

IN THE SUPREME COURT OF MISSOURI

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

**SUBSTITUTE BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This action is one involving the question of whether the Circuit Court of the County of St. Louis erred in granting Defendants Bituminous Casualty Corporation and Bituminous Fire & Marine's Motion for Summary Judgment and denying Plaintiff Bryan Gavan's Cross-Motion for Summary Judgment. As the action involves the above question, it does not fall within the exclusive appellate jurisdiction of the Supreme Court of Missouri pursuant to the provisions of Article V, Section 3, of the Missouri Constitution. The Supreme Court of Missouri has ordered the transfer of this case from the Court of Appeals for the Eastern District of Missouri upon application by Respondents. The Supreme Court of Missouri has jurisdiction over this appeal pursuant to the provisions of Article V, Section 10, of the Missouri Constitution.

## **STATEMENT OF FACTS**

This appeal arises from a declaratory judgment action brought by Plaintiff, Bryan Gavan, against Bituminous Casualty Corporation and Bituminous Fire & Marine Insurance Company (hereinafter “Bituminous Companies”). (L.F. 24-30). Bryan Gavan was injured while working as a bricklayer for a contractor, Ste. Genevieve Building Stone Company (hereinafter “Ste. Genevieve”), on a construction project at 115 Gravois Bluff in Fenton, Missouri. (L.F. 25, 31, 36). The accident occurred on May 15, 2000, as Mr. Gavan attempted to descend from a scaffold by means of a ladder. The ladder collapsed and Mr. Gavan fell to the ground sustaining serious injuries. (L.F. 129-132, 153-154). Zachary Brace and Joe Gotsch (hereinafter “Brace” and “Gotsch”) were laborers employed by St. Genevieve working at the construction site with Mr. Gavan at the time of his accident. (L.F. 153-154). The laborers’ duties at the work site included insuring that all scaffolding and ladders attached thereto were secured and set in the normal and proper position before the bricklayers attempted to use them. (L.F. 154). Brace and Gotsch were responsible for the scaffolding and ladder in Mr. Gavan’s work area and failed to secure the ladder. (L.F. 131). This caused the ladder to collapse and resulted in Mr. Gavan’s serious and permanent injuries. (L.F. 131).

On August 13, 2002, Plaintiff filed a cause of action for the injuries sustained in the incident of May 15, 2000, in the Circuit Court of the County of St. Louis, Missouri, known and numbered as Bryan D. Gavan v. Zachary Brace and Joe Gotsch, cause number 02CC-003141. (L.F. 1-3). In a letter dated November 5, 2002, Bituminous Companies stated that on May 15, 2000, there were in force and effect a commercial

general liability policy number CLP 3077498 issued by Bituminous Fire & Marine to Ste. Genevieve and a commercial umbrella policy number CUP 2530021 issued by Bituminous Casualty Corporation to Ste. Genevieve. (L.F. 101-104). However, the letter stated that neither Brace nor Gotsch was insured under these policies for the injuries alleged to have been sustained by Bryan Gavan in his petition. (L.F. 101-104). The letter further stated that Bituminous Companies would not provide a defense to Brace or to Gotsch. (L.F. 101-104).

On April 14, 2003, Bryan Gavan and Zachary Brace entered into a settlement agreement under §537.065, R.S.Mo., providing that a judgment against Brace would be satisfied only from the proceeds of any applicable insurance policies. (L.F. 105-110). On December 29, 2003, Bryan Gavan and Joe Gotsch entered a settlement agreement under §537.065, R.S.Mo., providing that a judgment against Gotsch would be satisfied only from the proceeds of any applicable insurance policies. (L.F. 113-118). After taking evidence, Judge Colleen Dolan entered a Final Judgment and Order on January 12, 2004, in favor of Bryan Gavan in the amount of two million, three hundred thousand dollars (\$2,300,000.00) for the injuries sustained as a result of the incident of May 15, 2000. (L.F. 119).

