IN THE SUPREME COURT OF MISSOURI
EN BANC

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| UTILITY SERVICE & MAINTENANCE, INC., et al., | ) | |
| Plaintiffs/Respondents, | ) | |
| vs. | ) | No. 86363 |
| NORANDA ALUMINUM, INC., et al., | ) | |
| Defendants/Appellants. | ) | |

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Appeal from the Circuit Court of St. Louis County
Hon. Carolyn Whittington

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# Brief of Appellant
# Noranda Aluminum, Inc.

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**Statutes And Other Authorities:**

## Jurisdictional Statement

This is a civil action for declaratory relief and indemnification. Plaintiff TIG Insurance Company accepted, unconditionally, Noranda's tender of defense of the underlying lawsuit. TIG took complete control of the defense of the lawsuit and then settled it. After the settlement, TIG decided that it had erroneously accepted Noranda's tender and sought recovery of the amounts it had paid to defend and settle the underlying lawsuit. In a court-tried case, the trial court agreed with TIG and entered judgment for $5,848,465.46.

After the court of appeals issued an opinion, this Court sustained Noranda's application for transfer and now reviews the case as though on original appeal. Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

## Statement of Facts

1. The Parties.

Plaintiff TIG Insurance Company (TIG) is a California corporation with its principal place of business in Irving, Texas. L.F. 63. TIG is the corporate successor to Transamerica Insurance Company. Id. In the interest of clarity, this brief will use the name TIG to describe both TIG and its predecessor.

TIG issued a comprehensive general liability (CGL) policy for $1 million, and an excess policy for $4 million, to Utility Service & Maintenance, Inc. (Utility). P. Ex. 36-37. Utility is a Missouri corporation with its principal place of business in St. Louis County. L.F. 63. Its president is Denny Dunaway. Tr. 9.

Utility specializes in painting high voltage electrical equipment and apparatus for large industrial customers. Tr. 9. Utility is a "very special type" of contractor, due to the dangers associated with working around electrical equipment. Tr. 44. As a result, a customer cannot rely on just anyone to perform such services. Tr. 46. The degree of specialization gives Utility leverage to negotiate terms of a contract despite its relatively small size. Tr. 47.

Noranda Aluminum, Inc. (Noranda) is a Delaware corporation authorized to do business in Missouri. L.F. 63. Noranda owns and operates a plant for the manufacture of aluminum in New Madrid, Missouri. L.F. 64. A solo practitioner named Lawrence Rost represented Noranda in connection with the events underlying this lawsuit. Tr. 290.

2. The Utility/Noranda Contract.

In 1992, Noranda solicited a bid from Utility to repaint some of the electrical structures at the New Madrid facility. Tr. 12. On July 30, 1992, Noranda sent a formal request for quotation to Utility. P. Ex. 45. The request recites that it included as Exhibit C the general conditions of the contract. Id. Mr. Dunaway testified, however, that the package he received did not include Exhibit C. Tr. 20; 22.

Paragraph 13 of Exhibit C contained a provision requiring the contractor to indemnify Noranda for any claims by any of the contractor's employees for death or personal injury, except where caused by Noranda's sole negligence. P. Ex. 33 ¶ 13. The trial court found that Exhibit C (and its indemnification provisions) were not part of the contract. Add. 3 ¶ 11. For purposes of this appeal, Noranda accepts that factual finding as accurate.

On August 31, 1992, Noranda issued a purchase order to Utility. Tr. 25; P. Ex. 46. The purchase order recited that acceptance "confirms your acknowledgement of our standard terms and conditions." P. Ex. 46. Mr. Dunaway testified that he did receive a copy of those standard terms and conditions on September 10, 1992. Tr. 26; P. Ex. 47.

Paragraph 19 of the standard terms and conditions also contains an indemnification clause:

> Seller shall indemnify and save Purchaser free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever

kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with Seller's performance hereunder or any default by Seller or breach of its obligations hereunder.

P. Ex. 47.

No one disputes that ¶ 19 was part of the contract. Mr. Dunaway testified that some of the other contracts under which Utility works contain clauses requiring the contractor to indemnify the owner from liability regardless of whose fault the injury might be. Tr. 64. The CGL policy that Utility purchased from TIG specifically provided coverage for such claims. Tr. 155.

3. The Tender.

On October 6, 1992, while performing under the contract, a Utility employee named Gary Murphy was injured on the job. Tr. 28-29. In 1995, Mr. Murphy filed an action against Noranda in the Circuit Court of the City of St. Louis alleging that Noranda's negligence had caused his injuries. P. Ex. 4.

On June 30, 1995, Mr. Rost made demand on Mr. Dunaway to indemnify Noranda for the Murphy lawsuit. P. Ex. 50. Mr. Dunaway passed the request on to TIG. Tr. 31. TIG assigned responsibility for the matter to Charles Buttner, then a senior claims examiner who had been handling insurance claims since 1961. Tr. 144-45; D. Ex. H at 27. Mr. Buttner retained Brown & James in St. Louis, to represent Noranda.

