
WD 69631

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Appellant**

vs.

**D.R. SHERRY CONSTRUCTION, LTD.,
Respondent**

**Appeal from the Circuit Court of Platte County, Missouri
6th Judicial Circuit, Case No. 05AE-CV03676, Division II
The Honorable Owens Lee Hull, Jr.**

**BRIEF OF APPELLANT
AMERICAN FAMILY MUTUAL INSURANCE COMPANY**

ORAL ARGUMENT REQUESTED

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II. STATUTES

Missouri Constitution Article V, § 3, and §§ 512.020 and 477.070, R.S.Mo. 4

§ 375.420, R.S.Mo. 56

JURISDICTIONAL STATEMENT

In the underlying action plaintiff, a construction company, claimed that its liability insurance carrier, defendant American Family Mutual Insurance Company, owed it coverage and compensation for property damage associated with a house constructed by plaintiff. American Family denied that its liability insurance policy provided coverage for plaintiff's claim. The jury returned its verdict in favor of plaintiff and on April 23, 2008 the Court denied defendant's Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, For A New Trial. The Court also denied defendant's Motion For Remittitur. American Family timely filed its Notice of Appeal on May 2, 2008.

The issues in this appeal generally concern the question of whether the underlying suit should have been decided by the Court, instead of by a jury, and whether the evidence supported the jury's verdict in this matter. Defendant also raises issues regarding the jury instructions in this case and certain evidentiary rulings by the Court. This appeal does not involve the validity of a treaty or statute of the United States or a statute or any provision of the Constitution of Missouri, the construction of revenue laws of this state, or the title to any office, nor is it a case where the punishment imposed is death or any of those other areas exclusively reserved for the Missouri Supreme Court. This appeal is within the jurisdiction of the Missouri Court of Appeals, Western District, pursuant to Missouri Constitution Article V, § 3, and §§ 512.020 and 477.070, R.S.Mo.

STATEMENT OF FACTS

In the underlying lawsuit plaintiff alleged that its liability insurance carrier -- defendant American Family -- breached its contract (i.e., its insurance policy) by failing to pay plaintiff for a damaged house that plaintiff constructed. American Family determined that for a variety of reasons its policy, which provided liability coverage, did not provide coverage for problems associated with the house that plaintiff had built. In other words, the dispute in the underlying case concerned a question of insurance coverage.

The House

Plaintiff is a Platte County general contractor engaged in the business of building residential structures. (L.F. 2). In 2003, plaintiff constructed a house at 13395 Sycamore Drive, in the Timber Park subdivision, which is located immediately south of Platte City. (L.F. 3). Construction began in March, 2003 and was completed in August, 2003. (Tr. 265). In August, 2003 the house was sold by plaintiff to the original homeowners for a price of \$238,000. (Tr. 107 and 265).

It is undisputed that the house is currently out of level by at least eight inches, as measured from opposite corners of the house. (Tr. 373). It is also undisputed that the property damage claimed by plaintiff is the result of that out-of-level condition.

Testimony from plaintiff's engineering expert, which was stricken by the Court after it had been presented to the jury, indicated that the out-of-level condition of the house is due to settlement. (Tr. 422). Testimony from defendant's engineering expert, who had previously

been retained by plaintiff, indicated that the house is out-of-level because of settlement, but also because the house, as built by plaintiff, “was constructed out of level to a great degree”. (Tr. 375 and 377). To be clear, it was and is American Family’s position that the insurance policy does not provide coverage for plaintiff’s claim in this case whether the damage to the house was the result of its initial construction or the result of subsequent settlement. (Tr. 444 and 636-7).

Plaintiff blamed the settlement of the house on unanticipated “bad soil”. (Tr. 213, 630 and 656). In his deposition testimony, plaintiff’s sole officer, director and shareholder, Darrin Sherry, denied that the house had been built on fill dirt. (Tr. 252 and 279). In his trial testimony Mr. Sherry said that the house “could have been” built on fill dirt. (Tr. 253). During his closing argument, plaintiff’s counsel said, “We don’t deny” that the house was built on fill dirt. (Tr. 629).

At trial a county engineer, called by defendant, testified that the house had, in fact, been built on fill dirt. (Tr. 407). He testified that the fill dirt under the house was 15 to 20 feet deep. (Tr. 407). The engineer also testified that Mr. Sherry’s development company, CLT, Inc., had placed the fill dirt on the lot before plaintiff built the house in question. (Tr. 411).¹ The engineer testified that the fill dirt in the subdivision had been compacted by CLT, Inc. in the areas where the streets were to be located, but that there was no evidence that the

¹(Mr. Sherry acknowledged that at the time he was an officer and director of CLT, Inc. (Tr. 586).)

fill dirt had been compacted on the residential lots of the subdivision, including the lot where plaintiff subsequently built the house in question. (Tr.408 - 9).

At trial Mr. Sherry testified, over defendant's objection, that this house settled because "the dirt moved". (Tr. 211). Mr. Sherry acknowledged at trial that settlement is a foreseeable risk associated with building houses on fill dirt. (Tr. 292-3). Nonetheless, throughout this lawsuit plaintiff took the position that the problems associated with the house were an "accident" -- an unintended and completely unanticipated surprise that was not the fault of plaintiff. (Tr.276, 606 and 655). Plaintiff took this position even though its own expert witness offered the opinion that the problems with the house were the result of a foundation that was constructed on bad soil -- soil that we now know was trucked onto the site by one of Mr. Sherry's companies. (Tr. 213).

In the summer of 2004 the original homeowners, who had owned the house for almost a year at that point, threatened to sue plaintiff over defects in the house and demanded that plaintiff repurchase the home from them. (Tr. 265-6). Ultimately, in March, 2005, before any suit was filed, plaintiff voluntarily repurchased the home from the original homeowners at a cost of \$268,000. (L.F. 11 and Tr. 171-2 and 270).

The Lawsuit

In November, 2005, plaintiff filed the present lawsuit against American Family, asserting claims for breach of contract and vexatious refusal to pay.² (L.F. 1). In Count I of

²Plaintiff's claim of negligent misrepresentation against American Family's agent,

its Petition -- the claim for breach of contract -- plaintiff alleged the breach of a single American Family policy -- a Commercial General Liability (CGL) policy whose policy number ended with the number 17. (L.F. 2).³ American Family has agreed throughout this lawsuit that the “Number 17” policy is the only policy that even potentially provided coverage with respect to plaintiff’s claim. (Tr. 499-501). At trial, however, plaintiff argued that American Family had relied on “at least three separate policies”. (L.F. 84).

In its Petition plaintiff did not allege the existence of any policy ambiguities; instead, plaintiff simply alleged that American Family had refused to pay for a loss that was covered by the policy. (L.F. 2-4). During plaintiff’s cross examination of American Family’s representative at trial, however, plaintiff alleged that there was confusion regarding the policy numbers and effective dates of various insurance policies. (Tr. 540-43). In its post-trial briefing, plaintiff argued that there was ambiguity regarding “every essential element” of the insurance policy, including the premiums charged, the terms of the coverage, the

defendant Gary L. Weaver Agency, Inc., was dismissed by the Court, with prejudice, at the close of plaintiff’s evidence. (Tr. 445-6 and 454). In dismissing the claim, the trial court noted that the only evidence of any misrepresentation allegedly made by agent Weaver was Darrin Sherry’s testimony that Weaver had assured him, “You’re covered”. (Tr. 445).

³In its response to American Family’s summary judgment motion, plaintiff took the position that the so-called “Number 17” insurance policy (and no other policy) was in effect when construction on the house began. (*See*, Appendix, p. A-128).

property covered, the dates of coverage, the applicable exclusions, and the methods for notifying the insurance company of claims. (L.F. 84).

Regarding plaintiff's claim for vexatious refusal to pay, plaintiff alleged in its Petition that plaintiff's representative (Mr. Sherry) notified American Family of its property damage claim regarding this house in July or August of 2004. (L.F. 5). In its interrogatory responses plaintiff alleged that it notified American Family of the claim on approximately December 27, 2004. (Tr. 244). In its "Statement Of Uncontroverted Facts", contained in plaintiff's response to American Family's motion for summary judgment, plaintiff asserted that it had notified the insurance company of the claim in December, 2004 or January, 2005. (See, Appendix, p. A-129). During his direct examination at trial, Darrin Sherry testified (consistently with the allegation in the Petition but contrary to his interrogatory answer) that he notified American Family of the claim in July, 2004. (Tr. 46-7, 132 and 165). In fact, Mr. Sherry testified at trial that he specifically remembered having two or three telephone conversations with American Family's representative during July, 2004. (Tr. 133, 148 and 247). (Plaintiff's counsel told the jury in his opening statement that Mr. Sherry notified American Family of the claim on July 12, 2004. (Tr.46)).

