IN THE SUPREME COURT OF MISSOURI

No. SC87908

EAST END TRANSFER & STORAGE, INC. and

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Respondent/Plaintiff,

v.

VANLINER INSURANCE COMPANY, *et al.*,

Appellant/Defendant.

Appeal from the Circuit Court of the County of St. Louis, Division 10
Honorable Kenneth M. Romines, Circuit Judge

SUBSTITUTE OPENING BRIEF OF APPELLANT VANLINER INSURANCE COMPANY

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JURISDICTIONAL STATEMENT

This is an appeal from the entry of partial summary judgment in two consolidated declaratory judgment actions involving insurance coverage. The circuit court declared that Vanliner Insurance Company's policies insuring United Van Lines LLC ("UVL") and UniGroup, Inc. provided primary and excess coverage for a personal injury case and a wrongful death case involving two of UVL's known hauling agents. The court rejected Vanliner's contention that its policies only applied to "hit-and-run" accidents in which a UVL hauling agent was unknown or unidentified. (L.F.10:1625-32; 20:3217-24; App. A1-A8).

The circuit court entered its judgment on May 25, 2005. (L.F.10:1632; 20:3224; App. A8). It designated its judgment as final for purposes of appeal and certified under Rule 74.01(b) that there was no just reason for delay. (L.F.10:1632; 20:3224; App. A8). The circuit court's summary judgment disposed of all of the issues raised in North American's petitions regarding Vanliner.

Prior to this summary judgment, the circuit court disposed of North American's claim against Traveler's Indemnity Company of Illinois, which was appealed under Rule 74.01(b) and affirmed in Appeal No. ED85825. *East End Transfer Storage, Inc. v. Vanliner Ins. Co.*, 176 S.W.3d 177 (Mo. App., E.D. 2005). Subsequent to the summary judgment in this case, the circuit court entered summary judgment in favor of American Guarantee & Liability Insurance Company against Vanliner on the same grounds as those in the May 25, 2005 summary judgment. That decision was also certified under Rule 74.01(b), and an appeal is pending in the Missouri Court of Appeals, Eastern District, No.

ED87608. The circuit court also entered judgment in favor of American Guarantee against North American. North American appealed that decision in ED87461, but later dismissed its appeal.

Vanliner filed its notice of appeal on July 1, 2005. (L.F.10:1642-58). On July 26, 2005, the Court of Appeals consolidated Vanliner's appeal with an appeal filed by UVL and UniGroup. On May 2, 2006, the Missouri Court of Appeals, Eastern District, filed its opinion affirming the circuit court. On September 26, 2006, the Court granted transfer of the case under Rule 83.04. The Court has jurisdiction under Article V, § 10 of the Missouri Constitution, and Rules 83.04 and 83.09.

STATEMENT OF FACTS

A. Introduction

The parties to the circuit court cases fall into three categories: Vanliner's named insureds under its policies, UVL and UniGroup (UVL's and Vanliner's parent corporation); the UVL hauling agents whose employees or contractors were driving the trucks involved in the accidents; and the insurance companies.

UVL is an interstate moving and storage business, operating through a network of hauling agents that actually perform the moving and storage services. (L.F.7:1173, 1192, 1201; 8:1243, 1246; 9: 1462, 1466; 10:1511-12; 17:2686, 2798, 2807; 18:2849, 2852). UVL is a wholly owned subsidiary of UniGroup. (L.F.3:465, 469).

Vincent Fister, Inc. and East End Storage & Transfer are two such UVL hauling agents. (L.F.5:804-05; 5:871-73; 7:1150-53; 7:1185-90; 11:1676; 12:1940; 14:1676, 2334-35; 17:2653, 2686-2701). Neither is a party to this appeal. Each had primary

insurance for accidents involving their drivers and vehicles from insurance companies not involved in this appeal, plus North American Specialty Insurance Company's excess coverages discussed below. (L.F.1:21, 61-101; 6:885, 888, 890, 893, 896, 955-95; 7:1174, 1202-03, 1216-17; 9:1443; 10:1512, 1533-37; 11:1676, 1707-49; 14:2266-67; 15:2417-59; 16:2475; 17:2656-57; 18:2859; 19:3050).

Vanliner Insurance Company (also a wholly owned subsidiary of UniGroup) provided $1 million in primary and $2 million in excess coverage to UVL and UniGroup, the terms of which form the dispute giving rise to this appeal. (L.F. 1:22, 25; 2:167-218; 3:388-89, 394-95; 5:806-08; 7:1086-1136, 1156-57, 1159; 11:1127-78, 1180; 12:1942, 1947-48; 16:2534-2604). North American issued excess insurance policies to the two UVL hauling agents involved, Fister and East End. (L.F.1:21, 61-101; 6:955-95; 11:1676, 1207-49; 15:2417-59). The Fister excess policy had $5 million in limits; the East End excess policy has $2 million in limits. *Id.* American Guarantee & Liability Insurance Company issued a $50 million umbrella policy to UVL and UniGroup that provided excess insurance to a number of policies, including the Vanliner policies and the UVL agents' policies. (L.F.3:334-85; 7:1178, 1205; 9:1443; 10:1515, 1533-37; 12:1886-1937; 17:2678-79, 2811; 19:3050).

B. The Underlying Cases

This case arises from the settlement of a wrongful death and a personal injury action. (L.F.1:19-28; 11:1673-84). In one, a moving van operated by Fister, and leased to UVL, struck and killed Michael Brouhard and injured Toni Brouhard. (L.F.5:804-05; 7:1149-83). The plaintiffs in the Brouhard litigation sued the driver, Fister and UVL. (L.F.1:20-

21, 41-60; 3:386; 5:804, 844-63; 7:1149-50). The parties settled the case for $4.5 million. (L.F.1:21; 3:387-88; 5:805; 6:996-1007; 7:1155). Two insurance companies, whose liability is now fixed, paid $1 million each. (L.F.3:388). Vanliner paid $1 million, North American paid $750,000, and American Guarantee paid $750,000. *Id.* Vanliner, North American and American Guarantee reserved their rights to have their coverage obligations determined in a declaratory judgment action. (L.F.1:22; 3:388; 5:806; 7:1073-84, 1156).

In the other, a moving van operated by East End, and leased to UVL, struck and injured Larry and Brenda Powell. (L.F.14:2265-66; 17:2652-55). The Powells sued the driver, East End, UVL, UniGroup and others. (L.F.11:1673-76, 1697-1706; 12:1940; 14:2265, 2308-17; 17:2652-53). The parties settled the case for $6.5 million. (L.F.14:2667-68; 15:2460-73; 17:2657-58). East End's primary insurer paid $1 million, North American paid $2 million, and American Guarantee paid $3.5 million. *Id.* Vanliner did not contribute to the Powell settlement. North American and American Guarantee's payments were subject to the same reservation of rights as made in the Brouhard case. (L.F.14:2267-68; 16:2545-52; 17:2658).

C. The Insurance Policies

UVL hauling agents, such as Fister and East End, execute Agency Agreements, Lease Agreements, or both, with UVL in conjunction with its business. (L.F.6:879, 883-84, 893, 904, 910-11, 935; 7:1174, 1185-90, 1201, 1214; 10:1485-89, 1506-10, 1512; 17:2675, 2686, 2690-2701; 18:2849, 2860; 19:3046-47, 3049-50). These agreements obligate each hauling agent and equipment lessor to have at least $3 million in insurance

coverage, to name UVL and UniGroup as additional insureds to that insurance coverage, and to indemnify UVL and UniGroup against any liability arising out of the hauling agent or lessor's operations on UVL and UniGroup's behalf. (L.F.7:1174, 1176, 1201-02, 1211-13, 1215, 1218-20; 8:1243, 1254, 1285A; 9:1345-46, 1349-52, 1439-40, 1442-43; 17:2671-77, 2686-87, 2690-2701, 2807-08, 2817-19; 18:2849, 2860, 2892; 19:2952-53, 2958-59, 3046-47, 3049-50).

Specifically, the Agency Agreements require each hauling agent, such as Fister and East End, to:

> indemnify Carrier [*i.e.*, UVL, UniGroup, and their affiliated companies] against, hold it harmless from and promptly reimburse it for, any and all payments of monies (fines, damages, settlement amounts, expenses, attorney's fees, court costs, judgments and the like), by reason of any claim, demand, tax, penalty or judicial or administrative investigation or proceeding arising from any actual or claimed occurrence involving the Agent or any act, omission or obligation of the Agent or anyone associated or affiliated with the Agent or acting on behalf of the Agent. At the election of the Carrier, the Agent shall also defend Carrier against the same.

(L.F.6:879-80; 7:1170-71, 1185-90, 1201, 1214; 9:1345; 17:2653, 2671-73, 2686, 2690-95; 19:2956-57).

The Lease Agreements had a similar indemnity provision:

> Agent further agrees it will indemnify and save UVL harmless from any and all liability of any nature whatsoever occasioned by any act or failure to act which

> may occur or happen as the result of the performance of services under this Agreement, including the operation of Equipment as referenced in paragraph 1 above.

(L.F.5:871-73; 6:882-83; 7:1201, 1214; 9:1346-47; 14:2334-35; 17:2653-55, 2686, 2696-97).

As such, Fister and East End each contractually agreed with UVL to carry at least $3 million in coverage, and to name UVL and UniGroup as additional insureds. Both hauling agents complied with these obligations. Fister bought a $1 million primary insurance policy from Transguard Insurance Company for $180,837. (L.F.6:885, 888, 890-91, 893, 896; 7:1174, 1202-03, 1216-17; 9:1443; 10:1512, 1533-37). Fister bought a $5 million excess policy from North American for $39,592. *Id.* East End bought $1 million in primary coverage from Southern County Mutual Insurance Company for $57,794. (L.F.11:1207, 1751; 14:2266-67; 15:2417; 16:2475; 17:2656-57; 18:2859; 19:3050). East End bought $2 million in excess coverage from North American for $9,136. *Id.*

UVL and UniGroup sought to structure a comprehensive insurance program around these contractual requirements to protect themselves against liability while hauling agents and lessors operate under UVL's authority. (L.F.8:1243, 1254, 1285A; 9:1345-46, 1351-52, 1417-18, 1439-40; 18:2849, 2860, 2892; 19:2952-53, 2958-59, 3024-25, 3046-47). They recognized that the UVL hauling agents' policies would not cover every risk that UVL and UniGroup faced from claims arising out of accidents involving the agents' trucks. (L.F.3:407, 465, 469; 7:1173-74, 1176, 1203; 8:1243, 1246, 1254, 1285A;

9:1439-40, 1462, 1466; 10:1512, 1533-37; 14:2302-03; 17:2674-75, 2798, 2809; 18:2849, 2852, 2860, 2892; 19:3046-07). One additional exposure involved "hit-and-run" accidents — a term UVL, UniGroup, Vanliner, and others have used to refer to a situation where the person injured could identify the vehicle as having a UVL or other UniGroup affiliated logo (such as Mayflower), but the hauling agent or lessor of that vehicle was unknown or unidentified. (L.F.3:407; 7:1176, 1192, 1203; 8:1228, 1243, 1254; 9:1327, 1413-14, 1434, 1462-63, 1466-67; 10:1512-13, 1533-37; 14:2303; 17:2677, 2798, 2809; 18:2833, 2849, 2851; 19:2934, 3020-21, 3041).

Vanliner first issued a business auto insurance policy to UVL and UniGroup in 1989 to cover the "hit-and-run" risk. (L.F.7:1177; 8:1228, 1243, 1252; 10:1538-90; 17:2678; 18:2833, 2858; 20:3131-83). It contained an endorsement that provided: "IT IS AGREED THAT THIS POLICY INSURES ONLY THE INTEREST OF UNIGROUP, INC. AND ITS SUBSIDIARIES WHEN A LOSS OR DAMAGE CLAIM AGAINST UNIGROUP, INC. AND/OR ITS SUBSIDIARIES IS MADE AND THE OWNERSHIP/LESSEE OF THE TRACTOR AND/OR TRAILER INVOLVED IT [*sic*] UNKNOWN." (L.F.10:1546; 20:3139). That policy was renewed year after year and its successor truckers policy is the Vanliner primary policy currently at issue on appeal.

