IN THE SUPREME COURT OF MISSOURI

No. SC87908

EAST END TRANSFER & STORAGE, INC., and
NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Respondent/Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
AMERICAN GUARANTEE & LIABILITY COMPANY, and
UNIGROUP, INC, UNITED VAN LINES, LLC,
VANLINER INSURANCE COMPANY,

Appellants/Defendants.

Appeal from the Circuit Court of the County of St. Louis, Division 10
Honorable Kenneth M. Romines, Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT VANLINER INSURANCE COMPANY

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INTRODUCTION

The evidence shows that Vanliner, UniGroup, and UVL intended that the Vanliner policies cover only "hit-and-run" claims where the UVL agents involved can't be identified. They didn't intend, as the Circuit Court held, for the Vanliner policies to cover all accidents involving UVL agents and their drivers. North American doesn't contest the existence of the substantial extrinsic evidence reflecting this shared intent to limit the insured risk to "hit-and-run" claims involving unidentified agents. It merely suggests that the evidence is not admissible because the policy is supposedly unambiguous. Extrinsic evidence is admissible to establish the fact of mutual mistake and to show how the policies should be corrected to conform to the agreement actually made, regardless of any ambiguity or lack of ambiguity. The Court's cases are clear on that point.

Even if ambiguity were needed for reformation, that requirement is satisfied here. The "Covered Auto Symbol" "51" used to describe those vehicles for which coverage attaches is undefined in the Vanliner policies — that, of course, was the mutual mistake. Whatever symbol "51" means, it does not mean the same as symbol "41," which is expressly defined to mean "ANY 'AUTOS' " (the vehicles which North American claims are "unambiguously" covered). While a four corner policy review doesn't identify the insured "autos," it certainly reveals that the contracting parties did not intend to cover "all" or "any" autos.

Mutual mistake and ambiguity are widely recognized as distinct. legal concepts. Both open the door to examination of extrinsic evidence concerning the intended "hit-and-run" limitation to the policies, albeit for different reasons. If the Circuit Court had considered

the undisputed extrinsic evidence as it should have, then summary judgment in favor of North American was not proper.

The intent of contracting parties is of paramount importance in interpreting and applying contracts, including insurance policies. If the Court lends its imprimatur to North American's view of the law, it will effectively deprive our legal system of a useful (indeed, the only) tool available to correct mistaken terms in an insurance policy to reflect the shared intent of both insurer and insured at the time of contracting.

North American's contention that § 379.195 RSMo 2000 prohibits reformation is untenable. Reformation isn't a post-loss agreement to cancel or annul; rather it is a court-ordered remedy designed to correct a policy to reflect the parties' pre-loss agreement.

North American's attack on Vanliner's and UniGroup's actions as "collusive" is little more than an attack on the credibility of its witnesses — a fact-intensive inquiry that hardly justifies summary judgment even if it were true. None of the evidence North American relies on to show "collusion" supports the claim. It is certainly strange that litigants can be accused of "colluding" to commit an unarticulated wrong simply because they acknowledge indisputable factual evidence of a mutual mistake.

The so-called "acceptance doctrine" relied upon so heavily by North American is nothing more than a corollary of the common law principle from first-year Contracts that one who accepts a counter-offer is bound by its terms. "Acceptance" *per se* isn't a bar to the equitable remedy of reformation. Indeed, the notion as North American seeks to apply it creates a paradox. If UVL or UniGroup had rejected the policy, there would be no need for reformation.

Finally, North American's contention that the indemnification provisions in the Agency and Lease Agreements between UVL and its agents are unenforceable because they are adhesion contracts has neither a legal nor factual basis. These were agreements among sophisticated business entities. The purpose of the provisions was to require the agents, not UVL and its affiliates, to bear the liability for accidents arising out of their operations when the agent could be identified. The insurance should follow the indemnification obligations.

ARGUMENT

I.

The Circuit Court Erred In Granting Summary Judgment On The Ground That The Vanliner Policies Could Not Be Reformed Absent Ambiguity.

