

**In The
SUPREME COURT OF MISSOURI**

No. SC90041

**ERIC D. BURNS,
Plaintiff-Respondent,
v.
LYNN M. SMITH,
Defendant,
and
FARMERS ALLIANCE MUTUAL
INSURANCE COMPANY OF KANSAS,
Garnishee-Appellant.**

**Appeal from the Circuit Court of St. Clair County
Hon. James K. Journey**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

Introduction

The first paragraph of plaintiff's argument reflects his misconception about the insurance policy at issue here, which sets the tone for his flawed approach to contract interpretation. Plaintiff says at the outset that the Farmers policy involved in this case is an "all risk," "personal liability" policy. It is not. It is, rather, a Farmowners-Ranchowners Policy (L.F. 65) – designed primarily to protect plaintiff's residence, farm premises, and personal property from property damage, including fire, windstorm, hail, explosion, vandalism, and theft, among others (L.F. 79). Thus, Section I of the policy is broadly written, but focuses on the farm premises to the exclusion of other premises. See L.F. 74 (theft limitation off premises); L.F. 73 (exclusion of business property while away from insured premises).

It is true that in Section II the insured is afforded coverage for personal liability, primarily against claims arising out of his farming activities and premises liability. Unlike Section I, however, this personal liability coverage is sharply circumscribed by numerous exclusions, most notably for automobile accidents, products liability, and injuries arising out of the insured's business activities (L.F. 83). The policy also does not cover "bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented, or controlled by any insured" (id.). The policy's main focus on Section I is reinforced by the fact that more than 80% of the premium is assessed for that coverage (L.F. 57).

Farmowner's insurance is nothing more than a homeowner's policy for a farm. As noted in 9A Couch on Insurance 3d §128:1, p. 128-5:

“Homeowners’ liability insurance is designed to protect homeowners from risks and activities associated with the home. In essence, farmowners’ liability insurance policies are homeowners’ policies but such policies are specifically tailored to the unique needs and requirements of persons who engage in farming activities.”

Plaintiff also tries to expand the purported scope of coverage of the policy by stating that Farmers is obligated to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury” (Br. 16) but omitting the rest of that sentence: “or property damage, to which this insurance applies, caused by an occurrence.” Obviously, the policy exclusions must be considered in determining to which injuries the insurance applies. Todd v. Mo. United School Ins. Council, 223 S.W.3d 156, 163 (Mo. banc 2007) (“Insurance policies are read as a whole, and the risk insured against is made up of both the general insuring agreement as well as the exclusions and definitions.”). Here, the injuries suffered by plaintiff Burns undeniably arose out of the business pursuits of the insured Smith and therefore were not covered by Farmers’ policy.

I. THE DEFINITION OF “BUSINESS” IS NOT AMBIGUOUS.

Plaintiff does not contend that the term “business pursuits” is itself ambiguous, and few would question that Smith’s on-the-job welding on a truck owned by his employer constitutes a “business pursuit.” Plaintiff, though, invokes a strained interpretation of the definition of “business” in an attempt to interject opacity where clarity otherwise prevails.

1. Plaintiff urges that the word “and” in the business definition can mean “together with” and therefore that two events – a business activity and the use of the residence premises – must exist “together with” each other (Br. 18). Although “together with” is a strained synonym for “and” in this context, even if it were to apply, it does not link the two events but the two clauses, and therefore functions essentially the same as “in addition to.”

Plaintiff contends that because different judges in this case have interpreted this particular “and” differently, it must be ambiguous. But such advocacy ignores the well-settled proposition that a term is not ambiguous merely because persons can disagree about its meaning. Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 901 (Mo. banc 1990) (Robertson, J.); State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 860 (Mo. banc 2006). Rather, a policy is ambiguous if its provisions are duplicitous or difficult to understand. Haulers Ins. Co. v. Pounds, 272 S.W.3d 902, 905 (Mo.App. 2008); Omaha Prop. & Cas. Ins. Co. v. Peterson, 865 S.W.2d 789, 790 (Mo.App. 1993). There is nothing about the business definition in general or the word “and” in particular that falls in that category.

Plaintiff implicitly suggests that because “and” has a number of synonyms, it must be ambiguous. Aside from the fact that the endorsement of such a concept would render virtually every word – and every contract – meaningless, plaintiff’s suggestion defies the principle that “[a] word with more than one dictionary meaning is not necessarily ambiguous if the Court concludes that, in context, only one meaning that comports with the parties’ objectively reasonable expectations is

applicable.” Strader v. Progressive Ins., 230 S.W.3d 621, 624 (Mo.App. 2007); King v. Cont’l Western Ins. Co., 123 S.W.3d 259, 265 (Mo.App. 2003).