The Vanliner policies covering UVL and UniGroup in effect on the date of the Brouhard and Powell accidents provided $1 million in primary coverage for a premium of $49,893, and $2 million in excess coverage for a premium of $9,779. (L.F.1:23, 27; 2:168, 206, 209; 3:390, 396-97; 5:807, 810; 7:1087, 1125, 1128, 1158; 8:1234; 11:1678; 12:1944; 14:2269, 2271; 16:2555, 2593, 2596; 17:2659, 2662). The Vanliner policies did

not, however, contain the endorsement quoted above that would have expressly limited the coverage to "hit-and-run" accidents. (L.F.3:409; 7:1179, 1194-95, 1205-06; 8:1244 1284, 1286; 9:1425, 1429, 1464, 1468; 14:2305; 17:2680, 2800-01, 2811-12; 18:2850, 2859, 2890, 2893; 19:3032, 3036).

A second exposure concerned potential liability in excess of the minimum limits purchased by UVL's agents and lessors as well as that purchased by UVL from Vanliner for "hit-and-run" situations. (L.F.7:1178, 1205; 9:1443; 10:1515, 1533-37; 17:2678, 2811; 19:3050). At the time of the Brouhard and Powell accidents, that risk was covered by a $50 million policy issued by American Guarantee. (L.F.3:335; 12:1886). American Guarantee provided an another layer of insurance against all claims and liabilities arising out of its interstate moving and storage business, including both accidents involving known hauling agents and lessors *and* "hit-and run" accidents. (L.F.7:1178, 1205; 9:1443; 10:1515, 1533-37; 17:2678-79, 2811; 19:3050). As is typical of umbrella policies, the American Guarantee policy had a schedule of the underlying policies to which it was excess. The American Guarantee schedules listed the Vanliner policies as "UniGroup Hit & Run," "United Hit & Run," and "Mayflower Hit & Run." (L.F.3:351, 355-56, 360; 7:1178-79, 1205; 9:1327; 12:1903, 1907-08, 1912; 17:2679, 2811; 19:2934, 2947).

Prior to the Bouhard or Powell accidents, American Guarantee's underwriter asked what "Hit & Run" policies were when UVL and UniGroup sought to extend their umbrella policy. In the ensuing e-mail exchange among the insurance broker, the underwriter, and Kathy Brittin (UniGroup's supervisor of risk management), it was

explained that the Vanliner "hit and run" policies were "in place for those situations where a third party is able to identify a company truck (United or Mayflower) but is unable to identify the agent." (L.F.7:1179; 9:1411-13; 10:1591-94; 17:2679-80; 19:3018-20; 20:3184-87). If the particular agent could not be identified, then the "hit-and-run" coverages would apply. *Id.* American Guarantee later issued its policy listing the Vanliner "Hit & Run" policies as among those to which the American Guarantee policy provided excess coverage. (L.F.3:351, 355-56, 360; 7:1178-79, 1205; 9:1327; 12:1903, 1907-08, 1912; 17:2679, 2811; 19:2934, 2947).

D. The Terms of the Vanliner Policies in Effect at the Time of the Accidents

The Vanliner primary policy provides that "[w]e will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." (L.F.1:22-23; 3:389; 5:807; 7:1093, 1158; 14:2268; 16:2561; 17:2659). The policy form defines an "insured" as follows: "a. You for any covered 'auto'; b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . .." (L.F.1:23; 3:389-90; 5:807; 7:1093, 1158; 14:2268; 16:2561; 17:2659).

The Vanliner policy used number symbols on the declarations page to identify what vehicles were "covered 'autos.' " (L.F.7:1087; 16:2555; App. A24). Coverage symbol "41," for example, is defined as "any auto." (L.F.7:1092; 16:2560; App. A25). The policy did not use symbol "41" to identify the covered vehicles. (L.F.7:1087; 16:2555; App. A24). Instead, it used a symbol "51" in the "SCHEDULE OF COVERAGES AND

COVERED AUTOS." (L.F.7:1087; 16:2555; App. A24). Symbol "51" was a manuscript, or non-standard, symbol. Manuscript symbols are used for special situations, and are supposed to be defined in an endorsement. Symbol "51," however, was not defined anywhere in the policy. (L.F.7:1087; 16:2555). All the policy had was an endorsement that read:

> SECTION I - COVERED AUTOS
>
> A. Description of covered auto designation symbols
>
> 51 = Per Composite Rate Endorsement - VL 4051

(L.F.7:1123; 16:2591; App. A27).

The Composite Rate Endorsement VL 4051 did not define coverage symbol "51." (L.F.7:1121-22; 16:2589-90; App. A26). It set the premium at $49,893, but it did not explain what vehicles were covered. *Id.* Kathy Brittin, UniGroup's risk management supervisor and corporate representative, and Gale Preston, a Vanliner officer and director, both testified (without contradiction) that symbol "51" was not intended to duplicate the standard symbol "41" — "any auto." Instead, it was supposed to refer to a composite rate calculated for "hit-and-run" accidents. (L.F.8:1252, 1256, 1265; 9:1321, 1326, 1344, 1416, 1440; 18:2858, 2862, 2871; 19:2928, 2933, 2951, 3023, 3047).

The Vanliner umbrella policy is a "follow form" policy, *i.e.*, it adopts the provisions of the primary Vanliner policy. (L.F.1:27; 2:209; 3:396-97; 5:810; 7:1125, 1128; 8:1234; 145:2271; 16:2593;, 2596; 17:2662). Thus, it incorporated (and mistakenly omitted according to Vanliner's witnesses) the coverage terms of the primary policy. *Id.*

North American offered no evidence that it knew of or reviewed the terms of the Vanliner policies before issuing its excess policies to Fister and East End. There is no evidence that North American listed the Vanliner policies on *its* schedule of underlying insurance, or that North American even knew that the Vanliner policies existed before the personal injury and wrongful death plaintiffs in the underlying cases sued.

E. Discovery of the Mutual Mistake

North American only learned of the existence of the Vanliner policies during the underlying litigation. At the mediation of the Brouhard litigation, North American first demanded that Vanliner pay for the cost of defending UVL, and that it contribute to any settlement or judgment in that case. (L.F.7:1179, 1194, 1205; 17:2680, 2800, 2811). Until then, Vanliner, UVL and UniGroup did not realize that the Vanliner policies in effect at the time of the Brouhard and Powell accidents no longer had the endorsement limiting the coverage to "hit-and-run" accidents. (L.F.3:409; 7:1179, 1194-95, 1205-06; 8:1244, 1253, 1284, 1286; 9:1425, 1429, 1464, 1468; 14:2305; 17:2680, 2800-01; 2811-12; 18:2850, 2859, 2890, 2893; 19:3032, 3036). North American offered no evidence to the contrary.

UniGroup, UVL and Vanliner representatives testified that the parties' mutual mistake involved the omission of the "hit-and-run" definition for purposes of symbol "51" in the Vanliner Policies. (L.F.7:1179, 1195; 8:1226, 1231, 1232, 1233, 1245-46, 1252, 1260; 9:1318, 1321, 1326, 1344, 1416, 1440-41; 17:2680, 2800-01, 2812; 18:2831, 2839, 2851, 2858, 2866; 19:2925, 2928-29, 2933, 2951, 3023, 3047-48). UniGroup's Kathy Brittin and Vanliner's Gale Preston both explained in their affidavits and testified

during depositions that the parties to the Vanliner policies intended the insured risk to be limited to "hit-and-run" accidents. They testified without contradiction that both Vanliner and its insureds made a mistake to the extent the Vanliner policies do not reflect that intent. (L.F.8:1226-1233, 144, 1252, 1260; 9:1318, 1321, 1326-27, 1344, 1412-16, 1440-41; 18:2831, 2833-34, 2836-37, 2839-50, 2858, 2866; 19:2925, 2928, 2933-34, 2951, 3019-23, 3047-48; App. A10-A23). Because the Vanliner excess policy followed the form of the primary policy, it also carried over the mistake as to coverage. (L.F.7:1180, 1195, 1206; 8:1234; 9:1343; 17:2680, 2800-01, 2812; 18:2839-40; 19:2950).

F. The Contentions in the Circuit Court

North American contended that the Vanliner policies clearly and unambiguously provided coverage for the Brouhard and Powell accidents. (L.F.1:19-28; 11:1673-84).Vanliner asserted as an affirmative defense that its policies should be reformed to provide coverage only for "hit-and-run" situations as intended by the contracting parties. (L.F.3:388-97; 4:658-64; 12:1942-50). North American's motion for summary judgment did not contest any of the facts supporting Vanliner's reformation claim. (L.F.5:803-15; 14:2264-76). Instead, North American took the position that unambiguous contracts cannot be reformed. *Id.*

On May 25, 2005, the circuit court entered a partial summary judgment in favor of North American. (L.F.10:1625-32; 20:3217-24; App. A1-A8). The circuit court agreed with North American that an unambiguous contract cannot be reformed. (L.F.10:1630; 20:3322; App. A6). In addition, the circuit court held that § 379.195 RSMo 2000 prevented Vanliner from seeking reformation of the policies, even though North

American had not raised the statute in its motion for summary judgment. *Id.* The circuit court designated the May 25 judgment as final for purposes of appeal and certified that there was no just reason for delay under Rule 74.01(b). (L.F.10:1625; 20:3224; App. A8). Vanliner, UVL, and UniGroup all filed appeals from the May 25 judgment in favor of North American. (L.F.10:1642-58). On May 2, 2006, a panel of the Court of Appeals affirmed that judgment under Rule 84.16. Vanliner, UVL, and UniGroup all filed timely motions for rehearing and transfer, which the Court granted on September 26, 2006.

POINTS RELIED UPON

I.

The Circuit Court Erred In Granting Summary Judgment On The Ground That The Vanliner Policies Could Not Be Reformed Absent Ambiguity – Because Reformation May Be Granted When There Is A Mutual Mistake Regardless Of Whether A Written Instrument Is Ambiguous Or Unambiguous, And Because Equitable Defenses Sounding In "Laches" or the "Acceptance Doctrine" Are Inapplicable – In That There Was Undisputed Evidence The Parties To The Vanliner Policies Made A Mutual Mistake By Omitting A Provision In Those Policies That Limited Coverage To "Hit-and-Run" Accidents In Which The Hauling Agent and Lessor Were Not Known Or Could Not Be Identified, And North American Did Not Properly Raise And Cannot Factually Support Defenses Of "Laches" Or The "Acceptance Doctrine."

II.

The Circuit Court Erred In Granting Summary Judgment (And By Denying Reformation) Based Upon § 379.195 – Because That Statute Is Inapplicable To Court Ordered Reformation And Is Limited To An Agreement To Cancel Or Annul An Insurance Policy To The Detriment Of An Injured Party After A Loss – In That Vanliner Sought To Conform The Policy (Which Would Remain In Effect After Reformation) To The Parties' Actual Intent And Pre-Loss Agreement That It Cover Only "Hit-and-Run" Accidents, Rather Than Seeking To Cancel Or Annul The Policy.

III.

The Circuit Court Erred in Granting Summary Judgment On The Ground That Vanliner's Policies Unambiguously Provided Coverage For The Brouhard And Powell Accidents Because The Policy Was Ambiguous In That It Failed To Define A "Covered Auto," And Thus The Court Should Have Considered The Policy, The Practical Construction Given To It By The Parties, And Extrinsic Evidence To Construe The Policy To Limit Its Coverage To "Hit-And-Run" Accidents.

IV.

The Circuit Court Erred In Granting Summary Judgment Because Allowing the Insurance Company For The Hauling Agents And Lessors To Recover Against Vanliner Defeats The Intentions Of The Agreements Between UVL And The Hauling Agents and Lessors In That The Hauling Agents Agreed To Indemnify UVL And UniGroup, And The Hauling Agents' Insurance Policies Covered That Obligation.

