

SC89728

IN THE SUPREME COURT OF MISSOURI

KARRI KINNAMAN-CARSON
and
RANDY CARSON,
Appellants,

v.

WESTPORT INSURANCE CORPORATION
and
ABC SPECIALTY, INC.,
Respondents.

Appeal from the Circuit Court of Jackson County
Honorable Jay Daugherty, Circuit Judge

SUBSTITUTE REPLY BRIEF OF THE APPELLANTS

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Reply of the Appellants

This is an appeal of Appellants Kari Kinnaman-Carson and Randy Carson from the summary judgment entered in favor of the Westport Insurance Company on their equitable garnishment claim. In their initial brief, the appellants argued that Westport was not entitled to judgment as a matter of law because (1) the negligence of Westport's insured, ABC Specialty, Inc., that caused their damages in the underlying case was not excluded from Westport's insurance policy with ABC (Brief of the Appellants 22-49); and (2) in any case, Westport could not now disclaim coverage because it had elected to defend and indemnify ABC in the underlying case (Br. of Appellants 50-67).

In its response, Westport largely addresses neither of these issues directly. Instead, Westport principally seeks to re-litigate the underlying personal injury case which, of course, is not now before this Court. Without any support in the Record, the insurance company makes scurrilous allegations implying that it should not have to defend ABC because ABC and the appellants engaged in some unspecified sort of fraud. Westport attacks the organization of the appellants' brief. It defends the now-vacated opinion of the Missouri Court of Appeals earlier in this case – which itself recognized that it could not be reconciled with previous Missouri opinions.

For this Court to accept Westport's position – when it does substantively respond to the appellants' arguments – the Court would have to disregard the facts of this case, as well as the applicable law and precedent.

Little in Westport's brief logically addresses the appellants' arguments. The automobile exclusion in Westport's policy with ABC does not exclude coverage for the independent negligence of ABC in failing to secure its premises so as to prevent a third party from stealing a dangerous piece of machinery that foreseeably would injure innocent Missourians. And by electing to defend and indemnify ABC in full without a reservation of rights, ABC cannot subsequently disclaim coverage for the appellants' damages under the law of Missouri.

I. Preliminary matters

At the outset, two things must be made clear. First, Westport cannot now re-litigate the underlying personal injury case. In these equitable garnishment proceedings, the judgment in that case is conclusive as to all facts and issues decided therein. The findings of fact and conclusions of law made in that judgment are binding in this equitable garnishment case.

Second, the proceedings before this Court in this case are completely independent of those earlier in the Court of Appeals, as if the intermediate appellate court's proceedings had not occurred. The opinion of the Court of Appeals is of no precedential value.

a. The underlying judgment in the personal injury case is conclusive and binding as to all facts and issues decided therein.

Throughout its brief, Respondent Westport Insurance Company seems to forget that this is an appeal from a summary judgment in its favor in an equitable garnishment proceeding. Instead, it seeks to re-litigate the question whether the negligence of its insured, ABC Specialty, Inc., caused the Kinnaman-Carsons' injuries. In this subsequent action, the underlying judgment is conclusive as to all questions and issues necessarily determined therein. The Honorable Kelly Moorhouse determined that ABC's negligent failure to secure its premises was a proximate cause of the Kinnaman-Carsons' damages. Westport agreed to indemnify and defend ABC in that action in full. It filed no motion for new trial and did not appeal. The longstanding law of Missouri is that it cannot now question the propriety of that judgment.

Because this is an appeal from a summary judgment in Westport's favor, the facts must be viewed a light most favorable to the non-movants, the Kinnaman-Carsons. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Nowhere in its brief does Westport even attempt to meet this standard.

A plaintiff in an equitable garnishment action must establish two elements in order to obtain her requested relief: (1) that she has obtained a judgment in his

favor against the insured during the policy period, and (2) that there is coverage. § 379.200, R.S.Mo. It is a longstanding principle of Missouri law that the facts as found in the judgment against the insured in the underlying personal injury case are final and certain. The underlying judgment cannot be relitigated in the equitable garnishment proceedings:

The general rule is that, [1] *where one is bound to protect another from liability, he is bound by the result of the litigation to which the other is a party, provided he had notice of the litigation, and an opportunity to control and manage it*, and [2] that the judgment rendered therein is conclusive in the subsequent action upon the indemnity contract as to all questions and issues necessarily determined therein.