On the basis of Mr. Sherry's trial testimony plaintiff argued that for several months in late 2004 and early 2005 American Family did "absolutely nothing" to respond to the claim. (Tr. 47, 260 and 632). According to plaintiff, the insurance company failed to take any action to investigate the claim. (Tr. 47, 272, 632 and L.F. 5). This was part of plaintiff's

theme at trial -- that American Family was guilty of “broken promises”. (Tr. 45, 50, 53, and 630).

However, on cross-examination at trial, Darrin Sherry admitted that his testimony that he had notified American Family of the claim in July, 2004, and his interrogatory response indicating that he had notified American Family on approximately December 27, 2004, could not be corroborated and were not correct. (Tr. 251-2). When confronted on cross-examination with the discrepancies in his testimony regarding the date that American Family was first notified of the claim, Mr. Sherry testified, “We all make mistakes”. (Tr.247). Under further cross-examination about the date or dates on which he allegedly notified the insurance company of the claim Mr. Sherry ultimately said, “It doesn’t matter”. (Tr. 246). By comparison, American Family’s testimony at trial established through documentation and oral testimony that the first time that plaintiff actually notified the insurance company of this claim was not in July or August or December of 2004; instead, the notification did not occur until January 25, 2005. (Tr. 462-3).

In its Petition, plaintiff alleged that even though it had been insured by American Family since 1991 it never received a “complete copy” of the CGL policy from American Family until June, 2005, well after the events in question had taken place. (L.F. 2). During the closing argument and in the post-trial briefing in this case, plaintiff’s counsel even alleged that by the time of trial American Family still had not provided plaintiff with a complete copy of the insurance policy. (Tr. 653 and L.F. 84). However, under cross

examination at trial plaintiff's President, Darrin Sherry, acknowledged that at some point during the decade or more that his company was insured by American Family he had, in fact, received the insurance policy in question. (Tr.293 and 295).

The Insurance Policy

Beginning as early as 1991, American Family issued a variety of insurance policies to plaintiff, including Commercial General Liability coverage, Worker's Compensation coverage, and coverage for plaintiff's vehicles. (Tr. 142 and 293). In 2003, when the house in question was constructed by plaintiff, there was in effect a Commercial General Liability (CGL) policy issued by American Family -- the so-called "Number 17" policy.

The "Insuring Agreement" of American Family's policy states in pertinent part:

**COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement.
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

* * *
 - b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" is caused by an

- “occurrence” that takes place in the “coverage territory”; and
- (2) The “bodily injury” or “property damage” occurs during the policy period;

* * *

(Tr. 504-5 and Appendix, p. A-14).

The insurance policy also defines the term “occurrence” as follows:

- “13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (See, Appendix, p. A-22).

The Verdict

On January 31, 2008, the jury returned the following verdict in favor of plaintiff:

On the policy	\$268,859.57
For interest	5,932.08
For penalty	none
For attorney fees	114,166.63

(L.F. 46). The Court entered Judgment on the jury’s verdict on February 5, 2008. (L.F. 47-9). American Family timely filed its Motion For Judgment Notwithstanding The Verdict, Or In The Alternative, For New Trial and also filed its Motion For Remittitur. (L.F. 50 and 78). On April 23, 2008, the Court issued its Order, denying defendant’s post-trial motions. (L.F. 135). American Family timely filed its Notice of Appeal on May 2, 2008. (L.F. 136).

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM, IN SUBMITTING PLAINTIFF'S BREACH OF CONTRACT CLAIM TO THE JURY, AND IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE THE INTERPRETATION OF AN INSURANCE POLICY, AND THE RESOLUTION OF AN INSURANCE COVERAGE DISPUTE, IS A QUESTION OF LAW FOR DETERMINATION BY THE COURT, NOT BY A JURY, IN THAT THE JURY IN THE PRESENT LAWSUIT WAS NOT ASKED TO MAKE ANY FINDINGS OF FACT, BUT INSTEAD WAS ASKED ONLY TO DETERMINE WHETHER THE CAUSE OF PLAINTIFF'S PROPERTY DAMAGE WAS COVERED BY THE INSURANCE POLICY -- A DETERMINATION THAT WAS NOT BASED ON ANY FACTUAL FINDINGS BY THE JURY, BUT WAS BASED SOLELY ON THE JURY'S INTERPRETATION OF THE INSURANCE POLICY.

Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co., 755 S.W.2d 300 (Mo. App. 1988)

H.K. Porter Co., Inc. v. Transit Cas. Co. in Receivership, 215 S.W.3d 134, 140-41 (Mo. App. 2006)

Velder v. Cornerstone Nat. Ins. Co., 243 S.W.3d 512, 516 (Mo. App. 2008)

Commerce Trust Company v. Howard, 429 S.W.2d 702, 705-6 (Mo. 1968)

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND ERRED IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL, BECAUSE, AS A MATTER OF LAW, THE INSURANCE POLICY IN QUESTION DOES NOT PROVIDE COVERAGE WITH RESPECT TO PLAINTIFF'S BREACH OF CONTRACT CLAIM: (A) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT THE PROPERTY DAMAGE IN QUESTION WAS THE RESULT OF AN "OCCURRENCE," (B) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT THE LOSS OCCURRED DURING THE POLICY PERIOD, AND (C) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT PLAINTIFF WAS "LEGALLY OBLIGATED" TO PAY ANY SUM TO ANYONE AS DAMAGES.

H.K. Porter Co., Inc. v. Transit Cas. Co. in Receivership, 215 S.W.3d 134, 140-41 (Mo. App. 2006)

American States Ins. Co., v. Mathis, 974 S.W.2d 647 (Mo. App. 1998)

Hawkeye-Security Ins. Co. v. Davis, 6 S.W.3d 419 (Mo. App. 1999)

State Farm Fire & Cas. Co. v. D.T.S., 867 S.W.2d 642 (Mo. App. 1993)

POINT III

THE TRIAL COURT ERRED IN SUBMITTING AN IMPROPER VERDICT DIRECTING JURY INSTRUCTION TO THE JURY, OVER DEFENDANT'S OBJECTIONS, BECAUSE THE INSTRUCTION DID NOT INFORM THE JURORS OF THE APPLICABLE AND CONTROLLING LAW, IN THAT THE INSTRUCTION DID NOT ADVISE THE JURORS OF THOSE EVENTS THAT CONSTITUTE AN "OCCURRENCE" UNDER MISSOURI LAW.

Bach v. Winfield-Foley Fire Protection Dist., 257 S.W.3d 605, 608 (Mo. banc 2008)

American States Ins. Co. v. Mathis, 974 S.W.2d 647 (Mo. App. 1998)

Hawkeye-Security Ins. Co. v. Davis, 6 S.W.3d 419 (Mo. App. 1999)

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S EXHIBIT NO. 1, THE REPORT BY PLAINTIFF'S EXPERT WITNESS, KEN SIDOROWICZ, BECAUSE THERE WAS A COMPLETE ABSENCE OF FOUNDATION FOR THE OPINIONS EXPRESSED IN THE REPORT, IN THAT PLAINTIFF NEVER OFFERED ANY TESTIMONY TO ESTABLISH THE QUALIFICATIONS OF THE WITNESS, MR. SIDOROWICZ, TO SERVE AS AN EXPERT IN THIS CASE AND BECAUSE THE COURT'S RULING ON THIS ISSUE WAS COMPLETELY INCONSISTENT WITH THE COURT'S PREVIOUS RULING IN WHICH THE COURT SUSTAINED DEFENDANT'S OBJECTION AND STRUCK THE TESTIMONY OF EXPERT WITNESS SIDOROWICZ ON THE GROUNDS THAT THE TESTIMONY LACKED FOUNDATION.

Zagarri v. Nichols, 429 S.W.2d 758, 761 (Mo. 1968)

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT PLAINTIFF PRESENTED NO EVIDENCE TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT PLAINTIFF'S PROPERTY DAMAGE WAS THE RESULT OF AN "OCCURRENCE," THAT THE PROPERTY DAMAGE OCCURRED DURING THE POLICY PERIOD, OR THAT PLAINTIFF WAS "LEGALLY OBLIGATED" TO PAY ANY SUM TO ANYONE AS DAMAGES.

