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
Hon. James K. Journey

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF FACTS 2

POINTS RELIED ON.....8

STANDARD OF REVIEW 10

ARGUMENT 12

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF AND AGAINST FARMERS BECAUSE INSURANCE COVERAGE WAS BARRED BY THE "BUSINESS PURSUIT" EXCLUSION IN THE SUBJECT FARMOWNER'S LIABILITY POLICY, IN THAT PLAINTIFF'S INJURY RESULTED FROM FARMERS' INSURED SMITH'S ENGAGING IN AN EXCLUDED TRADE, PROFESSION, OR OCCUPATION OTHER THAN FARMING.....12

A. The Definition of "Business" in the Policy Is Not Ambiguous 12

B. Even if the Policy Were Ambiguous, the Clearly Ascertainable Intent of Both Parties Precludes Coverage, and *Contra Proferentem* Is Inapplicable 23

C. *Contra Proferentem* in this Case Produces an Unreasonable and Absurd Result.....27

II. THE TRIAL COURT ERRED IN ITS COMPUTATION OF INTEREST ON THE UNDERLYING JUDGMENT BECAUSE PREJUDGMENT INTEREST AND POST-JUDGMENT INTEREST WERE BOTH ERRONEOUSLY CALCULATED ON THE FULL AMOUNT OF THAT JUDGMENT, IN THAT FARMERS, UNDER ITS POLICY, WAS RESPONSIBLE FOR PREJUDGMENT INTEREST ONLY "ON THAT PART OF THE JUDGMENT" THAT IT PAYS – WHICH WOULD BE $1,000,000 – AND POST-JUDGMENT INTEREST SHOULD HAVE BEEN REDUCED TO REFLECT PLAINTIFF'S RECEIPT OF $675,000 IN PARTIAL PAYMENT OF THE JUDGMENT ON APRIL 17, 2007.. 32

A. Prejudgment Interest.....32

B. Post-Judgment Interest.....34

CONCLUSION.....36

CERTIFICATE OF COMPLIANCE.....37

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

AJM Pkg. Corp. v. Crossland Constr. Co., 962 S.W.2d 906 (Mo.App. S.D. 1998) 11

Allstate Ins. Co. v. Hallman, 159 S.W.3d 640 (Tex. 2005).....29

Alum. Prods. Enters., Inc. v. Fuhrmann Tooling & Mfg. Co., 758 S.W.2d 119 (Mo.App. E.D. 1988).....26

Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297 (Mo.App. E.D. 2007).....9, 34

Bertler v. Employers Ins. of Wausau, 271 N.W.2d 603 (Wis. 1978).....19, 29

Bishop v. Crowther, 428 N.E.2d 1021 (Ill.App. 1981) 21, 22

Black v. Fireman's Fund Am. Ins. Co., 767 P.2d 824 (Idaho App. 1989).....16

Blair v. Perry County Mut. Ins. Co., 118 S.W.3d 605 (Mo. banc 2003).....10, 13

Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007) 4

CB Commercial Real Estate Group, Inc. v. Equity P'ships Corp., 917 S.W.2d 641 (Mo.App. W.D. 1996).....27

Cannon Ball Motor Freight Lines v. Grasso, 59 S.W.2d 337 (Tex.App. 1933), aff'd, 81 S.W.2d 482 (Tex. Comm'n App. 1935) 23

Central City Ltd. P'ship v. United Postal Sav. Ass'n, 903 S.W.2d 179 (Mo.App. E.D. 1995).....12, 27

Christian v. Progressive Cas. Ins. Co., 57 S.W.3d 400 (Mo.App. S.D. 2001).....10

City of St. Louis v. Consolidated Prods. Co., 185 S.W.2d 344 (Mo.App. E.D. 1945).....19

Clampit v. Cambridge Phase II Corp., 884 S.W.2d 340 (Mo.App. E.D. 1994).....13

Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74 (Mo. banc 1998) 11

Concord General Mut. Ins. Co. v. McCarty, 604 A.2d 573 (N.H. 1992).....8, 18, 23

Donovan v. Nettles, 327 So. 2d 433 (La.App. 1976) 8, 20, 21, 22

Dwyer v. Unit Power, Inc., 965 S.W.2d 301 (Mo.App. E.D. 1998) 27

Ellis v. Jurea Apts., Inc., 875 S.W.2d 203 (Mo.App. S.D. 1994).....25

Ethridge v. TierOne Bank, 226 S.W.3d 127 (Mo. banc 2007).....12, 13

Ex parte Lockhart, 171 S.W.2d 660 (Mo. banc 1943).....19

Fimbres v. Fireman's Fund Ins. Co., 708 P.2d 756 (Ariz.App. 1985).....30

First American Ins. Co. v. Commonwealth Gen'l Ins. Co., 954 S.W.2d 460 (Mo.App. W.D. 1997).....11

Fisher v. Miceli, 291 S.W.2d 845 (Mo. 1956).....24

Frisella v. Reserve Life Ins. Co., 583 S.W.2d 728 (Mo.App. E.D. 1979).....33

Gamel v. Continental Ins. Co., 463 S.W.2d 590 (Mo.App. 1971) 33

Garner v. Hubbs, 17 S.W.3d 922 (Mo.App. S.D. 2000).....12, 13

Gavan v. Bituminous Cas. Corp.;, 242 S.W.3d 718 (Mo. banc 2008) 13

Goldstein & Price v. Tonkin & Mondl, L.C., 974 S.W.2d 543 (Mo.App. E.D. 1998).....27

In re Marriage of Overhulser, 962 S.W.2d 951 (Mo.App. E.D. 1998).....35

Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 421 N.W.2d 355 (Minn.App. 1988) 19

J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261 (Mo. banc 1973).....13

Johnston v. Sweany, 68 S.W.3d 398 (Mo. banc 2002).....10

LaBarge v. LaBarge, 681 S.W.2d 441 (Mo. banc 1984).....24

Larson v. McCormack, 2 N.E.2d 974 (Ill.App. 1935).....24

Latter v. Century Grill, Inc., 1976 WL. 190712 (Ohio App. 1976) 18, 23

Levin v. State Farm Mut. Auto. Ins. Co., 510 S.W.2d 455 (Mo. banc 1974) 9, 33

Maschoff v. Koedding, 439 S.W.2d 234 (Mo.App. 1969).....25

McCormack v. Stewart Enters., Inc., 956 S.W.2d 310 (Mo.App. W.D. 1997)...9, 35

Miller v. Kamo Elec. Coop., Inc., 351 S.W.2d 38 (Mo.App. W.D. 1962).....13

Miller v. O'Brien, 168 S.W.3d 109 (Mo.App. W.D. 2005).....11

Miller v. Secura Ins. & Mut. Co., 53 S.W.3d 152 (Mo.App. W.D. 2001) 9, 34

Millers Mut. Ins. Ass'n v. Shell Oil Co., 959 S.W.2d 864 (Mo.App. E.D. 1997).....10