Lodigensky v. Am. States Preferred Ins. Co., 898 S.W.2d 661, 665 n.4 (Mo. App. 1995) (emphasis in the original) (quoting *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 481 (Mo. App. 1992) (quoting *Finkle v. Western Auto. Ins. Co.*, 224 Mo. App. 285, 26 S.W.2d 843, 849 (1930))). When the insurer has not affirmatively reserved the right to disclaim coverage, the underlying judgment simply “bind[s] the insurer.” *Id.* (quoting *Whitehead*, 844 S.W.2d at 481).

Westport obviously had notice of the underlying litigation against ABC, and had an opportunity to control and manage it. It clearly was following the case and

remained involved throughout. Its counsel engaged in a series of correspondence with counsel for both ABC and the Kinnaman-Carsons regarding the case, beginning even before ABC's answer was due (L.F. 156). It flip-flopped throughout the litigation as to whether it should reserve its right to disclaim coverage and stay out of the proceedings, defend ABC with a reservation of rights, or reserve no rights and instead defend and indemnify ABC in full (L.F. 156, 168-70, 171-72, 173). Finally, after judgment had been entered but before it was final, Westport settled on the last option listed above: it agreed to withdraw its only reservation of rights and instead defend and indemnify ABC in full (L.F. 4, 173). Westport filed no motion for new trial in the eight days between the date of that decision and the date of finality. It filed no notice of appeal thereafter.

But Westport nonetheless riddles its brief with attempts to question the judgment in the underlying personal injury case. In its statement of facts, Westport seeks to cast doubt on the underlying judgment's conclusion that ABC negligently failed to secure its premises, the Honda was stolen due to that negligence, and foreseeably was used to injure the Kinnaman-Carsons. Westport suggests instead that the Honda was stolen from the storage yard of someone named Falco who is not a party to this case and is not mentioned in the underlying judgment (Br. of Respondents 9, 10, 11, 19-20, 35). To discuss these alleged underlying facts, it

refers to things other than the judgment or indeed to no support at all (Br. of Respondents 19-20, 33-35).

But in its judgment in the underlying personal injury case, Judge Moorhouse made specific findings of fact and conclusions of law as to the negligence of ABC that caused the Kinnaman-Carsons' injuries, which consequentially now are binding on Westport and are beyond question in this subsequent case. The Kinnaman-Carsons' injuries are "attributable to the negligence of Defendant ABC Specialty, Inc." (L.F. 178). "Wallace Hopkins, a passenger in the Honda, was either an employee or former employee of ABC Specialty, Inc. Hopkins gained possession of the vehicle and provided it to Norton" (L.F. 178).

"ABC Specialty, Inc. has a duty to maintain proper safeguards when hiring, training and supervising its employees or contractors to ensure the safety of others. This duty includes, but is not limited to, screening potential employees to ensure they are proper candidates for work in the towing industry. It also includes training its employees and contractors in the proper storage of vehicles and the vehicles' keys so that unauthorized individuals will not gain possession of the keys or the vehicles. Further, the duty includes supervision of its employees, contractors and its premises." (L.F. 179-80).

"ABC Specialty, Inc. had a fence around its police tow lot and a video surveillance camera on the premises as well. ... [T]he Honda was removed from

the tow lot prior to the accident. ... [T]he fence at the tow lot was not broken, nor were the locks on the gates tampered with or damaged. ... [A]s reported to the Lee's Summit Police Department, ABC Specialty, Inc. left the keys in the Honda and the Honda in the impound lot." (L.F. 180).

"ABC Specialty, Inc. breached its duty to properly screen employees when it hired Wallace Hopkins. ... ABC Specialty, Inc.'s failure to properly screen employees set into motion a course of events that led to Hopkins gaining access to the Honda and subsequently providing it to Norton." (L.F. 180).

"ABC Specialty, Inc. failed to properly safeguard the Honda vehicle, and further failed to properly safeguard the keys to the same by leaving the keys in an unsecured location. ... [I]t is foreseeable that unauthorized third persons will attempt to remove vehicles that have been impounded in a police tow lot. ABC Specialty, Inc. is aware of this as evidenced by the fact that it has a fence around the lot and a security camera. It is foreseeable that when these vehicles are removed from a tow lot that the unauthorized third parties will use them to drive and there is a substantial likelihood that their driving will lead to an accident and cause injuries." (L.F. 181).

"ABC Specialty, Inc.'s breach was failing to prevent an unauthorized third party's acquisition and use of the vehicle that injured Plaintiff. This result necessarily flows as there was no evidence that the Honda Civic was used in the

towing business. In fact, the report from Lee's Summit Police Department indicates quite the opposite. It indicates that *the vehicle was kept in storage from the date of ABC Specialty, Inc.'s acquisition until the wreck.*" (L.F. 181) (emphasis added).