O'Neal v. Agee, 8 S.W.3d 238 (Mo. App. 1999)

Laws v. St. Luke's Hosp., 218 S.W.3d 461 (Mo. App. 2007)

POINT VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT ON PLAINTIFF'S VEXATIOUS REFUSAL TO PAY CLAIM WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT DEFENDANT NEVER DENIED PLAINTIFF'S CLAIM; INSTEAD, PLAINTIFF FILED SUIT TEN MONTHS AFTER NOTIFYING DEFENDANT OF THE CLAIM AND PLAINTIFF EFFECTIVELY BLOCKED DEFENDANT'S INVESTIGATION OF THE CLAIM WITH A CONFIDENTIALITY AGREEMENT.

O'Neal v. Agee, 8 S.W.3d 238 (Mo. App. 1999)

Laws v. St. Luke's Hosp., 218 S.W.3d 461 (Mo. App. 2007)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM, IN SUBMITTING PLAINTIFF'S BREACH OF CONTRACT CLAIM TO THE JURY, AND IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE THE INTERPRETATION OF AN INSURANCE POLICY, AND THE RESOLUTION OF AN INSURANCE COVERAGE DISPUTE, IS A QUESTION OF LAW FOR DETERMINATION BY THE COURT, NOT BY A JURY, IN THAT THE JURY IN THE PRESENT LAWSUIT WAS NOT ASKED TO MAKE ANY FINDINGS OF FACT, BUT INSTEAD WAS ASKED ONLY TO DETERMINE WHETHER THE CAUSE OF PLAINTIFF'S PROPERTY DAMAGE WAS COVERED BY THE INSURANCE POLICY -- A DETERMINATION THAT WAS NOT BASED ON ANY FACTUAL FINDINGS BY THE JURY, BUT WAS BASED SOLELY ON THE JURY'S INTERPRETATION OF THE INSURANCE POLICY.

A. Standard of Review

The meaning of an insurance contract is a question of law, particularly in reference to a question of coverage. H.K. Porter Co., Inc. v. Transit Cas. Co. in Receivership, 215 S.W.3d 134, 140-41 (Mo. App. 2006). Construction of an insurance contract is a question

of law which is reviewed *de novo*. Velder v. Cornerstone Nat. Ins. Co., 243 S.W.3d 512, 516 (Mo. App. 2008) (*citing*, Green v. Federated Mut. Ins. Co., 13 S.W.3d 647, 648 (Mo. App. 1999)). The interpretation of an insurance policy is a question of law. Commerce Trust Company v. Howard, 429 S.W.2d 702, 705-6 (Mo. 1968). If only a legal issue is at stake, the appellate court reviews the trial court's judgment *de novo*. H.K. Porter Co., Inc. v. Transit Cas. Co. in Receivership, 215 S.W.3d at 140-41.

B. Argument and Analysis

In Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co., 755 S.W.2d 300 (Mo. App. 1988), a lawsuit in which the defendant insurance company argued that the disputed coverage issue should have been decided by the court, and not by the jury, this Court agreed with defendant, reversed the trial court's judgment, and held:

“The court did not call upon the jury to make findings of fact but rather submitted the question of law of whether or not there was coverage. It requires no citation of authority to hold that the proper function of the jury is the determination of facts and the function of the court is to determine questions of law. It was error for the court to submit the issue of coverage to the jury.” *Id.* at 302 (*citing* Busch & Latta Painting Corp. v. State Highway Commission, 597 S.W.2d 189, 197 (Mo. App. 1980)).

The present lawsuit, excluding the claim for vexatious refusal to pay, presents a single question -- namely, whether the property damage alleged by plaintiff comes within the

coverage of the Commercial General Liability (CGL) policy issued to plaintiff by American Family. Simply put, the question is whether there is coverage for plaintiff's claim -- a question of law for the court.

In the present case, the verdict directing instruction, which was given at plaintiff's request and over defendant's objections (Tr. 662-3), stated:

“Your verdict must be for plaintiff if you believe:

First, that there is damage to a residence located at 13395 Sycamore Dr. and the cause of damage thereto is specifically covered in plaintiff's insurance contract with defendant, and

Second, plaintiff performed his agreement, and

Third, defendant failed to perform his agreement, and

Fourth, plaintiff was thereby damaged.”

(L.F. 38).

The parties agreed that the house was and is out of level and that it was therefore damaged (the first element of the instruction), although there was a dispute about the extent and value of the damage. The parties also agreed that plaintiff had “performed his agreement” (the second element of the instruction); in other words, the parties stipulated that plaintiff had paid the insurance policy premiums. (Tr. 234-5 and 564). Therefore, the only question that the instruction asked the jury to resolve was whether the cause of the damage to the house is specifically covered in plaintiff's insurance contract with defendant and

whether defendant thereby breached the insurance policy by failing to pay plaintiff's claim. That question is an insurance coverage question that should have been determined by the Court, not the jury, as a matter of law.

In the present case, defense counsel repeatedly offered the Court the opportunity to take this case from the jury and to resolve the disputed coverage issue as a question of law. In October, 2006, when the lawsuit had been on file for about a year, defendant filed its summary judgment motion, arguing that there was no coverage for plaintiff's claim. (L.F. 145). The Court denied that motion. (L.F. 146). At the pre-trial conference defendant sought leave to amend its Answer to assert a counterclaim for declaratory judgment, thereby converting the present lawsuit into a bench trial for resolution of the coverage issue. (Tr. 1-5). The Court denied that request. (Tr. 7-8). At the close of plaintiff's case, the Court directed a verdict against plaintiff with respect to the claim against American Family's insurance agent, Gary Weaver -- a claim that arguably presented fact questions for the jury. (Tr. 443)⁴. Once that directed verdict had been entered, the lawsuit involved only one defendant and only one substantive claim -- the claim for breach of contract. During the instruction conference, defendant again raised the issue that the lawsuit presented only a legal issue, for resolution by the Court, and not a fact question for the jury. (Tr. 621). The Court

⁴Defendant American Family also sought directed verdicts at the close of plaintiff's evidence and at the close of all the evidence on the breach of contract claim; however, those requests were denied.

again rejected defendant's request.

Plaintiff has argued that this case presented disputed facts and that those factual disputes required resolution by a jury. (L.F. 83-4). Specifically, plaintiff argued that the case was properly submitted to the jury because there was "conflict and ambiguity" concerning the terms of the coverage contained in the insurance policy. (L.F. 83). To demonstrate such alleged ambiguity plaintiff argued that "every essential element" of the insurance agreement was in conflict, including: the premiums charged, the terms of the coverage, the property covered, the dates of coverage, the applicable exclusions, and the methods for notifying defendant of a claim. (L.F. 84).⁵

⁵The general rules for interpretation of contracts apply to the interpretation of insurance policies. Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300, 301-2 (Mo. banc 1993). Construction of an insurance policy is unnecessary when the policy provision is clear and unambiguous. State Farm Mut. Auto Ins. Co. v. Ballmer, 899 S.W.2d 523, 525 (Mo. banc 1995). Where the language of a policy is unequivocal, it should be given its plain meaning, even if it restricts coverage. Jasper v. State Farm Mut. Auto Ins. Co., 875 S.W.2d 954, 956-7 (Mo. App. 1994). An insurance policy should be construed as written; it is not the function of the court to rewrite insurance contracts that are clear and unambiguous. Madison Block Pharmacy, Inc. v. U.S. Fidelity and Guaranty Co., 620 S.W.2d 343, 346 (Mo. banc 1981).

There are four responses. First, if there were disputed facts in this case, as plaintiff alleges, the jury was not asked to resolve any of them. In the verdict directing instruction (Instruction No. 6, L.F. 38), the jurors were not asked to resolve a single factual dispute; instead, they were simply asked to determine whether the damage to the residence was covered by American Family's insurance policy.

Second, the question of whether the language of an insurance policy is ambiguous is a question of law for the court, not an issue for resolution by a jury. Gavin v. Bituminous Casualty Corp., 242 S.W.3d 718, 720 (Mo. banc 2008).

Third, plaintiff's Petition, plaintiff's written discovery responses, and the deposition testimony of plaintiff's owner, Darrin Sherry, never mentioned a single word about any alleged "ambiguity" in American Family's insurance policy. Instead, plaintiff dredged up the "ambiguity" argument at trial as a means of prejudicing the jury against American Family; in reality, the argument had nothing to do with whether there is or is not coverage for plaintiff's claim under American Family's policy.