STANDARD OF REVIEW

The Court reviews a grant of summary judgment *de novo*. *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). A *de novo* standard also governs questions of law. *All Star Amusement v. Dir. of Rev.*, 973 S.W.2d 843, 844 (Mo. banc 1994).

When reviewing a summary judgment, the Court considers the evidence in the light most favorable to the party against whom the trial court ruled. *Volker Court v. Santa Fe Apts.*, 130 S.W.3d 607, 611 (Mo. App. 2004). The non-moving party is given the benefit of all reasonable inferences. *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 761 (Mo. banc 1996). Summary judgment will be upheld only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *ITT Comm. Fin.*, 854 S.W.2d at 376. When a plaintiff is the moving party, it must establish that the defendant's affirmative defenses fail as a matter of law. *ITT Comm. Fin.*, 854 S.W.2d at 381.

SUMMARY OF THE ARGUMENT

The grounds relied on by the circuit court in entering summary judgment do not withstand examination. Here, the policies proved ambiguous because of an undefined symbol "51," that necessarily leaves a reader uncertain as to the "autos" insured. Regardless, even an unambiguous contract *can* and *should* be reformed if it does not express the true intent of the parties as a result of mutual mistake. That has been the law in Missouri for over a century. Extrinsic evidence may be used to demonstrate the parties' shared intent at the time of contracting. The unrefuted evidence is that the parties

intended to limit the coverage provided by the Vanliner policies to "hit-and-run" accidents.

North American, and later the Court of Appeals, improperly injected and relied on defenses to reformation during the appeal not previously raised in the circuit court (in either the pleadings or on summary judgment). Regardless, an essential element of laches, estoppel, or any similar equitable doctrine is proof that the party seeking to take advantage of it was prejudiced or somehow relied to its detriment. In this case, North American would have had to demonstrate its reliance on a belief that the Vanliner policies were *not* of limited application when issuing its policies. North American cannot make the claim that it issued its policies, or indeed, took any action prior to the Brouhard and Powell accidents, that was premised on the notion that the Vanliner policies provided anything other than "hit-and-run" coverage. Quite simply, reformation will not prejudice North American.

Application of the "acceptance doctrine" as a defense to reformation is equally problematic. The undisputed facts demonstrate a mutual mistake among both insurer and insureds. The acceptance doctrine applies only in cases of unilateral mistake when the insured accepts as a counteroffer a policy issued by an insurer as a result of the insured's failure to reject the policy. Here, everyone involved intended the Vanliner policies to insure only the limited risk known as "hit-and-run" situations. Vanliner did not counteroffer with significantly broader coverage; UVL and UniGroup did not accept such a counteroffer. Any contrary approach would abolish the concept of reformation of insurance policies based on mutual mistake.

The circuit court went too far in finding a statutory bar to court ordered reformation in such a situation. The Missouri Legislature could not have intended to abrogate the common law for purposes of incomplete or erroneous insurance policies when it adopted § 379.195. Section 379.195 does not prohibit reformation of an insurance policy simply because reformation is sought after the loss. Reformation for a mutual mistake is not a post-loss agreement to "cancel" or "annul" the policies — instead, it is court-ordered equitable relief designed to restore to the policies the provisions both the insured and the insurer intended them to have.

Finally, as explained in detail in the substitute opening brief submitted by UVL and UniGroup, the insurance coverages should follow the parties' contractual indemnity obligations. The insurers' rights are derivative of their insureds. This approach is followed in Missouri to eliminate circuitous recoveries among and between the various contracting parties and their insurers.

ARGUMENT

I.

The Circuit Court Erred In Granting Summary Judgment On The Ground That The Vanliner Policies Could Not Be Reformed Absent Ambiguity – Because Reformation May Be Granted When There Is A Mutual Mistake Regardless Of Whether A Written Instrument Is Ambiguous Or Unambiguous, And Because Equitable Defenses Sounding In "Laches" or the "Acceptance Doctrine" Are Inapplicable – In That There Was Undisputed Evidence The Parties To The Vanliner Policies Made A Mutual Mistake By Omitting A Provision In Those Policies That Limited Coverage To "Hit-and-Run" Accidents In Which The Hauling Agent and Lessor Were Not Known Or Could Not Be Identified, And North American Did Not Properly Raise And Cannot Factually Support Defenses Of "Laches" Or The "Acceptance Doctrine."

A. Vanliner's Material Facts Of Mutual Mistake Stood Uncontroverted and Minimally Created A Genuine Issue of Fact

North American's only response to Vanliner's reformation claim in its summary judgment motion and reply under Rule 74.04(c)(3) was a contention that an unambiguous contract cannot be reformed, and thus the court should not consider any extrinsic evidence of mutual mistake. (L.F.5:803-15; 14:2264-76; 10:1618-24: 20:3211-16). The circuit court endorsed that position by holding that "absent a policy ambiguity, that parties seeking reformation are stuck with the language of their policy and cannot rely on

extrinsic evidence to establish an intent other than the intent expressed in the policy itself." (L.F.10:1630; 20:3322; App. A6).

This is simply an incorrect statement of Missouri law. The Court has long held that "*ambiguity is not the only basis for reformation of a written instrument.* There may exist also a mistake of a scrivener . . . who does not incorporate . . . the true prior intention of the parties which will be entitled to the remedy in equity of reformation of the instrument." *Edwards v Zahner*, 395 S.W.2d 185, 189 (Mo. 1965) (emphasis added; authorities excluded). The circuit court's decision to grant summary judgment based upon the notion that an unambiguous contract cannot be reformed, and thus preclude consideration of extrinsic evidence regarding the parties' actual intent, was wrong. Reformation is available when, by reason of mutual mistake, a written contract does not express the actual agreement of the parties. *Mills v. Cameron Mut. Ins. Co.*, 674 S.W.2d 244, 249 (Mo. App., S.D. 1984). The mistake must be mutual and common to both parties, *i.e.*, it must appear that both have done what neither intended. *Walters v. Tucker*, 308 S.W.2d 673, 675 (Mo. 1957); *Everhart v. Westmoreland*, 898 S.W.2d 634, 637 (Mo. App. 1995). It is unnecessary to show that the parties previously agreed upon any particular words or language, only that they agreed to accomplish a particular objective and that the instrument as executed is insufficient to execute their intention. *King v. Riley*, 498 S.W.2d 564, 566 (Mo. 1973); *Dutton v. Dutton*, 668 S.W.2d 585, 590 (Mo. App. 1984).

A party seeking reformation must prove its case by clear and convincing evidence. *CMI Food Service, Inc v. Hatridge Leasing*, 890 S.W.2d 420, 422-423 (Mo. App. 1995);

Kopff v. Economy Radiator Serv., 838 S.W.2d 449, 452 (Mo. App. 1992). North American provided no verified denial or counter-affidavits in response to the affidavits and other evidence incorporated in Vanliner's opposition to summary judgment and its statement of additional material facts. (L.F.10:1618-24; 20:3211-16). Consequently, the facts supporting reformation were admitted for purposes of Rule 74.04. *Mobley v. Copeland*, 828 S.W.2d 717, 729 (Mo. App. 1992).

Although Vanliner believes there is no genuine dispute of fact regarding the parties' shared intent, the resolution of any contradictory accounts of such essential facts is improper on summary judgment. *ITT Comm.*, 854 S.W.2d at 382. *See also J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 761 (Mo. banc 1996)("Where the record reasonably supports any inference other than those necessary to support a judgment for the movant, a genuine issue of material fact exists and the movant's motion for summary judgment should be overruled."). The circuit court should not have granted summary judgment to North American. At a minimum Vanliner was entitled to a trial on its reformation affirmative defense.

When by mutual mistake a contract or other instrument is not expressed in terms that have the force and effect the parties intended, equity will correct the mistake and reform the instrument so as to make it "speak the real agreement made between the parties." *Walters v. Tucker*, 308 S.W.2d 673, 675 (Mo. 1957); *Leimkuehler v. Shoemaker*, 329 S.W.2d 726, 730 (Mo. 1959). This has been the rule in Missouri for over 150 years. *See, e.g., Leitensdorfer v. Delphy*, 15 Mo. 160, 1851 WL 4212 (1851) at * 5. The court has a duty to enforce the contract that was really made and, when by mistake a contract is not

expressed in such terms as have the force and effect the parties intended, it is the clear duty of the court to correct the mistake. *Walters*, 308 S.W.2d at 675; *Duenke v. Brummett*, 801 S.W.2d 759, 765 (Mo. App., S.D. 1991).

Contrary to the judgment below, reformation is available regardless of whether a written contract is ambiguous or unambiguous. *CMI Food Service Inc. v. Hatridge Leasing*, 890 S.W.2d 420, 422-423 (Mo. App., W.D. 1995); *Duenke*, 801 S.W.2d at 765. A contract may be reformed if substantial evidence, including parol evidence, establishes the instrument does not express the parties' agreement by reason of their mutual mistake. *Id.* Parol or extrinsic evidence is admissible to establish the fact of mistake, the nature of the mistake, and how the writing should be reformed to conform to the intention of the parties. *Duenke*, 801 S.W.2d at 766; *see also Kopff v. Economy Radiator Service*, 838 S.W.2d 449, 453 (Mo. App., E.D. 1992).

The commentators agree. *See, e.g.*, 66 AM. JUR. 2D REFORMATION OF INSTRUMENTS, § 114 (2005) ("[i]t is practically the universal rule that in suits to reform written instruments on the ground of fraud or mutual mistake, parol and other extrinsic evidence is admissible to establish the fact of fraud or of a mistake, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had.") Any contrary approach would cause the parol evidence rule to become the instrument of the very wrong it was designed to prevent; evidence of mistake is seldom found in the instrument itself. 66 AM. JUR. 2D REFORMATION OF INSTRUMENTS, § 114 (2005).

The only authority cited by the circuit court in holding that parties are "stuck" with an unambiguous contract, and thus cannot reform it, was *Christen v. Christen*, 38 S.W.3d 488 (Mo. App. 2001). (L.F.10:1630; 20:3322; App. A6). In *Christen*, the court affirmed the refusal to set aside a deed because the grantor had deliberately chosen to convey the property using the statutory language necessary to "expressly declare" his intent to create a joint tenancy with right of survivorship. *Id.* at 491. The quotation from *Christen* the trial court relied on was a partial quotation from *Morris v. Brown*, 941 S.W.2d 835 (Mo. App., W.D. 1997).

Morris recognized that a mutual mistake may justify reformation, but a unilateral mistake does not. The *Morris* court held that the evidence *at trial* of the case it was reviewing did not support reformation. 941 S.W.2d at 839-842. Indeed, *Morris* expressly rejected the argument — made here by North American — that an unambiguous document cannot be reformed. *Id.* at 840. This is clear from the *complete* quotation:

> Absent any ambiguity on the face of the deed, *as conceded here, and having already lost on their claim that there was a mutual mistake warranting reformation of the deed, in interpreting the deed the respondents* are stuck with the language of the deed and cannot rely on parol evidence to establish an intent, other than the intent found in the language of the deed.

Id. at 843 (emphasis added). The lack of ambiguity did not foreclose the *Morris* court's consideration of extrinsic evidence to support reformation. It was the lack of evidence of a mutual mistake.

There is no such lack of evidence here. North American, by its failure to properly contest Vanliner's statement of uncontested material facts, admitted to the existence of a mutual mistake that led to the omission of the "hit-and-run" endorsement that both parties — the insurer and the insureds — failed to catch. The undisputed evidence showed:

- The Vanliner policies were part of UVL's comprehensive insurance program that required hauling agents and equipment lessors to obtain coverage that protected UniGroup and UVL against liability while operating under UVL's authority. UVL bought an equivalent amount of coverage from Vanliner to cover claims arising out of "hit-and-run" accidents with unidentified UVL agents. (L.F.7:1173-74, 1176-77; 17:2674-78).

