IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC92202

RUTH MENDENHALL

Plaintiff/Appellant

v.

PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD

Defendant/Respondent

and

JAY WALKER

Defendant

APPELLANT'S SUBSTITUTE BRIEF

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of St. Louis County, Missouri, wherein the trial court entered summary judgment in favor of Property and Casualty Insurance Company of Hartford ("Hartford") and against Ruth Mendenhall ("Mrs. Mendenhall" or "Appellant") on her claim for equitable garnishment of Hartford's Policy No. 83UENSZ4409 (the "Policy") for an incident in which Mrs. Mendenhall's husband, Len Mendenhall ("Len"), was killed.

Mrs. Mendenhall appealed and the Missouri Court of Appeals for the Eastern District reversed, holding that the trial court erred in granting summary judgment in favor of Hartford. However, based on the "general interest and importance of the question presented," the Court of Appeals transferred to this Court pursuant to Rule 83.02. Opinion of the Court of Appeals, December 13, 2011, pp. 8, 9 (Appendix A-1 – A-9). Accordingly, this Court has jurisdiction over the appeal pursuant to the Court of Appeals' Order of transfer, entered December 13, 2011. Rule 83.02.

POINTS RELIED ON

I. **The trial court erred in granting summary judgment in favor of Hartford and denying summary judgment to Mrs. Mendenhall because the Policy's employee indemnification and employer's liability exclusion does not negate coverage as Len was not an "employee," but rather a "temporary worker."**

Gavan v. Bituminous Cas. Corp., 242 S.W.3d 718 (Mo. 2008).

Nat'l Indem. Co. of the S. v. Landscape Mgmt. Co., 963 So. 2d 361 (Fla. Dist. Ct. App. 2007).

Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co., 853 N.Y.S.2d 870 (N.Y. 2008).

Bituminous Cas. Corp. v. Mike Ross, Inc, 413 F. Supp. 2d 740 (N.D. W. Va. 2006).

STATEMENT OF FACTS[1]

Mrs. Mendenhall's claim arises out of an incident occurring on March 8, 2007, wherein her husband, Len, was fatally injured when a dump trailer overturned crushing and killing him at 4 J Farms (the "Farm"), a working cattle farm and residence premises owned by Jay Walker ("Walker") and his wife, Dawn (LF 178, ¶ 1; LF 179, ¶ 3). In addition to owning the Farm, Walker is the sole shareholder of the Family Center of Farmington, Inc. (the "Family Center"), a retail store which sells, among other things, clothing, feed, and various types of farm equipment (LF 357–58; LF 361–62). On May 6, 2006, Len applied for a position of employment at the Family Center as a driver/mechanic (LF 614; for ease of reference, see Employment Application, Appendix A-25 – A-26). Gary Fraley, an employee of the Family Center, interviewed Len (LF 612, ¶ 4; for ease of reference, see Affidavit of Jay Walker, Appendix A-27 – A-28). After the interview, Gary spoke with Walker and indicated that Len "would be good" for a position (LF 613, ¶ 5; Appendix A-28). The Family Center chose not to hire Len; instead, Walker hired Len three days thereafter to work for him personally as a driver for the Farm (LF 613, ¶ 6; Appendix A-28).

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[1] The parties agree that the underlying facts relevant to this matter are not in dispute. To that end, the parties submitted a Joint Stipulation of Facts to the trial court which is incorporated herein by reference (LF 178–568). In addition to the facts set forth in the Joint Stipulation of Facts, Appellant incorporates herein the Affidavit of Jay Walker (LF 612–13; Appendix A-27–A-28).

Walker did not interview Len separately, but hired him on the basis of the Family Center's evaluation and conclusion (LF 613; Appendix A-28). The Family Center was involved in providing, supplying and referring Len to Walker because, absent Len's application for employment with the Family Center, the Family Center's interview of Len, and Walker's subsequent conversation with Gary, Walker would never have been introduced to Len and could not have hired him for the Farm (LF 613, ¶ 7; Appendix A-28). Thus, Walker would not have hired Len but for the Family Center's vetting and recommendation (LF 613; Appendix A-28).

