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 REPLY BRIEF

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

CAPES, SOKOL, GOODMAN & SARACHAN, P.C.

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REPLY TO RESPONDENT'S ARGUMENT

The issue before this Court is narrow: whether Appellant, Ruth Mendenhall's deceased husband, Len Mendenhall ("Len"), was an "employee" of Respondent's insured, Jay Walker ("Walker"), or a "temporary worker" under the insurance policy at issue (the "Policy"). The distinction is crucial because the Policy excludes coverage for claims made by Walker's employees, but covers claims made by "temporary workers" who are excluded from the definition of "employee." Appellant contends coverage must be provided because Len was a temporary worker as he was furnished to Walker by The Family Center of Farmington ("Family Center") to meet seasonal or short-term workload conditions. Respondent concedes that Len worked for Walker on a seasonal or short-term basis. Resp't Substitute Br. p. 11. Accordingly, the sole issue for this Court to consider in determining if Len was an "employee" or a "temporary worker" is whether he was "furnished" to Walker.

The parties agree that, under Missouri law, the term "furnished" requires third-party involvement in providing or supplying the worker to the insured. *Gavan v. Bituminous Casualty Corporation*, 242 S.W.3d 718, 721 (Mo. 2008). The test for "furnishing" is met in this case as Len applied for a position of employment with the Family Center, and Gary Fraley, an employee of the Family Center, interviewed Len and then provided or supplied Len to Walker, who hired Len as a temporary worker for his farm. Appellant Substitute Br. p. 3. Prior to filing its Substitute Brief, Respondent consistently took the position that 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. LF 620-623; LF 640-642. In fact, before the Court of Appeals, Respondent argued, "the definition and the phrase 'furnished to' is unambiguous and requires a 'temporary worker' to be furnished by an entity in the business of supplying workers, such as a temporary staffing agency, manpower provider, or headhunter." Resp't Court of Appeals Br., p. 12. Respondent's prior argument presupposed that only a specific *type* of third-party, one that employs the worker or is in the business of supplying workers, may "furnish" under the policy language. Appellant always disagreed, as the term "furnished" is susceptible to two reasonable interpretations, one of which is that *any* third-party may furnish a worker and, therefore, the term is ambiguous. Appellant Substitute Br., pp. 16-25.

Now, after years of litigation regarding the "furnished to" requirement, Respondent has changed its position, claiming instead that, "the key in interpreting 'a person who is furnished to you' as contained in the Hartford Policy is not the *type* of third-party doing the furnishing, rather it is the *actions* undertook to carry out 'furnishing.'" Resp't Substitute Br., p. 16 (emphasis added). Further, Respondent posits that the distinction between the types of third-parties that could plausibly furnish a worker is "unimportant because regardless of the type of third-party 'furnishing' the worker, the third-party must have sufficient authority or control over the worker such that its actions meet the definition of 'furnish.'" Resp't Substitute Br., p. 12.

Apparently, Respondent now agrees with Appellant that "furnished" can reasonably be read to mean that *any* third-party may furnish a worker. Now, Respondent has injected a new proposed requirement, contending that the defining characteristic of a

"furnishing" is the authority and control the furnishor exercises over the worker. In doing so, Respondent has aligned itself with a single case, *Empire Fire and Marine Ins. Co. v. Jones*, 739 F.Supp.2d 746 (M.D.Pa. 2010).

A. The Term "Furnish" Does Not Unambiguously Require Authority or Control.

In its efforts to convince this Court that the term "furnish" is unambiguous, Respondent has seemingly departed from its prior position that only a third-party employment-type business can furnish a worker, and replaced it with an attempt to define "furnish" by way of the control requirement, which is equally ambiguous.[1] This Court is now faced with whether the term "furnish" is ambiguous in two contexts: (1) whether *any* third-party may furnish a worker or whether that third-party must be a temporary employment agency, manpower service provider, headhunter or other similar business, and (2) whether the act of "furnishing" necessarily requires that the furnishing party have

[1] Respondent, although now focused on the act of furnishing rather than the type of third-party who must furnish the worker, may not have fully abandoned its earlier position as it still contends, "Mr. Mendenhall was not a "temporary worker" because…he was not furnished by an employment agency, by any other third-party in the business of supplying workers to others, *or* by anyone with the ability to control Mr. Mendenhall's employment." Resp't Substitute Br. pp. 11, 27. Thus, it is unclear whether Respondent still argues that the type of third-party is crucial in the analysis of the term "furnish."

some manner of authority or control over the worker who is furnished. The term "furnish" is ambiguous in both contexts.