This appeal arises from the claim filed by Plaintiff, Bryan Gavan, on December 20, 2004. (L.F. 4-8). Plaintiff named Bituminous Companies, Brace and Gotsch as Defendants and alleged Bituminous Companies had a duty to defend Brace and Gotsch and to satisfy any judgments rendered against Brace and Gotsch in favor of Plaintiff. (L.F. 4-6). On December 19, 2005, Plaintiff filed his First Amended Petition requesting

the court determine the rights of the parties and whether the insurance policies issued by Bituminous Companies provided coverage to Brace and Gotsch in connection with the underlying action. (L.F. 24-30). Plaintiff's First Amended Petition further prayed for an equitable garnishment of the insurance policy of Defendants. (L.F. 29).

On December 21, 2005, Bituminous Companies filed their motion for summary judgment stating that neither Brace nor Gotsch was an insured under the policies issued by Bituminous Companies. (L.F. 172-176). Bituminous Companies based this contention on the provision in their policies stating an employee is not an insured for "bodily injury" to a "co-employee." (L.F. 173-175). Plaintiff then filed his cross-motion for summary judgment on January 23, 2006. (L.F. 181-183). Plaintiff's cross-motion stated Bryan Gavan was a "temporary worker" of Ste. Genevieve under the policies issued by Bituminous Companies and not an "employee," therefore his injuries were not excluded by the "co-employee" exclusion. (L.F. 181-182). The parties thereafter filed additional briefs and affidavits. Additional facts will be referenced in Appellant's argument.

On June 15, 2006, Judge Barbara Ann Crancer of the Circuit Court for the County of St. Louis, State of Missouri, entered a judgment granting Defendants' motion for summary judgment and denying Plaintiff's cross-motion. (L.F. 353). Judge Crancer's order stated that there were no genuine issues as to any material fact. (L.F. 353). On June 28, 2006, Plaintiff filed his Notice of Appeal in the Eastern District Court of Appeals. On June 12, 2007, the Eastern District reversed Judge Crancer's order and remanded the case for further proceedings. This Court accepted transfer on September 25, 2007, upon motion by Bituminous.

**POINTS RELIED ON**

- I. **THE TRIAL COURT ERRED IN GRANTING DEFENDANTS  
BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE &  
MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT  
BECAUSE THE UNCONTROVERTED EVIDENCE ESTABLISHED  
THAT GOTSCH AND BRACE WERE INSURED FOR INJURIES  
THEY CAUSED TO BRYAN GAVAN IN THAT BRYAN GAVAN WAS  
A TEMPORARY WORKER AND NOT A CO-EMPLOYEE OF  
GOTSCH AND BRACE, THEREBY AVOIDING THE POLICIES'  
EXCLUSIONARY CLAUSES.**

American Family Mutual Ins. Co. v. As One, et al., 189 S.W.3d 194 (Mo.App.S.D.  
2006)

Gavan v. Bituminous Casualty Group, No. ED88258 slip op. (Mo.App.E.D., June 12,  
2007)

Hobbs v. Farm Bureau Town & Country Insurance Company of Missouri, 965  
S.W.2d 194 (Mo.App.E.D. 1998)

Martinez, et al. v. National Union Fire Insurance Co., 126 S.W.3d 1 (Mo.App.E.D.  
2003)

**II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT BECAUSE AN ISSUE OF MATERIAL FACT REMAINED IN THAT EVIDENCE PRESENTED BY DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO. DIRECTLY CONFLICTED WITH EVIDENCE PRESENTED BY PLAINTIFF BRYAN GAVAN ON WHETHER BRYAN GAVAN WAS A TEMPORARY WORKER.**

Baker v. Texas & Pacific Railway Co., 359 U.S. 227 (1959)

Gavan v. Bituminous Casualty Group, No. ED88258 slip op. (Mo.App.E.D., June 12, 2007)

ITT Commercial Financial Group v. Mid-America Marine Corp., 854 S.W.2d 371 (Mo. 1993)

L.A.C. v. Ward Parkway Shopping Center, Co., 75 S.W.3d 247 (Mo. 2002)

## POINT I

- I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE & MARINE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE UNCONTROVERTED EVIDENCE ESTABLISHED THAT GOTSCH AND BRACE WERE INSURED FOR INJURIES THEY CAUSED TO BRYAN GAVAN IN THAT BRYAN GAVAN WAS A TEMPORARY WORKER AND NOT A CO-EMPLOYEE OF GOTSCH AND BRACE, THEREBY AVOIDING THE POLICIES' EXCLUSIONARY CLAUSES.

