IN THE MISSOURI SUPREME COURT

MARK KARSCIG

Appellant,

v.

JENNIFER MCCONVILLE

Appellant,

And

AMERICAN FAMILY MUTUAL INSURANCE COMPANY

Respondent.

S.C. #90080
Transfer from the Missouri Court of Appeals, Western District
Appeal from the Circuit Court of Pettis County, Missouri
Eighteenth Judicial Circuit
The Honorable Robert M. Liston

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Mark Karscig brought suit against Jennifer McConville for his bodily injuries arising out of a motor vehicle/motorcycle collision that occurred on October 12, 2005, and against American Family for a declaratory judgment as to whether Jennifer McConville's own car insurance policy with American Family applied to the subject accident and Mark's claims. American Family filed a counterclaim and cross-claim for declaratory judgment asking the Trial Court to find no coverage owed to Jennifer McConville on her American Family policy. The Trial Court granted summary judgment in favor of American Family finding that Jennifer's policy did not provide her with coverage for Mark's injury claims. The Missouri Court of Appeals, Western District, affirmed the Trial Court's ruling. This Court granted transfer after opinion by the Court of Appeals. This Court therefore has jurisdiction pursuant to Missouri Supreme Court Rule 83.04 and Article V, Section 10, of the Constitution of Missouri.

STATEMENT OF FACTS

On October 12, 2005, Appellant Mark Karcsig and Jennifer McConville were involved in a car/motorcycle wreck in Warrensburg, Johnson County, Missouri. (L.F. 32, 36, 70-71 at ¶ 2 and 5, and 199 at ¶ 3-4). As a result of the collision, Appellant Karscig suffered a permanent and disabling injury to his left leg which required multiple medical procedures and operations; his medical bills exceeded $200,000.00. (L.F. 1412-33). Ms. McConville admitted fault for causing the wreck. (L.F. 1434).

At the time of the collision, Jennifer McConville was driving her parents' 1998 Pontiac Grand Am. (L.F. 32-36 at ¶ 4-8). That vehicle was insured by a motor vehicle liability policy issued by American Family to Jennifer McConville's parents, Ronald and Nancy McConville. The policy provided liability limits of $25,000.00 per person and $50,000.00 per accident and had a policy number of 7440-9123-03-55-FPPA-MO. (L.F. 32-36 at ¶ 4-8 and L.F. 200 at ¶ 12).

Jennifer McConville had a motor vehicle policy of her own which was issued by American Family and had a policy number of 7440-9123-07-67-FPPA-MO. (L.F. 270-280). That policy listed Jennifer McConville as the Named Insured and she paid the premiums for her policy. (A-31 and A-33). It also listed a 1990 Pontiac Grand Am, owned by Jennifer McConville's father. The policy did not state whether it was an "owner's policy" or an "operator's policy," but it is undisputed that Jennifer McConville did not own the car identified in the policy. (L.F. 234, 241, 307, 331 and 506).

American Family agreed that the accident policy issued to Ronald and Nancy McConville provided coverage to Jennifer McConville for the wreck; but, American

Family denied that the policy it issued to Jennifer McConville provided any coverage for the wreck. (L.F. 36-37, 72, 195, and L.F. 37). Because Appellant Karscig was unable to settle his injury claim with Respondent American Family, he filed this suit against Jennifer McConville for his damages and against American Family for a declaratory judgment that the policy issued by American Family to Jennifer McConville provided coverage. (L.F. 31-38, and 1517-1593). The Trial Court wholly separated and severed the negligence action from the declaratory judgment action. (L.F. 22).

The coverage clause in the policy American Family issued to Jennifer McConville states as follows:

> **You** have this coverage if bodily injury and property damage liability coverage is shown in the declarations. **We** will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the use of **a car** or **utility trailer**.

(emphasis original). American Family does not dispute that this clause provides coverage to Jennifer McConville for her wreck with Appellant Karscig. (L.F. 216, 234, 403 and 404). Rather, American Family denied coverage based on the following exclusion:

> 9. **Bodily injury** or **property damage** arising out the **use** of any vehicle, other than **your insured car**, which is owned by or furnished or available for regular **use** by **you** or any resident of **your** household.

(emphasis original). (L.F. 332, 405 and 919).