Len worked at the Farm on a short-term, as needed basis, generally hauling hay. On occasion, Walker directed Len to perform work for the Family Center, including hauling rock and delivering equipment. Len was paid by the Farm when he worked for the Family Center (LF 180, ¶ 8). On occasions when Walker asked Len to haul rock to the Family Center and haul hay to the Farm, Len used a Freightliner truck attached to a Summit "dump trailer" (hereinafter, the "Truck and Trailer"), owned by the Family Center and supplied to Len by Walker (LF 374–75). The Truck and Trailer are listed as a "covered auto" under the Policy (LF 179, ¶ 6).

On March 7, 2007, Walker called Len and told him he, "had some rock [he] would like hauled and wanted to know if [Len] was interested." Len agreed to perform the work as requested (LF 434). On the morning of March 8, 2007, Walker met Len at the Farm and instructed him to dump rock in a particular area where Walker intended to create a driveway (LF 435; LF 442; LF 445). At approximately 2:00 p.m. on March 8, 2007, Len, at the direction of Walker, was in the process of dumping a load of rock at the Farm. Len

was standing outside the Truck operating the controls in order to dump the load (LF 464). Len raised the Trailer approximately 10 feet in the air (LF 462; LF 482–83). The Trailer began to tip toward the driver's side, and the Truck subsequently tipped, crushing and killing Len (LF 465; LF 467).

PROCEDURAL HISTORY

Because he was engaged in "farm labor" at the time of his death, Len was excluded from coverage under the Workers' Compensation Act pursuant to MO. REV. STAT. § 287.090 (2010). Mrs. Mendenhall filed suit against the Family Center and the Walkers in the Circuit Court of St. Francois County, Missouri, Case No. O7SF-CC00568, alleging they were liable for the wrongful death of Len. Farm Mutual Insurance Company of St. Francois County ("Farm Mutual") provided a general liability policy for the Farm, and hired counsel to defend Walker in the wrongful death suit. Walker also tendered the claims to Hartford, alleging he was covered under the Hartford Policy (LF 83–93). Hartford agreed to share certain costs with Farm Mutual for Walker's defense, but reserved the right to deny coverage for any judgment or settlement. (LF 83–93).

In settlement of Case No. 07SF-CC00568, Walker and Mrs. Mendenhall entered into an agreement pursuant to MO. REV. STAT. § 537.065 (2010), which provides, in part, that any judgment entered against Walker would be executed solely against the proceeds of the Hartford Policy (LF 561–66). On December 8, 2009, the Circuit Court of St. Francois County, entered judgment against Walker in the principal amount of $840,000.00 plus post judgment interest (the "St. Francois County Judgment") (LF 568).

Following entry of the St. Francois County Judgment, Mrs. Mendenhall filed a separate action for equitable garnishment pursuant to MO. REV. STAT. § 379.200 (2010), against Hartford in the Circuit Court of St. Louis County, Missouri, seeking to apply the proceeds of the Policy in satisfaction of the St. Francois County Judgment (the "St. Louis County Case") (LF 94–98). The sole issue in the St. Louis County Case was whether the Policy provided coverage to Walker for the death of Len.

The parties filed a joint stipulation of facts and cross motions for summary judgment.[2] (LF 146–601). The trial court granted Hartford's motion for summary judgment, finding that the Policy's employee indemnification and employer's liability exclusion negates coverage for Walker because Len was Walker's "employee" as that term is defined under the Policy. Mrs. Mendenhall appealed claiming that Len was not an "employee" but rather a "temporary worker," falling within the exception to the Policy's exclusion. The Court of Appeals agreed, holding that the trial court erred in granting summary judgment in favor of Hartford (Appendix A1–A9). Pending before this Court is a transfer of the appeal, pursuant to Rule 83.02.

[2] The parties' respective coverage arguments rely heavily on the definitions of certain key Policy terms. Those terms are defined *infra* under Section C, Applicable Policy Provisions.

ARGUMENT

I. The trial court erred in granting summary judgment in favor of Hartford and denying summary judgment to Mrs. Mendenhall because the Policy's employee indemnification and employer's liability exclusion does not negate coverage for Walker as Len was not an "employee" of Walker, but rather a "temporary worker."