### SCOPE OF REVIEW

“Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” L.A.C v. Ward Parkway Shopping Center Co., 75 S.W.3d 247, 256 (Mo. 2002) (citing City of Hazelwood v. Peterson, 48 S.W.3d 36, 38-39 (Mo. 2001)). This Court, in ITT Commercial Financial Corp. v. Mid-America Marine Corp., 854 S.W.2d 371, 376 (Mo. 1993) stated, “The purpose of summary judgment is to terminate litigation about which there is no genuine factual dispute and where the prevailing party can be determined as a matter of law.” Appellate review of the propriety of summary judgment is *de novo*. L.A.C., 75 S.W.3d at 256 (citing City of Hazelwood, 48 S.W.3d at 38-39). Thus, an appellate court reviewing a trial court’s ruling applies the same standard as the lower court and no deference is given to the trial court’s determination. ITT Commercial Financial Corp., 854 S.W.2d at

376. “In reviewing the language of an insurance policy, this court need not give deference to the trial court’s interpretation.” City of Hazelwood, 48 S.W.3d at 38-39.

When considering appeals from summary judgment, the appellate court should review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Financial Corp., 854 S.W.2d at 376.

### **ARGUMENT**

The sole issue presented to the trial court was whether the insurance policies issued by the Bituminous Companies covered the judgment which Bryan Gavan obtained against Zachary Brace and Joe Gotsch. There was no dispute as to the validity of the judgment, nor was there a dispute about whether the insurance policies were in full force and effect.

In their motion for summary judgment, Bituminous Companies argued that a “fellow servant” exclusion precluded coverage. Simply stated, the fellow servant exclusion states an employee is insured under the policy for injuries caused to another, unless those injuries are caused to a co-employee. Since Bryan Gavan worked for the same employer as Brace and Gotsch, Defendants argue, they are co-employees and the exclusion applies. This argument, however, is not supported by the policy language or the facts. Under both policies, the co-employee exclusion does not apply if an employee injures a “temporary worker.” Thus, the central issue to decide is whether Bryan Gavan was a “temporary worker” of Ste. Genevieve at the time of his injury.<sup>1</sup>

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<sup>1</sup> Bituminous admitted that Gotsch and Brace were “employees” under the definition in

Resolving this issue requires a review of the policies' definitions. Both insurance policies have the same exclusion upon which the Bituminous Companies rely and both have identical definitions of "employee" and "temporary worker." Under both policies "employees" are insured for injuries they cause to others. However, "none of these 'employees' is an insured for: [b]odily injury . . . to a co-'employee.'" (L.F. 52, 72).

"Employee," in turn, is defined as follows:

"Employee includes a 'leased worker.' Employee does not include a 'temporary worker.'" (L.F. 56, 80).

Thus, if an "employee" injures another co-"employee," including a "leased worker," the exclusion applies. However, the exclusion, by the policy terms, does not apply to injuries caused to a "temporary worker." The policies define "temporary worker" as well:

"'Temporary worker' means a person furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." (L.F. 58, 84).

Thus, an employee who injures a person who 1) is furnished to substitute for a permanent employee on leave, or 2) is furnished to meet seasonal conditions, or 3) is furnished to meet short-term workload conditions, is covered by the insurance policies for their conduct.

