

Supreme Court No. 88003

IN THE MISSOURI SUPREME COURT

SHELTER MUTUAL INSURANCE COMPANY

Appellant

v.

MARK BARRON, et al.

Respondents

**APPEAL FROM THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI
No. 04CV75698**

**On Transfer From The Missouri Court of Appeals,
Western District, Case No. WD65947**

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal comes as a result of this Court granting transfer from the Western District Court of Appeals by Order dated September 26, 2006. This is an appeal from the grant of Plaintiffs' motion for summary judgment granted by the Buchanan County Circuit Court in *Mark Barron, et al. v. Shelter Mutual Insurance Company*, 04CV75698. Missouri law specifically provides that the interpretation and meaning of an insurance policy is a question of law for determination by the court and is a proper issue for appeal. *Mansion Hills Condominium Association v. American Fam. Mut. Ins. Co.*, 62 S. W. 3d 633 (Mo. App. 2001). Judgment was entered on August 29, 2005 and Appellant timely filed its Notice of Appeal on September 8, 2005.

STATEMENT OF FACTS

Plaintiffs sustained injuries in a boating accident that occurred on July 5, 2002 on Lake Pomme De Terre in Hickory County, Missouri. (LF 0011). At the time of the accident, a boat owned and driven by defendant Rodney Ogelsby struck a pontoon boat on which plaintiffs were riding. (LF 0011) Defendant Billy Hunt was riding on Ogelsby's boat at the time of the accident. (LF 0015) Ogelsby and Hunt were participating in a bass fishing tournament at the time. (Exhibit A, paragraph 24).

Ogelsby's boat was a G III 19 foot bass boat equipped with a 150-horse power outboard engine. (LF 0015). Neither Ogelsby nor Hunt owned the pontoon boat on which the plaintiffs were riding at the time of the accident. (LF 0013). At the time of the accident, Hunt was insured under a Homeowner's policy and a Boatowner's policy, both issued by Shelter Insurance. (LF 0016-0017). Hunt's Homeowner's policy (policy no.

24-71-007196013-0001) contained liability coverage limits in the amount of \$100,000.00 per accident and \$1,000.00 in medical payments coverage per person. (LF 0016-0017). Hunt's Boatowner's policy (policy no. 24-92-007196013-0001) contained liability coverage limits in the amount of \$100,000.000 per accident and \$1,000.00 in medical payments coverage per person. (LF 0016-0017).

At the time of the accident, Ogelsby was insured under a Homeowner's policy and a Boatowner's policy, both issued by Shelter Insurance. (LF 0017). Ogelsby's Homeowner's policy (policy no. 24-71-004585954-001) contained liability coverage limits in the amount of \$300,000.00 per accident and \$1,000.00 in medical payments coverage per person. (LF 0017). Ogelsby's Boatowner's policy (policy no. 24-92-004585954-001) contained liability coverage limits in the amount of \$300,000.000 per accident and \$2,000.00 in medical payments coverage per person. (LF 0017).

In the underlying personal injury litigation, Plaintiffs and defendant Hunt reached a settlement agreement wherein Shelter Insurance agreed to pay plaintiffs the \$100,000.00 liability limit on behalf of Hunt under the Homeowner's policy issued to Hunt by Shelter. (LF 0017-0018). As part of the settlement agreement, the parties agreed to submit to the trial court, by way of a declaratory judgment action, the issue of whether there was coverage available to Hunt for the subject boat accident under the Homeowner's policy issued by Shelter to Mr. Ogelsby. Additionally, the parties agreed to submit to the trial court the issue regarding whether there is coverage available for Hunt under the Boatowner's policy issued by Shelter to Hunt (LF 0017-0018).

The Plaintiffs and defendant Ogelsby also reached a settlement agreement in the underlying litigation wherein Defendant agreed to pay Plaintiffs the liability limit of \$300,000.00 on behalf of Ogelsby under the Boatowner's policy issued by Shelter to Ogelsby. (LF 0018-0019). As part of the settlement agreement with Ogelsby, the parties agreed to submit to the trial court the issue regarding whether there is medical payments coverage available for plaintiffs under the Boatowner's policy issued by Shelter to Ogelsby (LF 0018-0019).

The parties submitted motions for summary judgment to the trial court regarding the three issues submitted to the trial court for determination: (1) whether there was coverage available for Hunt under the Boatowner's policy issued to Hunt; (2) whether there was coverage for Hunt under the Homeowner's policy issued to Ogelsby; and (3) whether there was medical payments coverage available under the Boatowner's policy issued to Ogelsby. On August 29, 2005 the trial court issued its ruling granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment on all three issues submitted. (LF 0487-0488).

Appellant timely filed its Notice of Appeal on September 8, 2005 and the parties filed their briefs before the Court of Appeals. The Court of Appeals issued its Order on July 18, 2006 reversing the decision of the trial court and dismissing the action for lack of a justiciable controversy.

POINTS RELIED ON

- I. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary and denying Shelter's Motion for Summary Judgment because**

Missouri Appellate Courts in cases such as *Farm Bureau v. Barker*, 150 S.W. 3d 103 (Mo. App. 2004), et al., have determined that anti-stacking and “other insurance” provisions similar to the provisions in the Hunt Boatowner’s policy are not ambiguous and are enforceable and that the Shelter Boatowner’s policy issued to Mr. Hunt is not ambiguous and since Shelter paid the policy limits on behalf of Mr. Hunt under the Homeowner’s policy issued to him by Shelter there is no coverage available to Mr. Hunt under the Boatowner’s policy issued to him by Shelter.

