IN THE SUPREME COURT OF MISSOURI

BRYAN GAVAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC88764
	)	
BITUMINOUS CASUALTY CORPORATION, et al.,	)	
	)	
Respondents.	)	

RESPONDENTS' SUBSTITUTE BRIEF

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I

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE AND MARINE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IN THAT THE POLICIES ISSUED BY RESPONDENTS EXCLUDED COVERAGE FOR GOTSCH AND BRACE FOR INJURY TO THEIR CO-EMPLOYEE BRYAN GAVAN BECAUSE BRYAN GAVAN WAS NOT A TEMPORARY WORKER AS DEFINED BY THE POLICIES AND THE EXCLUSIONS APPLIED.

ARGUMENT

Respondent has no objection to nor does Respondent dispute Appellant's SCOPE OF REVIEW.

Contrary to Appellant's statement (Appellant Substitute Brief P. 12) Respondent **does** dispute the validity of the judgment in favor of Bryan Gavan and against Zachary Brace and Joe Gotsch in the amount of $2,300,000 in the Circuit Court of St. Louis County, Missouri. In their separate answers to Appellant's First Amended Petition in the present case, Respondents pleaded (L.F. 34, 39):

23. The judgment rendered by the St. Louis County Circuit Court in favor of Bryan Gavan and against Zachary Brace and Joseph C. Gotsch was a nullity in that the court did not have subject matter jurisdiction of the matter before it.

Bryan Gavan and Zachary Brace and Joseph A. Gotsch were co-employees of Ste. Genevieve Building Stone Company. Under Missouri law, suits against co-employees for breach of the duty to maintain a safe workplace are preempted by the workers' compensation remedy. There must be "something more". The allegations in the Petition filed by Gavan against Brace and Gotsch did not allege facts giving rise to a cause of action. Although the Petition states that the actions of Brace and Gotsch were "something more" than mere failure to provide a safe place to work, the specifications of negligence in the Petition clearly allege only a failure to provide a safe place to work (L.F. 93-95) which does not state a cause of action. In addition, Gavan's deposition taken in this case supports a claim only that Gotsch and Brace failed to provide a safe place to work. (L.F. 130-132). In his Statement of Facts (Substitute Brief P. 7) Gavan states that his injuries were caused by failure to secure the ladder, at worst a failure to provide a safe place to work. The Petition clearly shows that the Circuit

Court did not have subject matter jurisdiction and that exclusive jurisdiction was with the Division of Workers' Compensation. State ex. rel. Taylor v. Wallace, 73 S.W.3d 620 (Mo. 2002); Mackiewicz v. Essex Crane Rental, 191 S.W.3d 66 (E.D. Mo. 2006). The judgment below should not have been entered. Nevertheless it was entered and the coverage issue must be addressed.

On May 15, 2000, Bryan Gavan was injured when a ladder gave way causing him to fall. Gavan was employed as a bricklayer by Ste. Genevieve Building Stone Co. (Ste. Genevieve). Gavan filed suit in the Circuit Court of St. Louis County against two fellow employees, Zachary Brace and Joe Gotsch. Gavan claimed that Brace and Gotch had improperly secured the ladder. He obtained a judgment against them in the amount of $2,300,000. Ste. Genevieve was insured by Bituminous Casualty Corporation under two policies. Both policies provided coverage for employees of Ste. Genevieve for acts within the scope of their employment. They were not insured however for injuries to a co-employee or fellow employee.

Under Missouri case law, the term "fellow employee" has the same meaning as "another employee of the same employer." Zink v. Employers Mutual Liability Insurance Co., 724 S.W.2d 561, 563 (Mo.App. W.D. 1987). Zachary Brace and Joe Gotsch and Bryan Gavan were employees of the

same employer, Ste. Genevieve Building Stone Company. At the time of Gavan's injury, all three men were acting in the course of their employment and were performing duties relating to the conduct of Ste. Genevieve's business. Ste. Genevieve is a construction company engaged in the masonry business. Ste. Genevieve hires bricklayers and laborers. On May 15, 2000 Gavan and Brace and Gotsch were employed by Ste. Genevieve on the erection of a building for Kohl's department store.

Missouri cases have consistently upheld the validity of the "fellow employee" exclusion. Baker v. DePew, 860 S.W.2d 318 (Mo. 1993) involved a claim for damages because of injury sustained by Baker arising from the negligence of his fellow employee, DePew, in the operation of a truck. The exclusion in Baker was almost identical to those in the policies involved in this litigation. Despite a claim that the exclusion was void because of the Motor Vehicle Financial Responsibility Law, (p. 323) the court upheld it. The court said:

> P. 322-323 We have carefully analyzed the policy provisions and by our discussion demonstrated that the fellow employee exclusion clause, which provides that " 'bodily injury' to any fellow employee (Baker) of the 'insured' (DePew) arising out

of and in the course of the fellow employees (Baker's) employment," clearly bars coverage in this instance.

We hold that the fellow employee exclusion clause excluded coverage by Aetna of Baker's claim for injuries against DePew.

Other Missouri cases which have upheld the "fellow employee" exclusion in various factual situations are: Short v. Safeco Insurance Co., 864 S.W.2d 361 (Mo.App. W.D. 1993); Empire Fire and Marine Insurance Co. v. Dust, 932 S.W.2d 416 (Mo.App. E.D. 1996); Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729 (Mo.App. E.D. 2000); Thompson v. Schlechter, et al, 43 S.W.3d 847 (Mo.App. E.D. 2001); Ward v. Curry, 341 S.W.2d 830 (Mo. 1961). No Missouri case has been located which questions the applicability of the fellow employee exclusion.

There is no doubt that Gavan was an employee of Ste. Genevieve and a fellow employee or co-employee of Brace and Gotsch as those concepts are universally understood. (Appellant's Substitute Brief P. 14). Gavan was employed full time in the business of Ste. Genevieve, under the direction of Ste. Genevieve, for an agreed upon wage. He was covered for workers' compensation and received workers' compensation benefits after his injury.

However, Gavan denies he was an employee of Ste. Genevieve on the basis of certain definitions in the Bituminous policies:

In both policies, the definition of "employee" includes a "leased worker" but does not include a "temporary worker":

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

The policies also define "leased worker" and "temporary worker":

> "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
>
> "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short term workload conditions.

Gavan claims he was a person who was "furnished" to Ste. Genevieve to meet short term workload conditions. As such he claims to be a "temporary worker" as defined in the policies and not an employee of Ste. Genevieve nor a co-employee of Brace and Gotsch and that Brace and Gotsch are covered for liability under the Bituminous policies. Neither the facts nor the law support Gavan.

BRYAN GAVAN WAS NOT "FURNISHED TO" STE. GENEVIEVE AND WAS NOT A "TEMPORARY WORKER"

1.

Bryan Gavan was not furnished by Bricklayer's Local Union No. 1.

