IN THE SUPREME COURT OF MISSOURI

No. SC90041

ERIC D. BURNS
Plaintiff-Respondent
v.
LYNN M. SMITH
Defendant,
And
FARMERS ALLIANCE MUTUAL INSURANCE COMPANY OF KANSAS
Garnishee-Appellant

Appeal from the Circuit Court of St. Clair County
Honorable James K. Journey

SUBSTITUTE BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement of the Appellant.

STATEMENT OF FACTS

This is an equitable garnishment action brought by Plaintiff/Respondent Eric Burns against Appellant Farmers Alliance Mutual Insurance Company ("Farmers") after Plaintiff had obtained an underlying Judgment for personal injuries against Farmers' insured Lynn Smith. (LF0028).

The relevant facts are essentially undisputed. A Farmowners-Ranchowners insurance policy issued by Appellant provided Lynn Smith with $1,000,000.00 in **personal** liability coverage (LF0056), and in addition provided "Supplementary Payments" coverage without limitation for both **pre-judgment** and **post-judgment interest**. (LF0084; LF0109). Lynn Smith requested that Farmers refund and indemnify him on the underlying claim. Farmers denied coverage (LF0387, 393, 391), and offered to defend under a reservation of rights, which was refused by its insured. (LF0391). Thereupon, Farmers withdrew from the defense of Smith (LF0394), and although having been notified of the proceedings against Smith, chose not to participate. (LF0404). Farmers did not file a declaratory judgment action to obtain a judicial determination of any coverage issues.

Following a two-day bench trial at which Smith was represented by counsel retained by Oak River Insurance Company, Smith's commercial general liability insurance carrier (LF0404), Plaintiff Burns obtained a Judgment against Smith for $2,044,278.00 plus $673,437.52 in pre-judgment interest. (LF0027). The Trial Court specifically found that Smith had "breached a personal duty of care he owed to Plaintiff" (LF0026) (emphasis added). The Trial Court's Judgment was affirmed in all respects by the Missouri Supreme Court. See, *Burns v. Smith*, 214 S.W.3d 335 (Mo. Banc 2007).

Burns then filed this garnishment proceeding. Farmers initially raised four policy exclusions which it contended precluded coverage under the policy of personal liability insurance it sold to Lynn Smith. (LF0330-331). Plaintiff and Farmers filed cross-motions for Summary Judgment. Farmers' motion never raised any issue with respect to the amount of interest. (LF0136-152, LF0233-242). The Trial Court granted Plaintiff's Motion for Summary Judgment. After considering the undisputed material facts, the Court found that the four exclusions relied upon by Farmers either failed clearly and unambiguously to preclude coverage, or were at a minimum ambiguous and, therefore, Plaintiff was entitled to the policy's personal liability limits of $1,000,000.00 (LF0335-348). The Court also awarded the underlying pre-judgment interest of $673,437.52 and post-judgment interest of $733,783.17 pursuant to the Farmers policy's "Supplemental Payments" provisions (LF0348), Farmers having withdrawn from defending its insured (LF0394; SLF0209-210), and never having offered, paid, tendered, nor deposited in Court its policy liability limits of $1,000,000.00 (LF0407).

In this appeal, Farmers has not challenged the Trial Court's grant of Summary Judgment to Plaintiff on three of the four policy exclusions previously relied upon by Farmers to deny Smith coverage. Farmers appeals only the Trial Court's judgment that the policy's definition of "Business" mandated in the policy's "Business Pursuits" exclusion failed to clearly and unambiguously preclude coverage, or that at a minimum such definition of "Business" was ambiguous and thereby caused the policy's "Business Pursuits" exclusion to be fairly susceptible of more than one interpretation, therefore construing the exclusion against Farmers and in favor of coverage (LF0339).

A. The Policy's "Business Pursuits" Exclusion and Definition of "Business"

The "Business Pursuits" exclusion provides that coverage under the policy will not apply **"to bodily injury or property damage arising out of *business* pursuits of any insured except activities therein which are ordinarily incident to non-business pursuits or farming."** (LF0083)(italics added).

The policy defines "business" to mean: **(1) a trade, profession or occupation, excluding farming, and the use of any premises or portion of residence premises for any such purposes; and (2) the rental or holding for rental of the whole or any portion of the premises by any Insured."** (LF0066).

In construing this definition as written, the Trial Court found the conjunction "and" to mean the conjunctive "and". Thus, the business exception has two requirements. First, the activity must arise from "**a trade, profession or occupation**." Second, "**the use of the premises or residence premises for any such purposes**" must

also be present. Unless both elements are present, the exclusion does not apply. (LF0338). There is no dispute that Plaintiff Burns' injuries did not arise out of Farmers insured's use of his premises or residences premises. (LF0142).

The Trial Court concluded that if it had been Farmers' intention to have excluded coverage for injuries arising out of the "business pursuits" of its insured at locations other than the insured premises or residence premises, Farmers could have written its definition of "business" to simply state: " 'business' means a trade, profession, or occupation, excluding farming." Thus, injuries arising out of "Business Pursuits" defined as such would thereby be excluded from coverage whether they had arisen out of the use of the insured's premises or residence premises or anywhere else, "the result which Farmers Alliance now seeks." (LF0339).

B. The Policy's "Supplemental Payments" Provisions for Payment of Pre-Judgment and Post-Judgment Interest

Farmers now challenges the Trial Court's calculation of pre-judgment interest and post-judgment interest. In Farmers' Response to Plaintiff's Motion for Summary Judgment for pre-judgment and post-judgment interest, Farmers did not challenge either Plaintiff's entitlement to, nor the amounts of pre-judgment and post-judgment interest. Farmers raised the issue only after the Trial Court's Judgment awarding same was entered. (LF0245-266, LF0324-327, LF0363-368).

Farmers' "Supplementary Payments" coverage provides for payment of pre-judgment interest:

"The Company will pay, in addition to the applicable limit of liability, prejudgment interest awarded against the insured on that part of the judgment the Company pays. If the Company makes an offer to pay the applicable limit of its liability, the Company will not pay any prejudgment interest based on that period of time after the offer." (LF0407).

Farmers "Supplementary Payments" coverage also provides for payment of post-judgment interest:

"Personal Liability Claim Expenses: This Company will pay:

a. all expenses incurred by the Company and all costs taxed against the insured in any suit defended by this Company; …

c. all interest on the entire amount of the judgment which accrues after entry of the judgment and before this Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of this Company's liability thereon;…

Any expenses incurred by this Company under this provision shall not reduce the applicable limit of liability." (LF0084)

Farmers has never offered, paid, tendered, nor deposited in Court the limit of its liability coverage. (LF0407).

Farmers for the first time in its "Motion to Amend the Judgment", addressed its "Supplementary Payments" coverage and complained of the Trial Court's Judgment which calculated pre-judgment interest and post-judgment interest owed under the

"Supplemental Payments" provisions and the undisputed facts of this case. (LF0363-368).

Because Farmers had failed to include any legal authority in its "Motion to Amend the Judgment" in support of its request that the Trial Court recalculate pre-judgment and post-judgment interest, the Trial Court took Farmers' "Motion to Amend the Judgment" under advisement and allowed the parties to provide any case authority the parties "would care to" submit. (LF0017). After the parties had done so (SLF0205-212), the Trial Court considered the various legal authorities and arguments submitted by the parties and overruled Farmers' "Motion to Amend the Judgment" and its "Motion for Partial Satisfaction of Judgment". (LF0018).

