ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words used in the policy." *Id.* Put another way, language is ambiguous "'if it is reasonably open to different constructions,' and, in determining whether that is the case, 'the language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.'" *Id.*

If an insurance policy is ambiguous, insureds are entitled to a resolution of that ambiguity in a manner consistent with their objective and reasonable expectations concerning whether coverage would be provided. *Id.* The so-called "reasonable expectations doctrine" provides "that the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy, even if a more thorough study of the policy provisions would have negated these expectations."

Kellar v. American Family Mutual Ins. Co., 987 S.W.2d 452, 455 (Mo. Ct. App. 1999). The test is not what the insurer intended the words of an insurance policy to mean, "but rather what a reasonable layperson in the position of the insured would have thought they meant." *Niswonger*, 992 S.W.2d at 316–17.

Ambiguous insurance policies are construed against insurers because the purpose of such policies is to provide protection. *Hocker Oil Company v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 514 (Mo. Ct. App. 1999). If policy language is open to different constructions, the most favorable to the insured must be adopted. *Id.* at 516. Exclusionary clauses, in particular, are strictly construed against insurers, meaning that courts must adopt a construction favorable to the insured when faced with an ambiguous exclusion. *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. Ct. App. 1994). Insurers have the burden of proving that a policy exclusion or condition applies to defeat coverage. *Williams v. National Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004).

B. Argument

1. Hunt's Boatowners Policy is Ambiguous and Coverage Exists

Shelter argues that Billy Hunt's boatowners policy unambiguously precludes the stacking of its coverage on top of coverage the company has already provided under Hunt's homeowners policy. However, Billy Hunt's boatowners policy is ambiguous and a reasonable layperson reading it would conclude that an additional $100,000 in coverage remains available.

a. Hunt's Boatowners Policy

Hunt's boatowners policy contains the following provision for liability coverage:

> **1. COVERAGE A – BODILY INJURY LIABILITY; . . .**
>
> **We** will pay on behalf of the **insured** all sums, within the limits of liability of these coverages, which the **insured** shall become legally obligated to pay as damages because of:
>
> (a) **Bodily injury** sustained by any person,
>
> . . . .
>
> caused by accident resulting from the ownership, maintenance, or use of the **described property** or **non-owned property**.
>
> LF 0152–0153.

The policy includes an "other insurance in the company" provision. That provision reads as follows:

> **5. OTHER INSURANCE IN THE COMPANY**
>
> With respect to any accident, death, or loss to which this and any other insurance policy issued to **you** by **us** also applies, the total limit of **our** liability under all these policies won't exceed the highest applicable limit of liability or benefit amount under any one policy.
>
> LF 0158.

Hunt's boatowners policy also contains an "other insurance" provision, which states as follows:

> **5. OTHER INSURANCE**
>
> If the insured has other insurance against a loss covered by this Part, **we** shall not be liable under this policy for a greater proportion of the loss than the limit of liability under this policy for the loss bears to the total limit of liability of all valid and collectible insurance against the loss. However, the insurance under COVERAGES A and B of this policy for **temporary substitute property** or **non-owned property** shall be excess insurance over any other valid and collectible insurance.
>
> LF 0153.

b. Shelter's Position

Shelter contends that because it has already paid Respondents $100,000 under Hunt's homeowners policy, the "other insurance in the company" provision, **read in isolation**, precludes additional coverage from Hunt's boatowners policy. Shelter's position is erroneous because, under Missouri law, **insurance policies must be interpreted by reading the policy as a whole from the standpoint of a reasonable layperson.** *See Kellar v. American Family Mutual Ins. Co.*, 987 S.W.2d 452, 456 (Mo. Ct. App. 1999) ("Words or phrases in an insurance contract must be interpreted by the court in the context of the policy as a whole, and are not to be considered in isolation.").

c. Hunt's Boatowners Policy is Ambiguous and a Reasonable Layperson Would Conclude That Coverage Exists in this Case

Hunt's boatowners policy is ambiguous because there is a direct conflict between its "other insurance" provision and its "other insurance in the company" provision. The "other insurance" provision states that it provides excess liability coverage in the event that Hunt's liability results from his use of a non-owned boat, which is the case here. It states that its coverage is excess over "any other valid and collectible insurance," which strongly suggests that other Shelter policies are included. By contrast, the "other insurance in the company" provision purports to limit Shelter's total liability to the highest policy limits under several policies if an insured holds more than one Shelter policy.

Because of the conflict between these two provisions, the policy is ambiguous because it is duplicitous, indistinct and uncertain. One rather strained interpretation, the one Shelter urges this Court to adopt, is that the phrase "other valid and collectible insurance" in the "other insurance" provision means non-Shelter insurance and that the "other insurance in the company provision" precludes stacking of Shelter policies in all instances. This interpretation is problematic in several important ways, however.

Insurance policy language is to be interpreted from the standpoint of "the layman who bought and paid for the policy," not from the standpoint of those who have "great expertise in the special terminology and intricacies of insurance law." *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 316 (Mo.

Ct. App. 1999). It is highly unlikely that a layperson would construe the phrase "any other valid and collectible insurance" as meaning non-Shelter policies as suggested by Shelter.

Further, Shelter's interpretation violates the rule that policy exclusions and conditions must be construed strictly and in favor of coverage whenever possible. *E.g.*, *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. Ct. App. 1994). Strictly construed, the phrase "any other valid and collectible insurance" in the "other insurance" provision includes other Shelter policies, resulting in excess coverage for instances where, as here, Hunt's liability results from his use of a **non-owned boat**.

A reasonable layperson would interpret the "other insurance in the company" provision along with the "other insurance" provision and conclude that Hunt's boatowners policy provides excess insurance coverage over that provided by his homeowners policy under the circumstances of this case. First, Shelter admits that Oglesby's boat was a non-owned boat and it admits that Hunt's liability for Respondents' damages resulted from Hunt's use of Oglesby's boat. LF 0112 ¶¶ 27–28, LF 0244 ¶ 4. So there is no question that the requisite factors were in place to trigger liability coverage under Hunt's boatowners policy in the first instance.

Second, the last sentence of the "other insurance" provision indicates a contrary intent or exception to the general anti-stacking language contained in the "other insurance in the company" provision. The sentence begins with the word

"however," which signals a contrary intent to the policy's anti-stacking language. It also says that the boatowners insurance is excess over "ANY other valid and collectible insurance," which necessarily includes insurance coverage provided by Shelter under other Shelter policies—i.e., Hunt's homeowners policy. Thus, the "other insurance" provision would cause a reasonable layperson to conclude that despite the "other insurance in the company" provision, Hunt's boatowners policy provides $100,000 of coverage in addition to his homeowners policy because his liability resulted from his use of a non-owned boat.

d. Missouri Law Supports a Finding of Coverage

Missouri law supports Respondents' interpretation of Hunt's boatowners policy and a finding of coverage thereunder. In *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308 (Mo. Ct. App. 1999), the interaction and juxtaposition of an "other insurance in the company" provision and an "other insurance" provision in an automobile insurance policy were at issue. Mr. Niswonger was severely injured in an automobile accident. He was a police officer and was driving a police motorcycle at the time of the accident. Mr. Niswonger was able to demonstrate that the other driver's insurance provided insufficient coverage (i.e., his economic damages alone exceeded $350,000 and the other driver only had $50,000 in coverage). As a result, an "underinsured" situation existed. The Niswongers had three automobile insurance policies with Farm Bureau, each with underinsured limits of $100,000. They sought to stack these limits to recover $300,000 from Farm Bureau.

In arguing that the Niswongers could not stack the underinsured limits on their policies, Farm Bureau pointed to the following provision in the Niswonger policies:

> **5. OTHER AUTOMOBILE INSURANCE IN THE COMPANY**
>
> With respect to any occurrence, accident, death or loss to which this or any other automobile insurance policy issued to the named insured or spouse by the company also applies, the total limit of the company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit under any one such policy.

The Niswongers, however, pointed to another provision, arguing that it made the policy's anti-stacking language ambiguous. That provision reads as follows:

> In the event there is other like or similar insurance applicable to a loss covered by this endorsement, this company shall not be liable for more than the proportion which this endorsement bears to the total of all applicable limits. However, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance.

Judge Teitelman, writing for the he *Niswonger* court, held that the policy was ambiguous and that the Niswongers could stack each of the underinsured limits on their three policies to recover $300,000 from Farm Bureau because Mr.

Niswonger was occupying a **non-owned vehicle** at the time of the accident. *Id.* at 315–16. It explained that the sentence **"[h]owever, any insurance provided under this endorsement for a person insured while occupying a non-owned vehicle is excess of any other similar insurance,"** when read in conjunction with the policy as a whole, could be interpreted by an average lay person "as superseding the anti-stacking provisions which might normally and otherwise apply." *Id.* at 318. The *Niswonger* court therefore endorsed the Niswongers interpretation of the policy—i.e., that the policy limits from their two other policies were available as excess coverage over the amount already paid. *Id.* at 315.

The *Niswonger* court emphasized two significant aspects of the Niswonger policy in reaching its decision. First, it noted that use of the word "however" in the above quoted sentence could be interpreted by an average layperson as signaling an exception to the policy's general prohibition of stacking in circumstances where the insured was occupying a non-owned vehicle. *Id.* at 316. Second, the *Niswonger* court emphasized that the policy did not make it unambiguously clear that "other similar insurance" meant coverage available through other insurance companies, rather than other coverage available through the same insurer. *Id.* at 318.

Niswonger controls the issue of whether Hunt's boatowners policy provides excess insurance over that which Shelter has already paid Respondents under Hunt's homeowners policy. Like the "other insurance" provision in the

Niswonger policy, the last sentence of the "other insurance" provision in Hunt's boatowners policy could be interpreted by a reasonable layperson as superseding the policy's "other insurance in the company" provision in the special circumstance of this case where Hunt's liability results from his use of **non-owned property**. The last sentence of the "other insurance" provision begins with "however," which indicates that the policy provides excess coverage when Hunt's liability arises out of his use of a non-owned boat. Further, the sentence does not unambiguously state that "any other valid and collectible insurance" means non-Shelter insurance. A plain reading of the phrase "any other valid and collectible insurance" would cause a reasonable layperson to conclude that the phrase necessarily encompasses other insurance coverage provided by Shelter, including coverage provided by Hunt's homeowners policy.

This conclusion was recently bolstered by the court of appeals in *American Family Mut. Ins. Co. v. Ragsdale,* —S.W.3d—, 2006 Mo. App. LEXIS 1070 (July 11, 2006). In that case, the insurer initiated a declaratory judgment action against its insured regarding underinsured motorist coverage. The insured was injured in an automobile accident in the scope and course of his employment. He received workers' compensation benefits and $100,000 from the tortfeasor's insurer. The insured also had automobile policies for his two personal automobiles and each had underinsured motorist coverage of $100,000. The policies had an "other insurance" provision, which read as follows:

> If there is other similar insurance on a loss covered by this endorsement, we will pay our share according to this policy's proportion of the total limits of all similar insurance. But, any insurance provided under this endorsement for an injured person while occupying a vehicle you do not own is excess over any other similar insurance.

The insured sought to stack the underinsured coverage for a total of $200,000. The trial court allowed him to do so.