Gavan takes two positions with regard to the "furnished to" requirement. First, he relies on the case of American Family Mutual Ins. Co. v. As One, et al, 189 S.W.3d 194 (Mo.App. S.D. 2006) which holds that under the "furnished to" requirement a person may furnish himself or herself to the employer which is what Gavan did in this case.

Alternatively, Gavan argues that if As One is not applicable to this case, then Gavan did not furnish himself to Ste. Genevieve but was furnished to Ste. Genevieve by Bricklayer's Local Union No. 1. In support of this argument, Gavan relies on the various requirements of the Collective

Bargaining Agreement with Bricklayer's Local Union No. 1 (L.F. 196-210). Nowhere does the Agreement require the union to furnish or refer employees to prospective employers. Although the Agreement addresses in detail the relationship between the employee and the employer and the union, the Agreement conspicuously fails even to consider the question of hiring. However, there is evidence and testimony with regard to how the employee and employer can and do get together.

In his Affidavit (L.F. 191, Par. 3 and 4) Bryan Gavan stated that he usually obtained work by a referral from the union or by contacting contractors directly for work. In his deposition, Gavan testified that he never went through a temp agency but either went through the union or directly to the company, to the job site. (L.F. 243-244).

In his deposition, Tim Uding testified that bricklayers may come directly to the job looking for work or bricklayers may call him to see if there's work. Sometimes he calls the union. The union does not have a hiring hall or waiting list but sometimes the union will refer him to someone looking for work.

Gavan's Motion For Summary Judgment included an Affidavit of Don Brown Business Manager of Bricklayer's Local Union No. 1. (L.F. 194-195). Although Brown states that the company may contact the union

hall for names of trained journeymen bricklayers he does not address the fact that bricklayers often contact the companies directly looking for employment. Nor does he make any statement with regard to Gavan's employment by Ste. Genevieve.

There is absolutely no evidence in the record that Gavan was "furnished" to Ste. Genevieve by Local No. 1. Quite the contrary, the undisputed evidence is that Gavan made direct contact with Ste. Genevieve without involving the union. Gavan had formerly been employed by Ste. Genevieve as a bricklayer for about two years, from November 1996 until October 1998 (L.F. 125). He was the job steward. (L.F. 127). In January 2000, Gavan sought employment directly from Ste. Genevieve. In his deposition, Gavan testified:

> Q: Now, when you started in January of 2000, how did you happen to go with St. Genevieve, do you recall?
>
> A: They had a job going in Arnold that I could see from the highway and I just pulled in there.
>
> Q: So you just showed up at the job?
>
> A: Yeah.
>
> Q: Not through the union hall?

A: No.

Q: Who did you speak to?

A: I don't remember his name. One of the Udings. It might have been Mike Uding. I can't say for sure.

Q: And I guess you knew him from having worked there before?

A: Yes. He was running the job I worked on as the job steward.

Q: And you were still a member of the union in good standing?

A: Yes.

(L.F. 128)

It is basic law that a party is bound by his or her own testimony which is not corrected or explained. Ewanchuk v. Mitchell, 154 S.W.3d 476, 481 (Mo.App. S.D. 2005). In his affidavit, Gavan stated he would obtain work by a referral from the union or by contacting contractors directly for work. (L.F. 191). He made a clear distinction between the two methods. In view of his testimony there is absolutely no evidence to support his claim that he was furnished to Ste. Genevieve by Local No. 1. (See footnote, Page 5,

opinion of the Eastern District, Bryan Gavan v. Bituminous Casualty Corporation.)

2.

Bryan Gavan could not furnish himself to work

The Eastern District addressed the "temporary worker" definition in the recent case of American Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25 (Mo.App. E.D. 2003). In that case James Tickle worked periodically for James J. Kemper installing pipe in an in-ground watering system. He was injured on the job and sued his employer. The employer's insurer denied coverage under the employee exclusion and filed a declaratory action. Tickle claimed he was a "temporary worker" under the policy and that the exclusion did not apply. The court reviewed the purpose, history and reasoning behind the "temporary worker" exception to the employee exclusion and determined it was not ambiguous. Despite the statement in As One that it is guided by the Tickle case, the two cases clearly reach opposite conclusions.

The Eastern District in Tickle stated that an employer obtains a liability policy to cover its liability to the public for negligence of its agents and employees. "The primary purpose of an employee exclusion clause is to

draw a sharp line between employees and members of the general public." Tickle, P. 29. Compliance with the Workers Compensation Act constitutes the full extent of the employer's liability for injuries sustained by its employees arising out of and in the course of their employment. The Commercial General Liability (CGL) policy does not cover bodily injury to the insured's employees arising out of the employment. It should be noted that employees are also protected from liability for injury to co-employees except in very limited circumstances which are not present in this case. State ex. rel. Taylor v. Wallace, 73 S.W.2d 620 (Mo. 2002); Heinle v. K&R Express Systems, Inc., 923 S.W.2d 461 (Mo.App. E.D. 1996); State ex. rel. Larkin v. Oxenhandler, 159 S.W.3d 417 (Mo.App. W.D. 2005). The Circuit Courts do not have subject matter jurisdiction in such cases.

The case of As One and the opinion of the Eastern District in the present case fail to consider the relationship between the CGL policy and the Missouri workers' compensation law with regard to the proper meaning of "temporary worker". In As One as well as in the present case, the Courts examined the phrase "furnished to" in isolation without considering the reasons behind its inclusion in the policies. This was not simply a phrase that some insurance policy draftsman decided to use. In 1993, the definitions of "employee", "leased employee" and "temporary worker" were

added to the Insurance Service Offices (ISO) standard form CGL policy to cover the non-traditional employment relationship where a client company is using the services of employees of a staffing company. This was done in response to changes in the Workers' Compensation Law which codified the employers' obligation with respect to workers' compensation coverage for employees leased from a staffing firm. Tickle P. 30. As pointed out in Tickle P. 29 Missouri courts consistently turn to the Workers' Compensation Act in determining the meaning of the word "employee" as used in exclusion clauses of liability insurance policies, citing the case of Ward v. Curry, 341 S.W.2d 830, 836 (Mo. 1960).

Like the present case, Ward involved a fellow employee exclusion under a liability insurance policy which covered the insured's employees. Plaintiff was employed as a driver for a contract hauler for the insured. He was injured on the insured's premises by the negligence of the insured's employee. In a workers' compensation proceeding it was determined he was a statutory employee of the insured. The trial court held the plaintiff was not an "employee" of the insured within the meaning of the insurance policy and the fellow employee exclusion did not apply. The Supreme Court reversed, holding that since plaintiff was a statutory employee of the insured, plaintiff was an "employee" within the meaning of the insurance policy and the

fellow employee exclusion applied. This, despite the fact that plaintiff was actually employed by the contract hauler. The court stated, P. 836 "In Missouri, courts consistently turn to the Workmen's Compensation Act in determining the meaning of the word "employee" as used in exclusion clauses of liability insurance policies, involving questions fairly analogous to that here presented". See also American States Insurance Co. v. Broeckelman, 957 S.W.2d 461, 466 (Mo.App. S.D. 1997); Auto Owners Mutual Insurance Co. v. Wieners, 791 S.W.2d 751, 756 (Mo.App. S.D. 1990); American Family Mutual Insurance Co. v. Tickle, 99 S.W.3d 25, 29 (Mo.App. E.D. 2003).