Misemer v. Freda's Rest. Inc., 961 S.W.2d 120 (Mo.App. S.D. 1998) 34

Mo. Consol. Healthcare Plan v. BlueCross BlueShield, 985 S.W.2d 903 (Mo.App. W.D. 1999).....26

Modine Mfg. Co. v. Carlock, 510 S.W.2d 462 (Mo. 1974) 24

Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300 (Mo. banc 1993).....10

Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896 (Mo. banc 1990).....8, 10

Pierce v. Business Men's Assur. Co., 333 S.W.2d 97 (Mo. 1960) 10

Rathbun v. CATO Corp., 93 S.W.3d 771 (Mo.App. S.D. 2002).....13

Rodriguez v. Gen'l Acc. Ins. Co., 808 S.W.2d 379 (Mo. banc 1991) 11, 13

Rouggly v. Whitman, 592 S.W.2d 516 (Mo.App. E.D. 1979) 26

Seeck v. Geico Gen'l Ins. Co., 212 S.W.3d 129 (Mo. banc 2007) 10

Shell v. Shell, 658 S.W.2d 439 (Mo.App. W.D. 1982) 24

Silver Dollar City, Inc. v. Kitsmiller Constr. Co., 931 S.W.2d 909 (Mo.App. S.D. 1996) 12

Southern Guaranty Ins. Co. v. Duncan, 206 S.E.2d 672 (Ga.App. 1974) 19

State ex rel Northwestern Mut. Life Ins. Co. v. Bland, 189 S.W.2d 541 (Mo. banc 1945).....24

State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W.3d 833 (Mo.App. E.D. 2000) 8, 10, 24, 26, 27

Todd v. Missouri United Sch. Ins. Council, 223 S.W.3d 156 (Mo. banc 2007).....11, 12

Tri-Lakes Newspapers, Inc. v. Logan, 713 S.W.2d 891 (Mo.App. S.D. 1986) 24

Triarch Indus., Inc. v. Crabtree, 158 S.W.3d 772 (Mo. banc 2005).....13

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002) 19

Wilson v. Traders Ins. Co., 98 S.W.3d 608 (Mo.App. S.D. 2003).....10

Miscellaneous

2 Couch on Insurance 3d §22:17 (2005).....27

9A Couch 3d §128:12 29

9A Couch 3d §128:31 28

11 Williston on Contracts §32:12 (4th ed. 1999).....25

Black's Law Dictionary, p. 112 (rev. 4th ed. 1968).....16

Webster's New World College Dictionary, p. 51 (3d ed. 1996).....16

Webster's Third New International Dictionary, p. 80 (1993).....16

JURISDICTIONAL STATEMENT

The trial court's judgment against Farmers, as garnishee, was entered on March 4, 2008 (L.F. 348; Apdx. A-1). Farmers filed timely post-trial motions seeking reconsideration and alteration and amendment of the judgment on April 2, 2008 (L.F. 355, 363, 413). Those motions were overruled on June 30, 2008 (L.F. 18). Farmers filed its Notice of Appeal on July 8, 2008 (L.F. 417).

The Missouri Court of Appeals, Southern District, filed its opinion and judgment on February 17, 2009, reversing the judgment of the trial court. Respondent's motion for rehearing or transfer to this Court was denied on March 11. This Court sustained Respondent's application for transfer on May 5.

STATEMENT OF FACTS

This is an equitable garnishment proceeding arising out of the underlying action in which the plaintiff Eric Burns recovered a judgment of $2,717,715 against defendant Lynn Smith for personal injuries suffered as an employee of Kennon Redi-Mix, Inc., of El Dorado Springs, Missouri, a company wholly-owned by Smith (L.F. 138, 186). The relevant facts are essentially undisputed.

During the period in question, Smith was insured by Garnishee Farmers Alliance Mutual Insurance Co. ("Farmers") under Farmowners-Ranchowners Policy No. AR520691, which covered his dwelling, household property, and farm premises in Cedar County, Missouri, as well as providing $1,000,000 in personal liability coverage (L.F. 56). The policy contained the standard exclusion for "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" (L.F. 83). "Business" was defined to mean (1) "a trade, profession or occupation, excluding farming, and the use of any premises or portion of residence premises for any such purpose; and (2) the rental or holding for rental of the whole or any portion of the premises by any Insured" (L.F. 66).

The Underlying Case

Sometime before April 7, 2000, defendant Smith, as part of his duties as an employee of Kennon Redi-Mix, performed a welding operation on a salvage water-

pressure tank on a cement truck owned by Kennon (L.F. 49). The weld was placed on an area of the tank that had become corroded and rusted through. On April 7, 2000, plaintiff Burns, a truck-driver for Kennon, was seriously injured when the water-pressure tank exploded. (Id.) Burns was not an employee of Smith's farm, and both the welding by Smith and the rupture of the water-pressure tank occurred away from the farm premises covered by Smith's farmowner's policy (L.F. 139, 249, 338).

In 2002, Burns filed this suit against Smith, charging him with negligence in the welding of the water-pressure tank and seeking to avoid the exclusive jurisdiction of the Labor and Industrial Relations Commission by contending that Smith's actions were so egregious as to take him out of the protection afforded by workers' compensation. Kennon was not joined as a defendant, and Burns ultimately collected $151,459 through workers' compensation against Kennon (L.F. 397).

On April 27, 2004, Burns and Smith entered into an agreement under §537.065 RSMo in which they agreed to waive a jury trial and plaintiff promised that if he recovered a judgment against Smith, he would not seek to enforce it against Smith but would "limit recovery of any judgment against Lynn M. Smith to insurance policies/contracts that may provide coverage to Defendant if a judgment is entered against him" (L.F. 376-78).