- UVL and UniGroup asked Vanliner to provide coverage for the "hit-and-run" aspect of this comprehensive package in 1989. Vanliner initially issued the policy with a manuscript endorsement that confirmed the limited nature of the risk insured. (L.F.7:1177; 10:1538-90; 17:2678; 20:3131-83).

- Both insurer (Vanliner) and insureds (UVL and UniGroup) intended to limit the covered risk to "hit-and-run" accidents with unknown or unidentified UVL agents for all subsequent policy years. (L.F.7:1176-77, 1192-94, 1196, 1203-05, 1207; 17:2677-78, 2798-2800, 2802, 2809-11, 2813; App. A10-A23).

- Vanliner charged premiums that were commensurate with the limited risk that the parties intended the insurance to cover — for example, UVL and UniGroup paid $49,886 for $1 million in coverage — about 1/5 of what two of its agents, Fister and East End, together paid for $1 million in primary coverage each (or a total of $2 million). (L.F.6:890-91; 7:1087; 16:2475, 2555).

- The UVL agents had no expectation or belief that the Vanliner policies provided them any coverage. (L.F.7:1175, 1217; 17:2676, 2688).

- Vanliner adjusted claims under the policies in a manner consistent with the mutual understanding and intent of the parties that policies insured only "hit-and-run" accidents in which the UVL agent could not be identified. (L.F.7:1193-94, 1204-05; 17:2799-2800, 2810-11).

- The schedules of underlying insurance for the umbrella policy issued by American Guarantee Insurance Company identified the Vanliner policies as "hit & run" policies. (L.F.7:1178, 1205; 17:2678-79, 2811).

- In pre-loss e-mails during the course of obtaining the American Guarantee excess coverage, UniGroup and its insurance broker described the policies as "hit and run" policies "in place for those situations where a third party is able to identify a company truck (United or Mayflower) but is unable to identify the agent." (L.F.7:1179; 10:1591-94; 17:2679-80; 20:3184-87).

- Upon discovery of the mistake, the insurer (Vanliner) and insureds (UVL and UniGroup) voluntarily reformed their own policies to reflect the parties' intent in contracting and to rectify the mistake through the use of retroactive endorsements. (L.F.8:1228-29, 1233, 1236, 1243-44; 9:1327, 1396-97, 1401-02; 18:2833-34, 2839, 2842, 2849-50; 19:2934, 3003-05, 3008-09).

The facts of this case are remarkably similar to those in a recent First Circuit case, *OneBeacon America Ins. Co. v. Travelers Indemnity Co.*, ___ F.3d ___, 2006 WL 2848568 (1st Cir., Oct. 6, 2006). Although *OneBeacon* was decided under

Massachusetts law, there is nothing in the law of that state regarding reformation that differs from Missouri law.

In that case, OneBeacon insured vehicles owned by LAI. LAI leased the vehicles to other companies. The OneBeacon policy defined "insured" to include LAI's "covered autos" and "Anyone else while using with your [LAI's] permission a covered auto you own." *Id*. at * 1.

LAI leased trucks to Capform, Inc. The lease agreement required Capform to insure the vehicles at its own expense, either through being added to the OneBeacon policy or by obtaining a policy from another carrier. Capform insured its trucks with Travelers. One of Capform's leased trucks was involved in a serious accident with a pedestrian. Travelers defended the lawsuit and ultimately settled the case for $5 million.

During the course of settlement negotiations, Travelers learned of the existence and terms of the OneBeacon policy. It demanded that OneBeacon participate in the settlement because the truck was being used by Capform with LAI's permission (through the lease) at the time of the accident. Thus, Travelers claimed that Capform was an insured under the OneBeacon policy.

OneBeacon refused. It filed suit against Travelers and LAI, seeking a declaration that Capform was not its insured. It also sought to reform the policy based upon a mutual mistake because it contended that the policy language was intended to cover only lessees from LAI who agreed to be added to the OneBeacon policy and who paid OneBeacon a premium for the coverage. OneBeacon and LAI entered into a consent judgment agreeing that the policy did not provide coverage for lessees who decide not to be added to the

policy. *See id.* at *1. The district court, however, refused reformation with respect to Travelers because the policy was unambiguous, and because OneBeacon did not identify any language that was included or omitted by mistake. *See id.* at *2.

The First Circuit reversed. Relying on the RESTATEMENT (SECOND) OF CONTRACTS § 155, the court held that reformation does not involve interpretation of a contract. Rather, the party seeks to change the contract "to conform to the parties' intent." *Id*. at *3. Accordingly, restrictions on the use of parole or extrinsic evidence in contract interpretation do not apply. *See id*. Moreover, "[i]n a reformation case, it does not matter that a contract unambiguously says one thing. A court still will accept extrinsic evidence in evaluating a claim that both parties to the contract intended it to say something else." *Id*.

OneBeacon offered considerable evidence to support its claim that neither it nor LAI intended that the policy would provide coverage for LAI vehicles when the lessee chose to insure with another carrier, notwithstanding the definition of insured. Travelers did not offer contradictory evidence — it merely attempted to "diminish the significance" of OneBeacon's evidence. *See id*. at *4-*5.

It would be difficult to find a case more on point. Vanliner offered undisputed evidence that both it and its insureds intended that the policies cover only "hit-and-run" situations. Whether the policy terms were ambiguous or unambiguous was irrelevant — the policy did not reflect the parties' intentions. Vanliner, like OneBeacon, offered substantial evidence to support reformation of the policies — certainly substantial enough to survive summary judgment and to warrant a trial.

B. North American and the Court of Appeals Improperly Injected New Defenses to Reformation Not Raised in the Circuit Court

The appellate courts should not affirm a summary judgment on non-jurisdictional grounds not raised by the parties below. There are two separate problems with the resolution of the circuit court's summary judgment by the Court of Appeals: it relied on a ground that none of the parties raised at any time in the litigation — laches — and it relied on a ground that North American raised for the first time on appeal — the so-called "acceptance doctrine." The first is the more serious, but neither is a valid ground for affirmance.

In the usual appeal from a summary judgment, the appellant knows it must negate all of the grounds raised in the court below or suffer the consequences of a possible affirmance on a ground that the trial court did not rely on. *See, e.g.*, *Missouri Envelope Mut. Ins. Co. v. Nichols,* 149 S.W.3d 617, 623 (Mo. App., W.D. 2004). The appellant may anticipate the issue in its opening brief or, if raised by the respondent, address it in a reply brief.

But how is an appellant to anticipate or address an issue the appellate court raises on its own that turns out to be dispositive? It cannot do so effectively. The only recourse is to tackle it in a motion for rehearing. That, however, is a poor vehicle that hardly gives appellants an effective way to present their position. The essence of the adversary system, and the bedrock of due process, is that the parties argue their opposing views based on the evidence, the pleadings (where the issues are defined), and the case law. That process

is short-circuited when the *court*, not the parties, raises and decides a case on issues that neither party ever raised, or that the trial court never considered.

In the circuit court, North American asserted as its only avoidances of Vanliner's affirmative defense of reformation that an unambiguous contract cannot be reformed and that the statute precludes reformation. On summary judgment, North American argued the former, not the latter. (L.F.5:803-15; 14:2264-76; 10:1618-24; 20:3211-16). Nonetheless, the circuit court accepted both grounds as its basis for granting summary judgment. (L.F.10:1630; 20:3322; App. A6). On appeal, North American reiterated its contention that an unambiguous contract can never be reformed to correct a mutual mistake. The opinion below implicitly (and correctly) rejected that legal proposition because it is flatly wrong. *See, e.g., Edwards v. Zahner*, 395 S.W.2d 185, 189 (Mo. 1965), and Section A above.

The opinion assumed that Vanliner made out a case for reformation based on mutual mistake, Opinion at 13. However, the Court of Appeals affirmed the summary judgment on grounds that were not pleaded or argued by North American in the trial court, and not raised in North American's Respondent's Brief: laches and a quasi-estoppel notion that reformation isn't proper when it would negatively affect the rights of a third party. The Court of Appeals also relied on a ground — the so-called "acceptance doctrine" — that was not pleaded or argued by North American in the circuit court, although it was raised for the first time in North American's respondent's brief.

Each of these reasons are affirmative avoidances of Vanliner's affirmative defense of reformation.[1] The Opinion justified its reliance on these grounds by applying the principle that an appellate court can affirm on any ground that is sustainable as a matter of law, and that it is not limited to the grounds the trial court relied on. Opinion at 17-18. However, the "full statement of that rule . . . is that the order must be affirmed [if it can be] sustained on any ground *which is supported by the motion to dismiss* regardless of whether the trial court relied on that ground." *Property Exchange & Sales, Inc. v. King*, 822 S.W.2d 572, 574 (Mo. App., E.D. 1992).[2] The court should "decline to affirm a judgment on a ground which was not presented or supported by the motion to dismiss and which could have been presented to and considered by the trial court." *Id*. *See also Beck v. Fleming*, 165 S.W.3d 156, 158 (Mo. banc 2005); *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. banc 2001). Missouri courts have properly employed the same approach in the context of summary judgment motions. *Missouri Employers Mut. Ins. Co.*

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[1] An affirmative defense and an affirmative avoidance to an affirmative defense are governed by the same principles; both must be pleaded or waived. *See In re Estate of Kilbourn*, 898 S.W.2d 583, 586 (Mo. App., W.D. 1995); *Angoff v. Mersman*, 917 S.W.2d 207, 211 (Mo. App., W.D. 1996).

[2] *Property Exchange* involved a motion to dismiss, but the same principle applies to summary judgments, especially where the basis for affirmance is the refusal to find that an affirmative defense does not raise a triable issue of fact based upon an affirmative avoidance that was not pleaded or raised in the trial court.

v. Nichols, 149 S.W.3d 617, 623 (Mo. App., W.D. 2004) (may affirm grant of summary judgment if movant entitled to judgment based "on any ground raised in the motion and supported by the summary judgment record."); *Miller v. O'Brien*, 168 S.W.3d 109, 112 (Mo. App., W.D. 2005) (same).

The reason for such a rule is obvious. When the court *sua sponte* raises a non-jurisdictional issue that is dispositive of the appeal, the appellant is deprived of any opportunity to present its side of the argument. There may be — as there are here — a number of grounds on which these issues can be contested. But because neither North American nor the circuit court raised them, Vanliner had no opportunity prior to the appellate court's decision to present arguments of fact and law that counsel against affirmance on these grounds.

A motion for rehearing is an unsatisfactory vehicle for resolution of the issues. Post-opinion motions do not give a party the same opportunity to be heard on dispositive issues never before raised in the trial or appellate courts. The appellate court has already invested much time and effort in arriving at a result. It is commonly known that appellate courts almost never grant a motion for rehearing. Once the appellate court has made up its mind, there is a strong incentive to move on to the next case, and not to re-visit a decision the panel has made. That is why Rule 84.17(a)(1) prohibits reargument.

But the rule assumes that the losing party already had an opportunity to present its arguments on the points the appellate court found dispositive. That didn't happen here, and as a result Vanliner was left with only a motion for rehearing in which to provide a summary of the arguments it would have made had it known the reasons why it was

going to lose on appeal. Parties make choices at every turn in every lawsuit. They choose to raise certain issues or to make certain allegations, and not to raise others. The temptation for a judge to second guess a party's strategy may be strong, but it is not the court's function.

The procedural history of this case demonstrates that the Court of Appeals improperly considered laches and the acceptance doctrine as bars to reformation. Moreover, the opinion below failed to recognize that North American did not attempt to negate Vanliner's affirmative defense of reformation.

