

Supreme Court No. 88003

IN THE MISSOURI SUPREME COURT

SHELTER MUTUAL INSURANCE COMPANY

Appellant

v.

MARK BARRON, et al.

Respondent

**APPEAL FROM THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI
No. 04CV75698**

**On Transfer From The Missouri Court of Appeals,
Western District, Case No. WD65947**

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Homeowner’s policy is ambiguous, and the policy language in the Ogelsby Homeowner’s policy does not support the ruling by the Trial Court that a reasonable insured would expect liability coverage to be available to Mr. Hunt under the Homeowner’s policy issued to Mr. Ogelsby by Shelter.....9

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STATEMENT OF FACTS

Appellant Shelter Mutual Insurance Company (Shelter) submitted a detailed statement of facts in its Substitute Appellant's Brief in this matter and hereby adopts this statement of facts and incorporates such by reference in its reply brief.

REPLY TO ARGUMENT OF APPELLEES

I. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *Farm Bureau v. Barker*, 150 S.W. 3d 103 (Mo. App. 2004), et al., have determined that anti-stacking and "other insurance" provisions similar to the provisions in the Hunt Boatowner's policy are not ambiguous and are enforceable and that the Shelter Boatowner's policy issued to Mr. Hunt is not ambiguous and since Shelter paid the policy limits on behalf of Mr. Hunt under the Homeowner's policy issued to him by Shelter there is no coverage available to Mr. Hunt under the Boatowner's policy issued to him by Shelter.

Farm Bureau v. Barker, 150 S.W. 3d 103 (Mo. App. 2004).

Rader v. Johnson, 910 S.W. 2d 280 (Mo. App. 1995).

Farm Bureau Town and Country v. Hughes, 629 S.W. 2d 595 (Mo. App. 1981).

Noll v. Shelter Insurance Companies, 774 S.W. 2d 147 (Mo. 1989)

Plaintiffs contend in their Appellee's Brief that this Court should reject every case cited by Appellant that supports its assertion the "other insurance in the company" clause in Hunt Boatowner's policy is not ambiguous, and therefore, should be enforced as written in the policy. Appellees urge this Court to disregard *Farm Bureau Town and Country Ins. Co. v. Hughes*, 629 S.W. 2d 595 (Mo. App. 1981), *Farm Bureau Town & Country Ins. Co. v. Barker*, 150 S.W. 3d 103 (Mo. App. 2004) and *Rader v. Johnson*, 910 S.W. 2d 280 (Mo. App. 1995). However, Appellees fail to cite a single Missouri authority that has specifically overruled or overturned any of these decisions.

Moreover, Appellees fail to address the Missouri Supreme Court's decision in *Noll v. Shelter Insurance Companies*, 774 S.W. 2d 147 (Mo. 1989) wherein the Court upheld a provision substantially similar to the "other insurance in the company" clause at issue here. In *Noll*, this Court considered a Shelter Insurance "Other Automobile Insurance in the Company" clause, which read:

With respect to any occurrence, accident, death or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

Id. at 149. *Noll* cites *Farm Bureau Town and Country v. Hughes*, 629 S.W.2d 595 (Mo. App. 1981) for the proposition that "other insurance in the company" provisions such as this are sufficient to preclude the stacking of medical payments and liability

coverages. *Noll* at 15. The Shelter Insurance language considered in *Noll* is similar in all material respects to the language at issue here and should be enforced accordingly.

Additionally, as previously pointed out by Appellant, Appellees' reliance on *Niswonger v. Farm Bureau Town & Country Insurance*, 992 S.W.2d 308 (Mo. App. 1999) is misplaced. In *Niswonger*, the policy at issue contained an "other insurance in the company" clause, as does Hunt's Boatowner's policy. *Id.* at 314-315. However, the *Niswonger* court did not find the policy at issue in that case was ambiguous because the other insurance provision was broad and applied to "any" other insurance, as does the Hunt Boatowner's policy.

