SC100440

IN THE MISSOURI SUPREME COURT

State of Missouri ex rel. Brittany Trexler, Relator

v.

The Honorable Scott A. Lipke, Circuit Court of Cape Girardeau County, Missouri

Respondent

Substitute brief of Respondent

WATTERS WOLF BUB & HANSMANN, LLC

/s/ Bradley R. Hansmann
Bradley R. Hansmann, #53160
Julia D. McFarland, #73847
600 Kellwood Parkway, Suite 120
St. Louis, Missouri 63017
(636) 798-0570 (phone)
(636) 798-0693 (fax)
bhansmann@wwbhlaw.com
jmcfarland@wwbhlaw.com

Attorneys for Consumers USA

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JURISDICTIONAL STATEMENT

On May 31, 2023, Relator, Brittany Trexler, filed a Petition for Writ of Mandamus, or Alternatively Prohibition, with the Missouri Court of Appeals Eastern District, contending Respondent, the Honorable Scott A. Lipke, Circuit Court of Cape Girardeau, Missouri, exceeded his authority in issuing his November 14, 2022, and May 2, 2023, orders. *Relator's Ex. 20; 25*. The Missouri Court of Appeals Eastern District issued a Preliminary Order in Mandamus on June 28, 2023, and issued an opinion making its preliminary writ of mandamus permanent on November 21, 2023. A1. This Court ordered the cause transferred on March 5, 2024. Jurisdiction is proper pursuant to Mo. Const. Art. V, §4, which states "[t]he supreme court and districts of the court of appeals may issue and determine original remedial writs."

STATEMENT OF FACTS

On March 4, 2017, Relator Brittany Trexler ("Relator") was test-driving a vehicle as Hitt Automotive, LLC's customer when she was involved in an accident with Sean Monighan ("Monighan") who was injured. *Ex. 1; Ex. 2.* At the time of the accident, Relator maintained an insurance policy with Progressive that complied with the financial responsibility law limits. *Ex. 4.* Progressive paid the policy limits under its policy to Monighan on behalf of Trexler. *Ex. A*.

Consumers issued a garage insurance policy to Hitt Automotive, which provided liability coverage for "bodily injury" caused by an "accident" resulting from "garage operations" other than the ownership, maintenance, or use of covered "autos" ("the Policy"). *Ex. 3.* The Policy's definition of "insured" stated:

> 3. Who is An Insured
>
> a. The following are "insureds" for covered "autos":
>
> (1) You for any covered "auto".
>
> (2) Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> ***
>
> (d) Your customers. However, if a customer of yours:
>
> (i) Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
>
> (ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance.

Relator was excluded under the definition of "insured" because she was a customer that had other available insurance which satisfied Missouri's financial responsibility law. *Ex. 3.*

Consumers set up a claim file for its insured Hitt Automotive from a claim made by Monighan. *Ex. 21.* Consumers did not set up a claim file pertaining to Relator because she was excluded from the definition of insured under the Policy. *Ex. 3*. On July 9, 2021, Relator and Monighan entered into a contract under section 537.065 and subsequently engaged in an uncontested arbitration process that resulted in an arbitration award. *Ex. 12.* After the Circuit Court of Cape Girardeau County confirmed the arbitration award, Consumers deposited $25,000 to the Circuit Court of Cape Girardeau County on February 28, 2022. *Ex. 12*; *Ex. A*.

Monighan filed a Petition for Equitable Garnishment on February 15, 2022, pursuant to § 379.200, RSMo. against Relator and Consumers. *Ex. 13*. Relator filed an Answer and a Cross-Claim against Consumers, and she subsequently filed a First Amended Cross-Claim which asserts breach of insurance contract, bad faith, and negligence. *Ex. 1; Ex. 2*.

Relator propounded her first request for production seeking "[t]he complete claims file(s), including all documents, notes and communications that are part of any claims file(s) related to Brittany Trexler or the March 4, 2017, car accident in which Sean

Monighan was injured generated up through October 10, 2020." *Ex. 15*. A second request sought "[a]ll internal communications (written, recorded and electronic) at Consumers Insurance USA, Inc. referencing or related to Brittany Trexler or the March 4, 2017, car accident generated up through October 10, 2020." *Ex. 15*. Consumers objected to these requests because its claim file was protected by the insurer-insured privilege and the attorney-client privilege for its insured Hitt Automotive, and Relator was excluded from the definition of insured under the Policy. *Ex. 15*. Relator filed a Motion to Compel Her Insurance Claim File and Internal Communications about Her Claim and a Consumers' Claims Manual. *Ex. 15*.

On November 14, 2022, the trial court ordered Consumers to produce its relevant claims handling manual and "those portions of the Insurance Claims File that relate to any coverage decision made by Consumers USA regarding Ms. Trexler and the March 4, 2017, accident, including any internal communications related to such which are kept separate from the claims file, up through November 10, 2020." *Ex. 20*. Consumers produced supplemental answers to Relator's First Request for the Production of Documents on November 23, 2022, pursuant to the Court Order. *Ex. C, Ex. C-1*.

Relator filed a Motion for *In Camera* Inspection of the Claim Notes Or, Alternatively, For Clarification of the Court's November 14, 2022, Order. *Ex. 22*. Consumers consented to an *in-camera* inspection and filed a memorandum regarding its understanding of Respondent's order, but Respondent denied Relator's Motion for an *In*

Camera Inspection. *Ex. 22*. Relator subsequently filed a Petition for Writ of Mandamus or, Alternatively, Prohibition with the Missouri Court of Appeals, Eastern District.

On November 21, 2023, the court of appeals entered a Permanent Writ in Mandamus, ordering Consumers to provide to Respondent for an in-camera inspection all un-redacted documents which are responsive to Relator's discovery requests at issue and to include a privilege log referencing any privilege it claims with respect to the un-redacted documents. *A1-13*. The court of appeals further ordered Respondent to be guided in its in-camera inspection and subsequent order resolving discovery by the legal principles and holdings set forth in its opinion issued with its Permanent Writ of Mandamus. *A1-13*. The court of appeals' opinion held that if a policy of insurance excludes mandatory coverage under RSMo § 303.190.2(2), then a provision providing such coverage will be "read into the Policy" thereby causing a permissive driver such as Relator to be vested with the same rights and responsibilities as any other insured under the Policy. *State ex rel. Trexler v. Lipke,* 2023 WL 8042628, at *4 (Mo. App. E.D. 2023); *A4*.

On January 30, 2024, Respondent filed an Application for Transfer with this Court, presenting two issues of general interest or importance. The first issue being whether a permissive driver has the same vested rights and responsibilities under RSMo § 303.190.2(2), as any other insured under a motor vehicle liability policy if the permissive driver is excluded from the definition of insured in the Policy, or if the permissive driver is limited only to such coverage specifically prescribed under RSMo § 303.190(2). The

second issue presented in Respondent's Application for Transfer with this Court was whether a permissive driver is entitled to a claim file under RSMo § 303.190(2) if the permissive driver is excluded from the definition of insured from the motor vehicle liability policy. Additionally, Respondent's Application for Transfer provided that the court of appeal's opinion was contrary to previous decisions of this Court in *State Farm Mutual Auto Ins. Co. v. Ballmer*, 899 S.W.2d 523, 527 (Mo. banc 1995) and *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 92 (Mo. banc 2000). On March 5, 2024, this Court sustained Respondent's Application for Transfer, and Respondent's arguments in support of this Court denying Relator's Writ of Mandamus now follow.

SUMMARY OF ARGUMENT

Relator's Petition for Writ of Mandamus or Alternatively, Prohibition should be denied, because Relator has not established Respondent misapplied Missouri law or erroneously restricted discovery by its November 10, 2022, Order. *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406, 413 (Mo. App. E.D. 2021) (citing *Cullen v. Harrell*, 567 S.W.3d 633, 637 (Mo. banc 2019)). Relator filed her Petition for Writ of Mandamus or Alternatively for Prohibition with the Missouri Court of Appeals Eastern District contending that Respondent the Honorable Scott A. Lipke's Orders entered on November 14, 2022, and May 2, 2023, prohibited Relator from discovering significant portions of Hitt Automotive's claim file that she argues are relevant to her alleged bad faith claims and not subject to any recognized privilege. *See* Relator's Petition for Writ.