Mr. Buttner directed Brown & James to enter an appearance and obtain an extension of time to respond to the Murphy lawsuit while TIG assessed its obligations to Noranda. Tr. 148. In compliance with those instructions, on July 12, 1995, Russ Watters sent a letter to Mr. Rost. P. Ex. 65. That letter informed Mr. Rost that:

- Brown & James had entered an appearance and requested additional time to plead.
- The additional time would allow TIG an opportunity to determine whether it owed Noranda a defense.
- If TIG determined that no defense was owed, it would immediately notify Noranda and substitute counsel could enter their appearance.

Id.

Brown & James assigned Joe Swift to handle the matter. On September 6, 1995, Mr. Swift sent a letter to Mr. Buttner. P. Ex. 53. That letter quoted the language of ¶ 19 of the standard terms and conditions and concluded that "paragraph 19 may require Utility to honor the tender of defense and indemnity made by Noranda." Id.

On December 29, 1995, Mr. Swift faxed a copy of Noranda's standard terms and conditions to Mr. Buttner. Tr. 163. Based on the language of ¶ 19, Mr. Buttner concluded that TIG "had an obligation to defend and indemnify" Noranda. Id. Since Mr. Buttner never received Exhibit C, and did not know whether it was

part of the contract, the terms thereof played no part in his decision. P. Ex. 61 ¶ 6. Instead, he based his decision on ¶ 19, the language of the CGL policies, and the advice he had received from Mr. Swift that TIG probably owed a defense. Tr. 176.

The same day, Mr. Buttner told Mr. Swift, both orally and by fax, to "accept the tender of defense and indemnification" from Noranda and to "enter an unconditional appearance" on its behalf and defend the Murphy lawsuit. D. Ex. G. In compliance with these instructions, Mr. Swift wrote to Mr. Rost that he had received "both an oral and a handwritten commitment" to "accept, unconditionally, Noranda Aluminum's tender of defense and indemnification." D. Ex. F. The letter enclosed a copy of the handwritten fax whereby Mr. Buttner had communicated his decision. Id.

During Mr. Buttner's tenure with TIG, there was never "any indication that TIG was reserving their rights" with respect to the Murphy lawsuit. Tr. 204. At trial, TIG's counsel acknowledged that there was "no question" that "there was never a reservation of rights." Tr. 75. Mr. Swift testified that he assumed that Mr. Rost was "satisfied that TIG had said they will defend Noranda without a reservation of rights." Tr. 107.

After TIG's acceptance, Noranda "stopped the hunt for an attorney" and gave Mr. Swift "total control of the defense." Tr. 303-04.

4. The Settlement Of The Murphy Lawsuit.

Mr. Murphy had been severely burned over most of his body. Tr. 79. He was also missing some fingers and some earlobes, and he could not grow hair. Id. When the trial court denied Noranda's motion for summary judgment, Tr. 83-84, Mr. Murphy's counsel demanded $30 million to settle the case. P. Ex. 19. Counsel for both Noranda and Utility therefore requested TIG to settle the case within the combined $5 million in policy limits. P. Ex. 23; 25.

The parties retained George Fitzsimmons to mediate the case. Tr. 99-100. At that mediation, TIG's representative, Ralph Mason, had "sole control of whether to settle" and on what terms. Tr. 118. TIG "basically took over negotiations" and did not even want Mr. Swift's "advice about things." Tr. 118-19. TIG was solely responsible for the decision to pay the $4.3 million that it took to settle the case. Tr. 119.

5. TIG's Belated Attempt To Reserve Rights.

Mr. Buttner left TIG's employment on December 29, 1995, the same day he instructed Mr. Swift to accept, unconditionally, Noranda's tender of defense. In March 1997, someone else at TIG retained Sam Rynearson to "review certain aspects of liability" concerning the Murphy lawsuit. D. Ex. I. Mr. Rynearson requested a copy of Exhibit C. On May 14, 1997, Mr. Rynearson wrote that Mr. Dunaway had no recollection of receiving Exhibit C. P. Ex. 8 at 2. The letter further stated:

> Because of your long delay and refusal to supply Exhibit C and paragraph 13, we have reason to believe that such a document is not a part of the contract between Utility Services and Noranda Aluminum under the Substation Painting Proposal.

Id. The letter also suggested that, if there were no enforceable indemnity agreement, Noranda should assume defense of the Murphy case. Id.

On May 16, 1997, Mr. Rost forwarded a copy of Exhibit C to Mr. Rynearson. D. Ex. L. That letter stated that Utility "agreed to indemnify Noranda Aluminum, Inc. by dint of Paragraph 19 of the Terms and Conditions of Purchase" as well as by Exhibit C. Id.