The court of appeals affirmed the trial court's decision to permit stacking. It held that the last sentence of the "other insurance" provision was ambiguous and that a reasonable layperson would expect that underinsured coverage could be stacked. *Id.* at *12. The court explained that the phrase "other similar insurance" would most likely be interpreted as meaning other applicable insurance instead of other underinsured motorist coverage. *Id.* at *11–12. It noted that the insurer could have just said other underinsured motorist coverage if that is what it meant. *Id.* at *11.

Similarly, in this case, the phrase "other valid and collectible insurance" contained in the "other insurance" provision of Hunt's boatowners policy is ambiguous when juxtaposed against the "other insurance in the company" provision. Perhaps one construction is that it means non-Shelter insurance. But it is unlikely that a reasonable layperson would read it that way. It is more likely that the phrase "other valid and collectible insurance" would cause a reasonable

layperson to conclude that such insurance includes other Shelter policies. The phrase is broad enough to sweep in other Shelter policies. Most people would think that Hunt's homeowners policy would constitute "other valid and collectible insurance." After all, Respondents collected the proceeds of Hunt's homeowners policy from Shelter and there has been no suggestion that his homeowners policy was invalid.

For these reasons, this Court should affirm the circuit court's judgment and hold that $100,000 of liability coverage is available under Hunt's boatowners policy and that the proceeds of such coverage is payable to Respondents under the settlement agreement.

2. Shelter Relies On Inapposite Cases

In its brief, Shelter attempts to support its argument by directing this Court's attention to three cases: *Farm Bureau Town and Country Ins. Co. v. Hughes*, 629 S.W.2d 595 (Mo. Ct. App. 1981), *Farm Bureau Town & Country Ins. Co. v. Barker*, 150 S.W.3d 103 (Mo. Ct. App. 2004) and *Rader v. Johnson*, 910 S.W.2d 280 (Mo. Ct. App. 1995). *Hughes*, *Barker* and *Rader* are inapposite and therefore this Court should disregard them in deciding this case.

***a. This Court Should Disregard* Hughes**

In *Hughes*, a minor child was injured when riding in a vehicle which neither he nor his family owned. The insurer of the vehicle the child was riding in paid the policy's liability limits, but there was no medical payments coverage available under that policy. The child's family had three automobile policies, one

with medical payments coverage of $5,000 and two policies with $2,000 medical payments coverage each. The insurer paid $5,000, but refused to pay the remaining $4,000. It pointed to the "other insurance in the company" provision contained in the policy with $5,000 in medical payments coverage and argued that it precluded stacking of medical payments otherwise available from other policies. That provision stated as follows:

> **Other Automobile Insurance in the Company**
>
> With respect to any occurrence, accident, death, or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

The Hughes family directed the court's attention to another portion of the policy in arguing that the policy was ambiguous and that stacking should be allowed. The policy contained an "other insurance" provision which read as follows:

> If the insured has other automobile insurance affording benefits for medical expenses against a loss to which Coverage C of this policy applies, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability under this policy bears to the total applicable limits of liability of all such valid and collectible insurance against such

> loss; provided, however, the insurance afforded under Coverage C of this policy with respect to a temporary substitute or non-owned automobile shall be excess insurance over any other valid and collectible automobile insurance affording benefits for medical expenses.

The *Hughes* court held that the medical payments coverage from the Hughes' other two policies could not be stacked because it believed the phrase "any other valid and collectible insurance" referred to insurance provided by other insurance companies and did not include insurance provided by the same company. 629 S.W.2d at 597–98.

This Court should disregard *Hughes* in deciding this case for three reasons. First, and most importantly, the *Hughes* court did not apply the reasonable expectations doctrine, which is currently the standard governing the interpretation of ambiguous insurance policies, such as Hunt's boatowners policy. It simply concluded, without analysis, that the phrase "any other valid and collectible insurance" referred exclusively to coverage provided by other insurance companies. The reasonable expectations doctrine demands more scrutiny of insurance policies than the *Hughes* court brought to bear on the policy at issue in that case. Consequently, this Court should disregard *Hughes*[1] as obsolete.

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1. *Niswonger* made another point about *Hughes*. In particular, it noted that the phrase "other similar insurance," which was the language in the

Second, the *Hughes* court's interpretation of the policy language in that case is unconvincing in that it is conclusory. The *Hughes* court noted that it should have been clear to an insured that the phrase "other valid and collectible insurance" referred exclusively to coverage provided by other insurance companies. *Id.* However, its statement is conclusory because the court never explained why such a proposition should be clear to an average layperson reading the policy. Indeed, the *Niswonger* court rejected and refused to follow *Hughes* for

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Niswonger's policy, "**<u>might</u>** more readily be perceived by a reasonable layperson as presenting a specific conflict" with the policy's anti-stacking language than the phrase "other valid and collectible insurance," which was used in the Hughes' policy. 992 S.W.2d at 317 (emphasis added). Significantly, however, the *Niswonger* court did not conclude that the phrase "other valid and collectible insurance," which is also used in the "other insurance" provision of Hunt's boatowners policy, would necessarily be read by a reasonable layperson as referring to other insurance companies instead of other insurance coverage provided by Shelter. The *Niswonger* court just says that "other similar insurance" **<u>might</u>** more readily present a conflict with anti-stacking language. Indeed, the phrase "other valid and collectible insurance" does not unambiguously refer to coverage provided by other insurance companies and therefore a reasonable layperson would interpret it as including coverage provided by other Shelter policies, such as Hunt's homeowners policy.

that reason. It said that "[t]he court in *Hughes* reached the conclusion that it did on this point without any analysis or explanation of its reasoning, apparently assuming that the proposition it found 'clearly' to be true was self-evident." 992 S.W.2d at 317–18.

Another problem with interpreting the phrase "any other valid and collectible insurance" as referring exclusively to coverage provided by other insurance companies is that it is a highly nuanced or technical interpretation that someone experienced in the art of reading insurance policies might give the phrase, but it is not how a reasonable layperson would read the phrase. The test is not what persons schooled in the intricacies of insurance law interpret the clause as meaning; rather, the test is what a reasonable layperson in the position of the insured would interpret the clause as saying. *Niswonger*, 992 S.W.2d at 316–18. Further, "the 'reasonable expectations doctrine' provides that the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy, **even if a more thorough study of the policy provisions would have negated these expectations.**" *Kellar v. American Family Mut. Ins. Co.*, 987 S.W.2d 452, 455 (Mo. Ct. App. 1999).

A reasonable layperson reading Hunt's boatowners policy would not conclude that the phrase "any other valid and collectible insurance" only refers to insurance coverage provided by other insurers. A reasonable layperson would not dissect the policy with that sort of precision, but instead would conclude that "any

other valid and collectible insurance" includes insurance provided by other Shelter policies so long as those policies are "valid" and the proceeds "collectible." Therefore, this Court should overrule *Hughes* to the extent that it concludes that the phrase "any other valid and collectible insurance" only refers to insurance provided by other insurance companies.

Third, *Hughes* is factually distinguishable from this case. The *Hughes* court emphasized that there was no medical payments coverage available on the car in which the child was injured and therefore there was no coverage for the Hughes' policies to exceed. 629 S.W.2d at 598. In this case, by contrast, Hunt's boatowners policy would exceed coverage that has been provided under his homeowners policy.

***b. This Court Should Disregard* Barker**

Another case Shelter relies on, *Farm Bureau Town & Country Ins. Co. v. Barker*, 150 S.W.3d 103 (Mo. Ct. App. 2004), is inapposite because the language in the policy at issue in that case is materially different than that which is in Hunt's boatowners policy. In *Barker*, the parents of a young woman who had died in an automobile accident wanted to stack the underinsured limits of two automobile policies they had with Farm Bureau. Farm Bureau paid the Barkers one of the policy limits, $100,000, but refused to pay the other policy limit, contending that its policies precluded stacking. The Farm Bureau policies contained the following "other insurance in the company" provision:

TWO OR MORE AUTO POLICY LIMITS

If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all policies will not exceed the highest applicable Limit of Liability under any one policy.

The policies also contained an "other insurance" provision, which reads as follows:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage:

A. Any recovery for damages under all such policies or provisions of coverage may equal, but not exceed, the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

B. Any insurance we provide with respect to a vehicle you do not own will be excess over any collectible insurance providing coverage on a primary basis.

C. If the coverage under this policy is provided:

1. On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our Limit of

> Liability bears to the total of all applicable Limits of Liability for coverage provided on a primary basis.
>
> 2. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our Limit of Liability bears to the total of all applicable Limits of Liability for coverage provided on an excess basis.

The *Barker* court held that the Barkers could not stack the underinsured coverage available under both of their automobile policies. 150 S.W.3d at 108–09. It explained that "Section A makes it perfectly clear that whether the other applicable [underinsured] insurance is considered primary or excess coverage, any recovery from Farm Bureau for damages under all such policies may not exceed the highest applicable limit for any one vehicle." *Id.* at 108. The *Barker* court further explained that "far from introducing any ambiguity when there is a covered accident involving a non-owned vehicle, as was found to be the case by the *Niswonger* majority, the UIM endorsement here actually reiterates and reinforces the provisions of the unambiguous anti-stacking clause found in the 'GENERAL PROVISIONS' section of both the Barkers' policies." *Id.*

In this case, the "other insurance" provision contained in Hunt's boatowners policy does not unambiguously state that any recovery from Shelter may not exceed the highest limits of any one policy—i.e., $100,000. Instead, the provision plainly states that liability coverage for non-owned property—Oglesby's

boat—"shall be excess over any other valid and collectible insurance." There is no language in the "other insurance" provision that reiterates and reinforces the "other insurance in the company" provision. A reasonable layperson would thus conclude that Hunt's boatowners policy provides coverage in addition to coverage provided under his homeowners policy, which is other valid and collectible insurance, because Hunt's liability resulted from his use of a non-owned boat—Oglesby's boat. Consequently, the language at issue in this case is distinguishable from *Barker*.

***c. This Court Should Disregard* Rader**

Rader v. Johnson, 910 S.W.2d 280 (Mo. Ct. App. 1995), is inapposite. In *Rader*, Warren Johnson was test driving a truck owned by Metro Ford in Kansas City when he collided with the rear of Donald Rader's vehicle. Rader sued Johnson for negligence and Johnson filed a third-party petition seeking a declaratory judgment against Metro Ford's insurer, Universal Underwriters Insurance Company. Johnson had two automobile policies with State Farm at the time of the accident and each had $100,000 of liability coverage. The issue before the court was the extent of insurance coverage available under the Universal policy and the two State Farm policies.

The *Rader* court stated that $100,000 of coverage, instead of $200,000 of coverage, was available under the State Farm policies based on the following provision:

1. Policies Issued by Us to You.

If two or more vehicle liability policies issued by us to you apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

2. Other Liability Coverage From Other Sources.

Subject to item 1, if other vehicle liability coverage applies, we are liable only for our share of the damages. Our share is the percent that the limit of liability of this policy bears to the total of all vehicle liability coverage applicable to the accident.

3. Temporary Substitute Car, Non-Owned Car, Trailer.

If a temporary substitute car, a non-owned car or a trailer designed for use as a private passenger car or utility vehicle has other vehicle liability coverage on it, then this coverage is excess.