Rule 74.04(c)(3).

Farm Bureau v. Barker, 150 S.W. 3d 103 (Mo. App. 2004).

Rader v. Johnson, 910 S.W. 2d 280 (Mo. App. 1995).

Farm Bureau Town and Country v. Hughes, 629 S.W. 2d 595 (Mo. App. 1981).

II. The Trial Court erred in entering its Judgment granting Plaintiffs’ Motion for Summary Judgment and denying Shelter’s Motion for Summary Judgment because Missouri Appellate Courts in cases such as *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998) and *Kellar v. American Family Mut. Ins. Co.*, 987 S.W.2d 452 (Mo. App. 1999) have ruled that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Homeowner’s policy is ambiguous, and the policy language in the Ogelsby Homeowner’s policy does not support the ruling by the Trial Court

that a reasonable insured would expect liability coverage to be available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby by Shelter.

American Standard Insurance v. May, 972 S.W. 2d 595 (Mo. App. 1998).

Kellar v. American Family Mut. Ins. Co., 987 S.W.2d 452, 455 (Mo. App. 1999).

III. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998) and *Kellar v. American Family Mut. Ins. Co.*, 987 S.W. 2d 452 (Mo. App. 1999) have held that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Boatowner's policy is ambiguous, and the policy language in the Ogelsby Boatowner's policy does not support the ruling by the Trial Court that a reasonable insured would expect medical payments coverage would be available under the Boatowner's policy issued to Mr. Ogelsby by Shelter.

American Standard Insurance v. May, 972 S.W. 2d 595 (Mo. App. 1998).

Kellar v. American Family Mut. Ins. Co., 987 S.W.2d 452, 455 (Mo. App. 1999).

IV. The Declaratory Judgment action filed by Mark Barron, et al., was supported by a substantial controversy between the parties whose interests are genuinely adverse and such controversy is ripe for judicial determination.

Am. Fam. Mut. Ins. Co. v. Nigl, 123 S.W. 3d 297 (Mo. App. E.D. 2003)

Farmers Ins. Co. v. Miller, 926 S.W. 2d 104 (Mo. App. E.D. 1996).

Shelter Mut. Ins. Co. v. Vulgamott, 96 S.W. 3d 96 (Mo. App. W.D. 2003)

State Farm Fire & Cas. Co., v. Alberici, 852 S.W. 2d 388 (Mo. App. E.D. 1993)

ARGUMENT

I. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *Farm Bureau v. Barker*, 150 S.W. 3d 103 (Mo. App. 2004), et al., have determined that anti-stacking and "other insurance" provisions similar to the provisions in the Hunt Boatowner's policy are not ambiguous and are enforceable and that the Shelter Boatowner's policy issued to Mr. Hunt is not ambiguous and since Shelter paid the policy limits on behalf of Mr. Hunt under the Homeowner's policy issued to him by Shelter there is no coverage available to Mr. Hunt under the Boatowner's policy issued to him by Shelter.

In their Motion for Summary Judgment in the declaratory judgment action, Plaintiffs asserted there was coverage available to Mr. Hunt under his Boatowner's policy in the amount of \$100,000.00, the liability limit under such policy. Conversely Shelter, in its Motion for Summary Judgment, asserted there was no coverage available to Mr. Hunter under his Boatowner's policy. The trial court entered its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary

Judgment and finding there is \$100,000.00 in coverage available to Mr. Hunt under the Boatowner's policy issued to Mr. Hunt by Shelter. (LF 0487-0488).

Rule 74.04 of the Missouri Rules of Civil Procedure governs the use of summary judgment. The Missouri Rules of Civil Procedure provide that summary judgment "shall be granted if a Motion for Summary Judgment and response thereto show that there is no genuine issue as to material fact and that the moving party is entitled to Judgment as a matter of law." Mo. R. Civ. Pro. 74.04(c)(3). A "genuine issue" is a dispute that is real, not merely argumentative, imaginary or frivolous. *ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W2d 371, 381 (Mo. 1993).

Additionally, Missouri law specifically provides that the interpretation and meaning of an insurance policy is a question of law for determination by the court. *Mansion Hills Condominium Association v. American Fam. Mut. Ins. Co.*, 62 S. W. 3d 633 (Mo. App. 2001). Appellate review of motion for summary judgment is essentially de novo. *McClanahan v. Global Security Service Co., Inc.*, 26 S.W.3d 291, 292 (Mo. App. 2000). The appellate court reviews the record in the light most favorable to the party against whom judgment was entered. *Id.* The appellate court affords the non-movant the benefit of all reasonable inferences from the record. *Id.* at 293.

The Boatowner's policy issued to Mr. Hunt under which Plaintiffs assert there is \$100,000.00 in coverage available to Mr. Hunt for the incident accident contains an "other insurance in the company" clause that specifically states:

With respect to any accident, death or loss to which this and any other insurance policy issued to you by us also applies, the total limit of our

liability under all these policies won't exceed the highest applicable limit of liability or benefit amount under any one policy. (emphasis added)

(LF 0158).