One week later, on May 4, 2004, the St. Clair County Circuit Court (Judge William J. Roberts) conducted a non-jury trial. On March 9, 2005, the court issued its Findings of Fact, Conclusions of Law, and Judgment (L.F. 48-54; Apdx. A-22). It found that Smith had been guilty of "affirmative negligent acts of welding over the corrosion and rust on the water-pressure tank, which caused or increased the risk of injury to Plaintiff beyond the usual hazards of Plaintiff's employment," such that Smith was not protected by workers' compensation (L.F. 51).[1/] Damages of $2,044,278 were awarded, plus prejudgment interest of $673,437.52 pursuant to §408.040 RSMo (L.F. 54).

Defendant (represented by his liability insurer) appealed to the Court of Appeals, which reversed in a 2-1 decision, holding that workers' compensation was plaintiff's exclusive remedy and ordering the case dismissed. Burns v. Smith, No. SD26889 (May 30, 2006). This Court then granted transfer and affirmed the trial court. Burns v. Smith, 214 S.W.3d 335, 339-40 (Mo. banc 2007). The Court held that the welding done by Smith over rust and corrosion created a dangerous condition and that such a welded tank would eventually explode.

[1/] The court remarked that this finding was in response to defendant's request for findings and conclusions (L.F. 51).

The Court upheld findings that it was a mistake for Smith to attempt this kind of welding, that he was not a certified welder, and that the weld he made was not uniform because the heat was set wrongly in the welder. Smith had admitted that his vision wasn't good and that he really couldn't see what he was doing. He was therefore adjudged to have engaged in an "affirmatively negligent act by creating an additional danger beyond that normally faced in his job-specific environment" and was not protected by workers' compensation. Id. at 340.

The Garnishment Proceedings

On March 25, 2004, plaintiff Burns filed garnishment proceedings against Farmers under Smith's farmowner's policy (L.F. 28), and against Oak River Insurance Company under Smith's automobile and personal liability policies (L.F. 38). On April 14, 2005, the Oak River case was removed to federal court and was eventually settled on April 17, 2007, by the payment of $675,000 by Oak River to plaintiff (L.F. 29, 369).

The garnishment against Farmers was submitted to the St. Clair County Circuit Court (Judge James K. Journey) on cross-motions for summary judgment. In support of its position, Farmers submitted, inter alia, an affidavit by Lynn Smith, the insured, who testified that he obtained the Farmers policy to cover his farming activities and did not intend for it to cover his activities at Kennon Redi-Mix (L.F. 144). On March 4, 2008, the court issued its judgment holding Farmers liable for

its $1,000,000 policy limits, plus the entire amount of prejudgment interest awarded to Burns ($673,437.52) and post-judgment interest of $733,783.17, for a total of $2,407,220.69 (L.F. 348; Apdx. A-1). The court ruled that the business pursuit exclusion of Farmers' policy did not bar coverage because Smith's negligent welding did not occur on the insured farm premises, which was the only location at which the exclusion was construed to apply (L.F. 337-40).

On April 2, 2008, Farmers filed timely post-trial motions seeking reconsideration, challenging the court's interpretation of the policy, and requesting an amendment to the judgment with regard to the calculation of interest (L.F. 355, 363, 413). Those motions were overruled without comment on June 30, 2008 (L.F. 18). Farmers filed its Notice of Appeal on July 8 (L.F. 417).

On February 17, 2009, the Southern District reversed and remanded. Division Two (Lynch, C.J., and Parrish and Burrell, J.J.) held that the definition of "business" in Farmers' policy is not ambiguous and that the business pursuit exclusion bars coverage for claims arising out of any business activity of the insured, whether conducted on the insured farm premises or elsewhere. The court pointed out, inter alia, that plaintiff's interpretation would mean that the policy would cover all the insured's business activities except when those activities were conducted on the farm premises he was paying to insure. Such an unreasonable outcome would be contrary to the expectations of the general public and, in

particular, of Smith, who submitted sworn testimony that he did not intend Farmers to provide coverage for his activities at Kennon Redi-Mix (L.F. 144).

Plaintiff sought transfer to this Court, claiming that the opinion below raises the following issues "of general interest and importance to the law of Missouri:

> "A. Whether Missouri law should abandon the 'more rigorous' application of the rule of contra proferentum in ambiguous insurance contracts than applies in other contracts . . . .
>
> "B. Whether, when determining the meaning of an ambiguous insurance contract, a court may begin its attempt to find the meaning of the contract by relying on an affidavit of an insured rather than beginning with canons of construction in general and in particular with the rule of contra proferentum."

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF AND AGAINST FARMERS BECAUSE INSURANCE COVERAGE WAS BARRED BY THE "BUSINESS PURSUIT" EXCLUSION IN THE SUBJECT FARMOWNER'S LIABILITY POLICY, IN THAT PLAINTIFF'S INJURY RESULTED FROM FARMERS' INSURED SMITH'S ENGAGING IN AN EXCLUDED TRADE, PROFESSION, OR OCCUPATION OTHER THAN FARMING.

Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896 (Mo. banc 1990);

State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W.3d 833 (Mo.App. E.D. 2000);

Concord General Mut. Ins. Co. v. McCarty, 604 A.2d 573 (N.H. 1992);

Donovan v. Nettles, 327 So.2d 433 (La.App. 1976).

II. THE TRIAL COURT ERRED IN ITS COMPUTATION OF INTEREST ON THE UNDERLYING JUDGMENT BECAUSE PREJUDGMENT INTEREST AND POST-JUDGMENT INTEREST WERE BOTH ERRONEOUSLY CALCULATED ON THE FULL AMOUNT OF THAT JUDGMENT, IN THAT FARMERS, UNDER ITS POLICY, WAS RESPONSIBLE FOR PREJUDGMENT INTEREST ONLY "ON THAT PART OF THE JUDGMENT" THAT IT PAYS – WHICH WOULD BE $1,000,000 – AND POST-JUDGMENT INTEREST SHOULD HAVE BEEN

REDUCED TO REFLECT PLAINTIFF'S RECEIPT OF $675,000 IN PARTIAL PAYMENT OF THE JUDGMENT ON APRIL 17, 2007.

Levin v. State Farm Mut. Auto. Ins. Co., 510 S.W.2d 455 (Mo. banc 1974);

Miller v. Secura Ins. & Mut. Co., 53 S.W.3d 152 (Mo.App. W.D. 2001);

Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297 (Mo.App. E.D. 2007);

McCormack v. Stewart Enters., Inc., 956 S.W.2d 310 (Mo.App. W.D. 1997).