The Court in Tickle cites Sec. 287.282 R.S.Mo. which pertains to an employer which obtains part or all of its work force from another entity through an "employee leasing arrangement". Sec. 287.282.3 makes a clear distinction between employee leasing arrangements and temporary help service arrangements:

> For purposes of this section, the term "employee leasing arrangement" *shall not include temporary help service arrangements* which assign *their* employees to clients for a finite period of time to support or supplement the client's work force in special work situations, such as employee

absences, temporary skill shortages and seasonal workloads, and which are not knowingly utilized as a mechanism of depriving one or more insurers of premiums which otherwise are properly payable. (Italics supplied.) (Appendix A1)

Under the statute, leased workers are employees of the insured; temporary workers are not. This is how they are distinguished in the policies. Furthermore, the definition of "temporary worker" in the Code of State Regulations 20 CSR 500-6.800 (Appendix A2) which implements Sec. 287.282.3 R.S.Mo. is identical to the policy definition of temporary worker:

(A) Employee leasing arrangement means any arrangement, under contract or otherwise, where one (1) business or other entity leases any of its workers from another business. Employee leasing arrangements include, but are not limited to, full service employee leasing arrangements, long-term temporary arrangements and any other arrangement which involves the allocation of employment responsibilities among two (2) or more entities. For purposes of this rule, the phrase employee leasing arrangements does not include arrangements to provide temporary help service;

> (B) Temporary help service means where an organization hires its own employees and assigns them to clients for a finite time period to support or supplement the client's work force in special work situations such as employee absences, temporary skill shortages and seasonal workloads.
>
> (E) Leased worker (or leased employee) means any person performing services for a client under an employee leasing arrangement.

Of special significance to the issues in this case is the Employee Leasing Company Endorsement which excludes workers' compensation coverage to a "temporary worker", which is expressly defined as "a worker who is furnished to an entity to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions". (20 CSR 500-6.800 Ex. C, Appendix A2). This definition of "temporary worker" was adopted verbatim in the Bituminous policies issued to Gavan's employee, Ste. Genevieve Building Stone Company.

The court in Tickle clearly sets this out:

P. 30 The Code of State Regulations, 20 CSR 500-6.800, implements this statute to ensure that an employer who leases some or all of its employees properly obtains workers' compensation for those employees and that the appropriate premium is paid. *The Employee Leasing Company Endorsement set out in this regulation specifically excludes workers' compensation coverage for a temporary worker, who is defined as "a workers who is furnished to an entity to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions."* 20 CSR 500-6, Ex. C. This is identical to the CGL policy's definition of "temporary worker". (Italics supplied)

As can be readily observed, there is an interrelationship or "dovetailing" between the CGL policy and the Workers' Compensation Act when it involves coverage for potential tort liability claims by an employee, who is provided by another entity, against a co-employee. As injuries caused to a "leased worker" by a co-employee are covered by an employer's workers' compensation coverage, they are excluded from coverage under the CGL policy by virtue of the definition of "insured" and the "co-employee exclusion". In contrast, injuries caused to a "temporary worker" by a co-

employee are not covered by the employers' workers' compensation coverage, but the alleged negligent co-employee is an "insured", and is not denied liability coverage under the co-employee exclusion of the CGL policy.

The importance of interpreting the term "temporary worker" as used in the CGL policy in context with the meaning of the term under the Workers' Compensation Act was correctly recognized and applied in Tickle. The case of As One relied on in the decision of the Eastern District herein does not address the interplay between the CGL policy and the Workers' Compensation Act in regard to the correct interpretation of "temporary worker". The analysis of the Court in as One of the decision in Tickle was flawed because it ignored the clear holding in Tickle that the policy language, "who is furnished to you" could only mean that a third party provided or supplied the worker.

The decision in As One and the decision of the Eastern District below effectively rewrite the policy and strike out or eliminate the phrase "furnished to you" in the definition of "temporary worker". On page 6 the opinion of the Eastern District quotes with approval from the case of As One which states:

P. 199 In layman's terms, the policy in this case means a temporary worker is a person who works for a finite time period to support or supplement the workforce in special situations such as employee absences, temporary skill shortages and seasonal workloads.

The Court simply changed the definition. Not only does this ignore the clear wording of the policies but totally disregards Sec. 287.282.3 of the Workers' Compensation Act, the provisions of the Code of State Regulations, 20 CSR 500-6.800, the Tickle case and the majority of cases which have addressed this issue. Under the ruling, anyone who was hired was furnished. If Gavan could furnish himself, the word furnish in the definition of "temporary worker" would be meaningless. The United States District Court in Minnesota in the case of Amco Insurance Company v. Dorpinghaus, 2007 WL 313280 (Appendix A25) in an excellent opinion stated:

> "If the Court adopted the defendants' interpretation--that a worker could furnish himself to an insured simply by showing up to work—then *every* worker would be 'furnished to you' for purposes of the policy, and the phrase would be meaningless. There would be

> no difference between the definition of 'temporary worker' that actually appears in the policy--'a person who is furnished to you … to meet seasonal or short-term workload conditions'--and a definition of 'temporary worker' that completely omitted the furnished-to you qualifier--e.g., 'a person who meets seasonal or short-term working conditions.' Not requiring third-party involvement would in essence, "read 'furnished to' out of the policy"."

If the employee could fall within the definition of "temporary worker" whether he was furnished by a third party or whether he furnished himself, there would be no reason to use the word "furnish" in the definition. In that case the only reasonable definition of "temporary worker", as suggested by As One, would read as follows:

> "A person who substitutes for a permanent employee on leave or to meet seasonal or short term workload conditions."

Under such a definition, any person whether he furnished himself or was furnished by a third party and who was hired to do short time work would be a "temporary worker" as defined in the policy. But that would frustrate the entire purpose of Sec. 287.282.3 and the Code. Would such a definition also

change the definition under the Workers' Compensation Act and the Code of Regulations so that *any* person who substituted for a permanent employee on leave or to meet seasonal or short term workload conditions would be a "temporary worker" and not an employee? Would such person be excluded from workers' compensation coverage? Would there be one requirement for "temporary worker" under the CGL policy and a separate, more stringent requirement under the workers' compensation statute and the Code of Regulations? When one considers the reason and logic for the "temporary worker" provision under the CGL policy it becomes clear that the policy and the statute and Code of Regulations cannot be in conflict. Since the CGL policy lifts its definition of "temporary worker" from the Missouri Workers' Compensation Act, and the existence of a third party who furnishes a temporary worker" is crucial to the definition of that term under the Workers' Compensation Act, it follows that the existence of a third party who furnishes the "temporary worker" is also crucial to the definition of that term under the CGL policy.