A. *Vanliner's Material Facts Of Mutual Mistake Stood Uncontroverted And Created A Genuine Issue Of Fact*

North American acknowledges that its summary judgment motion didn't make any reference to Vanliner's affirmative defense of mutual mistake and reformation. (Resp. Br. at 65). It is less forthcoming in describing its Reply. North American argues that it responded appropriately to Vanliner's statement of additional material facts by citing evidence for "each and every one of Vanliner's additional facts." (Resp. Br. at 64). The record, however, reveals that North American didn't bother to dispute any of the facts cited by Vanliner in support of its claim of mutual mistake.

North American only denied each fact. As support for the denial, instead of including its own facts, North American said only that the "the policy speaks for itself." (L.F.5:803-

15; 14:2264-76; 10:1618-24; 20:3211-16). The cliché that the policy "speaks for itself" is meaningless, except perhaps as a hackneyed way of saying that the policy is unambiguous. That is only response North American made, and it is wholly insufficient to refute the testimony of the witnesses supporting the existence of a mutual mistake. Under Rules 74.04(c)(2) and (c)(3), the facts presented by Vanliner were deemed admitted for summary judgment purposes.

North American contends that Vanliner didn't preserve this argument for appellate review because of its failure to present it to the Circuit Court. (Resp. Br. at 64). But North American does not explain how Vanliner could have raised the deficiencies in North American's Reply in the trial court when the judge granted summary judgment on the same day North American filed its Reply. (L.F. 10:1625-32; 20:3217-24; App. A1-A8).

B. *North American Confuses Mutual Mistake And Ambiguity*

The failure to negate Vanliner's affirmative defense and refute Vanliner's facts are fatal blows to preserving the summary judgment, *see, e.g., ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). Recognizing this breakdown in its strategy at the trial level, North American is stuck on appeal to contending that the facts don't matter because a court can't reform an unambiguous contract as a matter of law. (*See* Resp. Br. at 39, 40, 42-46, 61-65, 67-69). That contention, however, conflates and confuses two separate and distinct legal doctrines: (1) that extrinsic evidence is admissible to construe an ambiguous contract; and (2) that extrinsic evidence is admissible to show that a contract fails to reflect both parties' intent because of fraud, duress, or (as in this case) mutual mistake.

North American says that Vanliner's "reformation argument rests on the assumption that the Vanliner Truckers Policy is ambiguous" (Resp. Br. at 65), that "Vanliner's claim in this case is that is policy should be reformed based on its ambiguity" (Resp. Br. at 67), and that "Vanliner overlooks that it sought reformation based solely on an alleged ambiguity." (Resp. Br. at 68). North American offers no citations to the record or to Vanliner's Brief because those statement are just not true. Vanliner has always defended the claims on the grounds of both mutual mistake and ambiguity.

Although one of Vanliner's contentions was that the unexplained use of the symbol "51" to describe "covered autos" created an ambiguity requiring extrinsic evidence to construe the meaning of the policy, Vanliner also alleged in an affirmative defense to both petitions that the Circuit Court should reform the policies because of a mutual mistake. (LF 3:388-97; 4:658-64; 12:1942-50). Vanliner specifically asserted in its affirmative defenses that the Vanliner policies in effect at the time of the Brouhard and Powell accidents:

> should be reformed to accurately reflect the mutual agreement of [Vanliner], [UVL], and [UniGroup], and to correctly identify the limited risk against which those parties intended to insure; and further states that none of the parties to that insurance contract agreed or intended that the coverage extended thereunder encompassed a claim and/or loss arising out of an accident in which the owner, lessor or agent of a leased, hired, rented or borrowed auto was identified and/or known.

(LF 3:393, 397; 4:658-64; 12:1946-47, 1949-50). Vanliner counterclaimed against North American as well as cross-claimed against UniGroup and UVL, seeking reformation of the policies for mutual mistake. (LF 3:402-464; 12:1954-65).

The summary judgment papers make clear that all involved understood that mutual mistake was the basis for reformation. (LF 7:1149-84; 10:1595-1617; 17:2652-85; 20:3188-3210). The Circuit Court recognized that Vanliner relied on evidence of mutual mistake in defense of the claims and the motion for summary judgment. Aside from its finding on ambiguity (the second full paragraph on page 5 of its judgment), the Circuit Court explicitly declined to reform the policies because "as a matter of law, the Court declares, absent a policy ambiguity, that parties seeking reformation are stuck with the language of their policy and can't rely on extrinsic evidence to establish an intent other than the intent expressed in the policy itself." (LF 10:1630; 20:3222; App. 6).