STANDARD OF REVIEW

The issue presented by this case turns on the interpretation of an insurance policy, which is a question of law for the Court. Seeck v. Geico Gen'l Ins. Co., 212 S.W.3d 129, 132 (Mo. banc 2007); Christian v. Progressive Cas. Ins. Co., 57 S.W.3d 400, 403 (Mo.App. S.D. 2001). The trial court's construction of the policy thus involves legal conclusions that are not binding on appeal, and appellate review is de novo, with no deference given to the trial court's interpretation. Seeck, 212 S.W.3d at 132; State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W. 3d 833, 838 (Mo. App. E.D. 2000); Millers Mut. Ins. Ass'n v. Shell Oil Co., 959 S.W.2d 864, 866-67 (Mo.App. E.D. 1997). As this is an equitable garnishment of an insurance company, Farmers may assert against the injured party, Plaintiff Burns, any defense it could have raised in an action brought by the insured Smith. Johnston v. Sweany, 68 S.W.3d 398, 400-01 (Mo. banc 2002); Wilson v. Traders Ins. Co., 98 S.W.3d 608, 612 (Mo.App. S.D. 2003).

Insurance policies are contracts that are governed by basic rules of contract interpretation. Blair v. Perry County Mut. Ins. Co., 118 S.W.3d 605 (Mo. banc 2003); Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300, 301-02 (Mo. banc 1993). The cardinal rule of policy interpretation is to ascertain the intention of the parties and to give effect to that intention. Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 901 (Mo. banc 1990); Pierce v. Business Men's Assur. Co.,

333 S.W.2d 97, 100 (Mo. 1960); Miller v. O'Brien, 168 S.W.3d 109, 114 (Mo.App. W.D. 2005); First American Ins. Co. v. Commonwealth Gen'l Ins. Co., 954 S.W.2d 460, 467 (Mo.App. W.D. 1997). The contract should be construed as a whole, giving meaning to every part to determine the true intention of the parties. Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 77 (Mo. banc 1998); AJM Pkg. Corp. v. Crossland Constr. Co., 962 S.W.2d 906, 912 (Mo.App. S.D. 1998). Courts should not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists. Todd v. Missouri United Sch. Ins. Council, 223 S.W.3d 156, 163 (Mo. banc 2007); Rodriguez v. Gen'l Acc. Ins. Co., 808 S.W.2d 379, 382 (Mo. banc 1991). If definitions and exclusions in a policy are clear and unambiguous, they will be enforced as written, even if the effect is to bar coverage. Todd, 223 S.W.3d at 163.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF AND AGAINST FARMERS BECAUSE INSURANCE COVERAGE WAS BARRED BY THE "BUSINESS PURSUIT" EXCLUSION IN THE SUBJECT FARMOWNER'S LIABILITY POLICY, IN THAT PLAINTIFF'S INJURY RESULTED FROM FARMERS' INSURED SMITH'S ENGAGING IN AN EXCLUDED TRADE, PROFESSION, OR OCCUPATION OTHER THAN FARMING.

A. The Definition of "Business" in the Policy Is Not Ambiguous.

The issues raised by plaintiff's application for transfer are not presented by this case because (a) the policy is not ambiguous, and (b) the Court of Appeals did not find it to be ambiguous. A contract is deemed to be ambiguous only when there is more than one reasonable interpretation which can be gleaned from the contractual language. Ethridge v. TierOne Bank, 226 S.W.3d 127, 131 (Mo. banc 2007); Silver Dollar City, Inc. v. Kitsmiller Constr. Co., 931 S.W.2d 909, 914 (Mo.App. S.D. 1996). Whether a contract is ambiguous is a question of law for the Court. Todd, 223 S.W.3d at 160; Garner v. Hubbs, 17 S.W.3d 922, 927 (Mo.App. S.D. 2000). In making that determination, the Court should consider the whole instrument and take into account the object, nature, and purpose of the agreement. Central City Ltd. P'ship v. United Postal Sav. Ass'n, 903 S.W.2d 179, 182

(Mo.App. E.D. 1995); Clampit v. Cambridge Phase II Corp., 884 S.W.2d 340, 345 (Mo.App. E.D. 1994). A provision is not ambiguous merely because the parties disagree about its meaning. Ethridge, 226 S.W.3d at 131; J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. banc 1973). An unreasonable alternative construction will not render the policy ambiguous. Gavan v. Bituminous Cas. Corp.; 242 S.W.3d 718, 720 (Mo. banc 2008); Blair, 118 S.W.3d at 606. When a contract is unambiguous, it is to be enforced according to its terms. Triarch Indus., Inc. v. Crabtree, 158 S.W.3d 772, 776 (Mo. banc 2005); Rodriguez v. Gen'l Acc. Ins. Co., 808 S.W.2d at 382.

If one party's interpretation of the agreement would lead to unreasonable results and the other's would be reasonable, the latter should be adopted. Garner, 17 S.W.3d at 927. Stated differently, a court must adopt an interpretation that makes a contract "fair, customary, and such as prudent men would naturally make" over one that "makes it inequitable, unusual, or such as reasonable men would not be likely to enter into." Rathbun v. CATO Corp., 93 S.W.3d 771, 781 (Mo.App. S.D. 2002); Miller v. Kamo Elec. Coop., Inc., 351 S.W.2d 38, 42 (Mo.App. W.D. 1962).

The underlying judgment against Farmers' insured, Lynn Smith, arose out of Smith's negligent welding of a leaking water pressure tank on a cement truck owned by Kennon RediMix, Inc. Kennon was wholly-owned by Smith as a

separate business, and Smith was an officer and employee of that company, which employed the plaintiff Burns. It is undisputed that Burns was injured in the course of his duties as an employee of Kennon. It is equally uncontroverted that Kennon was a business pursuit of Smith's, and that neither the welding nor Burns's injury occurred on Smith's insured farm premises.

The farmowner's liability policy issued by Farmers to Smith contains an express exclusion for "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" (L.F. 83). The term "business" is defined as "(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" (L.F. 66).

Burns's accident resulted from Smith's involvement in a trade, profession, or occupation other than farming and was thus expressly excluded from coverage under the policy. The trial court, though, at plaintiff's urging, adopted a severely strained interpretation of the "business" definition to find the exclusion ambiguous. The court construed the phrase "and the use of any premises or portion of residence premises for any such purposes" to mean that coverage was precluded only when business was conducted on the insured farm premises but not

when it was performed elsewhere. This bizarre reading – which stood the business pursuits exclusion on its head – was achieved by construing the first "and" in the above-quoted definition to mean that both the non-farm business and the residence premises need to be involved in order to trigger the exclusion. Such a crabbed construction distorts the meaning of the policy and vitiates the intent of the parties.