ARGUMENT

I THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR PLAINTIFF ERIC BURNS AND AGAINST FARMERS BECAUSE THE "BUSINESS PURSUIT" EXCLUSION DID NOT EXCLUDE COVERAGE FOR THE PERSONAL LIABILITY OF LYNN SMITH FOR THE INJURIES SMITH CAUSED ERIC BURNS.

Introduction to the Argument

Farmers Alliance Mutual Insurance Company (Farmers) issued an all-risk policy to Lynn Smith. The insured under the policy is not Kennon Redi-Mix, Inc.; the insureds are Lynn and Theresa Smith. (LF0057). The Farmers policy is a *personal* liability policy.

The coverage purchased by Smith for his personal liability provided that Farmers would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury…." (LF0083) There is no geographic or other limitation on the coverage declaration. If there are limitations in the coverage, such limitations must come from separate exclusions written into the policy by Farmers.

Under settled Missouri law, only events expressly and unambiguously excluded under the policy fall outside Farmers' coverage of Smith. Thus, this case turns on the

meaning of a "business pursuits" exclusion contained in the policy. More precisely, this case turns on the meaning of the word "and" contained in the policy's definition of "business." The phrase "business pursuits" is not defined.

Interestingly, both the trial court and the Southern District said that the policy exclusion *sub judice* is clear and unambiguous – and then reached opposite conclusions as to its meaning, both by applying rules of construction!

This is hardly surprising given that Farmers itself has offered at least two different meanings for the exclusion – that "and" means "or" (LF240)[1] and that "and" means "as well as" or "in addition to." (App.Br. at 15) Farmers treats "and" as joining two independent, stand-alone events that constitute business if either one of them occurs.

The Southern District adopted yet another meaning by application of rules of construction – that "and" means "a supplementary explanation/a supplementary parenthetical-like explanation." (Slip Op. at 6, 9). Strunk and White reject the Southern District's interpretation. Under normal usage, parenthetical explanations are separated from the words they explain by a comma. W. STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE §2.3 (2003). There is no comma in Farmers' definition that would create a parenthetical explanation.

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[1] See LF0240: Farmers argued that "this [Trial] Court should conclude that the word 'and' in the definition of 'business' in policy AR520691 must have the meaning of the disjunctive 'or.'" See also Judgment (LF0339)

The trial court concluded that "and" meant "and;" (LF0339) and the Southern District interpreted this as "a logical operator that requires both of two inputs to be present…." (Slip op at 6). Plaintiff suggests that the trial court was correct because the trial court's chosen meaning is consistent with the first definition of "and" found in the dictionary – "together with." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, Merriam-Webster, 2002. Under this reasoning, "and" links two events, both of which must be present for the definition to be met.

These inconsistent conclusions drawn by judges and lawyers concerning the meaning of the exclusionary language are proof enough that Farmers drafted an ambiguous exclusion. Language is ambiguous if it is reasonably open to different constructions. *Seeck v. GEICO General Ins. Co.*, 212 S.W.3d 129, 131-132 (Mo. banc 2007). To this inconsistency one must add Smith's own original belief that he was covered by the Farmers policy for his personal liability to Eric Burns for Burns's bodily injury. There is no other conclusion that supports Smith's demand for coverage and a defense from Farmers early in the litigation. (LF0391)

This Court has not said that form contracts offered by insurance companies on a take-it-or-leave it basis are uniformly contracts of adhesion. To ameliorate the unequal bargaining position between the parties, however, this Court has adopted rules of construction to favor the insured when the insurance contract is not clear and unambiguous. For example, coverage clauses are read broadly to favor coverage. *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997). And, "[t]he rule of '*contra proferentem*' [that rule that contracts are construed against the drafter] is applied more

rigorously in insurance contracts than in other contracts." *Mansion Hills Condominium Assoc. v. American Family Mutual Ins. Co.*, 62 S.W.3d 633 (Mo. App. E.D. 2001), quoting *Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308, 317 (Mo.App. E.D.1999).

Farmers argues that even if there is an ambiguity in the exclusion, there is no need to apply the rule of *contra proferentem* in this case because the intent of the parties is known. That claimed knowledge of intent is based on an affidavit provided by Lynn Smith stating that he did not believe the Farmers policy covered "any incidents arising from my separate business pursuit *of Kennon Redi-Mix, Inc.*" LF145. (emphasis added). But Smith's liability in this case is not liability of Kennon Redi-Mix. It is personal liability of Smith. This Court's decision in *Burns v. Smith*, 214 S.W.3d 335, 337 (Mo. Banc 2007), concluded that the injuries suffered by Eric Burns at Lynn Smith's hand fell outside workers compensation coverage. As a result, Smith was personally liable to Burns for the injuries.

There is a difference between coverage intended for *business* liability and coverage purchased for *personal* liability. Smith's affidavit recognized that Smith did not believe the Farmers policy covered his *business's* liability. But, as noted and as will be discussed in more detail below, Smith originally believed that Farmers covered his personal liability; early in the case he demanded of Farmers that it defend and cover his *personal* liability. This is consistent with the all-risk coverage he purchased from Farmers. Thus, Smith's affidavit, if read for the meaning Farmers hopes, contradicts his actions in seeking coverage for his personal liability. It also fails to speak to his intention

in regard to his personal liability. Nor does a conclusion that Smith's intent as to his *business* provide any insight into Smith's intent with regard to a policy covering his *personal* liability.

Because the language of the definition and thus the exclusion is ambiguous and because there is no clear understanding of what the parties to the contract intended, the exclusion must be read narrowly, in favor of the insured and against the drafter. The trial court must, therefore, be affirmed.

A. STANDARD OF REVIEW

This is a summary judgment case. The trial court entered summary judgment against the Appellant narrowly construing a policy exclusion. "Whether to grant summary judgment is an issue of law that the appellate Court determines *de novo*. The interpretation of an insurance policy is a question of law that this Court also determines *de novo*. In construing a provision in an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance, and resolves ambiguities in favor of coverage." *Seeck v. GEICO General Ins. Co*., 212 S.W.3d 129, 131-132 (Mo. banc 2007).

An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy provision at issue. Language is ambiguous if it is reasonably open to different constructions. *Seeck*, 212 S.W.3d at 132 citing *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1992); or when doubt or uncertainty

as to its meaning exists, and it is fairly susceptible to different interpretations, or is reasonably open to different interpretations. *American Family Mut. Ins. Co. v. Bishop*, 743 S.W.2d 590 (Mo.App. E.D. 1988). If, on the other hand, the insurance policy provision at issue is clear and unambiguous, the Court is to enforce the provision as written *Rodriguez v. General Accident Ins. Co*., 808 S.W.2d 379, 382 (Mo. banc 1991); and the Court is not to re-write the provision. *Millers Mutual Ins. Assn. of Ill. v. Shell Oil Co*., 959 S.W.2d 864, 867 (Mo.App E.D 197), citing *Krombach v. Mayflower Ins. Co., Ltd*., 785 S.W.2d 728, 731 (Mo.App. 1990).

B. THE EXCLUSION IS AMBIGUOUS.

The Farmers policy excludes coverage for business pursuits.

