Supreme Court Case No. SC87418

IN THE SUPREME COURT OF MISSOURI

ALBERT J. STONE and TAMMY STONE, in Their Capacity as Assignees of Arlene M. Bateman

Appellants/Cross-Respondents,

vs.

FARM BUREAU TOWN & COUNTRY INSURANCE COMPANY

Respondent/Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
31ST JUDICIAL CIRCUIT
The Honorable J. Miles Sweeney

APPELLANT'S-RESPONDENT'S SUBSTITUTE BRIEF

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ORAL ARGUMENT REQUESTED

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BRIEF OF CROSS-APPELLANT

JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement set forth in the Stones' brief.

STATEMENT OF FACTS

A. Procedural History

This case involves an appeal by respondent Farm Bureau Town & Country Insurance Company of Missouri ("Farm Bureau") from a summary judgment entered against it for $1,004,295 and a cross appeal by plaintiffs Albert and Tammy Stone regarding dismissal of the remaining counts of their petition in the same summary judgment. The underlying issue involves the failure of Farm Bureau's alleged insured, Arlene Bateman, to pay premiums resulting in cancellation of her auto policy 75 days before the motor vehicle accident in question. The trial court held the failure to pay premiums did not result in cancellation. The Missouri Court of Appeals, Southern District, reversed the judgment of the trial court and held that the auto policy had been canceled before the accident. This court accepted transfer on February 28, 2006. Because there is an appeal and cross appeal, the plaintiffs are the appellants here. Rule 84.04(j).

B. The accident

The automobile accident underlying this appeal occurred on December 23, 2002, and involved Arlene Bateman and Albert and Zella Stone. At the time of the accident, Arlene Bateman was driving a 1995 GMC Jimmy that had previously been insured by Farm Bureau, which policy is the subject of dispute here. Mr. Stone suffered injuries in the accident and his wife was killed. Mrs. Stone was survived by her husband and

daughter, Tammy Stone. Albert Stone and Tammy Stone ("the Stones") are the appellants in this action and have brought their claims against Farm Bureau as the purported assignees of Arlene Bateman.

C. <u>Farm Bureau's policy and premium notices</u>

Farm Bureau policy APV0270977 was issued to Arlene Bateman and her husband on August 2, 2002, contained a stated expiration date of February 2, 2003, with the premiums to be paid monthly. (LF 201-241) In fact, this policy was a reissue of a prior policy which had also been canceled for non-payment of premium. Farm Bureau's policy contained the following termination provisions that were applicable when an insured failed to make a timely premium payment:

TERMINATION

Cancellation

This policy may be canceled during the policy period as follows:
. . .

2. We may cancel by mailing to the named insured shown on the Declaration Page at the address last known by **us**:

a. At least ten (10) days notice:

(1) If cancellation is for nonpayment of premium **. . .**

Other Termination Provisions

1. Proof of mailing of any notice will be sufficient proof of notice.
. . .

3). The effective date of cancellation stated in the notice will become the end of the policy period. (LF 217)

Before the accident, Farm Bureau sent the Batemans three notices on the policy that related to payment of premium. The first notice (LF 153-154), sent on August 26, 2002, provided notice of payment due. (All notices are contained in the appendix) The August 26, 2002, notice required that premium of $58.05 be paid by the Payment Due Date of September 10, 2002. The August 26, 2002 notice also stated that "No insurance is provided [i]f premium is not received by the Payment Due Date." (LF 154) The Batemans never made the payment before either the "Payment Due Date" or the accident. (LF 83,86)

The second notice (LF 155), sent on September 20, 2002, provided further notice to the Batemans. The September 20, 2002, notice indicated that the premium of $58.05, due September 10, 2002, was past due and had still not been received and that if this amount was not received by October 9, 2002, the policy would be canceled. (LF 155) The notice listed the name and telephone number of the Bateman's Farm Bureau agent and indicated the agent would be glad to assist them or discuss any questions about the notice. The Batemans did not make any premium payment in response to the September 20, 2002, notice. (LF 83, 86)

The third and final notice (LF 157), sent on October 10, 2002, again advised the Batemans regarding their insurance.

The notice of October 10, 2002, indicated that the Batemans' policy had been canceled effective October 9, 2002, due to non-payment of premium.[1] Once again, the notice provided the name and phone number of Farm Bureau's agent and indicated the agent would be glad to assist them or answer any questions about the notice. (LF 157) Farm Bureau never received any premium payments from the Batemans during the 74 day period between October 10, 2002, and December 23, 2002, the day of the accident. (LF 83, 86, 87) There is no evidence in the record that Arlene Bateman attempted to obtain replacement coverage from a different insurance company after her coverage with Farm Bureau terminated on October 9, 2002. In addition, between October 9, 2002, and the time of the accident, there is no evidence that Arlene Bateman: (1) made payment to Farm Bureau; (2) attempted to make payment to Farm Bureau; or (3) contacted Farm Bureau or her agent to inquire about her policy or to complain about Farm Bureau's cancellation of her policy.

D. <u>Proof of mailing</u>

Farm Bureau's billing invoices and notices were produced from its computer system and were printed in Farm Bureau's computer area. These invoices and notices are

[1] Farm Bureau policy APV0270977 was not the only policy the Batemans had that was canceled for non-payment of premium. Before the accident, the Batemans had other policies with Farm Bureau that had been canceled on many occasions for non-payment of premium. See LF 78, 79 and 80 and see the opinion of the Southern District in this case for a summary of those events.

printed in batches, with each batch being checked and verified by both the computer operator and a technician who both verify the beginning and ending numbers for each batch. After this is complete, the invoices and notices are bundled and picked up by Triple A, a commercial mailing service in Jefferson City, Missouri. Triple A inserts the invoices and notices into envelopes and delivers this correspondence, no later than the next day, to the post office for mailing. (LF 83, 84). Farm Bureau's notices sent on August 26, 2002, September 10, 2002, and October 10, 2002, were mailed to Arlene Bateman in accordance with these procedures. (LF 84)

E. The Stones' suits against Arlene Bateman

On July 10, 2003, two different suits were filed by the Stones against Arlene Bateman in the Circuit Court of Greene County for claims arising out of the accident of December 23, 2002. The first suit was filed by Albert Stone for the personal injuries he suffered. The second suit was filed by Mr. Stone and his daughter for the wrongful death of Zella Stone. (LF 10) In a letter dated September 15, 2003, Arlene Bateman's personal attorney, Eric Hudson, advised Farm Bureau that Ms. Bateman had been "served with lawsuit papers." (LF 28) In addition, Mr. Hudson stated that Ms. Bateman "is hereby requesting and demanding that you defend her in this lawsuit" and that she "further demands that you pay this claim or settle this claim for the policy limits." (LF 28) Farm Bureau did not retain counsel to defend Arlene Bateman on either suit. (LF 11)

F. The Section 537.065 Agreement

On December 29, 2003, the Stones' attorney went to the home of Arlene Bateman to discuss the possibility of the parties entering into an agreement under 537.065,

R.S.Mo. whereby Arlene Bateman would have no personal exposure in connection with the suits by the Stones. (LF 162) An agreement was executed at the conclusion of the meeting (see LF 186-188) and its stated purpose was to "limit collection activity on any judgments which might be obtained." The agreement provided, in part:

> . . .
>
> Albert J. Stone and Tammy L. Stone agree that in the event that judgment is obtained in either of the two suits, or both of them, against Arlene Bateman, and damages assessed against her, that the full amount of damages which may be assessed in either one or both of said suits shall be collected SOLELY from assets, causes or chooses in action available to Arlene Bateman, specified as follows:
>
> (a) All claims and causes of action available to Arlene Bateman against Farm Bureau arising out of or relating to breach of contract, breach of fiduciary duty, bad faith and insurance coverage proceeds, and any and all other actual, compensatory or punitive damages which may otherwise be available, and whether said claims sound in contract, or in tort, and arising by reason of wrongful failure and/or refusal on the part of Farm Bureau, or its corporate affiliates, agents, servants or employees, to defend Arlene Bateman in each of the aforementioned suits, and/or failure to fulfill agreement to indemnify her, provide costs of defense, and breach of any and all contractual obligations relating to the same.
>
> (b) **All other assets, not specified in the immediately preceding sub-paragraph (a), whether real or personal property and whether owned**

jointly or joint and severally by Arlene Bateman and Gary Bateman, their heirs, successors or assigns, shall be and remain exempt from any and all collection process.

. . .

The parties hereto acknowledge that **this Agreement is for the purpose of limiting collection activity on any judgments which might be obtained**, and does not constitute a release of liability. (emphasis added)

G. The "trials" and judgments against Arlene Bateman

On January 6, 2004, judgments in the amount of $538,000 and $368,000 were entered against Arlene Bateman after uncontested hearings were conducted before the court. (LF 32, 33, 34 and 35) Arlene Bateman had no personal exposure to either of these judgments as they were both the subject of the § 537.065, R.S.Mo. agreement entered into between the Stones and Arlene Bateman prior to the trials and entry of judgments.

H. The "Assignment"

On January 6, 2004, Arlene Bateman executed an "Assignment" (LF 36-39) in favor of the Stones wherein she attempted to assign to them all of her claims and causes of action against Farm Bureau. The purported "Assignment" provides the following language regarding consideration:

In consideration of the commitment heretofore made by Albert J. Stone and Tammy L. Stone to limit collection efforts on the aforementioned judgments, Arlene M. Bateman hereby assigns to Albert J. Stone and Tammy L. Stone, jointly

and severally, all rights and interests which she may have to assert any and all claims available to her against Farm Bureau Insurance, or its corporate affiliates, however denominated, and whether named as Farm Bureau Insurance...(emphasis added)

I. The Stones' suit against Farm Bureau

On March 30, 2004, the Stones filed suit against Farm Bureau. The Stones' Amended Petition (LF 8) was filed on July 6, 2004 and contained the following claims:

Count I: Breach of contract

Count II: Breach of fiduciary duty to defend

Count III: Breach of fiduciary duty to settle

Count IV: Claim of bad faith in failure to defend

Count V: Claim for bad faith in failure and refusal to settle

Count VI: Punitive damages

J. The Stones' motion for partial summary judgment and Farm Bureau's motion for summary judgment

On September 24, 2004, the Stones' filed a motion denominated as "Plaintiffs' Motion for Partial Summary Judgment." (LF 58) In this motion, the Stones requested that the court enter partial summary judgment on Count I of their Amended Petition for breach of contract. (LF 58-73) In their motion for partial summary judgment, the Stones sought "[d]amages sustained as a result of the breach of the insurance contract by defendant Farm Bureau in an amount equal to the total principal amount of the two

judgments previously entered by the court against Arlene Bateman, together with interest thereon as allowed by law." (LF 59) The Stones did not seek to obtain judgment on any of the other counts in their Amended Petition in this motion. All of the other counts sought the same relief except for Count VI, which asserted a claim for punitive damages. On January 1, 2005, Farm Bureau filed its motion for summary judgment, or in the alternative, motion for partial summary judgment, seeking, inter alia, judgment that the policy had been canceled before the accident and that plaintiffs take nothing. (LF 271-463)

K. <u>The trial court's Judgment and notices of appeal</u>

On March 22, 2005, the trial court sustained the Stones' motion for partial summary judgment which sought judgment on a contract theory only and entered judgment against Farm Bureau in the amount of $1,004,295, which was the amount requested by the Stones in their motion. (LF 495-497) This amount, as calculated by the trial court, represents the sum of the two judgments along with accrued interest. (LF 496) The trial court dismissed Counts II, III, IVand V as moot and entered summary judgment against the Stones on Count VI of the Amended Petition. (LF 495-497) Thus, all claims in the Stones' Amended Petition were disposed of. On April 29, 2005, Farm Bureau filed its notice of appeal. Farm Bureau is appealing from the trial court's entry of final Judgment on Count I of the Stones' Amended Petition. On May 4, 2005, the Stones filed their notice of appeal. The Stones are appealing the trial court's dismissal of Counts II, III, IV, V and VI of their Amended Petition.