Rather, the *Niswonger* court determined the "other insurance" in an underinsured motorist ("UIM") endorsement clause was in conflict with earlier "anti-stacking" provisions in the policy. *Id.* at 316. The UIM "other insurance" clause in *Niswonger* provided coverage in excess of "any other similar insurance" for insureds occupying "non-owned" vehicles. *Id.* at 315. The Court found, however, that the provision could be construed to include other UIM coverage with the company, not just UIM coverage provided by another carrier on the "non-owned" vehicle. *Id.* at 315-316.

Thus, the court held the two "other insurance" clauses in *Niswonger* were contradictory to one another. *Id.* at 310. In so finding, The *Niswonger* court expressly distinguished, but did not overrule or reject, *Hughes*:

First, the holding on this point in *Hughes* is distinguishable in at least one significant respect. The clause there at issue referred very broadly and generally to "any other *valid and collectible insurance*." (emphasis added in original) In contrast, the clause here at issue refers specifically to "any other *similar insurance*." (emphasis added in original) Since the implication of the "similar insurance" language to a layperson would be that the Original UIM Endorsement, in the event of an injury while occupying a non-owned vehicle, provides such coverage in addition to any other applicable *underinsured motorist coverage*, (emphasis added in original) this might more readily be perceived by a reasonable layperson as presenting a specific conflict with the policy's previous anti-stacking language and thus creating an ambiguity, when compared to the language of *Hughes*.

Id. at 317.

The *Niswonger* decision clearly distinguishes the language at issue in *Niswonger* with the language in *Hughes*, *Barker*, *Rader*, and from the language at issue here. Contrary to Appellees' assertions, the *Niswonger* decision demonstrates the clauses at issue in the Hunt Boatowner's policy are neither in conflict nor ambiguous. A court should not create an ambiguity to distort the language of an otherwise unambiguous insurance policy. *Goza v. Hartford Underwriters Ins. Co.*, 972 S.W.2d 371, 373 (Mo. App. 1998). As the Shelter policies unambiguously limit

coverage under multiple policies, there is no coverage available to Mr. Hunt under his Shelter Boatowner's policy for this accident.

Appellees' reliance on *American Family Mut. Ins. Co. v. Ragsdale*, 2006 Mo. App. Lexis 1070 (July 11, 2006) is likewise misplaced. The "other insurance" clause at issue in *Ragsdale*, like the one in *Niswonger*, provided coverage excess over "any other similar insurance." As in *Niswonger*, the language at issue in *Ragsdale* is inapplicable to the language in the provisions at issue here. Thus, the trial court erred in granting Appellees' Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment regarding such issue.

II. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998) and *Kellar v. American Family Mut. Ins. Co.*, 987 S.W.2d 452 (Mo. App. 1999) have ruled that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Homeowner's policy is ambiguous, and the policy language in the Ogelsby Homeowner's policy does not support the ruling by the Trial Court that a reasonable insured would expect liability coverage to be available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby by Shelter.

American Standard Insurance v. May, 972 S.W. 2d 595 (Mo. App. 1998)

The trial court in this matter granted Appellee's Motion for Summary Judgment on the issue of coverage available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby. The Trial Court found "that Plaintiffs have and recover from Defendant the sum of Three Hundred Thousand and no/100ths, (\$300,000.00) dollars payable as insurance coverage for insured, RODNEY OGELSBY." (LF 487-488). As previously stated, contrary to the trial court's ruling, Appellees did not seek coverage for Rodney Ogelsby under the Homeowner's policy issued to Mr. Ogelsby. Rather, Appellees sought coverage for Mr. Hunt under Ogelsby's Homeowner's policy. Thus, the trial court's ruling is erroneous on its face.

Moreover, contrary to Appellees' assertions, Appellant has not admitted coverage for Mr. Hunt under Mr. Ogelsby's Homeowner's policy. Appellees allege in their brief that the following three facts are determinative of coverage available for Mr. Hunt under the Ogelsby Homeowner's policy: (1) that Ogelsby wrote to Shelter within thirty days to request coverage for his boat; (2) that Hunt was "legally responsible" for Ogelsby's boat at the time of the accident; and (3) Hunt's liability to Appellees resulted from Hunt's use of Ogelsby's boat. Appellant's position regarding its admission or denial of these three assertions is clear from the record below.