ABC Specialty, Inc. had a "lack of adequate security." (L.F. 182). Wallace Hopkins's "ability to gain access to the vehicle would be directly caused by ABC Specialty, Inc.'s failure to have adequate security measures in place." (L.F. 182).

"The breaches [of ABC's duties] were incident to the general business of ABC Specialty, Inc., and not incident to the use of the Honda to accomplish operations involved in ABC Specialty, Inc.'s towing business." (L.F. 182). The damages to Karri Kinnaman-Carson and Randy Carson both were the "direct and proximate result" of "the breaches of Defendant ABC Specialty, Inc." (L.F. 182-83).

Thus, whatever Westport may wish had happened in the underlying case, that court conclusively found that the Honda was stolen from ABC's police tow lot because ABC negligently failed to secure its premises, that negligence was the direct and proximate cause of the Kinnaman-Carsons' injuries, and it was foreseeable. The question in this case, then, is whether the second element of the equitable garnishment – coverage for this negligence in Westport's policy with ABC – is satisfied. These facts, however, cannot be in dispute.

Westport also bizarrely spends many pages contesting the lawfulness of the Kinnaman-Carsons' agreement with ABC under § 537.065, R.S.Mo. (Br. of Respondents 10-11, 33-35). Without any citation to any support whatsoever, Westport makes the scandalous and defamatory insinuation that the injured Kinnaman-Carsons colluded with ABC to defraud Westport in the 537.065 agreement, delaying in advising Westport of the settlement and purposefully taking advantage of the case's procedural posture (Br. of Respondents 34-35).

It is not surprising that Westport fails to back up this assertion with any citation to the Record, for this, too is belied by the judgment in the underlying case. There, the court noted that it "has reviewed an Agreement entered into by the parties pursuant to 537.065 RSMo. and finds the same to be fair, just and reasonable under all circumstances" (L.F. 183). In order for Westport's intimation of illicit behavior accusations to have any merit, Judge Moorhouse would have had to be in on the act. Of course, that makes no sense. And it certainly does not adhere to a view of the facts in a light most favorable to the Kinnaman-Carsons.

Because Westport plainly had notice of the litigation against ABC and an opportunity to control and manage it, it is bound by the result of that litigation. That judgment is conclusive in this subsequent action as to all these questions and issues determined therein. It fully satisfies the first element of the equitable garnishment statute.

b. The earlier opinion of the Missouri Court of Appeals in this case is of no precedential value; it is of no consequence before this Court after transfer.

Westport seems to misunderstand the role and function of this Court in these proceedings. This is not a review of the now-vacated opinion of the Court of Appeals in this case, as are cases brought to the Supreme Court of the United States on writ of *certiorari*. Rather, under Article V, § 10, of the Constitution of Missouri, this Court decides this transferred case as if it were on original appeal. The trial court's judgment is what is being reviewed, without regard to earlier proceedings in the intermediate appellate court.

Westport, however, discusses the Court of Appeals' proceedings at length in its Statement of Facts (Br. of Respondents 13-14). Without further explanation, Westport purports to incorporate by reference "the Court of Appeals' analysis and explanation" in its response to the appellants' first Point Relied On (Br. of Respondents 28-29). Its second footnote is a single-spaced block quote of the Court of Appeals' sixth footnote, which takes up nearly two pages of Westport's brief (Br. of Respondents 23-24).

To an objective reader, it could appear that Westport does not understand how this case came to this point; it suggests that the Court of Appeals transferred

the case to this Court (Br. of Respondents 14), when in fact this Court granted transfer itself.

When this Court transfers a case that first was decided by the Court of Appeals, it “review[s] the cause as though on original appeal.” *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. banc 1985) (citing the Constitution of Missouri, Art. V, § 10); *see* Rule 83.09. Consequently, the “decision of the court of appeals in a case subsequently transferred is of no precedential effect.” *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. 1993). The Court of Appeals’ opinion is “necessarily vacated and set aside and may be referred to as *functus officio*.” *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964). *Functus officio* means “having performed his or her office.” BLACK’S LAW DICTIONARY 682 (7th ed. 1999). It describes an office or official body “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” *Id.*

Thus, in this case, whatever the Court of Appeals decided earlier on is of no force and effect. The law of Missouri is that it has no precedential value. The appellants do not ask this Court to reverse the Court of Appeals – indeed, there exists nothing to reverse upon this Court granting transfer. Rather, the question on appeal is whether *the trial court* erred, as if this were the original appeal.