> This policy does not apply:
>
> I. Under Coverage G – Personal Liability and Coverage II – Medical Payments to Others:
>
> ***
>
> d. To bodily injury or property damage arising out of ***business pursuits*** of any insured except activities therein which are ordinarily incident to non-business pursuits or farming; …

(LF0083)(Emphasis added). Business pursuits is not defined in the policy. "Business" is defined, however. "Business" means:

> (1) A trade, profession or occupation, excluding farming, and the use of any premises or portion of residence premises for any such purposes; and (2) the rental or holding for rental of the whole or any portion of the premises by an insured.

(LF0066)(underlining added).

As the Court is fully aware, where an insurance company chooses to provide a definition for a particular term used in its policy, the Court is obligated to use such definition in the interpretation of the policy. *Mo. Empl. Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 625 (Mo.App. W.D. 2004). However, in order for the contractual definition to control, the definition itself must be clear and unambiguous. *Hobbs v. Farm Bureau Town & Country Ins. Co. of Missouri*, 965 S.W.2d 194, 197 (Mo.App. E.D.1998). If the contractual definition is not clear, a court is free to give a reasonable construction to the policy term, resolving doubts in favor of the insured. *Id*. *Accord, Mansion Hills Condominium Ass'n.,* 62 S.W.3d at 638. .

As the Southern District correctly noted, had Farmers simply placed a period after farming, the definition would be clear. (Slip Op. at 5). Farmers did not, however, and the resulting definition is ambiguous.

In determining the meaning of words used in a contract, the plain and ordinary meaning of a word is derived from the dictionary. *Id.* The dictionary defines "and" to mean "used as a function word to (1) express the general relation of connection or

addition, esp. accompaniment, participation, combination, contiguity, continuance, simultaneity, sequence …." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, Merriam-Webster, 2002. Strunk and White describe the inherent ambiguity of "and" more succinctly – "*and* is the least specific of connectives." W. STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE §2.4 (2003). To be fair, both sides have reached into the dictionary and found a meaning for "and" that results in a conclusion each side finds attractive.

Thus, the question before the Court is:

> (a) whether the underlined word "and" is a logical conjunctive that requires that both of the two elements of definition (1) be present before a business activity exists, i.e. "and" means "together with[2]" (as opposed to independent of)
>
> **or** (*not and!*)
>
> (b) whether "and" means either
>
> (i) "or, "
>
> (ii) is a parenthetical that defines the phrase "trade, profession or occupation," or
>
> (iii) means "as well as" or "in addition to."

With the exception of Farmers' trial court argument that "and" really means "or," each of these meanings of "and" finds support in the dictionary.

[2] "Together with" is the first definition of "and" listed in the dictionary.

For example, as "and" is used in instructions to juries, the definition of "business" lists two elements, both of which must be present to meet the condition or activity defined exists. A tort exists if a duty, a breach of duty, proximate cause and (together with) damages are all present; the absence of any one of the four elements means that there is no tort. In this sense, the "and" is a logical connective that has the value *true* only if all of its operands are true, otherwise a value of *false.* Under this reading, Farmers defined "business" to mean an event in which the insured was engaged in a trade, profession or occupation and (together with) was also using any portion of the insured premises or residence premises to carry on that trade, profession or occupation. This is what the trial court concluded the definition meant.

Farmers insists that the "and" creates two stand-alone elements of the definition of business. This argument ignores the fact that Farmers separated its definitions with numbers –implying that all of definition (1) must be read together as a single, stand-alone definition and that the definition designated (2) was separate from definition (1). For Farmers, an activity is a "business" if any one of three events occurs, whether or not the other two are present: (1) The exercise of a trade, profession or occupation anywhere is "business." (2) The use of the premises for the exercise of a trade, profession or business is "business" (Thus the "for any such purpose" phrase). (3) Rental of the premises is "business." In this sense, "and" means "or." Because the dictionary does not permit changing the conjunctive "and" into the disjunctive "or," Farmers changed its argument at the appellate level to argue that "and" means "as well as" or "in addition to."

The Southern District's opinion, however, displayed considerable confusion as to the proper use of a semicolon in its conclusion that "and" merely introduces a parenthetical explanation of "trade, profession or occupation." The Southern District assumes, incorrectly, that a semicolon and a comma serve the same function. As noted, Strunk and White disagree. A semicolon is the proper way to join two *independent* clauses if one chooses not to use a period. W. STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE §2.5 (2003). Thus, the second "and" in the definition, which follows the semicolon ("; and (2)…"), read together with the numerical designation (2), indicates an independent, stand-alone definition of "business" that includes a different activity that is defined as business in definition (1). Strunk and White remark that "[u]sed between independent clauses, [and] indicates only that a relation exists between them without defining that relation." *Id*. at §2.4. Thus, whether or not a trade, profession or occupation is involved, the rental of all or part of the premises qualifies as a business and falls within the exclusion. The (2) definition may be ignored for purposes of the analysis of the meaning of the definition of business designated as (1) precisely because of the semicolon.

The absence of the semicolon and the presence of the numbering system inserted by Farmers in the definition show that the two phrases contained in definition (1) in the policy must be read together, not as independent definitions.

Thus, each meaning proposed by the disagreeing courts and the disagreeing lawyers is reasonable; each provides a definition of business that can be reasonably applied to a factual milieu. That is the very definition of ambiguous. Language is

ambiguous if it is reasonably open to different reasonable constructions. *Seeck*, 212 S.W.3d at 132.

Only one conclusion is possible. The first definition of "business" contained in the Farmers policy is ambiguous.

C. CANONS OF CONSTRUCTION TAILORED TO INSURANCE CONTRACTS APPLY WHEN AN INSURANCE CONTRACT IS AMBIGUOUS.

"Where the language of a contract is plain, there can be no construction by the court since there is nothing to construe." *Grantham v. Rockhurst University*, 563 S.W.2d 147, 150 (Mo.App.1978). Where, as here, ambiguity exists, the canons of construction are used to aid the Court in determining the meaning of the contract.

Farmers' brief dealing with the rules of construction is applicable to insurance contracts generally. Missouri courts, however, have adopted special rules of construction for insurance contracts that recognize the take-it-or-leave-it nature of insurance agreements. These insurance-specific canons of construction for insurance policies redress the imbalance of imposed terms by enforcement of the reasonable expectations of the insured irrespective of ambiguity or nonambiguity or the necessary stricture of other technical rules which govern negotiated contracts. *Estrin Const. Co., Inc. v. Aetna Cas. and Sur. Co.* 612 S.W.2d 413, 419, fn3 (Mo.App. W.D. 1981). *See also, Linderer v. Royal Globe Insurance Company*, 597 S.W.2d 656, 661 (Mo.App.1980); *Craig v. Iowa Kemper Mutual Ins. Co.*, 565 S.W.2d 716, 722 n.5 (Mo.App.1978); *Grossman Iron &*

Steel Co. v. Bituminous Casualty Corp., 558 S.W.2d 255, 261 (Mo.App.1977); *Bennett v. American Life and Accident Insurance Com*pany, 495 S.W.2d 753, 758 (Mo.App.1973).

Insurance contracts are construed to *furnish* protection for the purchaser of personal liability insurance, not to defeat it. *Weathers v. Royal Indemnity Key Ins. Co*., 577 S.W.2d 623, 626 (Mo. banc 1979). Because of this principle, courts are to interpret insurance contracts to grant coverage rather than to defeat it. *Brown v. Gen. Sec. Indem. Co. of Arizona*, 174 S.W.3d 1, 5 (Mo. App. E.D. 2005).