The court in As One P. 198 and the opinion of the Eastern District in the present case P. 8 both commented on the fact Mr. Tickle "conceded" he was not furnished, implying that the court in Tickle did not consider whether the employee could furnish himself to work.

> Because Mr. Tickle admits he was not "furnished" to Mr. Kemper, he was not a "temporary worker" as that term was defined in the policy Tickle P. 31.

It is clear from the context that Mr. Tickle admitted he was not "furnished" by a third party. If he could furnish himself to work that sentence would be unnecessary since he would be "furnished" no matter how he obtained his employment. There could be no such thing as an employee who was not "furnished". The court in Tickle P. 30-31 held that the phrase "is furnished" applied to a person who substituted for a permanent employee as well as to a person furnished to meet seasonal or short-term workload conditions. If the employee could furnish himself or herself, Mr. Tickle's claim that "is furnished" applied to some workers and not to others would be unnecessary as all workers would be "furnished".

If the Court in As One thought the word "furnish" was susceptible to two interpretations, the more reasonable interpretation should have been given effect. Parker v. Pulitzer Publishing Co., 882 S.W.2d 245, 250 (E.D. Mo. 1994). "Furthermore, the court prefers a contract construction that gives meaning to all provisions of an instrument to a construction that leaves a portion of the writing useless and inexplicable." Martin v. United States

Fidelity and Guaranty Co., 996 S.W.2d 506, 511 (Mo. 1999). Harnden v. The Continental Insurance Company, 612 S.W.2d 392, 394 (S.D. Mo. 1981). It is the duty of the court to interpret the insurance policy and enforce it as it is written and not to remake it. Kearbey v. Reliable Life Insurance, 526 S.W.2d 866, 869 (Mo.App. 1975). The ruling in As One and in the present case leaves the phrase "is furnished" useless and inexplicable Martin (supra). Of course the most reasonable explanation is that given by the Eastern District in Tickle based on its analysis of Missouri statute and the Code of State Regulations. As One does not address the issues raised in Tickle. It does not refer to them or comment on them. It ignores the careful analysis and reasoning of the Eastern District. It reads the phrase "furnished to you" in isolation without considering the history, purpose and reason for the "temporary worker" exception to the employee exclusion.

The holding in Tickle has set a clear standard for cases throughout the country which have cited Tickle with approval in construing the policy definitions under the laws of their own states. This includes cases from states where the workers' compensation statutes do not make a distinction between leased and temporary workers. The Supreme Court of Kentucky in the case of Brown v. Indiana Insurance Co., 184 S.W.3d 528 (Ky. 2005) cited the Tickle case in addressing the issue of "temporary worker":

P. 539 However, courts that have construed the "temporary worker" exception in a state workers' compensation context have had no difficulty explaining or finding the logic in the "furnished to" requirement. Missouri has a workers' compensation statute, Mo. Rev. St. §287.282.3, as supplemented by a regulation, Mo. Code Regs. Ann. Tit. 20 §500-6.800(1)(A)&(B), that similar to KRS 342.615, distinguishes between "employee leasing arrangements" and "temporary help service arrangements" which assign their employees to clients for a finite period of time to support or supplement the clients work force in special work situations such as employee absences, temporary skill shortages and seasonal work loads ….." In construing the "temporary worker" exception to the employee exclusion in a CGL policy, the Missouri Court of Appeals found that the "furnished to" clause in the policy definition of "temporary worker" correlated with the statutory definition of "temporary help service." American Family Mutual Insurance Co. v. Tickle, 99 S.W.3d 25, 30-31 (Mo. Ct. App. 2003). Thus construed, the court found no ambiguity in the "furnished to"

language of the exception. *Id*. at 31. Even absent a workers' compensation statute similar to KRS 342.615, the Appellate Court of Connecticut had no difficulty understanding the meaning of the standard "furnished to" language contained in a CGL policy definition of "temporary worker".

Monticello Insurance Company v. Dion, 836 N.E.2d 1112 (App. Ct. of Mass. 2005) held that the phrase "furnished to" necessarily connotes some involvement by a third person (citing Tickle); Nautilus Insurance Company v. Gardner, (U.S.D.C. Pa.) 2005 WL 664358 P. 7 (Appendix A60). "It is clear that to be 'furnished' someone or something must be supplied, provided, or equipped to another entity or person" (citing Tickle); in Nationwide Mutual Insurance Company v. Allen, 850 A.2d 1047, 1057 (App. Ct. Conn. 2004) the court stated: "The court found that Allen did not go to an employment agency, manpower service provider or any similar service to employ or to utilize Shaw's services. Shaw was not employed by anyone who lent or furnished him to Allen as an employee. Thus, the court reasonably concluded that Shaw was not furnished to Allen within the definition of 'temporary worker' and could not be a temporary worker under the insurance policy. Additionally, we observe that the temporary worker

definition makes no grammatical sense without the 'furnished by' language."

In January 2007, the United States District Court in Minnesota in the case of Amco Insurance Co. v. Dorpinghaus, (U.S.D.C. Minn.) 2007 WL 313280 (Appendix A25) cited Tickle with approval and rejected the holding in As One. The United States Court of Appeals for the 6th Circuit in the case of General Agents Insurance Company of America, Inc. v. Mandrill Corporation, Inc., 2007 WL 2050850, P. 5-6, (Appendix A33) addressed the same issue. Again the court cited Tickle with approval and rejected the holding in As One. Even though the distinction between leased and temporary workers did not exist in the Tennessee Workers' Compensation Statute the court agreed that the phrase "furnished to" in the definition unambiguously requires the involvement of a third party, such as a temporary staffing agency, that supplies the worker to the insured employer. The court stated that the holding in As One "effectively reads the phrase 'furnished to' out of the CGL policy"; Pacific Employers Insurance Company v. Wausau Business Insurance Company (U.S.D.C. W.D. Fla.) 2007 WL 2900452, P. 3-4 (Appendix A44). (Citing Tickle); See: Scottsdale Insurance Company v. Carrabassett Trading Company Ltd., 460 F.Supp.2d 251, 258 (U.S.D.C. Mass. 2006).