North American filed two separate petitions for declaratory judgment, one for the Brouhard litigation and one for the Powell litigation. (L.F.5:803-15; 14:2264-76). Vanliner answered both petitions, asserting two affirmative defenses that are relevant on appeal. (L.F.3:388-97; 4:658-64; 12:1942-50; 13:2056-2068). Vanliner alleged that its policy did not cover the Brouhard and Powell lawsuits because there was a mutual mistake between Vanliner and its insureds that resulted in the policies failing to be limited to the risk that it was supposed to cover — where the hauling agent was unknown or unidentified. *Id.* Vanliner alleged that the policies should be reformed to cover only the limited risk the parties intended them to cover — "hit-and-run" accidents where the identity of the hauling agent was unknown. *Id.* That reformation was sought in the answer instead of a counterclaim doesn't matter, and it never has. Rule 55.08; *See also, e.g.*, *Leitensdorfer v. Delphy*, 15 Mo. 160, 1851 WL 4212 (1851) at *6 ("The power of a court of equity to reform an instrument, which by reason of a mistake fails to execute the intention of the parties is unquestionable. . . . It is not material . . . whether the proceeding

is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense").

Second, Vanliner alleged that the indemnity provisions of the hauling agents' Agency and Lease Agreements controlled over any allegedly contrary insurance policy provisions, and that those indemnity provisions required the hauling agents' insurance carriers to provide coverage in these two situations, rather than UVL's and UniGroup's carrier. (L.F. 4:658-664; 13:2056-2068).

North American did not file a reply to the affirmative defenses that attempted to allege any of the affirmative avoidances that the Court of Appeals or North American raised for the first time in the appellate court. Specifically, North American did not allege that reformation was barred by laches or by the acceptance doctrine. Thus, it waived any right to oppose reformation on these grounds.

North American's motion for summary judgment and memorandum in support did not mention either affirmative defense. (L.F.5:803-15; 14:2264-76). That alone should have resulted in denial of summary judgment. *See ITT Comm. Fin.*, 854 S.W.2d at 381 ("A claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law").

Neither mentioned the laches doctrine, let alone attempted to rely upon it as an avoidance of Vanliner's affirmative defense of reformation. *Id.* Likewise, neither the motion nor the memorandum in support mentions the acceptance doctrine, or any of the cases later relied on in the Court of Appeals to claim that the doctrine applied to this appeal. *Id.*

North American just alleged that UVL and UniGroup were insureds and that the vehicles involved in the accidents were "covered autos" that were being used by or on behalf of UVL and UniGroup. North American contended that the policies were unambiguous, and therefore Vanliner was liable. (LF.5:803-15; 14:2264-76). Neither the motion nor the memorandum in support mentioned how the policy defined "covered auto." *Id.*

Vanliner's response specifically asserted reformation as a defense to the motion for summary judgment. Vanliner cited extensively to the record where witnesses testified to the facts supporting reformation. (L.F.7:1149-84; 17:2652-85). For example, Vanliner cited the testimony of Kathy Brittin to explain UniGroup's comprehensive insurance program, that the hauling agents were required to provide $3 million in primary and excess coverage naming UVL and UniGroup as additional insureds, that the hauling agents were required to indemnify UVL and UniGroup against any claims arising out of accidents involving the hauling agents' drivers or vehicles, and that Vanliner's policies were intended to fill a hole in the coverage where a person involved in an accident could identify a UVL or Mayflower vehicle, but the hauling agent using that vehicle could not be identified. (L.F.7:1200-13; 9:1289-1461; 17:2806-19; 19:2986-3068).

Vanliner asserted that the policy was supposed to define what a "covered auto" was by a symbol number. The policy used symbol number "51," but it failed to define that number. Vanliner offered evidence that symbol "51" was supposed to refer to an endorsement that had last been in a 1989 policy, but through a mutual mistake had been omitted from later replacement policies. That endorsement read: "IT IS AGREED THAT

THIS POLICY INSURES ONLY THE INTEREST OF UNIGROUP, INC. AND ITS SUBSIDIARIES WHEN A LOSS OR DAMAGE CLAIM AGAINST UNIGROUP, INC. AND/OR ITS SUBSIDIARIES IS MADE AND THE OWNERSHIP/LESSEE OF THE TRACTOR AND/OR TRAILER INVOLVED IT [*sic*] UNKNOWN." (L.F.10:1546; 20:3139).

North American's reply to these facts was limited to a simple denial. (L.F.10:1618-24; 20:3211-16). It did not cite any testimony, affidavits, documents, or other matters in the record to support the denial of the facts alleged and supported by Vanliner. *Id.* Thus, under Rules 74.04(c)(2) and (c)(3), North American admitted all of the *facts* alleged by Vanliner regarding reformation and the indemnity provisions by its failure to support the denial "with specific references to the discovery, exhibits or affidavits that demonstrate specific facts." The rule is quite explicit that the failure to comply in this respect "is an admission of this truth of that numbered paragraph." Rule 74.04(c)(2)

The only justification that North American offered for negating the allegations supporting reformation was that "the policy speaks for itself." (L.F.10:1618-24; 20:3211-16). Presumably, this legal cliché was intended to assert — as North American did later on appeal — that an unambiguous contract cannot be reformed. That was apparently the way the circuit court took North American's reply because that was the principal ground on which it relied in granting the motion for summary judgment. (L.F.10:1630; 20:3322; App. A6).

As for the allegations that the indemnity provisions of the Agency and Lease Agreements overrode any contrary insurance provisions, North American merely denied

that the documents had that effect. (L.F.10:1618-24; 20:3211-16). It did not discuss the cases cited by Vanliner or attempt to distinguish them. *Id.*

On the same day that North American filed its reply, the circuit court entered its summary judgment. (L.F.10:1625-32; 20:3217-24; App. A1-A8). (North American did not file any additional statement of material facts with its reply, so Vanliner did not need to file a surreply; in any event, the circuit court gave it no opportunity to do so by the timing of its ruling; and the circuit court held no hearing on the summary judgment motions, despite the fact that a hearing has been scheduled).

On appeal, in addition to its contention that an unambiguous contract cannot be reformed, North American asserted as another reason for affirmance the application of the so-called "acceptance doctrine." That claim is wrong, *see* Section D, but the Court of Appeals should not have considered it, and neither should this Court. The acceptance doctrine was not a reason North American offered in the circuit court for avoiding reformation, the circuit court never considered it, and thus the circuit court did not rely upon it. It is settled that an appellant cannot raise issues that were never raised in the trial court. There is no reason to refuse to extend the rule to respondents.

But that is not the worst thing that happened here. The Court of Appeals itself raised a reason for affirmance by way of the doctrine of laches — a doctrine that *no one* had raised in the circuit court or appeal. This was truly a blind side hit.

Vanliner was given no notice that the appeal would be decided on laches. It therefore had no opportunity to argue against the use of the doctrine based on these facts — and it had very good arguments that the Court of Appeals' opinion failed to take into account.

See Section C. Its only chance to convince the Court of Appeals that laches did not bar reformation was on a motion for rehearing.

Motions for rehearing are a terrible method of countering an entirely new theory that none of the parties raised. It is well-known that the number of motions for rehearing that are granted is miniscule. There are good reasons for this. The panel has by the time the opinion is issued invested a good deal of time and effort into producing the opinion. The courts, aided by the parties, rarely overlook significant facts or principles of law.

But those considerations don't hold much sway in this situation. Here, the Court itself has developed a legal theory based on its assessment of the facts without any input from the parties. The losing party has no inkling that it is going to lose on a theory that no one has ever raised, and thus lacked any meaningful opportunity to point out flaws in the theory before the Court adopts it.

No one likes to be corrected or shown to have not thought a particular position through. That can be particularly true where the proponent of the theory believes he or she has hit upon a decisive point that everyone else has missed. But the Court is less likely to be intimately familiar with the record than the parties. There may be facts — particularly in an extensive record such as the one in this appeal — that are not readily apparent. And without the adversarial give-and-take of briefing on the facts and the law, the Court is deprived of any critical analysis of the theory that it has, *sua sponte*, developed.

Finally, principles of fairness dictate against courts coming up with theories to support one party or another that the parties themselves haven't raised. Although the

principle usually comes up in the context of deficient points relied on or statements of fact, it cannot be disputed that the courts should not be an advocate for either party. *Thurmond v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). It is not the Court's job to take sides and find a way for one party to win. Rather, the Court should be impartial, and decide the case on the basis of properly raised contentions.

Many times the Court says that a party has waived this or that point by failing to take certain action, such as failing to plead an affirmative defense. Without a rule that prohibits a Court from raising non-jurisdictional arguments the parties themselves haven't raised, how can a Court distinguish between cases where it should decide on a theory the parties haven't raised and cases where it declines to do so? There is no principled way to do it. Any other rule would smack of favoritism and run counter to everything the Courts and our system of justice stands for.

C. There Are No Facts Sufficient to Support a Laches Defense

The panel Opinion below held that Vanliner's assertion of a reformation affirmative defense was trumped by the doctrine of laches. Even though North American never itself asserted laches as an affirmative avoidance to reformation, *see* Rule 55.08, the Opinion held that Vanliner's failure to seek reformation of the original faulty policy in 1990 (and its similarly faulty successors) prevented it from seeking reformation of the policies in effect at the time of the Brouhard and Powell accidents.[3] The Court held that Vanliner

[3] Had Vanliner initiated the actions in 2002 to seek reformation of its 2001 policies, there is no possible way that the requested relief could be deemed untimely. *See Nupsl v.*

should not be able to reform a contract when it would adversely affect the rights of a third party who was unaware of the circumstances giving rise to reformation.

That reasoning doesn't help North American. Laches is an equitable doctrine that is personal to the party asserting it. Even assuming that an appellate court may raise affirmative avoidances or affirmative defenses on appeal that a party has not raised, the party seeking to take advantage of this newly discovered defense must nevertheless show that it was prejudiced.

A party relying on laches is required to plead it as an affirmative defense and bears the burden of proof as to that defense. *Metropolitan St. Louis Sewer District v. Zykan,* 495 S.W.2d 643, 657 (Mo. 1973). North American did not plead laches as an affirmative avoidance and cannot rely on the equitable doctrine. *See* Rules 55.01 and 55.08 (requiring that affirmative defenses and avoidances be pleaded or waived); *see also Angoff v. Mersman*, 917 S.W.2d 207, 211 (Mo. App., W.D. 1996); *Jaycox v. Brune,* 434 S.W.2d 539, 547 (Mo. 1968). Moreover, that burden requires evidence that Vanliner had knowledge of the mistake and unreasonably delayed asserting its right to reformation for an excessive time, and that North American suffered a material legal detriment or

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Missouri Medical Ins. Co., 842 S.W.2d 920, 923 (Mo. App., E.D., 1992). The equitable doctrine of laches follows the law. *Lane v. Non-Teacher School*, 174 S.W.3d 626, 640 (Mo. App., W.D. 2005). The same should hold true for purposes of Vanliner's affirmative defenses of reformation for mutual mistake. It is seeking to reform policies issued in 2001.

prejudice as a result of the delay. *Blackburn v. Richardson*, 849 S.W.2d 281, 289 (Mo. App. 1993); *Perez v. Missouri State Bd. Of Req. for Healing Arts*, 803 S.W.2d 160, 166 (Mo. App. 1991). Ordinarily, laches presents a factual issue to be determined from all evidence and circumstances presented. *Hagely v. Bd. Of Education of Webster School Dist.*, 841 S.W.2d 663, 670 (Mo. banc 1992).

Here, even if raised, North American could not have shouldered its burden. The undisputed evidence demonstrated that Vanliner and its insureds presented, adjusted and paid claims based upon their understanding that the risk insured was limited to "hit-and-run" situations. (L.F.7:1193-94, 1204-05; 17:2799-2800, 2810-11). The premium was commensurate with that limited risk. (L.F.6:890-91; 7:1087; 16:2475, 2555). Neither party knew or even suspected that the relevant endorsement had been omitted until demands were made during the 2002 mediation in one of the underlying personal injury cases. (L.F.3:409, 77:1179, 1194-95, 1205-06; 8:1244, 1253, 1284, 1286; 9:1425, 1429, 1464, 1468: 14:2305; 17:2680, 2800-01, 2811-12; 18:2850, 2859, 2890, 2893; 19:3032, 3036). Upon this discovery in 2002, Vanliner promptly sought reformation of the 2001 policies at issue. The record does not establish the requisite knowledge or unreasonable delay by Vanliner. *See, e.g. Rich v. Class*, 643 S.W.2d 872, 876-877 (Mo. App. 1982).