1. The plain meaning of "and" is "as well as" or "in addition to."

A reading of the simple policy language confirms that the business pursuits exclusion applies to bar coverage in this case. A pursuit is an excluded "business" if it is:

(a) a trade, or

(b) a profession, or

(c) an occupation, and

(d) when the insured premises are used for any such purpose.

The latter clause makes clear that even though the insured premises are the subject of the insurance provided, no coverage is extended for business activities even if they occur on the otherwise insured premises. The "and," rather than requiring a trade, profession, or occupation activity on the insured premises in order to trigger the exclusion, is sensibly construed according to its ordinary meaning of "as well as." Thus, the exclusion applies when the insured engages in

a trade, profession, or occupation other than farming, as well as when he does so out of his residence.[2/]

Plaintiff's and the trial court's insistence that "and" be construed only cumulatively to require the presence of all previously-mentioned elements can lead to implausible results, as evidenced by this case. If, for example, a provision were to exclude coverage for arson, earthquake, and water damage, plaintiff's interpretation would deny recovery only when all three conditions coincided to cause the damage. Likewise, as the Court of Appeals observed, consistent application of plaintiff's construction would preclude coverage under the Farmers policy only when the claim involved a business activity and the insured premises, and a rental of the premises – an "extremely restrictive definition."

Not unexpectedly, the lexicographers confirm our reading of the common word "and." Webster's Third New International Dictionary, p. 80 (1993) defines "and" to include "as well as" and "in addition to." Webster's New World College

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[2/] This clarifying language avoids the problem confronted in Black v. Fireman's Fund Am. Ins. Co., 767 P.2d 824, 830-31 (Idaho App. 1989), where the court held that there was no coverage under the business pursuit exclusion but ruled that the insurer nonetheless had a duty to defend because the injury was alleged to have occurred on the insured premises.

Dictionary, p. 51 (3d ed. 1996) lists "as well as" and "also." Black's Law Dictionary, p. 112 (rev. 4th ed. 1968) notes that "and" has been defined in decided cases to mean "along with," "also," "and also," "as well as," "besides," and "together with." Thus, the policy definition of "business" is properly read to mean "a trade, profession, or occupation, excluding farming, [as well as/in addition to/and also] the use of any premises or portion of resident premises for any such purposes."

This accords with the average lay person's understanding that the term "business" would include the insured's trade, profession, or occupation even when (rather than only when) it is conducted on his insured premises. By contrast, the construction advocated by plaintiff, and adopted by the court below, leads to the anomalous result that the insured, Lynn Smith, would be afforded coverage under the farmowner's policy for all business activities and pursuits conducted away from the farm but would have no such coverage on the farm premises which he paid to insure.[3/]

[3/] The Court of Appeals took a more direct route to the correct result, without regard to the meaning of "and," by giving the term "any premises" its plain meaning, so that business activities are excluded wherever conducted.

2. Relevant precedent unanimously supports Farmers' position.

The only appellate courts to squarely address this same definitional language have agreed with the Southern District below that the exclusion unambiguously applies to all premises where business is conducted. In Concord General Mut. Ins. Co. v. McCarty, 604 A.2d 573 (N.H. 1992), the New Hampshire Supreme Court made short work of plaintiff's theory:

> "McCarty contends that the second clause in the definition of 'business' requires the use of McCarty's resident premises in Rochester for the business pursuits exception to apply. Thus, he argues, 'business' does not include activities that occur off-premises, such as in this accident. We fail to see how a 'reasonable person in the position of the insured' could reach this conclusion. The homeowner's policy clearly excludes from coverage 'bodily injury' 'arising out of business pursuits of any Insured . . .,' whether on-premises or off-premises. There is no ambiguity, and the trial court properly denied coverage." Id. at 575-76 (citation omitted; ellipsis in original).

The court in Latter v. Century Grill, Inc., 1976 WL 190712 (Ohio App. 1976), was equally unimpressed:

> "[A]ppellant contends that the exclusion applies only if the business pursuit is carried on at the insured's premises. There is no merit in this

contention. Business is defined in the policy as meaning a 'trade, profession or occupation . . . and the use of any premises . . . for any such purpose.' It is clear that this definition does not contain the limitation which appellant suggests." Id. at *2 (ellipses in original).[4/]

Accordingly, the plain and proper meaning of "and" by itself requires reversal of the judgment below. The same result is also achieved by the common device of construing "and" to mean "or" in order to avoid creating an ambiguity and to implement the intent of the parties. See Ex parte Lockhart, 171 S.W.2d 660, 666 (Mo. banc 1943) ("or" and "and" are frequently substituted for each other whenever required to carry out the plain purpose of the statute or contract when to do otherwise would defeat its purpose or lead to an absurd result); City of St. Louis v. Consolidated Prods. Co., 185 S.W.2d 344, 346 (Mo.App. E.D. 1945) ("and" construed to mean "or" to conform to intent of drafters); United States v. Gomez-

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[4/] Plaintiff's proposed reading of the exclusion is so obscure that several courts have applied the same language to off-premises accidents without even considering plaintiff's interpretation. See Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 421 N.W.2d 355 (Minn.App.), rev'd on other grounds, 433 N.W.2d 82 (Minn. 1988); Bertler v. Employers Ins. of Wausau, 271 N.W.2d 603 (Wis. 1978); Southern Guaranty Ins. Co. v. Duncan, 206 S.E.2d 672 (Ga.App. 1974).

Hernandez, 300 F.3d 974, 978 (8th Cir. 2002) (courts are often compelled to construe "or" as meaning "and" and again "and" as meaning "or").

Indeed, this precise mechanism was utilized to reach the proper meaning of the business pursuit exclusion in Donovan v. Nettles, 327 So.2d 433 (La.App. 1976). There, the plaintiff sued four of his co-employees for negligent performance of their work-related duties outside the insured premises. They impleaded their homeowners' liability carriers, seeking indemnity. The insurers were granted summary judgment on the basis of the business pursuit exclusion, which defined "business" to mean a "trade, profession or occupation, including farming, and the use of any premises or portion of residence premises for any such purposes." Id. at 434-35.

On appeal, the insured defendants, like plaintiff here, argued that the use of the conjunctive "and" between "farming" and the phrase "the use of any premises . . . for any such purpose" restricted the scope of "business" to those situations where the trade, profession, or occupation was conducted on the insured premises. The appellate court unanimously rejected that interpretation and affirmed the trial court. It pointed out that homeowners' policies provide a package of coverages for insureds in their capacity as property owners and that the appellant-insureds' interpretation would lead to the "incongruous" and "absurd" result that coverage would exist for business activities away from the insured property but not for

business conducted on the insured property. The court therefore construed the "and" in the business definition to mean "or." Id. at 435.