Appellant Gavan cites the case of Bituminous Casualty Corp. v. Ross, 413 F.Supp. 740 (N.D. W.V. 2006) for the proposition that both "furnished" and "short term work load conditions" are ambiguous. The West Virginia workers' compensation law does not distinguish between "employee leasing arrangements" and "temporary help service arrangements". (Appendix A10) Ross cites only the case of Ayers v. C&D General Contractors, 237 F.Supp.2d 764 (W.D. Ky. 2002) in support of its position. In Ayers the Federal District Court speculated on how the Kentucky courts would construe the policy. The court found the phrase "furnished to you" to be ambiguous. After the decision in Ayers the Supreme Court of Kentucky in Brown v. Indiana Insruance Company, 184 S.W.3d 528, 539 did address this very issue and held that the court in Ayers got it completely wrong. The Brown court pointed out that the action in Ayers was not brought under the Kentucky Workers' Compensation Act but rather pursuant to the Longshore Harbor Workers' Compensation Act which draws no distinction between "temporary worker" and any other employee. The court in Ayers had no reason to look to the Kentucky Workers' Compensation Act to ascertain the explanation for or logic behind the distinction.

Respondent has been able to locate only three cases which cite Ross. Each case rejects the holding in Ross that the policy is ambiguous: General

Agents Insruance Company of America, Inc. v. Mandrell Corp., (USCA 6th Circ) 2007 WL 205850, P. 5 (Appendix A33); Amco Insurance Co. v. Dorpinghaus, (U.S.D.C. Minn.) 2007 WL 313280, P. 5 (Appendix A25); Pacific Employers Insurance Company v. Wausau Business Insurance Company, (U.S.D.C. W.D. Fla.) 2007 WL 2900452, P. 6 (Appendix A44).

The Eastern District in the present case stated that "the term 'furnished' is ambiguous". (P. 8) The opinion provided no analysis in support of that conclusion. As indicated above, it is contrary to the weight of authority. Brown v. Indiana Insurance Co., 184 S.W.3d 528, 539 (Ky. 2005); Monticello Insurance Company v. Dion, 836 N.E.2d 1112 (App. Ct. of Mass. 2005); Nautilus Insurance Company v. Gardner, (U.S.D.C. Pa.) 2005 WL 664358, P. 7 (Appendix A60); Nationwide Mutual Insurance Company v. Allen, 850 A.2d 1047, 1057 (App. Ct. Conn. 2004); Amco Insurance Co. v. Dorpinghaus, (U.S.D.C. Minn.) 2007 WL 313280, P. 5 (Appendix A25); General Agents Insurance Company of America, Inc. v. Mandrell Corporation, Inc., (U.S.C.A. 6th Circ.) 2007 WL 2050850, P. 5-6 (Appendix A33); Pacific Employers Insurance Company v. Wausau Business Insurance Company, (U.S.D.C. Fla. 2007) 2007 WL 2900452, P. 11-12 (Appendix A44); Scottsdale Insurance Company v. Carrabassett Trading Company Ltd., 460 F.Supp.2d 251, 258 (U.S.D.C. Mass. 2006);

Burlington Insurance Company v. De Vesta, (U.S.D.C. Conn. 2007) 2007 WL 2767958 (Appendix A56).

The word "furnish" is taken straight from the Code of State Regulations. Sec. 287.282.3 R.S.Mo. refers to temporary help service arrangements "which *assign* their employees". Obviously the code and the statute contemplate that an employee will be "furnished" or "assigned" by a third party. It is in this context that the word "furnished" is used in the CGL policy. Language in a policy must be construed in the context of the policy as a whole. Simply to say that the word "furnished" is ambiguous without consideration of the reason and logic behind its use is not sufficient. The Eastern District in Niswonger v. Farm Bureau Town & Country Ins. Co., 992 S.W.2d 308 (Mo.App. E.D. 1999) stated:

> P. 318-319 An insurance policy is not issued in a vacuum but rather under a given set of factual circumstances, and what at first blush might appear ambiguous in the insurance contract might not be such in the particular factual setting on which the contract was issued.

The word "furnished" is not ambiguous either standing alone or in the context of its use in the CGL policy.

Gavan asks this Court to repudiate the holding in American Family v. Tickle and adopt the ruling of the Southern District. Tickle is a well reasoned, thoughtful decision. It clearly explains the logic in the "furnished to" requirement and how it correlates with Missouri Workers Compensation law. It has been cited with approval by the courts of several states and appears to be well settled law. This Court should affirm the holding in Tickle.

3.

Bryan Gavan was not hired to meet "short term work load conditions."

The policy definition of "temporary worker" as that term is applicable to this case is one who is furnished to meet short term workload conditions.

The nature of the masonry business is such that the volume of business available increases and decreases depending on many variables. At times there may be less construction and consequently less work for the various building subcontractors and for the construction trades. Of course that is true for many businesses. An increase in business may prompt a law firm to hire more associates; if business decreases associates may find themselves out of a job. In his brief, Gavan appears to take the position that any employee whose employment may terminate in the indefinite future is a

"temporary worker". In that sense almost every employment is temporary and almost every employee could be considered a temporary worker. But a "temporary worker" as defined in the policy is not someone whose employment at some future indefinite date may terminate. A temporary worker is someone furnished to meet short term workload conditions.

The undisputed evidence in this case is that Gavan was hired not to meet short term workload conditions but rather was hired as a bricklayer for an indefinite period which could last for years depending on the volume of work available. In November 1996, Gavan went to work for Ste. Genevieve as a bricklayer. (Gavan depos. L.F. 125). He was told by Local 1 that Ste. Genevieve had a job going so he went out to the job site and was hired. (L.F. 126). He worked for Ste. Genevieve until October 1998, almost two years. He was appointed job steward by the union. As job steward his duties included keeping time sheets, making sure all employees were union, watching safety issues and dealing with grievances. (L.F. 127). During that period Gavan worked as a bricklayer on different jobs for Ste. Genevieve. (L.F. 305). He was not layed off but voluntarily quit because other workers were being layed off and it appeared to him they were running out of work. (L.F. 127) Clearly, Gavan was not hired in 1996 as a temporary worker to meet short term work load conditions. He was hired as a regular bricklayer

with additional responsibilities as job steward. Had he not chosen to quit, Ste. Genevieve may have placed him on another job. The clear implication is that if Ste. Genevieve had more work his employment would have continued for the indefinite future.

When Gavan was reemployed in January 2000 it was not for a certain job or for a certain period of time. He first worked on a Kohl's store in Arnold, Missouri. Next he worked on an elementary school in Chesterfield. He was sent to work at Gravois Bluffs for a week and then to a strip plaza in St. Charles. Finally he was sent to work at another Kohl's in Gravois Bluffs where he was injured. (L.F. 192). During that time Ste. Genevieve loaned him out to another contractor for a short period. A temporary worker might have been let go but Ste. Genevieve must have considered him an employee whom they wanted to keep for an indefinite period. The nature of Gavan's employment can be seen from his own deposition testimony. Gavan agreed that he was hired for an indefinite period. Mr. Gavan testified:

> Q: Now, when you were hired there in January 2000, you weren't hired for any particular time, were you?
>
> A: No.
>
> Q: You were hired for an indefinite period?

