

IN THE SUPREME COURT OF MISSOURI

BRYAN GAVAN, )  
 )  
 Appellant, )  
 )  
 vs. )  
 ) Supreme Court No.: SC-88764  
 BITUMINOUS CASUALTY )  
 CORPORATION, et al., )  
 )  
 Respondents. )

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BRIEF OF AMICUS CURIAE  
AMERICAN INSURANCE ASSOCIATION

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**POINTS RELIED ON**

- I. AIA IS A NATIONAL INSURANCE TRADE ASSOCIATION THAT PROMOTES THE INTERESTS OF ITS MEMBERS - PROPERTY AND CASUALTY (P&C) INSURERS THAT WRITE ALL LINES OF P&C INSURANCE THROUGHOUT THE COUNTRY. AIA RECOGNIZES THE SIGNIFICANCE OF THIS CASE, BECAUSE HOW INSURANCE CONTRACTS ARE INTERPRETED WILL HAVE A SUBSTANTIAL EFFECT ON THE EXPECTATIONS OF BOTH INSURERS AND COMMERCIAL POLICYHOLDERS IN MISSOURI, AS WELL AS ON EXPECTATIONS OF BOTH THE LEGISLATURE AND EXECUTIVE, IN ENACTING LEGISLATION PROMOTING ECONOMIC DEVELOPMENT THROUGH BALANCED WORKERS' COMPENSATION AND CIVIL JUSTICE SYSTEMS.**
- II. THE EASTERN DISTRICT ERRED BY NOT APPLYING PLAIN AND ORDINARY MEANING TO THE CONSTRUCTION OF THE PHRASE "A PERSON WHO IS FURNISHED TO YOU" AS USED IN THE DEFINITION OF "TEMPORARY WORKER" AND HENCE, THE CO-EMPLOYEE EXCLUSION APPLIES.**

*American Family Mutual Ins. Co. vs. As One, Inc.*, 189 S.W. 3d 194 (Mo.App. S.D. 2006)

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**I**

**1. AIA IS A NATIONAL INSURANCE TRADE ASSOCIATION THAT PROMOTES THE INTERESTS OF ITS MEMBERS - PROPERTY AND CASUALTY (P&C) INSURERS THAT WRITE ALL LINES OF P&C INSURANCE THROUGHOUT THE COUNTRY. AIA RECOGNIZES THE SIGNIFICANCE OF THIS CASE, BECAUSE HOW INSURANCE CONTRACTS ARE INTERPRETED WILL HAVE A SUBSTANTIAL EFFECT ON THE EXPECTATIONS OF BOTH INSURERS AND COMMERCIAL POLICYHOLDERS IN MISSOURI, AS WELL AS ON EXPECTATIONS OF BOTH THE LEGISLATURE AND EXECUTIVE, IN ENACTING LEGISLATION PROMOTING ECONOMIC DEVELOPMENT THROUGH BALANCED WORKERS' COMPENSATION AND CIVIL JUSTICE SYSTEMS.**

## ARGUMENT

AIA is the leading national property-casualty insurance trade association in the United States, representing over 450 insurers that write more than \$123 billion in premiums annually. In 2006, AIA members collectively wrote over \$1.5 billion in commercial lines coverage, about 33 percent of the Missouri market (including commercial general liability – or “CGL” – policies) and including over \$285 million in workers’ compensation premiums representing 28 percent of the market. AIA promotes the economic, legislative, and public standing of its members, provides a forum for discussion of issues of common concern to its members, and keeps members informed of pertinent regulatory, legislative and judicial developments. AIA also appears as amicus in cases before state and federal courts raising significant issues of policy for the insurance industry and the public generally.