Nothing more occurred until September 10, 1998, shortly before the mediation, when Mr. Rynearson wrote a letter to Mr. Rost. P. Ex. 11. That letter repeated TIG's question as to whether Exhibit C was part of the contract. And it restated TIG's effort to reserve its rights based on Exhibit C. Id. at 2. The letter said nothing about ¶ 19.

6. Proceedings Below.

The mediation and settlement of the Murphy lawsuit took place in November 1998. Tr. 319. On December 1, 1998, TIG filed an action for declaratory judgment and indemnity, based on the theory that the substation painting contract did not have an enforceable indemnification clause. L.F. 19.

The parties conducted a two-day bench trial on January 15-16, 2002. On October 8, 2002, the trial court issued a written order and judgment finding in favor of TIG and against Noranda. Salient parts of that order include findings that:

- Exhibit C was not a part of the contract between Noranda and Utility.
- TIG had authorized Mr. Swift to accept the defense unconditionally, with knowledge of the terms of ¶ 19 of the terms and conditions.
- Paragraph 19 was unenforceable as a matter of law, and did not require Utility to indemnify Noranda for Noranda's own negligence.
- For reasons not set forth in the order, TIG was not estopped from denying its liability to Noranda.

Add. 2-4 ¶¶ 11; 19-20; 35; 36.

This timely appeal followed.

## Points Relied On

**I. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage, In That It Unconditionally Accepted Tender Of Defense Without Reserving Its Rights.**

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384 (Mo. banc 1989);

State ex rel. Rimco, Inc. v. Dowd, 858 S.W.2d 307 (Mo. App. 1993);

Safeco Ins. Co. v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo. App. 1992);

Missouri Managerial Corp. v. Pasqualino, 323 S.W.2d 244 (Mo. App. 1959).

**II. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage Based On The Language Of ¶ 19, In That It Never Questioned The Validity Of ¶ 19 Before Settling The Underlying Lawsuit.**

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384 (Mo. banc 1989);

Atlanta Cas. Co. v. Stephens, 825 S.W.2d 330 (Mo. App. 1992);

Wood v. Safeco Ins. Co., 980 S.W.2d 43 (Mo. App. 1998);

Morris v. Travelers Ins. Co., 546 S.W.2d 477 (Mo. App. 1976).

**III. The Trial Court Erred In Entering Judgment In Favor Of TIG For Indemnification, Because TIG Was A Volunteer, In That It Assumed The Defense And Paid The Settlement With Full Knowledge Of The Facts.**

American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809 (Mo. App. 1969);

Jurgensmeyer v. Boone Hospital Center, 727 S.W.2d 441 (Mo. App. 1987);

Fairbanks Canning Co. v. London Guaranty & Accident Co., 133 S.W. 664 (Mo. App. 1910);

Commercial Union Ins. Co. v. Farmers Mut. Fire Ins. Co., 457 S.W.2d 224 (Mo. App. 1970).

**IV. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Was Obliged To Defend And Indemnify Noranda, In That ¶ 19 Of The Terms And Conditions Unambiguously Required Utility To Indemnify Noranda For Noranda's Own Negligence.**

Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996);

Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. banc 2001);

Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. 1998);

RJF Int'l Corp. v. B.F. Goodrich Co., 880 S.W.2d 366 (Mo. App. 1994).

## Argument

### I. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage, In That It Unconditionally Accepted Tender Of Defense Without Reserving Its Rights.

TIG unconditionally accepted Noranda's tender of the Murphy lawsuit. Noranda relied on that acceptance to its detriment in surrendering control of the defense of the case. Less than a month after settling the underlying case, TIG reneged on its unconditional acceptance. Numerous Missouri cases hold that such conduct estops TIG from denying coverage.

## Standard of Review

The Court reviews the result of a court-tried case under the familiar principles of Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Under Murphy, the Court will affirm the trial court's decision "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." Id. at 32.

In the instant case, the relevant facts are uncontested and the only issue is the legal effect of those facts. In such circumstances, "no deference is owed" to the trial court and the issue "is a matter for the independent judgment of this Court." La-Z-Boy Chair v. Director of Economic Development, 983 S.W.2d 523, 524-25 (Mo. banc 1999).

## Argument

An indemnitor like TIG, when faced with a demand for indemnification, has three choices:

A. It can unconditionally accept the tender of defense, as TIG did in the instant case. D.Ex. F-G.

B. It can conditionally accept the tender, reserving its right to deny indemnification depending on future developments.

C. It can unconditionally reject the tender.

State ex rel. Rimco, Inc. v. Dowd, 858 S.W.2d 307, 308 (Mo. App. 1993).