Respondent, as the party claiming the applicability of the employee indemnification and employer's liability exclusion, bears the burden of establishing that the term "furnish" unambiguously requires authority or control. *Am. States Ins. Co. v. Mathis*, 947 S.W.2d 647, 649 (Mo. Ct. App. 2000). Respondent's position, however, defies logic and is not in accordance with the case law cited by either party.

i. Most Courts Have Not Considered Authority or Control in Interpreting the Term "Furnish."

Only a handful of courts have gone beyond the issue of whether the term "furnish" unambiguously requires third-party involvement. All of the opinions which do so (with the exception of *Empire*) hinge on the identity of the third-party furnishor. The more reasoned opinions hold that when examined in the context of whether a particular type of third-party must provide or supply the worker, the term "furnished to" 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, Inc. v. Excelsior Ins. Co.*, 19 Misc. 3d 736, 741, 853 N.Y.S.2d 870, 873 (Sup. Ct. 2008) aff'd and remanded, 61 A.D.3d 655, 877 N.Y.S.2d 359 (2009) ("furnished to" in the context of a temporary worker does not necessarily mean furnished by a temporary employment agency); *National Indemnity Company of the South v. Landscape Management Company, 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 Casualty Corporation 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).

Other courts have held that "furnished to" requires the furnishing entity to be in the business of supplying workers. *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 that he was not a temporary worker). Only one court, the United States District Court for the Middle District of Pennsylvania, has addressed the issue of control. *See*, *Empire Fire and Marine Insurance Company*, 739 F.Supp.2d at 754 (third-party employer did not supply or provide worker to insured inasmuch as they had no control over worker and worker could have just as easily refused insured's offer of employment as he did accept it). Apparently, no court's opinion, other than *Empire*, has turned on this premise. Nor has *Empire* been cited by any court in interpreting the "furnished to" requirement.

In attempt to give credence to its argument that the furnishing third-party must have some authority or control over the worker, Respondent cites *Allen*, *De Vesta*, *Brown v. Indiana Ins. Co.,* 184 S.W.3d 528 (Ky. 2005), and *AMCO Ins. Co. v. Dorpinghaus*, CIV 05-1296 PJS/JJG, 2007 WL 313280 (D. Minn. Jan. 12, 2007), in addition to *Empire*.

See, Resp't Substitute Br., p. 13 ("the court in *Gavan* cited and relied on cases which also required that the furnishing third-party have some authority or control over the worker"); p. 15 ("[t]he facts and analysis of other cases support Respondent's argument that a third-party must have authority or control over the worker in order to "furnish" the worker to another employer"), and p. 26 ("*Brown*, *Dorpinghaus*, *De Vesta*, *Allen* and *Empire* specifically address the degree of control required before an individual or entity can "furnish" a worker"). Respondent's brief is misleading in this regard as *Allen*, *De Vesta*, *Brown*, and *Dorpinghaus* all focus on the identity of the third-party furnishor; not whether the act of "furnishing" requires authority or control.[2] Only *Empire* discusses control as part of the act of "furnishing."

Appellant is hard-pressed to see how any of the other cases cited can be interpreted as "specifically addressing the degree of control required." For instance, Respondent's citation of *Dorpinghaus* in support of its assertion that "a third-party must

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[2] Before the Court of Appeals, Appellant correctly pointed out that, contrary to Respondent's citations, there is no majority position on the issue of whether a specific type of third-party must furnish a worker. *See*, Appellant's Substitute Br., p. 15, Appendix A5. Now, Appellant is again required to expose Respondent's inapposite citation of cases. Along these lines, it is curious that Harford attaches Steven P. Perlmutter, *The Law of "Leased Worker" and "Temporary Worker" Under a CGL Policy* to its Substitute Brief, as the author's conclusion regarding the "majority line of cases" was dispelled by Appellant and rejected by the Court of Appeals.

