

IN THE SUPREME COURT OF MISSOURI

BRYAN GAVAN, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. ) No. SC88764  
 )  
 BITUMINOUS CASUALTY )  
 CORPORATION, et al., )  
 )  
 Defendants/Respondents. )

**SUBSTITUTE REPLY BRIEF OF APPELLANT**

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**POINTS RELIED ON**

- I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE UNCONTROVERTED EVIDENCE ESTABLISHED THAT GOTSCH AND BRACE WERE INSURED FOR INJURIES THEY CAUSED TO BRYAN GAVAN IN THAT BRYAN GAVAN WAS A TEMPORARY WORKER AND NOT A CO-EMPLOYEE OF GOTSCH AND BRACE, THEREBY AVOIDING THE POLICIES' EXCLUSIONARY CLAUSES.**

American Family Mutual Ins. Co. v. As One, et al., 189 S.W.3d 194 (Mo. App. S.D. 2006)

American Family Mutual Ins. Co. v. Tickle, 99 S.W.3d 25 (Mo. App. E.D. 2003)

Bituminous Casualty Corp v. Ross, 413 F. Supp. 2d 740 (N.D. W.Va. 2006)

Gavan v. Bituminous Casualty Corp., No. ED88258, 2007 Mo. App. LEXIS 871, slip op. (Mo. App. E.D. June 12, 2007)

**II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT BECAUSE AN ISSUE OF MATERIAL FACT REMAINED IN THAT EVIDENCE PRESENTED BY DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO. DIRECTLY CONFLICTED WITH EVIDENCE PRESENTED BY PLAINTIFF BRYAN GAVAN ON WHETHER BRYAN GAVAN WAS A TEMPORARY WORKER.**

Gavan v. Bituminous Casualty Corp., No. ED88258, 2007 Mo. App. LEXIS 871, slip op.

(Mo. App. E.D. June 12, 2007)

J.H. Berra Paving Co. v. Eureka, 50 S.W.3d 358 (Mo. App. E.D. 2001)

Zerebco v. Loloi Brothers Livestock Market, 918 S.W.2d 931 (Mo. App. W.D. 1996)

## ARGUMENT

**I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS  
BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE &  
MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT  
BECAUSE THE UNCONTROVERTED EVIDENCE ESTABLISHED  
THAT GOTSCH AND BRACE WERE INSURED FOR INJURIES  
THEY CAUSED TO BRYAN GAVAN IN THAT BRYAN GAVAN WAS  
A TEMPORARY WORKER AND NOT A CO-EMPLOYEE OF  
GOTSCH AND BRACE, THEREBY AVOIDING THE POLICIES'  
EXCLUSIONARY CLAUSES.**

Respondents first argue that that the underlying judgment of the Circuit Court of St. Louis County in favor of Bryan Gavan and against Zachary Brace and Joe Gotsch is invalid. Respondents claim that the Circuit Court did not have subject matter jurisdiction to enter judgment against Zachary Brace and Joe Gotsch in Gavan v. Brace and Gotsch, case number 02CC-0013141WCV.

Respondents' argument as to the validity of the Circuit Court's judgment in favor of Bryan Gavan and against Brace and Gotsch has no merit. "In general, a final judgment is immune from collateral attack if the court had personal and subject matter jurisdiction and the judgment is not void on its face." Reese v. United States Fire Ins. Co., 173 S.W.3d 287, 296 (Mo. App. W.D. 2005) (quoting Telge v. Telge, 677 S.W.2d 403, 405 (Mo. App. W.D. 1984)). Respondents argue that the Circuit Court did not have subject matter jurisdiction. As Respondents admit, a court has subject matter jurisdiction and a

suit against a co-employee is not preempted by workers' compensation where it is alleged that defendants' conduct was "something more" than the failure to provide a safe place to work. (Respondents' Substitute Brief 9). While a party may not waive lack of subject matter jurisdiction, the party may admit the existence or waive the formal proof of a fact essential to vest the court with authority to exercise jurisdiction of the subject matter. Berry v. Chitwood, 362 S.W.2d 515, 517 (Mo. 1962) (citing Caruthersville School Dist. No. 18 v. Latshaw, 233 S.W.2d 6 (Mo. 1950)).

The Reese court went on to state that when a movant collaterally attacks a judgment they must show "the record affirmatively discloses that the judgment was void . . . ." Reese, 173 S.W.3d at 296 (quoting Div. of Employment Sec. v. Cusumano, 809 S.W.2d 113, 115 (Mo. App. E.D. 1991)). When a party alleges "something extra" subject matter jurisdiction would exist. *See* Reese, 173 S.W.3d at 296.

Appellant's petition in the underlying action alleged defendants' actions were "something more" than merely failing to provide a safe place to work. (L.F. 94). The facts alleged that the defendants were careless and negligent in several respects. (L.F. 94). Neither the facts alleged nor the classification of the defendants' actions as "something more" than a failure to provide a safe place to work were denied or disputed. On January 12, 2004, Judge Dolan entered a Final Judgment and Order after considering the Settlement Agreement and evidence. (L.F. 119-121). Judge Dolan found all issues including liability in favor of Bryan Gavan and against Brace and Gotsch. (L.F. 111-112, 119-121). Thus, the court found the facts alleged to be true. These facts established the

defendants' actions amounted to "something more." The Circuit Court's judgment was not appealed by any of the parties.