The erroneous construction of the term “temporary worker” as used in the policy exclusion referred to by the Court of Appeals (Eastern District), and herein, as the “co-employee exclusion,” creates uncertainty as to whether policy language will be construed consistent with common usage and parlance, and therefore whether insurers can continue to rely on the language of their contracts in order to make reasonably objective actuarial estimates of anticipated losses. Because this co-employee exclusion is common in CGL policies written in this State, the uncertainty generated by the Court of Appeals decision threatens to further unsettle expectations of whether a claim within the jurisdiction of the Workers’ Compensation Act, Chapter 287, RSMo, also will be cognizant in tort. AIA respectfully urges this Court to confirm that a “person who is furnished to you,” within the CGL policy’s definition of the term “temporary worker,” requires the presence of a third person to supply its employee to another

employer under a temporary staffing arrangement. In so doing, the Court would preserve the intended scope of the exclusion, preclude a perverse policy result of a worker collecting both workers' compensation benefits and a tort award and emphatically hold that words mean what they are intended to mean, as they are commonly used.

Although on the surface this case involves the interpretation of a simple phrase in an insurance policy, the implications of this Court's action will have systemic repercussions to tort claims and workers' compensation claims in Missouri. If the Court follows the Eastern District, a broader class of claimants will be allowed to file actions in civil court seeking tort damages, which will likely be covered under liability insurance, or if the Court adopts the position of Respondent and amicus, workers injured on the job purportedly due to the negligence of co-workers will continue to be limited to the exclusive remedy of workers' compensation benefits for the most part. One of the benefits provided by amicus is to highlight for the Court the potential ramifications to a particular industry of the Court's action and argue for public policy considerations to play a role in the Court's deliberations.

The transcendent purpose in enacting tort and workers' compensation reform legislation is promoting economic development – attracting new business and retaining existing employers, and thereby creating a strong job market for Missouri citizens. Thus, by the passage of this legislation in 2005<sup>1</sup>, it has been declared to be public policy of this state that its civil justice and workers' compensation systems are to be administered in a consistent, objective manner so that an employer's liability for on-the-job injuries to members of its workforce is certain and predictable.

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<sup>1</sup> A. L. 2005 HB 393 (Tort Reform); A.L. 2005 SB 1 (Workers' Compensation Reform)

A review of recent press releases from Governor's office quoting Governor Blunt, department heads and legislative leadership makes a point.

In a press release issued by Governor Blunt's office on March 6, 2007, in part, it is stated as follows:

“Gov. Matt Blunt today announced that Missouri's economy is flourishing with nearly 80,000 new jobs created since January 2005 - a number so large it would employ more than the entire population of Cole County (72,000) where Blunt made the announcement.

‘We now have more jobs in Missouri and more Missourians employed than ever before in our state,’ said Gov. Blunt. ‘Our economy is growing as a result of the hard work of Missourians who are creating and recruiting high quality family-supporting jobs to our state. My administration will continue supporting pro-jobs, pro-growth policies that will help raise the standard of living for every Missourian, because I believe the hard working people of this state will keep us moving forward if we give them the opportunity and the freedom to succeed.’

‘Having Gov. Blunt take the lead on issues like tort reform and workers' comp. reform improved our business climate and produced jobs,’ said House Speaker Rod Jetton. ‘Now, we have more people working and we've gone from billion dollar shortfalls to \$300 million surpluses.’

Since taking office the governor has worked to enact pro-jobs, pro-growth policies that have helped move Missouri forward. The state's economic outlook has improved with the passage of aggressive litigation reform, workers' compensation reform and proactive recruiting tools like the Missouri Quality Jobs Act.”

Similarly, following a filing in September, 2007 by the National Council on Compensation Insurance, the statistical organization licensed by the Missouri Department of Insurance Financial Institution and Professional Registration (MDIFP) pursuant to Section 287.967, RSMo, which actuarially demonstrated that the loss component of workers' compensation insurance pricing in Missouri had dropped by 10.1% from the previous year, a press release was issued by Governor Blunt which states, in part, as follows:

“Missouri businesses and entrepreneurs have responded to Missouri's new pro-jobs, pro-growth policies by creating over 85,000 jobs for Missouri families over the past two and a half years,' Gov. Blunt said. 'The effects of workers' compensation reform appear to be having a positive impact on Missouri employers while providing essential protections for Missouri workers harmed on the job. This dramatic 10 percent reduction in costs for Missouri employers is helping attract and retain more jobs, promote continued economic growth and provide more opportunities for Missouri workers.’