This provision is distinguishable from the "other insurance" provision in Hunt's boatowners policy. First, the anti-stacking clause in the State Farm policies is in the "other insurance" provision instead of in a separate part of the policy as with Hunt's policy. This is significant because a layperson reading the "other insurance" provision in the State Farm policies might more readily conclude that stacking is not permitted in situations where another State Farm policy might be applicable. Second, the excess clause in the "other insurance" provision is narrower than the one in Hunt's boatowners policy. It refers to other

vehicle insurance; whereas, the pertinent phrase in Hunt's policy is "any other valid and collectible insurance." This is significant because a layperson reading "other vehicle insurance" in conjunction with the anti-stacking language in the earlier part of the "other insurance" provision would more readily conclude that one State Farm vehicle policy can never provide excess coverage over another State Farm vehicle policy. In this case, by contrast, the phrase "any other valid and collectible insurance" would cause a reasonable layperson to conclude that Hunt's boatowners policy provides excess coverage over any other insurance, including Shelter insurance, when a non-owned boat is involved. Third, *Rader* precedes *Niswonger* and *Niswonger* is on point with the facts of this case. As explained above, *Niswonger* requires a finding of coverage in this case because the "other insurance" provision and the "other insurance in the company" provision are in direct conflict. For these reasons, this Court should disregard *Rader*.

3. A Finding of Coverage is Consistent With the Principle that an Insurance Policy Cannot Provide Coverage Under One Provision and Take That Coverage Away in Another Provision

A finding of coverage under Hunt's boatowners policy is also consistent with the rule that if a policy contains a provision giving coverage to an insured and another provision takes that coverage away, the provision giving coverage will be enforced. *See Ragsdale v. Brotherhood of Railroad Trainmen*, 80 S.W.2d 272, 280 (Mo. Ct. App. 1934) ("If, on the facts, one provision of the policy creates liability and another limits it, the former will be enforced."). The reason for this is

that a promise of coverage coupled with an attempt to take it away makes the policy ambiguous. *See Kellar v. American Family Ins. Co.*, 987 S.W.2d 452, 455 (Mo. Ct. App. 1999) (stating that language which promises something in one point and takes it away in another is ambiguous).

Here, the "other insurance" provision provides excess coverage over that provided by Hunt's homeowners policy because Hunt's liability to Respondents resulted from his use of a non-owned boat. The "other insurance in the company" provision, which is located in the conditions section of Hunt's boatowners policy, attempts to take that coverage away. Therefore, the excess coverage provided by the "other insurance" provision should be enforced.

4. Conclusion

In sum, Hunt's boatowners policy is ambiguous because its "other insurance" provision is in direct conflict with its "other insurance in the company" provision. A reasonable layperson would read the policy as a whole and conclude that it provides $100,000 in coverage in addition to that which has already been paid under Hunt's homeowners policy because Hunt's liability resulted from his use of a non-owned boat. Additionally, Shelter cannot extend coverage to an insured under one part of its policy and take it away in another part, as it has done in Hunt's boatowners policy. By doing so, Shelter has made the policy ambiguous, meaning the policy's provision of coverage must be enforced. Therefore, this Court should affirm the circuit court's judgment granting Respondents' Motion for Summary Judgment, denying Shelter's Motion for

Summary Judgment and declaring that $100,000 in insurance coverage is available to Respondents under Hunt's boatowners policy.

II. Respondents' Response to Appellant's Second Point Relied On

The circuit court did not err in entering its judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Shelter admitted all the facts necessary to a finding of coverage under Rodney Oglesby's homeowners policy and, alternatively, the watercraft exclusion in Rodney Oglesby's homeowners policy contains a latent ambiguity in that it is uncertain as to whether Oglesby's application for boatowners insurance is the type of writing the policy contemplates when it says the watercraft exclusion does not apply if the insured writes to Shelter within thirty days after they acquire a boat telling it they want coverage, Shelter concluded that Hunt's application for boatowners insurance was sufficient to trigger watercraft coverage under his homeowners policy and a reasonable layperson would conclude that Oglesby's application for boatowners insurance is sufficient to trigger watercraft coverage under Oglesby's homeowners policy.

Aetna Casualty & Surety Co. v. Haas, 422 S.W.2d 316 (Mo. 1968).

MO. R. CIV. P. 74.04(c).

A. Standard of Review

Missouri Supreme Court Rule 74.04(c)(6) states that summary judgment is appropriate "[i]f the motion, the response, the reply and the surreply show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law." On appeal, a summary judgment ruling is reviewed de novo. *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 312 (Mo. Ct. App. 1999). If, as a matter of law, "the judgment is sustainable under any theory, it must be sustained." *Id.*

Ambiguous insurance policies are construed against the insurer. *Niswonger*, 992 S.W.2d at 316. "An ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words used in the policy." *Id.* Put another way, language is ambiguous "'if it is reasonably open to different constructions,' and, in determining whether that is the case, 'the language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.'" *Id.*

If an insurance policy is ambiguous, insureds are entitled to a resolution of that ambiguity in a manner consistent with their objective and reasonable expectations concerning whether coverage would be provided. *Id.* The so-called "reasonable expectations doctrine" provides "that the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy, even if a more thorough study of the policy provisions would have negated these expectations." *Kellar v. American Family Mutual Ins. Co.*, 987 S.W.2d 452, 455 (Mo. Ct. App. 1999). The test is not what the insurer intended the words of an insurance policy to mean, "but rather what a reasonable layperson in the position of the insured would have thought they meant." *Niswonger*, 992 S.W.2d at 316–17.

Ambiguous insurance policies are construed against insurers because the purpose of such policies is to provide protection. *Hocker Oil Company v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 514 (Mo. Ct. App. 1999). If policy language is open to different constructions, the most favorable to the insured must be adopted. *Id.* at 516. Exclusionary clauses, in particular, are strictly construed against insurers, meaning that courts must adopt a construction favorable to the insured when faced with an ambiguous exclusion. *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. Ct. App. 1994). Insurers have the burden of proving that a policy exclusion or condition applies to defeat coverage. *Williams v. National Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004).

B. Argument

1. Oglesby's Homeowners Policy

Rodney Oglesby's homeowners policy provides $300,000 in coverage for Billy Hunt's liability to Respondents. The policy contains the following personal liability provision:

> **COVERAGE E-PERSONAL LIABILITY**
>
> **We** will pay all sums arising out of one loss which an **insured** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** and caused by an occurrence covered by this policy.
>
> LF 0183.

Oglesby's homeowners policy defines "insured" as Rodney Oglesby and, for purposes of personal liability coverage, "any person or organization legally responsible for . . . watercraft covered by this policy and owned by [Rodney Oglesby]." LF 0173.

The policy contains a so-called watercraft exclusion, which states that:

> Under Personal Liability . . ., **we** do not cover:
>
> 1. **bodily injury** . . . arising out of the ownership, maintenance, use or entrustment of:
>
> . . . .
>
> (d) watercraft not located on the **insured premises**:
>
> (1) owned by or rented to an insured if it has inboard or inboard-outdrive motor power of more than 50 horsepower;
>
> (2) owned by or rented to an insured if it is a sailing vessel 26 feet or more in length; or
>
> (3) powered by one or more outboard motors with more than 25 total horsepower owned by an insured.
>
> (4) subdivisions (1), (2) and (3) do not apply if **you** write **us** within 30 days of the acquisition date of such items that **you** want coverage.

LF 0184.

Read together, these provisions mean that Rodney Oglesby's homeowners policy provides liability coverage for Hunt if he was legally responsible for Oglesby's boat at the time of the accident and Oglesby wrote Shelter within thirty days after acquiring his boat telling Shelter he wanted coverage. There are thus two salient issues concerning Hunt's coverage under Oglesby's homeowners policy: (1) did Oglesby write Shelter within thirty days after acquiring his boat telling Shelter he wanted coverage so as to trigger watercraft coverage under his homeowners policy; and (2) was Billy Hunt "legally responsible" for Oglesby's boat at the time of the accident such that he qualifies as an insured under Oglesby's homeowners policy. For the reasons explained below, the answers to both inquiries are yes.

2. Shelter Has Admitted the Facts Necessary to a Finding of Coverage

Shelter made several admissions which amount to an admission of coverage under Oglesby's homeowners policy. To begin with, Shelter admitted that Oglesby wrote Shelter within thirty days after acquiring his boat telling it he wanted coverage, which is sufficient to trigger coverage for Oglesby's boat under section 1(d)(4) of the exclusions portion of the policy's personal liability coverage. LF 0114 ¶¶ 36–37, 0244 ¶ 8, 0125–0126. It admitted that Hunt was legally

responsible[2] for Oglesby's boat when the accident at issue in the underlying case occurred,[3] which is sufficient to make Hunt an "insured" under the policy. LF

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2. Such responsibility stems from three sources. First, Hunt's liability to Respondents resulted from his use of Oglesby's boat, which directly supports the proposition that Hunt was legally responsible for Oglesby's boat. LF 0112 ¶ 28, 0244 ¶ 4. Second, on the night of the weigh-in, Hunt was attempting to keep a lookout over the oncoming water for buoys and other objects as Oglesby piloted the boat and Hunt was prepared to warn Oglesby of anything in the boat's path. LF 0109 ¶ 9, 0243 ¶ 1. By doing these things, he assumed the duty—i.e., legal responsibility—to use ordinary care in his use of Oglesby's boat. *Bowan v. Express Medical Transporters, Inc.*, 135 S.W.3d 452, 457–58 (Mo. Ct. App. 2004). Third, Hunt and Oglesby were joint venturers because they agreed to compete as a team in the bass tournament to win a cash prize and they had an equal right to a voice in the direction of their competition in the tournament, LF 0109 ¶¶ 4–10, 0243 ¶ 1, meaning they were joint and severally liable for damages that resulted from their tournament activities. *Perricone v. DeBlaze*, 655 S.W.2d 724, 725 n.1 (Mo. Ct. App. 1983); *Swindell v. J. A. Tobin Constr. Co.*, 629 S.W.2d 536, 542 (Mo. Ct. App. 1982). As a result, Hunt, as a joint venturer with Oglesby, literally was legally responsible for damages caused by Oglesby's boat.

3. Shelter attempted to deny this assertion, but it did not support its denial with evidence in the record. LF 0113 ¶ 32; 0244 ¶ 7. Therefore, by

0020 ¶ 61, 0057 ¶ 61, 0113 ¶ 32, 0244 ¶ 7, 0264 ¶ 32, 0352 ¶ 32. Finally, Shelter admits that Hunt's liability to Respondents for their damages resulted from Hunt's use of Oglesby's boat, which is sufficient to trigger the policy's personal liability coverage. LF 0112 ¶ 28, 0244 ¶ 4.