Where, as here, an insurance company relies upon a policy exclusion to assert non-coverage, the insurance company has a higher burden. *The insurer* must prove that an exclusion unambiguously precludes coverage in order to prevail, *Amer. Mot. Ins. Co. v. Moore*, 970 S.W.2d 876, 878 (Mo.App. E.D 1998). Further, the Court must construe the exclusion clause *strictly against* the insurer. *Sexton v. Omaha Property and Casualty Ins. Co*., 231 S.W.3d 844, 848 (Mo.App. S.D. 2007), citing *Killian v. State Farm Fire & Cas. Co*., 903 S.W.2d 215, 217 (Mo.App. 1995). *See also Gibbs v. Nat'l Gen. Ins. Co.*, 938 S.W.2d 600, 605 (Mo.App. 1997)(coverage clauses are read broadly, while exclusions read narrowly, to afford the greatest possible coverage). This rule is justified as a matter of policy because, as the drafter of the provision, the insurance company is in the better position to make its provisions clear and unambiguous. (*Seeck*, at p. 134).

To summarize these principles and the applicable standard of review in the context of this appeal, Farmers has the burden of demonstrating that its "Business Pursuits" exclusion clearly and unambiguously precludes coverage. If Farmers fails to meet that

burden, the judgment of the trial court must be affirmed. *Amer. Mot. Ins. Co. v. Moore,* 970 S.W.2d 876, 878 (Mo.App. E.D 1998).

D. THE TRIAL COURT'S INTERPRETATION OF THE POLICY IS REASONABLE.

Under the trial court's interpretation, the business pursuits exclusion applies under the facts of this case only if Smith is engaged in a trade, business or profession and is also using the premises or any portion of the residence premises to practice that trade business or profession.

Farmers argues that the trial court's interpretation is not reasonable – indeed absurd – because the policy would not cover an act that occurred on the farm but would cover that same act if it occurred off the farm premises.

Apparently vexing to both Farmers and the Court of Appeals was the dual use of the word "premises" in the exclusion. The policy expressly refers to the "Farm Premises designated herein are the *only premises* which the Named Insured… owns, rents, or operates as a farm or maintains a residence, other than business property." (LF0058)(emphasis added). Despite the fact that the policy itself uses the word premises to mean only the "Farm Premises," the Southern District found that that "premises" applied to *any* and *every* premises, not just the '[insured] residence premises.'" From this false premise that Court concluded that the trial court's interpretation of the policy was unreasonable. But if "premises" means only the Farm Premises, as the policy says, and not the whole world, the exclusion applies only if two things both occur: (1) Smith is

practicing his trade, profession or occupation and (together with) (2) using the premises (which includes any part of the whole Farm Premises)(or a part of the residence premises) for such trade, profession or occupation purposes. Here the negligence occurred off the Farm Premises. By its own terms the exclusion does not apply.

There are at least three reasons Farmers' absurdity argument fails. First, it is the use of the premises upon which the definition focuses, not on the actual premises itself. Farmers ignores the use limitation and reads "premises" as a geographic limitation. Second, had Farmers intended that the exclusion should apply everywhere, it could simply have ended the definition by placing a period after occupation. In that event, had the incident arisen as a result of Smith's trade, profession or occupation, irrespective of whether it occurred on his premises or elsewhere, it would have been excluded. Third, personal liability coverage provided under an all-risk policy often covers off-premises events.

An interpretation is not absurd because the drafter doesn't like the result its poor drafting produces. Something is "absurd" only if it is "ridiculously unreasonable" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, Merriam-Webster, 2002. It is not ridiculously unreasonable for a policy to apply as the trial court's interpretation would apply it. And where an interpretation is supported by reference to common grammar texts, it is a reasonable interpretation. *Schenewerk v. Mid Century Ins. Co.*, 263 S.W.3d 660 (Mo. App. E.D. 2008).

E. THE INTENT OF THE PARTIES

Insurance contracts are not negotiated and intent is generally derived from the words used in drafting. *Ward v.Gregory*, 305 S.W.2d 499 (Mo. Ct. App. 1957). It is for this reason that Missouri law traditionally looks at the language used by the insurer in determining both ambiguity and intent. Farmers prefers to look elsewhere for intent, to an affidavit signed by Smith that shares the drafting ambiguities of the policy language.

Farmers argues that the Court need not resort to the rules of construction because the record proves that neither Farmers nor Smith intended for the policy to provide coverage for Burns's injuries. That Farmers does not want to pay this (or likely any other) claim can be taken as a given. Smith's intentions, however are far less clear. Indeed, his acts and his affidavit, carefully read, indicate that he believed he did have coverage under this Farmers policy for the harm he did to Eric Burns.

The best place to begin is with the case that Farmers cites to support its argument.

> It is a well-established rule of law that the construction placed upon a contract by the parties as evidence by **acts, conduct, or declarations** indicating a mutual intent and understanding will be adopted by the courts where the language of a contract is ambiguous and there is reasonable doubt as to its meaning….

State ex rel Northwestern Mut. Ins. Co. v. Bland, 189 S.W.2d 541, 549 (Mo. banc 1945)(emphasis added) App.Br.24. Farmers highlighted the word "declarations" but

not “acts” and “conduct” in its brief. Nor does Farmers Statement of Facts or its brief inform the Court of Smith’s acts and conduct. On May 24, 2002, long before he executed an affidavit provided for him by this insurer to sign, Lynn Smith sought coverage under the same policy he now suggests he did not intend to afford him coverage for “my separate business pursuit *of Kennon Redi-Mix, Inc.*" (LF0391-93). His personal attorney demanded that Farmers Alliance, which had offered to defend under a reservation of rights, withdraw its reservation of rights and afford Mr. Smith a full defense and full coverage under the terms of his policy. (LF391).

At the time that Mr. Smith, made this demand through his attorney, he was fully exposed for significant personal liability in the lawsuit filed by Burns. It may be inferred that Smith instructed his lawyer to make the demand, the lawyer did so, and as a result, Farmers abandoned the defense that it was providing him. (LF0394) Later, prior to trial, Smith executed a 537.065 agreement. (LF0376-379). At that point, Mr. Smith was no longer personally liable for any damages. And then, after the case resulted in a judgment against him (but effectively against only his insurers), and without any personal risk in the matter, Smith executed the Farmers-drafted affidavit suggesting his intent was not to obtain coverage for his “business pursuits.” (LF0145).

In this regard Smith’s acts and conduct, while he was personally at risk, are the best indicators of what Smith’s intent truly was in purchasing the insurance. At the time he made the demand for coverage, and before he absolved himself of any personal liability through an agreement with Burns, he believed the policy provided coverage.

Nevertheless the Appellant suggests that even though he had "no skin in the game," (App. Br. at 25) his representations in the affidavit prepared for him by insurance counsel should still be accorded the status of inviolable truth. Appellant reasons that this affidavit, signed in Cedar County but obviously prepared in Greene County,[3] should have been dispositive with the trial court on the issue of intent. But should it?

Were Smith's affidavit to be given the legal effect Farmers assigns to it, it would amount to an admission that he made a false and/or frivolous claim for defense under the policy when his counsel made the demand for coverage. (LF0393). Thus not only would the trial court have been within the bounds of its considerable discretion to have disregarded the affidavit on the basis of the prior acts of the affiant, it likewise might have wondered how such an admission could do anything but damage the affiant's credibility on other matters.