Respondents refused to defend Zachary Brace and Joe Gotsch when presented with the Petition filed against them. (L.F. 101-104). The denial letter sent to Gotsch and Brace specifically recognized that this was a co-employee liability case, and that Gavan had alleged that the defendants' actions were "something more" than a failure to provide a safe workplace. (L.F. 101). Bituminous<sup>1</sup> knew this would vest subject matter jurisdiction in the Court. Bituminous chose not to defend based on its interpretation of the co-employee exclusion. (L.F. 101-104). Bituminous did not contest subject matter jurisdiction. Bituminous has lost its opportunity to do so.

Bituminous also had an opportunity to seek a Declaratory Judgment to determine its responsibilities under their policies but chose not to do so. Ballmer v. Ballmer, 923 S.W.2d 365, 369 (Mo. App. W.D. 1996). Respondents chose not to defend Brace and Gotsch and took no action to challenge the judgment of the Circuit Court. They are precluded from doing so in this action because the court had jurisdiction and the judgment is not void on its face. Reese, 173 S.W.3d at 296.

### **BRYAN GAVAN WAS "FURNISHED"**

Bituminous takes various positions to counter Appellant's argument that Bryan Gavan was furnished to his employer. In doing so, Bituminous mischaracterizes the collective bargaining agreement, misquotes American Family Mutual Insurance

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<sup>1</sup> Appellant will refer to Bituminous Casualty Corp. and Bituminous Fire & Marine Insurance Co. collectively as Bituminous.

Company v. Tickle, 99 S.W.3d 25 (Mo. App. E.D. 2003), and misconstrues American Family Mutual Insurance Company v. As One, et al., 189 S.W.3d 194 (Mo. App. S.D. 2006).

The holding in As One settles the issue of whether Gavan was furnished to Ste. Genevieve. As stated by the Eastern District in their opinion in favor of Appellants in the present case, “As One specifically and persuasively addressed the issues presented here, and Tickle did not . . .” Gavan v. Bituminous Casualty Corp., No. ED88258, 2007 Mo. App. LEXIS 871, slip op. at \*11 (Mo. App. E.D. June 12, 2007). Bituminous attempts to side-step As One by claiming that As One is in direct conflict with Tickle, and urges this Court to reverse the As One holding and the Eastern District’s opinion. Bituminous supports this approach because As One clearly holds that Bryan Gavan satisfied the requirement to be furnished when he approached Ste. Genevieve for work.

The flaw in Bituminous’ argument is that Tickle does not conflict with As One. Both decisions are, in fact, harmonious with each other. As the Eastern District found, As One simply extends the holding of Tickle. To appreciate this relationship, the posture of each case must be examined.

Tickle involved an injury sustained by James Tickle when he was performing casual work for ATO Irrigation Systems while laid off from his regular employment. Tickle, 99 S.W.3d at 28. He filed an action against ATO and its owner for his injury. American Family had issued a general liability policy to ATO with the exact same exclusionary language at issue in the Bituminous policies. Id. at 27. Mr. Tickle contended he was a temporary worker, and not an employee of ATO, based on the policy

language that a temporary worker is “furnished to you to substitute for a permanent employee on leave or to meet seasonal or short term workload conditions.” Id. The Eastern District Court of Appeals upheld the trial court’s ruling that Mr. Tickle failed to meet this definition. Id. at 31. However, the reasoning used by the Appellate Court was vastly different than what Bituminous represents it to be.

Mr. Tickle claimed that the definition of temporary worker was ambiguous because it was uncertain whether the term “furnished” modified and applied to the phrase “to meet short term workload conditions.” Id. at 30. Since Mr. Tickle conceded that he was not furnished, the only issue for the Eastern District Court of Appeals was whether “furnished” applied to “meet short term workload conditions.” Id. at 28, 30. The Court analyzed the syntax of the sentence in light of well established grammar construction principles and authorities. Id. at 30-31. The Court found, quite simply and narrowly, that “furnished” did modify “to meet short term workload conditions.” Id. at 31. The Court made no effort to further define or interpret the term “furnished,” because Mr. Tickle had conceded he was not furnished. Thus, since Mr. Tickle was not furnished by his own admission, he could not meet the definition of temporary worker. Id.

As One took the analysis one step further. As One involved an action for injuries a construction worker sustained working for a company called As One. American Family again issued the CGL policy containing a similar exclusionary clause. What separated As One from Tickle was that the injured worker in As One claimed he was furnished. Id. The As One Court then went on to analyze the meaning of “furnished.” Id. at 197-99.

Contrary to Bituminous' assertion, the As One Court did not find the term "furnished" to be ambiguous. Id. It found, quite simply, that "furnished" was not defined and therefore subject to its ordinary meaning, which the As One Court found in Webster's: "To provide or supply with what is needed, useful, or desirable." Id. at 198. The Court found that "[i]n the context of a worker, there is no requirement in 'providing' or 'supplying' or 'furnishing,' which mandates that the worker must be supplied, provided, or furnished . . . by someone else. The worker furnishes himself to work." Id.

Bituminous would have this Court believe that there is a sharp divide between Tickle, As One, and the Eastern District's opinion in this case. In fact, there is no conflict. The As One Court relied heavily on Tickle in its decision. The cases are, in fact, harmonious with each other, As One being an extension of the Tickle holding. Clearly, the Eastern District found no conflict.