Under Supreme Court Rule 84.04, because the Stones were the plaintiffs in the case below and have filed a cross appeal, they are deemed the "appellants" and Farm Bureau is deemed the "respondent" in this appeal. As Farm Bureau's brief, in accordance with 84.04, is to contain the issues and arguments involved in its appeal and the response to the brief of the appellants, Farm Bureau's brief is organized in the following manner:

Farm Bureau's appeal from the trial court's entry of summary judgment: Pages 18-52.

Farm Bureau's response to the Stones' cross-appeal: Pages 57-83.

FARM BUREAU'S APPEAL

POINTS RELIED ON

POINT I

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because, as a matter of law, Farm Bureau's policy did not provide coverage for the accident that occurred on December 23, 2002, in that: (A) Farm Bureau's policy was canceled effective October 9, 2002, for non-payment of premium as a result of the Batemans' failure to make the premium payments required by the notices dated August 26, 2002, and September 20, 2002, as the notice of September 20, 2002 complied with the contractual requirements of Farm Bureau's policy because it gave the Batemans 19 days notice (the policy only required 10 days notice) that their policy would be canceled for non-payment of premium if premium payment was not received before October 9, 2002; and (B) even if this Court interprets Farm Bureau's policy to require Farm Bureau to give the Batemans an additional 10 days notice of cancellation after failure to pay, Farm Bureau's policy would still not provide coverage to Arlene Bateman as the effective date of cancellation would be deemed to be extended to October 20, 2002, which was still prior to the accident.

CASES

Transit Casualty Co. In Receivership v. Certain Underwriters at Lloyd's of London, 963 S.W.2d 392, 396 (Mo. App. 1998)

Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156, 157 (Mo. banc 1977)

Eagle Star Ins. Co. of America v. Family Fun, Inc., 767 S.W.2d 623, 624 (Mo. App. 1989)

Blair v. Perry County Mut. Ins. Co., 118 S.W.3d 605 (Mo. banc 2003)

POINT II

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I in the amount of $1,004,295 because even if: (1) Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002 (which it does not); and (2) the Stones have standing to maintain this action against Farm Bureau (which they do not), the judgment against Farm Bureau cannot exceed $250,000 in that Farm Bureau's policy limit for liability coverage was $250,000 and Farm Bureau cannot be liable for more that its policy limit where the only claim is for breach of contract.

CASES

Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950)

Landie v. Century Indemnity Co., 390 S.W.2d 558 (Mo. App. 1965)

Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 557 (Mo. App. 1990)

POINT III

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because the Stones have no standing to assert a claim for breach of contract unless they are assignees of Arlene Bateman, which they are not, in that:
(A) the Stones' motion for partial summary judgment did not contain any evidence or proof of the purported "Assignment"; and (B) even if this Court overlooks the Stones' failure of proof on the assignment issue, the purported "Assignment" is void and unenforceable because it lacks consideration.

CASES

City of Bellefontaine Neighbors v. J.J. Kelley Realty and Building Co., 460 S.W.2d 298, 301 (Mo. App. 1970)

Wise v. Crump, 978 S.W.2d 1, 3 (Mo. App. 1998)

Sperry v. ITT Commercial Finance Corp., 799 S.W.2d 871, 877 (Mo. App. 1990)

ARGUMENT

POINT I

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because, as a matter of law, Farm Bureau's policy did not provide coverage for the accident that occurred on December 23, 2002, in that: (A) Farm Bureau's policy was canceled effective October 9, 2002, for non-payment of premium as a result of the Batemans' failure to make the premium payments required by the notices dated August 26, 2002, and September 20, 2002, as the notice of September 20, 2002 complied with the contractual requirements of Farm Bureau's policy because it gave the Batemans 19 days notice (the policy only required 10 days notice) that their policy would be canceled for non-payment of premium if premium payment was not received before October 9, 2002; and (B) even if this Court interprets Farm Bureau's policy to require Farm Bureau to give the Batemans an additional 10 days notice of cancellation after failure to pay, Farm Bureau's policy would still not provide coverage to Arlene Bateman as the effective date of cancellation would be deemed to be extended to October 20, 2002, which was still prior to the accident.

Standard of review

As Farm Bureau is appealing from the trial court's entry of summary judgment, this Court's review is de novo. In re Estate of Blodgett v. Mitchell, 95 S.W.3d 79, 81 (Mo. 2003) (quoting ITT Commercial Fin. v. Mid-Am. Marine Supply Corp., 854 S.W.2d

371, 376 (Mo. 1993)). This Court must review the record in the light most favorable to Farm Bureau and grant Farm Bureau the benefit of all reasonable inferences from the record. Id. Moreover, because they were the summary judgment movants, the Stones have the burden of showing "that there [was] no dispute of material fact and that [they were] entitled to judgment as a matter of law." Betts-Lucas v. Hartmann, 87 S.W.3d 310, 315 (Mo. App. 2002). Applying these standards, the trial court's ruling sustaining the Stones' motion for partial summary judgment and entering final judgment against Farm Bureau in the amount of $1,004,295 must be reversed.

Analysis

The effect of the ruling by the trial court is to require Farm Bureau to (1) pay under a policy which its insured never made even one premium payment in response to the subject notices to do so; (2) pay under a policy when its insureds received three notices of cancellation, all of which were totally ignored; (3) extend the term of a policy for 74 days after notice of cancellation; and (4) require it to pay over four times its policy limits. The ruling is contrary to established Missouri law in all respects and must be reversed.

Contract law controls cancellation of insurance policies

The law is well settled that insurance is a matter of contract and governed by the rules applicable to contracts. Transit Casualty Co. In Receivership v. Certain Underwriters at Lloyd's of London, 963 S.W.2d 392, 396 (Mo. App. 1998). Contractual interpretation is a question of law. Grand Investment Corp. v. Connaughton, Boyd & Kenter, P.C., 119 S.W.3d 101, 114 (Mo. App. 2003). The function of this Court is to

interpret and enforce an insurance contract as written, not to rewrite the contract. Eagle Star Ins. Co. of America v. Family Fun, Inc., 767 S.W.2d 623, 624 (Mo. App. 1989). This Court cannot construe a policy of insurance to afford coverage where it does not exist. Id. The law does not prevent the parties from contractually setting the terms or procedure whereby cancellation will occur, so long as the contractual provisions do not violate applicable statutes.[2] Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156, 157 (Mo. banc 1977).

The policy was canceled effective October 9, 2002

Below are the applicable contractual provisions in Farm Bureau's policy that relate to cancellation for non-payment of premium.

TERMINATION

Cancellation

This policy may be canceled during the policy period as follows:
. . .

2. We may cancel by mailing to the named insured shown on the Declaration Page at the address last known by **us**:

a. At least ten (10) days notice:

(1) If cancellation is for nonpayment of premium . . .

Other Termination Provisions

1. Proof of mailing of any notice will be sufficient proof of notice.
. . .

[2] Farm Bureau has not violated any statutes, nor have the Stones made this allegation.

3). The effective date of cancellation stated in the notice will become the end of the policy period. (LF 217)

As set forth above, in order to cancel its policy for non-payment of premium, Farm Bureau was required to tell the insured that the policy would terminate at least 10 days before the termination date. It did so here. Farm Bureau sent to the Batemans notices on August 26, 2002, September 20, 2002 and October 10, 2002. The first notice (LF 153, 154) required a premium of $58.05 be paid by the "Payment Due Date" of September 10, 2002. This notice clearly stated that "No insurance is provided [i]f premium is not received by the Payment Due Date" of September 10, 2002. (LF 154) In this regard, the Batemans were given 15 days notice that if premium was not received by September 10, 2002, they would not have insurance. No payment was received by Farm Bureau by September 10, 2002 or thereafter. (LF 83-87)

Thereafter, a second notice was sent to the Batemans. (LF 155) The notice of September 20, 2002, stated that the premium of $58.05, due September 10, 2002, was still past due and had not been received and gratuitously extended the due date. It stated that if this amount was not received by October 9, 2002, the policy would be canceled. Although the termination provisions in Farm Bureau's policy only required 10 days notice be given if the cancellation was for non-payment of premium, the September 20, 2002 notice gave the Batemans an additional 19 days notice (a total of 34 days notice) that their policy would be canceled unless the past due premium payment was made before October 9, 2002. Farm Bureau not only complied with the contractual requirements of its policy by providing 10 days notice, it gave the Batemans an additional

24 days notice. It is undisputed that the Batemans failed to make any payment in response to the September 20, 2002, notice. (LF 83-87) Thus, by September 20, 2002, the Batemans:

- Had received a notice telling them to pay $58.05 within 15 days and that no insurance would be provided if they did not pay by the due date (first notice)
- Made no payment in response to the first notice
- Received another notice telling them that they had not made the payment which was now past due (second notice) and which gratuitously extended the date to pay
- Made no payment in response to the second notice
- Had been advised to contact their agent with questions about the notices
- Had no communication with anyone about paying for their insurance, the contents of the notices or obtaining replacement coverage
- Had an additional 19 days to pay after failure to pay in response to the first notice.

After the Bateman's had ignored two notices, Farm Bureau sent a third notice advising that the policy had, in fact, been canceled on October 9, 2002.