The Donovan court further noted that if the appellants' construction were correct, then the first reference to "trade, profession or occupation" would be mere surplusage because the second part of the definition, by itself, would preclude coverage for the use of the home premises for a trade, profession, or occupation – the only circumstance in which, according to the appellants, coverage was excluded. Both parts of the definition should be given meaning and effect, and the first part barred coverage for the third-party claim asserted against the appellants. Id.

Despite Farmers' reliance on Donovan in the court below, the trial judge did not discuss that case or its reasoning in his opinion. Instead, he invoked the decision in Bishop v. Crowther, 428 N.E.2d 1021 (Ill.App. 1981), to justify his effective abrogation of the business pursuit exclusion. The entirety of the court's discussion stated that Bishop "considered a nearly identical policy EXCLUSION and DEFINITION and concluded that "and" does indeed mean "AND" (L.F. 433-34).

The trial court's "analysis" of Bishop embodies a gross oversimplification of that decision and a misperception of its actual holding. In Bishop, a company owned by the insured was hired to construct a family-room addition to the

insured's house. A loaned employee hired to apply the shingles fell off the roof, was injured, and sued the insured. After a lengthy discussion of whether the insured was "legally obligated to pay damages" because of his agreement with the plaintiff that the judgment would only be enforced against the insurer, the Illinois court turned to the business pursuit exception containing the same language as in the present case.

The court surmised, in an unexplicated dictum, that "it thus appears that the exclusion can be interpreted to apply only to injury or property damage arising from the operation of an insured's business out of his home." Id. at 1026. That statement was correct, of course, except for the gratuitous and erroneous use of the word "only," which was unnecessary to the analysis. Since the accident obviously occurred on the insured premises, it was dicta for the court to speculate whether the exclusion would apply to off-premises injuries. The actual holding of the court, however, was that the insured "was not engag[ing] in a 'business pursuit' when he acted as his own general contractor in the construction of the family room addition to his home." Id. at 1027.

The dispositive holding of Bishop is irrelevant to this case and does not support the result below. But the Bishop court's perfunctory and extraneous surmise about what the exclusion "appears" to cover stands in stark contrast to the thoughtful and persuasive analysis of Donovan and to the firmly expressed views

in McCarty and Latter. In any event, the plain meaning of the business definition requires the conclusion that plaintiff's injury arose out of Smith's business pursuit and mandates reversal of the trial court's judgment.

B. Even if the Policy Were Ambiguous, the Clearly Ascertainable Intent of Both Parties Precludes Coverage, and *Contra Proferentem* Is Inapplicable.

Although the foregoing discussion establishes that the business pursuit exclusion unequivocally bars coverage for plaintiff's injuries, the trial court determined "at a minimum" that the definition of "business" was ambiguous and "construe[d] it strictly against Farmers Alliance and in favor of coverage" (L.F. 433). Even if, arguendo, the exclusion is deemed ambiguous – which we dispute – the proper method of analysis is not to jump directly to the arbitrary rule of contra proferentem, as the trial court did, but first to exhaust other methods of interpretation to ascertain the intent of the parties.[5/]

[5/] Plaintiff's almost total reliance on contra proferentem begs the question why he – a complete stranger to the insurance policy – should be entitled to a favorable interpretation. See Cannon Ball Motor Freight Lines v. Grasso, 59 S.W.2d 337, 341 (Tex.App. 1933) (rule that policy provisions must be construed strictly against insurer does not apply to strangers to contract), aff'd, 81 S.W.2d 482 (Tex.

(Footnote continued)

If a contract is indeed ambiguous, resort may be had to extrinsic evidence to determine the true intent of the parties and resolve the ambiguity. LaBarge v. LaBarge, 681 S.W.2d 441, 444 (Mo. banc 1984); Modine Mfg. Co. v. Carlock, 510 S.W.2d 462, 468 (Mo. 1974); Fisher v. Miceli, 291 S.W.2d 845, 848 (Mo. 1956); State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W.3d 833, 842 (Mo.App. E.D. 2000). Evidence of the construction the parties themselves placed upon the contract is of considerable significance. Modine Mfg. Co., 510 S.W.2d at 468; Tri-Lakes Newspapers, Inc. v. Logan, 713 S.W.2d 891, 894 (Mo.App. S.D. 1986); Shell v. Shell, 658 S.W.2d 439, 444 (Mo.App. W.D. 1982). Even more to the point for present purposes is the decades-old maxim recognized by this Court in State ex rel Northwestern Mut. Life Ins. Co. v. Bland, 189 S.W.2d 541, 549 (Mo. banc 1945):

> "It is a well-established rule of law that the construction placed upon a contract by the parties as evidenced by acts, conduct, or declarations indicating a mutual intent and understanding will be adopted by the courts where the language of the contract is ambiguous or there is reasonable doubt as to its meaning, but not where it is plain and unambiguous . . . . And

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Comm'n App. 1935); Larson v. McCormack, 2 N.E.2d 974, 976 (Ill.App. 1935 (rule does not apply in favor of garnishing creditor of insured).

where an ambiguity in an insurance policy has been removed by the construction of the parties there is no room for the application of the rule that a policy must be construed strictly against the insurer." (Emphasis added.)

Accord: Ellis v. Jurea Apts., Inc., 875 S.W.2d 203, 208 (Mo.App. S.D. 1994), quoting Maschoff v. Koedding, 439 S.W.2d 234, 237 (Mo.App. 1969).

Here, any ambiguity that might be conjured up by plaintiff's creative advocacy is immediately dispelled by the declaration of the insured Lynn Smith that he never intended the Farmers policy to cover his on-the-job activities at Kennon Ready-Mix (L.F. 144). Plaintiff has attempted to downplay that declaration because it was made at a time when Smith no longer had any skin in the game. But that only reinforces the objectivity and trustworthiness of his acknowledgement, which is likewise buttressed by his purchase of personal and business liability insurance for Kennon-related activities from Fremont and Oak River (L.F. 222, 369).