‘The National Council on Compensation Insurance's data indicates that claim frequency has declined. We believe one of the reasons for

this downward pressure can be attributed to the 2005 workers' compensation reform,' said Doug Ommen, director of the Department of Insurance, Financial Institutions & Professional Registration. 'We continue to see rate decreases in the workers' compensation market and more insurers entering the market because they can provide employers with competitive rates and service.'

In 2005, Gov. Blunt signed into law legislation keeping his promise to restore fairness to Missouri's workers' compensation system by protecting rights of injured workers without threatening Missouri jobs."

Finally, the Governor on September 27, 2007, issued another press release citing the purpose and policy behind the medical malpractice reforms. This pronouncement followed a release by the MDIFP of the 2006 Medical Malpractice Report which compiled 2006 data regarding new medical malpractice claims and insurer claims payment. The report demonstrated that the number of new medical malpractice claims asserted and average insurer payout per claim both decreased substantially following enactment of the tort reform bill in 2005. The Governor stated:

" 'Legislation I signed in 2005 brought sweeping reforms to address a very serious medical crisis in our state by instituting needed lawsuit and medical malpractice reforms,' Gov. Blunt said. 'The reforms brought common sense and balance back to our state's laws and improved access to health care for all Missourians.'

The comprehensive reform Blunt signed placed limits on joint and several liability, restrictions on venue shopping and limits on punitive and non-economic damages.”

In reality, the closest most members of Missouri’s employer community come to either the workers’ compensation or civil justice system is when they open the premium billing statement from their insurer for workers’ compensation and commercial liability insurance for the coming year. The amount charged represents the insurer’s actuarial estimate of the risk and potential cost of claims arising during the policy term for that policyholder, plus a factor for administrative cost and profit. Actuaries establish the risk and cost components of various industry groups, and underwriters assess whether a potential policyholder has individual risk characteristics that meet the insurer’s guidelines for coverage, and if so, at what price.

Insurance rates are the most competitive in markets where risk assessment is objective and predictable. In other words, in those states where insurers can estimate their risk exposure with a high degree of certainty and actuarial confidence, rates generally will be lower. The converse is equally true in that in those states where it is difficult to predict the insurer’s ultimate exposure, rates will be higher as a general rule due to the necessity of factoring into the pricing a higher risk component to cover potential future losses.

Prior to the decision by the Eastern District below, the insurance carriers writing workers’ compensation and commercial general liability thought they knew what the law was concerning injuries to workers arguably caused by the negligence of co-employees; namely, with certain

exceptions, such injuries would be exclusively compensated within the workers' compensation system and the co-employees alleged to have engaged in tortious conduct would be immune from civil liability. One recognized exception in Missouri is for an employee deemed to be a "temporary worker." Estimated loss exposure for commercial general liability (CGL) coverage reflected actuarial judgments of such potential loss. If, as advocated by Appellant, a worker in a job that may be limited in time can be considered a "temporary worker" under CGL policy, the universe of potential claimants will increase exponentially. It is not implausible that virtually any employment situation, and certainly in certain kinds of employment, such as many facets of construction that are inherently seasonal, will end eventually if certain economic circumstances occur. Under Appellant's argument, it is very reasonable to envision that in certain categories of employment, such as seasonal holiday workers and students who take a summer job, employees may file for, and actually collect, workers' compensation benefits, and subsequently sue a co-employee for bodily injuries, thereby availing themselves of their employer's CGL coverage, which is exactly what Mr. Gavan did in this case.

Insurers facing this unsettled but higher liability exposure will recalibrate actuarial expectations of loss that will be reflected in higher liability costs and consequently upward pressure on the overall cost of doing business in Missouri. This result is contrary to the public policy embodied in recent workers' compensation and liability reforms, in promoting insurance stability and predictability with insurance costs a reasonable and an accurate reflection of potential risk.