Farm Bureau likewise never received any premium payments from the Batemans during the 74 day period between October 10, 2002 (the date of the third cancellation notice indicating the policy had canceled on October 9, 2002) and December 23, 2002

(the day of the accident). (LF83-87) The Batemans have admitted that they knew payments were due on a monthly basis and that the availability of their coverage was conditioned on timely payment. (LF 185, 194) Farm Bureau's policy does not provide coverage to Arlene Bateman for the accident of December 23, 2002, and the trial court's entry of summary judgment must be reversed. Simply put, Farm Bureau told the Batemans how much they owed and when they owed it. The Batemans did not pay. Farm Bureau then told the Batemans they had not paid, extended the time to pay and told them when the policy would terminate if they did not respond by payment. The Batemans still did not pay and the policy was terminated in accordance with the contractual requirements and the notices sent.

The Stones claim that Blair v. Perry County Mut. Ins. Co., 118 S.W.3d 605 (Mo. banc 2003) is controlling on the coverage issue. Although Blair does involve cancellation for non-payment, the policy provisions addressed by that court are far different than those contained in Farm Bureau's policy for two reasons: (1) Farm Bureau's policy does **not** require that the notice of cancellation be given "[n]ot less than 10 days before the cancellation is to take effect" as did the Perry County policy; and (2) Farm Bureau's policy provides: "The effective date of cancellation stated in the notice **will become the end of the policy period,**" which was not contained in the policy in Blair. Below is a comparison of the two policies.

Policy provisions in Farm Bureau's policy	**Policy provisions in <u>Blair</u>**
TERMINATION Cancellation This policy may be canceled during the policy period as follows: **. . .** 2. We may cancel by mailing to the named insured shown on the Declaration Page at the address last known by **us**: a. At least ten (10) days notice<u>:</u> (1) If cancellation is for nonpayment of premium **. . .** Other Termination Provisions 1. Proof of mailing of any notice will be sufficient proof of notice.	We may cancel this policy or any of its parts by mailing or delivering to the named insured a written notice before the cancellation is to take effect. The notice must be given: **<u>Not less than 10 days before the cancellation is to take effect</u>** when the cancellation is based upon one or more of the following reasons: a. Nonpayment of premium. (emphasis added)

. . . 3**)** . **The effective date of cancellation stated in the notice will become the end of the policy period.** (emphasis added)	

Unlike the policy in Blair, Farm Bureau's policy does **not** require that the notice of cancellation be given "[n]ot less than 10 days before the cancellation is to take effect." Because Farm Bureau's policy merely required 10 days notice of cancellations based on non-payment, it clearly complied with this requirement when it sent the Batemans the notices on August 26, 2002 and September 20, 2002. Additionally, Farm Bureau's policy does **not** require non-payment to occur before notice is sent setting a date for cancellation. The notice sent on August 26, 2002, allowed the Batemans **15 days** to make the premium payment of $58.05 by September 10, 2002. They did not pay. They then received another notice telling them cancellation would occur 19 days in the future due to their past failure to pay. Farm Bureau complied with the 10 day notice requirement in its policy and even provided the Batemans with 24 additional days notice. In the case at bar, the holding of Blair only applies to confirm that the coverage issues are contractual issues. Farm Bureau's policy provisions are not in conflict with any statutes or public policy. There is no public policy mandating "free insurance" for those who do not pay for it. As such, Arlene Bateman is bound by the terms of the termination

provisions in the Farm Bureau policy and there is no coverage available to her for the accident of December 23, 2002.

Even under the most liberal interpretation of the policy, coverage terminated on October 20, 2002

In their motion for partial summary judgment, the Stones' claimed that because of its *alleged* ineffective cancellation, Farm Bureau's policy provided coverage up until February 2, 2003, the ending date of the Batemans' policy term. This conclusion, however, is not supported by the applicable case law or the undisputed facts. In Blair, the insurer's policy was for a one-year term, beginning April 3, 1998 and ending on April 3, 1999. Notwithstanding this one-year policy period, the Missouri Supreme Court noted that the policy **only** provided coverage up to October 24, 1998, (10 days following the date of the ineffective cancellation) and never hinted or suggested that coverage could be extended to the end of the policy term. Id at 607. The Stones' claim that Farm Bureau's policy requires "free insurance" coverage for months after its insureds' failure to pay is contrary to the holding of Blair.

Although Blair involved different cancellation provisions, even if this Court interprets Farm Bureau's policy to require Farm Bureau to give the Batemans 10 days notice from October 10, 2002 (the date of Farm Bureau's third cancellation notice), the policy still would not provide coverage to Arlene Bateman as the effective date of cancellation would be deemed to be extended to October 20, 2002, thus giving Arlene Bateman yet another 10 days notice. After careful review of Blair, this result is obvious and unavoidable.

Chronology of Relevant Events in Blair v. Perry County Mut. Ins.

Date	Event
4-3-98 to 4-3-99	Insurer's one-year policy period
9-14-98	Carrier sent a "NOTICE OF PAYMENT DUE" advising that "POLICY VOID IF NOT PAID BY DUE DATE."
10-3-98	Insured's quarterly payment due.
10-14-98	Carrier sent another "NOTICE OF PAYMENT DUE" which indicated that "coverage on this policy has lapsed for non-payment."
10-21-98	October 21, 1998: Claimant injured
10-24-98	HELD: The earliest date insurer's policy could have been canceled (10 days from 10-14-02). Id at 607

In Blair, on October 14, 1998, the insurer sent a "NOTICE OF PAYMENT DUE" indicating that the policy had lapsed for non-payment of premium. Blair held that the **earliest** date for cancellation of the insurer's policy was October 24, 1998, **10 days after the date of the insurer's ineffective notice of cancellation**. Id. at 607. Unfortunately for the insurer, the claimant in Blair was injured 3 days before the policy was deemed canceled. Following the analysis used by Blair, had the accident in Blair occurred on October 24, 1998, or thereafter, the carrier's policy would not have provided coverage.

In this appeal, Farm Bureau sent a third notice, dated October 10, 2002, to the Batemans advising them that their policy was canceled effective October 9, 2002 because the Batemans had not paid in response to two prior notices sent more than 10 days prior.

Without dispute, this notice was sent out after the Batemans had failed to pay the premium by October 9, 2002. Under any interpretation of the law, and even ignoring the earlier notices, the latest date Farm Bureau's policy would provide coverage would be 10 days from October 10th or October 20, 2002. The accident involving the Stones and

Arlene Bateman occurred **64 days** after October 20, 2002. Thus, this notice clearly complies with even the most liberal interpretation of the policy and the law on cancellations.

The logic of extending the cancellation date of Farm Bureau's policy to October 20, 2002, not only follows the holding of Blair,[3] it also follows the rule adopted by the overwhelming majority of jurisdictions in the United States. See *Effect of Attempt to Terminate Insurance or Fidelity Contract upon Notice Allowing a Shorter Period than that Stipulated in Contract*, 96 A.L.R.2d 286, Section 3 (1964) and the cases cited therein. The majority view, as set forth in this A.L.R. article, is as follows:

> While a contrary view obtains in some jurisdictions, most courts are agreed that a notice, otherwise sufficient in form and content, which purports to cancel an insurance or fidelity contract at a time earlier than that permitted under the

[3] "By the terms of the policy, October 24 is the earliest date that cancellation can take effect." Blair at 607.

> pertinent cancellation provisions of the contract is not wholly ineffective but serves to cancel the contract and the coverage afforded by it at the expiration of the permitted time. Id. at 290.

This general rule has also been acknowledged by other legal scholars. See e.g. 2 Couch on Insurance 3d §§ 32:52 (Clark Boardman Callaghan 1995); 45 C.J.S. Insurance Section 498 (1993); and 43 AM. JUR. 2D Insurance Section 420 (2003).

As set forth in the cases discussing the majority view, the rationale for extending the date of cancellation is that it accomplishes the purposes of having a notice period--providing notice to the insured so that they will have an opportunity to obtain insurance with another company before the time their existing coverage is terminated, something the Batemans did not do for over 2 months after receiving this notice.

For example, in Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981), a wrongful death claim was brought against the insured/motel owner for deaths caused by carbon monoxide asphyxiation. Although the policy contained a 10 day notice provision, the insurer's notice sent on November 21, 1975, indicated that cancellation would be effective on December 1, 1975. The incident occurred on January 11, 1976. The insured's claimed that the notice was not effective because the date of cancellation in the notice was less than 10 days. Additionally, the insured argued that strict construction of the policy conditions dictated that the 10 day notice requirement be mandatory and that any notice less than 10 days notice was void and of no effect. The Colorado Supreme Court rejected these arguments and, in affirming the trial court's summary judgment in favor of the insurer, held:

> **The reason behind the ten day notice provision in the policy is to provide the insured with an opportunity to obtain insurance with another company prior to the time that his insurance coverage is terminated**. [citation omitted] A majority of the courts hold that a notice of cancellation which purports to cancel a policy of insurance at a time earlier than that fixed by the policy results in the postponement of cancellation until the time period set forth in the policy has expired. . .Here, the notice of cancellation was mailed on November 21, 1975, with a declaration that the insurance coverage would end on December 1, 1975. Ten days notice was required by the policy. Therefore, cancellation was effective on December 2, 1975. January 11, 1976 was the date of the occurrence which gave rise to the Campbells' claim of coverage. Cancellation was effective on December 2, 1975, and the Home Insurance Company's obligations under the policy ended at that time. Therefore, summary judgment was properly granted. Id. at 100. (emphasis added)

Moore v. Vernon Fire and Casualty Ins. Co., 234 N.E. 2d 661 (Ind. App. 1968), involved similar facts and issues. The insurer's policy required 10 days notice, the cancellation notice did not provide 10 days notice and the accident involved occurred after more than 10 days had elapsed from the date of the notice purporting to cancel coverage. As this was a case of first impression in Indiana, the court examined how other jurisdictions handled the notice and cancellation issues and concluded that 24 other jurisdictions had adopted a rule where the cancellation was extended to the time period set forth in the policy, while only 3 states had a rule to the contrary. The Indiana court

affirmed the lower court's ruling of no coverage, and held that a "superficial imperfection" in the notice should not outweigh the logic of the rule. The court noted that the purpose behind the rule of giving 10 days notice is to give the insured time to buy replacement insurance.