Citing this exclusion, American Family moved for summary judgment. (L.F. 330-335 and 402-408 and 976-1022). Appellants opposed the motion arguing, among other things, that the Motor Vehicle Financial Responsibility Law and this Court's opinion in American Standard Insurance Company v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001) required that the policy issued by American Family to Jennifer McConville provide minimum coverage of $25,000.00, and therefore, the exclusion was void or unenforceable. (L.F. 1309-1313). The Trial Court agreed with American Family and found that the policy issued by American Family to Jennifer McConville did not provide her with coverage for the wreck. (L.F. 2602-2605 and 2628-2629). This appeal followed. After the Missouri Court of Appeals, Western District's, opinion, this Court accepted transfer.

POINTS RELIED ON

The Trial Court erred in granting American Family's Motion for Summary Judgment and entering a judgment finding no coverage under the policy issued by American Family to Jennifer McConville because American Family did not have an indisputable right to judgment as a matter of law in that the Motor Vehicle Financial Responsibility Law and this Court's decision in American Standard Insurance Company v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001) require that every owners and operators motor vehicle liability policy issued in this state provide minimum liability limits.

American Standard Insurance Company v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001)

Distler v. Reuther Jeep Eagle, 14 S. W.3d 179, 182 (Mo.App. 2000)

Weathers v. Royal Indem. Co., 577 S.W.2d 623, 626 (Mo.banc. 1979)

Missouri Revised Statute §303.190

ARGUMENT

The Trial Court erred in granting American Family's Motion for Summary Judgment and entering a judgment finding no coverage under the policy issued by American Family to Jennifer McConville because American Family did not have an indisputable right to judgment as a matter of law in that the Motor Vehicle Financial Responsibility Law and this Court's decision in American Standard Insurance Company v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001) require that every owners and operators motor vehicle liability policy issued in this state provide minimum liability limits.

A. STANDARD OF REVIEW

A Trial Court's order granting summary judgment is reviewed de novo. Southers v. City of Farmington, 263 S.W.3d 603, 608 (Mo.banc. 2008). The criteria for testing the propriety of a summary judgment on appeal "are no different from those which should be employed by the Trial Court to determine the propriety of sustaining the motion initially." ITT Commercial Finance Corp., v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc. 1993). "The key to summary judgment is the *undisputed* right to judgment as a matter of law; not simply the absence of a fact question." Id. at 380 (emphasis added). Therefore, summary judgment should be upheld on appeal only if there is no genuine dispute of material fact and the movant has demonstrated the undisputed right to judgment as a matter of law. Id.

The movant bears the burden of demonstrating the indisputable right to judgment as a matter of law. Id. Consequently, the Court is precluded from granting summary judgment, even if the non-movant has failed to file a responsive pleading opposing the

motion for summary judgment, unless the law supports the grant of summary judgment. Landstar Investments II, Inc., v. Spears, 257 S.W.3d 630, 632 (Mo.App. 2008).

"Summary judgments are 'extreme and drastic remedies' and 'great care' must be used when considering them;" skepticism exists towards the use of summary judgment because denying a party's day in Court borders on denial of due process. See Hammonds v. Jewish Hospital of St. Louis, 899 S.W.2d 527, 529 (Mo.App. 1995) quoting ITT, 854 S.W.2d at 380.

B. THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW REQUIRES THAT THE POLICY ISSUED BY AMERICAN FAMILY TO JENNIFER McCONVILLE PROVIDE MINIMUM LIABILITY LIMITS OF $25,000.00.

Missouri Courts have consistently held that unless constitutionally infirm, the Court is obligated to follow and apply the law as written by the legislature. See State v. Williams, 24 S.W.3d 101, 115 (Mo.App. 2000). Applying §303.190 RSMo as written, it is clear that the law requires that the automobile insurance policy issued by American Family to Jennifer McConville provide coverage to Jennifer McConville while she was operating any non-owned vehicle, and therefore, the non-owned auto exclusion upon which American Family and the Trial Court relied upon in denying coverage is void or unenforceable.

1. The Policy Issued To Jennifer McConville Was An "Operator's Policy," And Therefore, §303.190.3 Mandated Coverage While She Was Operating "*Any*" Non-Owned Vehicle.