A: Well, they told me they didn't know how long they could keep me working.

Q: But that means indefinite?

A: I was just trying to get something to go til summer time, until the weather broke.

Q: But that's an indefinite period, isn't it?

A: I don't know. I guess you could say that.

Q: They didn't say, we're going to hire you from here until such and such a date and let you go at that time?

A: No. I think he mentioned something about we got two, three months' worth right now, then if something breaks loose later, it may be a little longer. Otherwise, it might just be two or three months.

Q. But if at the end of the Kohl's job, they had another job then you might have stayed on or might not have stayed on, is that right?

A. Right.

Q. So you were not hired for any particular job or any particular length of time, you were just hired as a bricklayer depending on how much work they had.

A. Right.

(L.F. 128)

This was confirmed by Timothy Uding, Vice President of Ste. Genevieve in his Affidavit (L.F. 305-306) where he stated that had Gavan not been injured, Ste. Genevieve would have continued to employ him indefinitely. It was a busy time for Ste. Genevieve and depending on the work load Gavan could have worked for Ste. Genevieve for several years or more. In his deposition Uding testified:

> A. Yes. It's a job, we got a job coming up that's going to be two year long project just on that one job site. And the individuals that will start there will probably be there for two years if I have a lot of work after that, they will move just to another job. (L.F. 157).

Of course this is consistent with Gavan's work history with Ste. Genevieve. He had previously worked for Ste. Genevieve for a period of two years which is indicative of regular employment not short time workload conditions. The definition of temporary worker includes substitution for a permanent employee on leave or to meet seasonal workload conditions. These are clearly short term, temporary, even urgent situations. By

definition, seasonal employment can last only a few weeks. Substitution for an employee on leave usually involves an urgent situation lasting a short period of time. The sense in which a word or phrase is used is normally determined by its context. Slay Warehousing Company, Inc. v. Reliance Insurance Co., 471 F.2d 1364, 1368 (USCA 8th Circ. 1973); Farm Bureau Town & Country Ins. Co. of MO v. Barker, 150 S.W.3d 103, 105-106 (Mo.App. W.D. 2004). "Words or phrases in an insurance contract must be interpreted by the court in the context of the policy as a whole and are not to be considered in isolation." Haggard Hauling & Rigging Co. v. Stonewall Ins. Co., 852 S.W.2d 396, 399 (W.D. W.D. 1993). Hall v. Federal Life Ins. Co., 71 S.W.2d 762 (W.D. Mo. 1934). Cochran v. Standard Acc. Ins. Co. of Detroit, 271 S.W. 1011 (Mo.App. W.D. 1925). Taking the phrase "short term work load conditions" in the context of the definition of "temporary worker", it clearly means hiring a person for a short period of time, not unlike substitution for an employee on leave or for seasonal work, and not for work which may last for an indefinite number of years. This is a consistent with Sec. 287.282.3 R.S.Mo. as supplemented by the Code of State Regulations 20 CSR 500-6.800. In his affidavit, Mr. Gavan states that he "was working for Ste. Genevieve Building Stone Company as a temporary worker; I was not a permanent employee of Ste. Genevieve

Building Stone Company" (L.F. 192) and "My employment with Ste. Genevieve was strictly temporary" (L.F. 193). These are not statements of fact, they are conclusions. The undisputed facts are that Gavan had been and might again be employed by Ste. Genevieve indefinitely for several years or more. Gavan does not dispute this. He admitted he was not hired for any particular job or for any particular length of time. He uses the word "temporary" in the sense that someday in the indefinite future Ste. Genevieve would run out of work and he would be out of a job.

Don Brown is the Business Manager of Bricklayer's Local Union No. 1 of Missouri. In his Affidavit he states that employment with a contractor is considered "temporary employment" and that most employment of bricklayers is considered temporary "to fulfill short-term workload conditions". (L.F. 195). Again, Mr. Brown states conclusions, not facts. He uses the phrase "is considered" which is an expression of opinion and not a statement of material fact. His statement regarding "short-term workload conditions" does not refer to Mr. Gavan. It is simply an abstraction. His affidavit ignores the fact that Gavan worked for Ste. Genevieve for two years between 1996 and 1998 and had he not been injured in 2000 he could have continued to work indefinitely.

Mr. Gavan contrasts himself to members of a family owned business. He complains that when work slowed down, non-family members were released, but that family members remained employed. Tim Uding testified that his father runs the business, his sister is in charge of the office, his aunt is bookkeeper, (L.F. 248-249). Several cousins are foremen (L.F. 250). Other long time employees work in the warehouse (L.F. 251). Mr. Gavan is a bricklayer, not an owner. When people get layed off from a family owned and run business, it is to be expected that employees who are not owners or family members will go first. But this has nothing to do with the nature of Gavan's employment. His statement that he was "temporary" and others were "permanent" is not helpful in determining whether Gavan was hired to meet short time work load conditions. To determine that it is necessary to look to Gavan's employment for the two year period 1996-1998 and to his employment in 2000.

This very issue was considered by the United States District Court in the case of Scottsdale Insurance Company v. Carrabassett Trading Co. Ltd., 460 F.Supp.2d 251 (U.S.D.C. Mass. 2006). The issue was whether an employee was a "temporary worker" defined the same as under the Bituminous policy. In finding the employee was not a "temporary worker", the Court stated:

> P. 258 The plain meaning of the word "short-term" suggests a period of time that is relatively brief and relatively finite. For example, someone hired to complete a specific project or responding to an unexpected, temporary demand in goods or services could reasonably said to have been furnished to meet "short-term" workload conditions. Conversely, "short-term" cannot mean "indefinite" or "open ended". A reasonable person considering policy language covering injuries to workers provided to meet "short-term workload conditions would not expect coverage for workers provided for "indefinite" workload conditions.

Scottsdale was cited with approval in the case of Pacific Employers Insurance Company v. Wausau Business Insurance Company, (U.S.D.C. Fla. 2007) 2007 WL 2900452 P. 11-12 (Appendix A44).

Gavan was not hired to complete a specific project or to respond to an unexpected temporary demand for services. He worked at several different projects as needed by Ste. Genevieve. As stated in his deposition, Gavan was not hired for any particular job or for any particular length of time. He

was hired as a bricklayer depending on how much work Ste. Genevieve had. If at the end of the Kohl job Ste. Genevieve had another job then he might or might not have stayed on. (L.F. 128) This is clearly "indefinite" or "open-ended" as contrasted with "short-term". Scottsdale P. 258.