Another case that illustrates the majority view of extending the date of cancellation to include the notice period set forth in the policy is Strickland v. Alabama Farm Bureau Mutual Cas. Ins. Co., 502 So.2d 349 (Ala. 1987). In Strickland, the insured transferred existing coverage from a farm truck to a newly acquired vehicle. The insurer, Alabama Farm Bureau, mailed the declarations page of the policy along with the first premium notice to the insured. No payment was made in response to the first premium notice. A second premium notice, mailed shortly thereafter, stated: "THIS IS YOUR FINAL NOTICE. DO NOT LET YOUR POLICY BE CANCELED FOR NON-PAYMENT OF PREMIUM." Id. at 350. Although Farm Bureau's policy required it provide 10 days notice before cancellation, having not received any premium after the second notice, on December 7, 1982, Farm Bureau sent the insured a cancellation notice advising them that their policy was "rescinded" and that they had "no coverage." The accident giving rise to the claim occurred on December 20, 1982. The Supreme Court of Alabama held that Farm Bureau's cancellation notice sent on December 7, 1982, became effective 10 days later on December 17, 1982, so that the insured would receive the notice required by the policy. In addition, because the date of the effective cancellation was 3 days before the loss date, the court held that Farm Bureau's policy did not provide

coverage. With regard to extending the effective date of cancellation to include the policy's full notice period, the court held:

> It is true, as Strickland argues, that the policy contained a provision which required ten days' notice, while the cancellation letter stated that cancellation was effective immediately. . .**"The rule is well settled in this and other jurisdictions, that, when the notice declares that the cancellation is presently operative, or fixes a time shorter than that prescribed, where the policy requires a certain number of days' notice, it becomes effective at the expiration of the prescribed period.** [citations omitted] Under that rule, the cancellation notice became effective ten days after December 7, 1982, i.e., December 17, 1982, which date was still prior to the date of the loss occurring on December 20, 1982. Id. at 352. (emphasis added)

Courts across the United States have also applied the same rule and have extended the cancellation date even when the notice period is prescribed by statute. For example, in Jorgensen v. Knutson, 662 N.W.2d 893 (Minn. 2003), Minnesota law required an insurer to give 10 days written notice where cancellation was for non-payment of premium. The insurer's notice of cancellation was mailed November 10, 1993, and warned that the policy would be canceled on November 22, 1993, unless the full premium was received before that date. No premium was received by that date. When Minnesota's "computation statute" (the statute governing how the notice period is calculated) was applied, it was determined that the insurer's notice only provided 9 days notice. The accident in question occurred in December 2, 1993, 9 days after the

expiration of the notice period required by Minnesota statute. The court held that the insurer's failure to state the correct notice period in the cancellation notice did not render the notice wholly ineffective. As in the numerous cases from other jurisdictions, the court held that the notice period was merely extended to the end of the accurately calculated 10 day period. In holding that the insurer's policy did not provide coverage, the Supreme Court of Minnesota specifically held:

> **…[T]he purpose of notice is not to provide shelter for insured's who make delinquent payments; it is to provide insureds with time to either pay the owed premium or find other coverage. Extending notice through the correctly computed "ten days" achieves that purpose**…We conclude that when an insurance company seeking to cancel a policy for unpaid premiums provides at least ten calendar days' notice that meets all other statutory requirements except to provide ten days' notice as calculated by Minn.Stat. §§ 645.15, **the consequence of such insufficient notice is an extension of the notice period through the end of the accurately calculated ten-day period**. Id. at 903-904. (emphasis added)

The court in Jorgensen based its decision, in part, on Zakrajshek v. Shuster, 239 N.W.2d 919 (Minn. 1976), an earlier Minnesota case involving a worker's compensation statute that required insurance companies to provide 30 days written notice to the state before canceling a worker's compensation policy. The insurer's notice received December 10, 1971, indicated that cancellation would become effective January 8, 1972. The employee sustained a work related injury on January 20, 1972. In holding that the

insurer's policy did not provide coverage for an injury that occurred more than 10 days after the effective date of cancellation, the Supreme Court of Minnesota held:

> Employers Insurance states the correct rule. Minn.St. 176.185, subd. 1 [Minnesota statute that required 30 days notice], **was not intended to provide free insurance to employers who are delinquent in their premium payments. It was intended to provide the employer a reasonable opportunity to obtain replacement insurance before his coverage is terminated and to provide the department a reasonable time to see that he does**. This purpose is fulfilled by continuing coverage for 30 days following the filing of notice with the department, even if the notice erroneously specifies that cancellation will become effective sooner than 30 days. Id. at 330. (emphasis added)

Similarly, Love v. Motorists Mut. Ins. Co., 620 N.E. 2d 987 (Ohio App. 1993), involved a claim for uninsured motorist benefits where the insurer's cancellation notice had an effective date one day earlier than required by the statute. The proper notice would have made cancellation effective on July 1, 1988. The accident occurred on August 23, 1988. The court noted that the purpose of the notice requirement was to give insureds notice of any planned cancellation of their policies in time for them to secure new coverage. In holding that the insurer's policy did not provide coverage, the court noted its ruling was consistent with the majority of other jurisdictions as well as the views expressed in a well recognized insurance treatise. In this regard, the Ohio Supreme Court held:

> One treatise author has noted:

> "[W]here the policy or statute fixes a 5-day limit, the policy remains in full force and effect for that length of time after receipt of the notice of cancellation, even though the notice fixes a shorter period of time, since the insured is entitled to the full number of days allowed by statute or the policy, to enable him, if he so desires, to protect himself by other insurance before the canceled policy expires.
>
> The fact that the notice contains a time limitation which is void because it is less than that required by the policy does not void the notice or make it inoperative. To the contrary, the notice takes effect as a notice, the insured, however, being entitled to the full period specified by the policy. Thus, the notice is effective, but is to be read as though it stated the proper date which would be allowed by the policy." (Footnotes omitted.) 17 Couch on Insurance 2d (Rev. Ed.1983) 629-630, Section 67:169.

Couch represents the majority view on this issue...Although there is authority to the contrary, [footnote omitted] we are persuaded that the majority view is correct...We hold, in accordance with the prevailing view, that rather than rendering the cancellation notice completely ineffective, the statutorily proscribed time limit merely requires the notice to be read as though it states the proper date, *i.e.* the insured is entitled to the full ten-day period before the policy can be terminated for nonpayment of premiums. Id. at 401-402. (emphasis added)

For other cases following the majority view of extending the date of effective cancellation, see: Commercial Union Fire Ins. Co. v. King, 156 S.W. 445 (Ark. 1913) (no coverage, cancellation date extended where policy required 5 days notice and notice to insured only provided 1 day notice); American Glove Co. v. Penn. Fire. Ins. Co., 113 P. 688 (Cal. App. 1910) (no coverage, cancellation date extended where policy required 5 days notice and notice sent to insured provided no notice); Walker v. Allstate Ins. Co., 424 S.E.2d 866 (Ga. App. 1992) (no coverage, cancellation date extended where insurer failed to comply with statutory notice requirement); Scanlon v. Empire Fire and Marine Ins. Co., 791 P.2d 737 (Idaho App. 1990) (no coverage, cancellation date extended where both policy and statute required 20 days notice and where notice to insured only provided 18 days notice); Jablonski v. Washington County Mut. Fire Ins. Co., 142 N.E.2d 170 (Ill. App. 1957) (no coverage, cancellation date extended where notice failed to provide the 5 days notice as required by the policy); Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co. of Hartford, 115 F. 653 (S.D.N.Y. 1902) (construing Kansas law, held cancellation date was extended, no coverage, where notice to insured did not comply with policy's 5 day notice requirement); Perkins v. Battiste, 469 So.2d 27 (La. App. 1985) (no coverage, cancellation date extended where notice to insured was less than the period required by policy); Seaboard Mut. Cas. Co. v. Profit, 108 F.2d 597 (4th Cir. 1940) (construing Maryland law, held cancellation date extended, no coverage, where notice to insured was less than the 5 days notice required by the policy); Phenix Ins. Co. of Brooklyn v. Hunter, 49 So. 740 (Miss. 1909) (no coverage where actual notice did not comply with policy's 5 day notice period); McRae v. Mercury Ins. Co., 253 N.W. 645 (Neb. 1934) (no coverage

where notice to insured was less than the 5 day notice period required by the policy); Gendron v. Calvert Fire Ins. Co., 143 P.2d 462 (N.M. 1943) (no coverage where actual notice did not comply with policy's 5 day notice requirement); Ocean Accident & Guarantee Corp. Limited v. Felgemaker, 143 F.2d 950 (6th Cir. 1944) (construing Massachusetts law, no coverage where notice to insured was less than the 15 day notice period stated in the policy); New York Central Employees Albany Dist. Fed. Credit Union No. 5119 v. Commercial Credit Co. of Newark, 13 Misc.2d 874 (N.Y. 1958) (no coverage, cancellation date extended where notice to insured was less than the 10 day period required by the policy); Commercial Standard Ins. Co. v. Garrett, 70 F.2d 969 (10th Cir. 1934) (construing Oklahoma law, held cancellation date extended, no coverage, where notice to insured failed to comply with state statute requiring 20 days notice); Emmott v. Slater Mut. Fire Ins. Co., 7 R.I. 562 (1863) (no coverage, cancellation date extended where notice to insured was less than the 7 day period required by the policy); Frontier-Pontiac, Inc. v. Dubuque Fire & Marine Ins. Co., 166 S.W.2d 746 (Texas App. 1942) (no coverage, cancellation extended where insured received less notice than the 5 day period required by the policy); State Farm Mut. Auto. Ins. Co. v. Pederson, 41 S.E.2d 64 (Va. App. 1947) (no coverage where notice sent to insured did not comply with policy's 5 day notice period); Insurance Management, Inc. v. Guptill and Premium Budget Co. Inc., 554 P.2d 359 (Wash. App. 1976) (no coverage, cancellation extended, where notice to insured failed to comply with state statute requiring 10 days notice); Benefit Trust Life Ins. Co. v. Office of the Commissioner of Ins., 419 N.W.2d 265 (Wisc.

App. 1987) (no coverage, cancellation extended, where notice to insured did not comply with statute requiring 10 days notice).

There are, of course, cases representing the minority view. See e.g. Silvernail v. American Fire & Cas. Co., 80 So.2d 707 (Fla. 1955); American Fire Ins. Co. v. Brooks, 34 A. 373 (Md. 1896); Hanna v. Reliance Ins. Co., 166 A.2d 877 (Pa. 1961); U.S. Fire Ins. Co. v. Fletcher, 423 S.W.2d 89 (Texas App. 1967); and National Auto & Cas. Ins. Co. v. California Cas. Ins. Co., 139 Cal. App. 3d 336 (Cal. App. 1983).

Consistent with Blair and the majority of other jurisdictions, even if this Court concludes that Farm Bureau's policy required it provide Arlene Bateman with more time than contained in its notices, the latest date cancellation would be effective would have been October 20, 2002, as the October 10, 2002, cancellation notice would be deemed extended until the expiration of the policy's full 10 day notice period. The purpose of the notice requirement in Farm Bureau's policy is to give the insured time to obtain replacement coverage before their existing coverage terminates. As previously expressed by this Court, this is the same purpose behind § 379.118 R.S.Mo., a statute that requires insurance companies to provide 30 days notice prior to the proposed effective date of cancellation in situations where an insurer proposes to cancel or refuse to renew an auto policy. Although § 379.118 R.S.Mo. does not apply to cancellations for non-payment of premium, this Court held that one of the reasons for the notice period in this statute is to "allow the insured ample time to obtain replacement coverage." See Shqeir v. Equifax, Inc., 636 S.W.2d 944, 949 (Mo. Banc. 1982).