## II

**THE EASTERN DISTRICT ERRED BY NOT APPLYING PLAIN AND ORDINARY MEANING TO THE CONSTRUCTION OF THE PHRASE “A PERSON WHO IS FURNISHED TO YOU” AS USED IN THE DEFINITION OF “TEMPORARY WORKER” AND HENCE, THE CO-EMPLOYEE EXCLUSION APPLIES.**

### **ARGUMENT**

The general rules applicable to the construction of an insurance policy are adequately set forth in Respondents’ Brief and will not be repeated herein.

However, one key rule of construction is worthy of added emphasis in giving meaning to the term “temporary worker,” as defined in the Bituminous CGL policy.<sup>2</sup> This is the “plain meaning” rule, which has been articulated by Missouri courts as follows:

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<sup>2</sup> Section V – Definitions:

- (5) “Employee” includes a “leased worker”. “Employee” does not include a “temporary worker”...
- (10) “Leased worker” means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. “Leased worker” does not include a “temporary worker”...
- (19) “Temporary worker” means a person who is furnished to you to substitute for a permanent “employee” on leave or to meet seasonal or short-term workload conditions.

“The plain or ordinary meaning of an insurance policy is the meaning that the average layperson would understand.” *Shahan vs. Shahan*, 988 S.W.2d 529 (Mo. 1999); “The meaning of insurance policy language is that which would reasonably be given by the ordinary person of average intelligence or common understanding, not in the manner of a painstaking lawyer.” *Reese v. U.S. Fire Ins. Co.*, 173 S.W.3d 287 (Mo.App. W.D. 2005); and “Where the language of an insurance contract is plain, straightforward, and susceptible of only one meaning, there is no room for judicial construction because there is nothing to construe.” *Thompson vs. Schlechter*, 43 S.W.3d (Mo.App. E.D. 2000).

The issue here is whether under common usage and ordinary meaning of the English language, “a person” may be “furnished to you” without the involvement of a third party who is legally separate and distinct from the insured.

It is unassailable that “who is furnished to you” modifies “person” and thereby imposes a condition that must be met before a “person” can fall within the ambit of the definition of “temporary worker.” The decision below eliminates any meaning being ascribed to the policy language “who is furnished to you.” It effectively rewrites the policy to read:

“A person who is furnished to you, *or who furnishes himself or herself to you*, to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions.” [Italicized language added.]

The decision below violates the principle that a court is to give meaning to all words and enforce a contract as it is written, not rewrite it. *Martin vs. U.S. Fidelity & Guaranty Co.*, 996 S.W.2d 506 (Mo. en banc. 1999).

In *American Family Mutual Ins. Co. v. Tickle*, 99 S.W.3d 25 (Mo.App. 2003), the Eastern District was confronted with an issue virtually identical to the issue in the case at bar, i.e., whether an injured employee fell under the definition of a ‘temporary worker’ as that term was defined in an employer’s commercial general liability insurance policy. The commercial general liability insurance policy at issue in *Tickle* had the same definition of ‘temporary worker’ as the commercial general liability insurance policy at issue in the present case.

In construing the definition of ‘temporary worker’, the Eastern District in *Tickle* analyzed the syntax and arrangement of the sentence defining ‘temporary worker’, and concluded that it was grammatically impossible to interpret the definition of ‘temporary worker’ without the verb “is furnished”. *Tickle* at 31. Hence, the *Tickle* court made a clear statement that to qualify as a temporary worker under a commercial general liability insurance policy, an employee must be ‘furnished to’ an employer, and further implied that the temporary worker must be ‘furnished to’ an employer by a third party.