Gavan cites the case of Martinez v. National Union Fire Insurance Co., 126 S.W.3d 1. That was a case in which the Eastern District entered its order affirming the judgment of the trial court pursuant to Rule 84.16(b). The Memorandum filed by the Court states that the case "shall not be reported, cited, or otherwise used in unrelated cases before this court or any other court". In that case, plaintiff obtained summary judgment in the Circuit Court. (L.F. 269-277). The facts in that case differ from the facts in the present case. Although the Circuit Court opinion is far from clear it appears that Martinez was "furnished" by the union for a single short time work project, the erection of a cellular telephone tower. When the tower was up, the job was over. The issue as framed by the trial court was whether Martinez was a "temporary worker" or a "leased employee". (L.F. 274). The court found he was not a "leased employee". (L.F. 276). The court in Martinez did not address the issues raised and ruled on in American Family v. Tickle. The court did not issue its opinion in Tickle until February 2003, almost seven months after the Order and Judgment in Martinez. The Record

on Appeal in this case does not include the record in Martinez. For that reason, it is impossible to compare Martinez to the present case. The trial court's ruling in Martinez is not precedent for any ruling in the present case.

The nature of Gavan's employment by Ste. Genevieve is really not disputed. He was not hired for "short term workload conditions" but rather as a bricklayer for an indefinite period which could (and did) last for years.

II

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IN THAT THE RECORD DOES NOT CONTAIN TWO PLAUSIBLE BUT CONTRADICTORY ACCOUNTS OF ESSENTIAL FACTS BECAUSE THE EVIDENCE PRESENTED BY RESOPNDENTS DID NOT CONFLICT WITH THE EVIDENCE PRESENTED BY PLAINTIFF GAVAN ON WHETHER GAVAN WAS A TEMPORARY WORKER.

ARGUMENT

1.

The evidence presented by Bituminous does not conflict with evidence presented by Bryan Gavan with regard to whether Gavan was hired to meet short term workload conditions.

A party is entitled to summary judgment if there is no genuine issue as to any material fact. Civil Rule 74.04(c)(6). A "genuine issue" exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of essential facts The record is viewed in the light most favorable to the non-movant. The movant bears the burden of

establishing a right to judgment as a matter of law on the record as submitted. Any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., etc., 854 S.W.2d 371, 382 (Sup. Ct. En Banc 1993).

One of the issues in this case is whether Bryan Gavan was employed by Ste. Genevieve Building Stone Co. to meet "short term workload conditions". As pointed out in other parts of this Brief, the masonry business is such that the volume of business increases and decreases. Ste. Genevieve cannot guarantee that a bricklayer's employment will be "permanent" in the sense that he will be employed until death or retirement and it is likely that at some indefinite future time, sooner or later, business will slow down and bricklayers will be layed off. This is simply the nature of the masonry business as indeed it is with most construction trades. When business slows down and construction jobs are completed, electricians, carpenters, laborers, painters, etc. may be layed off. That does not mean their careers consist of a series of short term workloads as that phrase would be understood by the layman or as that term is used in the context of the insurance policies. Of course, a workman may be hired to meet short term workload conditions depending on the facts but simply working in the

construction trades does not mean he or she automatically falls within the definition of "temporary worker". The question then becomes whether there is evidence from which a trier of fact could find that Gavan was employed by Ste. Genevieve to meet short term workload conditions. Of course if Ste. Genevieve unexpectedly received ten truckloads of bricks and hired Gavan for the sole purpose of helping unload them, then a trier of fact probably could find Gavan was hired to meet short term workload conditions. But those are not the facts with regard to Gavan's employment by Ste. Genevieve.

In his argument, Gavan ignores the fact that he had been employed by Ste. Genevieve as a bricklayer from November 1996 until October 1998. During that period he was appointed job steward. He voluntarily quit his employment because he was of the opinion that Ste. Genevieve's workload was slowing down. (L.F. 125-127). During that two year period he worked on different jobs for Ste. Genevieve. (L.F. 305). There is nothing in the record to indicate his employment in 2000 was any different than was his employment in 1996-1998. He was hired as a bricklayer for as long as Ste. Genevieve had work. He was not hired for any particular length of time. He was not hired for any particular job. He first worked at a Kohl's store then on various construction sites wherever he was needed. He admitted that had

he not been injured he might have stayed on with Ste. Genevieve. He agreed he was not hired for any particular job or any particular length of time. He was just hired as a bricklayer depending on how much work Ste. Genevieve had. (L.F. 128). Scottsdale Insurance Company v. Carrabassett Trading Co. Ltd., 460 F.Supp.2d 251, 258 (U.S.D.C. Mass. 2006); Pacific Employers Insurance Company v. Wausau Business Insurance Company, (U.S.D.C. Fla. 2007) 2007 WL 2900452, P. 11-12 (Appendix A44). Tim Uding in his Affidavit stated that had Gavan not been injured he might have continued employment with Ste. Genevieve for several years or more. (L.F. 305-306). Gavan's and Uding's testimony was consistent.

Gavan relies heavily on his Affidavit (L.F. 191-193) and the Affidavit of Don Brown (L.F. 194-195) in an attempt to raise a genuine dispute as to the material facts. A genuine issue exists if there is a dispute that is real, not merely argumentative, imaginary or frivolous. The mere existence of a slight doubt, or of an immaterial or frivolous dispute, will not defeat summary judgment. Universal Underwriters Insurance Co. v. Dean Johnson Ford, 905 S.W.2d 529, 532 (Mo.App. W.D. 1995).

In his Affidavit, Gavan states that his work for brick contractors "was primarily temporary work" and that he would be hired until the construction job was completed or the contractor ran out of work. He states that he was

working for Ste. Genevieve as a "temporary worker" and that he was not a "permanent employee" of Ste. Genevieve. His employment was "strictly temporary". He was not considered a "permanent employee" and helped meet "short term workload conditions". (L.F. 191-193).

In order to raise a genuine dispute, a non-movant must state facts which contradict the facts alleged by movant. Conclusions, opinions, legal conclusions, immaterial facts, hearsay, affidavits not made on personal knowledge are not sufficient to raise genuine issues of material fact. First Community Bank v. Western Surety Company, 878 S.W.2d 887, 890 (Mo.App. S.D. 1994); Zerebco v. Lolli Bros. Livestock Market, 918 S.W.2d 931, 934 (Mo.App. W.D. 1996); Tonkovich v. Crown Life Insurance Co., 165 S.W.3d 210, 214 (Mo.App. E.D. 2005); Universal Underwriters Insurance Co. v. Dean Johnson Ford, Inc., 905 S.W.2d 529, 532-533 (Mo.App. W.D. 1995).

Gavan's assertion that his work for brick contractors "was primarily temporary work" is not a fact that contradicts facts alleged by movant or that raises a genuine issue as to the material facts. What is at issue is not his work "for brick contractors" in general, but his work for Ste. Genevieve. Furthermore, the word "temporary" means different things depending on the context in which it is used. Obviously, by "temporary", Gavan means not

hired for any particular job or for any particular length of time but rather for an indefinite period depending on the amount of work available. This does not dispute or contradict the position taken by Ste. Genevieve. Furthermore, the issue is not whether his work "was primarily temporary work" or whether his employment was "strictly temporary". The issue is whether Gavan was a Temporary Worker defined as a person employed to meet "short term workload conditions". The word "temporary" as used by Gavan is an opinion or a conclusion and not a material fact. The employment of the President of the United States could be considered "temporary" but in no sense can the President be considered a "temporary worker".