Bituminous makes additional claims concerning the Tickle holding that are spurious. Bituminous claims that Tickle stands for the proposition that "employee," "furnished" and other parts of its policies, should be defined as per the workers' compensation statutes. In fact, Tickle makes no such statement. The Bituminous policies define "employee" in a manner not common in ordinary usage. (See L.F. 80). It is bound by that definition. Polston v. Aetna Life Insurance Company, 932 S.W.2d 786 (Mo. App. E.D. 1996). If the Tickle Court defined "employee" using the definition in the Workers' Compensation Statutes, or the definition found in the Code of State Regulations, it would have had been unnecessary to decide whether "furnished" modified "short term workload conditions." The Tickle Court cited the workers' compensation statutes only to illustrate

the history of the temporary worker status. Tickle, 99 S.W.3d at 29-30. The only holding it made related to the modifier “furnished.” Id. at 30-31. Anything else in the opinion is dicta. As stated by the Eastern District in their opinion in the present case, “[I]n Tickle, we never reached the issue addressed by the Southern District in As One and the case at hand because the employee in Tickle conceded that he was not ‘furnished.’” Gavan v. Bituminous Casualty Corp., No. ED88258 at \*11 (citing Tickle, 99 S.W.3d at 28). As such, this Court has the ability to follow the holding in both As One and Tickle in this case, as the Eastern District did below, and find in favor of Appellant.

The thrust of Bituminous’ argument is that this Court should determine the meaning of its policy by reference to matters outside of the policy. Bituminous asks this Court to define temporary worker as per the Code of State Regulations, not by the definition in its policy. Essentially, Bituminous is requesting this Court to incorporate the Missouri Workers’ Compensation Statutes and the CSR directly into its policy. If this Court elects to do so, it would run contrary to one well established tenant: “Courts are without authority to rewrite contracts of insurance.” Ward v. Curry, 341 S.W.2d 830, 837 (Mo. 1960). This insurance policy must be interpreted by language which Bituminous chose to use, not by language it wished it used.

Bituminous also argues that Ward v. Curry supports its position that the Court should look to the Workers’ Compensation Statutes to determine the meaning of the word “employee” in the Bituminous policy. Ward was reviewing a CGL policy that had a co-employee exclusion which did not contain a definition of employee. The Court therefore looked to Missouri cases and the Workers’ Compensation Statutes to find a definition.

Id. at 834-36. The Court adopted the definition used for statutory employee, which clearly fit the status of the plaintiff. As such, the co-employee exclusion precluded coverage. Id. at 838-39. In the case at bar, there is a definition of employee, and since it varies from common usage, Bituminous is bound by its definition, not definitions found elsewhere. Polston, 932 S.W.2d at 788.

Observations made by the Ward Court are worthy of noting. Ward commented that CGL policies are traditionally designed to protect the public from actions of a company's employees, not to protect fellow employees. Ward, 341 S.W.2d at 838. The Bituminous policy changes that traditional dynamic. The policy clearly anticipates that one co-worker will be insured for injuries to another co-worker (i.e., when an employee causes an injury to a temporary worker). This could arise in a variety of contexts, but clearly could arise where, as here, a contractor's employee causes injury to a temporary worker working by his side doing the same work.

Bituminous makes reference to other jurisdictions that have rejected the holding in As One and thus, the opinion of the Eastern District in the present case. Clearly, there is a division among the states that have addressed this issue. There is, however, a common thread to those jurisdictions that have rejected the strict construction of the co-employee exclusion adopted by As One. States that have "over read" the exclusion and judicially added additional meaning to "furnish" (i.e., adding the requirement that an employee be furnished by a third party) do not interpret contracts like Missouri courts. Missouri adheres to well-settled interpretation principles that unclear, undefined or ambiguous terms will be construed against the insurer. Gulf Ins. Co. v. Noble Broadcast, 936

S.W.2d 810, 814 (Mo. 1997). Jurisdictions cited by Bituminous interpret insurance contracts quite differently. For example, Minnesota resolves ambiguities “in accordance with the reasonable expectations of the insured.” AMCO v. Dorphinghaus, No. 05-1296, 2007, U.S. Dist. LEXIS 2440, at \*11 (D. Minn. Jan. 11, 2007). Likewise, Massachusetts requires the court to “consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.” Scottsdale Ins. Co. v. Carrabassett Trading Co., Ltd., 460 F. Supp. 2d 251, 254 (D. Mass. 2006). Connecticut interprets insurance policies by determining the intent of the parties, which is considered a question of fact. Nationwide Mutual Ins. Co. v. Allen, 850 A.2d 1047, 1055-56 (Conn. App. 2004).