have authority or control over the worker in order to 'furnish' the worker to another employer," is misplaced. Resp't Substitute Br., p. 16. In *Dorpinghaus*, the insurance company argued that the injured workers were not "temporary workers" because they were not furnished to the insured by a third-party, such as a temporary employment agency. 2007 WL 313280 at *3. The injured workers disagreed, arguing that their friend furnished them to the insured or that they were furnished by their respective businesses. *Id.* at *7. Although the court cited *Allen*, stating there was no hint in the record that anyone regarded the workers' businesses as having furnished employees to the insured in the manner of an employment agency, manpower service provider or similar service, the court also reasoned that "the temporary-worker provision requires the involvement of *any* type of third-party." *Id.* at *6-7. The *Dorpinghaus* opinion is vague in its analysis of whether a particular third-party is required and, contrary to Respondent's citations, does not touch on the issue of control.

Respondent's citation of *Brown* as suggesting that a third-party must have authority or control over the worker in order to "furnish" him to another is similarly inapt. In *Brown*, the Supreme Court of Kentucky analyzed the definition of "temporary worker" in the context of its workers compensation laws. 184 S.W.3d at 538-39. The Court held that because the workers were not "furnished" to the insured by a temporary help service, they fell within the "employee" exclusion. *Id.* Notably absent from the *Brown* opinion is any reference to the authority or control that a furnishor must have over a worker. *Id.*

In *De Vesta*, the court considered whether a worker's injuries were covered under a policy where employees were excluded from coverage. 511 F.Supp.3d at 233. It determined that in order to have been "furnished," the worker must have been hired through an employment agency, manpower service provider or any similar service and because the worker was not hired through any such service, he was an employee and not a temporary worker. *Id.* The court provided no analysis as to why a furnishing may only be accomplished by such a service and certainly did not address whether authority or control over the worker must be present. *Id.*

Finally, in *Allen* a Connecticut appellate court considered whether a worker was an employee, an independent contractor, or a "temporary worker." 850 A.2d at 1057. The court held that because the insured did not go to an employment agency, manpower service provider or any similar service to employ or utilize the worker's services, and the worker was not employed by anyone who lent or furnished him to the insured, the worker was not furnished within the definition of "temporary worker." *Id.* Unlike *Dorpinghaus, Brown*, and *De Vesta*, the concept of control was addressed by the court in *Allen*, however it was not in the context of the "furnished to" requirement. *Id.* at 1054. The court considered the right to control the means and methods of the injured party's work in response to his argument that he was not an employee, but rather an independent contractor. *Id.* at 1054. The concept of employee versus independent contractor is not in play in the present case and, therefore, *Allen's* discussion of control in that context is irrelevant.

Although Appellant disagrees with the rationales of *Dorpinghaus*, *Brown*, *De Vesta and Allen*, they all support the proposition that a particular type of third-party, one in the business of supplying workers to others, must "furnish" a worker. On the other hand, several cases cited by Appellant in her Substitute Brief find ambiguity in the definition of "temporary worker" because the term "furnish" could also mean that *any* third-party can furnish a worker, even if that third-party is not in the business of supplying workers to others. *See, Nick's Brick Oven Pizza*, 853 N.Y.S.2d at 874 (because policy was silent as to who must furnish worker to insured for the person to qualify as a temporary worker, and there were several reasonable interpretations as to who that might be, the policy was ambiguous); *National Indemnity Company of the South*, 963 So.2d at 363 (definition of "temporary worker" was ambiguous, and could be construed to apply to worker who was referred to work for the summer by a permanent employee of the insured; phrase was capable of different meanings as to who must furnish the worker, and did not explicitly require that the worker be furnished by third-party, such as temporary worker leasing company or other business); *Mike Ross*, 413 F.Supp.2d at 745 (if "furnished to" required a temporary employment agency's placement, the policy should read accordingly and based on the words of the policy alone, it was impossible for the court to determine what was meant by the phrase "furnished to").

Not a single case cited by Respondent or Appellant, other than *Empire*, is decided on the nature and degree of control that the furnishor has over the furnishee.

ii. A Temporary Employment Agency, Headhunter or Other Entity in the Business of Supplying Workers to Others, Does Not Necessarily Have Authority or Control Over a Worker.