Even more importantly, there is no evidence of prejudice. It is settled that "mere delay does not of itself constitute laches; instead the delay must work to the disadvantage and prejudice" of the party asserting laches. *Elson v. Davis II*, 123 S.W.3d 205, 211 (Mo. App., W.D. 2004). *See, e.g., Berry v. Continental Life Ins. Co.*, 224 Mo. App. 1207, 33 S.W.2d 1016 (1931) (20-year delay in seeking reformation of insurance policy not barred

by laches); *O'Connell v. School Dist. of Springfield R-12*, 830 S.W.2d 410, 417 (Mo. banc 1992) (delay must materially prejudice party opponent).

The doctrine does not apply where "no one has been misled to his harm in any legal sense by the delay, and the situation has not materially changed." *Metropolitan St. Louis Sewer District v. Zykan*, 495 S.W.2d 643, 657 (Mo. 1973); *Ruckels v. Pryor*, 174 S.W.2d 185 (Mo. 1943) (doctrine requires change in status of property or the parties' relation which operates to disadvantage). The disadvantage and prejudice is generally of two kinds: (1) the loss of evidence which would support North American's position and (2) a change in North American's position that would not have occurred but for the delay. *See Port Perry Marketing Corp. v. Jenneman*, 982 S.W.2d 789, 792 (Mo. App., E.D. 1998).

North American did not claim that there was any evidence lost with respect to the question of reformation of the Vanliner policies that would have supported North American's position. So, the question is whether North American suffered any "harm in any legal sense" as a result of the delay. First, North American has never claimed to have suffered any such harm. Second, to show harm from a delay in seeking reformation of a contract a party must show that it knew of and relied on the terms of the contract before reformation was sought.

There is no evidence is that North American knew of the Vanliner policies before the accidents, and before it had issued its excess policies to Fister and East End. To the contrary, the applicability of the Vanliner policies to these accidents came up long afterwards, during a mediation of one of the lawsuits. North American could not have relied on the terms of the unreformed Vanliner policies as covering identified or known

agent accidents either in setting the terms of its own policies or in setting the premiums for its policies because it didn't know the policies existed, let alone their terms, until after it had issued its own policies.

The only "prejudice" North American would suffer if Vanliner were permitted to go to trial on the reformation affirmative defense — and if the circuit court were to rule in Vanliner's favor — would be that it would have to pay the settlements of the personal injury cases without Vanliner being required to make any contribution to the settlements. This is, of course, *exactly the same position North American believed itself to be in when it issued its policies* to Fister and East End. That is the risk it undertook to insure, and for which it received premiums as consideration.

The Opinion below held that the mutual mistake in omitting the endorsement that limited the Vanliner policy to "hit-and-run" cases would be sufficient to justify reformation between Vanliner and UVL and UniGroup, but it could not be used to cause North American to "pay the price for their mistake" — by honoring its own contractual commitments — when it wasn't even a party to their contract. Opinion at 17. The Opinion relies on and approves a statement from *Homan Farms v. Carleton*, 877 S.W.2d 638, 641 (Mo. App., W.D. 1994), where the Western District noted that none of the cases relied on by the party seeking reformation involved the rights of third parties.

How the parties in *Homan* briefed that issue does not control this appeal. Not only did Vanliner cite cases where third persons, not parties to the contract, were "negatively affected" by reformation between the parties to the contract, the Court's own Opinion cited such a case at page 12.

In *Lunceford v. Houghtlin*, 170 S.W.3d 453 (Mo. App., W.D. 2005) the parties to a release sought to reform it because it mistakenly released two other parties involved in the accident. The court held that they could proceed with their claim for reformation, and reversed a summary judgment against the releasing parties. With regard to whether reformation was proper even though it would adversely affect the third parties who were mistakenly released, the court said reformation will be denied where it would "unfairly affect the rights of third parties." *See id*. at 464 n.4.

Third parties who would be unfairly affected would be good faith purchasers (as in *Homan*). The mistakenly released parties would not be unfairly affected because there was no evidence that they relied to their detriment on the existence or terms of the release. Its effect would be "to grant respondents a windfall, by absolving them of potential liability for those injuries without any action or contribution on their part." *Id*. *See also Courtway v Brand*, 159 S.W. 3d 409 (Mo. App., E.D. 2005)(parties permitted to rescind and enter a new release because of mutual mistake in releasing party neither intended to release); and *Great Atlantic Ins. Co. v. Liberty Mutual Ins. Co.*, 773 F.2d 976, 980-981 (8th Cir. 1985)(applying Missouri law and citing cases)(reformation not prevented by intervening third party rights where the third party is a gratuitous beneficiary of the mistake and was unaware of its existence when it issued its own policy), *affirming* 576 F.Supp. 561, 563-564 (E.D. Mo. 1983).

Again, *OneBeacon America Ins. Co. v. Travelers Indemnity Co.*, ___ F.3d ___, 2006 WL 2848568 (1st Cir., Oct. 6, 2006) provides a template for analyzing nearly identical facts. That court recognized that reformation could be denied where it unfairly affected

the rights of third parties. But, Travelers admitted that it did not even know of the existence of the OneBeacon policy in underwriting the Capform risk. *See id*. at *7. Thus, there was no unfairness to Travelers because it showed no detrimental reliance on the assumption that the OneBeacon policy covered the Capform vehicles. *See id*.

North American would not be "unfairly" affected by reformation because it underwrote the risks for Fister and East End's excess coverage before it even knew that the Vanliner policies existed. To allow North American to escape its own contractual liabilities that would clearly and without question apply because of a mutual mistake by Vanliner, UVL and UniGroup would be a windfall for North American. Although North American pretends to be the champion of the insureds here, the truth is that this lawsuit was brought to secure that windfall so that North American could avoid its own contractual obligations for which it was paid substantial premiums.

Whether Vanliner discovered the mistake in omitting the "hit-and-run" endorsement ten years or ten minutes before North American learned the terms of the Vanliner policies makes no difference. The delay caused it no "disadvantage" or "prejudice." The laches defense, first injected by the Court of Appeals, has no place in these declaratory judgment actions.

D. The Acceptance Doctrine Is Inapplicable

In applying the equitable doctrine of laches in the North American appeal, the Court of Appeals relied in part on *Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34, 38-39 (Mo. App., E.D. 2000) to conclude that the insureds had more than enough time in which to examine the policies and note the omission of limiting language. The panel opinion

reasoned that UniGroup was deemed to have accepted the Vanliner policies and cannot be relieved of the results of its negligence in failing to read the policies. (Opinion, pp. 15-16).

The "acceptance doctrine" is not appropriate in this case. The "acceptance doctrine" finds its origins in traditional principles of contract law pertaining to acceptance of a *counteroffer*: where the insured asks for a particular coverage X, the insurance carrier counters with different coverage Y, and the insured accepts coverage Y without reading or realizing what it has done. This much is clear from *Jenkad,* in which the court specifically distinguished the facts in a case where the insurer did not intend to offer the coverage sought by an insured (*i.e.*, a counteroffer) from cases where "the written instrument reflects *what neither party intended*." *Id.* at 39 n.4 (emphasis added). The approach is no different than that found elsewhere in contract law when a party seeking reformation for a unilateral mistake has executed a contract or otherwise accepted an offer. In an insurance context, the insured does not countersign the policy and therefore, the Missouri courts have found that policy retention *may* be deemed acceptance despite a unilateral mistake.

The evidence shows that the differences in coverage resulted from a mutual mistake among the insurer and the insured, all of whom believed the policies restricted coverage to "hit-and-run" situations, when (according to the circuit court) they did not. *Kopff,* 838 S.W.2d at 453 (evidence did not establish existence of counteroffer that could be accepted when no intent to make a counteroffer, and difference between intended coverage and written coverage was a clerical error); *Schimmel Fur Co. v. American*

Indemnity Co., 440 S.W.3d 932, 939 (Mo. 1969); *see also Mahaffey v. Kwon*, 659 S.W.2d 562 (Mo. App. 1983); *Earley v. Automobile Ins. Co. of Hartford, Conn.*, 144 S.W.2d 860 (Mo. App. 1940); 30 Mo. Practice Series, Insurance Law and Practice, § 1.16 (2005).

These authorities recognize that when a basis for reformation is established, that remedy should be barred only when an inequity results. Acceptance of the erroneous policy does not bar reformation when no prejudice results from it. *See Morehead v. State Farm Fire & Casualty Co.*, 662 S.W.2d 556, 563-564 (Mo. App., S.D. 1994). "Negligence should not permit others to gain an unconscionable advantage to which they are not entitled when there has been no change of position in reliance thereon." *Id.* (*quoting Cameron State Bank v. Sloan*, 559 S.W.2d 564, 567 (Mo. App. 1977)).

Here, there was no evidence that any of the parties involved — UVL, UniGroup, Vanliner, or North American — changed its position or detrimentally relied on the fact that the Vanliner policies did not have the limiting endorsement. To the contrary, both insurers and insureds believed the Vanliner policies to limit the risk to "hit-and-run" situations with unidentified agents. North American did not even know the policies existed when it issued its excess policies. There can be no harm in granting reformation to correct the policies to reflect this shared intent; the acceptance doctrine does not stand in the way of the equitable relief sought.

That the acceptance doctrine does not bar reformation for a mutual mistake makes sense. In a mutual mistake situation *both* parties have the opportunity to read the document, but through a mistake by *both* parties the document does not contain the terms that *both* parties thought it did. Since *neither* party intended the written instrument to

have the mistaken term omitted or included (as the case may be), *neither* party "offered" it to the other for "acceptance." Indeed, to enforce the acceptance doctrine in a case of mutual mistake would negate the remedy of reformation altogether.

North American contended that there was no evidence of mutual mistake because Vanliner wrote the policy and it should have been more careful. But the notion that reformation isn't proper where one of the contracting parties is the scrivener makes no sense. Somebody has to write the document. And there is no rule that reformation is allowed only where both parties' hands were on the pen when the mistake was made. Where the document does not reflect the intentions of either party, the identity of the scrivener is unimportant. *See, e.g., Zahner v. Klump,* 292 S.W.2d 585, 588 (Mo. 1956). *See also Edwards v. Zahner*, 395 S.W.2d 185, 189 (Mo. 1965)("[A]mbiguity is not the only basis for reformation of a written instrument. There may exist also a mistake of a scrivener . . . who does not incorporate . . . the true prior intention of the parties.")

II.

The Circuit Court Erred In Granting Summary Judgment (And By Denying Reformation) Based Upon § 379.195 – Because That Statute Is Inapplicable To Court Ordered Reformation And Is Limited To An Agreement To Cancel Or Annul An Insurance Policy To The Detriment Of An Injured Party After A Loss – In That Vanliner Sought To Conform The Policy (Which Would Remain In Effect After Reformation) To The Parties' Actual Intent And Pre-Loss Agreement That It Cover Only "Hit-and-Run" Accidents, Rather Than Seeking To Cancel Or Annul The Policy.

The circuit court also found that § 379.195 RSMo 2000 barred Vanliner's request for reformation. (L.F.2127; App. A7).[4] This additional finding misconstrues the plain language of that statute and erroneously applies it in favor of North American. The statute prevents cancellation or annulment by post-loss agreement of the insured and the insurer. It does not apply to the court-ordered remedy of reformation for mutual mistake. In reformation, the agreement is at policy inception and not post-loss; the parties neither annul nor cancel the policy, but instead the court corrects it to reflect the true intent of the parties when contracting.

Section 379.195 provides:

[4] North American did not assert the application of § 379.195 in its motion for summary judgment or reply under Rule 74.04(c)(3). (L.F.5:803-15; 14:2264-76; 10:1618-24; 20:3211-16). It never mentioned the statute its summary judgment papers.