One case cited by Bituminous, Pacific Employers Ins. Co. v. Wausau Business Ins. Co., does use an analysis identical to Missouri. Pacific was decided in two phases. The first was to determine whether the insurer’s coverage was precluded under the Employee Exclusion Provision as a matter of law. This issue was presented to the Court in a motion for summary judgment in Pacific Employers Ins. Co. v. Wausau Business Ins. Co., No. 3:05-cv-850-J-16TEM, 2007 U.S. Dist. LEXIS 43201 (M.D. Fla. filed June 14, 2007), (hereinafter “Pacific I”). In Pacific I, the Court concluded that the terms in the co-employee exclusion (“short-term” and “temporary worker”) were ambiguous. Id. at \*24. The Court therefore denied the insurer’s request for summary judgment. In Pacific II, another court heard evidence on the case and ruled in favor of the insurer on the merits. Pacific II, cited by Bituminous, specifically stated that its order was “only to decide this case and is not intended for official publication or to serve as precedent.” Pacific

Employers Ins. Co. v. Wausau Business Ins. Co., No. 3:05-cv-850-J-32TEM, 2007 U.S. Dist. LEXIS 73594 (M.D. Fla. filed Oct. 2, 2007), and Appendix to Respondents' Substitute Brief, Page A44. Thus, the official reported decision in Florida agrees with cases cited by Appellant which held that the co-employee exclusion in this case is ambiguous. To aid in its final decision on the merits, the Court indicated that parol evidence would be allowed: "because the Employer Exclusion Provision is ambiguous, the Court will consider parol evidence . . . during the trial." Pacific I, LEXIS 43201 at \*33. Allowing parol evidence was the only part of the Court's analysis that departed from Missouri's approach.

Missouri's interpretation rules compel finding coverage with undefined ambiguous terms; jurisdictions cited by Bituminous do not. It would violate well-established construction standards to add language (whether adopted from statutes or judicially) to Bituminous' policy.

Furthermore, Bituminous had alternatives to add clarity to its definition of "furnished" and "employee." To avoid any uncertainty in the meaning of its policies or definitions, Bituminous could alter the policy language or add endorsements. In the case at bar, Bituminous added various endorsements to Ste. Genevieve's policy. Some affected coverage for construction contractors (L.F. 88), some affected strictly Missouri policyholders (L.F. 91) and some added definitions in the policy (L.F. 88).

Bituminous went so far as to add an endorsement which precluded coverage for "bodily injury" to any "employee" of the insured. (L.F. 87). But this endorsement left unchanged the definition of "employee," thereby preserving coverage for injury to a

“temporary worker.” Bituminous had ample opportunity and ability to put unambiguous terms in its policy. It chose not to, and now asks this Court to rescue it from poor draftsmanship.

The curious undertone of Bituminous’ and Amicus’ arguments is that Bituminous would not expect that its coverage could be interpreted to provide insurance coverage for injuries among co-workers. The parties to this matter have cited numerous cases from multiple jurisdictions involving the debate on how to interpret this co-employee exclusion. Bituminous can hardly be surprised that many jurisdictions are finding that its policies extend co-employee coverage. Instead of rectifying its admitted problem by amending its policy language, it has chosen to take the risk that its policy will be judicially rewritten and interpreted to add language and expand exclusions that it refused to do itself. This Court should not oblige Bituminous’ request for the expanded interpretation it seeks. Rather, this Court should affirm the findings of the Southern and Eastern Districts and let Bituminous correct the inadequacies of its policy language.

Other courts have interpreted this very policy and criticized the drafting. In Bituminous Casualty Corp v. Ross, 413 F. Supp. 2d 740 (N.D. W.Va. 2006), the Court closely examined the Bituminous exclusionary clause at issue in this case. The Court concluded that both “furnished” and “short term workload conditions” were ambiguous. Id. at 745. Ross, As One, and the Eastern District all came to the same conclusion: The co-employee exclusion is poorly drafted and should be construed against Bituminous.

Despite its clear application to this case, Bituminous urges this Court to reject As One and Gavan below. Even if this Court rejected As One, the record demonstrates that

the Union furnished Gavan. As support for its argument that Gavan was not furnished by the Union, Bituminous claims that the Union agreement, “conspicuously fails to consider the question of hiring.” (Respondents’ Substitute Brief 15). In so stating, Bituminous completely disregards or misconstrues the agreement, which specifically states: “The employer recognizes and acknowledges that the Union is the exclusive representative of all its employees who are bricklayers . . . .” (L.F. 196). The agreement states that all workers hired by an employer must be members of the Union. (Section 3, L.F. 197). If Ste. Genevieve were to hire someone who is not a member of the Union, the Union could require the employer to terminate them. (Section 3, L.F. 197). The agreement dictates the pay scale. (L.F. 199). It provides that the Union will properly train bricklayers hired by Ste. Genevieve. (L.F. 203). The agreement dictates the hours of work, the holidays to be observed, and the manner in which grievances between workers and management will be resolved. (L.F. 207). It requires Ste. Genevieve to give a hiring preference to those living in the geographical area covered by the agreement. (L.F. 208). In short, it covers every aspect of the employment relationship, including hiring. Ste. Genevieve contractually obligated itself to hire only those bricklayers trained by the Union and represented by the Union. (L.F. 149, 155). With these facts, the Union clearly “furnished” bricklayers like Bryan Gavan to Ste. Genevieve and all other signatories to the contract.

Bituminous tries to avoid the obvious conclusion that the Union furnished Bryan Gavan by emphasizing that Bryan Gavan obtained his job by approaching Ste. Genevieve directly. This fact, according to Bituminous, negates the notion that Bryan Gavan was furnished by the Union. However, how Bryan Gavan secured his job is irrelevant. The

definition of “temporary worker” used by Bituminous is silent on the issue of how Bryan Gavan would have been hired. (L.F. 84). It only requires that Bryan Gavan be furnished to meet short term workload conditions. What is relevant is that unless Gavan was a member of the Union, Ste. Genevieve could not hire him. (L.F. 155). If they had, and Gavan was not a member of the Union, the Union could demand that Ste. Genevieve terminate him. It is probable that when Bryan Gavan sought work he had to prove he was a Union member. (L.F. 126).