These choices have consequences. If the indemnitor unconditionally accepts the tender, it has the "opportunity to control the litigation." Borgard v. Integrated Nat'l Life Ins. Co., 954 S.W.2d 532, 535 (Mo. App. 1997). If it rejects the tender, or defends under a reservation of rights, it "forfeit[s] its right to participate in the litigation and control the lawsuit." Id. Accord, Rimco, 858 S.W.2d at 309. While these issues usually arise in the context of insurance policies, the same principles apply to contracts of indemnity. See Stephenson v. First Missouri Corp., 861 S.W.2d 651, 657 (Mo. App. 1993) (indemnitee may settle if "demand is made to assume the defense of the litigation and that demand is refused").

As a result, unconditional acceptance of the defense estops the indemnitor from later renouncing coverage. This Court's opinion in Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384 (Mo. banc 1989), is the most complete

explanation of the doctrine. Under Brown, the indemnitor is estopped from denying liability if there is:

> (1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act.

776 S.W.2d at 388.

The instant case easily satisfies all three requirements. First, TIG unconditionally accepted the tender of defense. On December 29, 1995, Mr. Buttner told Mr. Swift to "accept the tender of defense and indemnification" and "enter an unconditional appearance." D. Ex. G. Mr. Swift immediately advised Noranda that he had received "both an oral and a handwritten commitment" from TIG "to accept, unconditionally, Noranda Aluminum's tender of defense and indemnification." D. Ex. F.

Second, Noranda relied on that representation in allowing TIG complete control of the defense and settlement of the case. After TIG's acceptance, Noranda "stopped the hunt for an attorney" and gave Mr. Swift "total control of the defense." Tr. 303-04. At the mediation, TIG's representative had "sole control of whether to settle" and on what terms. Tr. 118. TIG "basically took over negotiations" and did not even want Mr. Swift's "advice about things." Tr. 118-19. TIG was solely responsible for the decision to pay $4.3 million. Tr. 119.

Third, Noranda was prejudiced precisely because it relinquished all control over the defense and settlement of the case. In Safeco Ins. Co. v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo. App. 1992), the insurance company canceled the policy two weeks before the accident. Safeco nonetheless assumed control of the defense, without a reservation of rights. It waited another 18 months to raise the issue of cancellation. Applying Brown, the court of appeals held that the delay estopped Safeco from denying coverage:

> By assuming its policy right to control the defense of the lawsuit, Safeco precluded its insured from undertaking its own defense and from attempting to negotiate an amicable settlement at the early stages of the litigation. This is sufficient prejudice to estop Safeco from asserting the cancellation of the policy under the terms of which it continued to act.

822 S.W.2d at 569. Accord, Missouri Managerial Corp. v. Pasqualino, 323 S.W.2d 244, 251 (Mo. App. 1959) ("[t]hat Gillotte's position in protecting himself from loss resulting from the accident and in defending the suits was prejudiced by the company's attitude in assuming the defense of the lawsuits is so apparent as to require little discussion").

That is exactly what happened here. To repeat, TIG had total control of the defense and the settlement from the day it told Mr. Swift to accept the tender unconditionally until the day of the settlement. Had TIG reserved its rights initially, Noranda could have denied TIG control over the lawsuit and taken appropriate steps to protect its interests.

For example, Noranda could have opted to settle Mr. Murphy's claims under § 537.065. That statute allows the parties to settle the underlying case by limiting the plaintiff's recovery to specified assets, such as the defendant's liability insurance policy:

> The statutory settlement procedure allows the defendant in the tort litigation to buy his peace. Such a settlement places the plaintiff at risk that if no coverage exists no recovery of the judgment will occur. It places the insurer at risk that if coverage is found it will have no opportunity to defend on the issue of liability of the tort-feasor.

Rimco, 858 S.W.2d at 308-09.

Thus, § 537.065 effectively allows the defendant to settle using the insurance company's money instead of its own. So long as the settlement is reasonable in amount – a generous and deferential standard – it is binding on the insurance company. Rinehart v. Anderson, 985 S.W.2d 363, 372 (Mo. App. 1998).

The loss of the opportunity to settle under § 537.065 is clearly sufficient prejudice to support an estoppel. In Wollen v. DePaul Health Center, 828 S.W.2d 681 (Mo. banc 1992), this Court held that the loss of an opportunity to survive a bout with cancer was sufficiently concrete that it could support a medical malpractice claim. If a lost chance of survival warrants money damages, a lost chance of a favorable settlement warrants an estoppel.

The court of appeals rejected this theory on the rationale that estoppel cannot create coverage where none exists. Slip Op. at 9, citing Shelter General Ins. Co. v. Siegler, 945 S.W.2d 24, 27 (Mo. App. 1997). While Siegler does contain language to that effect, the case had nothing to do with an insurance company's control of the defense without any reservation of rights. Brown squarely holds that estoppel is "the preferred theory" for determining the insured's rights in that context. 776 S.W.2d at 388.

TIG unconditionally accepted the tender and assumed control of the defense. As a matter of law, that conduct estops it from questioning coverage after settling the underlying case.