It was undisputed by the parties in the declaratory judgment action that Shelter issued a Homeowner's policy to Mr. Hunt. (LF 0016 paragraph 33). It was also undisputed Shelter paid plaintiffs \$100,000 on behalf of Mr. Hunt under this Homeowner's policy, the limit of liability under that policy. (LF 0018, paragraph 47). Thus, as both policies issued to Mr. Hunt by Shelter contain liability limits of \$100,000, based on the "other insurance in the company" provision in Hunt's Boatowner's policy, Shelter was obligated to pay its highest applicable limit under only one such policy. As Shelter has already paid \$100,000 to Plaintiffs on behalf of Mr. Hunt under Hunt's Homeowner's policy, Shelter is under no further obligation to provide such coverage to Mr. Hunt under the Boatowner's policy.

The "other insurance in the company" clause in the Hunt Boatowner's policy has the practical effect of an anti-stacking provision. Anti-stacking provisions typically come before courts in the uninsured/underinsured motorist context. Missouri courts have consistently held that, absent some public policy requirement, such as with uninsured motorist coverage, whether certain coverages can be stacked is an issue to be determined by the language in the policy at issue.

Regarding underinsured motorist coverage, the Missouri Court of Appeals has stated "because of the absence of public policy regarding underinsured motorist coverage, the existence of such coverage and its ability to be stacked are determined by the

insurance policy.” See *Harris v. Shelter Mutual Insurance Company*, 141 S.W. 3d 56 (Mo. App. 2004). In this instance, since there is no statutory mandate, and no pronounced public policy regarding boat owner’s coverage, the “other insurance in the company” clause in the Hunt Boatowner’s policy is not void, and should be enforced.

Additionally, the Missouri Court of Appeals upheld a similar “other insurance in the company” anti-stacking provision in *Rader v. Johnson*, 910 S.W. 2d 280 (Mo. App. 1995). The court stated:

Johnson’s policies with State Farm each provide limits of \$100,000 per person, up to \$300,00 per occurrence. . . . Though Johnson’s policies with State Farm appear to provide up to \$600,000 coverage, a provision in each policy issued to Johnson by State Farm provides coverage for an accident, the total liability limits under the policies shall not exceed the greater of the limits of the individual policies. Applied to this situation, Johnson’s State Farm policies provide up to \$300,000 in liability coverage per occurrence.

Id. at 285.

The court also upheld a similar provision in *Noll v. Shelter Insurance Companies*, 774 S.W. 2d 147 (Mo. 1989). In *Noll*, this Court considered a Shelter Insurance "Other Automobile Insurance in the Company" clause, which read:

With respect to any occurrence, accident, death or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's

liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

Id. at 149. *Noll* cites *Farm Bureau Town and Country v. Hughes*, 629 S.W.2d 595 (Mo. App. 1981) for the proposition that "other insurance in the company" provisions such as this are sufficient to preclude the stacking of medical payments and liability coverages. *Noll* at 15. The Shelter Insurance language considered in *Noll* is similar in all material respects to the language at issue here and should be enforced accordingly.

A more recent case wherein the Missouri Court of Appeals upheld an anti-stacking provision in the underinsured motorist context is *Farm Bureau v. Barker*, 150 S.W. 3d 103 (Mo. App. 2004). In *Barker*, Farm Bureau issued two separate underinsured motorist policies to the Barkers. Farm Bureau paid the Barkers the policy limit of \$100,000 under one of the UIM policies. Each policy had an underinsured motorist coverage limit of \$100,000. Each policy also contained the following anti-stacking provision:

If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all policies will not exceed the highest applicable Limit of Liability under any one policy.

The Farm Bureau policies also contained the following "other insurance" clause:

If there is other applicable insurance available under one or more policies or provisions of coverage:

A. Any recovery for damages under all such policies or provisions of coverage may equal, but not exceed, the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

B. Any insurance we provide with respect to a vehicle you do not own will be excess over any collectible insurance providing coverage on a primary basis.

Id. The Barkers asserted that the anti-stacking provision and the “other insurance” clause were ambiguous and therefore, should be construed against Farm Bureau and they should recover the policy limit under each policy. The court rejected the Barkers’ argument and upheld the anti-stacking provision.

The opinion in *Barker* is consistent with the Court of Appeals earlier decision in *Hughes*. In *Hughes*, the policy at issue before the court contained an “other insurance in the company” clause nearly identical to the clause at issue here. The clause at issue in *Hughes* provided:

With respect to any occurrence, accident, death or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company’s liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

Id. at 596.

As in *Barker*, the *Hughes* court also rejected the argument the “other insurance in the company” clause was in conflict with an “other insurance” clause and therefore ambiguous. The “other insurance” clause in the policy at issue in *Hughes* provided:

If the insured has other automobile insurance affording benefits for medical expenses against a loss to which Coverage C of this policy applies, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability under this policy bears to the total applicable limits of liability of all such valid and collectible automobile insurance against such loss; provided, however, the insurance afforded under Coverage C of this policy with respect to a temporary substitute or non-owned automobile shall be excess insurance over any other valid and collectible automobile insurance affording benefits for medical expenses.

Id. at 598.