The principal reason that Hitt Automotive's claim file is protected from discovery by Relator is because Missouri's Vehicle Financial Responsibility Law ("MVFRL") does not contain a requirement that motor vehicle liability policies afford coverage for the defense of claims. *Ballmer*, 899 S.W.2d, at 526-27. As held in *Grewell* and subsequent cases, an insured's claim file belongs to the insured based upon an insurer owing a duty to defend its insured. *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 47 (Mo. App. S.D. 2008) (citing *Grewell*, 102 S.W.3d, at 36). Relator was excluded from the definition of "insured" under the Policy, and the MVFRL does not impose a duty to defend. *Rutledge v. Bough*, 399 S.W.3d 884, 887 (Mo. App. S.D. 2013); *Ballmer*, 899 S.W.2d, at 526-27. This

reason alone warrants denial of Relator's Writ of Mandamus, or Alternatively Prohibition. Relator fails to substantively acknowledge in her substitute brief that the right to free and open access to a claim file is premised upon both an individual being an insured under a policy of insurance and the insurer owing the insured a duty to defend. *Grewell*, 102 S.W.3d, at 36.

Relator raises two arguments in her substitute brief for why she is entitled to free and open access to Hitt Automotive's claim file. Both arguments raised by Relator are unsupported by this Court's holding in *Halpin v. Am. Fam. Mut. Ins. Co*, when this Court concluded that the MVFRL **"effects a partial invalidity"** as to clauses contained in insurance policies that do not comply with the minimum requirements of the MVFRL. 823 S.W.2d 479, 482 (Mo. banc 1992) (emphasis added).

First, Relator was not an insured under the Policy because Relator was excluded from the definition of "insured" under the Policy, and the definition's exclusion was enforceable to bar any coverage beyond $25,000 of indemnification. *See Ballmer*, 899 S.W.2d, at 525; *Halpin*, 823 S.W.2d, at 482; *Dutton*, 454 S.W.3d, at 324. The requirements pursuant to § 303.19.2(2) do not alter the Policy's definition of insured because if a provision violates the MVFRL it only "effects a partial invalidity" to the extent it does not provide the minimal financial responsibility required by the MVFRL. *Id*.

Furthermore, Relator did not meet the definition of "insured" under the Policy because the Policy's definition of insured clearly and unambiguously excluded customers

with other available insurance, whether that be primary, excess, or contingent. *Ex.* 3; *Ex.* 4. Consumers obligation to pay $25,000 to Monighan pursuant to the MVFRL was not available coverage under a policy of insurance but statutorily required under § 303.19.2(2). *Halpin*, 823 S.W.2d, at 482; *Ballmer*, 899 S.W.2d, at 527.

Additionally, Consumers did not have a contract with Relator and, therefore, did not have a right or duty to control Realtor's settlement decision. Moreover, the MVFRL does not impose a right or duty to settle a claim, and the $25,000 owed to Monighan, which has been satisfied, was statutorily imposed by the MVFRL and not coverage provided by a policy of insurance. *Id*. Regardless of Relator's assertions, the entitlement she seeks through her Petition for Writ is free and open access to a claim file which is dependent upon her being an insured under the Policy and Consumers owing her a duty to defend, which neither are true. *Grewell,* 102 S.W.3d, at 47; *Ballmer*, 899 S.W.2d, at 526-27. The purpose of the MVFRL is to protect the public from tortfeasors like Relator, not to benefit Relator by granting her the full benefits of an insurance policy from which she was excluded by the Policy's language. Therefore, this Court should hold that the MVFRL does not grant such additional benefits in an insurance policy, and Relator's request for a permanent writ of mandamus or prohibition should be denied.

STANDARD OF REVIEW

"There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus." *Beauchamp*, 471 S.W.3d, at 810. "A writ of mandamus is [only] appropriate where the trial court lacks authority or acts in excess of its authority." *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406, 413 (Mo. App. E.D. 2021) (citing *Cullen v. Harrell*, 567 S.W.3d 633, 637 (Mo. banc 2019)). "[I]f the trial court's discovery order is based on an erroneous conclusion of law, then the order is subject to reversal." *Id*. (citing *State ex rel. Dewey & Leboeuf, LLP v. Crane*, 332 S.W. 224, 231 (Mo. App. W.D. 2010)). "An appeals court is not restricted only to issues properly raised or preserved in circuit court." *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. W.D. 2008).

"A petitioner seeking mandamus must allege and prove that he or she has a 'clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." *Beuchamp*, 471 S.W.3d, at 810. The determination of whether discovery matters are privileged is a question of law. *State ex rel. Kilroy Was Here, LLC*, 633 S.W.3d, at 413 (citing *State ex rel. McBride v. Dalton*, 834 S.W.2d 890, 891 (Mo. App. E.D.1992)). "The relator **has the burden of establishing** the circuit court acted in excess of its authority."

State ex rel. Kilroy Was Here, LLC, 633 S.W.3d, at 413 (citing *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 382 (Mo. banc 1980)) (emphasis added).

"The purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law." *Id*. (citing *State ex rel. City of Crestwood v. Lohmam*, 895 S.W.2d 22, 27 (Mo. App. W.D. 1994)). "It is a long-established principle of law that mandamus does not issue where there is another adequate remedy available to relator." *Id*. (citing *State ex rel. Kelley*, 595 S.W.2d at 265). "In other words, 'the writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy." *Id*.

ARGUMENT

I. Hitt Automotive's claim file is protected by insurer-insured privilege, attorney-client privilege, and the work-product doctrine, and Relator does not have the right to free and open access to Hitt Automotive's claim file because she was excluded from the definition of insured under the Policy, and § 303.19.2(2) RSMo does not require a duty to defend or settle.

Hitt Automotive's claim file belongs to Hitt Automotive, not Relator. Relator was not an insured under the Policy and the definition's exclusion of "insured" was unambiguous and enforceable to bar any coverage beyond $25,000 in indemnification. *Ballmer*, 899 S.W.2d, at 525. The MVFRL only required Consumers to pay Monighan as an injured person $25,000, which Consumers has done. *Id*. The purpose of the MVFRL is not for the benefit of Relator as a negligent motor vehicle operator but for the benefit of Monighan as an injured person. *Ballmer*, 899 S.W.2d., at 527; *Halpin*, 823 S.W.2d, at 482; *Hargrave*, 34 S.W.3d, at 90; *Dutton*, 454 S.W.3d at 324; *State Farm Mut. Auto. Ins. Co. v. Zumwalt*, 825 S.W.2d 906, 908-09 (Mo. App. S.D. 1992). The Policy's exclusion from the definition of "insured" was enforceable to bar any duty to defend by Consumers, which also means Relator does not have the right to access Hitt Automotive's claim file because the discoverability of an insured's claim file is premised on both an individual being an insured under a policy of insurance and that the insurer owes its insured a duty to defend. *Grewell*, 102 S.W.3d, at 36.

i. Relator was excluded from the definition of "insured" under the Policy.

An insurance contract must be enforced according to its terms unless the contract is ambiguous. *Robin v. Blue Cross Hosp. Serv., Inc*., 637 S.W.2d 695, 698 (Mo. banc 1982). If the insurance contract is unambiguous, it "will be enforced as written absent a statute or public policy requiring coverage." *Id*. When determining whether the terms of an insurance contract are ambiguous, the words of the contract must be given their natural and ordinary meaning. *Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co*., 51 S.W.3d 83, 87 (Mo. App. W.D. 2001). "A court is not permitted to create ambiguity in order to distort the language of an unambiguous policy, or in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc 1991). Courts examining insurance policies "must endeavor to give each provision a reasonable meaning and to avoid an interpretation that renders some provisions useless or redundant." *Dibben v. Shelter Ins. Co*., 261 S.W.3d 553, 556 (Mo. App. W.D. 2008).