The MVFRL requires certain minimum coverage to be provided in motor vehicle liability policies. See §303.190 RSMo. The law provides that a "motor vehicle liability policy" can be an "owner's" or "operator's" policy. Id. Here, Respondent American Family issued a motor vehicle policy to Jennifer McConville which listed her as the named insured. (L.F. 128). She paid the premium from her own money. (A-31 and A-33). The policy also listed a 1990 Grand Am which was owned by Jennifer McConville's father. (L.F. 128). The policy did not state whether it was an "owner's policy" or "operator's policy." But, it is undisputed that Jennifer McConville did not own the 1990 Pontiac and therefore, the policy issued to her could not have been an "owner's" policy. Thus, the policy issue to McConville had to satisfy the MVFRL's requirements for an operator's policy.

Those requirements are found in §303.190.3 RSMo. That section of the MVFRL states as follows:

> Such operator's policy of liability insurance ***shall*** insure the person named as insured therein against loss from the liability imposed upon him or her by law for damages arising out of the use by him or her of ***any motor vehicle not owned by him or her***, within the said territorial limits and subject to the same limits of liability as are set forth above with respect to any owner's policy of liability insurance.

(emphasis added). Thus, to comply with the mandates of the MVFRL, the policy issued to Jennifer McConville, who was not an owner but an operator, had to insure her against loss arising out of the use of *any* car not owned by her.

Here, American Family and the Trial Court denied coverage based on a non-owned auto exclusion in Jennifer McConville's policy. That exclusion purported to preclude coverage for "**bodily injury** … arising out of the **use** of any vehicle … owned by … any resident of **your** household." (emphasis original). (L.F. 131). American Family argued that because the vehicle listed in Jennifer McConville's policy was owned by her parents with whom she lived, the exclusion precluded coverage. (L.F. 510)

But the exclusion upon which American Family relies is contrary to the language of §303.190.3 RSMo. As discussed above, that section of the statute requires that an operator's policy cover "***any*** motor vehicle not owned by him or her." It is undisputed that Jennifer McConville was operating a motor vehicle not owned by her, and therefore, the operator's policy issued to her had to provide minimum coverage pursuant to §303.190.3. Because the exclusion purports to deny coverage to Jennifer McConville which is specifically mandated by §303.190.3, the exclusion is invalid. See Distler v. Reuther Jeep Eagle, 14 S.W.3d 179, 182 (Mo.App. 2000) where the Court stated, "exclusions in automobile liability policies which deny coverage to insureds are contrary to public policy and are unenforceable to the extent that they purport to deny coverage in the amounts required by Missouri law." See also American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001) discussed *infra*.

2. Even If It Is Determined That The Policy Issued To Jennifer McConville Was Both An "Owner's" And An "Operator's" Policy, §303.190.3 RSMo Mandates Coverage.

Some Courts have held that policy language like that at issue here results in the policy being both an "owner's" and an "operator's" policy. See, e.g., State Farm Mutual Automobile Ins. Co. v. Scheel, 973 S.W.2d 560, 567 (Mo.App. 1998), and First National Ins. Co. of American v. Clark, 899 S.W.2d 520, 523 (Mo.banc. 1995). While the Court in those cases determined that a policy, like the one at issue here, was both an owner's and an operator's policy, the Scheel Court and others have found that such policies do not have to comply with the mandates of §303.190.3 RSMo. Appellants respectfully disagree with that determination and asks that this Court re-examine that case law.

The basic premise of the conclusion in Scheel is that because the policy complied with the requirements of an owner's policy set forth in §303.190.2, the policy did not have to meet the requirements of an operator's policy set forth in §303.190.3. See Scheel, 973 S.W.2d at 567. The reason that Appellants respectfully disagree with the conclusion reached in Scheel is because the conclusion is not consistent with the plain language of §303.190 RSMo.

Section 303.190 mandates what coverage is to be included within an owner's policy. The section states, in part, "such owner's policy of liability insurance: (1) ***shall*** designate by explicit description…; (2) ***shall*** insure the person named therein and any other person…." Thus, where a policy is an owner's policy, §303.190.2 mandates, by using the term "shall," what coverage must be within that policy. Likewise, in §303.190.3, the legislature mandates what coverage must be included within an operator's policy. That section states in part, "such operator's policy of liability insurance ***shall*** insure the person named as insured therein against loss from…." Again,

by the use of the term "shall," the legislature mandates what must be in an operator's policy.

Appellants understand that §303.190 does not require that an insurer issue both an owner's and an operator's policy; rather, either an owner's policy or an operator's policy may be sufficient. But this does not mean that if an insurer does issue a policy that is both an owner's and an operator's policy that the insurer can ignore the language of the statute which mandates the coverage that must be included in such policies.