C. *Even An Unambiguous Policy Can Be Reformed For Mutual Mistake*

North American stands by its claim that absent ambiguity, parties seeking reformation are bound by a contract's language and can't introduce extrinsic evidence to establish mistake by demonstrating a contrary intent shared by the contracting parties. (Sub. Resp. Br. 36-37, 39, 40, 42, 44, 64, 65, 66). This in the face of repeated decisions by this Court and the Courts of Appeal that "*ambiguity is not the only basis for reformation of a written instrument.* There may exist also a mistake of a scrivener . . . who does not incorporate . . . the true prior intention of the parties which will be entitled to the remedy in equity of reformation of the instrument." *Edwards v. Zahner*, 395 S.W.2d 185, 189 (Mo. 1965) (emphasis added; authorities excluded). *See also Kopff v.*

Economy Radiator Service, 838 S.W.2d 449, 453 (Mo. App., E.D. 1992) (*citing Duenke v. Brummett*, 801 S.W.2d 759, 766 (Mo. App. 1991); *see also* 66 AM. JUR. 2d REFORMATION OF INSTRUMENTS, § 114 (2005)(Extrinsic evidence is admissible in reformation cases to establish the fact of mutual mistake, the nature of the mistake, and how the writing should be reformed to reflect the parties' true intent).

North American relies on three decisions to argue otherwise: *Christen v. Christen*, 38 S.W.3d 488 (Mo. App., S.D. 2001) (also relied on by the Circuit Court), *Alea London Ltd. v. Bono-Soltysiak Enterprises*, 186 S.W.3d 403 (Mo. App., E.D. 2006) and *Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396 (Mo. App., W.D. 1993).[1] Its reliance on each is misplaced.

Christen v. Christen, 38 S.W.3d 488 (Mo. App., S.D. 2001) was the lone authority cited by the Circuit Court as justification for its refusal to look at extrinsic evidence of mutual mistake. (L.F. 10:1630; 20:3322; App. A6). As Vanliner pointed out in its Substitute Opening Brief, *Christen* quotes from *Morris v. Brown*, 941 S.W.2d 835 (Mo. App., W.D. 1997) for its explanation that a party is "stuck" with an unambiguous contract. *Christen*, 38 S.W.3d at 491. *Morris* expressly rejected the argument (identical to North American's) that a lack of ambiguity required the deed be construed based on an examination of the four corners alone, by explaining an exception to the parol evidence rule "arises when mutual mistake is alleged to reform a deed." *Id.* at 840. North

[1] North American also cites *EBSCO Indus., Inc. v. Royal Ins. Co.*, 775 So.2d 128, 131 (Ala. 2000). That decision is unpersuasive in light of the contrary Missouri authorities.

American's Substitute Respondent Brief doesn't even mention *Morris*, let alone try to distinguish it.

Alea London and *Haggard Hauling* are not to the contrary. In *Alea London*, the court recognized that whether parties "are laboring under a mutual mistake is normally a question of fact." 186 S.W.3d at 415. There, the circuit court found no evidence of mutual mistake after a full-blown trial of the case. While *Haggard Hauling* recites the applicability of the parol evidence rule in construing unambiguous insurance policies, it says nothing about whether a court may grant reformation of an unambiguous contract because of a mutual mistake.

D. *The Mistake Was Mutual And Resulted From A Scrivener's Error*

North American reluctantly recognizes that there are numerous Missouri cases that stand in stark contrast to its position. (Resp. Br. 67, 68). North American directs most of its efforts to arguing there was no mutual mistake because Vanliner, not its insureds UniGroup and UVL, erroneously assembled the policy forms and related endorsements. (Resp. Br. at 67-68).