The language of the judgment in the underlying personal injury case is plain and unambiguous. The findings of fact and conclusions of law in that judgment are conclusive to these proceedings: ABC is liable for the Kinnaman-Carsons' damages due to its negligent failure to secure its premises, which was the direct and proximate cause of their injuries and was foreseeable. The first requirement of the equitable garnishment statute was satisfied without question: this was the judgment against Westport's insured. The only question in this case before this Court, then, is whether the second element of the equitable garnishment – coverage under Westport's policy with ABC – is satisfied.

Westport's insurance policy with ABC must be construed to cover the negligence of ABC that caused the Kinnaman-Carsons' damages. The automobile exclusion in that policy does not exclude coverage for the independent negligence of ABC in failing to secure its premises such that the failure foreseeably would injure innocent Missourians. Because Westport elected to withdraw its reservation of rights and defend and indemnify ABC in full prior to the finality of the judgment in the underlying case, the law of Missouri prevents ABC from subsequently disclaiming coverage for the appellants' damages.

II. Westport’s insurance policy with ABC did not exclude coverage for the appellants’ injuries.

The appellants discussed at length in their initial brief Missouri’s public policy of construing exclusions in insurance policies strictly against the insurer (Br. of Appellants 24-26). Westport’s argument relies on ignoring this policy, and so Westport makes no mention of it in its brief.

The appellants’ first Point Relied On concerns the applicability of “Exclusion G” in Westport’s policy with ABC. The exclusion contains two paragraphs. The first states the general exclusion, and the second is dependent on the first. The first disclaims coverage for injuries “arising out of the ownership, maintenance, use, or entrustment to others of any ... auto ... owned or operated by or rented or loaned to any insured” (L.F. 59). The second says that if the occurrence that caused a claimant’s injuries “involved the ownership, maintenance, use or entrustment to others of” an automobile, “this exclusion applies even if the claims against any insured allege negligence ... in the supervision, hiring, employment, training, or monitoring of others” by the insured (L.F. 59).

Westport needlessly attacks the appellants for addressing the whole exclusion together in one Point Relied On, rather than several (Br. of Respondents 21-22). Westport suggests that “[t]his is improper pursuant to M.R.C.P. 83.08(b),” though it “will attempt to respond accordingly” (Br. of Respondents 21). Rule

83.08(b) mandates that a party's substitute brief in this Court "shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief, and shall not incorporate by reference any material from the court of appeals brief." This rule was designed to prevent the parties from raising an issue in this Court that was not raised before the Court of Appeals. *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo. banc 1997).

The Kinnaman-Carsons have not altered the basis of any claim that they raised before the Court of Appeals, have stated no new argument, and incorporate no material from their brief in that court by reference. In their brief in the Court of Appeals, the Kinnaman-Carsons raised three separate points relied on concerning the propriety of applying Exclusion G to ABC's negligence in this case, when it just as easily could have raised one. In this court, they more economically were able to do exactly that: Westport was not entitled to judgment as a matter of law because Exclusion G – both paragraphs – cannot be construed to exclude ABC's negligence in the underlying case. That does not alter the basis of their claims or incorporate material from their earlier brief by reference.¹ Their claims remain

¹ Westport, on the other hand, has included an entire portion of its Brief before the Court of Appeals as the first twelve pages of its Appendix. Westport refers to these Appendix pages once (Br. of Respondents 21).

precisely the same, merely more concisely stated. Their brief complies with Rule 83.08(b).

As to the first paragraph, Westport seeks to have this Court abandon Missouri's public policy of construing exclusionary insurance policy language against the insurer. Instead, Westport bends and twists the facts of this case to view them in a manner least favorable to the Kinnaman-Carsons, eventually coming up with an unreasonable interpretation of the automobile exclusion.

The indisputable facts of this case conclusively show that Westport's insured failed to secure its premises adequately, such that an unauthorized third party was able to steal a dangerous piece of property that later was used to injure the Kinnaman-Carsons. It was foreseeable that ABC's failure to have adequate security would lead to this theft, later causing injuries to innocent people in this way.