Finally, all of the factual disputes alleged by plaintiff are imaginary, as explained below. Plaintiff alleged, for instance, that an ambiguity exists in the insurance policy because there was a change in the coverage dates of the so-called "Number 17" policy -- the policy under which plaintiff claimed coverage. (Tr. 47 and L.F. 2 and 83-4). The evidence at trial established that the prior policy -- the so-called "Number 16" policy -- was initially in force from 9/18/01 to 9/18/02, but was extended to 12/5/02. (Tr. 497-8). The evidence

further established that that policy was renewed for an additional year, at plaintiff's request, with a policy period to run from 12/5/02 to 12/05/03. (Tr. 499-500). American Family's representative, Dean Barnhart, testified that plaintiff purchased additional property damage coverage from American Family when the policy was renewed, which had the effect of automatically converting the Number 16 policy into the Number 17 policy. (Tr. 577-8). However, the American Family representative also testified that prior to the expiration of the Number 17 policy, the coverage was cancelled at the request of plaintiff's President, Darrin Sherry. (Tr. 491-2).⁶ Because the policy was cancelled, effective September 18, 2003, the Affidavit attached to the insurance policy reflects the fact that the policy ended on that date. That ending date obviously is different from the original termination date identified on the

⁶At trial, Mr. Sherry twice denied that he had cancelled the coverage of the Number 17 policy. (Tr., pp. 295-6 and 299). Instead, Sherry testified that American Family had cancelled his coverage. (Tr. 296 and 299). However, at trial American Family demonstrated through an e-mail letter authored by Mr. Sherry that he had, in fact, instructed American Family to cancel the coverage of the Number 17 policy effective 9/18/03. (Tr., pp. 490-2). American Family also demonstrated that Mr. Sherry and his company did not pay any policy premiums to American Family after 9/18/03. (Tr.494). In fact, American Family demonstrated at trial that Mr. Sherry had purchased replacement coverage, from another company, that became effective on 9/18/03, which further confirmed his cancellation of the American Family coverage as of that date. (Tr. 297-9).

Declarations Page of the policy, but it is different only because plaintiff's President requested cancellation of the policy.

The differences in these dates and policy numbers do not constitute ambiguities in the policy, as plaintiff alleges, nor do they have any bearing on the issues of the case and they certainly do not demonstrate the sinister motives that plaintiff attempts to attribute to American Family. Instead, the different dates and policy numbers reflect changes in the coverage that were requested by plaintiff. Moreover, the issue of these alleged policy "ambiguities" was never presented to the jury for resolution.

Furthermore, although plaintiff alleges that American Family relied on multiple insurance policies (L.F. 84), the Number 17 policy was the only insurance policy identified in plaintiff's Petition and was the only policy at issue with respect to plaintiff's claim. (L.F. 2 and Tr. 499). Even if multiple policies had been at issue, which American Family denies, the language of the insuring agreement contained in American Family's policies was consistent and did not change. Plaintiff has not demonstrated any ambiguity in the language of the insuring agreement. The mere fact that the parties disagree over the interpretation of the terms of a contract does not create an ambiguity in that contract. Kyte v. American Family Mut. Ins. Co., 92 S.W.3d 295, 298-99 (Mo. App. 2002). An ambiguity arises where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in an insurance contract. Id.

As noted above, plaintiff also claims that ambiguities exist regarding “applicable exclusions” and “methods for notifying defendant” (L.F. 84); however, those issues are not relevant to the resolution of the present lawsuit. At trial American Family relied on only one policy exclusion -- Exclusion A, which pertains to “expected or intended injury”. (Tr. 526-30). The language of that exclusion never changed and was not in dispute. Furthermore, any confusion regarding the method for notifying defendant of potential claims has nothing to do with the question of whether the policy provided coverage or not.

Plaintiff also claims that ambiguities exist in various endorsements in the policy (L.F. 84); however, American Family never relied on, or even referred to, any policy endorsements in responding to plaintiff’s claim for property damage. American Family never made any reference to policy endorsements at trial. Therefore, any such endorsements are irrelevant to the resolution of the present matter. In addition, although plaintiff has identified a difference in a policy endorsement attached to the Number 16 and the Number 17 policies, it is irrelevant to the present lawsuit that American Family revised and updated a policy endorsement with respect to a subsequent version of the policy.

The only instance in which plaintiff addresses the language of the insurance policy occurred when plaintiff claimed that an ambiguity exists between the coverage for “real property” and the coverage for “tangible property”. (L.F. 85). The alleged ambiguity, however, involves nothing more than plaintiff’s confusion and plaintiff’s mis-reading of the policy. Plaintiff initially complained that the policy purports to provide coverage for damage

to “real property”, but then, according to plaintiff, purports to provide coverage only for damage to “tangible property”. From this premise, plaintiff concluded that the policy purports to provide coverage for real property, in one instance, but then fails to provide coverage for real property in another instance.

The insuring agreement of American Family’s policy actually says, in relevant part, that American Family will pay those sums that the insured becomes legally obligated to pay as damages because of “property damage” to which the insurance applies, if the property damage is caused by an “occurrence” that takes place within the coverage territory and during the policy period. The policy then defines the term “property damage” as physical injury to tangible property, including loss of use of that property. Plaintiff has failed to explain how that insuring agreement and definition constitute an ambiguity. Plaintiff has failed to explain how the policy provides coverage in one instance but not in another instance, as plaintiff alleges. Plaintiff has not provided any case law support for its allegation. No court has identified the claimed ambiguity allegedly uncovered by plaintiff. Furthermore, plaintiff has failed to explain how it was prejudiced by any perceived ambiguity in the policy. Simply put, the language of the insuring agreement of the policy was not ambiguous. As a result, the present lawsuit should have been resolved by the Court, not by a jury.

Finally, because plaintiff was permitted to try this insurance coverage dispute to a jury, instead of the court, plaintiff seized the opportunity and presented the case to the jury

in the most simplistic terms. First, plaintiff's counsel told the jury in his opening statement: "We are here because Mr. Sherry was promised that he would get protection from defendant American Family in case something went wrong with one of his houses." (Tr. 45). Counsel went on: "Mr. Weaver made certain representations to Mr. Sherry about what the policies would cover. He assured him -- he promised him that these policies would cover him in the event that something went wrong". (Tr. 52).

Next, Mr. Sherry testified that "something went wrong", although he denied that his company was in any way responsible for the failure of this house. (Tr. 263). Finally, plaintiff argued that by not paying plaintiff's claim American Family had breached its promise to protect plaintiff. In his closing argument, plaintiff's counsel told the jury: "And ladies and gentlemen, that's what this case comes down to: Isn't that why we have insurance, to protect us?" . . . Plaintiff's counsel added: "He was promised protection. He was promised to be covered. Where are we now? That promise has been broken . . ." (Tr. 630). Counsel also argued: "Something did go wrong. The house went bad. Why else would a builder have insurance except to cover this exact situation?" (Tr. 654).

It is worth noting that in its case-in-chief plaintiff never referred to the coverage language of American Family's insurance policy, except for a fleeting reference to a policy exclusion, even though plaintiff bore the burden of bringing itself within the coverage of that policy. (Tr. 210-11). State Farm Fire & Cas. Co. v D.T.S., 867 S.W.2d 642, 644 (Mo. App. 1993). Instead, plaintiff talked about "broken promises". In a perverse twist of logic,

plaintiff even argued in its post-trial briefings: “Defendant’s continued reliance on the language of the policy is fatal to its arguments”. (L.F. 92). Although plaintiff chose to rely on alleged “promises” that were made by American Family, the proper resolution of this insurance coverage dispute required an application of the relevant facts to the specific language of American Family’s policy. That resolution should have been provided by the court, not the jury.

Because the present lawsuit presented nothing other than a question of law, this Court should not remand this action to the trial court for further proceedings. Instead, this Court should enter judgment in favor of defendant American Family and against plaintiff as a matter of law because, as will be seen below, there is no coverage for plaintiff’s property damage claim under American Family’s CGL policy.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND ERRED IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL, BECAUSE, AS A MATTER OF LAW, THE INSURANCE POLICY IN QUESTION DOES NOT PROVIDE COVERAGE WITH RESPECT TO PLAINTIFF'S BREACH OF CONTRACT CLAIM: (A) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT THE PROPERTY DAMAGE IN QUESTION WAS THE RESULT OF AN "OCCURRENCE," (B) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT THE LOSS OCCURRED DURING THE POLICY PERIOD, AND (C) IN THAT PLAINTIFF PRESENTED NO EVIDENCE AT TRIAL TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT PLAINTIFF WAS "LEGALLY OBLIGATED" TO PAY ANY SUM TO ANYONE AS DAMAGES.