A mutual mistake exists if the written contract doesn't accurately set forth the terms of the agreement actually made, or doesn't incorporate the true prior intentions of the parties. *See, e.g.*, *Moreland v. State Farm Fire & Cas. Co.*, 662 S.W.2d 556, 563 (Mo. App., S.D. 1983) (requisite mutuality is present if one party makes a mistake and the other party, believing the first party to be correct, joins in that mistake. *See also* Lee R. Russ, COUCH ON INSURANCE 3d, § 27.3 ("a mistake is mutual where the parties have agreed to accomplish a particular object by the policy and, when executed, the policy was

insufficient to effectuate the intention, particularly if the errors was what induced one of them to make the contract. . . . Where there is evidence which makes it clear that neither party intended that the policy cover certain risks and that the exclusions of those risks were omitted in error, the insurer is entitled to reformation of the contract of insurance.")

In addressing a similar argument in *St. Louis Realty Fund v. Mark Twain South County Bank*, 651 S.W.2d 568, 576 (Mo. App., E.D. 1983), the court reformed a promissory note when both contracting parties admitted that a typed term didn't accurately reflect the true agreement between the parties. *See also* RESTATEMENT (SECOND) OF CONTRACTS, § 155; Russ, Lee R., COUCH ON INSURANCE 3d, § 27.26 ("[r]eformation has been allowed because of the insurer's clerical mistake, since in such instances it is apparent that the policy which was issued doesn't, in fact, set forth what had been agreed to and what was intended by all parties. This is true even when the insurer has greatly delayed the bringing of the suit therefor, or the reformation is not sought until after the loss.") Upon a finding of mutual mistake, courts should order reformation because the intent of the parties is paramount.

Moreover, it doesn't matter who the "scrivener" is because someone *has* to be the scrivener. "The cause of the defect in a written contract is immaterial, for reformation purposes, so long as the mistake is common to both parties to the transaction. Accordingly, when one seeks reformation on the basis of mutuality of mistake, it is immaterial who employed the draftsman." 66 AM. JUR. 2d REFORMATION OF INSTRUMENTS, § 20; *See also Zahner v. Klump*, 292 S.W.2d 585, 588 (Mo. 1956) (holding that agency of scrivener is unimportant upon a determination of the existence of

a prior agreement among the contracting parties not properly reflected in the writing; mistake isn't unilateral and reformation is proper even if one party employed scrivener that committed error) and Lee R. Russ, COUCH ON INSURANCE 3d, § 27.28 (mistake by clerk or scrivener "is, in fact, mutual in sense that result is not what either party intended"; "scrivener's negligence is not attributable to either party, even though he or she was agent of insurer").

North American also claims that this case doesn't involve a "scrivener's error" because the Vanliner policies contain no "language suggesting that [they] provided so limited a species of coverage." (Resp. Br. at 67-68). There is no exception to reformation that a scrivener's error must appear on the face of the writing. There is no significant difference between the inclusion of erroneously information in a policy of insurance and the omission of a key endorsement or definition. In both instances, the policy fails to reflect the contract entered by the parties. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, § 155 ("The error in expressing the agreement may consist in the omission or erroneous reduction to writing of a term agreed upon or the inclusion of a term not agreed upon.")

The First Circuit recognized nearly identical facts required a finding of mutual mistake and permitted reformation in *OneBeacon America Ins. Co. v. Travelers Indem. Co. of Ill.*, 465 F.3d 38 (1st Cir. 2006). There is no indication in *OneBeacon* that the insured and insurer simultaneously prepared the OneBeacon policy that omitted the coverage limitation intended by both. The First Circuit found a mutual mistake because the policy issued didn't reflect the intentions of either insurer or insured. *Id.* at 41

The First Circuit recognized that OneBeacon did not have to point to "any specific endorsement, exclusion or other limiting language . . . mistakenly omitted when [the] policies were issued . . ." because it could prove a critical omission of limiting language that would have excluded particular coverage. *Id.* at 45-46. Contrary to North American's implication, the First Circuit didn't say that the "omission" of a specific endorsement, exclusion or other limiting language converts a "mutual mistake" into a "unilateral mistake." Rather, it explained that the classic case for reformation is when a mutual mistake is traceable to a particular scrivener's error. *Id.* at 41. The mutual mistake found here is therefore even clearer than that found by the First Circuit in *OneBeacon.*

The initial policy issued by Vanliner to UniGroup in 1989 contained a clear "hit-and-run" limitation for the policy. The endorsement was mistakenly dropped and the renewals and replacement policies thereafter didn't reflect the parties' contractual intent. As North American itself explains, the mistake "was repeated year-to-year." (Resp. Br. at 70). Each such policy contains the same mistake. None of them reflect the contracting parties' true intention.