The Scheel Court relied on §303.190.7 in support of its conclusion that even though a policy is an operator's policy, it need not comply with the mandates of §303.190.3. Scheel, 973 S.W.2d at 566-567. Section 303.190.7 provides in part:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to ***the coverage specified*** for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term "motor vehicle policy" shall apply only to that part of the coverage ***which is required by this section***.

(emphasis added). Citing this language, the Court in Scheel claimed that because the policies before it provided the coverage mandated under an owner's policy, the additional operator's coverage provided by the policy was "excess or in addition to" the coverage in the owner's policy, and therefore, it need not comply with the provisions of §303.190. 973 S.W.2d at 566-67.

Appellants respectfully suggest that the error in the Scheel Court's reasoning is in its determination that when a policy is both an operator's policy and an owner's policy, the operator's policy is excess and not subject to the requirements of §303.190. First, §303.190.7 does not result in the operator's policy being excess. Section 303.190 mandates the coverage to be included in an operator's policy. Consequently, §303.190.7 would **not** treat an "operator's policy" as excess coverage. The coverage provided in the operator's policy is coverage which is "required by this section." Thus, the coverage mandated by §303.190.3 is not coverage in excess of or in addition to the coverage specified by the statute, but rather, it is in fact the coverage specified by the statute.

But even if §303.190.7 does apply, its application does not require a finding that the *operator's* policy is excess; perhaps it is the *owner's* policy that is excess. Claiming one is excess and the other is not without the policy itself identifying whether it is an owner's or operator's policy seems arbitrary. More importantly, deciding that the operator's policy, and not the owner's policy, is excess so that the Court can uphold an exclusion is contrary to long standing Missouri jurisprudence requiring the Court to interpret the policy in such a way as to find coverage rather than defeat it. See Weathers v. Royal Indem. Co., 577 S.W.2d 623, 626 (Mo.banc. 1979) where this Court stated:

> Missouri law favors a liberal construction of auto liability insurance policies … 'An insurance policy, being a contract designated to furnish protection, will, if reasonably possible, be construed so as to accomplish that object and not to defeat it.'

(citations omitted). Pursuant to this rule, the Court should find that the owner's portion of the policy is excess, and therefore, the operator's portion of the policy must comply with the mandates of §303.190.3 and any exclusions which contravene the coverage required under the statute are invalid and unenforceable.

Here, as discussed above, Jennifer McConville was not the owner of the 1990 Pontiac, and therefore, the policy issued to her could not have been an "owner's policy." If the Court disagrees, then, at a minimum, the policy issued to Jennifer McConville, pursuant to this Court's holding in Clark was both an operator's policy and an owner's policy. 899 S.W.2d at 523. Because the policy was in fact an operator's policy, §303.190.3 mandated that the policy provide coverage to Jennifer McConville while using "***any*** motor vehicle not owned by…her." The exclusion upon which American Family relies, purports to deny coverage to Jennifer McConville while operating certain non-owned vehicles. Because the exclusion denies coverage to Jennifer McConville which is specifically mandated by §303.190.3, the exclusion is invalid. See Distler v. Reuther Jeep Eagle, 14 S.W.3d 179, 182 (Mo.App. 2000) and American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001).

3. Regardless Of Whether The Policy Is An Owner's Policy Or An Operator's Policy, Pursuant To This Court's Holding In American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo.banc. 2001), The Policy Must Provide Minimum Liability Limits.

In American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 92 (Mo.banc. 2001) this Court stated, "What the MVFRL requires is that each valid owner's or operator's

policy provide the minimum liability limits specified…." Thus, regardless of whether one concludes that the policy issued by American Family to Jennifer McConville was an owner's or an operator's policy, this Court has made it clear that the MVFRL requires that the policy provide the minimum liability limits. The Trial Court's failure to find that the American Family policy issued to McConville provided the minimum liability limits required by the MVFRL is contrary to this Court's holding in Hargrave and contrary to the MVFRL. For this reason, Appellants respectfully request that this Court reverse the Trial Court.

In support of its decision, the Trial Court relied heavily on First National Ins. Co. of American v. Clark, 899 S.W.2d 520 (Mo.banc. 1995). In that case, after determining that the policy before it was both an owner's and an operator's policy, the Court held that the exclusion in the "operator's provision" of the policy would be enforced as written because there was a separate owner's policy sufficient to meet the minimum requirements of the MVFRL. Id. This Court further noted, however, that it was not deciding, "whether, in the absence of such owner's policy, the exclusion of coverage … would be valid." Id.