In the case at bar, even if the effective date of cancellation was extended to October 20, 2002, Arlene Bateman would have still had 64 days before the accident to obtain replacement coverage. Clearly, this provided her with more than the required time, as stipulated in the policy, in which to obtain other insurance. It defies logic to give free insurance to Arlene Bateman when she knowingly and voluntarily chose not to avail herself of other insurance protection and assumed the risks and consequences associated with not having insurance. Ms. Bateman admitted during her deposition that she knew that in order to have insurance she would have to pay her premiums and that she did not expect Farm Bureau to provide her with "free insurance." (LF 360, 375, 376) The majority view is that notice requirements are not designed to provide "free insurance" for those who are delinquent in their premium payments. Jorgensen, supra; Zakrajshek, supra. The purpose of the notice requirement is not to provide shelter for insureds who make delinquent payments, it is to provide insureds with time to either pay the owed premium or find other coverage. Jorgensen, supra. Without question, extending the effective date of cancellation to October 20, 2002, not only gives Arlene Bateman the benefit of the doubt on the issue of notice, but more importantly, it accomplishes what the notice requirement was designed to do in the first place by putting her on notice of Farm Bureau's intention to cancel her policy and giving her sufficient time to obtain other coverage before her existing Farm Bureau coverage terminated.

If the Farm Bureau policy provides no coverage, plaintiffs lose. No coverage was provided because the Batemans did not pay for coverage. Cancellation notices were sent

which complied with the contract or at the very least, caused cancellation to occur over two months before the accident. The judgment of the trial court must be reversed.

POINT II

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I in the amount of $1,004,295 because even if: (1) Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002 (which it does not); and (2) the Stones have standing to maintain this action against Farm Bureau (which they do not), the judgment against Farm Bureau cannot exceed $250,000 in that Farm Bureau's policy limit for liability coverage was $250,000 and Farm Bureau cannot be liable for more that its policy limit where the only claim is for breach of contract.

Standard of review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

Analysis

The judgment of the trial court would award the Stones who claim they are the assignees of the alleged insured of Farm Bureau over four times the $250,000 limits of liability on the policy in question. No case in Missouri has ever held a liability insurance company liable in excess of its policy limits under a breach of contract theory. In all Missouri cases, the insured may recover an amount in excess of the policy limits if and only if the insured proves the tort of bad faith and obtains a jury finding against the insurance company. The judgment of the trial court is unprecedented in Missouri and elsewhere and must be reversed.

The Stones' damages cannot exceed $250,000

The trial court entered final judgment against Farm Bureau in the amount of $1,004,295 on the Stones' claim for breach of contract as set forth in Count I of the Amended Petition. This amount, as calculated by the trial court, represents the sum of the two judgments along with accrued interest. (LF 496) Even if: (1) Farm Bureau's policy provides coverage; and (2) the Stones have standing to maintain this action against Farm Bureau, the trial court erred by entering judgment in the amount of $1,004,295 because Farm Bureau cannot be liable for more than $250,000, its policy limit for liability coverage.

Missouri law is well settled on the measure of damages available to the Stones on their claim for breach of contract. In the seminal case on this subject, Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950), the Missouri Supreme Court held that "[n]o action on a contract will lie against an insurance company for that part of a judgment recovered against the insured which is in excess of the policy limit." Id. at 756. Similarly, in Landie v. Century Indemnity Co., 390 S.W.2d 558 (Mo. App. 1965), the court held that in a breach of contract action against the insurer for failure to defend, the insurer is **only** liable for an amount up to the limits of the policy, plus attorney fees.[4] The court, in addressing the applicable measure of damages, specifically held:

[4] This refers to the attorney fees the insured expended in defending a claim which was properly covered under the policy. No claim was made for attorney fees here. (LF 8-24)

> The policy in question obligated the company to defend any suit against the insured claiming damages because of injury arising out of the ownership, maintenance or use of any automobile, even if such suit is groundless, false or fraudulent and the company reserved to itself the exclusive right to make such investigation, negotiation and settlement of any claim or suit as it deems expedient.
>
> This is a standard policy provision and under this or essentially similar provisions it has been universally held that the company is contractually obligated to defend anyone who in fact comes within the policy definition of 'insured'; that failure to so defend is a breach of contract and that reasonable or good faith belief that there is no coverage under the policy is no defense. The company fails to defend at its peril.
>
> **For such breach of contract the company is liable to its insured to pay any judgment recovered against him up to the limits of the policy plus attorney fees, costs, interest and any other expenses** incurred by the insured in conducting the defense of the suit which it was the obligation of the company to perform under its contract. . . Id. at 562. (emphasis added)

In the case at bar, the trial court's judgment of $1,004,295 represents the sum of the two judgments entered against Arlene Bateman along with accrued interest. (LF 496) This amount is clearly in excess of Farm Bureau's policy limit. At the time of the accident, Farm Bureau's liability policy provided a combined single limit of $250,000. Under the terms of Farm Bureau's policy, $250,000 is the most it "will pay regardless of

the number of" . . . "claims made." (LF 201, 209) The only way Farm Bureau can be liable for an amount in excess of its policy limit is if it is found liable for the tort of bad faith. See generally Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 557 (Mo. App. 1990) (on tort claim for bad faith, an insurance company "may become liable in excess of its undertaking under the policy provisions if it fails to exercise good faith in considering offers to compromise the claim for an amount within the policy limits"); and Landie at 566 (where insurance company refused in bad faith to accept offer of settlement within limits, insurer is liable to the insured, in tort, for the damages resulting from such bad faith, which may include that part of the judgment over and above the limits of the policy).

The Stones' misguided theory (as argued in their motions and adopted by the trial court) is that Farm Bureau had a duty to defend and a duty to settle under Missouri law; that it breached both duties; and that the damages for breach equal the underlying judgment in excess of the policy limits. The Stones' theory misses the mark entirely. It is predicated on the mistaken belief that the "duty to settle" is an absolute duty requiring an insurance company to settle every claim or be responsible for an unlimited amount if it does not. The "duty to settle" argued by the Stones is not a "duty" to settle at all. Instead, Missouri requires an insurance company to exercise good faith in considering settlement offers, whether it does is a jury question in the trial of a tort claim of bad faith. Ganaway at 556, 561. There is no duty in Missouri or elsewhere to settle every claim. Under the Stones' misguided theory, there would be little use for contractual policy limits on any case which is tried to a jury in which a previous settlement offer had been refused.

Under the Stones' theory, the insurance company would be liable for the full amount of the judgment, no matter how large, because it did not settle before suit. This theory, as advocated by the Stones, is a theory of absolute liability. If the trial court's judgment is affirmed, the entire underpinnings of the insurance process (including calculation of premiums, contractual allocation of risk and relative allocation of risk to be assumed by an insured and an insurance company) would be turned on its head.

The Stones elected to proceed on their claim for breach of contract only. The law is clear that an action for "bad faith" sounds in tort, not in contract." Ganaway at 557.[5] Under the Stones' breach of contract theory as set forth in Count I of their Amended Petition, it is clear that **even if** Farm Bureau is liable for breach of contract, its liability is not the amount of the underlying "Judgments," but rather is **limited to the amount of its policy**, $250,000. The trial court erred in entering judgment in the amount of $1,004,295 as this amount, under any scenario, does not accurately reflect the Stones' measure of damages for breach of contract. Thus, if this Court determines that Farm Bureau's policy was still in effect at the time of the accident and determines that the Stones have standing

[5] The Stones' tort claims for bad faith were dismissed by the trial court (LF 496) and the Stones have now waived those tort claims. See Point II, Respondent's Points, Pages 53-62 and Perez v. Boatmen's National Bank of St. Louis, 788 S.W.2d 296 (Mo. App. 1990).

to assert a claim under that policy, this Court must limit the judgment to the policy limit. Supreme Court Rule 84.14. That amount is $250,000.

POINT III

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because the Stones have no standing to assert a claim for breach of contract unless they are assignees of Arlene Bateman, which they are not, in that: (A) the Stones' motion for partial summary judgment did not contain any evidence or proof of the purported "Assignment"; and (B) even if this Court overlooks the Stones' failure of proof on the assignment issue, the purported "Assignment" is void and unenforceable because it lacks consideration.

Standard of review

Farm Bureau incorporates by reference the Standard of Review set forth on pages 26-27 of its brief.

Appellants have no standing to maintain this action

The trial court erred in granting summary judgment in favor of the Stones because the Stones have no standing to maintain this action against Farm Bureau.[6] In the case at bar, the Stones have brought suit in their capacity as the purported assignees of Arlene

[6] Lack of standing was raised as an affirmative defense in Farm Bureau's Answer and was again raised in "Defendant's Response to Plaintiffs' Statement of Uncontroverted Material Facts and Additional Material Facts That Remain in Dispute." (See LF 40, 53, 74 and 81)

Bateman (LF 8). In their motion for partial summary judgment, however, there was no evidence or proof of any assignment. (LF 58-62) The alleged "Assignment" is not self-proving and, absent such evidence, the Stones have no standing to maintain any contract action against Farm Bureau. A stranger to a contract of insurance may not sue the insurer under the contract, except in situations involving equitable garnishment, which is not applicable here. State Farm Mut. Automobile Ins. Co. v. Allen, 744 S.W.2d 782, 785 (Mo. banc 1988).

Even if the assignment was proved, it is void for lack of consideration

Even if this Court overlooks the Stones failure of proof on the assignment issue, the purported "Assignment" referred to in the pleadings is void and unenforceable because it lacks consideration in light of the fact that Arlene Bateman and the Stones previously executed a Section 537.065 R.S.Mo "Agreement." The 537.065 "Agreement" (LF 186-188), executed on December 29, 2003, provides, in part:

> . . .
>
> Albert J. Stone and Tammy L. Stone agree that in the event that judgment is obtained in either of the two suits, or both of them, against Arlene Bateman, and damages assessed against her, that the full amount of damages which may be assessed in either one or both of said suits shall be collected SOLELY from assets, causes or chooses in action available to Arlene Bateman, specified as follows:
>
> (a) All claims and causes of action available to Arlene Bateman against Farm Bureau arising out of or relating to breach of contract, breach of fiduciary duty, bad faith and insurance coverage proceeds, and any and all

other actual, compensatory or punitive damages which may otherwise be available, and whether said claims sound in contract, or in tort, and arising by reason of wrongful failure and/or refusal on the part of Farm Bureau, or its corporate affiliates, agents, servants or employees, to defend Arlene Bateman in each of the aforementioned suits, and/or failure to fulfill agreement to indemnify her, provide costs of defense, and breach of any and all contractual obligations relating to the same.