Defendants' motion for summary judgment contended that Bryan Gavan was a co-employee to Brace and Gotsch, therefore Gavan's injuries were not covered under the policy. (L.F. 172-176). Defendants' Memorandum in Support of their Motion for

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the policies, so no issue was presented as to their status. (L.F. 101, 167-168)

Summary Judgment (L.F. 160-165) cited the definition of employee used in Zink v. Employers Mutual Liability Insurance Co., 724 S.W.2d 561, 563 (Mo. App. W.D. 1987), as support for their contention that Bryan Gavan was an employee. (L.F. 163). This definition provides that a “fellow employee” means “another employee of the same employer.” Id. However, if a term is defined in an insurance policy, the court will look to the policy’s definition and nowhere else. Hobbs v. Farm Bureau Town & Country Insurance Company of Missouri, 965 S.W.2d 194, 197 (Mo. App. E.D. 1998). Thus, the definitions of “employee” and “temporary worker” used by Defendants in their policies control. As stated in Polston v. Aetna Life Insurance Co., 932 S.W.2d 786, 788 (Mo. App. E.D. 1996), “Definitions in an insurance policy are controlling as to the terms used within the policy, especially when the policy definitions differ from the ordinary definitions of those terms.” Here, it is clear that the definition of “employee” used by Defendants in their policies (as stated above) differs from the common law definition, as stated in Zinc, 724 S.W.2d at 563. Thus, Defendants cannot simply ignore the definition of “employee” that they have incorporated into their policies.

Further, using the definition of employee found in Missouri case law rather than the definition provided in Defendants’ policies would render the term “temporary worker” and its definition meaningless. The definition of “employee” provided in the policies would also be superfluous. The use of the common law definition of employee, rather than properly using the terms and definitions provided by the policies would directly conflict with Missouri cases stating that each term of a contract “is construed to avoid an effect which renders other terms meaningless.” Reese v. U.S. Fire Insurance

Co., 173 S.W.3d 287, 299 (Mo. App. W.D. 2005); (quoting Tuttle v. Muenks, 21 S.W.3d 6, 11 (Mo. App. W.D. 2000)).

Not only have Missouri courts consistently bound an insurer to the definitions the insurer provides in its policies, Missouri courts have established rules for interpreting policy exclusions. The interpretation of the meaning of an insurance policy is a question of law. American Family Insurance Co. v. Bramlett, 31 S.W.3d 1 (Mo. App. W.D. 2000). The burden rests on the insurer to prove that the loss was within policy exclusion. Exclusionary clauses in insurance contracts are strictly construed against the insurer. Rice v. Fire Insurance Exchange, 946 S.W.2d 40 (Mo. App. S.D. 1997). Although an exclusion may be given effect when it is clear and unequivocal, if it conflicts with other parts of the policy or if documents outside the policy create an ambiguity, the ambiguity will be construed in favor of coverage. Id. at 42. Policy provisions designed to restrict, limit or impose exceptions or exemptions on insurance coverage are strictly construed against the insurer. Christian v. Progressive Casualty Insurance Co., 57 S.W.3d 400 (Mo. App. S.D. 2001). An insurance contract is designed to furnish protection; therefore it will be interpreted to grant coverage rather than defeat it. American Family Mutual Ins. Co. v. Turner, 824 S.W.2d 19, 21 (Mo. App. E.D. 1991).

Thus, under Defendants' policies and the definitions and terms to which Defendants are properly bound, Bryan Gavan was not an employee if he was a person who was "furnished" to Ste. Genevieve "to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions." (L.F. 58, 84). The trial court erred in granting Defendants' motion for summary judgment because Plaintiff

presented uncontroverted evidence establishing that Bryan Gavan was furnished to meet short-term workload conditions.

In the trial court, after the Bituminous Companies filed their motion for summary judgment, Plaintiff filed a counter-motion for summary judgment raising the issue of Bryan Gavan's status as a temporary worker. The subsequent briefs of Defendants disputed Gavan's status as a temporary worker under two theories: 1) that Gavan was not hired to meet short-term workload conditions, and 2) that Gavan was not "furnished" as the policies required. Appellant will address these two points separately.