Plaintiff implores the Court to turn a blind eye to this dispositive evidence and to eschew any attempt to find the true intent of the parties by defaulting directly to contra proferentem and construing the policy against Farmers without any further analysis. But such a simplistic knee-jerk approach urged by plaintiff

has been routinely rejected for the reasons succinctly summarized in 11 Williston on Contracts §32:12, pp. 480-82 (4th ed. 1999):

> "The rule of contra proferentem is generally said to be a rule of last resort and applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning . . . . [It] does not justify a court in adopting an interpretation contrary to that asserted by the drafter, simply because of his or her status as the drafter."

Missouri courts have regularly adhered to this guidance. See, e.g., Esswein, 43 S.W. 3d at 842 (improper to construe policy against insurer solely because it drafted policy while ignoring relevant evidence of parties' intentions); Mo. Consol. Healthcare Plan v. BlueCross BlueShield, 985 S.W.2d 903, 910 (Mo.App. W.D. 1999) (contra proferentem applies "only if and when an ambiguity is found and the parties' intent cannot be determined otherwise from parol evidence"); Alum. Prods. Enters., Inc. v. Fuhrmann Tooling & Mfg. Co., 758 S.W.2d 119, 124 (Mo.App. E.D. 1988) (rule applies only when other means of construction fail and there is absence of other evidence to show what parties intended); Rouggly v. Whitman, 592 S.W. 2d 516, 523 (Mo.App. E.D. 1979) (rule employed only as a last resort).

Plaintiff's preference for arbitrary rules that defy the parties' stated intent can only be construed as a recognition that his case is logically unsustainable.

C. *Contra Proferentem* in this Case Produces an Unreasonable and Absurd Result.

Even in the absence of Smith's sworn interpretation of the policy, contra proferentem is also inapplicable here because such interpretive aids should not be used to produce an unreasonable or absurd result. This principle is set forth in 2 Couch on Insurance 3d §22:17, pp. 22-45, 46 (2005):

> "[I]f the construction sought by the insured is unreasonable from any standpoint, the rule of construction against the insurer is not to be employed as an expedient to nullify the expressed intent of the parties and to perpetuate an unjust imposition against the insurer by holding it bound to a risk that it has not assumed under any reasonable construction."

Accord: Esswein, 43 S.W. 3d at 844; CB Commercial Real Estate Group, Inc. v. Equity P'ships Corp., 917 S.W.2d 641, 646 (Mo.App. W.D. 1996); Dwyer v. Unit Power, Inc., 965 S.W.2d 301, 307 (Mo.App. E.D. 1998). Rather, the construction adopted should promote the object, purpose, and nature of the agreement. Goldstein & Price v. Tonkin & Mondl, L.C., 974 S.W.2d 543 (Mo.App. E.D. 1998); Central City Ltd. P'ship, 903 S.W. 2d at 182.

In the present context, the very nature and purpose of the insurance policy confirms that the parties did not intend to limit the exclusion for business pursuits only to such trade, professional, or occupational activities as occurred on Smith's

farm or at his home. As 9A Couch 3d §128:31, p. 128-61, says: "Farmowners' liability insurance policies are in essence homeowners' policies but such policies are specifically tailored to the unique needs and requirements of persons who engage in farming activities." The treatise goes on to observe that a farmowner's policy, like homeowner's insurance, covers an insured premises and protects against the usual perils covered by homeowner's policies but also insures against risks and activities relating to the insured's farming operations. Id. §§128:31-32.

The policy issued to Smith covers the "insured premises," defined to mean the farm property and grounds and private approaches, as well as the "residence premises," which denotes the family dwelling (L.F. 66). The policy insures the premises and personal property thereon against a variety of perils, including fire and lightning, windstorm or hail, explosion, vandalism, and theft (L.F. 73-74).[6/]

In keeping with the focus of homeowners' and farmowners' policies on the insured premises and perils associated therewith,

> "Homeowners' and farmowners' liability policies typically exempt from coverage bodily injury or property damage arising out of or in

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[6/] Interestingly, the theft coverage is subject to a number of exclusions for loss incurred away from the insured premises (L.F. 74), indicating the policy's primary concern with losses occurring on the farm property.

connection with a business engaged in by an insured. People characteristically separate their business activities from their personal activities, and, therefore, business pursuits coverage is not essential for their homeowners' or farmowners' coverage and is excluded to keep premium rates at a reasonable level." 9A Couch 3d §128:12, pp. 128-30-31.

In an article entitled "The Business Pursuits Exclusion Revisited," 1977 Insurance Law Journal 88, 89, the author, Lawrence A. Frazier, points out that the business pursuit exclusion recognizes that the hazards associated with home ownership and personal activities are generally shared by and common to all in that insurance pool, whereas the hazards of their respective income-producing activities are diverse and involve different legal duties and a greater risk of injury or property damage to third parties than their personal pursuits. Business activities can be and are insured by other types of policies, and are excluded from homeowners' coverage because of their variability, the exposure to risks involving specialized underwriting, and the desire to keep premiums low by removing coverage for activities not typically associated with the operation or maintenance of one's home. Id. These reasons for separating personal from business coverage are likewise recognized in the case law. See, e.g., Bertler v. Employers Ins. of Wausau, 271 N.W.2d 603, 606-07 (Wis. 1978); Allstate Ins. Co. v. Hallman, 159

S.W.3d 640, 645 (Tex. 2005); Fimbres v. Fireman's Fund Ins. Co., 708 P.2d 756, 758 (Ariz.App. 1985).

It is antithetical to the acknowledged intent of the parties and to the function of the business pursuit exclusion, and inconsistent with other terms of the policy, to construe it to bar coverage for business-generated claims only when they arise on the insured farm premises but not when they occur anywhere else on the planet. According to plaintiff's interpretation, as adopted by the trial court, Smith's act of negligent welding would have been excluded from coverage if performed in his garage on the farm but not if it occurred at the redi-mix plant or, for that matter, in Timbuktu. Since a relatively low percentage of wage-earners work out of their homes, such a construction would largely nullify the business pursuit exclusion and would send underwriters all over the country scurrying back to the drawing board.

Furthermore, according to plaintiff's theory, Farmers would be required to indemnify Smith for an infinite variety of his defalcations and misdeeds as a corporate officer and employee of Kennon Redi-Mix, Inc., even if they had nothing to do with farming or if they occurred in foreign countries. Smith admittedly did not expect or pay for coverage for, say, claims of breach of fiduciary duty or employment discrimination by Kennon employees any more than he bargained for indemnity for Burns's judgment. Indeed, his awareness that Farmers did not cover

his business activities is confirmed by the fact that he and Kennon Redi-Mix obtained liability coverage for the business from both Fremont Indemnity Company (L.F. 222) and Oak River Insurance Company (L.F. 369), the latter of which paid $675,000 toward the satisfaction of plaintiff's judgment.