But there may be a wiley consistency in Smith's affidavit and his acts demanding coverage. He likely signed this affidavit because he understood the difference between coverage purchased for *business* liability and coverage purchased for his *personal* liability even if Farmers does not. The affidavit recognized that Smith did not believe the Farmers policy covered his business's liability. But Smith's demand to Farmers early in the case that it defend and cover his *personal* liability is consistent with the coverage he

[3] Note that the jurat shows that the affidavit was taken in Greene County (the location of Farmers insurance counsel), but the notarial seal shows that it was signed in Cedar County. (LF0145).

purchased from Farmers. Thus, Smith's affidavit does not speak to his intention in regard to his personal liability—although the Farmers policy extends coverage for such personal liability unless excluded.

If this Court credits the observations in *Bland*, and also credits Farmers' interpretation of its poorly worded affidavit for Smith, then it is apparent that the acts and conduct of the insured in seeking coverage when he had a risk of personal liability, and not his post-537.065 agreement, post-judgment affidavit suggesting he didn't want any coverage that should be given credit. As Judge Wolff has noted, the law usually does not condone recantations. *State ex rel. Amrine v. Roper* 102 S.W.3d 541, 549 (Mo.,2003)(Wolff, J., concurring).

F. WHERE THE INTENT OF THE PARTIES IS NOT CLEAR, THE RULE OF *CONTRA PROFERENTEM* REQUIRES THAT COVERAGE BE PROVIDED.

Farmers argues that the rule of *contra proferentem* does not apply because the parties' intent as to the policy is clear. As has been shown, Farmers' reliance on Smith's ambiguous affidavit necessarily ignores Smith's acts, which contradict the affidavit. Farmers has no argument to defeat application of *contra proferentem* where the intent of the parties is not clear.

Schenewerk v. Mid-Century Ins. Co. 263 S.W.3d 660, 664 -665 (Mo.App. E.D. 2008) applies the rule without identifying by name.

> After reviewing the authoritative texts on word usage, we recognize the plausibility of the arguments raised by both parties based upon their interpretations of what portion of the clause "only" is intended to modify. Since we find both arguments viable, and have found scholarly sources which indicate both uses are correct, we find the policy can be subject to more than one reasonable interpretation. As such, we find the policy language ambiguous, and therefore, must resolve that ambiguity in favor of Kohler.

Id.

Contra proferentem finds its policy justification in the unequal bargaining position of the insurance company and the insured, as previously discussed. That reality results in the law requiring the insurer to prove that an exclusion unambiguously precludes coverage in order to prevail, *Amer. Mot. Ins. Co. v. Moore*, 970 S.W.2d 876, 878 (Mo.App. E.D 1998). If the exclusion is ambiguous, then the insurer cannot meet its burden of proof to show that it unambiguously excludes coverage, and summary judgment against it is therefore proper.

Courts employ the rule of *contra proferentem* to construe an exclusion *strictly against* the insurer. *Sexton v. Omaha Property and Casualty Ins. Co*., 231 S.W.3d 844, 848 (Mo.App. S.D. 2007), quoting *Killian v. State Farm Fire & Cas. Co*., 903 S.W.2d 215, 217 (Mo.App. 1995). The drafter of the provision is always in the better position to make its provisions clear and unambiguous. *Seeck*, 212 S.W.3d at 134. Indeed, the last time this Court had the issue of insurance ambiguity before it, in *Seeck*, the key issue

before the Court was whether the Geico policy was ambiguous. The Court held that where the "policy language is ambiguous, this Court was clear that it **must be construed against the insurer**." *Seeck* 212 S.W.3d at 132 (emphasis supplied). *See also*, *Gulf Ins. Co.,* 936 S.W.2d at 814.

Thus *contra preferentum* simply expresses the decades-long rule of construing exclusions strictly. The trial court applied the rule correctly.

G. FARMERS' CASE LAW IS DISTINGUISHABLE

Farmers does not want this Court to follow the case law of Missouri in this matter, preferring cases from Louisiana, Ohio and New Hampshire. Out-of-state appellate decisions are not controlling precedent in Missouri courts. *Craft v. Philip Morris Companies, Inc.,* 190 S.W.3d 368, 380 (Mo.App. E.D.2005). *Schenewerk,* 263 S.W.3d at 664. The cases cited by Farmers are, in any event, readily distinguishable.

First, Farmers invites the Court to apply rules adopted in a civil law jurisdiction that are different than the rules Missouri courts have adopted through the common law over the decades. *Donovan v. Nettles*, 327 So.2d 433 (La. App. 1976) is a Louisiana case. The opinion is silent on whether insurance policies are read broadly and exclusions interpreted narrowly, as is the rule in Missouri.

The rule in Missouri is that courts do not rewrite insurance policies and instead interpret them according to the words used. *Gabel v. Bird*, 422 S.W.3d 341 (Mo. banc 1967); *Kertz v. State Farm Mut. Auto Ins. Co*., 236 S.W.3d 39 (Mo. App. E.D. 2007); *Leventhal v. Trustmark Ins. Co*., 39 S.W.3d 46, 50, (Mo. App. E.D. 2001). But there is

apparently no such rule in Louisiana because the court rewrites the policy as shown:

> Taking the intended meaning of the definition first, it seems clear that the word 'and' in the definition was intended to have the meaning of the disjunctive 'or.' These homeowners policies combine such coverages as fire insurance which are directly related to the homes of the insureds with other coverages against risks arising away from homes, but their primary function is to provide a package of coverage for the insured in his homeowner capacity.

Id. at 435. No dictionary defining words as commonly used permits "and" to become "or."

The other case advanced by Farmers, *Concord General Mut. Ins. Co. v. McCarty*, 604 A.2d 573 (N.H. 1992), is equally indistinct in its application of law and analysis. Like *Donovan*, it fails to lead with any cognizable standard of review, and does not articulate a policy like Missouri's requiring the policy be interpreted to afford coverage[4].

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[4] New Hampshire applies standard contract interpretation rules to insurance contracts, unlike Missouri. The interpretation of the language of an insurance policy is a question of law. *High Country Assocs. v. N.H. Ins. Co.*, 139 N.H. 39, 41, 648 A.2d 474 (1994). New Hampshire courts "take the plain and ordinary meaning of the policy's words in context, and we construe the terms of the policy as would a reasonable person in the position of the insured based upon more than a casual reading of the policy as a whole." *Id.* …An insurance company is free to limit its liability through clear and

While stating the general rules regarding ambiguity and the interpretation of the reasonable person, *Id*. at 574-75, the court's opinion simply concludes that it fails "to see how a 'reasonable person in the position of the insured' could reach this conclusion." *Id*. at 575.

Appellant also cites *Latter v. Century Grill, Inc*., 1976 WL 190712 (Ohio App.), an unreported Ohio intermediate appellate court decision that does not disclose whether Ohio views insurance contracts as consumer-based contracts designed to afford coverage and offers no clue as to what analytical process resulted in the decision it announces. Instead, *Latter* states its holding as an *ipse dixit*: "It is clear that this definition does not contain the limitation which appellant suggests." Like *Donovan* and *Concord*, it does not cite to relevant authority, and does not disclose any legal basis for the ruling[5].

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unambiguous policy language. *Ross v. Home Ins. Co.*, 146 N.H. 468, 471, 773 A.2d 654 (2001). *Preferred Nat. Ins. Co. v. Docusource, Inc*. 149 N.H. 759, 763, 829 A.2d 1068, 1072 (N.H. 2003)

[5] Like New Hampshire and Louisiana, Ohio applies standard contract interpretation principles to insurance contract interpretations. "[I]nsurance contracts must be construed in accordance with the same rules as other written contracts." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102 (1992).