A. Standard of Review

The meaning of an insurance contract is a question of law, particularly in reference to a question of coverage. H.K. Porter Co., Inc. v. Transit Cas. Co. in Receivership, 215

S.W.3d 134, 140-41 (Mo. App. 2006). Construction of an insurance contract is a question of law which is reviewed *de novo*. Velder v. Cornerstone Nat. Ins. Co., 243 S.W.3d 512, 516 (Mo. App. 2008) (*citing*, Green v. Federated Mut. Ins. Co., 13 S.W.3d 647, 648 (Mo. App. 1999)).

B. Argument and Authorities

(A) Plaintiff presented no evidence at trial to establish, under the insuring agreement of the policy, that the property damage in question was the result of an “occurrence.”

Under Missouri law, a party seeking to establish coverage under an insurance policy has the burden of proving that the claim is within the coverage afforded by the policy. State Farm Fire & Cas. Co. v. D.T.S., 867 S.W.2d 642, 644 (Mo. App. 1993). To establish coverage an insured must demonstrate, among other things, a loss caused by a peril insured against. Valentine-Radford, Inc. v. American Motorists, Inc., 990 S.W.2d 47, 51 (Mo. App. 1999).

The “Insuring Agreement” of the insurance policy states, in part, that American Family will pay those sums that the insured becomes legally obligated to pay as damages because of property damage that is caused by an “occurrence”. (See, Appendix, p. A-14). The term “occurrence” is defined in the policy as:

“An accident, including continuous or repeated exposure to substantially the same general harmful conditions”.

(See, Appendix, p. A-22).

The Eastern District Court of Appeals, in the context of a CGL insurance policy, has held that an “occurrence” must be an “accident”. The Court then gave the following definition of “accident”:

“An event that takes place without one’s foresight or expectation; an undesigned, sudden, or unexpected event. Hence often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty; as, to die by an accident.”

American States Ins. Co., v. Mathis, 974 S.W.2d 647, 650 (Mo. App. 1998).

In the present lawsuit, plaintiff argued that all of the problems associated with the house were caused solely as a result of settlement and that the settlement was due to unanticipated soil conditions. (Tr. 211, 630 and 656). On the basis of this claim, plaintiff argued that the damage to the house was unanticipated and the result of an accident. (Tr. 655). Indeed, throughout the trial, Mr. Sherry pretended to be an innocent, passive bystander with respect to the house, as opposed to what he really was -- the head of the general contracting company that was responsible for the construction of the house and an officer and director of the company that dumped fill dirt on the lot before the house was built. In describing the problems with the house, Mr. Sherry repeatedly testified, “a bad circumstance

happened here”, “something happened”, “something went wrong”, “the house went bad”. (Tr. 263 and 273). Plaintiff’s counsel echoed that theme in his opening statement and closing argument, telling the jury that “this house went wrong” and “the house went bad”. (Tr. 49 and 654).

However, the testimony at trial demonstrated that plaintiff and Mr. Sherry were anything but innocent bystanders who were victimized by unanticipated circumstances. Defendant’s engineering expert, John Evans, who had previously been retained by Mr. Sherry to inspect the house, testified that the house is out-of-level for two reasons: (1) because the house was constructed by plaintiff “out-of-level to a great degree”, and (2) because of subsequent settlement of the house. (Tr. 375).⁷ This is the testimony of the expert retained by Darrin Sherry. Clearly, if plaintiff built the house out-of-level, that construction was not an “accident”; it was instead the result of faulty, defective construction by plaintiff, for which there is no coverage. Hawkeye-Security Ins. Co. v. Davis, 6 S.W.3d 419, 425 (Mo. App. 1999) (discussed below).

Furthermore, although Mr. Sherry maintained that the house had settled because of

⁷Evans reached the conclusion that plaintiff had built the house “out of level to a great degree” before Darrin Sherry hired him to inspect the house. Mr. Sherry knew that Evans had reached that conclusion, which essentially accused Sherry’s construction company of faulty construction, and yet Sherry hired Evans to conduct an inspection of the house anyway. (Tr. 283-4).

unanticipated soil conditions, the evidence at trial demonstrated otherwise. The trial testimony demonstrated that the house had been built on fill dirt that was 15 to 20 feet deep and that the fill dirt had been placed on the property by Darrin Sherry's development company, CLT, Inc., prior to construction of the house. (Tr. 407 and 411). At trial Mr. Sherry testified that he was and is the sole shareholder, sole officer and sole director of the plaintiff construction company and that, in addition, he was and is an officer and director of CLT, Inc. (Tr. 252, 279, and 586). He testified that he is personally familiar with the construction of this house. (Tr. 253). The uncontested evidence at trial established that CLT, Inc. put fill dirt on Lot 135, that the fill dirt was 15 to 20 feet deep, that CLT, Inc. compacted the fill dirt where the streets in the subdivision were to be laid out, but that the company did not compact the fill dirt on the residential lots. (Tr. 408-9). The evidence also established that plaintiff and Mr. Sherry never took soil samples and never performed geological tests on the fill dirt that had been placed on Lot 135 to determine whether it could bear the weight of a house. (Tr. 260). Mr. Sherry also admitted that constructing a house on fill dirt presents certain risks and he admitted that it was "foreseeable" that a house built on fill dirt would settle if inadequate piers were installed under the house prior to construction. (Tr. 292-3). Plaintiff's own expert, Mr. Sidorowicz, testified that the problems with the house were the result of a foundation that was constructed on "bad soil" (Tr. 213) -- in other words, the soil that Mr. Sherry's company knowingly and deliberately placed on the lot before construction of the house began.

Obviously, the damage to the house in question was not an accident from the perspective of Darrin Sherry or his construction company, nor was the damage to the house without his “foresight or expectation”, to quote Mathis. Id. The damage to the house was the very kind of “foreseeable” risk that Mr. Sherry acknowledged on cross-examination. Plaintiff tried to downplay the impact of this conclusion by pointing out during the trial testimony and in the closing argument that all of the work on the house had been approved by private engineers and/or city building inspectors. (Tr. 70, 77, 292, 413 and 630). Apparently plaintiff assumed that such approval relieved the company of responsibility for the failings at this house. But plaintiff’s arguments on this topic miss the point. Even if the work on this house was approved by other professionals, Mr. Sherry admitted that he knew the house was built on fill dirt and he admitted that he knew that settlement was a foreseeable risk of building on such dirt. As a result, because the damage to the house was not the result of an unforeseen accident, there was no “occurrence”, as defined in the insurance policy. Because there was no occurrence, the policy does not provide coverage.

The Southern District’s ruling in Hawkeye-Security Ins. Co. v. Davis, 6 S.W.3d 419 (Mo. App. 1999) dictates the outcome of the present lawsuit, in favor of American Family. In Hawkeye, the insurance company filed a declaratory judgment action with respect to a CGL policy containing language identical to that contained in American Family’s policy at issue in the present case. Id. at 421. Hawkeye arose from a house that was constructed with defects in both the materials and workmanship. Id. The homeowners sued the general

contractor and obtained a substantial judgment. Id at 422. Hawkeye-Security Insurance Company, which insured the general contractor, then filed a declaratory judgment action, arguing that it did not cover the homeowner's claims against the general contractor. Id. The trial court agreed and that ruling was affirmed on appeal. Id. In that case the Southern District Court of Appeals, relying on the Mathis decision, held that the homeowner's claims against the general contractor for defective materials and workmanship did not constitute an "occurrence" as that term was defined in Hawkeye's policy. Id. at 426. As a result, the court agreed with Hawkeye that the policy did not provide coverage with respect to the homeowner's claims against the general contractor. Id. Instead, the court found that Hawkeye's insured, the contractor, had simply breached its construction contract with the homeowners -- a breach that did not constitute an accident. The court specifically found that the general contractor's failure to perform according to the construction contract could not be characterized as an "undesigned or unforeseen occurrence", which was part of the description the Mathis court used in defining an "accident". Id.