"An insured cannot create an ambiguity by reading only a part of the Policy and claiming that, read in isolation, that portion of the Policy suggests a level of coverage greater than the Policy actually provides when read as a whole." *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 617 (Mo. banc 2017). The mere fact a policy contains a limitation on coverage or an exclusion does not render the Policy ambiguous. *Floyd-Tunnell v. Shelter Mutual Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014). Limitations, exclusions, conditions, and endorsements "are necessary provisions in insurance policies," and [i]f they

are clear and unambiguous within the context of the Policy as a whole, they are unenforceable." *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007).

In the current case, the relevant policy provision for "Who Is An Insured" is as follows:

> SECTION II – LIABILITY COVERAGE
> A. Coverage
> ***
> 3. Who Is An Insured
> a. The following are "insureds" for covered "autos":
> ***
> (2) Anyone else while using with you your permission a covered "auto" you own, hire or borrow except:
> ***
> (d) Your customers. However, if a customer of yours:
> (i) Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
> (ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance. *Relator's Ex. 3.*

Relator did not meet the definition of "insured" under the Policy because the Policy's definition of insured clearly and unambiguously excluded customers with other available insurance, whether that be primary, excess, or contingent. In *Rutledge v. Bough*,

the court found a permissive driver under the same factual situation and with the identical policy language was excluded from the definition of insured and the policy's definition of insured was enforceable to bar any coverage beyond that mandated by the MVFRL. *Rutledge*, 399 S.W.3d, at 885. Thompson Capital permitted Bough to test drive a vehicle, and during the test drive he was involved in an accident that caused the death of the other driver. *Id.* Bough was a named insured on a personal automobile policy issued by Safeco, which provided coverage for Bough's use of non-owned autos. *Id*. Safeco paid partial satisfaction for the judgment, but Thompson Capital's policy, which was issued by NCC, excluded Bough as an insured. *Id*. Rutledge and Cox brought an equitable garnishment action against NCC. *Id*. NCC's policy contained a Commercial Garage Coverage Part. Section II included the "Who Is An Insured" provision **identical** to Consumers' "Who Is An Insured" provision. *Id*. at 886. Along with finding the MVFRL imposed $25,000 of coverage required by NCC, the court also analyzed the Who Is An Insured provision contained in NCC's policy. *Id*. at 888. The court concluded that the term "customer" was not ambiguous under the "Who Is Insured" definition. *Id*. Because the "Who Is An Insured" provision was unambiguous, NCC's only obligation was $25,000 under the MVFRL. *Id*. NCC's exclusion from its definition of insured was enforceable to bar any additional liability insurance coverage to Bough. *Id*. at 888-89.

In the current case, for the same reason as was held in *Rutledge*, Relator was excluded from the Policy's definition of an "insured." The Policy clearly and unequivocally

provides that Hitt Automotive's customers are excluded from coverage. There are two exceptions to the exclusion, neither of which apply to Relator. Furthermore, the exclusion from the definition of "insured" contained in the Policy was the exact same provision analyzed by the court in *Rutledge*. As the court found in *Rutledge*, the definition of an "insured" is unambiguous and therefore enforceable to bar any additional coverage beyond that mandated by the MVFRL. *Id*. The MVFRL only requires $25,000 in indemnification for payment to Monighan, which Consumers has already paid, and the Policy's exclusion from the definition of "insured" is enforceable to bar any additional coverage, such as a duty to defend or settle a claim. *Ballmer*, 899 S.W.2d, at 526-27.

ii. The Missouri Financial Responsibility Law does not impose a duty to defend nor a duty to settle in good faith, and the Policy's exclusion is enforceable to bar any coverage beyond $25,000.

Under Missouri law, both owners and operators of vehicles registered in Missouri, or required to be registered in Missouri, must comply with the requirements of MVFRL. § 303.025 RSMo (2017). Section 303.190.2(2) RSMo (1999)[1] of the MVFRL provides an owner's policy of liability insurance:

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits, exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars

[1] Relator cites the 2019 version of § 303.190.2, but the accident occurred in 2017. However, there were no amendments to the statutory text pertinent to this case.

> because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident[.]

As analyzed below, the utilization of the word "as insured" under § 303.190.2(2) RSMo has been interpreted by this Court not to include a duty of an insurer to defend, and the requirement is exclusively for "amounts" of coverage under the MVFRL, thereby meaning the MVFRL only imposes indemnification up to $25,000 per person and $50,000 per occurrence. *Ballmer*, 899 S.W.2d at 526. Moreover, a provision that violates the MVFRL only "effects a *partial* invalidity" to the extent it does not provide the minimal financial responsibility required by the MVFRL. *Ballmer*, 899 S.W.2d at 526; *Halpin*, 823 S.W.2d, at 481; *Hargrave*, 34 S.W.3d, at 90.

This Court has held that the MVFRL, only "effects a partial invalidity of clauses" in a policy of insurance to the extent it does not provide the minimal financial responsibility required by the MVFRL. *Halpin*, 823 S.W.2d, at 480. In *Halpin*, Donald and Rebecca Halpin contracted for a liability insurance with American Family for a motor vehicle they owned. *Id*. An accident resulted with the Halpins' two minor children while riding in the insured's vehicle while Rebecca Halpin was driving. *Id*. American Family denied coverage of the claim by the children for the injuries caused by Rebecca Halpin's negligence because of a household exclusion in the insurance policy. *Id*. A declaratory judgment action was subsequently filed by the Halpins that argued the household exclusion clause was void as

contrary to public policy, and the trial court entered judgment in American Family's favor and was reversed by this Court. *Id*.

In reaching this conclusion, this Court looked to the history Missouri's financial responsibility law and public policy. *Id*. at 482. In looking to the purpose of the MVFRL this Court stated:

> The plain purpose of the 1986 amendment [2] is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators. This protection extends to occupants of the insured vehicle as well as to operators and occupants of other vehicles and pedestrians. The purpose would be incompletely fulfilled if the household exclusion clause were **fully enforced**. *Id*. (emphasis added)

Further, this Court refused to find the exclusion clause entirely void because of § 303.190(7) which reads:

> 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 liability policy" shall apply only to that part of the coverage which is required by this section.

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[2] The Motor Vehicle Financial Responsibility Law was enacted in 1986 and repealed certain sections of the Safety Responsibility Law. In *Halpin*, this Court found that the new law in contrast to the old, required owners of a motor vehicle to maintain "financial responsibility" without regard to driving history pursuant to RSMo § 303.025. Since this Court's holding in *Halpin*, the duty under § 303.025 to maintain financial responsibility that conforms with the laws of this state has substantively stayed consistent in relation to the requirements under §303.190(2). § 303.025 (2001); § 303.025 (2010); § 303.025 (2011); § 303.025 (2017); § 303.025 (2024).

Halpin, 823 S.W.2d, at 480. "Section 303.190.7 manifests to insureds that they have no basis for expecting coverage in excess of the requirements of § 303.190.2." *Id*. at 483. This Court recognized the freedom of contract in liability insurance. *Id*. (citing *Am. Fam. Mut. Ins. Co. v. Ward*, 789 S.W.2d 791, 796 (Mo. banc 1990) (stating "[a] corollary of the second rule is that the parties to a purely voluntary insurance contract may agree to such terms and provisions as they see fit to adopt, subject only to the requirements that the contract is lawful and reasonable).

This Court further found in *Ballmer* that the MVFRL does not impose any obligation upon an insurer to defend the vehicle's operator. 899 S.W.2d at 526-27. In *Ballmer*, Wilbur Ballmer was driving an automobile owned by Sharon Kulenkamp with her permission. *Id*. at 524. Wilbur Ballmer was involved in an accident that caused the death of his passenger, Daniel Ellis, who was also his half-brother. *Id*. Sylvia Ballmer sued Wilbur Ballmer for the wrongful death of the deceased, and State Farm offered to defend Wilbur Ballmer under a reservation of rights due to a household exclusion. *Id*. State Farm's policy's definition of "insured" included "any other person while using such a car if its use is within the scope of the consent of you or your spouse." *Id*. at 526. The Policy provided an exclusion, which stated:

> THERE IS NO COVERAGE … FOR ANY BODILY INJURY TO … ANY INSURED OR ANY MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD." *Id*. at 525.