These admissions constitute the facts necessary to a finding of watercraft coverage for Hunt under Oglesby's homeowners policy. Oglesby wrote Shelter within thirty days after acquiring his boat telling it he wanted coverage. Hunt was an insured under Oglesby's homeowners policy because he was legally responsible for a watercraft covered by the policy and owned by Oglesby. And Hunt's liability to Respondents results from his use of Oglesby's boat. Therefore,

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operation of law, the fact that Hunt was legally responsible for Oglesby's boat is deemed admitted. *See* MO. R. CIV. P. 74.04(c)(2) (stating that "[a] denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial. . . . A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph."). Plus, Shelter never disputed Respondents' arguments relating to the fact that Hunt was legally responsible for Oglesby's boat. As a result, Shelter cannot dispute, on appeal, the fact that Hunt was legally responsible for Oglesby's boat.

based on Shelter's admissions, this Court should affirm the circuit court's finding of watercraft coverage for Hunt under Oglesby's homeowners policy.

3. Oglesby's Homeowners Policy is Ambiguous and Watercraft Coverage Exists

Even if this Court concludes that Shelter's admissions are not sufficient—by themselves—to support a finding of coverage under Oglesby's homeowners policy, this Court should affirm the circuit court's finding of coverage under Oglesby's homeowners policy because the policy is ambiguous and a reasonable layperson would expect coverage under the circumstances of this case.

Specifically, section 1(d)(4) of the exclusions portion of the policy's comprehensive personal liability protection section is ambiguous. LF 0184. It says that if the insured writes to Shelter within thirty days after acquiring a watercraft telling Shelter they want coverage, then the watercraft exclusion does not apply, which indicates that the policy's general personal liability limits become applicable. LF 0184. Oglesby submitted an application for boatowners insurance to Shelter within thirty days after he acquired his boat. LF 0114 ¶¶ 36–37, 0125–0126, 0244 ¶ 8. Section 1(d)(4) is unclear about whether the application is sufficient to trigger coverage under Oglesby's homeowners policy. The application is, after all, a writing telling Shelter he wants coverage and it was submitted within the requisite time period and the policy does not discriminate between different types of writings.

Missouri law separates ambiguity into two categories: latent and patent. A patent ambiguity exists when a policy's language is uncertain, duplicative or indistinct on its face. *General American Life Ins. Co. v. Barrett*, 847 S.W.2d 125, 131 (Mo. Ct. App. 1993). A latent ambiguity, by contrast, arises when the application of seemingly unambiguous policy language to a particular set of facts is uncertain, duplicative or indistinct. *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991). If a latent ambiguity exists, a court can look beyond policy language to extrinsic evidence to ascertain what the parties intended the policy to mean. *Id.*

Aetna Casualty & Surety Co. v. Haas, 422 S.W.2d 316 (Mo. 1968), is particularly applicable to this case. In *Haas*, the insurer sought a judicial declaration that it did not have to pay a default judgment that had been rendered against its insured as a result of an explosion that occurred in a customer's residence while the insured was fumigating the residence. It invoked an exclusion that precluded coverage when property damage occurred while residential property was in the care, custody or control of the insured. However, the insurer had previously paid for a similar loss under an identical policy without invoking the exclusion.

The *Haas* court held that the policy was ambiguous and that the exclusion did not preclude coverage. 422 S.W.2d at 319–20. It explained that the exclusion contained a latent ambiguity because the exclusion's application to the factual circumstances at hand was uncertain. *Id.* at 319. In concluding that coverage

existed, the *Haas* court placed a great deal of emphasis on the fact that the insurer had previously provided coverage under an identical policy for a similar loss without invoking the exclusion. *Id.* at 319–20.

Similar to the exclusion at issue in *Haas*, the watercraft exclusion in Oglesby's homeowners policy contains a latent ambiguity. When applied to the facts of this case, section 1(d)(4) is uncertain. The policy does not directly indicate whether Oglesby's application for boatowners insurance is the type of writing contemplated by section 1(d)(4). But his application is a writing and within the application, Oglesby is requesting coverage for his boat. Further, he submitted the application to Shelter within thirty days after acquiring his boat, thereby fulfilling section 1(d)(4)'s time requirements. These things should be sufficient to trigger watercraft coverage under Oglesby's homeowners policy. Shelter, of course, disagrees.

The evidence available in the record reveals that Shelter has interpreted an identical homeowners policy as providing watercraft coverage when all that was submitted to it was an application for boatowners insurance. That policy was Hunt's homeowners policy.

Shelter admitted that Hunt had liability coverage under his homeowners policy for injuries resulting from his use of a watercraft. *See* LF 0061 ¶ 103 **("Shelter concluded that the Accident could trigger coverage under either Hunt's BO policy or his HO policy.")**; 0114 ¶ 39 **(In its answer to Plaintiffs' Petition for Declaratory Judgment, Shelter admitted that Billy Hunt had**

liability coverage under his homeowners policy for injuries resulting from his use of a watercraft."); 0244 ¶ 8 **("Defendant admits the assertions in Paragraphs 33 through 39 of plaintiffs' Statement of Uncontroverted Facts.")**. Shelter also admitted that Hunt obtained watercraft coverage under his homeowners policy by submitting an application for boatowners insurance. In their Statement of Uncontroverted Material Facts in support of their Motion for Summary Judgment, Respondents asserted the following statement of fact: **"To obtain watercraft coverage under his homeowners policy, Hunt submitted a written application for boat insurance within thirty days after acquiring his boat."** LF 0114 ¶ 40. In response, Shelter said **"[Shelter] admits this assertion."** LF 0244 ¶ 9. Further, a review of Hunt's underwriting file reveals that the only "writing" that could qualify as Hunt writing Shelter within 30 days after acquiring a boat telling it he wants coverage are his applications for boatowners insurance. LF 0496–0514. Shelter admits this fact too.[4]

4. The fact that the only writings in Hunt's underwriting file that could trigger watercraft coverage under his homeowners policy are his applications for boatowners insurance is asserted in Plaintiffs' Statement of Additional Material Facts in Support of Their Motion for Summary Judgment, which was filed at the same time as Plaintiffs' Reply Suggestions in Support of Their Motion for Summary Judgment. LF 0493. Shelter never denied this fact and therefore it is deemed admitted. MO. R. CIV. P. 74.04(c)(2).

Shelter's conclusion that Hunt had watercraft coverage under his homeowners policy indicates that Shelter intended for section 1(d)(4)'s writing requirement to encompass applications for boatowners insurance. With that understanding of section 1(d)(4)'s meaning, this Court should resolve section 1(d)(4)'s latent ambiguity in Respondents' favor and conclude that Oglesby's application for boatowners insurance was sufficient to trigger watercraft coverage under his homeowners policy. If Shelter meant to exclude applications for boatowners insurance from section 1(d)(4)'s writing requirement, it could have described what types of writings are sufficient or it could have specifically stated what types of writings are not sufficient. Shelter did neither of these things.

In addition to extrinsic evidence showing watercraft coverage under Oglesby's homeowners policy, a reasonable layperson reading section 1(d)(4) and looking at Oglesby's application for boatowners insurance would conclude that the application constitutes a writing sufficient to trigger watercraft coverage. The application is a writing requesting coverage for Oglesby's boat and its was submitted within thirty days after Oglesby acquired his boat.

Shelter argues that the circuit court never found that Oglesby's homeowners policy was ambiguous and as a result, should not have reached the reasonable expectations test. This simply is not true. The judgment cited applicable Missouri law regarding insurance policy interpretation and the court noted that its task was to determine whether the policies at issue were ambiguous and if so, whether coverage was within the reasonable expectations of an average

layperson. LF 0487. Respondents argued in the summary judgment proceeding that Oglesby's homeowners policy was ambiguous with respect to whether Oglesby's application for boatowners insurance was a writing sufficient to trigger coverage under section 1(d)(4). LF 0341–0342, 0479–0480. After examining the policies at issue, the circuit court simply agreed with Respondents and concluded that the coverage they advocated was within the reasonable expectations of an insured. LF 0488.

In addition, this Court's review of the circuit court's summary judgment decision is de novo. *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 312 (Mo. Ct. App. 1999). If, as a matter of law, "the judgment is sustainable under any theory, it must be sustained." *Id.* For the reasons described above, this Court should conclude, on its own, that Oglesby's homeowners policy is ambiguous and that an average layperson would conclude that coverage exists in this case because Oglesby wrote Shelter within thirty days after acquiring his boat notifying it he wanted coverage and Hunt qualified as an insured under Oglesby's homeowners policy.

Similarly, with respect to Shelter's argument that the judgment is erroneous because it states "that Plaintiffs have and recover from Defendant the sum of Three Hundred Thousand and no/100ths, ($300,000.00) dollars payable as insurance coverage for insured, RODNEY OGLESBY," this Court can review the relevant policy language and the facts and conclude through its de novo review

that coverage exists for Hunt under Oglesby's homeowners policy. The circuit court's judgment is sustainable on the theories set forth herein.

Shelter argues that the circuit court's decision to grant Respondents' Motion for Summary Judgment was error because it should have been clear that the writing requirement in section 1(d)(4) of the exclusions portion of the policy's comprehensive personal liability section was a provision for short-term boat insurance which ceased once long-term boat insurance was obtained. However, this reading of section 1(d)(4) is not grounded in any of the policy's language. It is nothing more than Shelter imposing a self-serving interpretation on the policy. In fact, it is a contrary interpretation to Shelter's interpretation of Hunt's homeowners policy. Further, Shelter's interpretation is not what a reasonable layperson reading the policy would conclude because there is no language in the policy concerning short-term coverage.

Shelter points out that there is no evidence of Oglesby specifically requesting coverage for his boat under his homeowners policy. He did, however, submit an application for boatowners insurance within thirty days after acquiring his boat, which a reasonable layperson would construe as a writing sufficient to trigger coverage under section 1(d)(4) of the policy's comprehensive personal liability section. Additionally, there is no evidence that Hunt specifically requested coverage for his boat under his homeowners policy and Shelter nevertheless found that watercraft coverage existed. LF 0061 ¶ 103.

Shelter points out that there is no schedule or endorsement to Oglesby's homeowners policy identifying his boat as being insured under the policy. However, there was no schedule or endorsement to Hunt's homeowners policy identifying his boat as being insured under the policy and Shelter nevertheless found that watercraft coverage existed under his homeowners policy. LF 0061 ¶ 103, 0195–0219.

Shelter points out that no boat appears on the declarations page for Oglesby's homeowners policy. However, there was no boat on the declarations page of Hunt's homeowners policy and Shelter nevertheless found that watercraft coverage existed under his homeowners policy. LF 0061 ¶ 103, 0195.

Shelter points out that Oglesby never paid Shelter an additional premium for watercraft coverage under his homeowners policy. However, Hunt never paid Shelter an additional premium for watercraft coverage under his homeowners policy and Shelter nevertheless found watercraft coverage existed under Hunt's homeowners policy. LF 0061 ¶ 103, 0195.

4. Hunt Qualifies as an Insured Under Oglesby's Homeowners Policy

Shelter argues, in conclusory fashion, that Hunt did not qualify as an insured under Oglesby's homeowners policy. However, the policy includes within its definition of "insured" "any person or organization legally responsible for . . . watercraft covered by this policy and owned by [Rodney Oglesby]." LF 0173.

Hunt fits within the policy's definition of "insured" for several reasons. First, it is undisputed that the watercraft in this case was owned by Rodney

Oglesby, the named insured under Oglesby's homeowners policy. LF 0109 ¶ 7, 0243 ¶ 1.