The insured's sworn testimony, as well as the well-established purpose and intent of farmowner's liability coverage, and its express carve-out of business activities, impugns the trial court's judgment and establishes beyond question that the result below subverts both the language of the policy and the intent of the parties. Even assuming, arguendo, that the policy is ambiguous, the trial court abdicated its duty to search for the parties' intent by its mechanical invocation of contra proferentem, and reached an irrational conclusion. Its judgment should be reversed.

II. THE TRIAL COURT ERRED IN ITS COMPUTATION OF INTEREST ON THE UNDERLYING JUDGMENT BECAUSE PREJUDGMENT INTEREST AND POST-JUDGMENT INTEREST WERE BOTH ERRONEOUSLY CALCULATED ON THE FULL AMOUNT OF THAT JUDGMENT, IN THAT FARMERS, UNDER ITS POLICY, WAS RESPONSIBLE FOR PREJUDGMENT INTEREST ONLY "ON THAT PART OF THE JUDGMENT" THAT IT PAYS – WHICH WOULD BE $1,000,000 – AND POST-JUDGMENT INTEREST SHOULD HAVE BEEN REDUCED TO REFLECT PLAINTIFF'S RECEIPT OF $675,000 IN PARTIAL PAYMENT OF THE JUDGMENT ON APRIL 17, 2007.

For the reasons stated above in Point I, Farmers believes and earnestly submits that there is no basis for any claim by plaintiff against Farmers and that the judgment below should be reversed outright. If the Court should disagree, the judgment still must be reduced to correct the trial court's erroneous calculation of both prejudgment and post-judgment interest.

A. Prejudgment Interest

The farmowner's policy issued by Farmers to Smith contained a limit of $1,000,000 in liability coverage (L.F. 55). The policy expressly addressed the insurer's responsibility to pay prejudgment interest on third-party claims:

> "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" (L.F. 109, emphasis added).

Thus, in a worst-case scenario, Farmers would be responsible for indemnifying Smith for $1,000,000 of the damages awarded to Burns, as well as 9% on that sum from the date of the demand – July 12, 2001 – to the entry of the judgment in the underlying case – March 9, 2005. That would total $329,431 (L.F. 366).

The trial court, however, ignored the policy provision and ruled that Farmers was responsible for all prejudgment interest calculated on the entire $2,044,278 judgment entered in favor of Burns and against Smith. That produced a prejudgment interest award of $673,437.52 and a total judgment for Burns of $2,717,715 (L.F. 348). The court denied without comment Farmers' motion to alter or amend to fix the errors (L.F. 18, 363).

An insurer's liability is circumscribed by the terms of its contractual undertaking as set forth in the policy. Levin v. State Farm Mut. Auto. Ins. Co., 510 S.W.2d 455, 461 (Mo. banc 1974); Frisella v. Reserve Life Ins. Co., 583 S.W.2d 728, 733 (Mo.App. E.D. 1979). A court cannot award any interest except in compliance with the policy terms. Levin, 510 S.W.2d at 461; Gamel v. Continental Ins. Co., 463 S.W.2d 590, 596 (Mo.App. 1971). Farmers agreed to pay prejudgment interest in addition to its policy limits, but only as calculated on

those policy limits. In Miller v. Secura Ins. & Mut. Co., 53 S.W.3d 152, 157 (Mo.App. W.D. 2001), the court noted that identical language was effective to limit the insurer's liability for prejudgment interest to interest calculated on its policy limits. The court recognized that neither the policy nor the law requires a party to pay interest on a sum greater than the principal for which it is responsible.

Therefore, the trial court's imposition of prejudgment interest was excessive by $344,886 and should be reduced, in the event of an affirmance on liability, to $329,431.

B. Post-Judgment Interest

As for post-judgment interest, the policy stipulates that Farmers will pay "all interest on the entire amount of the judgment which accrues after entry of 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" (L.F. 84).

Farmers agrees that this provision requires it to pay post-judgment interest on any unsatisfied insured judgment, even if it exceeds the policy limits. But this requirement applies only to the extent that the judgment remains unsatisfied. Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297, 307 (Mo.App. E.D. 2007) (post-judgment interest accrues only to the extent, and during the time when, the judgment is unpaid); Misemer v. Freda's Rest. Inc., 961 S.W.2d 120, 123

(Mo.App. S.D. 1998) (partial payment on principal reduces amount on which interest is calculated). Here, the original judgment was reduced by $675,000 on April 17, 2007, pursuant to plaintiff's settlement with Oak River Insurance Company, the liability and automobile insurer for Smith and Kennon Redi-Mix, Inc. (L.F. 369). As of that date, the outstanding part of the judgment was reduced to $2,042,715.

Interest is awarded only to compensate the creditor for delay in payment and loss of use of money. McCormack v. Stewart Enters., Inc., 956 S.W.2d 310, 314 (Mo.App. W.D. 1997); In re Marriage of Overhulser, 962 S.W.2d 951 (Mo.App. E.D. 1998). Therefore, $2,042,715 is the figure upon which post-judgment interest should have been computed at 9% from April 17, 2007, until entry of the garnishment judgment on March 4, 2008, or $503.68 per day. That corrected calculation would reduce the post-judgment interest component of the trial court's judgment from $733,783.17 to $676,167.[7/]

[7/] Calculated at $670.12 per day from March 9, 2005 until April 17, 2007 ($513,982) and at $503.68 per day from April 18, 2007 to March 4, 2008 ($162,185).

Accordingly, if the Court should affirm on liability, the damage award should be reduced to $1,000,000 principal, $329,431 prejudgment interest, and $676,167 post-judgment interest, for a total of $2,005,598.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of St. Clair County should be reversed and the case remanded with directions to enter judgment for Garnishee Farmers Alliance Mutual Insurance Company and to dismiss the garnishment with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that this Brief for Appellant complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) and that it contains 7,321 words, excluding the cover, this certificate, the signature block, and the Appendix as determined by the Microsoft Word 2003 Word-counting system. I also certify, pursuant to Rule 84.06(g) that the diskettes of the Brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

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Thomas C. Walsh

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Judgment and Opinion of the Circuit Court of St. Clair County (March 4, 2008) A-1

Findings of Fact, Conclusions of Law, and Judgment of the Circuit Court of St. Clair County (March 9, 2005) A-22