This Court found Willbur Ballmer was an insured under the definition of insured because Kulenkamp granted him permission to use the car but, because the injured person was Ballmer's relative, the household exclusion applied and prevented coverage under the Policy. *Id*. at 526. This Court concluded, "**the household exclusion is" … "unenforceable 'insofar as it purports to deny coverage in the amounts mandated by section 303.190.2, but valid as to any coverage exceeding those amounts."** *Id*. (emphasis added). Additionally, "[t]he financial responsibility law does not contain a requirement that motor vehicle liability policies afford coverage for the defense of claims. If an insurance policy affords such coverage, it is in excess of the coverage mandated by the law." *Id*. State Farm was, therefore, required to provide coverage but only for the amounts mandated by the MVFRL and was not mandated to defend Ballmer. *Id*. at 526-27.

Moreover, over the past three decades this Court along with appeals courts in this state have repeatedly found that the MVFRL only effects a partial invalidity as to clauses contained in insurance policies that do not comply with the minimum requirements of the MVFRL. *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88 (Mo. banc 2000); *Progressive Northwestern Ins. Co. v. Talbert*, 407 S.W.3d 1, 8 (Mo. App. S.D. 2013) (stating "Missouri courts have repeatedly found household exclusion clauses are valid as to any coverage exceeding the amounts mandated by the MVFRL").

Clayborne v. Enter Co. of St. Louis, LLC, is further illustrative of the effect of this Court's holdings in *Halpin* and *Ballmer* in relation to the requirements of the MVFRL.

Clayborne v. Enter. Leasing Co. of St. Louis, LLC, 524 S.W.3d 101 (Mo. Ct. App. 2017). In *Clayborne*, a motorist was injured in an automobile accident with an individual renting a car from Enterprise Leasing Company. *Id*. at 103-04. The renter declined to purchase insurance coverage from Enterprise and also declined the option to purchase supplemental liability protection. *Id*. at 103. Contained within the rental agreement was a clause regarding responsibility to third parties regarding the motor vehicle financial responsibility law as a state certified self-insurer. *Id*. That clause included the following statement, "if Renter and AAD(s) are in compliance with the terms and conditions of this Agreement and if Owner is obligated to extend its motor vehicle financial responsibility to Renter, AAD(s) or third parties, then Owner's obligation is limited to the applicable state minimum financial responsibility amounts." *Id*. at 104.

The injured party and renter entered into a Section 537.065 agreement, wherein a judgment of $575,000 was entered against the renter. *Id.* The injured motorist brought a garnishment action against Enterprise, ELCO, and the renter, seeking the MVFRL limit of $25,000. *Id*. In addition, the renter filed a cross-claim for bad faith for failure to settle and breach of contractual duty to defend. *Id.* Enterprise and ELCO eventually satisfied the injured motorist's garnishment claim for $25,000, which resulted in the injured motorist dismissing his garnishment claim. *Id.* Enterprise subsequently filed a motion for summary judgment against the renter's claims which the trial court granted. *Id*. at 105.

On appeal the court held that Enterprise and ELCO "satisfied their only obligation with regard to coverage of liability as a car rental company under the MVFRL by paying $25,000 to Clayborne [the injured party]." *Id.* at 107. **The court also concluded that Enterprise did not owe a "contractual duty under the rental agreement or a statutory duty under the MVFRL to defend [the renter]."** *Id.* at 107. **(emphasis added). Furthermore, the court explained that "neither the rental agreement nor the MVFRL gave Enterprise or ELCO the exclusive right to contest or settle any claims against [renter] or prohibited him from voluntarily assuming any liability or settling any claims against him without Enterprise's consent."** *Id.* (emphasis added).

Moreover, as reiterated by this Court time and time again the purpose of the MVFRL—mandating $25,000 of liability coverage—is not for the benefit of a negligent motor vehicle operator but for the benefit of an injured person. *Ballmer*, 899 S.W.2d, at 527; *Halpin*, 823 S.W.2d, at 482; *Am. Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 90 (Mo. banc 2000); *State Farm Mut. Auto. Ins. Co. v. Zumwalt*, 825 S.W.2d 906, 908-909 (Mo. App. S.D. 1992).

Relator acknowledges that the MVFRL's purpose is to ensure people injured on Missouri highways may be compensated for their injuries by the negligent motor vehicle operators who caused those injuries, but contends without support that this goal is accomplished by writing into the MVFRL a duty to settle a claim on behalf of a negligent motor vehicle operator. *See* Rel. Subst. Br. at 58-59. Relator is in essence asking this Court

to write into the MVFRL a duty that does not exist. If the legislature intended such a duty be contained within the MVFRL, it could have written such into the MVFRL, but did not. Moreover, writing such a duty into the MVFRL would benefit a negligent tortfeasor, which is the opposite purpose of the MVFRL.

Additionally, the tort of bad faith refusal to settle is established from a contract that is the policy of insurance. *Scottsdale Ins. Co*., 448 S.W.3d, at 829. "Inherent in a policy of insurance is the insurer's obligation to act in good faith regarding settlement of a claim." *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 94 (Mo. App. W.D. 2005). "This obligation is part of what the insured pays for." *Id*. Here, Relator had no contract with Consumers, and Relator paid no premium to Consumers for coverage under the Policy.

Further, Relator's contention that § 303.190.6 imposed a duty on Consumers to settle a claim on her behalf in good faith is misguided. Section 303.190.6 provides that an insurance carrier has the right to settle any claim covered by the Policy and if such settlement is made in good faith, the amount is deducted from the limits of liability specified in § 303.190.6(3). This provision does not impose a duty upon an insurer to settle in good faith and only provides that an insurer "has the right to settle any claim covered by the policy." § 303.190.6(3). Relator again is asking this Court to write language into the MVFRL that does not exist. Relator did not have a claim covered by the Policy and regardless, § 303.190.6(3) only sets forth that an insurer "has the right to settle any claim"

which makes sense because as this Court has rationalized in *Scottsdale Ins. Co*., the duty to settle arises from a contract of insurance. 448 S.W.3d, at 829.

Relator's argument that she was owed by Consumers a duty to settle because she was a third-party beneficiary is also unsupported by Missouri law. "In determining whether someone is a third-party beneficiary to the contract, 'the question of intent is paramount ... [and] is to be gleaned from the four corners of the contract." *OFW Corp. v. City of Columbia*, 893 S.W.2s 876, 879 (Mo. App. W.D. 1995) (internal citations omitted). The three types of third-party beneficiaries to a contract are 1) donee beneficiaries, 2) creditor beneficiaries, and 3) incidental beneficiaries. *Id*. "A donee beneficiary is one upon whom the promisee intends to confer the benefit of performance of the contract although such performance will not discharge a preexisting duty or obligation to the beneficiary." *Id*. A creditor beneficiary is "one upon whom the promisee intends to confer the benefit of the performance of the contract and thereby discharge an obligation or duty the promisee owes the beneficiary." *Id*. An incidental beneficiary is one "who will be benefited by performance of a promise but who is neither a promisee nor an intended beneficiary." *Id*. (citing Restatement (Second) of Contracts § 315 cmt. a (1981)). Only donee and creditor beneficiaries have enforceable rights under a contract. *Id.* Relator is not a third-party beneficiary under the Policy because she is not an intended beneficiary of the contract nor was there any conferment from the benefit of performance to Relator under the Policy for

her to have any enforceable rights under the Policy. Moreover, Relator is not an intended beneficiary because the policy excludes her.