## II. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Is Estopped From Contesting Coverage Based On The Language Of ¶ 19, In That It Never Questioned The Validity Of ¶ 19 Before Settling The Underlying Lawsuit.

Some 17 months after TIG unconditionally accepted the defense, it attempted to reserve rights based on the theory that Exhibit C was not part of the contract between Noranda and Utility. But TIG never questioned the enforceability of ¶ 19 or attempted to reserve rights based on that theory. As a matter of law, that also estops TIG from challenging the enforceability of ¶ 19.

## Standard of Review

The Murphy v. Carron standard of erroneous declaration or application of the law also applies to Point II. 536 S.W.2d at 32. Once again, because the facts are uncontested, this Court reviews the case independently of the trial court's decision. La-Z-Boy, 983 S.W.2d at 524.

## Argument

A "proper reservation of rights" requires the insurance company to provide the insured with "full knowledge of the position of the insurance company of its right to assert non-liability." Atlanta Cas. Co. v. Stephens, 825 S.W.2d 330, 333 (Mo. App. 1992). As a result, "an insurer, having denied liability on a specified ground, may not thereafter deny liability on a different ground." Brown, 776 S.W.2d at 386 (citations and internal punctuation omitted). Accord, Wood v. Safeco Ins. Co., 980 S.W.2d 43, 53 (Mo. App. 1998):

> It is the announcement of the specific defense which lulls the insured into relying to his detriment and subsequent injury on the insured's stated position. Thus, the rationale of these cases is that the plaintiff has relied to his detriment on the assertion of the defense by preparation to meet that issue and that the defendant may not shift the grounds of the defense after the fact.

Brown, 776 S.W.2d at 389 (citations and internal punctuation omitted).

That rule fully applies to the instant case. TIG may have sent Noranda a belated reservation of its right to challenge indemnity under Exhibit C. Prior to filing suit, however, it never sought to reserve rights based on its current theory that ¶ 19 is too vague to be enforceable. Tr. 359. Mr. Rynearson's May 14, 1997, letter spoke only to the question of whether Exhibit C was a part of the contract. P. Ex. 8 at 2. Mr. Rost promptly reminded Mr. Rynearson that Utility "agreed to indemnify Noranda Aluminum, Inc. by dint of Paragraph 19 of the Terms and Conditions of Purchase" as well as by Exhibit C. Id. TIG never responded.

TIG's only other effort to reserve rights was Mr. Rynearson's letter of September 10, 1998 to Mr. Rost. P. Ex. 11. That letter restated TIG's contention that it had provided a defense "based upon your representation that paragraph 13, Exhibit C . . . was a part of the Substation Painting Contract." P. Ex. 11 at 1. And it restated TIG's effort to reserve its rights based solely on that issue:

> TIG will continue to defend and indemnify Noranda based upon your representation that the indemnity agreement is in fact a part of the Substation Painting Contract. TIG will seek reimbursement of the cost of defense and indemnity from Noranda Aluminum if a determination is made that the indemnity agreement is not part of the contract.

Id. at 2. The letter said nothing about ¶ 19.

In fact, Exhibit C is a giant red herring. TIG decided to accept Noranda's tender based entirely on ¶ 19. Mr. Swift wrote TIG in September 1995 that "paragraph 19 may require Utility to honor the tender of defense and indemnity."

P. Ex. 53 at 2. Mr. Buttner never saw Exhibit C. Tr. 152. He decided to accept the tender based on the language of ¶ 19, the terms of the CGL policy, and the advice from Mr. Swift that Utility owed Noranda a defense. Tr. 176.

In short, TIG never once attempted to reserve rights based on the theory on which it has now prevailed: that ¶ 19 was too vague to be enforced. As a result, TIG is estopped from denying coverage based on that theory:

A. TIG unconditionally accepted the tender based on ¶ 19. When TIG questioned whether Exhibit C was part of the contract, Noranda reminded TIG that Utility also owed indemnity under ¶ 19, and TIG never responded.

B. Noranda relied on TIG's actions in surrendering control of the defense and settlement to TIG. Tr. 118-19; 303-04.

C. That reliance prejudiced Noranda in two ways. First, as previously explained, loss of control of the defense is prejudice as a matter of law. Second, Noranda was fully prepared to meet TIG's original defense – the absence of Exhibit C from the contract – because there was no question that ¶ 19 was part of the contract. When the insured is "prepar[ed] to meet" the insurance company's original defense, the latter "may not shift the grounds of defense after the fact." Morris v. Travelers Ins. Co., 546 S.W.2d 477, 487-88 (Mo. App. 1976).

TIG accepted coverage based on ¶ 19 and never challenged that paragraph as insufficiently specific to indemnify Noranda against its own negligence until after TIG settled the Murphy lawsuit. Even if its belated reservation of rights was effective as to Exhibit C, it plainly was insufficient as to ¶ 19.