Similarly the “other insurance” clause in the Hunt Boatowner’s policy states in relevant part, “coverage of this policy for. . .non-owned property shall be excess insurance over any other valid or collectible insurance.” (LF 0153). In finding that such clauses are not ambiguous, *Hughes* is unequivocal in stating; “Clearly, the excess insurance provision applies to insurance provided by a third party on an automobile not owned by the injured person, and not to policies in the same company, as specified in Condition 5 (the “other insurance in the company” clause).” *Id.*

The “other insurance” clause in the Hunt Boatowner’s policy, like the clause considered by the court in *Hughes*, applies to policies not issued by Shelter Insurance Company. As such, the “other insurance in the company” and the “other insurance” clauses in the Hunt Boatowner’s policy are not ambiguous. Thus, there is no coverage available to Mr. Hunt under his Boatowner’s policy for this accident and the trial court erred in so finding.

In their briefing to the trial court, the only case cited by Plaintiffs in support of their assertion the Hunt Boatowner’s policy is ambiguous and therefore provides additional coverage to Mr. Hunt is *Niswonger v. Farm Bureau Town & Country Insurance*, 992 S.W.2d 308 (Mo. App. 1999). In *Niswonger*, the policy at issue contained an “other insurance in the company” clause, as does Hunt’s Boatowner’s policy. *Id.* at 314-315. However, the *Niswonger* court did not find the policy at issue in that case was ambiguous because it contained the broad, general term “any” other insurance as is contained in the Hunt Boatowner’s policy. Rather, the *Niswonger* court determined the “other insurance” clause was in conflict with the “other insurance in the company” clause, which specifically related to underinsured motorist coverage. *Id.* at 315-316. The “other insurance” clause in *Niswonger* stated the coverage provided thereunder was excess over “any other similar insurance”, i.e., other underinsured motorist coverage. *Id.*

Thus, the court held the two clauses in *Niswonger* were in contradictory with one another. *Id.* at 310. In so finding, The *Niswonger* court expressly distinguished *Hughes*:

First, the holding on this point in *Hughes* is distinguishable in at least one significant respect. The clause there at issue referred very broadly and generally to "any other *valid and collectible insurance*." (emphasis added in original) In contrast, the clause here at issue refers specifically to "any other *similar insurance*." (emphasis added in original) Since the implication of the "similar insurance" language to a layperson would be that the Original UIM Endorsement, in the event of an injury while occupying a non-owned vehicle, provides such coverage in addition to any other applicable *underinsured motorist coverage*, (emphasis added in original) this might more readily be perceived by a reasonable layperson as presenting a specific conflict with the policy's previous anti-stacking language and thus creating an ambiguity, when compared to the language of *Hughes*.

Id. at 317.

Conversely, the language at issue in the Hunt Boatowner's policy is akin to the language upheld in *Hughes* and *Barker*. As in *Hughes* and *Barker*, the "other insurance in the company" clause and the "other insurance" clause in the Hunt Boatowner's policy are neither conflicting, nor ambiguous and should be enforced as written. Contrary to Plaintiffs' assertions, the *Niswonger* decision does not support a finding that such clauses are generally ambiguous. Rather, the *Niswonger* decision clearly distinguishes the language at issue in *Niswonger* with the language in *Hughes*, in *Barker*, and from the language at issue here. The *Niswonger* decision demonstrates that the clauses at issue in

the Hunt Boatowner's policy are not in conflict and are not ambiguous. Thus, there is no coverage available to Mr. Hunt under his Boatowner's policy for this accident.

Plaintiffs additionally asserted in the declaratory judgment action below that Mr. Hunt admitted the Boatowner's policy provided coverage. In support of their contention, Plaintiffs relied on Mr. Hunt's answer to an interrogatory propounded to him in the underlying personal injury case. The interrogatory requested that Mr. Hunt identify ". . . any insurance policy or any insurance agreement under which any person carrying on an insurance business may be liable to satisfy" a judgment against Mr. Hunt (emphasis added). (LF 0237). In response, Mr. Hunt identified the Boatowner's policy currently at issue in this case. (LF 0237).

The fact that Mr. Hunt identified his Boatowner's policy as a policy that may have provided coverage to him for any liability he may have been assessed is not tantamount to Mr. Hunt admitting there is coverage available under the policy. Mr. Hunt was merely identifying a policy under which the possibility of coverage existed. There has been no admission there is any coverage available under the Boatowner's policy. To the contrary, in the Settlement Agreement in the underlying personal injury case, all parties agreed there was still a dispute as to coverage under the Hunt Boatowner's policy. Pursuant to the Settlement Agreement, the parties agreed to submit that issue to trial court in the declaratory judgment action. There was never any admission that any coverage existed under Hunt's Boatowner's policy.

Additionally, Defendant Shelter was not a party to the underlying personal injury action. Mr. Hunt was merely an insured under a policy issued by Shelter and was not an

agent acting on behalf of Shelter. Mr. Hunt had absolutely no authority to admit there was coverage available to him under the Boatowner's policy. Insureds are not the final arbiters whom determine whether there is coverage available to them under policies issued to them. As such, Plaintiffs' assertion that Mr. Hunt admitted there was liability under the Boatowner's policy is completely without merit.