"Although the contract need not name the third-party beneficiary, the terms of the contract must directly and clearly express an intent to benefit an identifiable person or class." *Id*. "In the absence of such an express declaration, there is a strong presumption that the parties contracted only for themselves and not for the benefit of others." *Id*. (citing *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 141 (Mo. banc 1987). "It must be shown that the benefit to the third party was the cause of the creation of the contract." *Id*. (citing *Chmieleski v. City Prods. Corp*., 660 S.W.2d 275, 289 (Mo.App.1983). "Only those third parties for whose primary benefit the contracting parties intended to make the contract may maintain an action." *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 922 (Mo. App. W.D. 1991). An appeals court may not speculate from the language in the contract as to whether the contracting parties intended to make the plaintiff a third-party beneficiary. *OFW Corp. v. City of Columbia*, 893 S.W.2d, at 879. (internal citations omitted).

Relator cites to *Great American Alliance Ins. Co. v. Anderson*, in stating "in the event of an accident, the permissive user is generally covered under the named insured's insurance policy as a third-party beneficiary." 847 F.3d 1327, 1331 (11th Cir. 2017). Not only is this case not supported by Missouri law (the court applied Georgia law), but the issue before the court was not to determine whether a permissive user was a third-party

beneficiary, nor did it deal with the issue that an individual was explicitly excluded under the definition of an "insured" under an insurance contract as in this case. *Id*.

Relator also cites to *Ennen v. Integon Indemnity Corp*. 268 P.3 277, 283-84 (Alaska 2012), which states "an intended third-party beneficiary of an insurance contract should be able to bring a cause of action for bad faith against the insurer." *Ennen* decided whether a passenger—who was covered by the policy language—was an intended beneficiary. Although the case discussed payment under the Alaska MVFRL, the case did not determine that a third-party tortfeasor was covered by the policy and had a claim for bad faith. *Id*. Respondent has found no state which holds that a tortfeasor is entitled to all the benefits of an insurance contract by way of the MVFRL, which makes sense as such holding would be contrary to the purpose of the MVFRL and public policy. *Hargrave*, 34 S.W.3d, at 90.

The case *St. Paul Guardian Ins. Co. v. Luker*, 801 S.W.2d 614, 618-19 (Tex.Ct.App. 1990), which is cited by Relator, also fails to support Relator's contention that she is a third-party beneficiary under the Policy based upon Missouri law. That case dealt with the issue of whether an "intended" third-party beneficiary to a contract was owed a duty of good faith and fair dealing. *Id*. However, unlike Relator, the third party at issue was intended to be a third-party beneficiary under the Policy and was not explicitly excluded under the definition of an insured. *Id*. Specifically, the court found the insurance policy there applied not only to the coverage of the house but also to the coverage of property belonging to a third party within the house. *Id*. The court looked at whether an insurance

policy covering property damage included individuals' personal property within the house. *Id*.

Consumers and Hitt Automotive did not intend that the Policy would benefit Relator as required under Missouri law to find Relator is a third-party beneficiary. *OFW Corp*., 893 S.W.2d at 879. The Policy explicitly excludes Relator under the definition of an insured. It is illogical to find that parties "intended" a person to benefit from a contract if the person is explicitly excluded. Trexler's argument lacks even basic logic. In fact, the exclusion shows it was "unintended."

Moreover, the MVFRL's explicitly prevents any third-party beneficiary claim. § 303.190(7) reads:

> 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 liability policy" shall apply only to that part of the coverage which is required by this section.

If the legislature wanted to create a third-party beneficiary status, it would not permit insurers to write coverage in excess of that required by the MVFRL, which is not subject to the provisions of Chapter 303.

In sum, this Court has unequivocally established that § 303.190.2 only imposes $25,000 of indemnification. *Ballmer*, 899 S.W.2d, at 526-27; *Hargrave*, 34 S.W.3d, at 90. Consumers satisfied this obligation by paying $25,000 to Monighan. The MVFRL does

not require anything more from Consumers, and anything additional would be in clear contravention of its purpose because it would benefit a negligent motor vehicle operator. *Ballmer*, 899 S.W.2d, at 526-27; *Dutton*, 454 S.W.3d, at 323; *Halpin*, 823 S.W.2d, at 482; *Hargrave*, 34 S.W.3d, at 90.

iii. The MVFRL's requirement of $25,000 in indemnification does not alter Consumers' definition of "insured" under the Policy.

Relator further attempts to circumvent the purpose of the MVFRL by contending the MVFRL requires the definition exclusion to be stricken from the Policy and supplemented with the MVFRL's express language making Relator Consumers' "insured" for all purposes under the Policy. In making such a misguided contention, Relator misapplies *Dutton*, 454 S.W.3d at 324; *Rutledge*, 399 S.W.3d, at 887; *Rader*, 910 S.W.2d 280 (Mo. App. W.D. 1995). None of these cases support Relator's contention or otherwise find the MVFRL strikes Consumers' definitional exclusion or requires Relator to be treated under the Policy as an "insured" for purposes of a duty to defend or a duty to settle in good faith. Relator does not cite one case supporting her contention that the MVFRL imposes a duty to defend or an exclusive right or duty to contest or settle a claim on behalf of Relator. Case law interpreting the MVFRL holds in opposition to Relator's contention because the MVFRL only effects a *partial* invalidity for the sole purpose for payment of $25,000 to an injured party. *Ballmer*, 899 S.W.2d at 526; *Halpin*, 823 S.W.2d, at 481; *Hargrave*, 34 S.W.3d, at 90. Further, accepting Trexler's argument would be violative of the rationale

and purpose of the MVFRL; that being it is for the benefit of injured persons and not for the benefit of negligent motor vehicle operators. *Id.*

Relator contends that this Court's decision in *Dutton v. American Family Mut. Ins. Co*., dictates that if a definition of insured under a policy of insurance fails to include minimum coverage required by the MVFRL the definition exclusion is stricken from the Policy, and instead, the Policy is supplemented with the express language of the MVFRL thereby in this case making Relator an "insured" under the Policy up to a coverage limit of at least $25,000. *See* Rel. Subst. Br. at 42-43. Relator's reliance upon *Dutton* is misguided because this Court in *Dutton* did not hold or find that an exclusion from the definition of insured is stricken from a policy of insurance if it fails to include the minimum requirements of the MVFRL, and this Court has repeatedly held in opposite of this conclusion. *Ballmer*, 899 S.W.2d at 526; *Halpin*, 823 S.W.2d, at 481; *Hargrave*, 34 S.W.3d, at 90. Additionally, the purpose of the MVFRL would not be served if the exclusion from the definition of insured in the Policy was stricken in its entirety because the purpose of the MVFRL is not for the benefit of Relator. *Id*. Likewise, *Rutledge*, also relied upon by Relator, held in opposite to Relator's argument, and *Rutledge* involved the exact same definition of insured at issue in this case. 399 S.W.3d 884.

In *Dutton*, Ms. Hiles was a named insured on two separate American Family Insurance policies for two different vehicles she owned which included a Nissan and a Ford. *Dutton*, 354 S.W.3d at 321. Both policies were identical and had policy limits of

$25,000 per person and $50,000 per accident. Mr. Dutton was injured in a motor vehicle accident when Ms. Hiles' Nissan collided with Mr. Dutton's vehicle. *Id*. Ms. Hiles' Ford was not involved in the accident. *Id*. Mr. Dutton made a demand of $50,000 for the Policy limits on the Nissan policy and the minimum policy limits required under the MVFRL for the Ford policy. *Id*. Mr. Dutton, Ms. Hiles, and American Family subsequently entered into a settlement of Mr. Dutton's claims against Ms. Hiles under which Mr. Dutton received $25,000 under the Nissan policy, and Mr. Dutton was assigned Ms. Hiles' right to sue American Family for any coverage provided by the Ford policy. *Id*.

Mr. Dutton subsequently filed a declaratory judgment action against American Family seeking a determination of whether the Ford policy provided $25,000 in coverage for the injuries sustained by Mr. Dutton under the MVFRL. *Id*. Mr. Dutton argued in a motion for summary judgment that every owner's liability policy issued in Missouri must meet the minimum requirements of the MVFRL, and therefore, the Ford policy was required to cover an accident involving the Nissan, even though the Ford vehicle was not involved in the accident, as an owned vehicle by Ms. Hiles. *Id*. The trial court entered judgment for American Family and Mr. Dutton appealed. *Id*.