In a policy designed to afford protection to an insured’s farm and residence premises, and to limit coverage for off-premises losses, it is ridiculous to suggest that the parties’ objectively reasonable expectations were that Smith’s business activities would be covered everywhere in the world except on those insured premises. By giving “and” its ordinary meaning of “as well as” or “in addition to” or “and also,” the purposes of the policy and the expectations of the parties are met by reading “business” to mean “a trade, profession, or occupation excluding farming, [as well as/in addition to/and also] the use of any premises or portion of residence premises for any such purposes.” The latter clause makes clear that while broad coverage is supplied for on-premises activities and perils, business activities nevertheless are not covered there or anywhere.

2. Plaintiff also argues that the punctuation in the business definition illustrates its ambiguity (Br. 17, 25). For support he cites a purported 2003 edition of Strunk & White which, according to our library, does not exist. Regardless, plaintiff’s conclusions from whatever treatise he was consulting are perplexing at best and simply wrong at worst. At page 17, for example, he says that the clause “and the use of any premises or portion of residence premises” (the “premises clause”) could not be a parenthetical explanation of the previous clause (as the Southern District held) unless it is separated by a comma. But it is separated by a comma.

At page 25 plaintiff invokes the same source as observing that “A semicolon is the proper way to join two independent clauses if one chooses not to use a

period.” Surely somewhere else in that publication the authors must have acknowledged that merely a comma is needed if the clauses are joined by a coordinating conjunction (as indeed Strunk and White did at page 5 of their 2009 edition). “And,” of course, is a coordinating conjunction – one that “joins together words or groups of equal grammatical rank.” Webster’s New Ninth Collegiate Dictionary, p. 288 (1988). Thus, since the two clauses of the business definition are separated by a comma and a coordinating conjunction, they are independent clauses of a compound sentence, both of which have “business” as a subject and both of which have equal grammatical rank:

Business means a trade, profession or occupation, excluding farming,
and

business means the use of any premises or portion of residence premises for any such purposes.

Accordingly, plaintiff’s preoccupation with punctuation is actually counter-productive. It is also an inferior tool of analysis, as this Court said in Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 84 (Mo. 1958):

“In construing legal writings, generally the punctuation is subordinate to the text and the use of a period or other mark is not controlling upon the question of proper construction where such use would result in an unreasonable or absurd construction.”

3. Cognizant of the absolute dearth of authority supporting his position, plaintiff has buried at the back of his Point I a discussion of the unanimous universe of court decisions squarely rejecting his proposed interpretation of the same language of the premises clause (Br. 35-39). He points out that out-of-state

cases are not controlling, which of course is true. But this Court frequently cites decisions from other jurisdictions that have previously considered the same issue, especially when it is res nova in Missouri.

Indeed, in his earlier incarnation as a judge of this Court, plaintiff's appellate counsel often consulted cases from other states to refine his thinking and/or justify his conclusions. See, e.g., Cruzan v. Harmon, 760 S.W.2d 408, 413 nn.4, 5 (Mo. banc 1988) (Robertson, J.) ("It is our duty in a case of first impression in this state not only to consider precedents from other states, but also to determine their strengths," citing 54 cases from 16 other states), aff'd, 497 U.S. 261 (1990); Southside Nat'l Bank v. Hepp, 739 S.W.2d 720, 722-23 (Mo. banc 1987) (Robertson, J.) (discussing and following decisions from New York, Georgia, Indiana, and New Jersey); Hanson v. Hanson, 738 S.W.2d 429, 433-34 (Mo. banc 1987) (Robertson, J.) (discussing cases from Washington, Wisconsin, Kansas, Nebraska, Pennsylvania, and Texas).

Plaintiff also maintains that the courts in Louisiana, New Hampshire, and Ohio that have rebuffed the position he espouses were not applying the same rules of interpretation that govern in Missouri. His examples do not bear that out, but more fundamentally those courts were simply applying plain English and did not need to utilize canons of construction because the business definition was unambiguous.

The five judges of the New Hampshire Supreme Court viewed the language as written and summarily concluded: "We fail to see how a 'reasonable person in the position of the insured' could reach this conclusion," holding that "there is no ambiguity." Concord Gen. Mut. Ins. Co. v. McCarty, 604 A.2d 573, 576 (N.H.