Elsewhere in its Substitute Respondent's Brief, North American contends that that the mistake isn't mutual because the policy form changed between 2001 and 1989, and a mutual mistake only exists when both parties share a misconception at the time of contracting. (Resp. Br. 46, 70). It is unimportant that the policy forms changed — that is literally an argument of form over substance. The replacement policy, whatever its form, didn't reflect the intent of the parties. One served as a replacement for the other, consistent with a change in ISO forms for insuring the risk intended for coverage. Finally,

the parties did share a misconception *at the time of contracting* about the contents of the 2001 policies at issue, just as they shared a misconception *at the time of contracting* about the contents of earlier policies.

The repetition of the mistake doesn't eliminate it or otherwise transform the mutual mistake into a unilateral mistake. Here the 2001 Vanliner policies did not reflect the intent of the parties to limit the coverage to "hit-and-run" situations. Vanliner properly asserted third party claims for and defended on grounds of reformation for mutual mistake

As a fallback, North American argues *OneBeacon* actually supports its position because it recognized that reformation, as an equitable remedy, may not be available if the reformation will prejudice third parties. North American says the reformation will be a detriment to the hauling agents and the drivers. (Resp. Br. at 71).

This isn't an argument that North American was prejudiced. It wasn't — it didn't even know the Vanliner policy existed when it issued its own policy. *See* Vanliner's substitute Opening Brief at 51-55. The hauling agents and their drivers were not prejudiced either. The hauling agents testified that they didn't believe or expect that the Vanliner policy provided them any coverage. (LF 7: 1175, 1217; 17: 2676, 2688.)

North American offered no evidence below (and it certainly cited none in its Brief in this Court) that the drivers had an expectation of coverage under the Vanliner policies. One could hardly infer from the evidence available that the drivers had such an expectation of coverage when the hauling agents they worked for, UVL, UniGroup, Vanliner, and American Guarantee (UVL and UniGroup's excess insurer) all believed

and acted as though the Vanliner policies had the exclusion limiting coverage to "hit-and-run" situations where the driver and the hauling agent could not be identified.

E. *The Improper Injection Of New Defenses To Reformation*

North American concedes that the Missouri Court of Appeals improperly injected laches into the case as grounds for its affirmance. But it fails to recognize that defending the summary judgment on the grounds of the acceptance doctrine, ratification, collusion, and estoppel runs afoul of the same problem. All of these grounds are affirmative avoidances to the affirmative defense of reformation. None were pleaded as required by Rules 55.01 and 55.08. These grounds were not raised in North American's reply to Vanliner's response to the motion for summary judgment Nor did the Circuit Court rely upon any of these grounds in granting summary judgment. All of these grounds should be deemed waived. *Missouri Employers Mutual Ins. Co. v. Nichols*, 149 S.W.3d 617, 623 (Mo. App., W.D. 2004).

F. *The Acceptance Doctrine Is Inapplicable*

North American makes much of the so-called "acceptance doctrine." Applying the acceptance doctrine here would abrogate the long standing law on reformation for mutual mistake in the context of insurance policies. The acceptance doctrine is rooted in both the distinction between mutual mistake and traditional principles of contract law governing counteroffers. Here, the undisputed evidence showed that the insured requested only "hit-and-run" coverage, the insurance carrier intended to offer only "hit-and-run" coverage, but what was actually written lacked the endorsement limiting coverage to "hit-and-run" situations. The trial court construed the policy to cover every accident involving a UVL

agent, whether it was a "hit-and-run" situation or not — exactly the opposite of what was intended.

An insurance application is an offer, and a policy that varies from that applied for is a counteroffer. 43 AM. JUR. 2D INSURANCE § 224 (2005). Insureds are not required to countersign insurance policies or otherwise perform to indicate acceptance. There is no date certain for the determination of "acceptance" by insureds. When a request for certain coverage is made (offer) and the insurer provides something different (counteroffer), the insured is deemed to have accepted the counteroffer when it fails to reject the policy issued by the insurer within a reasonable period of time. The acceptance doctrine in insurance law is simply a vehicle for finding "acceptance" of an offer that in other contexts is indicated by, for example, signing the contract.