## III. The Trial Court Erred In Entering Judgment In Favor Of TIG For Indemnification, Because TIG Was A Volunteer, In That It Assumed The Defense And Paid The Settlement With Full Knowledge Of The Facts.

TIG accepted the defense unconditionally based entirely on ¶ 19 and Mr. Swift's advice that it required TIG to assume the defense. When it accepted the defense and settled the Murphy lawsuit, TIG had full knowledge of the facts. The doctrine of voluntary payment therefore bars this action.

### Standard of Review

The Murphy v. Carron standard of erroneous declaration or application of the law also applies to Point III. 536 S.W.2d at 32. Once again, because the facts are uncontested, this Court reviews the case independently of the trial court's decision. La-Z-Boy, 983 S.W.2d at 524.

### Argument

It is "well established" that a person "who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress,

cannot recover it back." Jurgensmeyer v. Boone Hospital Center, 727 S.W.2d 441, 444 (Mo. App. 1987), quoting American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809, 812 (Mo. App. 1969).

This rule applies to payments by insurance companies as much as by any other person or entity. It applies to payments voluntarily made to the carrier's insured, as in Shrock, and to payments that ought properly to have come from another insurance company. Commercial Union Ins. Co. v. Farmers Mut. Fire Ins. Co., 457 S.W.2d 224, 226 (Mo. App. 1970).

In the instant case, TIG voluntarily decided to assume Noranda's defense and it voluntarily decided to settle the Murphy case. As previously noted, the sole bases for Mr. Buttner's decision to accept the defense were ¶ 19, Mr. Swift's advice that it probably required TIG to accept the defense, and the terms of the CGL policy it had issued to Utility. Tr. 176. Thus, TIG had full knowledge of all relevant facts both when it assumed the defense and when it settled.

The court of appeals held that TIG was acting under duress when it accepted the tender, because it "risked liability" to Utility if it rejected the tender. Slip Op. at 10.[1] The court of appeals cited no authority that such a form of pressure rises to the level of duress, for the excellent reason that none exists. That is precisely the sort of liability that the insurance company risked in Shrock, and yet the court applied the voluntary payment doctrine:

[1] TIG never pleaded duress in the trial court.

> [I]f a person would resist an unjust demand he must do so at the threshold of the matter; that if he intends to litigate the question he must make his defense in the first instance – not later, after paying the money and biding the course of uncertain future events. The underlying reason for those requirements is that it would be inequitable to give such person the privilege of selecting his own time and convenience for litigation short of the bar of the statute of limitations, and thereby subject the payee to the uncertainty and casualties of human affairs likely to affect his means of defending the claim.

Shrock, 477 S.W.2d at 812. That rationale precisely describes the instant case.

If an insurance company's potential liability to its insured constitutes duress, the court of appeals has created an exception that swallows the rule. Under that theory, every voluntary payment by any insurance company is made under duress, so the voluntary payment rule would never apply to such a payment. But Schrock holds that it does.

If TIG really did feel it was under duress, it could have easily protected its rights. TIG could have accepted the tender conditionally, subject to a reservation of rights, and initiated an immediate action for declaratory judgment about the meaning of ¶ 19. But the price of doing so would have been loss of control of the defense. The law will not permit an insurance company to "have its cake and eat it too." Lodigensky v. American States Preferred Ins. Co., 898 S.W.2d 661, 667 (Mo. App. 1995).

The court of appeals also held that TIG had reason to believe it would be reimbursed if it turned out that Exhibit C was not part of the contract. Slip Op. at 10. That holding is wrong on both the law and the facts. It is wrong on the facts because TIG accepted the defense based on ¶ 19, not on Exhibit C. It is wrong on the law, because a party making a voluntary payment with knowledge of the facts cannot recover it, even "though the payment is made . . . under protest." Shrock, 447 S.W.2d at 812 (citations and internal punctuation omitted).

The court of appeals finally held that equity will relieve a mistake of law if the other party induces the mistake or acts inequitably. Slip Op. at 10. There is no evidence that Noranda induced any mistake or behaved inequitably. Mr. Buttner decided to accept tender based solely on ¶ 19, Mr. Swift's advice that it probably required TIG to accept the defense, and the terms of the CGL policy. Tr. 176. Noranda had nothing to do with any of these conclusions.

If TIG "carelessly cho[]se to act without knowledge," that is TIG's responsibility, not Noranda's. Fairbanks Canning Co. v. London Guaranty & Accident Co., 133 S.W. 664, 666 (Mo. App. 1910):

> If, instead of relying upon his right when the claim was first brought to his attention, he, without due investigation, assumes himself to be liable, sets the assured aside and claims the right of control of the defense, he cannot afterward ignore the right the assured has acquired by reason of such action, merely because he has made a belated discovery of fact, or law, which he thinks puts the case outside the terms of the policy.