Second, section 1(d)(4) of the exclusions in Oglesby's homeowners policy contains a latent ambiguity and for the reasons discussed above, that ambiguity should be resolved in favor of coverage. So Oglesby's boat was a watercraft covered by his homeowners policy.

Third, Hunt was legally responsible for Oglesby's boat. In their Statement of Uncontroverted Material Facts in Support of Their Motion for Summary Judgment, Respondents made the following statement of fact: "Billy Hunt was legally responsible for Oglesby's boat." LF 0113 ¶ 32. Shelter tried to deny this statement, but did not support its denial with citations to the record. LF 0244 ¶ 7. As a result, the fact that Hunt was legally responsible for Oglesby's boat is deemed admitted. MO. R. CIV. P. 74.04(c)(2). Likewise, Shelter never disputed Respondents' arguments to the circuit court that Hunt was legally responsible for Oglesby's boat and therefore Shelter has acquiesced in the validity of such arguments.

Out of an abundance of caution, however, Respondents will reiterate here why Hunt was legally responsible for Oglesby's boat when the accident occurred. To begin with, Hunt's liability to Respondents resulted from his use of Oglesby's boat, which Shelter admits. LF 0112 ¶ 28, 0244 ¶ 4. If Hunt's liability to Respondents resulted from his use of Oglesby's boat, then Hunt was legally responsible for Oglesby's boat. Also, on the night of the weigh-in, Hunt was

attempting to keep a lookout over the oncoming water for buoys and other objects as Oglesby piloted the boat and Hunt was prepared to warn Oglesby of anything in the boat's path. LF 0109 ¶ 9, 0243 ¶ 1. By doing these things, Hunt assumed the duty—i.e., legal responsibility—to use ordinary care in his use of Oglesby's boat. *Bowan v. Express Medical Transporters, Inc.*, 135 S.W.3d 452, 457–58 (Mo. Ct. App. 2004). Hunt's duty in connection with Oglesby's boat made him legally responsible for Oglesby's boat. Finally, Hunt and Oglesby were joint venturers because they agreed to compete as a team in the bass tournament to win a cash prize and they had an equal right to a voice in the direction of their competition in the tournament, LF 0109 ¶¶ 4–10, 0243 ¶ 1, meaning they were joint and severally liable for damages that resulted from their tournament activities. *Perricone v. DeBlaze*, 655 S.W.2d 724, 725 n.1 (Mo. Ct. App. 1983); *Swindell v. J. A. Tobin Constr. Co.*, 629 S.W.2d 536, 542 (Mo. Ct. App. 1982). As a result, Hunt, as a joint venturer with Oglesby, literally was legally responsible for Oglesby's boat.

5. Conclusion

In sum, Oglesby's homeowners policy provides $300,000 in coverage for Hunt's liability to Respondents. Shelter has admitted the facts necessary to a finding of coverage. It admits that Oglesby wrote Shelter within thirty days after acquiring his boat telling it he wanted coverage, which is sufficient to trigger coverage for Oglesby's boat under his homeowners policy. It admits that Hunt was legally responsible for Oglesby's boat, which is sufficient to make Hunt an "insured" under Oglesby's homeowners policy. And it admits Hunt's liability to

Respondents resulted from his use of Oglesby's boat, which is sufficient to trigger coverage under the personal liability section of Oglesby's homeowners policy.

Alternatively, even if this Court finds that Shelter's admissions are not sufficient to support a finding of coverage, section 1(d)(4) of the exclusions in the comprehensive personal liability part of Oglesby's policy contains a latent ambiguity. Its application to this case is uncertain in that it is not clear whether the application for boatowners insurance Oglesby submitted to Shelter within thirty days after acquiring his boat is a writing contemplated by section 1(d)(4). Shelter's interpretation of Hunt's homeowners policy, which has language identical to Oglesby's, and its finding of coverage thereunder indicates that an application for boatowners insurance is a writing contemplated by section 1(d)(4). Moreover, a reasonable layperson would regard the application as being a writing sufficient to trigger watercraft coverage under Oglesby's homeowners policy. For these reasons, this Court should affirm the circuit court's judgment granting Respondent's Motion for Summary Judgment, denying Shelter's Motion for Summary Judgment and declaring that $300,000 in coverage is available under Oglesby's homeowners policy and payable to Respondents.

III. Respondents' Response to Appellant's Third Point Relied On

The circuit court did not err in entering its judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because the medical payments provision in Rodney Oglesby's boatowners policy is ambiguous and a reasonable layperson would conclude that medical payments coverage is available to Respondents in that they were occupying a non-owned boat at the time they were injured and their injuries resulted from Rodney Oglesby's occupancy of a boat.

A. Standard of Review

Missouri Supreme Court Rule 74.04(c)(6) states that summary judgment is appropriate "[i]f the motion, the response, the reply and the surreply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." On appeal, a summary judgment ruling is reviewed de novo. *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 312 (Mo. Ct. App. 1999). If, as a matter of law, "the judgment is sustainable under any theory, it must be sustained." *Id.*

When an insurance policy is ambiguous, it is construed against the insurer. *Niswonger*, 992 S.W.2d at 316. "An ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words used in the policy." *Id.* Put another way, language is ambiguous "'if it is reasonably open to different constructions,' and, in determining whether that is the case, 'the language used

will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.'" *Id.*

"Insureds are entitled to a resolution of that ambiguity consistent with their objective and reasonable expectations as to what coverage would be provided." *Id.* "The 'reasonable expectations doctrine' provides that the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy, even if a more thorough study of the policy provisions would have negated these expectations." *Kellar v. American Family Mutual Ins. Co.*, 987 S.W.2d 452, 455 (Mo. Ct. App. 1999). The test is not what the insurer intended the words of an insurance policy to mean, "but rather what a reasonable layperson in the position of the insured would have thought they meant." *Niswonger*, 992 S.W.2d at 316–17.

Ambiguous insurance policies are construed against insurers because the purpose of such policies is to provide protection. *Hocker Oil Company v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 514 (Mo. Ct. App. 1999). If policy language is open to different constructions, the most favorable to the insured must be adopted. *Id.* at 516. Exclusionary clauses, in particular, are strictly construed against insurers, meaning that courts must adopt a construction favorable to the insured when faced with an ambiguous exclusion. *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. Ct. App. 1994).

B. Argument

Medical payments coverage is available under Oglesby's boatowners policy. Specifically, the medical payments provision states as follows:

> **1. COVERAGE C – MEDICAL PAYMENTS**
>
> **We** will pay all reasonable medical expenses which are incurred within three years from the date of accident for necessary medical services for bodily injury to any **insured** caused by accident.
>
> . . . .
>
> **2. PERSONS INSURED**
>
> As used in this Part, Insured means:
>
> . . . .
>
> (b) Any other person:
>
> . . . .
>
> (2) while occupying a non-owned boat, if the bodily injury results from your operation or occupancy . . . .
>
> LF 0228–0229.

In this case, it is undisputed that Respondents were occupying a non-owned boat vis-à-vis Oglesby's boatowners policy. *See* App. Br. at 22. It is likewise undisputed that Respondents sustained bodily injury. *Id.* Yet, the provision stated above is ambiguous because there is uncertainty as to whether Oglesby had to be operating or occupying the non-owned boat Respondents were riding on. An average layperson could read the provision and conclude that the bodily injury

need only result from Oglesby's operation or occupancy of a boat. Therefore, this Court should affirm the circuit court's Judgment granting Respondents' Motion for Summary Judgment and declaring that medical payments coverage is available under Oglesby's boatowners policy.

Shelter argues that the Judgment should be reversed because the circuit court did not specifically find that Oglesby's boatowners policy was ambiguous. However, the Judgment cites the applicable caselaw which gives courts the task of determining whether an insurance policy is ambiguous and if so, whether coverage is within the reasonable expectations of an insured. Respondents argued throughout the proceedings below that the medical payments coverage in Oglesby's boatowners policy is ambiguous. The circuit court simply agreed with Respondents and concluded that medical payments coverage was consistent with the reasonable expectations of an insured. Consequently, the fact that the Judgment does not contain a specific finding of ambiguity is of no moment.

IV. RESPONDENTS' RESPONSE TO APPELLANT'S FOURTH POINT RELIED ON

The court of appeals erred in reversing the trial court's judgment and dismissing Respondents' Petition for Declaratory Judgment because Respondents' petition presents a justiciable controversy in that it pleads facts showing that the declaration Respondents seek would entitle them to specific, consequential relief in the form of $100,000 of insurance proceeds under Billy Hunt's boatowners policy, $300,000 of insurance proceeds under Rodney Oglesby's homeowners policy and additional medical payments coverage under Oglesby's boatowners policy and because Billy Hunt and Rodney Oglesby are not indispensable parties in Respondents' action against Shelter in that Respondents released Hunt and Oglesby from personal liability and Respondents dismissed with prejudice their personal injury and wrongful death action against Hunt and Oglesby in exchange for, in part, Shelter's agreement to participate in a declaratory judgment action concerning disputed insurance coverage.

County Court of Washington County v. Murphy, 658 S.W.2d 14 (Mo. 1983).

Shelter Mut. Ins. Co. v. Vulgamott, 96 S.W.3d 96 (Mo. Ct. App. 2003).

Citizens Ins. Co. v. Leiendecker, 962 S.W.2d 446 (Mo. Ct. App. 1998).

Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc., —S.W.3d—, 2006 Mo. App. LEXIS 984 (June 30, 2006).

A. Standard of Review

Circuit courts are given considerable discretion in deciding whether to entertain a declaratory judgment action. *Shelter Mutual Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 101 (Mo. Ct. App. 2003). On appeal, this Court reviews "the allegations set forth in the petition to determine whether principles of substantive law are invoked, which, if proved, would entitle [the] petitioner to declaratory relief." *Id.* at 102. If the facts pled would entitle the petitioner to a declaration of rights, the petition is sufficient and will be upheld on appeal. *Id.*

B. Argument

The court of appeals should not have dismissed Respondents' Petition for Declaratory Judgment. It presents a justiciable controversy in that it sets forth facts demonstrating that Respondents are entitled to specific, consequential relief in the form of insurance proceeds of $100,000 under Hunt's boatowners policy, $300,000 under Oglesby's homeowners policy and medical payments coverage under Oglesby's boatowners policy. Further, Respondents did not have to name Hunt and Oglesby as parties in their petition.

1. Respondents' Settlement Agreement With Shelter, Hunt and Oglesby

When Respondents settled their personal injury and wrongful death lawsuit against Hunt and Oglesby, the facts unearthed through discovery revealed that (1) Respondents had a strong case of liability against Hunt and Oglesby, (2) the

monetary value of Respondents' damages was extremely high and (3) the extent of liability coverage available under Shelter's policies was disputed. As a result, instead of going through a lengthy and expensive trial to obtain a judgment when a judgment in Respondents' favor was probable and the damages substantial, the parties got together and narrowed the case to the issue which the parties most disputed—the extent of insurance coverage available under the policies Shelter issued to Hunt and Oglesby.