1992). Three judges of the Court of Appeals of Ohio, per curiam, were even more succinct: “There is no merit to this contention.” Latter v. Century Grill, Inc., 1976 WL 190712, at *2 (Ohio App. 1976). And three Louisiana appellate judges construed “and” to mean “or,” based on the purpose of the homeowners’ insurance and the need to avoid the “incongruous” and “absurd” result advocated by plaintiff. Donovan v. Nettles, 327 So.2d 433, 435-36 (La.App. 1976).^{1/}

It is of course not the number of judges who have endorsed a given position that is dispositive. But it is telling that not a single jurist in any appellate court has ever concluded that the business pursuits exclusion – which has been around for decades – can reasonably be interpreted as plaintiff proposes. The trial judge here did not address the illogic of his unique interpretation but merely offered the observation that “and” means “and.” He cited only the Illinois decision in Bishop, which was mere dicta, as pointed out in our opening brief. Understandably, plaintiff does not rely on Bishop in his brief to this Court.

4. Plaintiff’s invitation to the Court to apply a contorted construction to the policy language violates the maxim that courts should not unreasonably distort the language of the policy or exercise inventive powers for the purpose of creating an ambiguity where none exists. Todd, 223 S.W.3d at 163; Rodriguez v. Gen’l

^{1/} We have not even counted at least nine additional appellate judges in Minnesota, Wisconsin, and Georgia who applied the business pursuits exclusion to off-premises accidents without even mentioning plaintiff’s interpretation, whether because the plaintiffs’ lawyers deemed it untenable of assertion or because the judges deemed it unworthy of discussion. See Farmers Subs. Br. 19 n.4.

Acc. Ins. Co., 808 S.W.2d 379, 382 (Mo. banc 1991) (Robertson, J.) An unambiguous provision is to be enforced as written, even if the effect is to bar coverage. Todd, 223 S.W.3d at 163.

5. As the Southern District held, plaintiff's proposed construction of the business definition would produce an irrational result. Hence, it is not a reasonable alternative interpretation that can be used to create an ambiguity. Gavan v. Bituminous Cas. Corp., 242 S.W.3d 718, 720 (Mo. banc 2008).

Application of these well-settled principles requires rejection of the trial court's analysis and reversal of its judgment.

II. EVEN IF THE BUSINESS DEFINITION IS DEEMED AMBIGUOUS, THERE IS NO COVERAGE FOR OFF-PREMISES BUSINESS ACTIVITIES.

Plaintiff's substitute brief wisely backs away from the absolutist position advanced in his application for transfer and acknowledges that the search for the parties' intent should be exhausted by all available means before defaulting to the arbitrary rule of contra proferentem (Br. 30).

1. Here the parties' intent can be ascertained from a variety of sources. In that process, the insurance policy must be read as a whole, keeping in mind the object, nature, and purpose of the agreement. Todd, 223 S.W.3d at 162; Braden v. von Stuck, 950 S.W.2d 489, 494 (Mo.App. 1997); Title Ins. Co. v. Constr. Escrow Serv., Inc., 675 S.W.2d 881, 889 (Mo.App. 1984). As we have seen, the principal purpose of the Farmers policy was to provide coverage against property damage to Smith's home and farm. At pages 27-30 of our substitute brief in this Court, we

noted that the purpose of such policies – and of the carve-out for business pursuits – is well recognized by treatises and case law alike. Plaintiff does not address this published recognition of the parties’ intent.

In Allstate Ins. Co. v. Hallman, 159 S.W.3d 640, 645 (Tex. 2005), the Texas Supreme Court discussed this issue:

“Furthermore, as numerous courts have recognized, the purpose of the business pursuits exclusion is to lower homeowner’s insurance premiums by removing coverage for activities that are not typically associated with the operation and maintenance of one’s home.”

Smith paid a \$240 premium for \$1 million worth of limited personal liability coverage (L.F. 56), which is totally inconsistent with any assertion that the parties intended to cover his risky and hazardous activities, including welding, on the job at Kennon Redi-Mix. His understanding of the limitation on his Farmers coverage is also evidenced by his purchase of liability coverage for himself and Kennon from both Oak River Insurance Co. and Fremont Indemnity Company (L.F. 222, 369). Plaintiff offers no explanation for why someone already supposedly covered by a \$1 million policy for off-premises, on-the-job liability would buy such substantial additional primary, not excess, coverage.