The record establishes that neither Vanliner nor UniGroup or UVL intended to make or accept a counteroffer seeking coverage of all accidents involving UVL agents. Rather, the evidence shows that the differences in coverage resulted from a mutual mistake among those three parties. *Kopff*, 838 S.W.2d at 453 (evidence didn't establish existence of counteroffer that could be accepted when no intent to make a counteroffer, and difference between intended coverage and written coverage was a clerical error); *Schimmel Furniture Co. v. American Indemnity Co.*, 440 S.W.2d 932, 939 (Mo. 1969); 30 MO. PRACTICE SERIES, INSURANCE LAW AND PRACTICE, § 1.16 (2005).[2]

[2] North American also argues that the mistake could have been eliminated if the policies had been properly reviewed. Mistakes can always be eliminated or they wouldn't be

An unreasonably late objection would be tantamount to no rejection at all, or at least an ineffective rejection. Cases involving reformation for mutual mistake recognize that the writing to be reformed is already in place or "accepted." Reformation finds its origins in equity and is designed to provide a correction of the writing to reflect the parties' true intent. There would be no need for court-ordered reformation if rejection had occurred. Why would a contracting party be required to reform a mistaken writing that it never accepted?

North American cites no cases in which reformation was barred because the writing was fully executed, and presumably "accepted" due to a mutual mistake. Equity recognizes an exception to enforcement by either party of a writing not reflective of their shared contractual intent. It doesn't matter which party is seeking the reformation. Clear and convincing evidence of mutual mistake permits the correction because it would be unjust to enforce the contract as written. The RESTATEMENT (SECOND) OF CONTRACTS explains the difference by way of illustrations 3 and 4 in § 157. RESTATEMENT (SECOND) CONTRACTS, § 157 (omission from writing that would have been obvious to parties if read can be reformed by either to reflect true intentions; contract can't be reformed by party accepting counteroffer because of its failure to review and recognize terms altered from original offer).

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mistakes at all. Here, the mistake was *repeated* over a period of years. But the specific policy for which Vanliner sought reformation for mutual mistake was issued in 2001. Vanliner promptly reformation of the policy after discovery of the mistake.

Jenkad Enters., Inc. v. Transp. Ins. Co., 18 S.W.3d 34 (Mo. App., E.D. 2000) is not applicable. In *Jenkad*, there was an offer and a counteroffer. The insurance company issued the policy intending that it have a particular provision, and Jenkad accepted the policy by failing to reject the counteroffer. *Id.* at 39 n.4 (recognizing that mutual mistake requires that written agreement reflect what neither party intended). There is a significant difference between a counteroffer containing a term at least one of the parties intended to be in it (*Jenkad*), and reformation of a writing that does not reflect *either* parties' intent due to a mistake (this case).

G. *Lack of Evidence Of Collusion*

North American also claims that Vanliner and UniGroup and UVL engaged in acts of "collusion" to avoid a coverage obligation. Even if there was evidence to support this notion, it would at best be an attack on the credibility of Vanliner's and UVL's witnesses. An alleged lack of credibility is not, of course, a basis for granting summary judgment.

But North American's claim of collusion is based entirely on the corporate affiliation of the insurer and its insureds. That proves nothing. Different corporations — even those affiliated by common ownership — are treated as separate and wholly distinct entities in the absence of strong evidence domination by one of the other and that the corporate cloak is used to perpetuate a fraud. *Grease Monkey Int'l, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. App., E.D. 1995); *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W.2d 779, 783-84 (Mo. App., W.D. 1993). The notion that Vanliner, UVL, and UniGroup were shown to have colluded because they share a lunchroom and other similar facilities is ludicrous.