Moreover, regardless of whether these assertions of fact have been admitted by Appellant, the existence of these three facts is not determinative of whether coverage is available to Hunt under Ogelsby's Homeowner's policy. To find if such coverage is available would require a tortured reading of the Ogelsby's Homeowner's policy.

Such an effort would be contradictory to Missouri law regarding insurance policy interpretation. *Goza*, 972 S.W. 2d at 373.

Missouri courts have long held that provisions in an insurance policy are not considered in isolation. Rather, they should be considered by reading the policy as a whole, in the context of the entire policy. *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998). In essence, it is Appellees' position that because Mr. Ogelsby applied for and obtained a Boatowner's policy on the boat in question, Mr. Hunt should be covered under Ogelsby's Homeowner's policy for an accident that occurred over a year after Ogelsby applied for, and was issued, separate and independent coverage on the boat. Appellees' position would require a finding that the Ogelsby Homeowner's policy, provided coverage for the boat for an indefinite, if not infinite period of time. Plainly, this was not the intent of the Ogelsby Homeowner's policy.

Plaintiffs do not assert, and in fact there is no evidence presented that Mr. Ogelsby ever requested coverage for the boat under the *Homeowner's* policy at issue. In fact, there is no provision under the policy that would allow him to do so. There is no schedule or other endorsement to Ogelsby's Homeowner's policy identifying this boat, or any boat, as being insured under the policy. Additionally, there is no indication on the declarations page that this boat, or any boat is covered under the policy, and no indication an additional premium is being charged for coverage on the boat.

A fair reading the entire policy, and of the notice provision relied upon by Appellees, in context of the entire policy, shows there is no coverage available to Mr. Hunt under the Ogelsby Homeowner's policy. Rather, the provision relied on by Appellees merely provides interim coverage for a boat on a short-term basis. The coverage is plainly intended to apply only until such time as appropriate coverage can be obtained, for instance, the Boatowner's policy subsequently issued by Shelter Insurance. It is not a reasonable interpretation of the policy to claim that by applying for a Boatowner's policy from Shelter, either Hunt or Ogelsby also would create coverage for the use of the boat for an indefinite period of time under Ogelsby's Homeowner's policy.

Appellees also reason that since Shelter issued Homeowner's policies to both Hunt and Ogelsby, and provided coverage to Hunt under Hunt's Homeowner's policy, then coverage also must be available to Hunt under Ogelsby's Homeowner's policy. This assertion ignores the terms and conditions that define an "insured" under the Ogelsby policy. Those terms and conditions are completely different from the provisions under which Hunt is covered as a "named" insured by his own Homeowner's policy. Additionally, Mr. Hunt did not own the boat involved in the accident. Thus, a different analysis applies regarding whether there is coverage available to Mr. Hunt under the Ogelsby Homeowner's policy than under the Hunt Homeowner's policy.

Further, contrary to Appellees' assertions to the trial court, Shelter did not admit there was coverage available for Mr. Hunt under *his* Homeowner's policy.

Rather, Shelter specifically denied such coverage was available in their Answer to Appellees' Declaratory Judgment Petition. In paragraph 44 of their Declaratory Judgment Petition, Appellees specifically allege, "In the underlying litigation Shelter Insurance maintained Hunt was only covered by Hunt's Homeowner's Insurance Policy with total available limits of \$100,000.00. (LF 0017). In response, in paragraph 44 of its Answer to the Petition, Shelter states, "Shelter denies the allegations in paragraph forty-four of the petition for declaratory judgment." (LF 0031). Thus, Shelter did not admit there was coverage available to Hunt under his Homeowner's policy but rather merely made a compromise settlement with Appellees in the underlying action.