Just as the Southern District found that defective work by a general contractor does not constitute an "occurrence" under the language of a standard CGL insurance policy, this Court should reach the same conclusion in the present case and find that American Family's policy does not provide coverage for plaintiff's claim.

Also, as noted above, plaintiff's Petition in this matter asserts two claims against defendant American Family -- a breach of contract claim (Count I) and a claim for vexatious

refusal to pay (Count II). Obviously, and it should go without saying, if there is no coverage for plaintiff's claim under American Family's insurance policy, and consequently there is no breach of the insurance contract, there can be no valid basis for a claim that American Family acted vexatiously in handling plaintiff's claim. Allstate Ins. Co. v. Peters, 641 S.W.2d 156, 158 (Mo. App. 1982). Jury Instruction No. 8, submitted by plaintiff, properly stated as a precondition that the jury was required to find in favor of plaintiff on the claim on the insurance policy before it could consider the vexatious refusal claim. (L.F. 42-3).

(B) Plaintiff presented no evidence a trial to establish, under the insuring agreement of the policy, that the loss occurred during the policy period.

Plaintiff bears the burden of proving that its claim came within the policy period of the insurance policy in question. American States Ins. Co. v. Herman C. Kempker Const. Co., Inc., 71 S.W.3d 232, 235 (Mo. App. 2002). In other words, plaintiff bears the burden of proving that its claim arose prior to September 18, 2003, the last date of the insurance coverage. Plaintiff has not and cannot meet its burden on this issue.

The "Insuring Agreement" of American Family's CGL policy provides that American Family will pay those sums that the insured becomes legally obligated to pay as damages because of property damage to which the insurance applies. (See, Appendix, p. A-14). The Insuring Agreement also states that the insurance applies only if the property damage is caused by an occurrence that takes place within the coverage territory and during the policy period. Id.

The evidence at trial established that the insurance policy ended, due to cancellation by plaintiff's President, Darrin Sherry, effective September 18, 2003. (Tr. 490-492). According to Mr. Sherry's trial testimony, construction of the house had been completed approximately one month earlier, in August, 2003. (Tr. 265). He also testified that the closing on the sale of the house to the original homeowners occurred on August 15, 2003. (Tr. 108-9). Mr. Sherry testified that there were no problems with the house until approximately eight months later, when he received a phone call from the homeowners in April, 2004, advising him of problems. (Tr. 265). Plaintiff presented no evidence at trial that the house had started to settle at an earlier date. In fact, Mr. Sherry testified that the last effective date of the American Family policy -- September 18, 2003 -- was "absolutely" before he knew of any problems with the house. (Tr. 301). According to plaintiff, the house was out-of-level due solely to settlement. (Tr. 291). However, plaintiff never presented any evidence at trial which even attempted to establish that the settlement of the house occurred, or even began, prior to September 18, 2003, when the insurance coverage ended.

Also, the latest possible date by which a valid claim could have been made against this insurance policy is actually a little earlier than the September 18, 2003 policy termination date. When the sale of the house to the original homeowners closed on August 15, 2003, plaintiff ceased to have an insurable interest in the property, as of that date. No valid claim could arise under the CGL policy once plaintiff ceased to have an insurable interest in the house in question. DeWitt v. American Family Mut. Ins. Co., 667 S.W.2d 700, 704 (Mo.

banc 1984).

(C) Plaintiff presented no evidence at trial to establish, under the insuring agreement of the policy, that plaintiff was “legally obligated” to pay any sum to anyone as damages.

The “Insuring Agreement” of American Family’s CGL policy states, in part:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.” (emphasis added). (See Appendix, p. A-14).

In the present case, however, the insured, D.R. Sherry Construction, never became legally obligated to pay any sum to anyone with respect to the property damage at the house in question.

Plaintiff’s evidence at trial established that eight months after plaintiff sold the house to the original homeowners, those homeowners began to complain for the first time about problems with the house. (Tr. 121-2). According to testimony from Darrin Sherry, in the summer of 2004 the homeowners threatened to sue plaintiff and demanded that plaintiff repurchase the home. (Tr. 265-6). Ultimately, in March, 2005 plaintiff repurchased the home from the homeowners. (Tr. 171-2). No suit was ever filed. (Tr. 269-70). Plaintiff repurchased the house voluntarily. (Tr. 270).

Darrin Sherry testified that by repurchasing the home his company “did the right thing”. (Tr. 171). He acknowledged that his company’s repurchase of the home was

voluntary and that it was based on a deal worked out by his attorneys. (Tr. 270). However, because the repurchase of the house was voluntary, plaintiff never became “legally obligated” to pay any sum as damages because of the property damage at the house. Plaintiff therefore never met its burden of proving that its claim falls within the insuring agreement of American Family’s policy. Because plaintiff was never “legally obligated” to pay any sum to anyone, there is no coverage under the policy with respect to the present claim.

If the lawsuit that had been threatened by the homeowners had been filed and if that lawsuit had resulted in a verdict and judgment against D.R. Sherry Construction Company, then at that point the company would have been “legally obligated” to pay damages resulting from property damage. American Family advised Mr. Sherry that it would pay to defend plaintiff with respect to any such lawsuit filed by the homeowners. (Tr. 166 and 267). However, Mr. Sherry testified that he wanted to avoid the lawsuit because he thought his company would lose the suit and because he didn’t want the bad publicity that it might generate for his company. (Tr. 267). But by voluntarily paying the homeowners for the repurchase of the house, plaintiff avoided any legal obligation with respect to damages. Accordingly, because plaintiff was never “legally obligated” to pay any damages to anyone with respect to problems at the house, there is no coverage for the present claim. Just to be clear, American Family is not arguing at this point that the verdict on this issue was against the weight of the evidence; instead, defendant is arguing that plaintiff presented absolutely no evidence to bring its claim within the insuring agreement of the insurance policy because

plaintiff never demonstrated that it was “legally obligated” to pay any damages to anyone. There is a complete absence of evidence to support this part of plaintiff’s claim.

Because the present lawsuit presented nothing other than a question of law, this Court should not remand this action to the trial court for further proceedings. Instead, this Court should enter judgment in favor of defendant American Family and against plaintiff as a matter of law because there is no coverage for plaintiff’s property damage claim under American Family’s CGL policy.

One additional point needs to be made. At this stage, plaintiff has the deed to (and possession of) the house in question, but plaintiff also has received a verdict and judgment in its favor for the full value of the house. Because plaintiff has possession of the house and a judgment for the full value of the house, the present circumstances constitute an impermissible double recovery in favor of plaintiff. Ozark Air Lines, Inc. v. Valley Oil Company, L.L.C., 239 S.W.3d 140, 147 (Mo. App. 2007)(“The general rule is that a party may not recover from all sources an amount in excess of the damages sustained, or be put in a better condition than he would have been had the wrong not been committed”). Obviously, American Family seeks reversal of the underlying Judgment in this case. But if plaintiff prevails in the present appeal, plaintiff should be required to relinquish ownership of the house in question to American Family in exchange for payment of the underlying Judgment. Otherwise, plaintiff will receive an impermissible double recovery.

POINT III

THE TRIAL COURT ERRED IN SUBMITTING AN IMPROPER VERDICT DIRECTING JURY INSTRUCTION TO THE JURY, OVER DEFENDANT'S OBJECTIONS, BECAUSE THE INSTRUCTION DID NOT INFORM THE JURORS OF THE APPLICABLE AND CONTROLLING LAW, IN THAT THE INSTRUCTION DID NOT ADVISE THE JURORS OF THOSE EVENTS THAT CONSTITUTE AN "OCCURRENCE" UNDER MISSOURI LAW.

A. Standard of Review

Whether a jury was properly instructed is a question of law that is reviewed *de novo*. Bach v. Winfield-Foley Fire Protection Dist., 257 S.W.3d 605, 608 (Mo. banc 2008). Review is conducted in the light most favorable to the submission of the instruction and if the instruction is supported by any theory, its submission is proper. Id. Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action. Id.

B. Argument and Analysis

In the present case the verdict directing instruction -- Instruction No. 6 -- was submitted to the jury at plaintiff's request. (L.F. 38-9). The only disputed question raised by that instruction is whether the cause of the damage to the house is specifically covered by the insurance policy issued to plaintiff by American Family. The instruction was defective, however, and defendant adequately established its objections to the instruction. (Tr. 662-5).