A. Standard for Appellate Review of Summary Judgment.

When considering appeals from summary judgment, appellate review is *de novo*. *Nat'l Union v. City of St. Louis*, 947 S.W.2d 505, 506 (Mo. Ct. App. E.D. 1997). The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine whether to grant or deny the motion initially. Rule 74.04 provides that summary judgment is granted in situations in which the movant can establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (en banc). The court takes as true facts set forth by affidavit or otherwise in support of the moving party's motion unless contradicted by the non-moving party's response. *Id.* The standard of review is the same for cross-motions for summary judgment. *Poage v. State Farm Fire & Cas. Co.*, 203 S.W.3d 781, 783 (Mo. Ct. App. S.D. 2006).

B. The Rules Governing Interpretation of Insurance Policies are Well Established.

The interpretation of the meaning of an insurance policy is a question of law. *Am. Family Mut. Ins. Co. v. Bramlett,* 31 S.W.3d 1, 4 (Mo. Ct. App. W.D. 2000). The insurer has the burden of demonstrating the applicability of any exclusions on which it relies. *Am. States Ins. Co. v. Mathis*, 947 S.W.2d 647, 649 (Mo. Ct. App. E.D. 1998). Policy provisions designed to restrict, limit or impose exceptions or exemptions on insurance coverage are strictly construed against the insurer. *See Christian v. Progressive Cas. Ins., Co.,* 57 S.W.3d 400, 403 (Mo. Ct. App. S.D. 2001). When reviewing an insurance

policy, the policy is given a reasonable construction and interpreted so as to afford, rather than defeat, coverage. *Id.*

In construing the terms of an insurance policy, the Court must apply the meaning which would be attached by an ordinary person of average understanding if purchasing insurance, and resolve ambiguities in favor of the insured. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. 2007). Language contained in an insurance policy, if not ambiguous, is given its plain meaning and enforced as written. *See Wilson v. Traders Ins. Co.*, 98 S.W.3d 608, 612 (Mo. Ct. App. S.D. 2003). "Ambiguity occurs when the language of an insurance policy reasonably and fairly is open to different constructions," or "when there is duplicity, indistinctness or uncertainty in meaning." *Polston v. Aetna Life Ins. Co.*, 932 S.W.2d 786, 788 (Mo. Ct. App. E.D. 1996). "Where reasonably possible, an insurance policy will be interpreted as affording coverage." *Kirk King, King Constr., Inc. v. Cont'l W. Inc. Co.*, 123 S.W.3d 259, 264 (Mo. Ct. App. W.D. 2003), citing *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623, 626 (Mo. 1979) (en banc).

C. Applicable Policy Provisions

Application of the facts at hand to the Policy provisions cited below demonstrates that Len was not an "employee" of Walker, but rather was a "temporary worker" and, therefore, the employee indemnification and employer's liability exclusion does not apply.

SECTION II – LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage"… caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

1. Who Is An Insured

The following are "insureds":

a. You for any covered "auto."

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow…

B. Exclusions

This Insurance does not apply to any of the following:

4. Employee Indemnification And Employer's Liability

"Bodily injury" to:

a. An "employee" of the "insured" arising out of and in the course of:

(1) Employment by the "insured"; or

(2) Performing the duties related to the conduct of the "insured's" business;

SECTION V – DEFINITIONS

F. "Employee" includes a "leased worker." "Employee" does not include a "temporary worker."

I. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."

...

O. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

D. The Policy's Employee Indemnification and Employer's Liability Exclusion does not Negate Coverage.

Hartford has asserted only the applicability of the employee indemnification and employer's liability exclusion ("Exclusion") to avoid coverage. It is well established under Missouri law that, because Hartford is the party claiming the Exclusion, the burden of proof rests on it to show that the Exclusion applies. *See generally Arbeitman v. Monumental Life Ins. Co.,* 878 S.W.2d 915 (Mo. Ct. App. E.D. 1994); *Am. Family Mut. Ins. Co. v. Brown,* 657 S.W.2d 273 (Mo. Ct. App. W.D. 1983). Because insurance policies are designed to provide protection, they will be liberally interpreted to grant rather than deny coverage. *Am. Family Mut. Ins. Co. v. Turner,* 824 S.W.2d 19, 21 (Mo. Ct. App. E.D. 1991). This also means that exclusion clauses are to be strictly construed against the insurer. *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1264–65 (W.D. Mo. 1997).