Id.

TIG voluntarily assumed the defense and paid the settlement with full knowledge of what ¶ 19 said. It therefore cannot recover even if it did try to make that payment conditional on some other, unrelated proposition.

## IV. The Trial Court Erred In Entering Judgment In Favor Of TIG, Because TIG Was Obliged To Defend And Indemnify Noranda, In That ¶ 19 Of The Terms And Conditions Unambiguously Required Utility To Indemnify Noranda For Noranda's Own Negligence.

Missouri cases on the language required to obtain indemnification for one's own negligence are not a model of clarity. In the context of individual consumers, there must be a specific reference to the indemnitee's own negligence. When, as here, the contracting parties are sophisticated corporations, most of the more recent cases, and certainly the better reasoned cases, recognize that less precise language is required. Thus, the trial court's legal conclusion that ¶ 19 "does not require Utility to indemnify Noranda for its own negligence," App. A-3-4, is wrong as a matter of law.

### Standard of Review

Whether a contract is unambiguous and, if so, what it means, is a question of law. Maryland Cas. Co. v. Martinez, 812 S.W.2d 876, 881 (Mo. App. 1991). Because the trial court's construction of a "legal conclusion," is "not binding on

appeal," this Court engages in plenary review. Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 32 (Mo. banc 1991).

## Argument

Paragraph 19 of the Terms and Conditions to the contract between Utility and Noranda provides:

> Seller [Utility] shall indemnify and save Purchaser [Noranda] free and harmless from and against **any and all** claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with Seller's performance hereunder or any default by Seller or breach of its obligations hereunder.

App. A-2 (emphasis added).

Paragraph 19 does not specifically refer to Noranda's own negligence. Because this is a commercial transaction between two corporations, ¶ 19 does not need to specifically reference Noranda's own negligence in order to be enforceable.

Paragraph 19 covers "any and all" claims "resulting from or connected with" Utility's performance. The word "any" is "all-comprehensive, and is equivalent to every." State ex rel. Sayad v. Zych, 642 S.W.2d 907, 911 (Mo. banc 1982) (internal punctuation omitted). The word "all" is "the most comprehensive word in the English language." Wimberly by Bauer v. Furlow, 869 S.W.2d 314,

316 (Mo. App. 1994). There is no reasonable argument that Mr. Murphy's injury was not "connected with" Utility's performance under the contract.

The modern starting point for construction of indemnification agreements involving one's own negligence is this Court's opinion in Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330 (Mo. banc 1996). Vic Tanny operated a health club. Plaintiff was a retail customer. The issue was whether Vic Tanny could avoid liability to plaintiff based on an exculpatory clause that did not use the word "negligence." This Court equated exculpatory clauses with indemnification clauses. 923 S.W.2d at 338. In the context of a retailer/customer relationship, the Court held that the word "negligence" or its equivalent was necessary. Id. at 337.

But the Court was careful to qualify that holding in the context of commercial entities:

> This case does not involve an agreement negotiated at arms length between equally sophisticated commercial entities. Less precise language may be effective in such situations, and we reserve any such issues.

923 S.W.2d at 338 n.4.

This Court next visited the issue in Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. banc 2001). Executive contracted to inspect an aircraft for Purcell. The form language in the contract limited Executive's liability to the cost of the services performed and required Purcell to indemnify Executive for "any damages or expenses claimed" beyond the cost of the services. Distinguishing Alack, this Court held that the clause was effective to limit liability

for Executive's negligence even though it never used that word. "Sophisticated businesses that negotiate at arm's length may limit liability without specifically mentioning 'negligence,' 'fault,' or an equivalent." 59 S.W.3d at 509:

> Language that is ambiguous to an unsophisticated party may not be ambiguous to a sophisticated commercial entity. Beechcraft and Purcell Tire were sophisticated businesses, experienced in this type of transaction. In this commercial context, no ambiguity exists.

Id. at 510-11 (citations omitted).

Judge White's concurring opinion also emphasized the difference between consumers and commercial businesses. The "standards for waiver of negligence liability by consumers established in Alack are much more stringent than those applied here." 59 S.W.3d at 511 (White, J., concurring). As a result, "sophisticated commercial contractors may enter enforceable agreements to limit liability for specifically identified tortious conduct without using the words 'negligence' or 'fault.'" Id. at 512.

Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314 (Mo. App. 1998), is a post-Alack case illustrating that, in the commercial context, an enforceable indemnity does not need to use the magic word "negligence" in order to cover the indemnitee's own negligence. Monsanto agreed to continue producing and selling polychlorinated biphenyls (PCBs) to Gould's predecessor. The indemnification required the predecessor to:

> defend, indemnify and hold harmless Monsanto, its present, past and future directors, officers, employees and agents, from and against any and all liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses arising out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of such PCB's by, through or under Buyer, whether alone or in combination with other substances, including, without implied limitation, any contamination of or adverse effect on humans, marine and wildlife, food, animal feed or the environment by reason of such PCB's.