Thus, for the reasons stated above, the trial court erred in granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment and finding there was \$100,000.00 available to Mr. Hunt for the subject accident under the Shelter Boatowner's policy issued to him.

II. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998) and *Kellar v. American Family Mut. Ins. Co.*, 987 S.W.2d 452 (Mo. App. 1999) have ruled that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured, but only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Homeowner's policy is ambiguous, and the policy language in the Ogelsby Homeowner's policy does not support the ruling by the Trial Court that a reasonable insured would expect liability coverage to be available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby by Shelter.

Plaintiffs also asserted in their Motion for Summary Judgment regarding Count II of their Petition for Declaratory Judgment there was \$300,000.00 in coverage available for Hunt under Ogelsby's Homeowner's policy. Conversely, Shelter asserted in its Motion for Summary Judgment there was no such coverage available for Mr. Hunt. The trial court seemingly granted Plaintiffs' Motion for Summary Judgment and denied Shelter's motion regarding Count II finding "that Plaintiffs have and recover from Defendant the sum of Three Hundred Thousand and no/100ths, (\$300,000.00) dollars payable as insurance coverage for insured, RODNEY OGLESBY." (emphasis original). Contrary to the trial court's ruling, Plaintiffs were seeking a determination there was \$300,000.00 of coverage available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby, not that there was \$300,000.00 in coverage available to Mr. Ogelsby under his Homeowner's policy. Accordingly, the Judgment is erroneous on its face.

Additionally, the trial court never specifically determined the Ogelsby Homeowner's policy was ambiguous. Nevertheless, the trial court found "Plaintiffs have demonstrated that, in each instance, based upon the language provisions therein, they had reason to expect that coverage would extend to them under the policies." The trial court's ruling on this finding also is erroneous.

Missouri courts have long held that provisions in an insurance policy are not considered in isolation. Rather, they should be considered by reading the policy as a whole, in the context of the entire policy. *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998). Moreover, Missouri courts have applied the "reasonable expectations doctrine" in interpreting insurance contracts when policies are ambiguous.

Kellar v. American Family Mut. Ins. Co., 987 S.W.2d 452, 455 (Mo. App. 1999). The “reasonable expectations doctrine” provides “the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy. . .” *Id.* However, “the application of the reasonable expectations doctrine depends on the presence of an ambiguity in the policy language.” *Id.* at 455.

As previously stated, the trial court, in its Judgment granting Plaintiffs’ Motion for Summary Judgment and denying Shelter’s Motion, made no finding whatsoever that the Homeowner’s policy issued to Mr. Hunt was ambiguous. In fact, the Hunt Homeowner’s policy contains an exclusion plainly precluding coverage in this instance. Such exclusion should be enforced here.

The Homeowner’s policy issued by Shelter to Mr. Ogelsby contains personal liability provisions that provide liability coverage in certain instances. Section II of the policy states “we will pay all sums arising out of any one loss which an insured becomes legally obligated to pay as damages because of bodily injury or property damage and caused by an occurrence covered by this policy.” (LF 0183). However, the policy also contains the following explicit exclusion that specifically precludes coverage in this instance:

Under Personal Liability and Medical Payments to others, we do not cover:

1. bodily injury or property damage arising out of the ownership, maintenance, use or entrustment of:

(d) Watercraft not located on the insured premises:

(3) Powered by one or more outboard motors with more than 25 total horsepower owned by an insured.

(LF 0184).

It is undisputed the accident at issue occurred on Lake Pomme De Terre in Hickory County, Missouri. (LF 0013). It is also undisputed the boat involved in this accident was owned by Mr. Ogelsby, and was powered by a 150 horsepower outboard motor. (LF 0015). Mr. Ogelsby purchased the boat in June of 2001. (LF 0273). All of the conditions set forth in the exclusion are satisfied. The exclusion plainly and unambiguously precludes coverage for this incident. Thus, the trial court's apparent application of the "reasonable expectations doctrine" is unfounded.

Moreover, even if the "reasonable expectations doctrine" was applicable, the facts of this matter do not support the trial court's determination. A reasonable insured would not expect liability coverage to be available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby by Shelter. The boat at issue was in use on a public lake, not the insured's premises, and had a motor several times the horsepower stated in the exclusion.

Plaintiffs asserted in the declaratory judgment action the exclusion in the Oglesby policy did not apply, because Oglesby "wrote to Shelter within thirty days of acquiring the boat involved in the accident and told Shelter he wanted coverage." (LF 0273). In support of their assertion, Plaintiffs relied on an application Mr. Ogelsby made to Shelter to acquire a Boatowner's policy on the boat. (LF 0273). Mr. Ogelsby applied for

coverage on the boat on June 27, 2001 (LF 0273). The accident at issue occurred on July 5, 2002. (LF 0015).

In essence, it is Plaintiffs' position that because Mr. Ogelsby applied for and obtained a Boatowner's policy on the boat in question, Mr. Hunt should be covered under Ogelsby's Homeowner's policy for an accident that occurred over a year after Ogelsby applied for, and was issued, separate and independent coverage on the boat. Plaintiffs' position would require a finding that the Ogelsby Homeowner's policy, provided coverage for the boat for an indefinite, if not infinite period of time. Plainly, this was not the intent of the Ogelsby Homeowner's policy, nor would it have been a reasonable expectation of any insured under the policy.