In his Affidavit Gavan states "I helped meet short term workload conditions". Whether Gavan met short term workload conditions is an issue for this court. It is not sufficient for Gavan to state that he helped meet short term workload conditions in order to prove that proposition. He must state facts from which this court can find that he was in fact employed to meet short term workload conditions. But the undisputed facts do not support this proposition. In his Brief, Gavan points out that Tim Uding in his Affidavit states "Gavan was not hired as a temporary worker. He was not furnished to Ste. Genevieve Building Stone Company to substitute for a permanent employee on leave or to meet seasonal or short term workload conditions."

(L.F. 305). Gavan argues that since that statement in Uding's Affidavit contradicted the affidavits filed by Gavan "it created a genuine issue as to Brian Gavan's employment status".

Uding's statement is no more a statement of fact than is Gavan's statement. Neither statement standing alone is evidence that Gavan was or was not employed to meet short term workload conditions. Both are conclusions of law. A case in point is Zerebco v. Lolli Bros. Livestock Market, 918 S.W.2d 931 (Mo.App. W.D. 1996). The issue in that case was whether plaintiff who was injured on the job was an employee of defendant. Plaintiff argued that the trial court erred in granting summary judgment because the affidavit of defendant was legally insufficient and contained incompetent testimony. The court stated:

> P. 934 Having reviewed the affidavit of James D. Lolli, we agree that some of the statements he swears to, including those claiming appellant was an "employee" and performing work in Lolli Brothers "usual course of business" when he was injured, without reference to any supporting facts, are conclusions of law that a trial court should disregard in ruling on a motion for summary judgment. See: First Community Bank v. Western Surety Co., 878 S.W.2d 887, 890 (Mo.App. 1994).

> Nonetheless, it is only these conclusory statements, not the entire affidavit, that are disregarded.

The affidavit statements of both Gavan and Uding with regard to "short term workload conditions" without reference to any supporting facts are legal conclusions and should be disregarded. However, statements of fact set out in Uding's affidavit along with undisputed deposition testimony from both Uding and Gavan clearly show that Gavan does not fall within the definition of Temporary Worker.

The Affidavit of Don Brown (L.F. 194-195) does not set out facts which give rise to a genuine dispute as to material facts. It states that "employment with a contractor is considered temporary employment" and that "most employment of bricklayers is considered temporary to fill short-term workload conditions". The objections raised to Gavan's Affidavit are equally applicable to Brown's Affidavit. Furthermore Brown uses the phrase "is considered". Considered by whom and on the basis of what facts? This is clearly an opinion and/or conclusion. Finally, Brown makes no reference to Bryan Gavan. His statements are simply abstractions and have no application to Gavan's relationship to Ste. Genevieve.

In its Motion for Summary Judgment Bituminous alleged that Joe Gotsch and Zachary Brace were employees of Ste. Genevieve and were covered under the Bituminous policies except for liability for injuries to co-employees. It is still Bituminous' belief and position, based on Missouri case law, especially the case of American Family v. Tickle that Gotsch and Brace were employees of Ste. Genevieve. Should this court hold that Gavan was a Temporary Worker as defined in the policies, then under all the facts Gotsch and Brace would also be Temporary Workers, not employees, and would not be entitled to coverage under the Bituminous policies.

2.

The evidence presented by Bituminous does not conflict with evidence presented by Bryan Gavan with regard to whether Bryan Gavan was furnished to Ste. Genevieve

In the Substitute Brief, Bryan Gavan argued that he either furnished himself to Ste. Genevieve or was furnished by the union. Here he seeks to reargue that position based on the assertion that there are factual disputes. There are no factual disputes. In his Affidavit (L.F. 191) and in his deposition (L.F. 243-244) Gavan stated he would obtain work by a referral by the union or by going to the job site and being hired directly to the contractor. He made a clear distinction between the two methods of

obtaining employment. In January 2000 he was hired by Ste. Genevieve his old employer by going to the job site and obtaining employment directly from his old job superintendent and not by referral by the union. (Gavan deposition, L.F. 128).

Gavan makes the argument that the Collective Bargaining Agreement standing alone is evidence that Gavan was furnished by the union. A review of the various provisions of the agreement do not support that argument. It may be that some collective bargaining agreements require all hiring must be done through the union. This clearly is not one of them. Nothing in the agreement refers in any way to the method or requirements of hiring. The Agreement covers compensation, pension benefits, vacations, days of the work week, apprentice programs and other employment matters but it does not mention hiring. Although the testimony is that the union may refer employees it is undisputed that employees often obtain their own jobs as did Gavan in this case. The Agreement does not touch on that issue. Gavan's position that by the terms of the Agreement it must be concluded that the union "furnished" Gavan to Ste. Genevieve has no support in fact or in law.

In his argument, Gavan did not identify any factual dispute with regard to how Gavan was hired in 2000. The evidence all came from Gavan and was not in any way disputed by Ste. Genevieve.

Ste. Genevieve submits there are no genuine issues as to any material facts in this case. There are only questions of law for this court. Gavan's suggestion that this court follow As One, 189 S.W.3d at 199 and remand the case on the question of "short term workload conditions" is not appropriate. In As One there were factual disputes that had to be resolved. In the case before this court there are none.

CONCLUSION

The trial court correctly granted Summary Judgment on behalf of Respondents Bituminous Casualty Corp. and Bituminous Fire and Marine Insurance Company.

Bryan Gavan and Zachary Brace and Joseph A. Gotsch were fellow employees of Ste. Genevieve Building Stone Company. There was no coverage under the Bituminous policies for any liability of Brace and Gotsch to Bryan Gavan.

Bryan Gavan was not a "Temporary Worker" as defined in the policies.

The record does not contain two plausible but contradictory accounts of essential facts.

Respondents respectfully submit that this court affirm the ruling of the trial court and enter judgment for Respondents.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Joseph L. Leritz, Attorney for Respondents, hereby certifies that two copies of the above and foregoing Respondents' Substitute Brief were mailed, first class, postage prepaid through the United States Postal Service this ____ day of November, 2007 to:

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ATTORNEYS FOR APPELLANT

CERTIFICATION

Come Now Respondents and states their Substitute Brief does not exceed 90 percent of the limits prescribed in Rule 84.06(b) and is approximately 12,696 words or 1,349 lines. The Substitute Brief is in 14 font, Times New Roman.

Respondents further certify they have provided a three and half inch floppy disk in Microsoft Word format and that the disk has been scanned for viruses and it is virus free.

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