Of these rules, the most critical rule is when the intent of the parties is evident, *i.e.*, "if the language of the policy's provisions is clear and unambiguous, this court may not 'resort to construction of that language.' " *Id.*, quoting *Karabin v. State Auto. Mut. Ins.*

Ohio, New Hampshire and Louisiana have different rules, and do not interpret policy provisions broadly and exclusions narrowly. The cited cases can be distinguished on the legal standards that apply.

Farmers also cites three Missouri cases, *Ex parte Lockhart*, 171 S.W.2d 660, 666 (Mo. banc 1943); *City of St. Louis v. Consolidated Prods Co.*, 185 S.W.2d 344, 343 (Mo.App. E.D. 1945); and *United States v. Gomes Hernandez*, 300 F.3d 974, 978 (8th Cir 2002). Farmers contends that these cases support its argument that Farmers should be allowed to rewrite its exclusion's definition, substituting "or" for "and". (App. Br. at 19).

None of these cases involves the interpretation of an insurance policy exclusion, None stands for the proposition that "or" can be substituted for "and" in insurance contracts. Rather, the cases deal only with attempting to determine: (1) the 'intent' of city aldermen when drafting city ordinances in the early 1940's (*Ex parte Lockhart* 171 S.W.2d at 665, and *City of St. Louis v. Consolidated Prods Co*. 185 S.W.2d 345); and (2) the 'intent' of the United States Sentencing Commission when it drafted a definition of 'crimes of violence', as that definition would be applied to a criminal defendant's prior California conviction for unlawful sexual intercourse with a minor (*Gomez Hernandez*, 300 F.3d at 978-979).

Co., 10 Ohio St.3d 163, 167, 10 OBR 497, 499, 462 N.E.2d 403, 406. (1984) *LISN, Inc. v. Commercial Union Ins. Cos.* 83 Ohio App.3d 625, 629, 615 N.E.2d 650, 653 (Ohio App. 9 Dist.,1992)

Indeed, *Gomez* held not only that "and" is "usually a conjunctive", it further conceded that its search was strictly to determine the Sentencing Commission's intent, "not for perfect drafting." *Id.* This is a far cry from the proper analysis required of an *insurance* policy exclusion under Missouri law – and that is the issue in this appeal, The Court's task here is to determine whether the definition of "Business", *as written* by Farmers, "clearly and unambiguously" precludes coverage, and if it does not, to construe the policy in favor of coverage. *Seeck*, 212 S.W.3d at 132; 134.

H. CONCLUSION

The insurer wrote a definition of business. It had within its power to make that definition clear. Had it wished to exclude all business activities anywhere in the world, it had only to stop writing with the word "occupation." Instead of making it that simple, clear, and direct definition, it added a clause that restricted the exclusion to "the use of any premises or portion of residence premises for any such purposes." (LF66). It now calls this language "clarifying language." This is a triumph of hope over reality.

The exclusion is ambiguous, and where an exclusion is ambiguous, it does not defeat coverage. *Harrison*, 956 S.W.2d 268. *Seeck* , 212 S.W.3d 132.

This Court should affirm the judgment of the trial court.

II. THE TRIAL COURT DID NOT ERR IN CALCULATING PRE-JUDGMENT AND POST-JUDGMENT INTEREST BASED UPON THE ENTIRE AMOUNT OF THE UNDERLYING JUDGMENT AGAINST APPELLANT'S INSURED, WHERE APPELLANT INSURANCE COMPANY NEVER PAID, OFFERED TO PAY, TENDERED, OR DEPOSITED IN COURT ITS LIABILITY LIMITS OF COVERAGE AS REQUIRED BY ITS POLICY'S "SUPPLEMENTARY PAYMENTS" PROVISIONS TO HALT THE ACCRUAL OF PRE-AND POST-JUDGMENT INTEREST; AND BECAUSE WHERE APPELLANT INSURANCE COMPANY WITHDREW FROM THE DEFENSE OF ITS INSURED, IT WAIVED ITS RIGHT TO ARGUE THAT IT IS NOT LIABLE FOR PRE-AND POST-JUDGMENT INTEREST CALCULATED ON THE ENTIRE AMOUNT OF THE UNDERLYING JUDGMENT; AND WHERE APPELLANT FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUES OF THE PROPER AMOUNTS OF PRE- AND POST-JUDGMENT INTEREST DUE, THE ISSUES HAVE BEEN WAIVED.

A. This Point is Not Preserved for Appellate Review

In responding to the Motion for Summary Judgment in this case, Farmers never contested the amount of the prejudgment interest. They did not raise their objections about the amount until after the Trial Court had ruled on the Motion for Summary Judgment. It is a fundamental principle of law that one in possession of a right, conferred

by law or contract, and *who has full knowledge of material facts* who does, or *fails to do,* something which is inconsistent with the existence of his right or of his intention to rely upon same, waives such right and is precluded from claiming anything by reason of it afterwards. *Eveloff v. Cram,* 236 Mo.App. 1013, 161 S.W.2d 36, 39 (1942). *Sheehan v. Northwestern Mut. Life Ins. Co*., 103 S.W.3d 121, 129 (Mo.App. E.D. 2002) (failure to raise issue in response to summary judgment motion is consistent only with waiver). With only rare exceptions, an appellate court will not convict a trial court of error on an issue that was never presented to the trial court for its consideration *Guzzardo v. City Group, Inc*., 910 S.W.2d 314, 317 (Mo.App. E.D. 1995). *McMahan v. Missouri Dept. of Social Services, Div. of Child Support Enforcement,* 980 S.W.2d 120, 126 -127 (Mo.App. E.D. 1998). Should the court wish to conduct *ex gratia* review, Appellant's claim still fails.

B. Standard of Review

Because Farmers in Point II seeks an interpretation of its pre-and post-judgment interest provisions which will "cut down, restrict or limit coverage already granted", (See *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210-211 (Mo. banc 1992)), the applicable standard of review and rules which govern the interpretation of insurance policies in Missouri are the same as that stated under Point I of Respondent's Brief.

C. Rules Governing The Interpretation Of Insurance Provisions Which Cut Down, Restrict Or Limit Coverage Already Granted Are The Same As Those Which Apply To The Interpretation Of Insurance Policy Exclusion In Missouri

Respondent's discussion of the rules governing policy exclusions set out in Point I are further incorporated into this point. See, e.g., *American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876, 878 (Mo.App. E.D. 1998); *Sexton v. Omaha Prop. and Cas. Ins. Co*., 231 S.W.3d 844, 848 (Mo.App. S.D. 2007); *Gibbs v. National Gen. Ins. Co.*, 938 S.W.2d 600, 605 (Mo.App. S.D. 1997) (Coverage clauses are read broadly, while exclusions read narrowly, to afford the greatest possible coverage).

As noted *supra*, these principles of Missouri law recognize that insurance is provided to *furnish* protection for the purchaser of such personal liability insurance, not to defeat it. *Weathers v. Royal Indem. Co*., 577 S.W.2d 623, 626 (Mo. banc 1979).

D. Special Rules Apply When An Insurer Refuses to Defend Its Insured And Is Found Liable For Pre- And Post-Judgment Interest

With respect to the issue of the calculation of pre- and post-judgment interest, there are special rules which apply because Farmers refused to defend its insured after its insured rejected Farmers' reservation of rights defense in the underlying case. (LF0391-392, 394, 404, 407-408).