Empire is an outlier for the clear reason that its interpretation of the term "furnish" as requiring control is contrary to the classic examples of "furnishing" cited by each of the courts above. There is no dispute that a worker who is supplied or provided by a temporary employment agency, manpower service provider, headhunter or other entity in the business of supplying workers, is "furnished" to the insured and qualifies as a "temporary worker" under the Policy's definition. Indeed, the temporary help service is the classic example of a "furnishor" cited by the courts. *See, e.g., Rhiner v. Red Shield Ins. Co.*, 208 P.3d 1043, 1045 (Or. Ct. App. 2009) (third-party such as employment agency or other entity must supply the worker); *General Agents Ins. Co. of America, Inc. v. Mandrill Corp., Inc.*, 243 Fed.Appx. 961, 967 (6th Cir. 2007) (the phrase "furnished to you" in the definition of "temporary worker" unambiguously requires the involvement of a third-party, such as a temporary staffing agency, that supplies the worker to the insured employer); *Northland Cas. Co. v. Meeks*, 540 F.3d 869, 876 (8th Cir. 2008) (worker is not furnished to an insured unless a third-party - typically a staffing agency - has been involved in providing or supplying the worker to the insured).

No court has held that a temporary employment agency or other entity in the business of supplying workers to others is not a "furnishor." Further, Respondent has repeatedly taken the position that only one who employs the worker or is in the business of supplying workers can "furnish" them to others. LF 620-623; LF 640-642.

Yet, under Respondent's definition of "furnish" as requiring authority or control, even a temporary employment agency or other similar service would not be able to "furnish" a worker. Respondent contends, "[t]his type of relationship and level of control over a worker's employment – **namely the ability to instruct the worker to perform labor for another employer** – is simply most often found in the context of employment agencies, temporary staffing agencies, or manpower services." Resp't Br., p.16 (emphasis added).

To the contrary, a temporary work agency does not instruct or *require* the worker to perform labor for another employer. Rather, the temporary worker is offered an assignment and the worker has discretion to either accept or reject it. *See, e.g., Osman v. Division of Employment Security*, 332 S.W.3d 890, 894 (Mo. Ct. App. 2011) (defining "temporary help firm" under Missouri Employment Security Law and explaining that a temporary employee is not obligated to accept any position that is offered). A temporary employment agency enlists applicants based on their particular skills and credentials and places such applicants in a database. Companies or individuals looking to hire someone on a temporary basis contact the agency and describe the skill set they are seeking. A temporary employee is then found in the database and is contacted to see if he or she would be interested in taking the assignment. *See, e.g., Garas v. Kelly Services, Inc.*, 211 S.W.3d 149, 150-51 (Mo. Ct. App. 2007) (in evaluating claimant's position, Court explained staffing agency that placed employees for temporary employment called worker to see if she was interested in a temporary position and worker was entitled to decline).

Likewise, a recruitment agency sources candidates for particular positions through networking, advertising or other methods. The recruiter screens potential candidates as well as meets with the potential employer to determine the qualifications necessary for the position. The recruiter then assists in preparing the candidate for an interview, provides feedback to both parties, and handles salary and benefits negotiations. At no time does the recruiter mandate that the candidate accept the position. The recruiter maintains no authority or control over the workers that are furnished. Interestingly, then, under the reasoning of *Empire*, the worker provided by a temporary employment agency or recruitment firm is not "furnished," as the worker could "just as easily refuse the offer of employment as he did accept it." *See*, *Empire*, 739 F. Supp at 754. This result is unfathomable.

Control cannot be the bright line test for what constitutes a "furnishing" as this eliminates many classic examples of furnishors cited by the courts as well as those consistently cited by Respondent. Resp't Substitute Br., pp. 11, 15, 16, 19, 20, 26, 27. Further, if "furnished" unambiguously implies authority or control, it is puzzling that Respondent has only mentioned this "clear requirement" for the first time before this Court. Respondent has wavered from one position to the next in efforts to define the term and this inconsistency alone is testament to Appellant's argument that the term "furnish" is ambiguous.