Plaintiffs do not assert, and in fact there has been no evidence presented, that Mr. Ogelsby ever requested coverage for the boat under his Homeowner's policy. In fact, there is no provision under the policy for him to do so. There is no schedule or other endorsement to Ogelsby's Homeowner's policy identifying this boat, or any boat, as being insured under the policy. Additionally, there is no indication on the declarations page that this boat, or any boat is covered under the policy, and no indication an additional premium is being charged for coverage on the boat.

A fair reading the entire policy, and of the notice provision relied upon by Plaintiffs, in context of the entire policy, shows there is no coverage available to Mr. Hunt under the Ogelsby Homeowner's policy. Rather, the provision relied on by Plaintiffs merely provides interim coverage for a boat on a short term basis, until such time as appropriate coverage can be obtained, such as the Boatowner's policy issued by

Shelter Insurance. It is not a reasonable interpretation of the policy that by applying for a Boatowner's policy from Shelter, either Hunt or Ogelsby also would obtain coverage for the use of the boat for an indefinite period of time under Ogelsby's Homeowner's policy.

Plaintiffs also reason that since Shelter issued Homeowner's policies to both Hunt and Ogelsby, and provided coverage to Hunt under Hunt's Homeowner's policy, then coverage is available to Hunt under Ogelsby's Homeowner's policy. This agreement ignores the terms and conditions which determine whether Mr. Hunt may be considered an "insured" under the Ogelsby policy. Those terms and conditions are completely different than the provisions under which Hunt is covered as a "named" insured by his own Homeowner's policy. Additionally, Mr. Hunt did not own the boat that was involved in the accident. Thus, a different analysis applies regarding whether there is coverage available to Mr. Hunt under the Ogelsby Homeowner's policy than under the Hunt Homeowner's policy.

Further, contrary to Plaintiffs' assertions to the trial court, Shelter did not admit there was coverage available for Mr. Hunt under his Homeowner's policy. Rather, Shelter specifically denied such coverage was available in their Answer to Plaintiffs' Declaratory Judgment Petition. In paragraph 44 of their Declaratory Judgment Petition, Plaintiffs specifically allege, "In the underlying litigation Shelter Insurance maintained Hunt was only covered by Hunt's Homeowner's Insurance Policy with total available limits of \$100,000.00. (LF 0017). In response, in paragraph 44 of its Answer to Plaintiffs' Petition, Shelter states, "Shelter denies the allegations in paragraph forty-four of the petition for declaratory judgment." (LF 0031). Thus, Shelter did not admit there

was coverage available to Hunt under his Homeowner's policy but rather merely made a compromise settlement with Plaintiffs in the underlying action.

Additionally, by settling the claims against Mr. Hunt under the Homeowner's policy issued to Mr. Hunt, Shelter in no way waived any of the policy defenses available to it regarding coverage for Mr. Hunt under the separate and distinct Ogelsby Homeowner's policy. The fact Shelter settled under the Hunt Homeowner's policy does not prevent or estop Shelter from asserting all applicable policy defenses available to it under the Ogelsby Homeowner's policy. Based on foregoing, there is no coverage available to Mr. Hunt under the Homeowner's policy issued to Mr. Ogelsby and the trial court erred in granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment regarding this issue.

III. The Trial Court erred in entering its Judgment granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment because Missouri Appellate Courts in cases such as *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998) and *Kellar v. American Family Mut. Ins. Co.*, 987 S.W. 2d 452 (Mo. App. 1999) have held that insurance policy provisions should be read in the context of the entire policy and interpreted based upon the reasonable expectations of an insured but, only if the policy is ambiguous, in that the Trial Court did not find the Ogelsby Boatowner's policy is ambiguous, and the policy language in the Ogelsby Boatowner's policy does not support the ruling by the Trial Court

that a reasonable insured would expect medical payments coverage would be available under the Boatowner's policy issued to Mr. Ogelsby by Shelter.

Plaintiffs alleged in their Petition in the declaratory judgment action that medical payments coverage is available under the Ogelsby Boatowner's policy. Plaintiffs also obtained Summary Judgment from the trial court on that issue and Shelter's Motion for Summary Judgment was denied. As previously stated, Missouri courts apply the "reasonable expectations doctrine" to insurance policy interpretation only when the policy is deemed to be ambiguous. *Kellar v. American Family Mut. Ins. Co.*, 987 S.W.2d 452, 455 (Mo. App. 1999). Moreover, provisions in an insurance policy are not considered in isolation. Rather, they should be considered by reading the policy as a whole, in the context of the entire policy. *American Standard Insurance v. May*, 972 S.W. 2d 595 (Mo. App. 1998). As with the Ogelsby Homeowner's policy, the trial court did not enter a finding the Ogelsby Boatowner's policy is ambiguous. Thus, the trial court's apparent application of the "reasonable expectations doctrine" was erroneous.

The declarations page of the Ogelsby Boatowner's policy does provide for a medical payments limit of \$2,000 per person for any one accident. (LF 0221) The policy provides "we will pay all reasonable medical expenses which are incurred within three years from the date of the accident for necessary medical services for bodily injury to any insured caused by an accident (emphasis added)." (LF 0228) The policy includes in the definition of an "insured" any person:

while occupying a non-owned boat, if the bodily injury results from your operation or occupancy, but only if you have or reasonably believe that you

have the permission of the owner to use the boat, and your use is within the scope of such permission.