Westport's policy with ABC excluded coverage for injuries "arising out of the ownership, maintenance, use, or entrustment to others of any automobile owned or operated by" ABC. While one cause may have been ABC's ownership of an auto or another's use of an auto, which would be excluded, yet another cause is ABC's negligent failure to secure its premises leading to foreseeable injury. It does not matter that the dangerous piece of property stolen was an automobile. The Kinnaman-Carsons' injuries do not "arise out of" that fact. An unauthorized

third party could have stolen any other dangerous piece of property, such as a gun. The theft of any dangerous piece of property due to a failure to maintain adequate security foreseeably would lead to it being used to injure an innocent Missourian. The appellants' injuries do not "arise out of" ABC's use or ownership of an automobile. They arise out of ABC's negligence in failing to prevent its premises so as to prevent foreseeable injuries.

The Kinnaman-Carsons explained at length in their opening brief (pp. 34-36) that in Missouri, where "an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable so long as one of the causes is covered by the policy." *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 619 (Mo. App. 1983). This is the "concurrent cause doctrine." *Green v. Penn-America Ins. Co.*, 242 S.W.3d 374, 383 (Mo. App. 2007).

In a series of six open-ended questions to which it gives no answers, Westport baldly suggests that the concurrent cause doctrine is not the law of Missouri (Brief of Respondents 25-30). The concurrent cause doctrine is the principle that when damages have two concurrent causes, one of which a policy excludes and one it does not, the policy does not exclude a claim for the damages because one cause is covered. Not only is this doctrine firmly established in Missouri, but our public policy of construing insurance policies strictly in favor of coverage requires it. When one covered cause of the appellants' injuries is

concurrent with a potential non-covered cause, the law of Missouri is that the policy is construed in favor of coverage.

The concurrent cause doctrine has been upheld as the law of Missouri numerous times. Although it first was applied in its modern form in this state in *Braxton, supra*, the Court of Appeals noted in that opinion that it is a longstanding doctrine in any jurisdiction that, like Missouri, requires that exclusionary clauses in insurance policies with contested meanings must be construed strictly against the insurer. If it were otherwise, the law could “be summed up as an uncomplicated syllogism: [the plaintiff] admits that his injury was caused by [an automobile]; the policy excludes from coverage any bodily injury arising out of the use of [an automobile]; therefore, [the plaintiff’s] injury is not covered by the policy.” 651 S.W.2d at 618.

Missouri’s concurrent cause doctrine, however, serves to invalidate this syllogism and brings the law regarding concurrent causes into line with the requirement that courts construe ambiguous insurance policy exclusions strictly against the insurer and in favor of coverage. Concurrent causation arises as a normal doctrine in American tort law when “two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result.” PROSSER AND KEETON ON TORTS, § 41, at 266 (5th ed.1984). In *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862-63 (Mo. banc

1993), the famous “two fires” case, this Court adopted this definition, restating the case as one “involving two independent torts, either of which is sufficient in and of itself to cause the injury....” *Id.* at 862-63.

Since *Braxton*, Missouri courts consistently have followed this reasoning and upheld the sensible doctrine of concurrent causation, such that when one excluded proximate cause of an injury acts concurrently with a non-excluded cause, the insurance policy exclusion is read strictly in favor of coverage for the non-excluded cause. *See, e.g., Am. States Ins. Co. v. Porterfield*, 844 S.W.2d 13, 15 (Mo. App. 1992); *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 99-103 (Mo. App. 1995); *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204, 207-09 (Mo. App. 1999); *Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341, 345 (Mo. App. 2000); *Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1, 7 (Mo. App. 2005) (noting that the concurrent cause doctrine is “broadly accepted”).

In *Braxton*, the court also reviewed similar cases from California, Louisiana, Washington, New York, New Jersey, Massachusetts, Minnesota, New Hampshire, Illinois, and Colorado applying this doctrine in the same manner. 651 S.W.2d at 619-20. In *State Farm Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973), a homeowner’s policy excluded coverage for injuries arising out of the use of an automobile. A passenger in the insured’s car was injured when a pistol discharged as the car traveled over a rough section of road.

The insured had negligently modified the trigger mechanism of the pistol to give it “hair trigger action.” The court found that the policy applied despite the automobile use exclusion, since the negligent modification of the gun and the use of the automobile were concurrent proximate causes of the passenger's injury, only one of which was excluded from the policy.

In *Le Jeune v. Allstate Ins. Co.*, 365 So.2d 471 (La. 1978), a deputy sheriff assigned to escort a funeral cortege failed to stop his vehicle and properly secure an intersection. His negligence resulted in a collision between the hearse and another vehicle. The sheriff's professional liability policy excluded coverage for injuries “arising out of the ownership, operation, or use” of motor vehicles. The court found coverage under the policy only because of the exclusionary clause at issue expressly did not apply “where the insured's act is a result of negligence independent of, even though concurring with, his use of an automobile.” *Id.* at 479.