B. Respondent's Citation of Cases Involving the "Furnishing" of Personal Property or Objects is Inapposite.

Respondent also directs this Court's attention to "other areas of the law"[3] where courts have recognized that an individual cannot furnish what he or she does not have the right to possess. Resp't Substitute Br., pp. 21-22. Importantly, however, each of the cases cited by Respondent involves the furnishing of real or personal property. *See, e.g., U.S. ex rel. Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co.*, 08-CV-1685 W AJB, 2010 WL 3489348 (S.D. Cal. Sept. 3, 2010) (interpreting the term "furnish" in the context of re-rented equipment); *W. Pac. L-C Corp. v. Tidewater Contractors, Inc.*, 2:07CV504GEB-DAD, 2008 WL 906285 (E.D. Cal. Apr. 2, 2008) (interpreting the term "furnish" in the context of lodging and office facilities); *Apex Oil Co. v. Beldner*, 567 S.W.2d 336, 339 (Mo. Ct. App. 1978) (to furnish a product to another, a necessary element of the act of furnishing is making the product available to the intended purchaser); *Woods Constr. Co. v. Pool Constr. Co.*, 348 F.2d 687, 689 (10th Cir. 1965)

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[3] Three of the four cases cited by Respondent relate to claims under the "Miller Act," a federal statute requiring that a person must provide both payment and performance bonds before certain contracts are awarded for the construction of any public building of the Federal Government. 40 U.S.C.A. § 3131. These cases are not only unsuitable for reliance by this Court because they deal with the "furnishing" of objects or materials, but also because the term "furnish" is interpreted in the statutory context and should not necessarily be given the same meaning in other contexts.

(determining whether construction company was the furnishor or supplier of materials). The furnishing of human labor cannot be deemed analogous to the furnishing of inanimate objects or property. Certainly, no person has the right to have and hold, or own as property, another human being and, therefore, this line of cases cited should be disregarded.

Although Appellant deems these cases and their reasoning wholly inapplicable to the facts and circumstances of the case at bar, it is interesting to note that the opinion of the court in *Woods* is not authority for the proposition for which Respondent cites it. To the contrary, the court stated, "With reference to their use in this statute the words 'furnished or supplied' have no special meaning or connotation and we must consider them as ordinarily used. We do agree with appellee to the extent that there may be circumstances under which someone other than the owner could be deemed, under the Act, as a furnisher or supplier but no such circumstances are present in this case." *Woods*, 348 F.2d at 689. No further attention need be given to this point.

C. Where There is Any Ambiguity in the Policy Language, the Issue Must be Resolved in Favor of Coverage.

Respondent has the burden of demonstrating the applicability of the employee exclusion; thus it is the party charged with establishing that Len was not a "temporary worker." *See*, *Mathis*, 974 S.W.2d at 649. Moreover, in interpreting Respondent's arguments regarding the exclusion, this Court strictly construes the Policy language against Respondent. *Christian v. Progressive Cas. Ins., Co.,* 57 S.W.3d 400 (Mo. Ct. App. 2001) (policy provisions designed to restrict, limit or impose exceptions or

exemptions on insurance coverage are strictly construed against the insurer). When reviewing an insurance policy, the policy is interpreted so as to afford, rather than defeat coverage, and all ambiguities must be resolved in favor of the insured. *Id.* Thus, Appellant prevails if this Court finds the definition of "temporary worker" is ambiguous as to (1) the type of third-party that must furnish the worker ***or*** (2) the action which constitutes furnishing. In both regards, the term "furnished" is reasonably susceptible to multiple meanings.

i. The Term "Furnished" is Ambiguous When Considered in the Context of Who the Furnishing Third-Party Must Be.

Because there are varying interpretations as to the kind of third-party which must provide or supply the worker, "furnished," in this context, is ambiguous. Adding to this ambiguity is the Policy's definition of "leased worker" as compared to the definition of "temporary worker." While "leased worker" is defined as "a person leased to you *by a labor leasing firm...,*" "temporary worker" is defined simply as "a person furnished to you..." The fact that the definition of leased worker explicitly refers to the third-party (i.e. the labor leasing firm), while the definition of temporary worker does not call out a specific third-party, must mean that the two provisions were written with different levels of specificity. *Dorpinghaus*, 2007 WL 313280 at *6; *Carl's Italian Rest. v. Truck Ins. Exchange*, 183 P.3d 636, 640 (Colo. App. 2007); *Meeks*, 540 F.3d at 875-76. Accordingly, the Policy is ambiguous as to whether any third-party may furnish a worker and must be construed in favor of coverage.

ii. The Term "Furnished" is Ambiguous With Respect to the Actions Which Must Be Undertaken to Carry Out a Furnishing.