(LF 0228-0229)

While the Plaintiffs were occupying a “non-owned boat,” their injuries did not result from Ogelsby’s “operation” of the “non-owned” boat. It is undisputed Ogelsby was driving his own boat at the time of the accident, not “operating” the pontoon boat occupied by plaintiffs. (LF 0015) It is clear from the policy language stating coverage is available “only if you have or reasonably believe that you have the permission of the owner to use the boat. . .” that coverage is only available if the insured (in this case Mr. Ogelsby) is operating a non-owned boat (in this instance, the pontoon boat upon which Plaintiffs were riding). As Ogelsby was not operating the “non-owned boat” and Plaintiffs were not occupying a non-owned boat being “operated” by Ogelsby, Plaintiffs do not meet the definition of an “insured” set forth in Ogelsby’s Boatowner’s policy. As Plaintiffs are not “insureds” under the policy, there is no medical payments coverage available to them under such policy. The trial court erred in its application of the “reasonable expectations doctrine.”

Moreover, even if the “reasonable expectations doctrine was applicable, the facts of this matter do not support the trial court’s determination that a reasonable insured would expect medical payments coverage to be available under Ogelsby’s Boatowner’s policy. Thus, the trial court erred in granting Plaintiffs’ Motion for Summary Judgment and denying Shelter’s Motion for Summary Judgment regarding this issue.

IV. The Declaratory Judgment action filed by Mark Barron, et al., was supported by a substantial controversy between the parties whose interests are genuinely adverse and such controversy is ripe for judicial determination.

Pursuant to Missouri law, a declaratory judgment action seeking the interpretation of an insurance policy and the determination of the obligations arising under it, are properly determined under the Declaratory Judgment Act. *Am. Fam. Mut. Ins. Co. v. Nigl*, 123 S.W. 3d 297, 301 (Mo. App. E.D. 2003). (citing *Shelter Mut. Ins. Co. v. Vulgamott*, 96 S.W. 3d 96, 101-102 (Mo. App. W.D. 2003); § 527.020 R.S.Mo.). “[A] petition for declaratory judgment must show three things: (1) a justiciable controversy between the parties; (2) the petitioner has a legally protectible interest at stake; and (3) the question posed is ‘appropriate (sic) and ripe for judicial resolution.’” *State Farm Fire & Cas. Co. v. Alberici*, 852 S.W. 2d 388, 389 (Mo. App. E.D. 1993). In determining whether to entertain a declaratory judgment action, a trial court is afforded considerable discretion. *Nigl* at 301 (citing *Vulgamott* at 101).

In *Vulgamott*, the court of appeals cited Rule 87.03 of the Missouri Rules of Civil Procedure for the proposition that a “contract may be construed in a declaratory judgment action *either before or after there has been any breach of that contract.*” (emphasis added) *Vulgamott* at 102. The court also stated that justiciable controversy exists where “the parties’ dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character.” *Id.* Under this standard and based on the facts of that case, the court held:

[i]n sum, Shelter Mutual pleaded a contract, its interest therein, a dispute over the effect of its provisions, and prayed for a declaration of the parties' rights thereunder. The pleadings thereby set forth facts establishing a justiciable controversy ripe for adjudication and stated a cause of action for declaratory relief. *Id.*

Other courts have considered the “justiciable controversy” issue in terms of the relief which might be afforded in the declaratory judgment action asserted. In those cases, courts have determined that a justiciable controversy exists if a decree in the declaratory judgment action would be “of a conclusive character as distinguished from a decree which is merely advisory as to the state of law upon purely hypothetical facts.” *Fidelity Cas. Co. v. Western Cas. and Surety Co.*, 337 S.W.2d 566, 569 (Mo. App. E.D. 1960) (citing § 527.010 and 527.020, R.S. Mo. 1949; *M.F.A. Mut. Ins. Co. v. Hill*, Mo. 320 S.W.2d 559 (Mo. 1959)). Under such an analysis, the court should determine whether the issues presented have “jelled” sufficiently to ensure that the issue presented to the court and its holding would settle the case. *Id.* at 571.

In this case, the Barrons are more than mere claimants. The Barrons reached a settlement agreement with Shelter (hereinafter “Agreement”). Pursuant to the Agreement, Shelter admitted that if any additional coverage exists for the accident described in the agreement, it owes the limits of any liability coverage applicable to Mr. Hunt under Oglesby's homeowner's policy or Hunt's boatowner's policy. (LF 0011; 0050; 0143, ¶6.) Thus, by operation of the Agreement and the parties' pleadings on the

Agreement, there is no uncertainty as to Shelter's obligation to pay additional policy limits to the Barrons, *if additional liability coverage exists*.¹

This situation is no different than that which would be presented by a judgment creditor in possession of a judgment equal to or greater than the amount of additional coverage sought. Certainly, the parties dispute whether Mr. Oglesby's homeowner's policy or Mr. Hunt's boatowner's policy provide additional coverage to Mr. Hunt. However, the amount due to the Barrons under the Agreement is not in dispute, depending upon the Court's determination of coverage.