In *N.J. Prop. Liab. Guar. Ass'n v. Brown*, 174 N.J.Super. 629, 417 A.2d 117 (1980), the court considered a homeowner's policy which excluded injuries “arising out of business pursuits except activities therein which are ordinarily incident to non-business activities.” The insured purchased a pistol for the protection of his business. A friend dropped by his office on a social visit. As the insured showed his friend the new pistol, it discharged. The court recognized that

the resulting injuries were “causally related” to the insured’s business pursuits. Nevertheless, it found coverage because the injury also arose from concurrent (and non-excluded) non-business causes.

In *Bulyga v. Underwriters at Lloyd’s*, 1 Mass.App. 359, 297 N.E.2d 68 (Mass. App. 1973), a liability policy issued to a fireworks company excluded coverage for “liability arising from [f]ireworks which are intended to travel through the air or to move from the position in which they are fired.” During a fireworks display, an aerial bomb exploded while still within its firing tube. Fragments of the tube struck a spectator some 360 feet away from the firing site. A jury found that the insured had been negligent in failing to place a barrier around the firing tube to deflect shrapnel. The court found coverage for the insured’s negligence under the policy, despite the fact that the explosion of the aerial bomb was also a factor in causing the injury.

The Court of Appeals in *Braxton* noted that this similarly applied in Missouri because exclusions from coverage must “be accomplished by language unequivocal in its meaning.” 651 S.W.2d at 619 (quoting *Cochran v. Standard Accident Ins. Co. of Detroit*, 219 Mo. App. 322, 271 S.W. 1011 (1925)). Thus, where “the language in the policy at issue [i]s reasonably susceptible of two interpretations, the court [i]s required to apply the construction most favorable to the insured and this is especially true when the clause in question attempts to limit

or exclude coverage under the policy.” *Id.* (quoting *Heshion Motors v. Western Int’l Hotels*, 600 S.W.2d 526, 537 (Mo. App. 1980)).

The first paragraph of Westport’s policy with ABC excludes coverage for injuries “arising out of the ownership, maintenance, use or entrustment of any” automobile “owned or operated by or rented or loaned to any insured” (L.F. 59). While one proximate cause of the Kinnaman-Carson’s injuries may have been the negligent ownership of an automobile or Mr. Hopkins and Ms. Norton’s negligent use of an automobile, which arguably are excluded from coverage under Exclusion G, the trial court held in the underlying judgment that another, concurrent proximate cause of the Kinnaman-Carsons’ injuries was ABC’s negligence failure to secure its premises, which plainly is not excluded under Exclusion G. Westport believes that the language does exclude this, because an automobile was involved in the injuries.

But the language used in the exclusion is not “involving;” it says “arising out of.” The trial court in the underlying personal injury case held that the Kinnaman-Carsons’ damages arose out of ABC’s negligent failure to secure its premises, not merely the use or ownership of an automobile. The first paragraph of Exclusion G plainly must be construed strictly in favor of covering this negligence not specifically excluded, and not unreasonably to exclude something its plain language does not exclude.

As to the second paragraph, which is dependent on the first, the appellants pointed out that it does not expressly exclude ABC's negligence in failing to have adequate security. Therefore, because it, too, necessarily must be construed strictly against the insurer and in favor of coverage, it cannot be read to extend to exclude types of negligence it does not mention.

Westport's first response to the Kinnaman-Carsons' point regarding Exclusion G's second paragraph is procedural, rather than substantive. It argues that the appellants did not properly brief what it believes to be a separate argument either because (1) it was not set out as separate Points Relied On, as it was in their brief in the Court of Appeals (Br. of Respondents 21-23) or (2) it was not raised in the trial court (Br. of Respondents 39).

Westport misunderstands the Kinnaman-Carson's point. Their first Point Relied On is that Exclusion G – the whole exclusion – cannot be read as operating to exclude coverage for the Kinnaman-Carsons' injuries. They always have argued that neither paragraph of the exclusion reasonably can be construed to exclude their injuries. The interpretation of both paragraphs involves legal construction, both require the same rules of construction, and both have the same standard of review. The whole exclusion does not apply. So, in this Court, the appellants more simply were able to make one single Point Relied On concerning the applicability of Exclusion G, and a separate one on the operation of Westport's

withdrawal of their reservation of rights. Those are the two issues this appeal always has involved.