It is clear that third parties such as employment agencies, manpower service providers and headhunters are examples of furnishing third-parties who do not necessarily exercise any authority or control over the worker who is provided. This gives rise to serious ambiguity as to whether control over the worker is required to effectuate a "furnishing." Further, certain courts have held that a referral or recommendation is enough to constitute a "furnishing." Significantly, the dissenting judges in *Gavan* interpreted the majority opinion as requiring a third-party referral. Judge Teitelman wrote, "the majority concludes that Gavan is not a temporary worker solely because he was not ***referred*** to the employer by a third-party." *Gavan*, 242 S.W. 3d at 722-23 (emphasis added).

In *Rhiner,* the court similarly interpreted the term "furnish" stating, "we conclude that the phrase 'a person who is furnished to you' means a person who is ***referred from***, or provided by, a third-party." *Rhiner*, 208 P.3d at 1046 (emphasis added). This conclusion supports the view a referral is sufficient. *Id.* Although Respondent cites *Rhiner* claiming it suggests that the court "would require a third-party entity with control over the worker to furnish the worker" (Resp't Substitute Br., p. 27), the court in *Rhiner* makes no such finding and the opinion contains no suggestion whatsoever on the issue of control.

Respondent also cites *Parra v. Markel International Insurance Company Limited*, where the court held "the clause 'person who is furnished to you,' required a showing

that a third person, rather than an agent or employee of the employer, ***referred*** the temporary worker to the employer for employment." 300 Fed.Appx. 317, 319, 2008 WL 4974299 (5th Cir. 2008) (emphasis added). Even though the *Parra* court interpreted "furnish" as synonymous with "referral," *Parra* is distinguishable as Appellant does not contend Len was furnished to Walker by another employee of Walker's farm, but rather by the Family Center. The Family Center is a third-party, separate and distinct from Walker's farm. Although Walker may own the farm and be the sole shareholder of the Family Center, they are two separate legal entities (LF 178, ¶ 1; LF 179, ¶ 3; LF 357-358; LF 361-362). There can be no dispute that Mr. Fraley, a Family Center employee, was a third party and not an agent or employee of the farm. Thus, the test set forth in *Parra* is met under the facts of this case as a third-party, other than an agent or employee of the employer, supplied, provided or minimally referred, Len to Walker.

Although each of the courts above seemingly equates a "referral" and a "furnishing," it is unnecessary for this Court to make such a finding. Rather, it is clear that more than a referral or recommendation occurred in this case. Respondent alleges that "the Family Center and Mr. Fraley *simply introduced* Mr. Walker and Mr. Mendenhall which resulted in Mr. Walker making an offer of employment to Mr. Mendenhall." Resp't Substitute Br., p. 23 (emphasis added). The record establishes that more than a simple introduction was made by Mr. Fraley. Instead, the Family Center interviewed Len which constitutes a vetting of Len as a potential candidate. LF 612, ¶ 4, Appellant's Substitute Br., Appendix A-27 – A-28. Then, Mr. Fraley provided or supplied Len to Walker both by making him aware of Len's particular qualifications and

offering his endorsement of Len by indicating Len "would be good" for the position. LF 613, ¶5, Appellant's Substitute Br., Appendix A-27 – A-28. Thus, Mr. Fraley and the Family Center did more than introduce the parties. Instead, they *actively participated* in providing or supplying Len to Walker by orchestrating the entire process – from attracting Len as a potential candidate, interviewing him and vetting his particular qualifications, endorsing Len as "good for the position," and then providing the means by which Walker ultimately hired Len. Thus, there was a furnishing in this case due to the active effort on the part of Mr. Fraley and the Family Center in supplying or providing Len to Walker. The Family Center's vetting and recommendation of Len makes this more than a case of a "mere referral."

However, the distinction (or lack thereof) between the act of "referring" and "furnishing" is not the issue before this Court. Instead, this Court is called to decide if the latter term is ambiguous. It is. Because "furnish" could mean supplied or provided by any number of third parties and does not necessarily connote authority or control over the worker who is furnished, the term is ambiguous. Accordingly, 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 not an "employee" of Walker for purposes of the Policy's employee exclusion, the Policy provides coverage. Accordingly, this Court should reverse the Judgment of the trial court.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Substitute Reply 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 4,903 exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has, on the 2nd day of February, 2012, delivered via e-filing and via U.S. mail a copy of this brief to:

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