1. In respect to every contract of insurance made between an insurance company, person, firm or association . . . and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid, occasioned by said casualty.

2. *No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured* after the said assured has become responsible for such loss or damage, *and any such cancellation or annulment shall be void*.

§ 379.195 (emphasis added) (App. A9).

When construing a statute, a court must not add provisions under the guise of construction if they are not plainly written or necessarily implied. *Coastal Mart, Inc. v. Dept. of Natural Resources*, 933 S.W.2d 947, 955-956 (Mo. App., W.D. 1996). Instead, words are considered in their plain and ordinary meaning to ascertain the intent of the

legislature. *M.A.B. v. Nicely,* 909 S.W.2d 669, 671 (Mo. banc 1995). The legislature is also presumed not to have intended an unreasonable or absurd result, but rather a logical one, and to have intended what the law states directly. *Metro Auto Auction v. Dir. of Revenue,* 707 S.W.2d 397, 401-402 (Mo. banc. 1986).

Vanliner, UVL, and UniGroup have never sought to cancel or otherwise annul the Vanliner policies. Unlike those prohibited acts, which seek to undo a contractual relationship, reformation has the effect of "rewriting" an instrument to give force and effect to the actual pre-loss agreement of the parties. *See Morrison v. Jack Simpson Contractor, Inc.*, 748 S.W.2d 716, 717 (Mo. App., E.D. 1988); *Dutton v. Dutton*, 668 S.W.2d 585, 590 (Mo. App., E.D. 1984)(reformation serves not to make a new contract for the parties, but rather to more adequately express the contract the parties have made for themselves). Since the prohibitions of § 379.195 are expressly limited to post-loss agreements among the contracting parties to cancel or annul an insurance policy, that statute has no application to the separate, distinct, and equitable remedy of court ordered reformation. Had the legislature intended the statute to apply to "reformation" situations, it could have easily included the term "reform" or "reformation." It elected not to do so.

Reformation operates retroactively to correct a writing to reflect the true intent of the parties. *Morrison v. Jack Simpson Contractor, Inc.*, 748 S.W.2d 716, 717 (Mo. App., E.D. 1988). Reformation does not do away with the parties' pre-loss intent like cancellation or annulment, but achieves the parties' pre-loss intent. The statutory ban is designed to enforce pre-loss intent not to override it. Reformation is intended to achieve equity. The statutes were intended to do the same by protecting properly contracted for

coverage in the face of a loss. The equitable relief of reformation and § 379.195 are not in conflict when there exists clear and convincing evidence of mistake as in the present case. That is why § 379.195 provides that the insurer's liability accrues on the occurrence of a loss, "if liability there be." If there was never any intent to provide coverage for the accident, then the statute does not create such liability. *See, e.g. Slagle v. Minich*, 523 S.W.2d 160 (Mo. App. 1975) (finding no liability owing from insurer to insured at time of accident based on legitimate defense of fraudulent misrepresentation); *Taylor v. Black*, 258 F.Supp. 82, 88-89 (E.D. Mo. 1966)(same).

Reformation is not an agreement occurring after the loss. For example, in *Great Atlantic Insurance Company v. Liberty Mutual Insurance Company*, 576 F.Supp. 561 (E.D. Mo. 1983), an excess insurer made an argument identical to that asserted by North American on appeal. The district court explained, "[n]ot only are Sections 379.195 and 379.200 inapplicable to a case such as this, but the correction of the [underlying] policy coverage or 'reformation' thereof by the insured and insurer was not based on a *subsequent* agreement, but rather on the pre-existing agreement and intention of the parties as of the time the policy was issued." *Id.* at 565 (emphasis in original).

The statutory bar is not intended to apply to mutual mistake cases in which the parties seek to reform a policy to reflect the parties' *agreement* at the time of contracting. There is no evidence that Vanliner and its insureds reached an agreement to cover only "hit-and-run" accidents *after* the Brouhard and Powell Accidents. Rather, they reached that agreement *prior* to policy inception when they contracted for the coverage. This agreement pre-dated the Brouhard and Powell accidents.

The Court implicitly reached the same conclusion in *Edwards v. Zahner*, 395 S.W.2d 185 (Mo. 1965), where the Missouri Supreme Court considered whether to reform an aircraft liability policy to include plaintiff's decedent as an insured in action brought pursuant to § 379.195 and § 379.200. If those statutes truly barred reformation, there would have been no need for that Court to review the sufficiency of plaintiff's evidence to support invocation of that equitable remedy based upon a mutual mistake affecting an otherwise unambiguous insurance contract. *Id.,* 395 S.W.2d at 189-191.

Moreover, the Missouri legislature is presumed to intend what the law states directly and to synchronize its language with existing common law. *Lawson Rural Fire Ass'n. v. Avery,* 764 S.W.2d 113, 116 (Mo. App., W.D. 1989). Numerous decisions have granted reformation after a loss to accord with the parties' prior contractual intent. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Maguire*, 905 S.W.2d 150 (Mo. App., W.D. 1995); *Kopff v. Economy Radiator Service,* 838 S.W.2d 449 (Mo. App., E.D. 1992), *Mills v. Cameron Mut. Ins. Co.*, 674 S.W.2d 244 (Mo. App., S.D. 1984). The trial court's finding, which gives a contrary construction of § 379.195, cannot be reconciled with these decisions or *Edwards*, *supra.*

Finally, the circuit court's invocation of § 379.195 was erroneous because North American is not a member of the class of persons the statute is intended to protect. *See generally Johnson v. Kraft General Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994); *Shqeir v. Equifax, Inc.*, 636 S.W.2d 944, 948 (Mo. banc 1982). The legislature adopted the statutory scheme involving § 379.195 to preserve policy proceeds for ultimate

collection by an injured party. *See Cronin v. State Farm Fire & Cas. Co.*, 958 S.W.2d 583, 584-585 (Mo. App., W.D. 1997).

North American is not an injured party occupying the status of a judgment creditor; it is an insurance company seeking to avoid its *own* coverage obligations and liability for the Brouhard and Powell accidents based upon a mutual mistake by Vanliner and its insureds. *See Budget-Rent-A-Car v. Guaranty Nat'l Ins. Co.*, 939 S.W.2d 412 (Mo. App., E.D. 1996)(rejecting analogous argument by insured that accord and satisfaction violated § 303.190.6(1), which prohibits cancellation of insurance after the occurrence of an accident; purpose of statute was to protect claimants and insured had no standing to rely on the statute). To the extent §§ 379.195 and 379.200 operate to protect members of the public, that objective has been fully accomplished through the settlement of the Brouhard litigation and the Powell litigation. *Cf. Great West Cas. Co. v. Mallinger Truck Line*, 640 S.W.2d 479 (Mo. App. 1982)(policy considerations underlying I.C.C. regulations were not diluted or abrogated where there was no diminution of recovery resulting to an insured third party).

No reasonable construction of § 379.195 precludes reformation of an insurance policy for the benefit of another insurance company, particularly one which needs no equivalent protection because it specifically underwrote the risk of liability arising out of the operations of both Vincent Fister and East End. Consequently, the statute does not bar Vanliner's request for equitable relief and the circuit court's finding to the contrary should be reversed.

III.

The Circuit Court Erred in Granting Summary Judgment On The Ground That Vanliner's Policies Unambiguously Provided Coverage For The Brouhard And Powell Accidents Because The Policy Was Ambiguous In That It Failed To Define A "Covered Auto," And Thus The Court Should Have Considered The Policy, The Practical Construction Given To It By The Parties, And Extrinsic Evidence To Construe The Policy To Limit Its Coverage To "Hit-And-Run" Accidents.

The judgment declares that the Vanliner Truckers Policy provides primary coverage for the Brouhard and Powell accidents and that the Vanliner policies afford coverage for those accidents. (L.F.10:1625-32; 20:3217-24; App. A1-A8). Rather than ascribe meaning to the manuscript coverage symbol utilized in those policies to determine what constituted a "covered auto," the circuit court apparently accepted North American's arguments regarding the ISO policy form to find that coverage existed. This finding misapplies rules of policy construction and erroneously failed, in the first instance, to identify the risk against which the parties to those insurance contracts intended to insure. Accordingly, the judgment should be reversed.

In Missouri, all provisions of an insurance policy should be given effect and the policy should be reasonably construed in light of the specific situation with which the parties are dealing. *Auto. Club Inter-Ins. Exch. v. Farmers Ins. Co.*, 778 S.W.2d 772, 774 (Mo. App. 1988); *MFA Mut. Ins. Co. v. American Fam. Mut. Ins. Co.*, 654 S.W.2d 230, 232 (Mo. App. 1983). In addition, each term in an insurance policy should be construed to avoid an effect which renders other terms meaningless or otherwise leaves a provision

without function or sense. *Martin v. U.S. Fid. & Guar. Co.,* 996 S.W.2d 506, 511 (Mo. banc 1999). *See also American Fam. Mut. Ins. Co. v. Moore,* 912 S.W.2d 531, 533 (Mo. App., W.D. 1995) (all provisions of a liability policy must be given their plain and reasonable meaning and all parts must, if possible, be harmonized and given effect in order to accomplish intention of parties.).

The record establishes the role of the Vanliner policies in the comprehensive insurance program created by UVL and UniGroup and the limited risk of "hit-and-run" accidents against which those policies were intended to insure. (L.F.3:408; 7:1177, 1193-94, 1204-05; 8:1228, 1245, 1252, 1284; 9:1327, 1413-14, 1434, 1463, 1467; 10:1513, 1533-37; 14:2304; 17:2678-2800, 2810-11; 18:2833, 2881, 2888, 2890; 19:2934, 3020-21, 3041). There is no dispute the policies in question utilized "covered auto" symbol "51" to describe that risk. (L.F.8:1252, 1256, 1265; 9:1321, 1326, 1344, 1416, 1440; 18:2858, 2862, 2871; 19:2928, 2933, 2951, 3023, 3047). Representatives of UniGroup, UVL and Vanliner testified, without contradiction, that this manuscript coverage symbol was not intended to duplicate the standard symbol for "any auto", but rather referred to a composite rate calculated on a different basis. *Id.* As a result of a mutual mistake, however, symbol "51" was not defined in the Vanliner policy. Evidence of the parties' shared intent and mutual mistake is found in the affidavits of UniGroup's Kathy Brittin and Vanliner's Gale Preston and confirmed in their depositions. (L.F.8:1226-1233, 1244, 1252, 1260; 9:1318, 1321, 1326-27, 1344, 1413-16, 1440-44; 18:2831, 2833-34, 2836-37, 2839, 2850 2858, 2866; 19:2925, 2928, 2933-34, 2951, 3019-23, 3047-48). This mutual mistake was adopted in the Vanliner umbrella policy that follows the form of the

Vanliner primary policy. (L.F.7:1180, 1195, 1206; 8:1234; 9:1343; 17:2680, 2800-01, 2812; 18:2839-40; 19:2950).

The fact that endorsements were mistakenly omitted or failed to define coverage symbol "51" does not, however, necessitate a construction in favor of coverage. The insurance company's failure to define the terms used in an endorsement does not require extending coverage to situations neither the insurer nor the insured intended to cover. In *State Farm Mut. Auto. Ins. Co. v. Esswein*, 43 S.W.3d 833 (Mo. App., E.D. 2001), the court observed:

> The primary goal of construing an insurance policy is to determine the intent of the parties and to give effect to that intention. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 901 (Mo. banc 1990); *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. 1996). "In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties but subsidiary agreements, the relationship of the party, the subject matter of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the party." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995) (internal quotations omitted). If a contract is deemed ambiguous, resort may be had to extrinsic evidence to determine the true intent of the party to the contract and resolve the ambiguity. *Modine Manufacturing Co. v. Carlock*, 510 S.W.2d 462, 467 (Mo. banc 1974).

Id. at 842.