As to whether the appellants raised the applicability of the second paragraph below, it plainly is preserved because the appellants argued to the trial court that neither the first nor the second paragraph of the exclusion could be read to exclude their injuries (L.F. 439). One of their points was that “Comprehensive Liability Coverage Does Exist for This Claim” (L.F. 443). That is what their first Point Relied On in their brief argues as well. The appellants raised the applicability of the second paragraph before the trial court, did not alter their position at any time, and plainly have not included a new issue.

The little argument that Westport makes about the actual applicability of the second paragraph of Exclusion G depends on ignoring two important facts: (1) the second paragraph is dependent on the first, and (2) the second paragraph does not mention negligent failure to have adequate security, which is what ABC was held liable for doing. In so doing, Westport fails to construe the clause strictly by its plain language in favor of coverage.

As new and separate Points Relied On, Westport argues that the language in the second paragraph must be read to apply. In order to make the language apply, Westport broadens its terms and claims that the language is meant to apply because an insurance industry form says so (Br. of Respondents 38-39). It takes negligent

failure to have adequate security and makes it mean negligent supervision, hiring, employment training, or monitoring of others. Indeed, ABC was negligent in all those ways, but in the underlying personal injury case the trial court also found ABC liable for a “lack of adequate security” (L.F. 182).

This was one of “the breaches” of ABC’s duties which “were incident to the general business of ABC Specialty, Inc., and not incident to the use of the Honda to accomplish operations involved in ABC Specialty, Inc’s towing business.” (L.F. 182). The damages to Karri Kinnaman-Carson and Randy Carson were the “direct and proximate result” of all such “breaches of Defendant ABC Specialty, Inc.” (L.F. 182-83). The trial court laid it out specifically and separately. The plain language of Exclusion G’s second paragraph does not exclude this negligence.

As well, Westport ignores the plain language of the second paragraph making it dependent on the first. “If the occurrence which caused the ... injury ... *involved* the ownership, maintenance, use or entrustment to others of any ... auto ... owned or operated by or rented or loaned to any insured”, then “this exclusion” (presumably the one just stated in the first paragraph excluding injury “*arising out of* the ownership, maintenance, use or entrustment to others of any ... auto ... owned or operated by or rented or loaned to any insured”?) “applies even if the claims against any insured allege negligence in the hiring, employment training, or monitoring of others by that insured.”

So, in order for this Exclusion to operate, three questions must be answered in the affirmative:

- (1) Did the occurrence which caused the Kinnaman-Carsons' injury involve the ownership, maintenance, use or entrustment to others of any auto owned or operated by or rented or loaned to ABC?
- (2) If so, did the injury arise out of the ownership, maintenance, use or entrustment to others of any auto owned or operated by or rented or loaned to ABC?
- (3) If so, did all the Kinnaman-Carsons' claims against ABC allege negligence in the hiring, employment, training, or monitoring of others by ABC?

If any of these three questions are answered negatively for a form of negligence for which ABC was held liable, the exclusion cannot exclude that negligence. The occurrence that caused the injuries arguably did *involve* ABC's ownership of an automobile and the use of an automobile, but most certainly did not *arise out of* ABC's ownership of that automobile. They arose out of ABC's negligent "lack of security." Finally, negligence in failing to have adequate security so as to prevent foreseeable injuries to the public is not mere negligence in "hiring, employment, training, or monitoring of others," as that phrase must be construed strictly by its plain meaning. The obvious ambiguities of both the text

and structure of the second paragraph must be construed against the insurance company and in favor of coverage.

III. Westport admits that it elected to defend and indemnify ABC in full, such that it was error as a matter of public policy for Westport to be relieved of all duties to perform on its promise.

In their second Point Relied On, the Kinnaman-Carsons argued that because Westport had withdrawn its one and only reservation of rights and affirmatively had elected to defend and indemnify ABC without a reservation of rights in the underlying personal injury suit, under the law of Missouri, Westport waived the defense that the policy does not cover the Kinnaman-Carsons' claims (Br. of Appellants 50-67).

Westport's response is not that Westport did *not* withdraw its reservation of rights and elect to indemnify ABC in full. Indeed, Westport absolutely admits that, "[o]n September 22, 2006, Westport advised ABC's attorney that it had agreed to defend ABC without a reservation of rights in the lawsuit brought by the Carsons" (Br. of Respondents 34). Instead, Westport's only response is to claim either (1) that the appellants did not adequately preserve this matter for appeal or (2) without citing to *any* support in the record, that the appellants and ABC somehow colluded to defraud Westport in their § 537.065 agreement, of which Westport was unaware (Br. of Respondents 31-36).