As explained by the Court in *Versaw v. Versaw*, 202 S.W.3d 638, 651 (Mo.App. S.D. 2006):

> When issues arise on whether a claim is covered by a policy, an insurer's decision to defend only under a reservation of rights is a risky one. In part this stems from the fact that insurers cannot force their insureds to accept a reservation of rights defense. To explain, if the insured rejects the conditional defense and the insurer stands by its decision of no coverage, it (the insurer) loses control of the litigation.

Id. (internal quotations and citations omitted). This results in a "loss of control" risk for the insurer who opts not to defend its insured.

Once an insured exercises his right to reject the insurer's conditional offer to defend under a reservation of rights, the insurer is left with three options:

(1) it can choose to represent its insured without the reservation of right thus fulfilling its contractual obligation to defend; or

(2) it can withdraw from representing its insured altogether; or

(3) it can file a declaratory judgment action to obtain a ruling as to the scope of the policy's coverage. *Versaw* 202 S.W.2d at 651.

If the insurer chooses option (2) and withdraws from representing its insured altogether, it is bound by its decision and the consequences which follow. *Id*. at 651-652. Where the insurer has erred in its assessment of the coverage issues, its refusal to defend its insured is seen as unjustified and as a breach of its contractual obligations to its insured *Id. citing Miller v. Secura Ins. and Mut. Co. of Wisconsin*, 53 S.W.3d 152, 155 (Mo.App. W.D. 2001), rendering it liable for damages for that breach, including payment of interest under the insurance policy's "Supplemental Payments" coverage, calculated

on the *entire* amount of the underlying judgment rendered against its insured in its absence, rather than interest calculated simply on the limits of the insurer's liability coverage, where the insurer has never paid, offered to pay, tendered, nor deposited in court its liability limits as required by its pre- and post-judgment interest provisions in order to stop the accrual of such interest. *Id.* at 652. This is so because where coverage exists, it is a suit which the insurer should have defended. *Id.* (citing *Miller* 53 S.W.3d at 156) *accord*, *Sexton v. Omaha Prop. and Cas. Ins. Co.*, 231 S.W.3d 844, 849 (Mo.App. S.D. 2007).

More importantly, specifically with regard to an insurer's liability for *both* pre- and post-judgment interest under "Supplementary Payments" provisions identical to Farmers in this appeal, where an insurer refuses to defend its insured it waives its right to argue that it is not liable for both pre- and post-judgment interest based upon the entire amount of the underlying judgment rendered against its insured in its absence. *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297, 305-306 (Mo.App. E.D. 2007).

Ennulat reaffirms both principles that:

1. Where an insurer refuses to defend its insured and its insured is thereby subjected to a judgment in excess of the insurer's limits of liability, the insurer's liability for both pre- and post-judgment interest is calculated on the entire amount of the underlying judgment rendered against the insured, not simply the lesser amount of the policy's liability limits; and

2. Where an insurer refuses to defend its insured, both pre- and post-judgment interest continue to accrue on the entire amount of the underlying excess judgment, not

simply on the lesser amount of the policy's liability limits, until the insurer pays, offers to pay, tenders or deposits in court its applicable limits of liability. *Ennulat* 231 S.W.3d at 305-307.

Based upon the undisputed facts in this case, Farmers' "Supplemental Payments" pre- and post-judgment interest provisions, and the above controlling Missouri precedents, the Trial Court's calculation of both pre- and post-judgment interest should be affirmed.

1. Pre-Judgment Interest

Farmers' policy contained a limit of $1,000,000.00 in personal liability coverage for its insured (LF0056). The policy also contained an "Amendatory Endorsement – Prejudgment Interest", whereby the policy's "Supplemental Payments" coverage was amended to include coverage without limitation for prejudgment interest awarded against Farmers' insured. (LF0109). The complete prejudgment interest provision consists of *two* sentences and provides:

"The Company will pay, in addition to the applicable limit of liability, prejudgment interest awarded against the insured on that part of the judgment the Company pays. *If the Company makes an offer to pay the applicable limits of its liability, the Company will not pay any prejudgment interest based on that period of time after the offer."* (LF0109)

The fact that Farmers has failed to include in its Brief (App. Br. at 33) the second, italicized sentence of its prejudgment interest provision speaks volumes about the deep concern Farmers has over the implausibility of the position it has taken in this appeal.

Farmers knows very well that such a second sentence in a pre- or post-judgment interest provision giving the insurer the right to pay or offer to pay its limits of liability serves only to limit the duration of the insurer's liability for pre-judgment interest (i.e. pre-judgment interest continues to accrue until such time as Farmers "makes an offer to pay the applicable limits of its liability", which it has never done (LF0407-408)), not with how the amount of interest is calculated. *Miller v. Secura Ins. and Mut. Co. of Wisconsin*, 53 S.W.3d 152, 157 (Mo.App. W.D. 2001). Although the pre-judgment interest provision at issue in *Miller* consisted of only the first sentence of the Farmers' pre-judgment interest provision at issue in this case, it is the second sentence of the Farmers pre-judgment interest provision (and of *Secura's* post-judgment interest provision), stating that the insurer will not be responsible for further pre- or post-judgment interest after it makes an offer to pay its liability limits, which under the *Miller* decision obligates Farmers for pre-judgment interest up until such time as it "makes an offer to pay the applicable limit of its liability".

Farmers' argument that it should have to pay pre-judgment interest only on its policy limit of $1,000,000.00 (which it still has refused to offer) rather than on the entire underlying Judgment of $2,044,278.00, is the same argument made by Secura in *Miller*. This would result in an interpretation of the policy putting these insurers in a better position by breaching their obligations to their insureds by not defending them than had they met their obligations to their insureds. As held in *Miller*, this would be an untenable result. *Miller*, 53 S.W.3d at 155.

Further, this is a case where Farmers refused to make any offer whatsoever in response to Plaintiff's offer to settle the claim against its insured within the policy limits (LF0387). Then, after Farmers had hired counsel (Len Frischer) to defend its insured under a reservation of rights, Farmers' insured's personal counsel (John Kemppainen) reviewed the policy and on May 4, 2002, demanded that Farmers withdraw its reservation of rights and provide its insured with a full defense and full coverage under the terms of its policy. (LF0391-392).

Three months later Farmers' insured received Farmers' response to his refusal to accept Farmers' defense under a reservation of rights – Farmers' counsel withdrew from defending Farmers' insured (LF0394). Farmers was notified of, but did not participate in, the pre-trial mediation (LF0404). Farmers did not participate in either the trial or the appeal of the underlying case (SLF0199). Farmers refused Plaintiff's suggestion that it pay its $1,000,000.00 limit of liability to halt the accumulation of post-judgment interest pursuant to the "Supplemental Payments" coverage of the policy (LF0407-408). Most recently Farmers reaffirmed that its insured had indeed rejected Farmers' offer to defend under a reservations of rights (SLF0209-210).

Farmers refused to participate on its insured's behalf during the underlying proceedings, including those during which the Trial Court heard evidence and calculated **prejudgment interest** of $673,437.52, based upon the entire underlying Judgment of $2,044,278.00 rendered against Farmers' insured in Farmers' absence.