In *Esswein*, the appellate court ultimately reversed the trial court's determination of unlimited liability coverage, concluding that evidence elsewhere in the policy, as well as in the extrinsic rental agreement, illustrated the parties' intent to provide the minimum liability insurance required to comply with each state's financial responsibility law; and that there was no evidence of the parties' intent to provide unlimited coverage in Ohio or anywhere else. *Id.* at 842-44.

The premise underlying the circuit court's summary judgment — that the Vanliner policy provisions as to what was a "covered auto" were unambiguous — is incorrect. The declarations page provides for the insurance company to select various symbols to identify the "covered autos" by identification of numerical symbols. Here, the symbol identified was number "51." (L.F. 7:1087; 16:2555). The definition selected by the trial court was symbol "41" — the one that means "any auto." (L.F. 7:1092; 16:2560).

Neither the circuit court nor North American explained why symbol "41", instead of some other symbol, should be selected as a default. Certainly, there is nothing inherently ambiguous in the number "51," nor anything about that number or the facts surrounding the issuance of this policy that suggests that Vanliner (or the insureds) intended to select the symbol "41" instead of the symbol "51."

The difficulty here is created because symbol "51" was not defined. Rather, the policy defined symbol "51" as "Per Composite Rate Endorsement — VL 4051." (L.F.7:1123; 16:2591). The Composite Rate Endorsement didn't define symbol "51" either. (L.F.7:1121-22; 6:2589-90).

The *evidence* was that symbol "51" was used for manuscript descriptions, *i.e.*, non-standard coverage descriptions. Here, the parties mistakenly failed to provide the description of what the "covered autos" were because they did not define the symbol "51." *Id.*

So, the Court is not presented with the usual ambiguity where the words that appear in the document are vague, or where particular phraseology is unclear or uncertain. There is nothing inherently vague about the number "51." It just isn't defined. Invoking doctrines that were intended to construe words or phrases doesn't work well here.

The rule that the court should construe an ambiguous provision against the drafter of the contract is one of "last resort." *Graham v. Goodman*, 850 S.W.2d 351, 356 (Mo. banc 1993). In construing a contract of doubtful meaning the *first* resort is to look for evidence concerning the subject matter of the contract, the facts and circumstances surrounding its negotiation and execution, and the parties' apparent purpose in entering into the contract. *McIntyre v. McIntyre*, 377 S.W.2d 421, 425 (Mo. 1964). *Only* if there is an absence of such evidence should the Court resort to *contra proferentem*. Vanliner offered substantial evidence of the related agreements, the relationship of the parties, the subject matter of the contract, the practical construction the parties put on the contract, and other external circumstances that shed light on the parties' intent. *See State Farm Mutual Ins. Co. v. Esswein*, 43 S.W.3d 833, 842 (Mo. App., E.D. 2001).

UVL had detailed Agency and Lease Agreements that spelled out the relationship between it and its hauling agents. (L.F.6:879-80; 7:1170-71, 1185-90, 1201, 1214; 9:1345; 17:2653, 2671-73, 2686, 2690-95; 19:2956-57). These Agreements also had

insurance requirements that required the agents to obtain coverage for themselves and to name UVL and UniGroup as additional insureds. (L.F.6:882-84, 918, 935-37; 7:1201-02, 1211-13, 1215-16, 1218-20; 9:1345-46, 1351-52; 10:1512; 17:2673, 2686-87, 2690-92, 2696, 2698-2701; 19:2952-53, 2956-59). Of course, for those policies to cover any of the insureds, one had to know the identity of the hauling agent involved in the accident. If that identity was not known, then no insurance obtained by the hauling agents could cover anybody. The Vanliner insurance was intended to fill this hole in the coverage. (L.F.3:407; 7:1176, 1192, 1203; 8:1228, 1243, 1254; 9:1327, 1413-14, 1434, 1462-63, 1466-67; 10:1512-13, 1533-37; 14:2303; 17:2677, 2798, 2809; 18:2833, 2849, 2851; 19:2934, 3020-21, 3041).

These policies were intended to cover only UVL and UniGroup — not every hauling agent and every driver for a hauling agent. That was shown both by the circumstances in which the policy was intended to have effect, and by the relatively low premiums charged in accordance with the relatively few occasions when the hauling agent could not be identified. (L.F.3:408; 5:840; 7:1193-94, 1204-05; 9:1463, 1467; 10:1513-14; 14:2304; 17:2799-2800, 2810-11).

There was nothing — nothing — to suggest that the parties meant to use the symbol "41" ("any auto") to describe what vehicles were covered. North American pointed to no evidence that symbol "41" was intended. Nor did North American contest Vanliner's evidence of how the mistake was made, except to suggest that its witnesses' testimony was not credible.

In short, the Vanliner policies were ambiguous in the sense that they failed to define symbol "51" which was supposed to identify the vehicles that were the "covered autos." In those circumstances, the trial court should have looked outside the four corners of the policy to determine the parties' intent.

IV.

The Circuit Court Erred In Granting Summary Judgment Because Allowing the Insurance Company For The Hauling Agents And Lessors To Recover Against Vanliner Defeats The Intentions Of The Agreements Between UVL And The Hauling Agents and Lessors In That The Hauling Agents Agreed To Indemnify UVL And UniGroup, And The Hauling Agents' Insurance Policies Covered That Obligation.

As alternative grounds for denying North American's motion for summary judgment, Vanliner asserted that application of its policies to the Brouhard and Powell Accidents would defeat the indemnification and anti-subrogation provisions in the Agency and Lease Agreements. The circuit court, however, found that the coverage issues between North American and Vanliner were "not affected, eliminated or limited" by those Agreements. (L.F.10:1630-31; 20:3222-23; App. A6-A7). This finding is wrong.[5]

[5] The circuit court questioned the sufficiency of Vanliner's joinder (LF 5:796-97; 16:2644-49) in UniGroup and UVL's motion for partial summary judgment on these same grounds. (L.F.10:1633; 20:3225). Not only did North American never object to this joinder, that practice has been approved. *See, e.g., Cook v. DeSoto Fuels, Inc.*, 169

Section 2 of the Agency Agreements sets forth the responsibilities of UVL's agents. These include § 2.I, which states that the "Agent shall at all times have in effect insurance coverage required by Carrier Policies. . . . Minimum requirements shall be that such insurance coverage shall name Carrier as an additional named insured and shall provide for a waiver of subrogation against the Carrier." (L.F.7:1170, 1187, 1201, 1214; 17:2653, 2671-72, 2686, 2692). The Agency Agreements further provide:

> M. The Agent will indemnify Carrier against, hold it harmless from and promptly reimburse it for, any and all payments of monies (fines, damages, settlement amounts, expenses, attorney's fees, court costs, judgments and the like), by reason of any claim, demand, tax, penalty or judicial or administrative investigation or proceeding arising from any actual or claimed occurrence involving the Agent or any act, omission or obligation of the Agent or anyone associated or affiliated with the Agent or acting on behalf of the Agent.

(L.F.7:1170-71, 1186-89, 1201, 1214; 17:2653, 2671-73, 2686, 2690-95). The Lease Agreements similarly provide that:

> 6. Agent agrees to maintain insurance as set forth in the attached Schedule A, entitled "UVL Insurance Requirements", incorporated herein by reference.

S.W.3d 94, 102 (Mo. App., E.D. 2005) (where the same facts and reasoning apply, adoption of other party's motion for summary judgment is not inappropriate because it promotes efficiency and judicial economy without imposing additional burdens on opposing counsel.)

* * *

13. Agent further agrees it will indemnify and save UVL harmless from any and all liability of any nature whatsoever occasioned by any act or failure to act which may occur or happen as the result of the performance of services under this Agreement, including the operation of Equipment as referenced in paragraph 1 above.

(L.F.5:871-72; 7:1201, 1214; 14:2334-35; 17:2653-55, 2686, 2696-97).

Thus, it is apparent that Vincent Fister, East End and UVL each contemplated that the hauling agents were to bear any liability arising out of the circumstances involved in the Brouhard and Powell Accidents. These Agreements further demonstrate that the hauling agents were contractually responsible to purchase liability insurance which would cover both the hauling agents' liability to parties claiming personal injury or property damage *and* the hauling agents' indemnification obligations to UniGroup and UVL. (*See, e.g.,* L.F.11:1724).

These contractual undertakings are valid and enforceable. Most courts, including Missouri, have given effect to the insureds' indemnity agreements when resolving their insurers' respective coverage obligations. *See, e.g., Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160 (Mo. App., E.D. 2005); *American Indemnity Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 436 (5th Cir. 2003); *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 594-95 (8th Cir. 2002). These decisions recognize that a contrary holding would render the indemnity contract between the insureds completely ineffectual and result in circuitous litigation.

For example, *Federal Ins. Co. v. Gulf Ins. Co.*, considered whether the trial court had correctly determined that Federal Insurance was entitled to equitable contribution against Gulf Insurance based upon the application of a general rule governing "other insurance" clauses. The court reversed, invoking an exception to that general rule triggered when the policy of the insurer attempting to invoke an "other insurance" clause also covers an insured who is liable to indemnify the insured in the policy of the other insurer. *Id.* at 162 S.W.3d at 164. Explaining its rationale for that reversal, the court said:

> To hold otherwise would render the indemnity contract between the insureds completely ineffectual and would obviously not be a correct result, for it is the parties' rights and liabilities to each other which determine the insurance coverage; the insurance coverage does not define the parties ' rights and liabilities one to the other.' *Chubb [Ins. Co. of Canada v. Mid-Continent Cas. Co.*, 982 F.Supp. 435, 438 (S.D. Miss. 1997)]. To apply the 'other insurance' provisions to reduce the indemnitor's insurer's liability 'would serve to abrogate the indemnity agreement between' the indemnitor and indemnitee owner. *J. Walters Const., Inc. v. Gilman Paper Co.*, 620 So.2d 219, 221 (Fla. App. 1 Dist. 1993). '[T]o apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on the [owner's insurer] when [owner] bargained with [contractor] to avoid that very result as part of the consideration for the construction agreement.' *Rossmoor [Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622, 634, 119 Cal.Rptr. 449, 532 P.2d 97 (1975)].

> Further, failure to give effect to the indemnity agreement would result in circuitous litigation which would ultimately end with the excess carrier paying the settlement. *Wal-Mart*, 292 F.3d at 587; *American Indem.*, 335 F.3d at 437. Courts should consider the obligations under an indemnity agreement before allocating responsibility for the settlement liability according to the terms of the relevant policies. *St. Paul [Fire Ins. v. Amer. Intern. Spec. Lines*, 365 F.3d 263, 277 (4th Cir. 2002)].

Id., 162 S.W.3d at 165; *see also Great West Cas. Co. v. Mallinger Truck Line*, 640 S.W.2d 479, 485 (Mo. App. 1982)(court may examine collateral agreements between the insurance companies' insureds to determine how coverage should be allocated.)

This reasoning applies to the present circumstances. It is undisputed that North American's excess policies cover both the liability and indemnity obligations assumed by Vincent Fister and East End. The intentions of UVL and its hauling agents are described in the Lease and Agency Agreements. In addition, because those Agreements are between sophisticated businesses, the language utilized was sufficient to support their indemnity obligations. *See generally Utility Serv.& Main., Inc. v. Noranda Aluminum, Inc*, 163 S.W.3d 910, 913-14 (Mo. banc 2005). Thus, all the relevant considerations confirm that the Agreements' indemnity provisions should govern the insurance allocation issue. *Federal Ins. Co*, 162 S.W.3d at 166-67. For these reasons, as well as those developed at greater length in the Substitute Appellant's Opening Brief filed on behalf of UniGroup and UVL in this consolidated appeal, the circuit court's finding erroneously declares and applies Missouri law. The circuit court's failure to give proper effect to the indemnity

obligations assumed by North American's insureds is therefore another reason for reversing its award of summary judgment.

CONCLUSION

The award of summary judgment in North American's favor should be reversed, and the matter remanded to permit a proper consideration of Vanliner's affirmative defenses and evidence. Vanliner further requests such other relief as the Court deems appropriate in the present circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains _____ words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5” floppy disk in Microsoft Word 2003 format.

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