This Court found the MVFRL did not require American Family to pay the minimum statutory limit of liability coverage on the Ford policy for an accident involving the Nissan because the MVFRL does not require owners to have coverage for undesignated vehicles. *Id*. at 327. The Court looked to the language of the MVFRL and noted that "if the MVFRL

requires a policy in Missouri to provide coverage, and if the Policy as a whole excludes such coverage, then a provision providing **such coverage** will in effect be read into the Policy, up to the MVFRL's minimum statutory limit of liability coverage." *Id*. at 324. (emphasis added). Further, as stated by this Court insurance policies are read as a whole. *Id*.

Relator misapplies this Court's language in *Dutton* by drawing the conclusion that, by the requirements of the MVFRL being read into a policy, it therefore means the Policy's entire definition of insured under the Policy is stricken, therefore making Relator and an insured under the definition. Relator's conclusion does not follow from the holding in *Dutton* nor does it follow this Court's precedent in finding the MVFRL only effects a partial invalidity. *Dutton*, 454 S.W.3d at 324. Rather, this Court in *Hargrave*, *Halpin* and *Ballmer* made clear that the requirements of the MVFRL **only effect a partial** invalidity of an exclusion. *Ballmer*, 899 S.W.2d at 526; *Halpin*, 823 S.W.2d, at 481; *Hargrave*, 34 S.W.3d, at 90.

Moreover, in *Rader*, Johnson went to Metro Ford automobile dealership and test-drove a vehicle. *Rader*, 910 S.W.2d, 281 (Mo. App. W.D. 1995). Johnson struck the rear of Rader's vehicle during the test drive. *Id*. Universal issued an automobile liability insurance policy to Metro Ford, and Johnson had two personal automobile liability policies with State Farm. *Id*. Rader filed a petition against Johnson and Johnson filed a third-party Petition seeking declaratory judgment of coverage under Universal's policy. *Id.* The trial

court granted Universal's motion for summary judgment, and an appeal followed. *Id*. Universal's policy defined who is an insured as follows:

> WHO IS AN INSURED-
>
> With respect to the AUTO HAZARD:
>
> …. (3) **Any other person or organization required by laws to be an insured** while using an AUTO covered by this Coverage Part within the scope of YOUR permission. *Id*. at 282.

Universal's policy also had a limits clause that stated:

> With respect to persons or organizations required by law to be an insured, the most WE will pay is that portion of such limit needed to comply with the minimum limits provision of such law in the jurisdiction where the OCCURRENCE took place. When there is other insurance applicable, WE will pay only the amount needed to comply with such minimum limits after such other insurance is exhausted. *Id*.

Universal contended coverage was not provided to Johnson under its policy because the State Farm policies were above the amounts required by the Missouri Financial Responsibility Law. *Id*. at 282.

The Western District Court of Appeals found that the excess coverage provisions in the Universal policy were implicated because Johnson "became an insured under the Universal policy only by operation of law requiring Metro Ford to provide coverage for permissive users of their vehicles." *Id*. at 284. The court continued, stating, "[t]he policy specifically states it **provides excess coverage only for individuals who become insured by operation of the law**, and only up to the statutory minimum." *Id*. (emphasis added). Of

further note, the court concluded the liability limit for excess coverage implicated by Universal's policy was $25,000 pursuant to the MVFRL. *Id*. Therefore, Metro Ford was only obligated to a pro-rata share of the judgment at issue up to $25,000. *Id*. at 285. The court **did not find the MVFRL imposed a duty to defend or a duty to settle**. *Id*.

Relator cites *Rader* but fails to provide the insurance policy language in *Rade*r that was at issue before the court or the rationale for the court finding Johnson was an insured under Universal's policy.[3] *See* Rel. Subst. Br. at 45. The court did not conclude, as Relator contends, that Johnson was an insured under the Policy because of the MVFRL. *Id*. Instead, it did so because the Policy specifically included language under Who is an Insured, as "Any other person or organization required by laws to be an insured." *Id*. at 282. Further, regardless, the Universal policy's excess clauses were merely implicated up to $25,000 as required by the MVFRL and it only had to satisfy the judgment at issue up to that limit. *Id*. at 285. **The court did not find the MVFRL imposed a duty to defend or a duty to settle.** *Id*.

Here, the language in Consumers' policy could not be more dissimilar than that at issue in *Rader*. Consumers' policy specifically excludes customers from the definition of insured except for those without other available insurance that satisfies the compulsory

[3] Relator omits pertinent court findings in making the following statement within her Brief: "Pursuant to section 303.190.2(2), Universal must provide coverage to Johnson while he was driving the Metro Ford vehicle" and that "Johnson became an insured under the Universal policy by virtue of the Financial Responsibility law."

financial responsibility law. There is no language providing "insured" status under Consumers' policy by operation of law. Furthermore, regardless, this court did not find a duty to defend or a duty to settle, and the Universal policy's excess clauses were only implicated up to $25,000 as required by the MVFRL. *Id.*

Relator also points to *Rutledge* in contending the MVFRL requirements essentially strike the Policy's definition of "insured" and supplement with the MVFRL thereby creating a duty to defend and settle owed by Consumers. But this is in direct contravention to *Rutledge*, and *Rutledge* does not substantiate her assertion. *Rutledge*, 399 S.W.3d, at 885. Relator contends *Rutledge* and *Rader*'s holdings led to the result that Relator was Consumers' "insured." In contending that she was Consumers' "insured," Relator mistakes the MVFRL's use of "insured" to include the duties to defend and good faith in settlement. As stated above, in *Rutledge*, the court found the definition of "insured," which is identical to the definition of "insured," in the Policy, enforceable to bar any additional liability insurance coverage for Bough beyond that mandated by the MVFRL. *Rutledge*, 399 S.W.3d, at 888. The MVFRL does not impose a duty to defend or a duty to settle in good faith. *Ballmer*, 899 S.W.2d, at 526-27; *Hargrave*, 34 S.W.3d, at 90; *Clayborne*, 524 S.W.3d, at 888. Relator ignores this fact. Therefore, Consumers' exclusion from the definition of "insured" was enforceable to bar an obligation to defend or a duty to settle. *Id*.

Relator also argues that the Consumers Policy was ambiguous as to whether Relator was an "insured" by way of not having other available insurance, even though Relator's insurer Progressive paid its policy limit to the injured claimant. Relator relies upon the term "available" contained in the Policy and argues that the Progressive policy's coverage was not "available" because it purported to provide excess coverage. However, whether coverage purports to be primary or excess merely pertains to the order in which coverage is paid, with no bearing on whether coverage is available for a claim. Progressive's policy was available to Relator as evidenced by the fact that Progressive paid its policy limit. Moreover, The Policy's definition of "insured" specifically contemplated excess coverage as being a type of coverage "available" to the customer, so even if the Progressive policy provided "excess" coverage, that coverage was nonetheless "available" to Relator, thereby preventing Relator from qualifying as an "insured" under the Consumers Policy.

As reiterated through this brief, the Policy's definition for "Who Is An Insured" states:

> SECTION II – LIABILITY COVERAGE
> A. Coverage
> ***
> 3. Who Is An Insured
> a. The following are "insureds" for covered "autos":
> ***
> (2) Anyone else while using with you your permission a covered "auto" you own, hire or borrow except:
> ***
> (d) Your customers. However, if a customer of yours:

(i) Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.

(ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance. *Relator's Ex. 3*.

Under Consumers' policy, Relator as a customer was excluded unless she had no other ***available*** insurance (whether primary, excess or contingent) or had other ***available*** insurance (whether primary, excess or contingent) less than that required by the MVFRL.