(b) **All other assets, not specified in the immediately preceding sub-paragraph (a), whether real or personal property and whether owned jointly or joint and severally by Arlene Bateman and Gary Bateman, their heirs, successors or assigns, shall be and remain exempt from any and all collection process**.

. . .

The parties hereto acknowledge that **this Agreement is for the purpose of limiting collection activity on any judgments which might be obtained**, and does not constitute a release of liability. (emphasis added)

The purported "Assignment," dated 8 days later on January 6, 2004, provided the following language regarding consideration:

In consideration of the commitment heretofore made by Albert J. Stone and Tammy L. Stone to limit collection efforts on the aforementioned judgments, Arlene M. Bateman hereby assigns to Albert J. Stone and Tammy L. Stone, jointly and severally, all rights and interests which she may have to assert any and all

claims available to her against Farm Bureau Insurance, or its corporate affiliates, however denominated, and whether named as Farm Bureau Insurance...(emphasis added) (See LF 36-39).

If this document is proved up, after the Stones executed the 537.065 Agreement, they no longer had the right to collect either of the judgments against Arlene Bateman. This is clear from the terms and conditions of the agreement. When the "Assignment" was executed 8 days later, the consideration for the Stones was their "commitment . . . to limit collection" of the judgments—**a promise they were already legally obligated to perform under the terms of the 537.065 Agreement**. Because the Stones were already legally obligated to restrict collection of any judgment against Arlene Bateman, this same promise cannot constitute valid consideration for the "Assignment." See City of Bellefontaine Neighbors v. J.J. Kelley Realty and Building Co., 460 S.W.2d 298, 301 (Mo. App. 1970) (a promise to do that which one is already legally obligated to do cannot serve as consideration for a contract). See also Wise v. Crump, 978 S.W.2d 1, 3 (Mo. App. 1998) and Sperry v. ITT Commercial Finance Corp., 799 S.W.2d 871, 877 (Mo. App. 1990). Accordingly, the purported "Assignment" in the case at bar does not operate to transfer any claim from Arlene Bateman to the Stones because it lacks consideration. As the Stones have no standing to maintain any claim against Farm Bureau, the trial court erred in sustaining the Stones' motion for summary judgment.

FARM BUREAU'S RESPONSE TO STONES' APPEAL

RESPONSE TO BRIEF OF APPELLANTS/CROSS RESPONDENTS

STATEMENT OF FACTS

Farm Bureau adopts its statement of facts as set forth on pages 8-20 of its brief.

POINTS RELIED ON

I.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) because, as a matter of law, Farm Bureau's policy did not provide coverage for the accident that occurred on December 23, 2002, in that: (A) Farm Bureau's policy was canceled effective October 9, 2002, for non-payment of premium as a result of the Batemans failure to make the premium payments required by the notices dated August 26, 2002, and September 20, 2002, as the notice of September 20, 2002, complied with the contractual requirements of Farm Bureau's policy because it gave the Batemans 19 days notice (the policy only required 10 days notice) that their policy would be canceled if premium payment was not received before October 9, 2002; and (B) even if this Court interprets Farm Bureau's policy to require Farm Bureau to give the Batemans an additional 10 days notice of cancellation after failure to pay, Farm Bureau's policy would still not provide coverage to Arlene Bateman as the effective date of cancellation would be deemed to be extended to October 20, 2002, which was still prior to the accident.

CASES

Hyatt v. Trans World Airlines, Inc., 943 S.W. 2d 292, 296 (Mo. App. 1997)

Koenig v. Skaggs, 400 S.W. 2d 63, 68 (Mo. 1966)

II.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition because the waiver doctrine precludes the Stones from proceeding on any of these tort counts in that: (A) the Stones selected their remedy of breach of contract when they moved for partial summary judgment on Count I of their Amended Petition and, by doing so, waived their tort claims when final judgment was entered against Farm Bureau on the Stones' claim for breach of contract; and (B) the Stones are only entitled to one judgment for damages and allowing them to proceed on any of these counts would result in double recovery.

CASES

Perez v. Boatmen's National Bank of St. Louis, 788 S.W.2d 296 (Mo. App. 1990)

Premium Financing Specialists, Inc. v. Hullin, 90 S.W.3d 110 (Mo. App. 2002)

Meco Systems, Inc. v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794 (Mo. App. 2001)

See Peterson v. Brune, 273 S.W.2d 278, 284 (Mo. 1954)

III.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition because the Stones have no standing to maintain the claims in these counts unless they are assignees of Arlene Bateman, which they are not, in that: (A) the Stones' motion for partial summary judgment did not contain any evidence or proof of the purported "Assignment"; and (B) even if this Court overlooks the Stones' failure of proof on the assignment issue, the purported "Assignment" is void and unenforceable because it lacks consideration.

CASES

City of Bellefontaine Neighbors v. J.J. Kelley Realty and Building Co., 460 S.W.2d 298, 301 (Mo. App. 1970)

Wise v. Crump, 978 S.W.2d 1, 3 (Mo. App. 1998)

Sperry v. ITT Commercial Finance Corp., 799 S.W.2d 871, 877 (Mo. App. 1990)

IV.

(RESPONDING TO POINT III OF STONES' BRIEF)

The trial court did not err in dismissing Count VI (claim for punitive damages) because the Stones proceeded to judgment on their contract claim in that: (A) the Stones did not allege a claim for punitive damages in conjunction with their claim for breach of contract; and (B) even if this Court interprets the Amended Petition to allege a claim for punitive damages in connection with the Stones' claim for breach of contract, Missouri law does not allow the Stones to recover punitive damages on their claim for breach of contract except in two circumstances, neither of which were pled or apply to the contract claim which was pleaded.

CASES

Williams v. Kansas City Public Service, Co., 294 S.W.2d 36, 40 (Mo. 1956)

Peterson v. Continental Boiler Work, Inc., 783 S.W.2d 896, 902 (Mo. Banc. 1990)

Esicorp, Inc. v. Liberty Mut. Ins. Co., 193 F.3d 966 (8th Cir. 1999)

Brown v. Mercantile Bank of Poplar Bluff, 820 S.W.2d 327, 340 (Mo. App. 1991)

V.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II and III of the Amended Petition in that a separate cause of action for breach of fiduciary duty does not lie where the tort of bad faith has been alleged because claims for breach of fiduciary duty are included within the tort of bad faith.

CASES

Catron v. Columbia Mut. Ins., 723 S.W.2d 5, 6 (Mo. Banc. 1987)

Young v. United States Fidelity & Guaranty, 588 S.W.2d 46 (Mo. App. 1979)

ARGUMENT

I.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) because, as a matter of law, Farm Bureau's policy did not provide coverage for the accident that occurred on December 23, 2002, in that: (A) Farm Bureau's policy was canceled effective October 9, 2002, for non-payment of premium as a result of the Batemans failure to make the premium payments required by the notices dated August 26, 2002, and September 20, 2002, as the notice of September 20, 2002, complied with the contractual requirements of Farm Bureau's policy because it gave the Batemans 19 days notice (the policy only required 10 days notice) that their policy would be canceled if premium payment was not received before October 9, 2002; and (B) even if this Court interprets Farm Bureau's policy to require Farm Bureau to give the Batemans an additional 10 days notice of cancellation after failure to pay, Farm Bureau's policy would still not provide coverage to Arlene Bateman as the effective date of cancellation would be deemed to be extended to October 20, 2002, which was still prior to the accident.

Standard of Review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

There was no error in dismissing Counts II through VI because there was no coverage under the policy

In the Stones' brief,[7] they claim that the trial court erred in dismissing Counts II through VI of their Amended Petition. The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition because on December 23, 2002, Farm Bureau's policy did not provide coverage to Arlene Bateman as it was canceled effective October 9, 2002, for non-payment of premium. The analysis for this point relating to whether or not Farm Bureau's policy provided coverage to Arlene Bateman is the same as the analysis set forth on pages 23 to 34 of Farm Bureau's brief. As such, that portion of Farm Bureau's brief is incorporated herein by reference and the arguments and authorities will not be repeated here. All of the Stones' theories require, as a prerequisite, a valid automobile policy which was in effect on the day of the accident. Dismissal of those counts was proper because no policy existed on the day of the accident.

Similarly, the trial court did not err in dismissing Count VI (punitive damages) because Farm Bureau cannot be liable for punitive damages where there is no liability on

[7] Farm Bureau will respond to the Stones' brief on the merits even though their Points Relied On do not comply with 84.04(d)(1) in that the Points fail to concisely state the legal reasons for the claims of reversible error or explain why the legal reasons, in the context of the case, support the claim of reversible error.

any of the Stones' underlying claims. Punitive damages are predicated on a valid cause of action for compensatory damages. Hyatt v. Trans World Airlines, Inc., 943 S.W.2d 292, 296 (Mo. App. 1997). There can be no recovery for punitive damages unless actual damages are also recovered. Koenig v. Skaggs, 400 S.W.2d 63, 68 (Mo. 1966). Since the Stones do not have a valid cause of action for compensatory damages due to policy cancellation, dismissal of the punitive damage count (Count VI) was proper. It should be noted that while the court did not dismiss Counts II through IV for these reasons, a summary judgment should be affirmed if it is proper for any reason, even if it is improper for the reasons set out by the trial court. Taylor v. Richland Motors, 159 S.W.3d 492, 497 (Mo. App. 2005).

II.

(RESPONDING TO POINTS I, II, III and IV OF THE STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition because the waiver doctrine precludes the Stones' from proceeding on any of these tort counts in that: (A) the Stones' selected their remedy of breach of contract when they moved for partial summary judgment on Count I of their Amended Petition and, by doing so, waived their tort claims when final judgment was entered against Farm Bureau on the Stones' claim for breach of contract; and (B) the Stones are only entitled to one judgment for damages and allowing the Stones to proceed on any of these counts would result in double recovery.

Standard of Review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

The waiver doctrine precludes recovery in tort once the Stones sought and obtained judgment of their contract count

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition. The Stones are precluded from proceeding on any of these counts because of the waiver doctrine. Missouri courts have adopted the waiver doctrine set forth in 1A C.J.S. Actions

175.[8] See Perez v. Boatmen's National Bank of St. Louis, 788 S.W.2d 296 (Mo. App. 1990); Premium Financing Specialists, Inc. v. Hullin, 90 S.W.3d 110 (Mo. App. 2002); and Meco Systems, Inc. v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794 (Mo. App. 2001).