The Kinnaman-Carsons explained in their initial brief where and how these facts and this argument were raised below (Br. of Appellants 62-66). They raised it in their equitable garnishment petition (L.F. 3-4). They discussed its effect in their response to Westport’s Motion for Summary Judgment (L.F. 448-450). They noted that

Westport is in breach of its duty to satisfy ABC Specialty’s legal obligation to pay those sums that ABC Specialty became legally obligated to pay, as damages, as a result of the Judgment. If Westport *truly* believed, as it now contends, that ABC Specialty had no liability to the Carsons in the Negligence Suit, because of the automobile exclusion, then Westport obviously breached its duty to defend ABC Specialty.

(L.F. 451) (emphasis in the original). The appellants will not belabor this point. They adequately raised and preserved this issue below.

If the Court finds, however, that they did not raise and preserve this issue adequately for appeal, then the appellants respectfully request that the Court review this issue for plain error under Rule 84.13(c). This rule provides that “[p]lain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” It applies

equally to both civil and criminal cases. *Breshears v. Union Electric Co.*, 373 S.W.2d 948, 952 (Mo. banc 1964).

“Plain error” is error that is evident, obvious, and clear. *Ryan v. Maddox*, 112 S.W.3d 476, 479 (Mo. App. 2003). Plain error review involves a two-step process. *State v. Smith*, 185 S.W.3d 747, 757 (Mo. App. 2006). First, the appellant must show that the error he alleges is, on its face, a plain error. *Id.* Second, the appellant must show that the error he alleges, on its face, establishes substantial grounds for believing that manifest injustice or miscarriage of justice has occurred. *State v. Parker*, 856 S.W.2d 331, 332–33 (Mo. banc 1993). If, on review, there is a strong showing of manifest injustice, or miscarriage of justice, an appellate court will reverse a trial court for plain error. *Id.*

In an equitable garnishment action, the injured party stands in the insured’s shoes and has neither greater nor lesser rights than the insured. *Carroll v. Mo. Intergovernmental Risk Mgmt. Ass’n*, 181 S.W.3d 123, 126 (Mo. App. 2005). The appellants have showed – and Westport does not dispute – that it is the public policy of Missouri that where an insurer chooses to defend its insured without a reservation of rights, the insurer must be bound by the decision it has made and must follow through with its promise (Br. of Appellants 56-58). Westport admits that, before judgment in the underlying case was final, it chose to defend ABC

without a reservation of rights (Br. of Respondents 34). Indeed, in the trial court, Westport stated that the relevant correspondence “speaks for itself” (L.F. 186).

Westport agreed to indemnify ABC in full – granting a right to ABC which is imputed to the Kinamman-Carsons in this equitable garnishment case. Westport attempts to use procedural vagaries to vitiate this known and admitted right. It was error to conclude that Westport did not have to indemnify ABC, when Westport had, by its own admission, expressly agreed to indemnify ABC. This is manifestly unjust. The Kinnaman-Carsons are innocent parties who were injured by ABC’s negligence. Even if not preserved, setting Westport free from its duties given these facts and Westport’s own admissions would be a plain error affecting the substantial rights of ABC and the Kinnaman-Carsons, resulting in manifest injustice. Despite Westport’s duty and promise, the Kinnaman-Carsons could not recover their damages.

Even if the Court finds that this issue was not adequately preserved, both parties agree on the facts underlying it, the legal implications of which are plain.

Conclusion

Exclusion G in Westport Insurance Corporations policy issued to ABC Specialty, Inc., did not exclude coverage for ABC's negligent failure to secure its premises, a proximate cause of the appellants' injuries. Moreover, Westport elected to indemnify and defend ABC in full, and should not now be allowed to do otherwise.

This Court should reverse the trial court's judgment and remand this case with instructions to enter judgment for the appellants.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I scanned the enclosed CD-ROM for viruses using Norton AntiVirus 2008 and it is virus free, and that I used Microsoft Word 2003 for word processing. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), and that this brief contains 6,790 words.

Attorney

Certificate of Service

I hereby certify that on February 23, 2009, I mailed a copy and a CD-ROM of this Substitute Reply Brief of the Appellants to Barry W. McCormick, Attorney, and Edward M. Boyle, Attorney, Suite 470, Corporate Woods Building 55, 9300 West 110th Street, Overland Park, Kansas 66210, counsel for the respondents.

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