Therefore, under Missouri law and in light of the undisputed facts of this case, where Farmers' insured rejected Farmers' offer of a reservation of rights defense, and

Farmers thereafter refused to defend its insured and withdrew from his defense resulting in an excess Judgment against Farmers' insured, Farmers' is liable for pre-judgment interest in the amount of $673,437.52, as properly calculated by the Trial Court in the underlying case on the entire amount of the underlying Judgment of $2,044,278.00, and as properly awarded by the subsequent Trial Court in its Judgment in this garnishment action (LF0329, 348). The properly calculated pre-judgment interest award of $673,437.52 should, therefore, be affirmed.

Farmers' citation to *Levin v. State Farm Mut. Auto. Ins. Co.*, 510 S.W.2d 455, 461 (Mo. banc 1974) does not aid Farmers' position for two reasons. First, the insurer in *Levin* had offered its limits of liability, which thereby stopped the accrual of post-judgment interest, where here Farmers still has never done so. Second, *Levin* simply reaffirmed the principle that interest is to be calculated on the *entire* amount of an underlying judgment until the insurer offers its limits of liability. *Levin*, 510 S.W.2d at 461.

These principles were unequivocally extended to apply similarly to pre-judgment interest in *Ennulat*, 231 S.W.3d at 306-307. Of course, *Ennulat* also confirmed that an insurer in Farmers' position which has refused to defend its insured has now waived its right to argue that it is not liable for both pre- and post-judgment interest calculated on the *entire* amount of the underlying judgment. *Ennulat*, 231 S.W.3d at 306. "Hence, Auto-Owners' decision to defend Defendants only under a reservation of rights constitutes a refusal to defend. Accordingly, Auto-Owners waived its right to argue that it is not liable for pre- and post-judgment interest because it did not control the defense of

the lawsuit and is liable for pre- and post-judgment interest on the $2.4 million judgment." *Id.* (emphasis added) (the entire, excess underlying judgment in *Ennulat* was $2.4 million whereas the policy limits were only $1 million).

Finally, Farmers argues that *Miller v. Secura* supports its position by incorrectly representing to this Court that *Miller* involved a pre-judgment interest provision "identical" to the Farmers' provision at issue in this case. In making this representation to the Court, Farmers continues to pretend that the second sentence of its pre-judgment interest provision does not exist. It does indeed exist (LF0109), and where, as here, Farmers breached its contractual duties to its insured, it is liable for pre-judgment interest calculated on the *entire* amount of the underlying Judgment of $2,044,278.00, for a total of $673,437.52 in pre-judgment interest. See *Miller* 959 S.W.2d at 157; *Ennulat*, 231 S.W.3d at 305-306.

2. Post-Judgment Interest

Respondent acknowledges Appellant's concession that Farmers indeed owes post-judgment interest on the *entire* amount of Plaintiff's underlying Judgment against its insured (Appellant's Brief, p. 37). However, in seeking a reduction of the amount of post-judgment interest owed, Appellant seems committed to its course of ignoring relevant portions of policy provisions, misstating the applicable Missouri rules of law governing the issues in this appeal (those governing insurance policy exclusions rather than ambiguities in contracts in general), and once again in this section of its brief being overly generous with the holdings of cases it cites as authority for the proposition that the amount of post-judgment interest must be reduced.

First, Appellant cites *Ennulat*, 231 S.W.3d at 307 for the proposition that Farmers is obligated to pay post-judgment interest only on any "unsatisfied" judgment (App. Br. at 34). Appellant stated the *Ennulat* holding at p. 307 as "post-judgment interest accrues only to the extent, and during the time when, the judgment is unpaid" (App. Br. at 34). In fact, *Ennulat* at p. 307 says nothing at all about post-judgment interest on "unsatisfied" judgments, nor does it say that interest accrues "only to the extent, and during the time when, the judgment is unpaid".

What *Ennulat* actually says is, "[insurer] is liable for post-judgment interest on the full amount of the judgment, even if the judgment exceeds the policy limits, but only until such time as IT [here Farmers] pays the policy limits". *Ennulat* 231 S.W.3d at 307 (emphasis added).

Appellant implies to this Court that *Misemer v. Freda's Restaurant Inc*., 961 S.W.2d 120, 123 (Mo.App. S.D. 1998) stands for the proposition that Farmers is entitled to a reduction of its obligation for post-judgment interest because of a "particular payment on principal" as held in *Misemer*. As the Court can plainly see, *Misemer* did not involve a post-judgment payment in satisfaction of a judgment, but rather a simple partial payment on a note, before judgment, which obviously reduced the amount due in the subsequent judgment. *Misemer*, 961 S.W.2d at 123. Neither of the remaining two cases cited by Appellant, *McCormack v. Stewart Enterp., Inc*., 956 S.W.2d 310, 314 (Mo.App. 1997), nor *In re Marriage of Overhulser*, 962 S.W.2d 951 (Mo.App. E.D. 1998), even addresses statutory post-judgment interest, nor post-judgment interest "Supplemental

Payments" provisions in personal liability insurance policies and, therefore, likewise offer no support for Appellant's point on appeal.

Where a party cites no legal authority in support of its position on appeal, it is not entitled to the relief sought based upon such asserted position. "A point of error unsupported by a citation of relevant authority is deemed abandoned." *Inman v. Reorganized School Dist. No. II*, 845 S.W.2d 688, 694 [6] (Mo.App.1993); *Harris v. Parman*, 54 S.W.3d 679, 686 (Mo.App. S.D. 2001). Such is the case with Appellant's Point II, and therefore the relief requested therein should be denied. *Id.* at 694.

As pointed out to the Trial Court, Respondent and Farmers' insured had contractually agreed that Respondent would file a Satisfaction of Judgment only when such Judgment was satisfied by payment or settlement; and specifically reserved all pending claims against Farmers Alliance (Appellant herein), which reserved claims included Respondent's claims for pre- and post-judgment interest. (LF0377, 370).

All of the above notwithstanding, counsel for Respondent hereby represents to this Court that if the Court is satisfied that, even after denying coverage to its insured, after withdrawing from its insured's defense, after raising and then abandoning numerous alleged policy exclusions upon which it had long relied to deny its insured's personal liability coverages to Respondent who has suffered such catastrophic injuries as a result of the breach of Appellant's insured's <u>personal</u> duty of care owed to Respondent Eric Burns, Farmers Alliance Insurance Company has exhibited "hands clean enough" to be entitled to the equitable relief from this Court of reducing the award of post-judgment

interest from $733,783.17 to $676,167.00, Respondent will respect such equitable authority and decision of this Court.

CONCLUSION

This Court should enter its order affirming the trial court in all respects.

Respectfully Submitted,

_____
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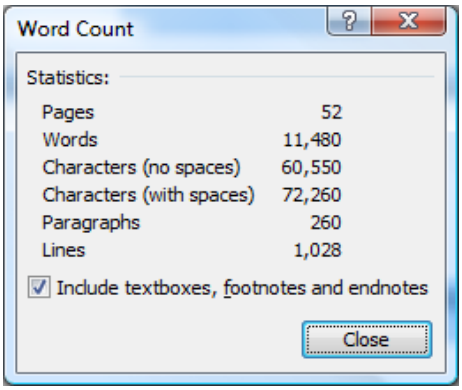
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 11,480 words. The word count was derived from Microsoft Word.



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Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that all copies required by Supreme Court Rules of Respondent's Brief were sent to counsel listed below by first-class mail, postage pre-paid, this 8th day of June, 2009:

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