Since the Court's decision in Clark, this Court has handed down its opinion in Hargrave. In Hargrave, like Clark, there was both an owner's policy and the operator's portion of another owner's policy that provided coverage for the wreck. Although one of the owner's policies provided the minimum coverage required by the MVFRL, this Court held that the policy covering the driver, i.e the operator's portion of that policy, still had to provide the minimum coverage required by the MVFRL, and therefore, the household

exclusion was invalid. In other words, the fact that a separate owner's policy provided coverage sufficient to meet the minimum requirements of the MVFRL did not make an otherwise invalid exclusion valid. Thus, this Court's opinion in Hargrave appears to have stripped the Clark Court of its justification for enforcing the exclusion in the policy that was before it.

Hargrave is truer to the language and intent of the MVFRL. An exclusion in a policy that is contrary to the language of the MVFRL or public policy as expressed in the Act, should not be enforced regardless of the circumstances. The Clark Court's holding that an exclusion may be invalid in some circumstances but enforceable in others contravenes the plain language of the act which sets forth specific requirements for an operator's policy. Nothing in the Act makes the requirements in the Act contingent on whether some other policy applies.

American Family issued a motor vehicle liability policy to Jennifer McConville naming her as the insured. Pursuant to this Court's holding in Hargrave, that policy, whether it was an owner's policy or an operator's policy, had to provide Jennifer McConville minimum coverage in the amount of $25,000.00 regardless of the fact that she was also covered by another policy issued to her parents. 34 S.W.3d at 92. The Trial Court erred in finding otherwise. Appellants respectfully request that this Court reverse the Trial Court and remand this matter to the Trial Court with instructions to enter judgment finding that the policy issued by American Family to Jennifer McConville provides liability coverage to McConville in the amount of $25,000.

CONCLUSION

The policy issued by American Family to Jennifer McConville did not state whether it was an operator's policy or an owner's policy. However, it is undisputed that she did not own the vehicle identified in her policy, and therefore, the policy could not have been an owner's policy. As an operator's policy, it had to provide coverage for *any* non-owned vehicle. It is undisputed that the vehicle Jennifer McConville was operating at the time of the wreck was a non-owned vehicle, and therefore, pursuant to §303.190.3, the policy had to provide coverage.

Even if, pursuant to Clark, the policy is deemed to be both an owner's and an operator's policy, the policy must provide minimum coverage of $25,000. Prior cases have held that the operator's portion of a hybrid policy is excess, and therefore, does not have to comply with the MVFRL. Those cases fail to follow the plain language of the Act and fail to follow long standing Missouri jurisprudence requiring a court, if reasonably possible, to interpret a policy so as to find coverage rather than defeat it. If the policy is both an owner's and an operator's policy, it is more than reasonably possible to interpret the owner's portion of the policy as excess thereby requiring the operator's portion of the policy to comply with the mandates of §303.190.3. Consequently, the exclusion upon which American Family and the Trial Court relied is invalid because it contravenes the coverage mandated by §303.190.3

Regardless of whether the policy was an owner's policy or an operator's policy, this Court's holding in Hargrave mandates that the motor vehicle liability policy issued by American Family to Jennifer McConville provide McConville minimum coverage in

the amount of $25,000. The exclusion upon which American Family and the Trial Court relied in denying coverage contravenes public policy as expressed in Hargrave and §303.190.3, and therefore, the exclusion is invalid and unenforceable.

For the foregoing reasons, Appellants respectfully request that this Court reverse the Trial Court and remand this matter to the Trial Court with directions to enter a judgment finding that the policy issued by American Family to Jennifer McConville provides coverage in the amount of $25,000 and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 4,549 words.

Also, pursuant to Missouri Supreme Court Rule 84.06, accompanying this brief is a CD containing full text of this brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskette has been scanned for viruses and that the diskette is virus-free.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____

Andrew J. Gelbach

CERTIFICATE OF SERVICE

I, Andrew J. Gelbach, hereby certify that on the 8th day of June 2009, two (2) complete copies of Appellants' Substitute Brief along with a disk containing Appellants' Substitute Brief were mailed, first class postage prepaid to the following:

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