The parties have expressly agreed that *if* the Court determines that additional coverage does exist, Shelter owes additional coverage, just as if the Barrons had actually obtained a judgment equal to the amount of such additional coverage. By the same token, if no additional coverage exists under Oglesby's policies, Shelter's obligations to its policyholders and to the Barrons have been exhausted. Thus, the parties dispute has “jelled” to the point that this Court’s determination of the coverage issues presented would be conclusive and not merely advisory.

In *Farmers Ins. Co. v. Miller*, 926 S.W.2d 104 (Mo. App. E.D. 1996), the court considered a declaratory judgment action filed by wrongful death claimants against an alleged tortfeasor's liability insurer. *Id.* at 105-106. The insurer, Farmers, took the position that it had reached a settlement agreement with the two wrongful death claimants in the amount of \$25,000 each, which the claimants denied. Thereafter, the wrongful

¹ Shelter has steadfastly denied such coverage and asserted the numerous applicable policy defenses as outlined in Shelter's briefs both in the trial court, the court of appeals, and in this Court.

death claimants filed a declaratory judgment action against Farmers as the alleged liability carrier for the driver of the vehicle that killed their son. Farmers contested the claimants' right to bring a declaratory judgment action because the claimants were not in privity with Farmers, and because the claimants had not reduced their claims to final judgment. *Id.* at 106.

The court agreed and held, "[t]o show a justiciable controversy exists, respondents' Petition must allege facts from which they have present legal rights against Farmers with respect to which they may be entitled to some consequential relief immediate or perspective." *Id.* at 106-107 (citing *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo. 1983)).

Miller is distinguishable from this case, however. In this action, the Barrons' claims against Shelter's policyholders Hunt and Oglesby have been reduced to a settlement agreement. The Barrons pleaded the Agreement in their Petition for Declaratory Judgment. (LF 0011). In its First Amended Answer to Plaintiffs' Petition for Declaratory Judgment, Shelter admitted the allegations contained in paragraph 1 of plaintiffs' Petition for Declaratory Judgment. (LF 0050).

As a result, a justiciable controversy exists between the Barrons and Shelter. The Agreement reached between the Barrons and Shelter creates "present legal rights" on which the Barrons *may* be entitled to "some consequential relief, immediate or prospective" against Shelter; Shelter's alleged additional coverage obligations, if any, are clearly and unequivocally established under the agreement; and the parties have a present

dispute regarding Shelter's additional payment obligations, if any, under the agreement. *See Miller* at 106-107.

Moreover, the Barrons are in privity with Shelter by virtue of the Agreement to which Shelter is a party. The existence of privity between the Barrons and Shelter distinguishes this case from other cases in which Missouri courts have refused to hear declaratory judgment actions filed by claimants to a liability insurance policy. *See e.g. Miller* at 108. Here, the Barrons and Shelter are not "strangers." They are parties to an agreement which has created a "legally protectible interest" in the Shelter policies. (LF 0142-0146). This uncontroverted fact distinguishes the present case from other cases in which the courts have refused to hear declaratory judgment actions filed by strangers to an insurance contract. *See American Economy Ins. Co. v. Ledbetter*, 903 S.W. 272, 2776 (Mo.App. S.D. 1995).

In sum, the Barrons have effectively pled a contract, i.e., the parties' settlement agreement and Shelter's policies as they pertain to such agreement; their "interest" in those contracts, and a dispute over the effect of the provisions within such contracts. Therefore, the Barrons have done all that is required to present a justiciable controversy to the Court. *Vulgamott* at 102-103.

CONCLUSION

For the foregoing reasons, the Court of Appeals' dismissal of this action for want of a justiciable controversy, as well as the Judgment of the trial court granting Plaintiffs' Motion for Summary Judgment and denying Shelter's Motion for Summary Judgment should be reversed. This matter should be remanded to the trial court with direction to

enter its Judgment in favor of Shelter Mutual Insurance Company on its Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment.

CERTIFICATE OF MAILING

I hereby certify that two copies of the above and foregoing, as well as a floppy disk containing this Substitute Brief, were mailed this 18th day of October, 2006, to: Kenneth E. Siemens, Murphy, Taylor, Siemens & Elliot, P.C., 3007 Frederick Ave., P.O. Box 6157, St. Joseph, Missouri 64506, Attorneys For Plaintiffs.

**ATTORNEY FOR DEFENDANT
SHELTER MUTUAL INSURANCE
COMPANY**

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Jack W. Green, Jr., hereby certify as follows:

1. The attached Substitute Brief complies with the limitations contained in Supreme Court Rule 84.06. The Substitute Brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains **8,824 words**, which does not exceed the 31,000 words allowed for an appellant's brief.
2. Pursuant to Special Rule XXXII, the floppy disk filed with this brief contains a copy of this brief. It was scanned for viruses on October 18, 2006 using the Norton Antivirus program, which was updated on October 18, 2006. According to that program, this disk is virus-free.
3. Two true and correct copies of the attached Substitute Brief and a floppy disk containing a copy of this Substitute Brief were mailed, postage prepaid, to Kenneth E. Siemens, 307 Frederick Avenue, P.O. Box 6157, St. Joseph, MO 64506 on the 18th day of October, 2006.

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