Bituminous cites a definition of furnished from a Pennsylvania case, which defines furnished as “supplied, provided or equipped to another entity.” Nautilus Ins. Co. v. Gardner, No. 04-1858, 2005 U.S. Dist. LEXIS 4423, at \*21 (E.D. Pa. March 21, 2005). Certainly without the Union, Ste. Genevieve could not hire Bryan Gavan. (L.F. 155). When Ste. Genevieve hired him, they knew the Union was Bryan Gavan’s “exclusive representative.” (L.F. 196). They also knew that Bryan Gavan had been properly trained by the Union. (L.F. 155, 203). And, once Bryan Gavan was hired, Ste. Genevieve not only became contractually obligated to pay Bryan Gavan the contract rate for his services, but it was obligated to make direct payments to the Union for the welfare plan (L.F. 200), the pension plan (L.F. 200), vacation (L.F. 202), industry promotion (L.F. 202), and the apprentice program (L.F. 203). In short, the Union “supplied or provided” bricklayers to Ste. Genevieve, and in turn Ste. Genevieve made payments to the Union which benefited the Union, Bryan Gavan and Ste. Genevieve.

## SHORT-TERM WORKLOAD CONDITIONS

Bituminous claims that Bryan Gavan was not hired to meet short-term workload conditions, and emphasizes two points: (1) Bryan Gavan was hired for an indefinite period of time, and (2) Bryan Gavan worked for Ste. Genevieve for two years in the mid-1990s. Both arguments are without merit.

Bituminous claims that Bryan Gavan, when hired in January 2000, was hired for an indefinite period of time. Bituminous goes so far as to suggest that when he was hired, Gavan was hired “for an indefinite period which could last for years depending on the volume of work available.” (Respondents’ Substitute Brief 38). This statement ignores the undisputed evidence in the record. Bryan Gavan testified that when he was hired, he was told that the work was only expected to last two to three months. (L.F. 128). There was no assurance that more work was available. Certainly there was no offer of permanent employment. As it turned out, Ste. Genevieve’s prediction was true: In March work ran out and Bryan Gavan went to work for Hykamp Masonry. (L.F. 129, 192). Hykamp paid Bryan Gavan, but work there was also temporary. (L.F. 129). After three weeks, he was hired again by Ste. Genevieve. Several weeks after going to work for Ste. Genevieve, Gavan was injured. (L.F. 129, 192).

Bituminous argues that Gavan’s work for Ste. Genevieve in the mid-1990s, and the several months in early 2000 prove he was not temporary. In fact, those limited work assignments prove exactly the opposite: He was hired to meet short-term workload conditions. Bituminous ignores the fact that Gavan was working for Ste. Genevieve only a few weeks when he was hurt. (L.F. 129, 192). Bituminous glosses over the three week

period Bryan Gavan worked for Hykamp. (L.F. 129, 192). It ignores the fact that Ste. Genevieve did indeed run out of work in March, which required Plaintiff to find work elsewhere. Bituminous offers the explanation that Ste. Genevieve “loaned” Gavan out to Hykamp. (L.F. 305). Bituminous never explains the significance of its claim that Ste. Genevieve “loaned” Gavan to Hykamp. The statement does, however, conflict with Gavan’s affidavit and deposition testimony, which states that he worked directly for Hykamp for three weeks and was paid by Hykamp. (L.F. 129, 192). Either way, one fact is clear: Ste. Genevieve kept Gavan working between January of 2000 and March of 2000 because they were meeting short-term workload conditions. When Ste. Genevieve no longer needed the temporary help, they let Gavan go and he found additional temporary work with Hykamp. (L.F. 129, 192). The claim of Bituminous that Gavan could have worked “for years” for Ste. Genevieve is simply untrue. The increase in workload was just as Ste. Genevieve represented: temporary. (L.F. 128). When Gavan returned to Ste. Genevieve for more temporary work, he was injured. (L.F. 129, 192). When Gavan’s doctor cleared him for light duty work, Gavan went to Ste. Genevieve, but they would not provide him with work. (L.F. 193). Ste. Genevieve’s permanent workers did get light duty work. (L.F. 193). The record supports only one finding: Gavan was a temporary worker.

Decisions by other jurisdictions support this conclusion. In Ross, 413 F. Supp. 2d at 745, the Court found that the phrase “short-term workload condition” was ambiguous. Ambiguities are resolved in favor of coverage. Krombach v. Mayflower Insurance Company, 827 S.W.2d 208, 210 (Mo. banc 1992). In Batter-Up, Inc. v. Commercial

Union Ins. Co., 1997 U.S. Dist. LEXIS 13267 (N.D. Ill. Aug. 28, 1997), the court had to determine whether a waitress (suing for sexual harassment) met the definitions of “temporary worker” and “short term workload conditions.” The court held that since the claimant worked only two short periods of several months each, she could be classified as a “temporary worker.” Id. at \*14. As such, the Court found that the employee exclusion provision of the policy did not apply. Id. at \*15.