On Shelter's side of the table, Missouri law, and its policies, required it to negotiate a settlement and release of Hunt and Oglesby to avoid the potential for a verdict exceeding insurance coverage, which in this case was likely. *Truck Insurance Exchange v. Prairie Framing, LLC*, 162 S.W.2d 64, 94 (Mo. Ct. App. 2005); LF 0153 (Hunt's boatowners policy states as follows: "We will defend any suit seeking damages which are payable under the terms of this policy . . . [and] [w]e may investigate, negotiate or settle any claim or suit."); LF 0183 (Oglesby's homeowners policy states as follows: "If a claim is made or suit is brought against the insured for liability under this coverage, we will defend the insured at our expense . . . [and] [w]e may investigate or settle any claim or suit as we think appropriate."). Shelter's policies gave it an exclusive right to unilaterally fashion a settlement with Respondents, the contours of which could be determined by Shelter without any input from Hunt and Oglesby. LF 0153 (Hunt's boatowners policy states as follows: "We will defend any suit seeking damages which are payable under the terms of this policy . . . [and] [w]e may investigate, negotiate or

settle any claim or suit."); LF 0183 (Oglesby's homeowners policy states as follows: "If a claim is made or suit is brought against the insured for liability under this coverage, we will defend the insured at our expense . . . [and] [w]e may investigate or settle any claim or suit as we think appropriate.").

Knowing that Hunt and Oglesby were exposed to liability for potentially huge damages, Shelter chose to give Respondents the proceeds of liability coverage under Hunt's homeowners policy and Oglesby's boatowners policy and agreed to participate in a declaratory judgment action with Respondents concerning disputed liability coverage. LF 0018–0019 ¶ 52; 0020–0021 ¶ 67; 0142–0144. In particular, the parties disagreed about whether additional liability coverage is available for Hunt's liability to Respondents under Hunt's boatowners policy and Oglesby's homeowners policy. LF 0143 ¶ 6. Shelter admitted Hunt's liability to Respondents for the damages they sustained as a result of the July 5, 2002 accident. LF 0020 ¶ 61; 0022 ¶ 76; 0057 ¶ 61; 0058 ¶ 76, 0142 ¶ 5–0143 ¶ 6. Shelter also conceded that Respondents' damages equal or surpass the total amount of disputed coverage. LF 0021 ¶ 69; 0023 ¶ 84; 0025 ¶ 96; 0058 ¶ 69; 0059 ¶ 84; 0061 ¶ 96; 0143 ¶ 6. Additionally, the parties disagreed about whether additional medical payments coverage was available to Respondents under Oglesby's boatowners policy. LF 0143 ¶ 6. Shelter agreed to pay Respondents the proceeds of any liability or medical payments coverage which this Court finds to exist without requiring Respondents to obtain a finding of liability on the part of

or a judgment against Hunt or Oglesby. LF 0021 ¶ 69; 0023 ¶ 84; 0025 ¶ 96; 0058 ¶ 69; 0059 ¶ 84; 0061 ¶ 96; 0143 ¶ 6.

In exchange for Shelter's agreement to participate in this action and to pay the proceeds of any remaining insurance coverage if Respondents can establish its existence, Respondents agreed to dismiss with prejudice their personal injury and wrongful death lawsuit against Hunt and Oglesby and to release Hunt and Oglesby from personal liability for their damages. LF 0142 ¶ 4.

2. The Declaratory Judgment Act

The Declaratory Judgment Act (the "Act") vests circuit courts with the power "to declare rights, status and other legal relations." Section 527.010, R.S.Mo. 2005. The Act's purpose is remedial—it is designed to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. Section 527.120, R.S.Mo. 2005. For this reason, the Act is to be liberally construed and administered. *Id.*

Under the Act, a person interested under a written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract may have any question of construction arising under that contract resolved by a judicial declaration of rights, status or other legal relations thereunder. Section 527.020, R.S.Mo. 2005. However, when a party seeks declaratory relief, they must join all persons as parties in the action who have or claim any interest which would be affected by the declaration. Section 527.110, R.S.Mo. 2005.

Missouri courts have interpreted the Act as requiring a petition for declaratory judgment to include four basic elements. First, a person seeking a declaratory judgment must establish that "a justiciable controversy exists which presents a real, substantial, presently-existing controversy as to which specific relief is sought." *Shelter Mutual Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 101 (Mo. Ct. App. 2003). Second, they must demonstrate that they have "a legally protected interest directly at issue and subject to immediate or prospective consequential relief." *Id.* Third, a person seeking a declaratory judgment must establish that "the question presented is ripe for adjudication." *Id.* And fourth, they must demonstrate that they do not have an adequate legal remedy available. *Id.*

This Court has explained the justiciable controversy element as follows:

> **No justiciable controversy exists and no justiciable question is presented unless an actual controversy exists between the persons whose interests are adverse in fact. Plaintiff must have a *legally protectable interest* at stake and the question presented must be appropriate for judicial decision . . . . Plaintiff's petition must present a real and substantial controversy admitting of *specific relief* through a decree of a *conclusive character,* as distinguished from a decree which is merely advisory when there is a sufficient interest in either plaintiff or defendant to justify judicial determination, i.e., where the judgment sought would not constitute a specific relief to one party or the other. They**

> **are merely advisory when the judgment would not settle actual rights. If actual rights cannot be settled the decree would be a pronouncement of only academic interest. Plaintiff must have a legal interest in the relief he seeks. The question is justiciable only where the judgment will declare a fixed legal right and accomplish a useful purpose. Plaintiff must present a state of facts from which he has present legal rights against those he names as defendants with respect to which he may be entitled to some *consequential relief* immediate or prospective. If it appears plaintiff can have no relief against defendant, defendant should not be forced into litigation which can have no possible final result in favor of plaintiff.**

County Court of Washington County v. Murphy, 658 S.W.2d 14, 16 (Mo. 1983).

3. Respondents' Petition for Declaratory Judgment Contains Facts Demonstrating That Respondents Are Entitled to Specific, Consequential Relief and That They Have a Legally Protectable Interest at Stake

a. The Factual Allegations in Respondents' Petition for Declaratory Judgment

Respondents' petition sets forth the factual circumstances surrounding the July 5, 2002 boating accident, the deaths which resulted and the damages the

survivors sustained. LF 0013 ¶ 10–0016 ¶ 32. It identifies the litigation which resulted from the July 5, 2002 accident. LF 0011–0012 ¶ 1.

The petition describes the settlement agreement Respondents reached with Shelter, Billy Hunt and Rodney Oglesby in the underlying litigation. First, it states that Respondents and Shelter disagreed about whether an additional $100,000 of insurance coverage was available for Hunt under his boatowners policy and whether an additional $300,000 of insurance coverage was available for Hunt under Oglesby's homeowners policy. LF 0017 ¶ 44–0018 ¶ 46. Second, the petition states that Respondents, Hunt and Shelter agreed to an immediate payment of $100,000 to Respondents under Hunt's homeowners policy and $300,000 under Oglesby's boatowners policy. LF 0018 ¶ 47; 0018–0019 ¶ 52. Third, it states that as part of the consideration for the release of Hunt and Oglesby, Respondents and Shelter agreed to participate in a declaratory judgment action for a determination of whether additional coverage existed for Hunt under his boatowners policy and under Oglesby's homeowners policy. LF 0018 ¶ 47; 0018–0019 ¶ 52. Fourth, the petition states that Shelter agreed that upon final determination by an appropriate appellate court that coverage exists under any Shelter policies, Shelter will pay the total of any available liability and medical payment coverage under such policies to Respondents without requiring Respondents to obtain a finding of liability or a judgment against Hunt and Oglesby. LF 0021 ¶ 69; 0023 ¶ 84; 0025 ¶ 96. Fifth, it states that Hunt's liability to Respondents is undisputed. LF 0020 ¶ 61; 0022 ¶ 76.

Respondents also alleged that they had no other adequate remedy at law with respect to their insurance coverage disputes with Shelter. LF 0021 ¶ 71; 0023 ¶ 86; 0026 ¶ 98. Additionally, Respondents alleged that the real and substantial dispute between them and Shelter regarding insurance coverage for Hunt under his boatowners policy and under Oglesby's homeowners policy and regarding medical payments coverage under Oglesby's boatowners policy is ripe for judicial determination. LF 0021 ¶ 70; 0023 ¶ 85; 0025 ¶ 97. Pursuant to their settlement agreement with Shelter, Respondents prayed for a judgment in their favor declaring that $300,000 of liability insurance coverage was available for Hunt's liability under Oglesby's homeowners policy and payable to Respondents, that $100,000 of liability insurance coverage was available for Hunt's liability under his boatowners policy and payable to Respondents and that medical payments coverage was available to Respondents under Oglesby's boatowners policy. LF 0021; 0024; 0026.

b. The Factual Allegations of Respondents' Petition for Declaratory Judgment Present a Justiciable Controversy Between Respondents and Shelter

According to this Court's decision in *County Court of Washington County v. Murphy*, 658 S.W.2d 14 (Mo. 1983), a petition presents a justiciable controversy if the facts alleged show that the plaintiff is entitled to specific, consequential relief which settles actual rights. *Id.* at 16. The petition, in other words, must show that the plaintiff has a legally protectable interest at stake. *Blue Cross and*

Blue Shield of Kansas City, Inc. v. Nixon, 26 S.W.3d 218, 223 (Mo. Ct. App. 2000).

Respondents' petition sets forth facts which demonstrate they have a legally protectable interest at stake in the present litigation and that they are entitled to specific, consequential relief. First, it demonstrates that Shelter has admitted Billy Hunt's liability to Respondents and that the substantive question in this case is whether Shelter's policies provide coverage for such liability. LF 0019 ¶ 58–0023 ¶ 86. Second, the petition reveals that Shelter, in the settlement agreement, has agreed that Respondents are entitled to the proceeds of its policies if this Court determines coverage exists. LF 0021 ¶ 69; 0023 ¶ 84; 0025 ¶ 96. Third, in their petition, Respondents claim that coverage exists under Hunt's boatowners policy and Oglesby's homeowners policy and that they are entitled to the proceeds of such coverage to compensate them for the damages they suffered as a result of the July 5, 2002 boating accident. LF 0020 ¶ 62; 0021 (wherefore clause); 0022 ¶ 77; 0024 (wherefore clause).

Because Respondents' petition states a claim for specific, consequential relief—a declaration that Respondents are entitled to $300,000 under Oglesby's homeowners policy and $100,000 under Hunt's boatowners policy—and shows that Respondents have a legally protectable interest at stake, it demonstrates that a justiciable controversy exists between Shelter and Respondents. Accordingly, this Court should reverse the Western District's decision and affirm the circuit court's decision.