With the definition of temporary worker in both *Tickle* and the present case, “is furnished” is the key phrase, without which, the definition of temporary worker would be incomprehensible and grammatically anomalous. The clause “furnished to you to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions” is a participial phrase modifying ‘person’. Within this clause, the phrases “to substitute for a permanent employee on leave” and “to meet seasonal or short-term workload conditions” are parallel infinitive phrases modifying ‘furnished’, and both restrict the persons covered under this definition to an employee who is furnished to the employer by a third party. *See Tickle*, 99 S.W.3d at 30 (citing DIANA HACKER, THE BEDFORD HANDBOOK 763-64, 766 (5<sup>th</sup> ed.

1998). Further, “because these phrases are separated by the word ‘or’, a coordinating conjunction that is ordinarily used to connect grammatically equal elements, they equally modify the verb ‘is furnished’” Therefore, it is grammatically impossible to interpret the definition of ‘temporary worker’ without the verb ‘is furnished’. *Id.* As a result, the grammar and structure of the sentence defining ‘temporary worker’ in the commercial general liability insurance policy at issue in the present case requires that, to qualify as a temporary worker, an employee must not only be furnished to an employer, but he also must be furnished by a third party.

To better illustrate this point, a sentence diagram detailing the separate grammatical components that make-up the definition of temporary worker in the commercial general liability insurance policy issued by Bituminous is included herewith.<sup>3</sup> It is clear from both examining the sentence diagram, and from scrutinizing the definition of temporary worker as it appears in the policy, that the phrase “furnished to you” is more than merely superfluous wording added to the definition on a whim by the drafters. If that were the case, and the phrase “furnished to you” was not integral to the definition of temporary worker, the phrase would be discarded and the definition would read; “Temporary worker means a person [who] substitute[s] for a permanent employee on leave or meet[s] seasonal or short-term workload conditions.”

However, a “policy must be construed as a whole and every clause must be given some meaning....” *Brugioni v. Maryland Cas. Co.*, 382 S.W.2d 707 (Mo. 1964). Further, “the function of [a] court in construing an insurance contract is not to make a contract for the parties, but to construe the language used. General rules for construction of insurance contracts do not

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<sup>3</sup> See Appendix, Page A-1

authorize a perversion of language...; the court's function is to give force and effect to the contract as it is written. *Jordan v. United Equitable Life Ins. Co.*, 486 S.W.2d 664 (Mo.App. 1972)(emphasis added). Thus, in the present case, the Court must give full force and effect to each word and phrase in the Bituminous policy, comprising the definition of temporary worker. The essential nature of the phrase "furnished to you" must be recognized and incorporated into the interpretation of the definition of temporary worker, as does the implication that said temporary worker be furnished to an employer by a third party.

Amicus urges this Court to adopt the analysis and conclusion of the decision in *American Family Mutual Ins. Co, vs. Tickle*, 99. S.W.3d 25 (Mo.App. E.D. 2003) regarding the interpretation of "temporary worker" as used in a CGL policy. The reasoning and conclusion of the Eastern District below and the holding in *American Family Mutual Insurance Company vs. As One, Inc.*, 189 S.W. 3d 194 (Mo.App. S.D. 2006) are fundamentally flawed and at odds with *Tickle*, as well as common, everyday usage and grammar.

## CONCLUSION

The Court should vacate the decision of the Court of Appeals, and in its opinion, uphold the clear meaning of the policy language – and the English language – that “furnished to you” can logically and grammatically only involve a third party. In so holding, the Court also would resolve the conflict within the Districts of the Courts of Appeals on this issue. Finally, in so doing, the Court would implicitly recognize the broad public policy objectives embodied in recently enacted economic development legislation.

Respectfully submitted,

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	)	
<b>Respondents.</b>	)	

**CERTIFICATE OF COMPLIANCE**

COMES NOW counsel for Amicus Curiae, and for their Certificate of Compliance, states as follows:

1. The undersigned does hereby certify that Substitute Brief of Amicus Curiae filed herein complies with the page limits of Rule 84.06(b) and contains 3,066 words of proportional type.
2. Microsoft Word was used to prepare Substitute Brief of Amicus Curiae.
3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing document mailing a true copy thereof on this 5th day of November, 2007, via prepaid U.S. Mail, to:

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**APPENDIX**

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