Despite the fact that Tim Uding of Ste. Genevieve clearly identifies Gavan as a temporary worker, Bituminous claims that since no one knew exactly when the job would end, the employment was indefinite, and therefore Gavan was not hired to meet short-term workload conditions. The flaw in this reasoning is that the definition of temporary worker is devoid of any mention of a temporal restriction. (L.F. 84).

The issue is whether Bryan Gavan was hired to meet short-term workload conditions. The Bituminous policy does not impose any time limit on how long a worker must work before he is no longer considered a temporary worker. Being a temporary worker and working indefinitely are not mutually exclusive. Anyone familiar with construction knows that selecting an exact date for completion of a project is impossible due to unforeseen delays. That does not equate, however, to a finding that a temporary worker on a project is permanent, no matter how long the project takes. Bryan Gavan was told he was hired only for a short term while the temporary increase of work persisted. (L.F. 128, 193).

Had Bituminous desired to impose a time limit on temporary workers, it could have written that into the policy. In fact, it had a good example of such language in the

Code of State Regulations cited in Respondents' Substitute Brief, and in the American Family policy from As One: "Temporary worker means a person furnished to you for a finite period of time to support or supplement your work force . . . ." (L.F. 308 and As One, 189 S.W.3d at 196). But here, Bituminous chose not to put a temporal limit on the definition of temporary worker. (L.F. 84). Furthermore, Bituminous cites no Missouri case law asserting that employment for an indefinite length cannot also be considered "short term." As such, its argument that Bryan Gavan may have been hired for an indefinite period fails. Bryan Gavan was hired to meet short-term workload conditions.

**II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT BECAUSE AN ISSUE OF MATERIAL FACT REMAINED IN THAT EVIDENCE PRESENTED BY DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE COMPANY DIRECTLY CONFLICTED WITH THE EVIDENCE PRESENTED BY BRYAN GAVAN ON WHETHER BRYAN GAVAN WAS A TEMPORARY WORKER**

**SHORT-TERM WORKLOAD CONDITIONS**

Bituminous argues that whether Gavan was a temporary worker is a question of law for the Court. Bituminous arrives at this conclusion by arguing that there is no dispute as to the material facts on this issue. However, to arrive at that conclusion, Bituminous makes the curious argument that this Court should disregard portions of the affidavit of Tim Uding that it filed, as well as disregarding affidavits filed by the Appellant.

Bituminous' argument is curious because it argued to the trial court that Tim Uding's affidavit supported their position that Gavan was not hired to meet short-term workload conditions. Now in its Substitute Brief, Bituminous admits that Uding's statements were a conclusion, and would not be evidentiary support for its position. (Respondents' Substitute Brief 54). In essence, Bituminous is stating that if the trial court actually considered the part of Tim Uding's affidavit that refuted Gavan's claim that he was hired to meet short-term workload conditions, then the trial court was in

error. The question that Bituminous fails to answer is this: If Uding's statement regarding whether Gavan was furnished to meet short-term workload conditions should be "disregarded," then why did Bituminous prepare, file and argue the efficacy of the affidavit to the trial court?

Bituminous is offering an argument to this Court that is absolutely contrary to its argument to the trial court. Bituminous is plainly admitting that the trial court's ruling would be unsupported if it relied upon Uding's sworn statement that Bryan Gavan was not hired to meet short-term workload conditions. The use of Tim Uding's affidavit by Bituminous in support of its Motion for Summary Judgment clearly violates Missouri Supreme Court Rule 74.04(e) which states in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Appellant believes that this alone is reason enough to remand the case with instructions to let a fact finder decide that issue.

However, Bituminous' plea to have this Court disregard select portions of all the affidavits still does not establish that there were no issues of material fact in dispute. There are many facts from which a fact finder could conclude that Gavan was a temporary worker. Facts which support Gavan as a temporary worker include the following: that most employment of bricklayers is considered temporary (L.F. 125, 195); that Ste. Genevieve has employees that are permanent, and it has employees who are temporary (L.F. 149); that when Gavan was hired in January of 2000, he was told that there may be work for "two or three months" (L.F. 128, 193); that in fact, two to three

months later, work ran out and Gavan was forced to find work with Hykamp (L.F. 192); that after working for Hykamp for three weeks, Ste. Genevieve had an increased workload and rehired Gavan; that several weeks into that job, Gavan was injured (L.F. 192); that after Gavan's injury, he was released to return to work on light duty, but Ste. Genevieve would not provide him with such work. (L.F. 193).

Although Bituminous requests this Court to disregard select statements in the affidavits, the factual statements included in the affidavits should be considered. Zerebco v. Lolo Brothers Livestock Market, 918 S.W.2d 931, 934 (Mo. App. W.D. 1996). The facts set out in Gavan's affidavit contradict those of the affidavit of Mr. Uding. (L.F. 305-306). Mr. Uding states that Gavan had steady employment as a bricklayer for Ste. Genevieve from January 19 through May 15. (L.F. 305). Gavan's testimony and affidavit state that Ste. Genevieve ran out of work for bricklayers in March of 2000 and that he worked for Hykamp for three weeks. (L.F. 129, 192). Uding states that Gavan was "loaned" to another contractor "for a short period in February." (L.F. 305). Mr. Gavan, however, indicated that he worked for Hykamp in March until April of 2000. (L.F. 192). Even without considering statements from the affidavits that Respondents take issue with, the affidavits raise questions of material fact regarding Mr. Gavan's employment with Ste. Genevieve.