The Exclusion bars coverage for "bodily injury" to "[a]n 'employee' of the 'insured'" arising out either "[e]mployment by the 'insured'" or "[p]erforming the duties related to the conduct of the 'insured's' business." As will be explained *infra*, Len was not an "employee" of Walker, but rather was a "temporary worker" as that term is defined under the Policy. Therefore, the Exclusion does not apply and the Policy provides insurance coverage for Walker.

i. Len was not an "employee" of Walker, but rather a "temporary worker."

The Exclusion applies only to "employees" of the "insured." Under the Policy definitions, an "'employee' includes a 'leased worker;' 'employee' does not include a 'temporary worker.'" Thus, the distinction between an "employee" and a "temporary worker" is crucial because the Policy excludes coverage for claims made by Walker's employees, but covers claims made by "temporary workers" who are not employees. A "temporary worker," is defined as "a person who is *furnished* to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." (emphasis added).

If Len was a "temporary worker," as Mrs. Mendenhall contends, then coverage exists because he falls within the exception to the Exclusion. While there is no dispute that Len worked for Walker on a temporary basis to meet seasonal or short-term workload conditions, Hartford takes the position that he was not "furnished" to Walker by a third-party. Thus, the sole issue for this Court in determining whether Len qualifies as a "temporary worker" is whether he was "furnished" to Walker.

ii. A third-party must be involved in providing or supplying the worker to the insured.

The term "furnished" is not defined in the Policy. When interpreting insurance policy language, courts give a term its ordinary meaning unless it plainly appears that a technical meaning was intended. *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997) (en banc). The word "furnish" means, "[to] provide or supply with what is needed, useful or desirable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 923 (1986). In *Gavan v. Bituminous Casualty Corporation*, this Court recently analyzed a policy containing an identical definition of the term "temporary worker" and considered whether a worker may "furnish himself" to work. 242 S.W.3d 718, 721 (Mo. 2008). Recognizing that, if the "furnished to" clause were read to include the ability for one to furnish oneself, the clause would have no meaning, the Court held that the term "furnished," necessarily implies that a third-party has been involved in providing or supplying the worker to the insured. *Id.*

Gavan overturned precedent in Missouri to the effect that a worker could furnish him or herself to work and qualify as a "temporary worker." *Am. Family Mut. Ins. Co. v. As One, Inc.*, 189 S.W.3d 194 (Mo. Ct. App. S.D. 2006), *overruled by Gavan*, 242 S.W.3d at 721. The requirement that a worker is not "furnished" unless a third-party was involved is consistent with the majority of jurisdictions that have interpreted similar policies. *Id.; see also, e.g., Northland Cas. Co. v. Meeks*, 540 F.3d 869, 875 (8th Cir. 2008) (finding that the term "furnished to" clearly requires the involvement of a third-party in furnishing the worker); *Carl's Italian Rest. v. Truck Ins. Exch.,* 183 P.3d 636, 639

(Colo. App. 2007) ("[I]n the context of the insurance policy, we conclude that plaintiffs' interpretation is unreasonable. If a person could furnish himself to an employer, every worker could choose to 'furnish himself' . . . and become a 'temporary worker' whenever such classification would be convenient"); *Rhiner v. Red Shield Ins. Co.*, 208 P.3d 1043, 1046 (Or. Ct. App. 2009) (concluding the phrase "a person who is furnished to you" as used in the definition of temporary worker means a person who is referred from, or provided by, a third-party).