2. Another tool in divining the intent of the parties requires the Court to try to harmonize all the provisions of the policy so that none of the provisions are rendered superfluous, useless, or without function or sense. Topps v. City of Country Club Hills, 272 S.W.3d 409, 416 (Mo.App. 2008); Dibben v. Shelter Ins. Co., 261 S.W.3d 553, 556 (Mo.App. 2008). In this case, plaintiff reads the policy to exclude only “the use of any premises or portion of residence premises for any

trade, profession or occupation, excluding farming.” Since these premises, according to plaintiff, are the only premises upon which the exclusion acts, the first part of the provision defining “business” to mean “a trade, profession or occupation, excluding farming” is rendered superfluous and meaningless. The Louisiana court so noted in Donovan, 327 So.2d at 435. Moreover, plaintiff’s construction effectively eviscerates the exclusion for injuries arising out of premises other than the insured premises (L.F. 83).

3. An additional interpretive aid in the search for the parties’ intent is the truism that they should not be viewed as trying to accomplish an unreasonable result. Blair v. Perry County Mut. Ins. Co., 118 S.W.3d 605, 606 (Mo. banc 2003). We have already discussed on several occasions how plaintiff’s proposed construction turns the insurance policy upside down, and plaintiff has never offered any coherent explanation of how his reading makes sense. That’s no doubt because it doesn’t. Hence, plaintiff’s fondness for the arbitrariness of contra proferentem.

4. Furthermore, why would Section I of the policy exclude coverage for business property located off the insured premises (L.F. 73) if Section II provided personal liability coverage for off-premises business torts?

5. Finally, the best evidence of the parties’ intent and understanding of the policy is the construction they themselves have placed on it. State ex rel. Northwestern Mut. Ins. Co. v. Bland, 189 S.W.2d 541, 549 (Mo. banc 1945). In this regard, the evidence is conclusive that business coverage was never sought or supplied. The insured Lynn Smith, under oath, testified that he bought the Farmers policy “to cover my farming activities. In purchasing said policy, I did not intend

for Farmers Alliance to provide coverage for any incidents arising from my separate business pursuit of Kennon Redi-Mix, Inc.” (L.F. 144 ¶15).

Recognizing the import of this affidavit, plaintiff resorts to double-talk to urge that it doesn't mean what it says (Br. 31-33). As we understand it, plaintiff wants the Court to interpret the affidavit as saying that Smith's references to “business pursuits” somehow did not encompass claims asserted against him personally arising from the Kennon business. In the process, plaintiff has truncated the language used by Smith, which disclaimed an intent to obtain “coverage for incidents arising from” his Kennon employment, and plaintiff's interpretation is at odds with the plain language of the affidavit. Moreover, Smith testified that the negligent act which led to the Burns claim “was performed by me in the course of my occupation, trade, or profession,” and that Burns' injuries “arose out of my business pursuits with regard to Kennon Redi-Mix” (L.F. 144-45 ¶¶17, 18), the pursuits for which he sought no coverage from Farmers. Plaintiff's suggestion that Smith was acting in a personal, rather than a business, capacity when performing the negligent welding, because of the holding in Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007) (Br. 19), is baseless.

Plaintiff also tries to blunt the effect of Smith's affidavit by contending that his expressed understanding in that declaration was inconsistent with his initial tender of the Burns defense to Farmers. That argument, too, is without substance. When the Burns case was filed, Smith retained counsel, who immediately put all carriers, including Farmers, on notice and tendered defense of the case. This was appropriately precautionary on the part of the lawyer, and the record does not indicate whether Smith was even aware of the tender. Contrary to plaintiff's view,

there is nothing improper about tendering the defense of a lawsuit to an insurer at the outset of a case, before coverage can fully be assessed, in order to avoid defenses by the insurer based on waiver, untimely notice, failure to cooperate, prejudice, etc.

The insurer's duty to defend is broader than the duty to indemnify, and is determined by the allegations in the tort victim's petition. McCormack Baron Mgm't Servs., Inc. v. Am. Guarantee & Liab. Ins. Co., 989 S.W.2d 168, 170 (Mo. banc 1999). If any of the claims is potentially within the policy's coverage, the insurer must defend. Id. at 170-71; Union Pac. R.R. Co. v. Am. Family Mut. Ins. Co., 987 S.W.2d 340, 345-46 (Mo.App. 1998); Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 79 (Mo.App. 2005). Here, the Burns petition is not in the record, so its contents are unknown. Viewed another way, there is no evidence to cast any doubt on Smith's sworn, objective affidavit, which was motivated by nothing other than a desire to do the right thing, and which, after all, comes to the same conclusion required by the unambiguous terms of the policy, the applicable canons of construction, and all the case law.