4. The Court of Appeals Erred in Holding that Respondents' Petition for Declaratory Judgment Did Not Present a Justiciable Controversy

In its opinion, the court of appeals held that Respondents did not have standing to pursue a declaratory judgment action against Shelter. It explained that they were not parties to, nor beneficiaries of, Hunt's boatowners policy, Oglesby's homeowners policy and Oglesby's boatowners policy. The court further explained that they "did not have standing to seek a declaration of the contracting parties' rights under the policies." The court suggested that the only way Respondents could obtain standing to seek a declaration of coverage is if they obtain a judgment against Hunt. The court of appeals' decision should be reversed for several reasons.

a. The Court of Appeals Overlooked the Relief Respondents Seek

The Western District overlooked the relief Respondents actually seek. Respondents are seeking a declaration of their rights, not a declaration of the contracting parties' rights, as the Western District would have it. In their petition, Respondents claimed a right to the proceeds of the liability coverage under Hunt's boatowners policy and to the proceeds of the liability coverage under Oglesby's homeowners policy. LF 0020–0021 ¶¶ 61, 62, 69, wherefore clause; 0022–0024 ¶¶ 76, 77, 84, wherefore clause. Through the settlement agreement, Shelter vested Respondents with this right and conditioned it upon a judicial declaration of coverage under the policies at issue. LF 0021 ¶ 69; 0023 ¶ 84. Respondents initiated this declaratory judgment action to satisfy that condition by proving the

existence of coverage under Hunt's boatowners policy and Oglesby's homeowners policy. LF 0011–0012 ¶ 1. Because Respondents seek specific, consequential relief which inures to them pursuant to a legally protectable interest created by the settlement agreement, Respondents' petition presents a justiciable controversy.

b. The Western District Misinterpreted Missouri Caselaw

The Western District misinterpreted Missouri caselaw in holding that a judgment against insured tortfeasors is required before an action can be maintained against their insurer. To Respondents' knowledge, prior to the Western District's decision, no Missouri case ever held that a judgment is required before a tort claimant can maintain an action against a tortfeasor's insurer. The cases the Western District cited merely state that a judgment creditor may maintain an action against a tortfeasor's insurer. *See Greer v. Zurich Ins. Co.*, 441 S.W.2d 15 (Mo. 1969) (stating the general rule that an injured person who has obtained a judgment against a tortfeasor stands in the shoes of the tortfeasor as against the tortfeasor's insurer); *American Family Ins. Co. v. Nigl*, 123 S.W.3d 297, 302 (Mo. Ct. App. 2003) (stating that unless tort claimants recover a judgment or secure a settlement they may never obtain rights under a tortfeasor's insurance policy).

These cases do not stand for the proposition that a judgment is the exclusive medium through which an action against a tortfeasor's insurer can be maintained by persons other than the insured tortfeasor. In fact, the *Nigl* court recognized that securing a settlement with an insured tortfeasor is sufficient to obtain rights under

their insurance policy. *See* 123 S.W.3d at 302 (citing *Cotton v. Iowa Mut. Liab. Ins. Co.*, 251 S.W.2d 246, 249 (Mo. 1952)).

In this case, Shelter entered into a settlement agreement with Respondents on Rodney Oglesby and Billy Hunt's behalf. Shelter's purpose was to obtain the release of Oglesby and Hunt and to give Respondents the right to secure insurance proceeds available under the liability provisions of Oglesby and Hunt's insurance policies if they could demonstrate that additional coverage exists thereunder. Pursuant to its policies, Shelter had the power to craft this agreement without any input from Hunt or Oglesby. LF 0153 (Billy Hunt's boatowners policy states as follows: "We may investigate, negotiate or settle any claim or suit."); 0183 (Rodney Oglesby's homeowners policy provides as follows: "We may investigate or settle any claim or suit as we think appropriate."). Further, Shelter admitted Hunt's liability to Respondents.[5]

As a practical matter, this state of facts is no different than if Respondents had obtained a judgment against Hunt and then sought to enforce the judgment against Shelter through an equitable garnishment action. In both cases, Hunt's liability to Respondents would be established. In both cases, Shelter would have denied coverage and would have required Respondents to prove its existence.

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5. Through their declaratory judgment action, Respondents are trying to establish that liability coverage existed for Hunt under his boatowners policy and that liability coverage existed for Hunt under Oglesby's homeowners policy.

And in both cases, once coverage is established, Shelter would be required to pay Respondents the applicable insurance proceeds. Thus, requiring a judgment puts form over substance.

Accordingly, because Respondents are parties to a settlement agreement giving them the right to insurance proceeds if they can prove the existence of insurance coverage, they have standing to pursue a declaratory judgment action against Shelter and have presented a justiciable controversy in their petition.

To the extent this Court finds that current Missouri caselaw stands for the proposition that a judgment is an absolute prerequisite tort claimants must meet before pursuing an action against a tortfeasor's insurer, such caselaw should be overruled. Allowing parties to obtain standing through a settlement agreement serves the public policy of narrowing litigation to reduce litigation expenses and burdens on Missouri courts.

In cases where insured tortfeasors are exposed to significant liability but the extent of insurance coverage is disputed—a scenario which is not uncommon, the insurer can eliminate the insured's exposure to personal liability by entering into an agreement with the tort claimants to pursue a declaratory judgment action regarding the extent of insurance coverage available under the tortfeasor's insurance policy or policies. This avoids the stigma associated with the insured tortfeasor having an unsatisfied judgment on the books, which the insurer may or may not be required to satisfy at the end of an equitable garnishment proceeding.

It also eliminates the burdens, uncertainties and expenses associated with obtaining that judgment.

Courts in other jurisdictions have allowed such actions to proceed. In *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677 (7th Cir. 1992) (Posner, J.), the plaintiff, a bank, loaned money to a borrower in reliance on an appraisal done by a company named Lee A. Keeling & Associates ("LKA"). The borrower eventually defaulted on the loan and the bank sued LKA for negligently appraising the borrower's collateral. After that suit was filed but before a judgment was entered, the bank also filed a federal declaratory judgment action against LKA's insurer, seeking a declaration that if the bank wins a judgment in the underlying action, the insurer would have to indemnify LKA up to the limits of the policy. The federal district court dismissed the suit because, in its opinion, there was not a justiciable controversy between the bank and the tortfeasor's insurer and there would not be unless and until the bank obtained a judgment against the insured tortfeasor.

The Seventh Circuit reversed the district court's dismissal of the bank's declaratory judgment action, holding that "the victim of an insured's tort, even though he is not a third-party beneficiary of his injurer's insurance policy, has a legally protectable interest in that policy before he has reduced his tort claim to a judgment (but only after he has been injured)." *Id.* at 682. The court reasoned that in many situations obtaining the proceeds of liability insurance coverage is the only realistic means of collecting on a judgment against a tortfeasor and that an

early determination of whether coverage is available often eliminates the more expensive and burdensome alternative of prosecuting a lawsuit to judgment and then pursuing the insurance company. *Id.* at 681–82. If a court decides that coverage is not available, then the plaintiff may decide to not prosecute the suit further. Likewise, if a court decides coverage is available, the parties to a tort suit can know that prosecuting and defending the suit is not futile.

The *Bankers Trust* case is consistent with other courts who have held that an injured party has a legally protectable interest in a tortfeasor's liability policy before they obtain a judgment against the tortfeasor. *See, e.g.*, *Shingleton v. Bussey*, 223 So. 2d 713, 715 (Fla. 1969) (classifying tort victims as quasi third-party beneficiaries of liability policies and holding that they can pursue an action against a tortfeasor's insurer before obtaining a judgment against the tortfeasor); *Howard v. Montgomery Mutual Ins. Co.*, 805 A.2d 1167, 564–65 (Md. 2002) (holding that an injured party can bring a declaratory judgment action against a tortfeasor's insurer before obtaining a judgment against the insured if the coverage issue is separate and distinct from the tortfeasor's liability); *Michigan Educational Employees Mutual Ins. Co. v. Executive Risk Indemnity, Inc.*, 2004 WL 134005 at *4 (Mich. Ct. App. Jan. 27, 2004) (holding that an injured party can maintain a declaratory judgment action against a tortfeasor's insurer because, among other things, the injured party would be a necessary party if the insurer had brought a declaratory judgment action).

This Court should follow the *Bankers Trust* court as well other courts which permit injured parties to bring declaratory judgment actions against a tortfeasor's insurer before the injured party's claim has been reduced to a judgment against the tortfeasor, especially where, as here, the insurer has agreed to pay insurance proceeds to the injured parties if they can establish insurance coverage.

c. The Western District Failed to Recognize That the Settlement Agreement Between Respondents and Shelter Is Sufficient to Confer Standing on Respondents

The settlement agreement Respondents entered into with Shelter accomplished several things. First, the personal injury and wrongful death lawsuit against Billy Hunt and Rodney Oglesby was dismissed with prejudice and Respondents released Hunt and Oglesby from personal liability. Second, Shelter paid Respondents the proceeds of insurance coverage which was not disputed. Third, Respondents and Shelter agreed to narrow the issues between them by participating in a declaratory judgment action concerning disputed insurance coverage. Fourth, Shelter admitted Hunt's liability to Respondents for their damages. Fifth, Shelter agreed to pay Respondents the proceeds of the disputed insurance coverage if this Court determined that coverage existed. Sixth, the settlement agreement incorporated Hunt's boatowners policy, Oglesby's homeowners policy and Oglesby's boatowners policy by reference.

i. Shelter Had the Contractual Right to Confer Standing Upon Respondents

Shelter, under its policies, had a unilateral right to settle Respondents' claims in any manner it saw fit and did not have to solicit or entertain input from Hunt and Oglesby in any manner whatsoever. Specifically, the personal liability coverage clause in Oglesby's homeowners policy provides that **"[Shelter] may investigate or settle any claim or suit as we think appropriate."** The coverage clause in Hunt's boatowners policy provides that **"[Shelter] may investigate, negotiate or settle any claim or suit."** The clear import of these provisions is that Shelter can settle a lawsuit tendered to it for defense in any manner it wants and insureds literally have no right to a voice in the matter. This includes the power to give Respondents a right to the proceeds of the policies if Respondents can demonstrate the existence of additional coverage through a declaratory judgment action.

When Shelter entered into the settlement agreement with Respondents, it was acting well within its contractual right to settle Respondents' personal injury and wrongful death lawsuit by agreeing, in part, to participate with Respondents in a declaratory judgment action and neither Shelter nor Respondents had to obtain Hunt and Oglesby's permission to do so. Shelter literally had the power to do as it did—unilaterally convert Respondents from so-called "strangers to the contracts" to parties with rights to the proceeds of the insurance coverage provided by the contracts. The fact that Shelter concedes Hunt's liability bolsters the conclusion

that Respondents have a right to any available proceeds of liability coverage available under Shelter's policies. Once a tortfeasor's liability to injured parties is determined either by judgment or by an admission of a tortfeasor's insurer, the injured parties' right to available liability coverage springs forth. And because Respondents have rights under Shelter's contracts with Hunt and Oglesby through the settlement agreement, they have standing to pursue a declaratory judgment action against Shelter to enforce their rights.

ii. Respondents Are Enforcing the Settlement Agreement With the Insurance Policies At Issue Incorporated Therein

Respondents, through their Petition for Declaratory Judgment, are enforcing the settlement agreement with Hunt's boatowners policy, Oglesby's homeowners policy and Oglesby's boatowners policy incorporated therein. Under Missouri law, when "a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, —S.W.3d—, 2006 Mo. App. LEXIS 984 at *21–22 (June 30, 2006). As a result, "[t]he incorporated matter is to be interpreted as part of the writing." *Id.* If a contract makes clear reference to another document and sufficiently describes it so that its terms are certain, "the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, **including a separate agreement to which they are not parties.**" *Id.* (emphasis added).