If this Court disregards the portions of Uding's affidavit which state that Gavan was not hired to meet short-term workload conditions (as Bituminous urges), it is left with Uding's statement that had Plaintiff not been injured, he "could have" worked for Ste. Genevieve for several years or more. (L.F. 305, 306). This statement directly

conflicts with what Gavan was told in January of 2000. (L.F. 128, 193). It is inconsistent with what is known about Gavan's work with Ste. Genevieve: that work ran out for Gavan in March and he had to find work elsewhere. (L.F. 129, 192). It also conflicts with the fact that when Gavan was released by his doctors to return to work for light duty, Ste. Genevieve would not provide him with such work. (L.F. 193). These are not, as Bituminous claims, undisputed facts which refute Gavan's status as a temporary worker.

Appellant has no objection if this Court disregards Uding's affidavit. However, Gavan's affidavit and deposition testimony contain ample facts to establish his status as a temporary worker. Gavan's affidavit stating he was a temporary worker is competent evidence. Mo. Sup. Ct. R. 74.04(e). Gavan's affidavit is made on his personal knowledge, sets forth facts that are admissible evidence and demonstrates that he is competent to testify to the matters contained in his affidavit. His statement that he was a temporary worker as opposed to a permanent employee of Ste. Genevieve is only a conclusion of law if one assumes Gavan is stating he is a temporary worker as defined by the Bituminous policies' definition. As an experienced bricklayer, he certainly knew the difference between being a permanent employee and a temporary worker. He had prior experience with Ste. Genevieve. He knew that Ste. Genevieve had permanent employees. (L.F. 192). He knew when he approached the Ste. Genevieve construction site for work, that if he got work it would be short term. (L.F. 191-193). Ste. Genevieve offered him work that might last a few months, and it did. (L.F. 128, 192-193). But when work ran out, Gavan moved on to another company. (L.F. 129, 192). This would not have been necessary if he was hired as a permanent employee. Gavan returned to Ste. Genevieve

several weeks later, and was injured. (L.F. 129, 192). When Gavan's medical treatment ended, he was returned to light duty but Ste. Genevieve would not provide him with light duty. (L.F. 193). It was Gavan's observation that Ste. Genevieve allowed its permanent work force to work light duty. (L.F. 193).

Although Bituminous is critical of the affidavit of Don Brown, the affidavit sheds valuable light on bricklayers' work. (L.F. 194-195). The life of a construction worker, contrary to the view of Bituminous, can be filled with multiple short term assignments. While some workers have the good fortune to be hired permanently by a company, most bricklayers do not find permanent employment and they move from company to company over the course of their careers. (L.F. 125, 195). This is why the Union plays such a vital role. Because workers are rarely permanent, normal benefits of long term employment (health insurance, pensions, disability, etc.) are not provided directly by their employers. Having the Union train and supply bricklayers and provide benefits allows companies like Ste. Genevieve to hire bricklayers for short periods to meet increases in workload. The Union exists because most of its members are working in temporary assignments. The statements of Don Brown provide important and relevant information as to how the Union functions to provide qualified bricklayers, such as Bryan Gavan, to the employers and how the Union fulfills its obligation to furnish qualified temporary help when it is needed.

#### FURNISHED TO

As Appellant has stated earlier in this brief, he does not believe that there is an issue of fact to be resolved with whether or not he was furnished to Ste. Genevieve. The

As One decision settles this question as a matter of law. As One holds that when Bryan Gavan approached Tim Uding for work on a job site, and was hired, he furnished himself to the job site, which satisfies the definition of temporary worker. As One, 189 S.W.3d at 198.

If this Court decides that it will not adopt the As One holding, there is more than ample evidence that Bryan Gavan was furnished to Ste. Genevieve by the Union. Appellant has set forth extensive argument on this point earlier in the Substitute Brief of Appellant and in this Substitute Reply Brief. Those points will not be re-argued here. Suffice it to say that Appellant believes that if this Court were not convinced that Bryan Gavan was “furnished” by the Union as a matter of law, there are certainly questions of material fact to submit to a fact finder to determine whether or not Bryan Gavan was furnished to Ste. Genevieve. If this Court does determine that there is a question of fact on this issue, this matter should be remanded with instructions to submit these issues to a fact finder.

As its final argument, Bituminous claims that if Gavan is a temporary worker, then both Gotsch and Brace are temporary workers, and excluded from coverage. This argument was not made to the trial court, because Bituminous admitted that Gotsch and Brace were employees. Respondents are precluded from this argument because “[a] party is bound by their pleadings.” J.H. Berra Paving Co. v. Eureka, 50 S.W.3d 358, 362 (Mo. App. E.D. 2001) (citing Construction Materials Co. v. Grund, 192 S.W.2d 45 (Mo. App. 1946)). “[A]llegations in a petition, admitted in an answer, are judicial admissions . . . .” Id. (quoting Piel v. Piel, 918 S.W.2d 373, 375 (Mo. App. E.D. 1996)). Here,

Bituminous is bound by their Answers to Plaintiff's First Amended Petition in which they admit that Brace and Gotsch are employees. (L.F. 32, 37). Bituminous has stated throughout the entirety of this action, up until this point, that Brace and Gotsch are employees under the Bituminous policies. (L.F. 97-100, 101-104, 159, 163, 167, 172-173). Thus, this argument has no merit.