Simply put, the waiver doctrine provides that one who has contract and tort claims arising out of one event may plead both such claims. However, when one proceeds to judgment (including summary judgment) on a contract theory, all tort claims are thereby waived and judgment is limited to whatever measure of damages are permitted in a contract case. This is true even if the contract damages do not give the plaintiff full recovery.

Missouri courts have applied the waiver doctrine[9] many times and have confirmed its application in this state. In these cases, the plaintiff filed a multi-count petition,

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[8] Missouri cases involving this section cite to 1A C.J.S. 2d Actions 123. 1A C.J.S Actions Correlation Table indicates that the section has been reassigned to 1A C.J.S. Actions 175.

[9] Some of the Missouri cases involving the waiver doctrine use the phrase "elected a remedy" or "elections of remedies." The waiver doctrine applicable to this appeal should not be confused with the "election of remedies" doctrine set forth in Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504 (Mo. Banc. 1993), Altmann v. Altmann, 978 S.W.2d 356 (Mo. App. 1998) or other Missouri cases, but is a separate and distinct doctrine.

seeking damages in tort and for breach of contract, and then moved for partial summary judgment on the breach of contract claim only. This is, of course, the precise series of events which occurred in this case. Missouri courts applying the waiver doctrine have consistently held that when the plaintiff decides to seek judgment (including summary judgment) on a claim for breach of contract only, all other tort claims arising out of the transaction are waived. In addition, the doctrine precludes the plaintiff from seeking any other tort damages, even if the plaintiff is not made whole by the damages applicable to a breach of contract claim. Application of the waiver doctrine is precisely the same in the case at bar.

For example, in Perez v. Boatmen's National Bank of St. Louis, 788 S.W.2d 296 (Mo. App. 1990), the plaintiff opened a corporate account at defendant Boatmen's in the name of Platinum Images Marketing Concepts, Inc. The account allowed withdrawal if two of the three signatories agreed. The signatories were plaintiff, plaintiff's husband and defendant Merta. Although the corporation did not exist when the account was opened, defendant Merta told the plaintiff that he would form the corporation and would issue to her 20% of the corporate stock. The corporation was formed, but no stock was issued to plaintiff. One month after the account was opened, $4,676 was transferred from it to a second account at the bank to which only defendant Merta had access. Plaintiff claimed that defendant Merta accomplished the transfer without a second signature by convincing the bank that plaintiff and her husband were "crooks" who were trying to steal Merta's money. Plaintiff's petition against the bank and defendant Merta contained the following claims:

Count I: fraudulent misrepresentation (against defendant Merta only)

Count II: conspiracy to convert

Count III: conversion

Count IV: slander

Count V: conspiracy to breach Merta's fiduciary duty to plaintiff

Count VI: breach of this fiduciary duty

Count VII: money had and received (against defendant Merta only)

Counts II and III were dismissed for failure to state a claim. Plaintiff then moved for partial summary judgment on Count VII, her breach of contract claim for money had and received. The trial court sustained plaintiff's motion, entered judgment against defendant Merta for $20,000 and dismissed the remaining counts against defendant Merta. The trial court also granted the bank's motion for partial summary judgment as to Count IV and later dismissed the final two Counts, V and VI. The trial court's rationale for the dismissal of these counts was that, by seeking and receiving judgment on her claim for breach of contract, plaintiff waived all other tort actions arising from the same facts.

On appeal, the plaintiff claimed the trial court erred in granting summary judgment in favor of the bank on Count V (conspiracy to breach) and Count VI (breach of fiduciary duty) because these claims were not inconsistent with the action against defendant Merta for money had and received. The appellate court rejected this argument and affirmed the trial court's dismissal based on the waiver doctrine. Additionally, the

court held that allowing plaintiff to proceed on Count V and VI would allow the plaintiff to make a double recovery. The court specifically held:

> An action for money had and received is proper where defendant received money from plaintiff under circumstances that in equity and good conscience call him to pay it to plaintiff. [citation omitted] **Such an action sounds in contract and waives all torts arising from the same conduct.** . . While the mere waiver of a tort is neither a ratification of it nor an admission of its nonexistence, analogous to the effect of an election between inconsistent remedies. . . **one waiving a tort and suing in contract makes such a binding election of remedy as cannot be reconsidered**…
>
> **Plaintiff cannot thereafter treat the action brought as if it were a tort action, or bring an action of tort with regard to the same cause of action**…
>
> **By waiving the tort and suing in contract, a party necessarily waives the entire tort, and cannot recover part of his damages in contract and afterward maintain an action in tort for the balance**, and it is not only with regard to defendant in the action brought that the waiver operates, but as regards others as well, a waiver of the tort and an action in contract brought against one of several tort-feasors precluding a subsequent action in tort against the others who were not parties to the first action. 1A. C.J.S. 2d Actions 123. . .
>
> It is clear that the appellant made a choice to proceed to final judgment under a contract theory and having done so **she cannot seek to obtain double recovery by pursuing a tort action**. Id. at 299, 300. (emphasis added)

The court in Perez held that the plaintiff, by moving for and obtaining summary judgment on her breach of contract claim only, thereby waived all other tort claims arising out of the transaction. The court also held that allowing plaintiff to maintain any of her tort claims would have resulted in double recovery.

In the case at bar, the waiver doctrine precludes the Stones from maintaining their claims in Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages), all of which are tort claims. The Stones had the choice of remedies, but chose to proceed with their claim for breach of contract contained in Count I. The Stones voluntarily moved for partial summary judgment on their breach of contract claim only and the trial court entered final judgment against Farm Bureau on this claim. By obtaining final judgment on their contract claim, the Stones waived the entire tort and cannot now maintain an action in tort. Thus, like the trial court in Perez, the trial court here properly dismissed Counts II, III, IV, V and VI, all sounding in tort.

In addition, the trial court correctly determined that the "recovery, if any, under Count II, III, IV and V would be duplicative of the damages determined by the court to be due and recoverable by the Stones on the breach of contract claim in Count I." (See LF 496) The Stones likewise acknowledge that the damages sought in the various counts are overlapping. (See the Stones' brief page 63) Under Missouri law, however, a party cannot be compensated for the same injury twice. Perez, supra. This is true whether the injury arises out of contract or tort. Id.; Meco Systems, Inc. v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794 (Mo. App. 2001). Moreover, final judgment has been

entered against Farm Bureau and the law is clear that there can only be one judgment against a defendant, irrespective of how many theories under which the defendant may be held liable. See Peterson v. Brune, 273 S.W.2d 278, 284 (Mo. 1954); Scheibel v. Hillis, 570 S.W.2d 724 (Mo. App. 1978); and State ex. rel. State Highway Comm. v. Galloway, 292 S.W.2d 904 (Mo. App. 1956). The trial court did not err in dismissing all counts and the Stones cannot seriously contend otherwise.

Even if the Stones do not get complete recovery under their contract theory, the waiver doctrine still applies

The waiver doctrine not only operates to waive all other tort actions arising from the same facts, it also mandates that breach of contract principles govern in determining the measure and amount of damages,[10] even if these damages are wholly insufficient to cover a party's actual damages. A recent case that illustrates this feature of the waiver doctrine is Meco Systems, Inc. v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794 (Mo. App. 2001). Meco involved a mechanic's lien case where the plaintiff did not elect a remedy before the case was submitted to the trial judge; rather, the plaintiff submitted its claims for breach of contract and unjust enrichment to the court. The trial judge selected

[10] **An action brought in contract, after waiver of a tort, is governed by the rules and principles applicable to such form of action**, as with regard to the question of jurisdiction, the venue of the action, the statute of limitations applicable, the effect of the death of a party, the form of the judgment, **and the measure and amount of damages**. 1A C.J.S. Actions 175. (emphasis added)

a remedy by entering judgment in favor of the plaintiff on its breach of contract claim and denied its unjust enrichment claim. The appellate court affirmed the decision of the trial court and held that the waiver doctrine applied even though the final judgment on the contract claim was insufficient to cover its actual damages. The court noted that allowing recovery on the unjust enrichment claim would have resulted in double recovery for the same injury. The court specifically held:

> MECO concedes in its brief that the judgment for MECO and against DBE on the breach of contract count included the sums yet owed by MECO to Subcontractors. Consequently, to also award MECO those amounts under the unjust enrichment count as MECO urges, runs afoul of Missouri's rule against double compensation for the same injury. [citation omitted]. **This is true even though the final judgment against DBE on the contract count may be wholly insufficient to cover its actual damages because of DBE's bankruptcy filing**. "As a general rule the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against plaintiff, is a decisive act which constitutes a conclusive election.... **The rule is the same, even though the suitor fails to secure satisfaction by means of the remedy adopted, or has misjudged the effect of his first election.**" *Powell v. Schultz,* 118 S.W.2d 25, 30 (Mo. App.1938) (quoting 20 C.J., § 19, p. 28). Although Powell involved adoption of a remedy by a litigant, rather than by the court, we see no meaningful distinction. **Since MECO forced the trial judge to select a remedy, it cannot now**

complain the selected remedy was insufficient to cover its actual damages.

(emphasis added) Id. at 811.

In the case at bar, the Stones selected their remedy based on breach of contract and cannot now seek additional relief even if the damages for breach of contract are insufficient to cover their actual damages.[11]

The Stones have cited the case of Kincaid Enterprises, Inc. v. Porter, 812 S.W.2d 892 (Mo. App. 1991). In Kincaid, plaintiffs brought suit against the seller of a business for breach of contract and fraud. At trial, the plaintiff tendered, and the court submitted, **both** theories of recovery to the jury. The jury returned a $35,000 verdict on the breach of contract claim and a $36,000 verdict on the fraud claim. The court entered judgment for $71,000. On appeal, to prevent the plaintiff making a double recovery, the court properly reversed the judgment on the contract claim and entered judgment on the fraud claim.

Kincaid is not on point and does not support the Stones' position because it involved a situation where **two separate theories** were submitted to the jury for consideration. It did not involve or address the waiver doctrine or a situation where the plaintiff voluntarily elected to proceed on a breach of contract claim, to the exclusion of all other tort claims that were available. For the same reasons, their reliance on Trimble

[11] The trial court's judgment of $1,004,295 does not reflect the correct measure of damages as, even if Farm Bureau is liable for breach of contract, its liability cannot exceed its policy limit of $250,000. See pages 35-38 of Farm Bureau's brief.

v. Pracna, 167 S.W.3d 706 (Mo. banc 2005) and Vogt v. Hayes, 54 S.W.3d 207 (Mo. App. 2001) is misplaced because these cases likewise involved a situation where **two separate theories** were submitted to the jury for consideration.