Additionally, by settling the claims against Mr. Hunt under the Homeowner's policy issued to Mr. Hunt, Shelter in no way waived any of the policy defenses available to it regarding coverage for Mr. Hunt under the separate and distinct Ogelsby Homeowner's policy. Shelter's settlement under the Hunt Homeowner's policy does not prevent or estop Shelter from asserting all applicable policy defenses available to it under the Ogelsby Homeowner's policy. Based on foregoing, there is no coverage available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby and the trial court erred in granting Appellees' Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment regarding this issue.

III. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for

Summary Judgment because Missouri Appellate Courts in cases such as American Standard Insurance v. May, 972 S.W. 2d 595 (Mo. App. 1998) and Kellar v. American Family Mut. Ins. Co., 987 S.W. 2d 452 (Mo. App. 1999) have held that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Boatowner's policy is ambiguous, and the policy language in the Ogelsby Boatowner's policy does not support the ruling by the Trial Court that a reasonable insured would expect medical payments coverage would be available under the Boatowner's policy issued to Mr. Ogelsby by Shelter.

Appellees alleged in their Motion for Summary Judgment in the declaratory judgment action that medical payments coverage is available under the Ogelsby Boatowner's policy. The trial court granted Appellees Motion for Summary Judgment on that issue and Appellant's Motion for Summary Judgment.

The declarations page of the Ogelsby Boatowner's policy does provide for a medical payments limit of \$2,000 per person for any one accident. The policy provides "we will pay all reasonable medical expenses which are incurred within three years from the date of the accident for necessary medical services for bodily injury *to any insured* caused by an accident (emphasis added)." The policy includes in the definition of an "insured" any person:

while occupying a non-owned boat, if the bodily injury results from your operation or occupancy, but only if you have or reasonably believe that you have the permission of the owner to use the boat, and your use is within the scope of such permission.

(LF 0228-0229)

The policy language stating coverage is available “only if you have or reasonably believe that you have the permission of the owner to use the boat. . .” plainly demonstrates that coverage is only available if the insured (in this case Mr. Ogelsby) is operating a non-owned boat (in this instance, the pontoon boat upon which Appellees were riding). While the Appellees were occupying a “non-owned boat,” their injuries did not result from Ogelsby’s “operation” of the non-owned boat the Appellees occupied. It is undisputed Ogelsby was driving his own boat at the time of the accident.

Since Ogelsby was not operating the “non-owned boat” and Appellees were not occupying a non-owned boat *being “operated”* by Ogelsby, Appellees do not meet the definition of an “insured” set forth in Ogelsby’s Boatowner’s policy. As Appellees are not “insureds” under the policy, there is no medical payments coverage available to them under such policy. Thus, the trial court erred in granting Appellees’ Motion for Summary Judgment regarding whether there is medical payments coverage available under the Ogelsby Boatowner’s policy.

CONCLUSION

For the foregoing reasons, the Judgment of the trial court granting Appellees' Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment should be reversed. In the alternative, the trial court's Judgment granting Appellees' Motion for Summary Judgment should be reversed and this matter remanded to the trial court with direction to enter its Judgment granting summary judgment on behalf of Appellant.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the above and foregoing, as well as a floppy disk containing this Substitute Reply Brief, were mailed this 1st day of December, 2006, to: Kenneth E. Siemens, Murphy, Taylor, Siemens & Elliot, P.C., 3007 Frederick Ave., P.O. Box 6157, St. Joseph, Missouri 64506, Attorneys For Plaintiffs.

**ATTORNEY FOR DEFENDANT
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Jack W. Green, Jr., hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 3,651 words, which does not exceed 27,900 words, ninety percent the words allowed for an appellant's substitute reply brief.

2. Pursuant to Special Rule XXXII, the floppy disk filed with this brief contains a copy of this brief. It was scanned for viruses on November 30, 2006 using the Symantec Antivirus program, which was updated on November 30, 2006. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Kenneth E. Siemens and Benjamin Creedy at Daniel E. Hamann, 307 Frederick Avenue, P.O. Box 6157, St. Joseph, MO 64506 on the December 1, 2006.

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