#### APPELLANT'S RESPONSE TO AMICUS

The American Insurance Association (hereinafter "AIA") argues in their Amicus Brief that the Court of Appeals for the Eastern District's construction of "temporary worker" in this case creates uncertainty for insurers and threatens to further unsettle expectations of insurers. However, as the cases cited by Appellant indicate, the Eastern District is neither the first nor the only court to find either that the temporary worker definition is ambiguous or that the term "furnished" does not require a third party. In fact, it is not even the only Missouri court to find such. See As One, 189 S.W.3d 194. As such, AIA's argument for consistency and predictability in Missouri supports the position of Appellant that this Court should follow the Southern District's interpretation of "temporary employee" in As One and the Eastern District's decision below. Contrary to AIA's belief, a finding by this Court that "furnished to" does not require a third party would be in accord with both the decision in Tickle and As One.

AIA argues that there will be ramifications to the insurance industry should this Court find that Bituminous' policies cover the injuries to Mr. Gavan. Respondents have made a choice to continue to use the same policy language throughout the country even though such language has been subject to very different interpretations. In this case,

Bituminous chose not to amend or change their policy language to avoid such confusion and not to bring a declaratory judgment action to determine their obligations under their policies issued to Ste. Genevieve. As such, the ramifications to the insurance industry are the result of a failure on the part of insurance companies, such as Bituminous, to provide clear and concise language that may be uniformly interpreted. It is not the courts that should adapt to the insurance industry, but rather the insurance industry that should amend policy language to avoid conflicting interpretations of the same language.

AIA argues that the Eastern District failed to apply the plain and ordinary meaning to the phrase “a person who is furnished to you.” To determine the ordinary meaning, this Court has consulted standard English language dictionaries. Farmland Industries Inc. v. Republic Ins., 941 S.W.2d 505, 508 (Mo. 1997). In interpreting the term “temporary worker” in insurance policies, both the Eastern District in this case and the Southern District in As One cited the definition of the term “furnished” as provided by a standard English dictionary (Webster’s Third New International Dictionary 923 (1986)). Gavan, No. ED88258 at \*8, As One, 189 S.W.3d at 198. In each of these instances, the courts found that the definition of furnished, “to provide or supply with what is needed, useful, or desirable” did not include a third party. Bituminous and AIA desire this Court to include or interject the requirement that a third party or entity provide or supply the worker. Doing such would not be in accord the principles of contract interpretation established by this Court.

## CONCLUSION

The Circuit Court of the County of St. Louis erred in granting Defendants' Motion for Summary Judgment and denying Plaintiff Bryan Gavan's Cross-Motion for Summary Judgment. The evidence establishes that the Circuit Court, in Gavan's action against Brace and Gotsch, had subject matter jurisdiction and entered a valid judgment in favor of Bryan Gavan as to all issues of liability. Further, the evidence presented to the Circuit Court in this action establishes that Gavan was a "temporary worker" as defined by the policies issued by Bituminous, and not subject to the co-employee exclusion as Bituminous argued. Gavan was "furnished" as this term has been interpreted in As One, Tickle, and the Eastern District's opinion in this case. The facts illustrate that Bryan Gavan was hired by Ste. Genevieve to meet "short-term workload conditions." The Bituminous policies therefore cover Brace and Gotsch for the judgments entered against them for the injuries caused to Bryan Gavan. As such, this Court should reverse the Circuit Court's grant of summary judgment for Defendants and grant Plaintiff's summary judgment. In the alternative, this Court should follow the opinion of the Eastern District Court of Appeals below and reverse the Circuit Court's grant of summary judgment and remand the case because a genuine issue of material fact remains as to whether Bryan Gavan is a "temporary worker."

IN THE SUPREME COURT OF MISSOURI

BRYAN GAVAN, )  
 )  
 Plaintiff/Appellant, )  
 ) No.: SC88764  
 vs. )  
 )  
 BITUMINOUS CASUALTY )  
 CORPORATION, et al., )  
 )  
 Defendants/Respondents. )

**CERTIFICATE OF COMPLIANCE**

COME NOW counsel for Plaintiff/Appellant, and for their certificate of compliance, state as follows:

1. The undersigned do hereby certify that the Substitute Reply Brief of Appellant herein complies with the page limits of Rule 84.06(b) and contains 7,067 words of proportional type.
2. Microsoft Word was used to prepare the Substitute Reply Brief of Appellant.
3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the Substitute Reply Brief of Appellant and one copy of the accompanying disk were mailed this 19<sup>th</sup> day of November, 2007, to: Joseph L. Leritz, Attorney for Defendants Bituminous, One City Centre, Suite 2001, St. Louis, MO 63101.

\_\_\_\_\_  
Anna E. Spink

Subscribed and sworn to before me this 19<sup>th</sup> day of November, 2007.

\_\_\_\_\_  
Notary Public

My Commission Expires:

## APPENDIX

### Item

### Page

Pacific Employers Mutual Ins. Co. v. Wausau Business Ins. Co.,

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et al., No. 3:05-cv-850-J-16TEM, 2007 U.S. Dist.

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