The Circuit Court certainly made no factual findings of "collusion" in its summary judgment, only citing the existence of a corporate relationship. This Court can't affirm on the basis of collusion in the absence of any evidence in the record to support such a finding. Moreover, the existence of so-called "collusion" would be intensely fact-dependent, and necessarily involve credibility determinations. *First Financial Ins. Co. v. Golliday*, 91 S.W.3d 679, 683 (Mo. App., E.D. 2002). For example, a fact finder would have to reject the witnesses' testimony that no one on either side of the transaction intended to seek or offer anything more than "hit-and-run coverage," especially given the role such coverage was supposed to play in the comprehensive insurance package contemplated by the parties.

North American also claims that the cooperation among and the similar litigation positions taken by Vanliner, UniGroup, and United Van Lines supports its "collusion" theory. (Resp. Br. at 48-50). But the recognition of a mistake isn't necessarily collusive. That parties who make a mutual mistake take the same position as to whether the mistake occurred is hardly a news flash. Of course they both agree that the mistake occurred. Isn't that simply a recognition of a mutual mistake? That UVL and UniGroup attempted to confess judgment doesn't detract from Vanliner's reformation claim either. The parties in *OneBeacon* did exactly the same thing. *See OneBeacon*, 465 F.3d at 45. The First Circuit explained there is nothing inherently implausible about an insured telling the truth, and found that the confession of judgment seemed appropriate based on the substantial, undisputed evidence of mistake. *Id.* This case fits the same mold exactly.

Next, North American takes issue with Vanliner's "argument" that UniGroup's admission of mistake conclusively establishes Vanliner's right to reformation as well as Vanliner's "reliance" on *Everhart v. Westmoreland*, 898 S.W.2d 2d 634, 637 (Mo. App., W.D. 1995). (Resp. Br. at 71-72). Vanliner agrees with the *Everhart* decision, and appreciates North American bringing it to the Court's attention. That case explains that when contracting parties agree to the existence of a mistake, there is little need for additional evidence to meet the applicable standard of proof to achieve reformation. *Everhart*, like *OneBeacon*, shows that litigants do from time to time admit to mistakes. *See also Great Atlantic Co. v. Liberty Mutual Ins. Co*, 773 F.2d 976 (8th Cir. 1985); *St. Paul Mercury Ins. Co. v. Foster*, 268 F.Supp.2d 1035, 1042 (C.D. Ill. 2003). That said, while Vanliner pointed to UniGroup's admission of the mistake, it made no argument in its Substitute Opening Brief that UniGroup's admission conclusively established the right to reformation.

II.

The Circuit Court Erred In Granting Summary Judgment (And By Denying Reformation) Based Upon. § 379.195RSMo 2000.

Sections 379.195 RSMo 2000 prevents cancellation or annulment by agreement of the insured and the insurer. It doesn't apply to the equitable court-ordered remedy of reformation based on evidence of mutual mistake. "Annulment" and "cancellation" differ significantly from the relief requested by Vanliner — reformation for mutual mistake. Had the legislature intended the statute to apply to "reformation" situations, it could have easily included the term "reformation," but elected not to do so. North American

recognizes this fact, but in an impermissible leap of logic reasons that "reformation" is subsumed within the ambit of the statute because the word "cancel" is defined to mean "annul, to revoke, to abolish or make void" and the term "annul" means to declare invalid. (Resp. Br. at 75).

Reformation does not cancel or end the contract. Rather , it corrects the contract to what the contracting parties previously agreed to reflect their true intent. *Morrison v. Jack Simpson Contractor, Inc.*, 748 S.W.2d 716, 717 (Mo. App., E.D. 1988). Reformation doesn't do away with the parties' pre-loss intent like cancellation or annulment, but implements the parties' pre-loss intent.

III.

The Circuit Court Erred In Granting Summary Judgment On The Ground That Vanliner's Policies Unambiguously Provided Coverage For The Brouhard And Powell Accidents Because The Policy Was Ambiguous.

North American spends four pages in its Statement of Facts describing the Vanliner Policy. (Resp. Br. 22-26). Its description surprisingly lacks any mention of the symbols contained in the Vanliner Policy that describe what vehicles are "covered autos."

It is clear that the Vanliner Policy included the "covered auto" symbol "51" to describe the insured risk. It is clear that symbol "51" was undefined in the Policy in that the only reference was to "Per Composite Rate Endorsement – VL 4051," and the Composite Rate Endorsement provides no definition. It is clear that policy form utilized for the policies contemplates the use of "covered auto" symbol "41" to describe coverage for "ANY 'AUTOS.'" What is unclear — and what North American never explains — is

how anyone can reach the conclusion that symbol "51" unambiguously has the same meaning as symbol "41."