The purpose of a jury instruction is to guide the jury in reaching a just verdict “by informing the jurors of the law as it is to be applied to the evidence they have heard”. Dorrin v. Union Elec. Co., 581 S.W.2d 852, 860 (Mo. App. 1979). In the present action, verdict directing Instruction No. 6 failed to properly advise the jurors of the applicable law. Among other hurdles that plaintiff had to clear in order to meet its burden of proving that its claim is within the coverage provided by the insurance policy, plaintiff had to establish that the property damage in question was caused by an “occurrence”. The question of what constitutes an “occurrence” within the context of a CGL insurance policy has been frequently litigated in Missouri and there are numerous reported opinions on the topic. If the present lawsuit had been resolved by the Court, as a matter of law, as American Family recommended, the Court could have applied that body of law to the facts of the present case, based on briefs submitted by the attorneys. However, in this instance, at plaintiff’s request, the jury determined whether the policy afforded coverage for plaintiff’s claim even though the jury did not have at its disposal the body of Missouri law regarding “occurrence”.

In American States Ins. Co., v. Mathis, 974 S.W.2d 648 (Mo. App. 1998) the insurer sought a declaratory judgment on the grounds that it had no duty to defend or indemnify its insured under a CGL policy. Id. at 648. The trial court entered summary judgment in favor of the insurer, holding that the conduct which caused the damage was not an “occurrence” as defined in the policy. Id. The Eastern District Court of Appeals affirmed the decision. Id.

In Mathis, pursuant to a construction agreement, a subcontractor built trenches in conjunction with the construction of a federal penitentiary. Id. During the course of the project the general contractor discovered that the trenches constructed by the subcontractor were the wrong grade and slope and that the subcontractor had failed to install rebar. Id. The general contractor terminated the subcontractor, tore out the improperly constructed trenches, and repaired the work. Id. The general contractor then sued the subcontractor for the costs of the repair. Id.

The Court of Appeals held that this factual background did not establish the existence of an “occurrence” as defined in the policy. The Court noted that an occurrence must be an “accident.” The Court then gave the following definition of “accident”:

An event that takes place without one’s foresight or expectation;
an undesigned, sudden, or unexpected event. Hence often, an
undesigned and unforeseen occurrence of an afflictive or
unfortunate character; a mishap resulting in injury to a person or
damage to a thing; a casualty; as, to die by an accident.

Id. at 650.

Based on this definition of accident, the Mathis court concluded the loss sustained was not the result of an accident, and therefore did not constitute an “occurrence” as the term was defined in the policy. Id.

The Court also noted that the intent of commercial general liability policies “is to protect against the unpredictable and potentially unlimited liability that can result from accidentally causing injury to other persons or their property”. Id. at 649. The Court held that such a policy “does not serve as a performance bond, nor does it serve as a warranty of goods or services”. Id. (In the present matter, by making a first-party claim against a third-party liability insurance policy, plaintiff attempts to make American Family’s CGL policy a performance bond or a warranty of services provided.)

In the present lawsuit, the extensive body of Missouri law, exemplified by Mathis and Hawkeye (addressed in Point II, above), was not before the jury for its consideration during deliberations. The verdict directing instruction submitted by plaintiff and given by the Court therefore did not adequately inform the jurors of the applicable law. The instruction therefore failed in its primary purpose, resulting in prejudice to defendant American Family.

Because this Court’s review of this issue is *de novo* and because an improper instruction was submitted to the jury in this case, which resulted in prejudice to defendant American Family, this Court should reverse the Judgment and remand the present action to the trial court for a new trial, specifically a non-jury bench trial.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S EXHIBIT NO. 1, THE REPORT BY PLAINTIFF'S EXPERT WITNESS, KEN SIDOROWICZ, BECAUSE THERE WAS A COMPLETE ABSENCE OF FOUNDATION FOR THE OPINIONS EXPRESSED IN THE REPORT, IN THAT PLAINTIFF NEVER OFFERED ANY TESTIMONY TO ESTABLISH THE QUALIFICATIONS OF THE WITNESS, MR. SIDOROWICZ, TO SERVE AS AN EXPERT IN THIS CASE AND BECAUSE THE COURT'S RULING ON THIS ISSUE WAS COMPLETELY INCONSISTENT WITH THE COURT'S PREVIOUS RULING IN WHICH THE COURT SUSTAINED DEFENDANT'S OBJECTION AND STRUCK THE TESTIMONY OF EXPERT WITNESS SIDOROWICZ ON THE GROUNDS THAT THE TESTIMONY LACKED FOUNDATION.

A. Standard of Review

Appellate review of a trial court's decision concerning admissibility of evidence is for abuse of discretion. Closson v. Midwest Div. IRHC, LLC, 257 S.W.3d 619, 621 (Mo. App. 2008). Matters involving admission of evidence are reviewed for prejudice, not mere error, and will result in reversal only if the defendant demonstrates that the error was so prejudicial that it deprived him of a fair trial. Id. at 621-22.

B. Argument and Analysis

During the first day of trial plaintiff's counsel advised the Court that plaintiff's expert witness, Ken Sidorowicz, would testify live in the courtroom during the trial, although counsel said that there were problems getting Mr. Sidorowicz to court. (Tr. 34). On the second day of trial plaintiff's counsel moved for the admission of Exhibit 1, which is Mr. Sidorowicz' September 20, 2006 report in this matter. (Tr. 212). (See Appendix, p. A-116). Defense counsel did not object to the admission of that exhibit because counsel intended to use the report to cross-examine Mr. Sidorowicz during his live courtroom testimony. (Tr. 212).

On the second day of trial plaintiff's counsel again advised the court that Mr. Sidorowicz would be called to testify. (Tr. 213-4). At the end of the second day of trial plaintiff's counsel once again assured the court that Mr. Sidorowicz "absolutely" would be present in court to testify the following morning. (Tr. 390-1).

At the beginning of the third day of trial plaintiff's counsel announced that due to "scheduling conflicts" Mr. Sidorowicz would not appear at trial. (Tr. 419). Instead, counsel read portions of Mr. Sidorowicz' deposition testimony to the jury. (Tr.419, et seq.). At the conclusion of that reading, the Court sustained defendant's objection and struck Sidorowicz' testimony because plaintiff had failed to present any evidence to establish Mr. Sidorowicz' credentials as an expert witness. (Tr. 442-3).

Thereafter, defense counsel raised an objection to the Sidorowicz' report, Exhibit 1,

and asked that it be stricken for the same reason that Mr. Sidorowicz' testimony had been stricken -- because of a complete lack of foundation regarding Sidorowicz' credentials as an expert witness. (Tr. 621-2). The Court overruled defendant's objection and the report was sent to the jury during its deliberations, along with all of the other exhibits. (Tr. 625 and 666-8).

If Mr. Sidorowicz' deposition testimony lacked foundation, as the Court correctly held, then the same must be true with respect to Exhibit 1, Mr. Sidorowicz' September 20, 2006 report. Nothing in the report establishes that Mr. Sidorowicz is an expert witness or that he is qualified to give the opinions and conclusions contained in the report. The Court's rulings on these two issues are inconsistent and irreconcilable. If Mr. Sidorowicz' deposition testimony was properly stricken, then his report in this matter should have been stricken as well. Once stricken, the jury should have been given a withdrawal instruction regarding the Sidorowicz report. The fact that the report was sent to the jury during its deliberations raises the irrebuttable presumption that those deliberations were poisoned by the improperly admitted exhibit. Zagarri v. Nichols, 429 S.W.2d 758, 761 (Mo. 1968)(it is improper and erroneous to allow the jury to have articles not properly in evidence which would tend to influence the verdict).

Because the verdict in this case was tainted by an improperly admitted exhibit, this Court should reverse the Judgment and remand the present action to the trial court for a new trial, specifically a non-jury bench trial.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL BECAUSE THE JURY'S VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT PLAINTIFF PRESENTED NO EVIDENCE TO ESTABLISH, UNDER THE INSURING AGREEMENT OF THE POLICY, THAT PLAINTIFF'S PROPERTY DAMAGE WAS THE RESULT OF AN "OCCURRENCE," THAT THE PROPERTY DAMAGE OCCURRED DURING THE POLICY PERIOD, OR THAT PLAINTIFF WAS "LEGALLY OBLIGATED" TO PAY ANY SUM TO ANYONE AS DAMAGES.