Appellant does not quarrel with the holding in *Gavan*. To the contrary, Appellant's interpretation of the term "furnished to" is consistent with *Gavan* as a third-party, the Family Center, was involved in providing or supplying Len to Walker. Absent Len's application for employment with the Family Center, the Family Center's interview of Len, and Walker's subsequent conversation with Gary (a Family Center employee), Walker would have never been introduced to Len and could not have hired him for the Farm. (LF 613, ¶ 7; Appendix A-28). Accordingly, the requirements set forth under *Gavan* are satisfied in this case, as a third-party (the Family Center) was involved in providing or supplying the worker (Len) to an insured (Walker). *See Gavan*, 242 S.W.3d at 721.

It is Hartford which asks this Court to go beyond the definition of "furnished" set forth in *Gavan*. Under Hartford's theory, the term "furnished" contemplates more than providing or supplying the worker to another, but also requires that the third-party either employ the worker, or be in the business of supplying workers to others. This argument presupposes that only a specific *type* of third-party may furnish a worker.

Neither party disputes that under Missouri law, a "temporary worker" must be furnished to the insured by a third-party. However, there is no Missouri authority on the precise issue presented here namely, whether the Policy requires that a *specific type* of third-party, one in the business of supplying workers to others, must provide or supply the worker to the insured or, whether *any* third-party may furnish the worker. Only a handful of courts from other jurisdictions have addressed this issue.

iii. Few courts have considered whether a specific type of third-party must "furnish" a worker and, among them, they are split in their conclusions.

Before the Court of Appeals, Hartford argued that a majority of courts from other jurisdictions have concluded that the phrase "furnished to" requires a temporary worker be furnished by an entity in the business of supplying workers, such as a temporary staffing agency, manpower provider or headhunter. Appellant argued that this interpretation obfuscates the true majority position of courts that have construed the definition of "temporary worker." The Court of Appeals agreed, writing that Harford's position is "incorrect as only a handful of courts have addressed this precise issue of the type of third-party required, and among them, they are split in their conclusions." (Appendix A5).

Certain courts have held that "furnished to" requires the furnishing entity to be in the business of supplying workers. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Allen*, 850 A.2d 1047, 1057 (Conn. App. Ct. 2004); *Burlington Ins. Co. v. De Vesta*, 511 F. Supp. 2d 231, 233 (D. Conn. 2007) (citing *Allen,* and concluding without analysis, that because worker

was not hired through an employment service, he was not a temporary worker). Other courts have held that, when examined in the context of whether a particular type of third-party must provide or supply the worker, the term "furnished" is reasonably susceptible to multiple meanings, one of which is that *any* third-party may furnish the worker. *See, e.g.*, *Nick's Brick Oven Pizza v. Excelsior Ins. Co.*, 853 N.Y.S.2d 870, 873 (N.Y. 2008) ("furnished to" in the context of a temporary worker does not necessarily mean furnished by a temporary employment agency); *Nat'l Indem. Co. of the S. v. Landscape Mgmt. Co., Inc.*, 963 So. 2d 361, 364 (Fla. Dist. Ct. App. 2007) (because policy language did not explicitly require temporary worker be furnished by a third-party such as a temporary worker leasing company or other business, worker could be furnished by any person or company, including another employee of insured); *Bituminous Cas. Corp. v. Mike Ross, Inc.*, 413 F. Supp. 2d 740, 745 (N.D. W. Va. 2006) (policy's contemplation of workers being leased by particular third-party in defining 'leased worker' lends support for the finding that "furnished" to in the context of a temporary worker, does not necessarily mean furnished by a temporary employment agency). As these two conflicting lines of cases demonstrate, there is no clear majority position for this Court to follow.

iv. The term "furnished" is reasonably susceptible to multiple meanings.

Appellant does not ask this Court to deviate from its opinion in *Gavan* nor the majority of other courts holding that the term "furnished" unambiguously requires a third-party must be involved in supplying or providing the worker to the insured. Instead, Appellant contends the term is ambiguous when considered in the context of who that third-party must be. The requirement that a temporary worker be "furnished" to the

insured is susceptible to two reasonable interpretations: (1) *any* third-party can furnish a person to the insured to qualify that person as a temporary worker; or (2) as Hartford suggests, only a third-party which employs the worker or is in the business of supplying workers to others can furnish a person to the insured. Hence, the term "furnished" is ambiguous.