In all material respects, that language is essentially the same as that in ¶ 19. When Monsanto was sued for negligence arising from post-indemnity PCB sales, Gould made exactly the same argument that TIG does: the contract does not use the magic word "negligence," so it cannot cover Monsanto's alleged negligence.[2] Noting that both Monsanto and Gould were "sophisticated commercial entities," the opinion held that the agreement was enforceable:

> Such terms clearly and unequivocally provide for Gould to indemnify Monsanto against any and all claims. Thus, the contract terms must be enforced absent a showing of duress, fraud or undue influence.

---

[2] The attorney who advised TIG that ¶ 19 did require indemnification, Joe Swift, was Gould's counsel in Monsanto. 965 S.W.2d at 315. In so advising TIG, Mr. Swift presumably relied on lessons he learned in Monsanto.

965 S.W.2d at 317.

The court of appeals declined to follow Monsanto because that indemnification agreement was a separate document whereas ¶ 19 was one of 23 pre-printed terms and conditions. To the extent that this theory ever had any validity, it did not survive Alack, as this Court held in Purcell:

> The character and quality of negotiations do not vary the terms of a written contract between sophisticated businesses.
>
> . . . .
>
> Weindel and Schaffer were decided before Alack. To the extent these cases imply that parties agree only to negotiated-over terms, they should no longer be followed.

59 S.W.3d at 509.

Pre-Alack cases recognize the same distinctions between consumers and commercial entities. In Terminal R.R. Ass'n v. Ralston-Purina, 180 S.W.2d 693 (Mo. 1944), for example, Ralston agreed to clear its property of obstructions so the railroad could provide rail service to Ralston. Ralston agreed to indemnify the railroad for "all loss, damage, injury or death" arising from the presence of any obstruction. The indemnity clause did not refer to the railroad's own negligence.

Once again, Ralston argued that the clause was unenforceable as to the railroad's own negligence because it did not use the magic word "negligence." This Court disagreed:

> It is said, however, and rightly so, that a contract will not be so construed, unless it was clearly intended to have that effect. **This**, **of course**, **does not mean that the intention must be expressed in terms**, but that, if not so expressed, it must otherwise clearly appear in the language used.

180 S.W.2d at 697 (emphasis added) (citations and internal punctuation omitted).

More recently, in RJF Int'l Corp. v. B.F. Goodrich Co., 880 S.W.2d 366 (Mo. App. 1994), Goodrich sold part of its business to RJF. RJF agreed to indemnify Goodrich against "any and all claims, liabilities, damages, losses, costs and expenses" arising from products sold after the date of closing. The agreement did not use the word "negligence." A personal injury plaintiff alleged that Goodrich was negligent in failing to prepare proper warnings for a product that it designed, but which was sold by RJF. The court of appeals held that Goodrich was entitled to indemnification from RJF:

> [T]he parties contemplated that RJF would indemnify BFG for certain acts, even though they occurred prior to the closing date, as in the present action, **irrelevant of fault**.

880 S.W.2d at 371 (emphasis added).

Thus, when the contract involves sophisticated commercial entities, Missouri courts generally enforce indemnification agreements whether or not they use the magic word "negligence":

> The first category consists of cases in which the Missouri courts have uniformly refused to uphold a purported indemnification

> clause, despite seemingly clear language, because the parties did not "clearly and unequivocally" intend for the supposed indemnifying party to act as liability insurer for the negligent conduct of the indemnified party. . . . The second category consists of cases in which the Missouri courts have upheld an indemnification agreement between commercially equal parties because the parties intended for the indemnifying party to act as a liability insurer for the negligent conduct of the indemnified party. . . . When these two lines of cases are compared, it is apparent that the courts of Missouri are not wholly concerned with the express language of the agreement in determining whether there is "clear and unequivocal" intent to indemnify, but are also concerned with whether or not the indemnifying party intended to serve as a liability insurer.

Salts v. Bridgeport Marina, Inc., 535 F. Supp. 1038, 1039-40 (W.D. Mo. 1982).

Certainly, one can find cases that refuse to enforce an indemnification agreement that does not contain the word "negligence." Since Alack and Purcell, those cases are no longer valid to the extent they involve commercial entities. "Sophisticated parties have freedom of contract – even to make a bad bargain or to relinquish fundamental rights." Purcell, 59 S.W.3d at 508. In ¶ 19 of the terms and conditions, Utility agreed to indemnify Noranda for any damages "connected with" Utility's performance of the contract. The Court should enforce the agreement as written.

## Conclusion

For these reasons, Noranda respectfully prays that the Court reverse the trial court's judgment and remand with instructions to enter judgment in favor of Noranda.

Respectfully Submitted,

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## Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 7,733 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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## Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on January 14, 2005:

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# Appendix