While the Policy is ambiguous as to the "covered autos" because symbol "51" remains undefined, it is obvious what symbol "51" doesn't mean. It can't mean the same thing as symbols "41", "43," "44," "45," "46," "47," "48," "49," or "50," all of which are expressly defined in the Policy, and were not used to describe the automobiles covered by the Policy. Thus, one must look to extrinsic evidence to determine the parties' intent as to the meaning of symbol "51."

North American argues (citing pp. 20-21 and 27-28 of Vanliner's Brief) that Vanliner admitted that its policies cover any "auto" in the absence of the missing endorsement. (Resp. Br. 43-44, 77). That simply isn't true. That part of the Brief only explains the evidence demonstrating the parties' intent to define symbol "51" so as to limit the coverage to "hit-and-run" situations, and explains the need for such evidence if the policies are found to be ambiguous *or* fail to reflect the parties' intent due to a mutual mistake. Vanliner has consistently taken the position that the lack of definition for symbol "51" rendered the policies ambiguous as to vehicles were covered "autos." Indeed, Vanliner said that on page 27 of its Opening Substitute Brief, the very page relied on by North American to argue that Vanliner admitted that the policies cover "any" auto.

IV.

The Circuit Court Erred In Granting Summary Judgment Because Allowing The Insurance Company For The Hauling Agents And Lessors To Recover Against Vanliner Defeats The Intentions Of The Agreements Between UVL And The Hauling Agents And Lessors.

North American addresses Vanliner's Point IV concerning the indemnification agreements in a scattershot fashion in several sections, again raising new arguments for the first time on appeal. North American now claims the indemnity provisions are unenforceable "adhesion contracts." (*See* Resp. Br. at 53-56, 79-80). The Circuit Court made no such finding, and nothing in the record would support it.

There is no evidence that the agents were unsophisticated businesses for purposes of executing the Agency Agreements. The Agency Agreements are therefore enforceable against the agents. *See Burke v. Goodman*, 114 S.W.3d 276, 280 (_____); *Swain v. Auto Services, Inc.* 128 S.W.3d 103, 107 (Mo. App., ___ 2003).

Despite North American's argument to the contrary, it isn't important that the indemnifications provisions specifically provide that UniGroup and UVL are to be indemnified for their own negligence. There is nothing ambiguous about a requirement that one party indemnify the other for "any and all claims" in a commercial contract. The language in the present case is just as broad as that in *Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910 (Mo. banc 2005).

The Circuit Court erred in rejecting the application of *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 166 (Mo. App., E.D. 2005). Like *Wal-Mart Stores, Inc. v. RLI Ins.*

Co., 292 F.3d 583 (8th Cir. 2003) before it, *Federal* requires that indemnification agreements control over insurance policies. Fister and East End purchased the coverage required from North American. The North American policies provide coverage for the hauling agents' negligence, and coverage for the agents' indemnification obligations to UVL and UniGroup. UniGroup and UVL purchased coverage under the Vanliner policies. Because the indemnification runs from the agents to UniGroup and UVL, the coverage follows the indemnity obligations.

North American argues that Fister, East End, and their drivers each qualify as additional insureds under the Vanliner policies. Even if the Circuit Court were correct in finding that the hauling agents and drivers were additional insureds, *Federal Insurance* still controls. That case is premised on allocating loss among policies in a manner consistent with the contracting parties' indemnification agreements. Here, the coverage purchased by the indemnitee (UVL and UniGroup) shouldn't share the risk with that purchased by the indemnitors (Fister and East End). Moreover, it disregards the fact that Vanliner is also an indemnitee as an affiliate of UVL and UniGroup.

CONCLUSION

The award of summary judgment in North American's favor should be reversed, and the matter remanded to permit a proper consideration of Vanliner's affirmative defenses and the evidence. Vanliner further requests such other relief as the Court deems appropriate in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains _____ words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5” floppy disk in Microsoft Word 2003 format.

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