Quite apart from Smith's affidavit, however, it is folly to suggest that any reasonable purchaser of insurance would buy a homeowner's policy to cover his occupational activities. Would a lawyer purchase homeowner's coverage to protect him against claims of legal malpractice? Would a restaurant proprietor expect his homeowner's carrier to cover customers' claims of product or premises liability? Of course not. That is why particular types of policies, with their own premium structure, are written to cover those specific perils.

6. For the foregoing reasons, all relevant considerations lead inevitably to the conclusion that the parties did not contract or attempt to contract for coverage of this loss. The Court can therefore decide the case without resort to the doctrine of contra proferentem, which is not an attempt to determine the parties' intent but a last-resort policy choice when their intent is not otherwise ascertainable.

III. THE COURT'S AWARDS OF PREJUDGMENT AND POSTJUDGMENT INTEREST ARE EXCESSIVE.

Obviously, the issues pertaining to interest will become justiciable only upon a determination that Farmers is liable to plaintiff under the farmowner's policy issued to Smith. For the reasons previously stated, we submit that the liability judgment should be reversed, and the interest issue in that instance would be moot. Hence, our reply to plaintiff's interest arguments will be brief.^{2/}

1. With regard to prejudgment interest, plaintiff has never argued that Farmers' principal exposure should be more than its \$1,000,000 policy limits. As

^{2/} Plaintiff's assertion that this issue was not preserved is meritless. Farmers contested plaintiff's entitlement to any recovery, the whole thus encompassing its parts. Farmers never separately challenged plaintiff's entitlement to such interest as might be permitted by the terms of the policy. But it had no obligation to anticipate the court's liability finding or its excessive interest award, and timely sought a correction as soon as it was entered for an amount that exceeded plaintiff's entitlement.

such, he is inconsistent in insisting that prejudgment interest should be calculated on a greater amount for which Farmers is not liable. This is especially true in light of the policy provision specifically limiting prejudgment interest to “that part of the judgment the Company pays” (L.F. 109). If the policy limits are effective, so is the interest provision.

The Eastern District’s seemingly contrary conclusion in Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297, 304-06 (Mo.App. 2007), overlooks the fact that even if coverage for the insured was erroneously denied, the insurer did not breach any duty to the garnishing creditor and should not be precluded from relying on the policy provision limiting its exposure for prejudgment interest. Ennulat is also contrary to the statement of the Western District in Miller v. Secura Ins. & Mut. Co. of Wisconsin, 53 S.W.3d 152, 157 (Mo.App. 2001), that the same provision regarding prejudgment interest as is contained in the Farmers policy is effective to limit the insurer’s responsibility for prejudgment interest to that portion of the judgment it is responsible for paying. Ennulat is likewise at odds with Wilson v. Traders Ins. Co., 98 S.W.3d 608, 617-18 (Mo.App. 2003), where the Southern District held that the insurer’s liability for prejudgment interest was properly calculated on the amount of its liability, not on the total judgment awarded to the garnishor.

If the Court reaches this issue, the prejudgment interest holding of Ennulat should be overruled.

2. As for post-judgment interest, plaintiff propounds no reason why Farmers should be assessed post-judgment interest on an amount greater than the remaining unpaid portion of the judgment, or, for that matter, why he should

continue to be paid interest on sums he has already received in partial satisfaction of the judgment.

CONCLUSION

Plaintiff's industrial accident at Kennon Redi-Mix was unfortunate, but he has already been compensated more than \$825,000 by insurers who actually covered the risk (Oak River and Workers' Compensation) (L.F. 369, 397). His attempt to expand his recovery through a \$537,065 agreement against Farmers by distorting the plain terms of an inapplicable insurance policy to which he was not a party is unavailing. The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that this Substitute Reply Brief for Appellant complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) and that it contains 3,900 words, excluding the cover, this certificate, and the signature block as determined by the Microsoft Word 2003 Word-counting system. I also certify, pursuant to Rule 84.06(g) that the diskettes of the Brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

Thomas C. Walsh