Progressive's Policy issued to Relator provided the following insuring agreement:

PART 1-LIABILITYTO OTHERS

INSURING AGREEMENT

Subject to the General Definitions, to all the terms, conditions, and limitations of Part VI-Duties In Case Of An Accident Or Loss, to all the terms, conditions, and limitations of Part VI I-General Provisions, and to all the terms, conditions, exclusions, limitations, and applicable reductions described in this Part I, if **you** pay the premium for this coverage and coverage under this Part I applies, **we** will pay damages for **bodily injury** and **property damage** for which an **insured person** becomes legally responsible because of an accident. *Relator's Ex. 4 pg. 135.*

The Progressive policy defined an "Insured person" to include: "you [Relator], a relative, or a rated resident with respect to an accident arising out of the ownership, maintenance or use of an auto or a trailer." Relator was a named "insured" under her policy

with Progressive. Relator was paying a premium to Progressive and the Progressive policy therefore was available to provide her coverage.

Relator contends the following provision required Progressive's policy to be excess:

> **OTHER INSURANCE, SELF-INSURANCE, OR BOND**
>
> Subject to the General Definitions, to all the terms, conditions, and limitations of Part VI - Duties In Case Of An Accident Or Loss, to all the terms, conditions, and limitations of Part VII-General Provisions, and to all the terms, conditions, exclusions, limitations, and applicable reductions described in this Part I, if any insurance **we** provide in accordance with the terms of this Part I is applicable and any other insurance from another insurer, any self-insurance or any bond also applies, any insurance **we** provide will be excess over any other collectible liability insurance from another insurer, any self-insurance, or any bond. If this policy and one or more policies from another insurer, self-insurer or bond provider also apply on an excess basis, **we** will pay only **our** share of the damages. Our share is the proportion that **our** limit of liability bears to the total of all applicable liability insurance limits from all applicable policies. *Relator's Ex. 4 pg. 140.*

In interpreting the policies together, Progressive's policy was not "excess" because Relator did not have "other insurance from another insurer" that applied. Relator argues a reasonable "insured" might read the policy to mean she was an "insured" under the Policy, but somehow misses the fact the requirements of the MVFRL are statutorily based and not found within the Policy. § 303.190.2. Additionally, Progressive's other insurance clauses specifically provided that a pro-rata share only applied if there was one or more policies from another insurer that applied on an excess basis. The requirements of indemnification by Consumers was not from a policy of insurance but was statutorily based. § 303.190.2.

In a further attempt to argue that her Progressive policy was excess, Relator cites *Distler v. Reuther Jeep Eagle* for her contention that a policy insuring the liability of a

vehicle owner has the first and primary coverage, but she fails to provide the analysis or specific holding of the case. In reality, the court in *Distler* found a garage policy was excess because the garage policy's "other insurance" clause provided it was excess for a non-owned automobile. In contrast, the vehicle owner's insurance policy provided that its policy was pro rata if other vehicle liability coverage applied. 14 S.W.3d 179, 185 (Mo. App. E.D. 2000). The *Distler* case did not suggest that the excess coverage was not "available" to the insured. *Id*.

The holding in *Rader* further confirms that Relator's policy with Progressive was not excess over Consumers' policy. As stated above, the court in *Rader* held that Universal's policy's excess clause only became operative by the language contained in Who is An Insured, which included "[a]ny other person or organization required by laws to be an insured." *Rader*, 910 S.W.2d at 285. Here, the Policy's exclusion from the definition of insured, did not include any language stating an insured included a person "required by law," as was the case in *Rader*, but specifically excluded customers with other available insurance, whether that be in excess. It is not reasonable to conclude that Progressive's coverage was not "available" to Relator merely because Progressive's policy contained an excess clause, especially because the Policy specifically contemplates "available" insurance as included excess coverage.

iv. Realtor does not have the right to free and open access to Hitt Automotive's claim file because Consumers does not owe Relator a duty to defend.

Relator was not an insured under the Policy because she was excluded from the definition of insured and the claim file sought by Relator belonged to Hitt Automotive. Relator's contention that as an insured under the Policy, she had an absolute right to access Hitt Automotive's claims file is an erroneous declaration of law. Relator was not an insured under the Policy and Consumers did not owe Relator a duty to defend. *Rutledge*, 399 S.W.3d, at 887; *Ballmer*, 899 S.W.2d, at 526-27. Therefore, Relator does not have the right to free and open access to Hitt Automotive's claim file. *Grewell*, 102 S.W.3d, at 36.

This Court first recognized the insurer/insured privilege in *State ex rel. Cain v. Barker*. In *Cain*, realtor was a defendant in a wrongful death action arising out of a highway accident, sought that a respondent be prevented from enforcing an order directing relator to produce for inspection and copying by plaintiff the written statement given by relator to an adjuster for his insurance carrier through a writ of prohibition. *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 51 (Mo. banc 1976). The writ of prohibition sought by defendant was one of first impression which sought this Court to determine whether "… a statement given by an insured to his liability insurer, concerning an event which may be the basis of a claim against him covered by his policy, is a privileged communication under an extension of the doctrine as applied to the relationship of attorney and client." *Id*. at 53-54.

This Court found based on the rationale of the cases upholding the privileged nature of communications between insured and insurer where the insurer is under an obligation to

defend that the statement sought by plaintiff was not subject to discovery under rule 56.01. *Id*. at 55. This Court rationalized that even though "such communications are normally made by the insured to a layman and in many cases no lawyer," …"[n]evertheless, by the terms of the common liability insurance contract, the insured effectively delegates to the insurer the selection of an attorney and the conduct of the defense of any civil litigation." *Id*.

In *Grewell v.* State *Farm Mut. Auto. Ins. Co., Inc*., this Court further expanded upon insurer-insured privilege by holding that once communications between an insurer-insured attain an attorney/client type privilege and the insured becomes subject to a claim covered by a policy, a claim file belongs to an insured. 102 S.W.3d 33, 36-37 (Mo. banc 2003). Mr. and Mrs. Grewell brought an action against State Farm Automobile Company ("State Farm") and their claims specialist, to obtain access to their insurance file. *Id*. at 34. The Grewells were insured under a policy issued by State Farm. *Id*. The Grewells sought their claim file so they could review the claims specialist determination of fault from a motor vehicle accident and subsequently filed a declaratory judgment action seeking declaration of an insurer-insured relationship and requested the information that State Farm refused to produce. *Id*. The trial court denied the request, but this Court reversed and held that the Grewells were entitled to their own claim file because it belonged to them. *Id*. at 34; 37.

In reaching this conclusion, this Court looked to *Cain*, and quoted the following:

> a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the Policy, is a privileged communication, as being between attorney and client, **if the Policy requires the company to defend him through its attorney**, and the communication is intended for the information or assistance of the attorney in so defending him.

Id. at 36-37. (citing *State ex. rel. Cain*, 540 S.W.2d, 54 (emphasis added).

As stated by this Court, in *Grewell*, in summarizing *Cain* "[a]ppellants' insurance policy required [r]espondents to defend them when they became subject to a claim covered by that policy", the communications between them were subject to a privilege analogous to that between an attorney and client. *Id*. In the same, the Court in *Grewell* found that because the communications sought from a claim file with an insured concerned their potential liability resulting from the automobile accident, such communications, therefore, became subject to an attorney-client privilege, and "[o]nce such a relationship attained that protected status, any claim file that resulted belonged to the insured." *Id.*

In this case, Relator is not entitled to free and open access of Hitt Auomotive's claim file because it is Hitt Automotive's claim file, and Consumers does not owe Relator a duty to defend. *Ballmer*, 899 S.W.2d, at 526-27. The MVFRL does not impose a duty to defend and there was no policy of insurance issued by Consumers that provided coverage for a claim asserted against Relator from the accident because she was excluded from the

definition of insured. *Ballmer*, 899 S.W.2d, at 526-27; *Dutton*, 454 S.W.3d at 324. As this Court has unequivocally held in *Grewell*, an insured has the right to access their claim file when an insurer owes a duty to defend an insured. *Grewell*, 102 S.W.3d, at 36-37. If there is no duty to defend owed towards Relator, then she does not have the right to free and open access to Hitt Automotive's claim file. *Id*.

Additionally, the MVFRL does not alter the definition of insured and only effected a partial invalidity of the unambiguous definition of insured. *Ballmer*. Unlike *Grewell,* where this Court found the insureds were entitled to open access of their claim file related to a claim asserted against them that was covered under an automobile policy, here, there is no claim asserted against Relator that is covered under the Policy.

vi. The redacted portions of Hitt Automotive's claim file including any internal communications and reports are protected from discovery by Relator because of attorney-client privilege, insurer-insured privilege, and work product.