The Stones made the decision to proceed on their claim for breach of contract, voluntarily moved for partial summary judgment on this claim and were later granted a final judgment on this claim alone. The Stones, by so proceeding, have waived the entire tort and cannot recover part of their damages in contract and later maintain an action in tort for the balance. Perez, supra.

The Stones also seek to rely on the cases of Whittom v. Alexander-Richardson, 851 S.W.2d 504 (Mo. banc 1993), Ellsworth Breihan Building Co. v. Teha Inc., 48 S.W.3d 80 (Mo. App. 2001) and Scott v. Blue Springs, 176 S.W.3d 140 (Mo. banc 2005). None of these cases are applicable as they all involve the election of remedies and do not involve or even address the waiver doctrine or a situation where a party has elected to abandon available tort claims and obtain a final judgment on a claim based on breach of contract. As such, the trial court did not err in dismissing Counts II, III, IV, V and VI. The damages awarded by the trial court on the Stones' breach of contract claim must be reduced even if the trial court was correct in entering judgment on this claim. Breach of contract damages are limited to $250,000. See Zumwalt, supra; Landie, supra. This issue is the subject of Point II of Farm Bureau's appeal.

III.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II (breach of fiduciary duty to defend), III (breach of fiduciary duty to settle), IV (bad faith failure to defend), V (bad faith failure and refusal to settle) and VI (punitive damages) of the Amended Petition because the Stones' have no standing to maintain the claims in these counts unless they are assignees of Arlene Bateman, which they are not, in that: (A) the Stones' motion for partial summary judgment did not contain any evidence or proof of the purported "Assignment"; and (B) even if this Court overlooks the Stones' failure of proof on the assignment issue, the purported "Assignment" is void and unenforceable because it lacks consideration.

Standard of Review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

The Stones lack standing to pursue their tort claims

The trial court did not err in dismissing Count II, III, IV, V and VI of the Stones' Amended Petition because they do not have standing to assert any of these claims against Farm Bureau. The analysis for this point is the same as the analysis set forth on pages 39-42 of Farm Bureau's brief. As such, that portion of Farm Bureau's brief is incorporated herein by reference and the arguments and authorities will not be repeated here.

Whether or not the trial court dismissed the tort claims because of lack of standing or some other reason, that portion of the judgment must still be affirmed. The court of appeals must sustain the trial court's award of summary judgment if the judgment can be sustained under any theory supported by the summary-judgment record. Taylor v. Richland Motors, 159 S.W.3d 492, 497 (Mo. App. 2005).

IV.

(RESPONDING TO POINT III OF STONES' BRIEF)

The trial court did not err in dismissing Count VI (claim for punitive damages) because the Stones proceeded to judgment on their contract claim in that: (A) the Stones did not allege a claim for punitive damages in conjunction with their claim for breach of contract; and (B) even if this Court interprets the Amended Petition to allege a claim for punitive damages in connection with the Stones' claim for breach of contract (which it does not), Missouri law does not allow the Stones to recover punitive damages on their claim for breach of contract except in two circumstances, neither of which were pled or apply to the contract claim which was alleged.

Standard of review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

No claim for punitive damage was alleged in connection with plaintiffs' contract theory

The trial court entered judgment against Farm Bureau on the Stones' claim for breach of contract. The trial court did not err in dismissing the Stones' claim for punitive damages because the Stones never sought punitive damages in conjunction with their

claim for breach of contract.[12] The Stones' claim for punitive damages is contained in Count VI of the Amended Petition. Their claim for breach of contract is contained in Count I of the petition. Review of the Amended Petition clearly reflects that the Stones did not seek punitive damages along with the damages for breach of contract. The Amended Petition states:

Count VI

> 54. The conduct of defendant Farm Bureau as more particularly set forth in regard to the claims and causes asserted within Count II (claim for breach of fiduciary duty to provide defense), Count III (claim for breach of fiduciary duty to settle), Count IV (claim for bad faith in refusal to defend) and Count V (claim for bad faith in failure and refusal to settle) was, in either one or all events alleged or asserted in each of the aforementioned counts, intentional tortious conduct which was willful, wanton, and in reckless disregard of the rights of others. (LF 21)

Noticeably absent from paragraph 54 of the Amended Petition is reference to the breach of contract claim contained in Count I. Because the Stones did not seek to recover punitive damages along with Count I, the trial court did not err in dismissing Count VI of the Amended Petition when it entered judgment on Count I.

[12] The Stones also appear to claim that their inability to depose Dana Frese had some bearing on the trial court's ruling dismissing their claim for punitive damages. There is nothing in the legal file showing that this deposition would somehow correct their pleading deficiency.

Even if this Court interprets the Stones' Amended Petition to state a claim for punitive damages along with their claim for breach of contract, the trial court's ruling dismissing the claim for punitive damages was correct because the general rule is that punitive damages are not recoverable in breach of contract actions. See Williams v. Kansas City Public Service, Co., 294 S.W.2d 36, 40 (Mo. 1956); Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 902 (Mo. banc 1990). See also Esicorp, Inc. v. Liberty Mut. Ins. Co., 193 F.3d 966 (8th Cir. 1999) (held that, under Missouri law, punitive damages could not be awarded in breach of contract claim for bad faith refusal to defend).

The Missouri Supreme Court in Peterson noted that this general rule is subject to two exceptions. In order to recover punitive damages under either exception, however, the plaintiff must specifically allege the applicable exception in the pleadings. Peterson at 904.

The first exception is where the breaching party's conduct, apart from an intentional breach of the contract, amounts to a separate, independent tort. Id. at 902. With regard to this independent tort exception, the plaintiff must: (1) **plead** and (2) prove this tort in order to be awarded punitive damages. Peterson at 904. In the case at bar, the Stones have **not** specifically pled this independent tort exception. (See Amended Petition LF 8-39) In addition, they are not able to prove an independent tort as a matter of law because they have waived all of their tort claims by reducing to judgment their claim for breach of contract. See pages 53-62 of Farm Bureau's brief for discussion of the waiver doctrine.

The second exception applicable to the recovery of punitive damages is where the breach of contract is coupled with violations of a fiduciary duty and where the fiduciary duty has breached a "public" trust. Id. at 902-903; Brown v. Mercantile Bank of Poplar Bluff, 820 S.W.2d 327, 340 (Mo. App. 1991). This second exception likewise has no application to this appeal. As with the "independent tort" exception, the fiduciary duty "public" trust exception was not alleged by the Stones. (LF 8-39) Even if the strict pleading requirement is overlooked, no Missouri court has ever applied this exception to facts similar to those in the case at bar. Clearly, Farm Bureau did not have any fiduciary duty or obligation to Arlene Bateman on December 23, 2002, as her policy with Farm Bureau was canceled on October 9, 2002, for non-payment of premium.[13] See Brown at 341 (plaintiff could not recover punitive damage under fiduciary exception because there was no fiduciary relationship between the plaintiff and the defendant). The trial court did not err in dismissing Count VI of the Stones' Amended Petition.

[13] For discussion of issues relating to the cancellation of Farm Bureau's policy see pages 23-34 of Farm Bureau's brief.

V.

(RESPONDING TO POINTS I, II, III AND IV OF STONES' BRIEF)

The trial court did not err in dismissing Counts II and III of the Amended Petition in that a separate cause of action for breach of fiduciary duty does not exist where the tort of bad faith has been alleged because claims for breach of fiduciary duty are included within the tort of bad faith.

Standard of review

Farm Bureau incorporates by reference the Standard of review set forth on pages 26-27 of its brief.

All Breach of Fiduciary duty claims are contained in the pleaded bad faith claim and cannot be separately asserted

The trial court did not err in dismissing Count II (breach of fiduciary duty to defend) and Count III (breach of fiduciary duty to settle) because Missouri law does not allow a separate cause of action to be asserted for breach of fiduciary duty where bad faith has also been alleged. A separate claim for breach of fiduciary duty cannot be made in these circumstances as these claims are part of the claims that make up the tort of bad faith. As noted by the Missouri Supreme Court in Catron v. Columbia Mut. Ins., 723 S.W.2d 5, 6 (Mo. banc 1987) "[t]he tort of bad faith was conceived to provide redress to insureds for an insurers' breach of their fiduciary duty in negotiating and settling third party claims against the insured." In addition, this Court in Young v. United States Fidelity & Guaranty, 588 S.W.2d 46 (Mo. App. 1979) held:

> All are familiar with the doctrine of "bad faith" as applied to claims made against the insured by persons to whom the insured is liable. In such cases it is held that an insurer must act in good faith to make whatever payment or settlement an honest judgment and discretion would dictate; failure to comply with this duty may subject the insurer in tort to the insured. [citations omitted] Recovery is quite convincingly rationalized on the ground that the reservation of the exclusive right to contest or negotiate the claim against its insured **imposes a fiduciary duty upon the carrier**. [citation omitted] **Actions brought against insurers for breach of this duty are referred to by the insurance industry itself as "third party bad faith" claims**. Id. at 47-48. (emphasis added)

As set forth above, implicit in the tort of bad faith is the insurance carrier's fiduciary duty to its insured. Bad faith is the tort cause of action that is made against an insurance company for breach of this duty. Missouri law does not and should not allow a separate cause of action for breach of fiduciary duty in cases where the tort of bad faith has been alleged. The trial court did not err in dismissing Counts II and III, the Stones' claims for breach of fiduciary duty.

CONCLUSION

Because of the complex nature of this appeal and cross appeal, Farm Bureau provides the following analysis of the relief requested and the proposed results of this case under the various rulings available to this Court. Supreme Court Rule 84.14 permits this Court to give such judgment as the trial court ought to give and is particularly applicable to questions of law.

Holding	Result
Farm Bureau's policy was properly canceled and was not in force at the time of the accident.	Reverse the judgment of the trial court and enter judgment for Farm Bureau on all counts.
Farm Bureau's policy was in force at the time of the accident, but the Stones waived any tort claims and are limited to contract damages.	Judgment for Stones in the amount of $250,000. In all other respects, trial court judgment affirmed.

Farm Bureau seeks the above relief in the above order. In no event should this Court affirm the judgment of the trial court because, at the very least, the trial court improperly awarded damages in excess of the contractual policy limit on the Stones' contract claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Come now Michael J. Patton and Joseph P. Winget and hereby certify, pursuant to Rule 84.06(b) as follows:

1. That this brief includes the information required by Rule 55.03.

2. That this brief complies with the limitations contained in Rule 84.06(b).

3. That there are 18,621 words contained in this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of May, 2006, one original and 10 copies of the foregoing brief and a diskette containing a copy of the brief were sent to the court as required by Rule 84.06(f) and two copies of the brief and a diskette containing a copy of the brief was forwarded to Thomas W. Millington, 1736 East Sunshine, Suite 405, Springfield, Missouri 65804 by hand-delivery of same to counsel and to the court.

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