Further indicating an ambiguity in the use of the term "furnish" with respect to third-parties, is the distinction between the Policy's definitions of "temporary worker" and "leased worker." On its face, the definition of "temporary worker," does not delineate a certain type of third-party that must furnish the worker (LF 253–337). In contrast, the Policy defines "leased worker" as, "a person leased to you *by a labor leasing firm*…to perform duties related to the conduct of your business" (emphasis added). The "leased worker" provision identifies a specific type of third-party (i.e. a labor leasing firm) while the "temporary worker" provision only implies third-party involvement by way of the "furnished to" requirement.

The more general reference to third-party involvement in the definition of "temporary worker" demonstrates that, on its face, the Policy allows *any* third-party to furnish the worker. As evidenced by the definition of "leased worker," if Hartford wanted to exclude coverage only for those who are furnished by particular types of third parties, it could have done so. The Policy's contemplation of workers being leased by a particular third-party in defining a "leased worker" lends support for the finding that "furnished to" in the context of a temporary worker does not necessarily mean furnished

to the insured by a particular type of third-party. Instead, any third-party may furnish the worker.

Although overruled by *Gavan* on the grounds that a third-party must be involved to furnish a worker, the Court in *As One* addressed this exact distinction. *As One, Inc.*, 189 S.W.3d at 199. Contrasting the definitions of "leased worker" and "temporary worker," the *As One* court held,

> [b]ecause 'leased worker' is a worker which is provided *by a labor leasing firm*, the implication is that a 'temporary worker' may be a person who is not supplied by an employment agency since the definition of 'temporary worker' in the policy does not contain a similar phrase such as 'furnished' to you *by an employment agency*. *Id.*

Gavan did not take issue with *As One's* finding that no particular *type* of third-party must furnish the worker. *See Gavan*, 242 S.W.3d at 721. *Gavan* overruled *As One* solely on the issue of whether a worker may furnish himself to work. *Id.* *Gavan* is silent as to whether the third-party must employ the worker or be in the business of supplying workers to others. *See generally Gavan*, 242 S.W.3d 718.

The opinion in *As One* is instructive when compared to that in *Gavan* as the comparison highlights the lack of ambiguity in the requirement that a third-party must be involved to furnish a worker (*Gavan*), and the ambiguity of whether the term "furnished" requires the involvement of a third-party employment-type business (*As One*). Like the courts from other jurisdictions referenced below, the court in *As One* concluded that the

business. *As One, Inc.*, 189 S.W.3d at 199. Other than *As One*, no Missouri court has addressed the issue.

v. Relying on the plain meaning of the Policy language, the line of cases cited by Appellant holds that *any* third-party may "furnish" a worker.

Consistent with the court's finding in *As One* on the issue of whether a specific type of third-party must furnish the worker, three recent cases from other jurisdictions have held that the "furnished to" requirement is satisfied when *any* third-party has been involved in providing or supplying the worker to the insured. *See generally Nick's Brick Oven Pizza, Inc.*, 853 N.Y.S.2d 870; *Nat'l Indem. Co. of the S.*, 963 So. 2d 361; *Mike Ross, Inc.*, 413 F. Supp. 2d 740.

In *Nick's Brick Oven Pizza*, a New York court found the phrase "furnished to" in the temporary worker provision was ambiguous. 853 N.Y.S.2d at 873. The Court stated, "[t]he phrase 'furnished to' is not defined by the policy and is reasonably susceptible to multiple meanings. To qualify under this definition, does the worker have to be 'furnished by' a temporary employment agency? Or can another individual 'furnish' a person to the insured merely by recommending him?" *Id.* The Court found support for the answer to this question within the language of the policy, stating,

> [t]he policy's only help in answering these questions is found in its definition of "leased worker," which means a worker who is "leased" to the insured by a labor-leasing firm pursuant to a contract. The policy's contemplation of workers being leased under contract in defining another kind of worker lends support for the finding that "furnished to" in

> the context of a "temporary worker" does not necessarily mean "furnished to" by a temporary employment agency. If "furnished to" required a temporary employment agency's placement, the policy should read accordingly. *Id.*

Construing this ambiguity against the insurer, the court held that because the policy did not explicitly require that the temporary worker be furnished by a particular third-party, the worker could be furnished by *any* person or company. *Id.* at 874. The court further reasoned that because the policy was silent as to who must furnish the person to the insured for that person to qualify as a temporary worker, and there were several reasonable interpretations as to who that third-party might be, the policy was ambiguous. *Id.* In the instant case, where the definitions of "temporary worker" and "leased worker" are identical to the definitions of those terms in *Nick's Brick Oven Pizza*, the same reasoning is applicable.