Rule 56.01(b)(3) authorizes discovery of relevant matters not privileged. *State ex rel. Tillman*, 271 S.W.3d, at 46. "Discovery allows access to relevant, non-privileged information while minimizing undue expense and burden." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002) (citing *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992); *State ex rel. Gamble Constr. Co. v. Carroll*, 408 S.W.2d 34, 38 (Mo. banc 1966)). "The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system

should be sacrificed to mindless overzealous representation of plaintiffs and defendants." *Id*. (citing *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999))

As stated by the court in *Tillman*, this Court in *State ex rel. Cain v. Barker* first recognized that an insurer-insured relationship falls within the protection of the attorney-client privilege. *Id*. at 46. "[T]he insured-insurer relationship is surrounded with the 'same cloak of privileged confidentiality that protects the communications between attorney and client from discovery." *Id*. (citing *May Dept. Stores Co. v. Ryan*, 699 S.W.2d 134, 136 (Mo. App. E.D. 1985). Furthermore, a report made by an insured concerning the details of an incident that is transmitted to an insurer is also a privileged communication that is not subject to discovery, absent a waiver. *Tillman*, 271 S.W.3d 42, 47 (Mo. App. S.D. 2008).

Relator does not have the right to free and open access to Hitt Automotive's claim file because she was excluded from the definition of insured under the Policy and Consumers did not owe her a duty to defend. *Ballmer*, 899 S.W.2d, at 526-27; *Rutledge*, 399 S.W.3d, at 885. Additionally, Relator is not entitled to the redacted claim notes and internal communications from Hitt Automotive's claim file because they are protected from discovery by attorney-client and insurer-insured privilege. *State ex rel. Shelter Mut. Ins. Co. v. Wagner*, 575 S.W.3d 476, 483 (Mo. App. W.D. 2018). The claim file notes and internal communications include communications with Hitt Automotive, which are therefore protected under insurer-insured privilege.

Hitt Automotive's claim file is further protected under the work-product doctrine. The shield from work product attaches when adversary materials were prepared in anticipation of litigation or for trial. *May Dept. Stores Co*., 699 S.W.2d, at 136. "The term' work product' includes two types of work product – 'tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memorandum) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories – sometimes called opinion work product*)." State ex rel. Kilroy Was Here, LLC*, 633 S.W.3d, at 414. "Tangible work product may be discoverable if the party seeking discovery has shown a substantial need for the materials in the preparation of its case and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id*. (citing Rule 56.01(b)(3); *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. banc 1995). However, "Rule 56.01 (b)(3) does not permit the discovery of intangible work product even if the party seeking it has a substantial need for it." *Id*.

On October 20, 2022, Consumers sent a letter to Plaintiff Sean Monighan's counsel stating Relator was excluded from the definition of "insured" and, therefore, there was no coverage for Relator. In response to Consumers' October 20, 2022, letter, Sean Monighan's counsel sent a letter to Consumers' claims adjuster, Lee Poston, on October 27, 2020, stating he hoped Consumers obtained the advice of a lawyer and threatened a judgment over applicable policy limits. Relator's Ex. 7. These letters signify the time when the

anticipation of litigation began regarding potential claims from the Consumers coverage decision concerning the claim made against Relator. Therefore, materials prepared after such date are covered under work-product.

II. Relator is not restricted in discovery for her alleged claims of breach of contract, bad faith, and negligence because Respondent's November 14, 2022, Order provides Relator claim notes and internal communications related to the coverage decision of Brittany Trexler and the March 4, 2017, accident.

Relator has asserted claims of breach of contract, bad faith, and negligence against Consumers. Without regard to the merits of Relator's alleged claims against Consumers, Respondent did not erroneously restrict discovery by its November 10, 2022, Order because that Order required Consumers to produce the claim notes and internal communications related to Relator and therefore provides her all the evidence from Hitt Automotive's claim file that is relevant to her alleged claims. As stated above, "a writ of mandamus is to be used only as a last resort on the failure of any adequate alternative remedy." *Beauchamp,* 471 S.W.3d, at 811. Relator has not established she is entitled to extraordinary relief with "clear unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought," because Respondent's November 22, 2022, Order required Consumers to produce all claim notes and internal communications related to Consumers' coverage decision pertaining to Brittany Trexler and the March 4, 2017, accident.

"The general rule in Missouri is that relevance is two-tier: logical and legal." *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002) (citing *State v. Smith*, 32 S.W.3d 532, 546 (Mo. banc 2000); *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *Id*. "Logically relevant evidence is admissible only if legally relevant. Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*.

Relator contends a right to a permanent order in mandamus directing respondent to vacate his November 14, 2022 Order because the entire Hitt Automotive's claim file is relevant to Relator's bad faith claim. The only potentially legally and logically relevant evidence from Hitt Automotive's claims file is that which concerns the coverage decision about the injury claim asserted against Relator because that is the basis of Relator's claims against Consumers. Other aspects of the claim file pertaining only to Hitt Automotive are entirely irrelevant as to Relator's claims against Consumers. Moreover, such claim file is Hitt Automotive's claim file.

Relator contends she will be required to proceed with an unfair trial without the benefit of basic discovery to support her claims. Relator's contention is unfounded because Respondent's November 10, 2022, Order allowed her to discover all of the claim notes and internal communications regarding Consumers' coverage decision pertaining to Relator.

Those are the only materials that could potentially be relevant to Relator's claims against Consumers. Consumers has produced the responsive documents in its possession regarding its coverage decision concerning the injury claim made against Relator. Therefore, this Court should deny Relator's Petition for Writ.

CONCLUSION

WHEREFORE, Respondent, the Honorable Scott A. Lipke, and Consumers Insurance USA, Inc. respectfully request for the reasons stated herein, as well as in the underlying action briefing, that this Court deny Relator's request for Writ of Mandamus or In the Alternative, for Prohibition and enter such other and further relief as the court deems just and proper.

WATTERS WOLF BUB & HANSMANN, LLC

/s/ Bradley R. Hansmann
Bradley R. Hansmann, #53160
Julia D. McFarland, #73847
600 Kellwood Parkway, Suite 120
St. Louis, Missouri 63017
(636) 798-0570 (phone)
(636) 798-0693 (fax)
bhansmann@wwbhlaw.com
jmcfarland@wwbhlaw.com

Attorneys for Consumers USA

CERTIFICATE OF COMPLIANCE FOR WORD OR LINE LIMITS

Counsel Consumers Insurance USA, Inc. hereby certifies that this brief includes the information required by Missouri Supreme Court Rule 84.06. This brief was prepared with Microsoft Word for Windows, using Times New Roman in 13-point font, and does not excess the word and page limits for a respondent's brief in this Court. The word-processing software identified that this brief contains 12,945 words, and 53 pages including the cover page, signature block, and certificates of service and of compliance. It is in searchable PDF form.

/s/ Bradley R. Hansmann

CERTIFICATE OF SERVICE AND
CERTIFICATION UNDER RULE 55.03(A)

The undersigned certifies that a true and correct copy of the foregoing was sent via the court's electronic filing system this 15th day of April, 2024 to counsel of record. Pursuant to Rule 55.03(a), the undersigned certifies that he signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

Daniel J. Grimm
Cook, Barkett, Ponder & Wolz, L.C.
1610 N. Kingshighway, Suite 201
Cape Girardeau, MO 63701
dgrimm@cbpw-law.com
Attorney for Plaintiff Sean Monighan

Edward D. Robertson, III
Kelly C. Frickleton
4000 W. 114th Street, Suite 310
Leawood, KS 66211
krobertson@bflawfirm.com
kellyf@bflawfirm.com
Attorneys for Relator

The Honorable Scott A. Lipke
Cape Girardeau County Courthouse
32nd Judicial Court
203 North High Street
Jackson, MO 63755
Respondent

/s/ Bradley R. Hansmann