The settlement agreement clearly refers to Hunt's boatowners policy, Oglesby's homeowners policy and Oglesby's boatowners policy and therefore those policies are incorporated into Respondents' settlement agreement with Shelter by reference. LF 0142 ¶¶ 2–3; 0143 ¶ 6. As a result, the incorporated policies are to be interpreted as part of the settlement agreement. And because Respondents—as parties to the settlement agreement—have standing to enforce the settlement agreement, with the insurance policies at issue incorporated therein, their petition presents a justiciable controversy. *See, e.g., American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 275 (Mo. Ct. App. 1995) (indicating that it is proper for a party to a contract to enforce it through a declaratory judgment action). The controversy between Respondents and Shelter concerns the proper interpretation of the policies **as part of** the settlement agreement.

iii. The Settlement Agreement Made Respondents Third-Party Beneficiaries Under Hunt's Boatowners Policy, Oglesby's Homeowners Policy and Oglesby's Boatowners Policy

Respondents are third-party beneficiaries under Shelter's policies. Under Missouri law, a person is a third-party beneficiary to a contract if the contract expresses an intent to specifically benefit the third party or if the contract expresses an intent to benefit a class of persons and the person belongs to that class. *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. 1993). Third-party beneficiaries have a right to enforce contracts through declaratory judgment actions. *Id.*

Hunt's boatowners policy contains the following liability coverage provision:

> **We will pay on behalf of the insured all sums, within the limits of liability of these coverages, which the insured shall become legally obligated to pay as damages because of [bodily injury] sustained by any person . . . caused by an accident resulting from the ownership, maintenance, or use of the described property or non-owned property.**

LF 0152–0153.

Oglesby's homeowners policy contains the following liability coverage provision:

> **We will pay all sums arising out of any one loss which an insured becomes legally obligated to pay as damages because of bodily injury . . . and caused by an occurrence covered by this policy.**

LF 0183.

The benefit contemplated by these provisions is Shelter's payment to injured third parties, not to the insureds. Injured third parties constitute the class which the contracts are intended to benefit. Respondents are members of that class because they are injured third parties whose injuries were caused by Hunt. Shelter has admitted Hunt's liability or legal responsibility to Respondents and has agreed to pay Respondents the proceeds of the policies if Respondents can demonstrate that additional coverage exists for Hunt's liability. LF 0020 ¶ 61;

0021 ¶ 69; 0022 ¶ 76; 0023 ¶ 84; 0057 ¶ 61; 0058 ¶ 69; 0058 ¶ 76; 0059 ¶ 84. Therefore, if Respondents can prove coverage exists under the two policies, they are the third party beneficiaries who are entitled to payment from Shelter in accordance with the settlement agreement.

5. The Court of Appeals Erred in Holding That Hunt and Oglesby Are Indispensable Parties Which Had to Be Joined in This Action

The Court of Appeals' July 18, 2006 Opinion is contrary to important Missouri caselaw which demonstrates that Rodney Oglesby and Billy Hunt are not indispensable parties to Respondents' declaratory judgment action.

Missouri Supreme Court Rule 87.04 states that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." In *State ex rel. Emcasco Ins. Co. v. Rush*, 546 S.W.2d 188 (Mo. Ct. App. 1977), the court defined what constitutes an "interest" sufficient to trigger joinder of a party in a declaratory judgment action as follows:

> **An 'interest' which compels joinder does not include a mere consequential, remote or conjectural possibility of being in some manner affected by the result of the original action. It must be such a direct claim upon the subject matter of the action that the joined party will either gain or lose by direct operation of the judgment rendered.**

Id. at 197.

Further, in *Citizens Ins. Co. v. Leiendecker*, 962 S.W.2d 446 (Mo. Ct. App. 1998), the court held that named insureds under an insurance policy were not indispensable parties to a declaratory judgment action under circumstances similar to this case. In that case, the Leiendeckers had recommended the services of a life insurance salesman to several of their friends and acquaintances. The salesman met with those people, who paid him for life insurance policies he never procured. They turned around and sued, among others, the Leiendeckers, the salesman and the life insurance company who was supposed to receive the money given to the salesman, Jackson National Life. Jackson National Life filed a contribution claim against the Leiendeckers. The Leiendecker's homeowners insurer, Citizens, provided a defense to the Leiendeckers under a reservation of rights. Eventually, Jackson National Life entered into a settlement agreement with the Leiendeckers whereby it agreed not to execute on any judgment it might eventually obtain against them except to the extent of their insurance coverage.

Subsequently, Citizens filed a declaratory judgment action against Jackson National Life and the Leiendeckers asking for a declaration that its homeowners policy did not provide coverage for Jackson National Life's contribution claims against the Leiendeckers. Citizens dismissed the Leiendeckers before the declaratory judgment action was adjudicated by summary judgment.

The *Leiendecker* court held that the Leiendeckers were not indispensable parties to Citizens' declaratory judgment action because Jackson National Life had agreed to not execute on the insureds or their assets and to collect only against the

insurance proceeds if coverage was established. *Id.* at 450. Therefore, according to the *Leiendecker* court, the insureds—the Leiendeckers—did not have an "interest" which could be affected by the declaratory judgment action and as a result, their joinder was not required under Rule 87.04. *Id.*

Like the insureds in *Leiendecker*, Respondents released Rodney Oglesby and Billy Hunt from personal liability before Respondents filed their declaratory judgment action. They also dismissed with prejudice their personal injury and wrongful death suit against Oglesby and Hunt before this action was filed. Pursuant to Respondents' agreement with Shelter, the availability of insurance coverage under their Shelter policies was all that was at stake in Respondents' declaratory judgment action. Oglesby and Hunt's personal assets were no longer at stake when this action was filed. Further, Respondents did not seek a declaration as to Oglesby and Hunt's rights, duties or liability concerning the July 5, 2002 boating accident which was the subject of the underlying personal injury and wrongful death action. Indeed, Shelter admitted Hunt's liability for purposes of this action.

For these reasons and pursuant to *Leiendecker*, Rodney Oglesby and Billy Hunt were not indispensable parties pursuant to Rule 87.04 because they did not have an interest which would be affected by the outcome of this action. A judgment based on the declarations Respondents seek would not cause Oglesby or Hunt to gain or lose anything. Any imaginable interest Oglesby and Hunt might have in the outcome of this action would merely be remote or conjectural, which is

not sufficient to compel joinder under Rule 87.04. *State ex rel. Emcasco Ins. Co. v. Rush*, 546 S.W.2d 188, 197 (Mo. Ct. App. 1977).

The Court of Appeals cited *American Economy Insurance Company v. Ledbetter*, 903 S.W.2d 272 (Mo. Ct. App. 1995), for the proposition that Oglesby and Hunt were indispensable parties in Respondents' declaratory judgment action. *Ledbetter* is distinguishable because unlike *Leiendecker* and this case, the availability of coverage was an issue in that case while the insured's personal liability for the tort claimants' damages was still at stake. The insured in *Ledbetter* still faced the potential of having his personal assets executed on or garnished when the declaratory judgment action was filed. Thus, the insured's interest in making sure his personal liability for the claimant's damages was insured was enough to require his joinder under Rule 87.04.

In this case, by contrast, Oglesby and Hunt did not have a similar interest because they were released from personal liability for Respondents' damages and Respondents dismissed with prejudice the personal injury and wrongful death action before they filed this action. During the pendency of this action, their personal assets have not been at stake.

In sum, Rodney Oglesby and Billy Hunt are not indispensable parties to Respondents' declaratory judgment action. They did not have an "interest" in the outcome of such action such that their joinder was compelled by Missouri Supreme Court Rule 87.04.

6. Respondents Have No Other Adequate Remedy At Law

Respondents have no other adequate remedy at law by which they can enforce their rights against Shelter. An equitable garnishment action would not be available to them because they did not have a judgment against Hunt and Oglesby when they brought this action. *See* Section 379.200, R.S.Mo. 2005 (requiring a final judgment). Such a proceeding, moreover, is equitable in nature. *See Zink v. Employers Mut. Liab. Ins. Co.*, 724 S.W.2d 561, 564 (Mo. Ct. App. 1987) (stating that an equitable garnishment "is no garnishment at all, but is a suit in equity against the insurance company to seek satisfaction of one's judgment under an insurance policy"). So even if Respondents had obtained a judgment, an equitable garnishment action would not constitute an adequate remedy **at law**.

Similarly, Respondents could not have invoked traditional garnishment proceedings allowed by Rule 90 because they did not have a judgment against Hunt and Oglesby when they filed this action. But even if they had obtained a judgment and pursued Shelter through a traditional garnishment proceeding, Respondents would have exposed themselves to potential liability for Shelter's attorneys fees, which is something they cannot afford. This Court has recognized that traditional garnishment proceedings are disfavored by litigants in light of exposure to attorney fee liability and for that reason, litigants should not be forced to pursue this remedy. *Cf. Johnston v. Assurance Co. of N. Am.*, 68 S.W.3d 398, 404 (Mo. 2002) (discussing the fact that traditional garnishment proceedings expose unsuccessful litigants to liability for attorney fees and suggesting that

ambiguous pleadings will be construed as invoking the equitable garnishment statute). Accordingly, a traditional garnishment proceeding is not an adequate remedy.

A breach of contract action would not provide an adequate remedy to Respondents either. Respondents' dispute with Shelter turns on the existence of insurance coverage for Hunt's liability to Respondents. Shelter has already agreed that Hunt is liable to Respondents and that it will pay them the proceeds of any additional liability coverage. The parties need a court to construe the insurance policies at issue and issue a declaration concerning the availability of additional coverage. Such a declaration cannot be made in a breach of contract action and therefore such an action is not an adequate remedy.

7. Conclusion

In sum, the court of appeals erred in reversing the circuit court's judgment and dismissing Respondents' petition. Hunt and Oglesby are not indispensable parties who Respondents had to join in this action. Hunt and Oglesby do not have an interest in this action and do not stand to gain or lose anything by being left out. Respondents have released them from personal liability for Respondents' damages and Respondents have dismissed with prejudice their personal injury and wrongful death suit against Hunt and Oglesby.

Additionally, Respondents' petition presents a justiciable controversy. It pleads facts showing that they are entitled to insurance proceeds if they can demonstrate that additional insurance coverage is available to cover Hunt's

liability for their damages. If Respondents prevail, in whole or in part, in this action, they will be entitled to specific, consequential relief. This is all that is required to give Respondents standing to pursue a declaratory judgment action against Shelter and to present a justiciable controversy. This Court should therefore reverse the court of appeals' decision and reinstate Respondents' petition.

CONCLUSION

For the reasons stated above, this Court should reverse the court of appeals' decision, reinstate Respondents' Petition for Declaratory Judgment and affirm the circuit court's judgment in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Benjamin S. Creedy, hereby certify as follows:

Respondents' Substitute Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b). Respondents' Substitute Brief contains 19,330 words and 1,946 lines of text.

Pursuant to Special Rule XXXII, the floppy disk filed with Respondents' Brief contains a copy of the Brief. It was scanned for viruses before its submission to this Court and is virus-free.

Two true and accurate copies of Respondents' Brief and a floppy disk containing a copy of the Brief were sent via U.S. Mail on this 10th day of November 2006 to the following:

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