A. Standard of Review

The trial court has broad discretion to grant or deny one new trial on the grounds that the verdict was against the weight of the evidence. O'Neal v. Agee, 8 S.W.3d 238, 241 (Mo. App. 1999). The trial court's ruling will be reversed only on a showing of abuse of discretion. Id. When reviewing a decision to grant or deny a new trial, the Court of Appeals will view all inferences and evidence in the light most favorable to the trial court's decision. Laws v. St. Luke's Hosp., 218 S.W.3d 461, 466 (Mo. App. 2007).

B. Argument and Analysis

Plaintiff's breach of contract claim in this case alleges, in effect, that American Family's insurance policy provided coverage for plaintiff's property damage claim and that

American Family breached the policy/contract by failing to pay plaintiff's claim. As argued in the previous points in this Brief, there is no coverage for plaintiff's claim -- and therefore there could be no breach of contract -- because plaintiff was never "legally obligated" to pay any sum to anyone, because the alleged loss did not occur during the policy period, and because plaintiff failed to establish that the property damage was the result of an "occurrence".

Even viewed in the light most favorable to plaintiff -- adopting plaintiff's theory that the house is out-of-level due solely to settlement caused by the soil conditions beneath the house -- the evidence at trial established:

- Darrin Sherry's development company (CLT, Inc.) placed fill dirt on the residential lot prior to the construction of the house in question.
- The fill dirt placed on the lot was 15 to 20 feet deep under the house in question.
- Although the dirt was compacted by Mr. Sherry's development company in other areas of the subdivision, there is no evidence that the dirt on the residential lots, including the lot where this house was built, was ever compacted.
- Plaintiff's own expert testified that the problems with the house were the result of construction on "bad soil".
- Mr. Sherry testified that settlement is a foreseeable risk associated with

building houses on fill dirt.

Given all of these factors, it is clear that there is no coverage for plaintiff's claim under American Family's liability policy. If there is no coverage, then it cannot be said that American Family breached its contract with plaintiff. As a result, the jury's verdict in favor of plaintiff was against the weight of the evidence.

The trial court abused its discretion in denying defendant's motion for a new trial on the grounds that the verdict was against the weight of the evidence. Therefore, this Court should reverse the Judgment and remand the present action to the trial court for a new trial, specifically a non-jury bench trial.

POINT VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL BECAUSE THE JURY’S VERDICT ON PLAINTIFF’S VEXATIOUS REFUSAL TO PAY CLAIM WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT DEFENDANT NEVER DENIED PLAINTIFF’S CLAIM; INSTEAD, PLAINTIFF FILED SUIT TEN MONTHS AFTER NOTIFYING DEFENDANT OF THE CLAIM AND PLAINTIFF EFFECTIVELY BLOCKED DEFENDANT’S INVESTIGATION OF THE CLAIM WITH A CONFIDENTIALITY AGREEMENT.

A. Standard of Review

The trial court has broad discretion to grant or deny one new trial on the grounds that the verdict was against the weight of the evidence. O’Neal v. Agee, 8 S.W.3d 238, 241 (Mo. App. 1999). The trial court’s ruling will be reversed only on a showing of abuse of discretion. Id. When reviewing a decision to grant or deny a new trial, the Court of Appeals will view all inferences and evidence in the light most favorable to the trial court’s decision. Laws v. St. Luke’s Hosp., 218 S.W.3d 461, 466 (Mo. App. 2007).

B. Argument and Analysis

The jury in the present lawsuit did not award plaintiff any sum as a “penalty” with respect to plaintiff’s vexatious refusal claim against American Family; however, the jury did award attorney’s fees in the amount of \$114,166.63 on plaintiff’s vexatious refusal claim.

(L.F. 46). Pursuant to § 375.420, R.S.Mo. -- the vexatious refusal statute that applies to American Family -- an award can be made if the evidence demonstrates that the insurance company “refused to pay such loss without reasonable cause or excuse”.

The evidence at trial established that plaintiff first notified American Family of a claim regarding this house on January 25, 2005. (Tr. 462-3). The present lawsuit was filed ten months later, on November 29, 2005. (L.F. 1). The evidence also established that during eight of the months following the first notification of the claim -- until late September, 2005 -- American Family was prevented from adequately investigating plaintiff’s claim because plaintiff and the original homeowners had entered into a Confidentiality Agreement -- an agreement that was entered into at plaintiff’s request in an effort to prevent any bad publicity related to the construction of this house. (Tr. 486-8 and 272-4). American Family’s representative attempted to interview the homeowners about this claim but they refused to talk to that representative because of the Confidentiality Agreement. (Tr. 486-8). Indeed, American Family’s representative testified at trial that Darrin Sherry specifically asked him not to contact the owners of the house for purposes of investigating this claim. (Tr. 551). Given the fact that plaintiff had instituted a gag order which blocked American Family’s investigation of the claim, it can hardly be said that American Family acted “without reasonable cause or excuse” by failing to investigate the claim in a timely fashion.⁸

⁸It is important to note that American Family never denied plaintiff’s claim or refused to pay the claim; instead, the insurance company was pursuing its investigation of the claim

In addition, the evidence at trial demonstrated that American Family's representative requested various documents from plaintiff regarding its claim. (Tr.471-2). Some of the requested documents were provided to American Family, but other documents were not provided. (Tr. 479-80 and 480). American Family's representative testified that he did not initiate engineering studies regarding the house because he did not want to duplicate efforts that had already been undertaken; instead, he wanted to receive and study the reports of the engineers who had already investigated the house, either at the request of the homeowners or at plaintiff's request. (Tr. 493-4).

Furthermore, American Family's representative advised Darrin Sherry that the company would provide defense counsel for the construction company in the event that it was sued by the homeowners. (Tr. 132-3 and 267). Mr. Sherry acknowledged that the offer of defense had been made by American Family. (Tr.267).

In short, the jury's verdict in favor of plaintiff on its vexatious refusal claim was against the weight of the evidence. Indeed there was no evidence presented at trial that the insurance company refused to pay the claim "without reasonable cause or excuse".

The trial court abused its discretion in denying defendant's motion for a new trial on the grounds that the verdict was against the weight of the evidence. Therefore, this Court should reverse the Judgment and remand the present action to the trial court for a new trial, specifically a non-jury bench trial.

when plaintiff filed the present lawsuit. (Tr. 492-3 and 562).

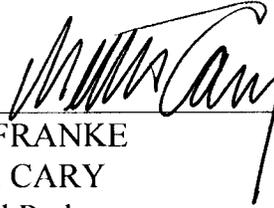
CONCLUSION

The underlying lawsuit should have been resolved by the trial court, as a matter of law, rather than by the jury, because plaintiff's breach of contract claim concerned an insurance coverage issue -- a matter of law -- and because the jury was not asked to resolve any factual disputes. In addition, as demonstrated in Point II above, there was a complete absence of proof on plaintiff's part to support its assertion that its property damage claim was within the coverage of American Family's insurance policy. As a result, the verdict was against the weight of the evidence, as argued in Points V and VI. As demonstrated in Point III, an improper verdict directing jury instruction was given in this case. Finally, a critical exhibit -- plaintiff's Exhibit No. 1 -- was improperly admitted into evidence, which had the effect of poisoning the jury's deliberations, as argued in Point IV.

If this Court reverses the underlying Judgment pursuant to either of the first two points raised herein, the Court should not remand this action to the trial court for further proceedings. Instead, this Court should enter judgment against plaintiff and in favor of defendant on both the breach of contract claim and the vexatious refusal claim. On the other hand, if this Court reverses the Judgment pursuant to any or all of Points III through VI herein, the matter should be remanded to the trial court for a new trial, and specifically for a non-jury bench trial.

Respectfully submitted,

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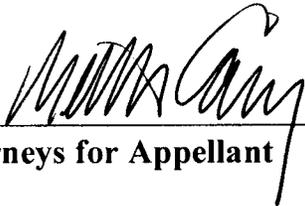
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Brief of Appellant American Family Mutual Insurance Company were mailed this 9 day of January, 2009, to:

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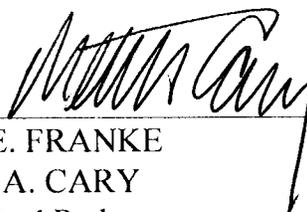
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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Appellant hereby certifies that this Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 12,610 words counted using Corel WordPerfect 10. Furthermore, this Brief complies with Rule 84.06(g) in that the computer disk provided to the Court containing this Brief has been scanned for viruses and that it is virus-free and has been formatted in Coral WordPerfect 10.

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