In *National Indemnity Company of the South*, the insurance company also argued that in order for the worker to be "furnished" to his employer, it was necessary that a third-party, such as a temporary labor leasing company or other business be involved in the transaction. 963 So. 2d at 363. However, the trial court rejected this argument, finding that the exclusion, by its plain language, did not require the use of a temporary employment agency or other business for a "temporary worker" to be "furnished," and that imposing such a requirement would amount to rewriting the terms of the policy. *Id.* On appeal, the insurance company argued that because the worker was interviewed

directly by the insured to obtain employment,[3] he was not furnished by a third-party. *Id.* This argument was unavailing. The Florida Court of Appeals held that the phrase "furnished to" was ambiguous because the language was capable of different meanings, one of which affords liability coverage. *Id.* Because the language of the policy did not explicitly require that the temporary worker be furnished by a temporary worker leasing company, the worker could be furnished by *any* person or company, including another employee of the employer. *See id.*

As in *Nick's Brick Oven Pizza* and *National Indemnity Company of the South*, the court in *Mike Ross* found the term "furnished" to was ambiguous because, among other things, "[t]he phrase 'furnished to' [was] not defined in the policy and [was] reasonably susceptible to multiple meanings." 413 F. Supp. 2d at 744–45. The phrase could mean furnished by a temporary employment agency or by an individual who recommends a worker to the employer. *Id.* at 745. The court reasoned that the latter interpretation was supported by the definition of "leased worker" which includes reference to a "labor leasing firm." *Id.* The court concluded that the absence of such a reference in the definition of "temporary worker" meant that a person could be a temporary worker even

[3] In *National Indemnity Company of the South,* the worker was interviewed directly by the insured and the court still found that he was furnished by a third-party because he was referred by another employee. Here, Len was interviewed not by Walker, but by the third-party that furnished him to Walker, the Family Center.

though he was not furnished by a temporary employment agency but was furnished by an individual third-party. *See id.*

In the case at bar, the trial court, citing *Gavan* and *Meeks*, held that the term "furnished" to in context and in its plain and ordinary meaning, has been found unambiguous. (LF 676–677). However, both *Gavan* and *Meeks* stand solely for the proposition that the term "furnished" unambiguously requires the involvement of a third-party in furnishing the worker. *Gavan*, 242 S.W.3d at 721; *Meeks*, 540 F.3d at 876. Neither *Gavan* nor *Meeks* addresses the precise ambiguity at issue here, namely, that because the Policy's definition of "temporary worker" is silent as to whether a specific type of third-party must furnish the worker, the definition is ambiguous. *Nick's Brick Oven Pizza*, 853 N.Y.S.2d at 874, citing *Nat'l Indem. Co. of the S.*, 963 So. 2d at 364.

The ambiguity in the definition of "temporary worker," in this context, relates to whether the employee exclusion operates to exclude coverage to Walker. If the language of a policy is ambiguous (if there is duplicity, indistinctness or uncertainty in its meaning), and therefore, open to different constructions, then it will be interpreted in the manner that would ordinarily be understood by the lay person who bought and paid for the policy. *Rice v. Fire Ins. Exch.,* 946 S.W.2d 40, 42 (Mo. Ct. App. S.D.1997). Additionally, exclusionary clauses of policies are strictly construed against the insurer, and if they are ambiguous, they will be construed favorably to the insured. *Id.* In accordance with these general principles, the ambiguity must be construed against Hartford and in favor of coverage.

vi. The definitions of "leased worker" and "temporary worker" reflect varying levels of specificity.

Even in cases like *Gavan* and *Meeks* where courts were asked only to determine whether a third-party must be involved to "furnish" a worker, several still noted the varying levels of specificity in the definitions of "leased worker" and "temporary worker." *See, e.g.*, *Carl's Italian Rest. v. Truck Ins. Exch.*, 183 P.3d 636 (Colo. App. 2007); *AMCO Ins. Co. v. Dorphinghaus*, 2007 WL 313280 (D. Minn. 2007); *Northland Cas. Co. v. Meeks*, 540 F.3d 869 (8th Cir. 2008). In *Carl's Italian Restaurant*, the Colorado Court of Appeals considered definitions of "leased worker" and "temporary worker" identical to those at issue here. 183 P.3d at 639. The court stated, "the 'leased worker' provision requires that the worker be furnished by a particular type of third party, while the 'temporary worker' provision requires involvement of *any type of third party*." *Id.* at 640. (emphasis added). The distinction between the two terms did not create an ambiguity in the context of whether a third-party was required, but simply reflected different levels of specificity in the policy. *Id.*

In *Dorpinghaus*, the principal case relied upon by Hartford in its motion for summary judgment, the defendants argued that because the definition of leased worker refers to a third-party and the definition of temporary worker does not, a "temporary

worker" could be self-furnished.[4] 2007 WL 313280 at *5. Addressing the distinction between the two terms, the court stated,

> [J]ust because one provision of an insurance policy refers to third-party involvement more explicitly than another provision of the same policy does not mean that third-party involvement is *excluded* from the latter provision. It simply means that the two provisions were written with different levels of specificity. The leased-worker provision requires the involvement of a particular type of third party (a leasing firm). The temporary-worker provision requires the involvement of *any* type of third party. But both provisions require third-party involvement. *Id.* at *6.

Likewise, in *Meeks*, also cited by Hartford and the trial court, the court noted the exact same distinction. 540 F.3d at 876. When considering the definitions of "leased worker" and "temporary worker," the court held, "the distinction merely shows that the provisions contemplate differing degrees of specificity. *Id.* (citing *Dorpinghaus*, 2007 WL 313280 at *6).

The distinction between "leased worker" and "temporary worker" on the face of the Policy cannot be disregarded. The varying degrees of specificity clearly establish that the temporary worker provision allows for the involvement of *any* third-party in

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[4] Again, this argument is not analogous to Appellant's argument which embraces the requirement that a third-party must be involved in providing or supplying the worker to the insured as set forth under *Gavan*, *supra*.

furnishing the worker. *See Dorpinghaus*, 2007 WL 313280 at *6; *Carl's Italian Rest.*, 183 P.3d at 239. If "furnished to" required that the party furnishing the worker employ him or be in the business of supplying workers to others, the Policy should read accordingly. Hartford failed to make such distinction and cannot now impose a requirement which is inconsistent with the plain language of the Policy. *See Nick's Brick Oven Pizza*, 853 N.Y.S.2d at 873. Because Hartford failed to identify whether a specific type of third-party must furnish the worker under the "temporary worker" definition, and it is Hartford's responsibility to clearly set forth any exclusions on which it relies, the Exclusion does not apply and coverage must be provided.

CONCLUSION

Len was a "temporary worker," because he was "furnished" to Walker by the Family Center to meet seasonal or short-term workload conditions. Because Len was a "temporary worker," as defined in the Policy, he was not an "employee" of Walker for purposes of the Exclusion and, therefore, the Policy provides coverage. Accordingly, this Court should enter its Order that the trial court erred in granting summary judgment in favor of Hartford and denying summary judgment to Mrs. Mendenhall, and that she may recover against Hartford for the Judgment which is the subject of this action.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Substitute Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is 5,981 exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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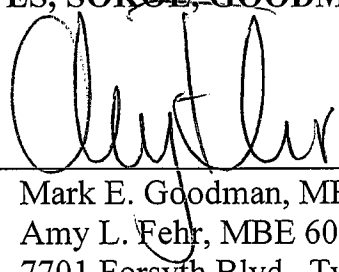
By: 

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