**A. BRYAN GAVAN WAS HIRED TO MEET "SHORT-TERM WORKLOAD CONDITIONS"**

The evidence presented by Plaintiff opposing Defendants' motion and in support of his motion for summary judgment included the deposition testimony of Mr. Tim Uding, Vice President of Ste. Genevieve (found in the Legal File and at A22). Ste. Genevieve is a company which provides bricklaying services for commercial and residential construction. (L.F. 148). On the Gravois Bluffs project, where Plaintiff was injured, St. Genevieve was the brick subcontractor. (L.F. 249). Mr. Uding testified that one of his primary duties is the hiring of bricklayers for the company's construction projects. (L.F. 150). Mr. Uding testified that Ste. Genevieve is a family owned business. (L.F. 147). Mr. Uding testified that there are some individuals he considers "permanent employees." (L.F. 149). This would include the family members that work administratively for the company. It would also include his two cousins who are foremen and laborers that have been with his company for "years and years." (L.F. 149).

Similarly, Defendant Zachary Brace (who is a laborer for Ste. Genevieve and the stepson of Tim Uding) testified that there are “company men” that consistently work for Ste. Genevieve. “Company men” choose to stay home when Ste. Genevieve is slow rather than work for another contractor. (L.F. 142). The testimony of Mr. Uding and Mr. Brace establishes a distinction between bricklayers and laborers that work consistently and exclusively for Ste. Genevieve and those hired to meet short-term workload conditions when Ste. Genevieve has an increased volume of work.

Mr. Uding testified that hiring depends on the “volume of work.” (L.F. 150). In his deposition (L.F. 145-158), the following exchange took place:

Q: Now, we talked about employees that might be permanent and I assume you have people that you have to hire for specific jobs depending on the size of the job, is that right?

A: It’s the volume of work. If we’re busy, one job may take twenty individuals on that individual job. Another job may only take four or five people. But depending on how many jobs we have going at the time, our work load determines how many people we keep on hand.

...

Q: Let’s take an example. Let’s say you got a job that requires twenty guys. How do you fill those employment slots?

A: I either shift bricklayers from another job to that job or if somebody has called in looking for work, I’ll put them on.

Q: What about do you ever call the union?

A: I call them occasionally if nobody is really looking for work.

Usually if we are busy, everybody is busy, so it's hard to find bricklayers.

Q: And that's just the nature of the beast?

A: That's the nature of the trade. There is more work than there is people to do it.

Q: So are you set up so that if you're anticipating needing a lot of guys, you might call guys that you've worked with before to see if they are available?

A: Yes. There is normally a group that works with one company. If we get slow, they will go find work elsewhere, just to tie them over until we get busy again.

Q: And if you get – so if it's a big job that you can fill it with those guys and you need more, will you call the hall then?

A: Yes. (L.F. 150-151)

Mr. Uding further stated that when Ste. Genevieve hires a bricklayer there is no guarantee that the work will last for any length of time. Whether a bricklayer will continue to work for Ste. Genevieve is solely dependent on whether the company has any work to give him or her. (L.F. 151).

Prior to his injury, Bryan Gavan worked for Ste. Genevieve for a period of time in the mid-1990's. (L.F. 151). At that time, Ste. Genevieve needed additional bricklayers for a project and called the union hall, which then sent Mr. Gavan to Ste. Genevieve. (L.F.126). Gavan was laid off when the job he was hired for was completed. (L.F. 127).

In the ensuing years, Gavan worked for a variety of bricklaying companies. Mr. Uding testified that when Bryan Gavan was hired in early 2000, Ste. Genevieve was “very busy.” (L.F. 152). He testified that he does not recall how Bryan Gavan was hired in early 2000. (L.F. 152). Mr. Uding testified that when he needs bricklayers for a particular job he will fill this need by shifting bricklayers from another job, calling bricklayers whom he has worked with and that he knows well (on his “call list”), calling the union hall, or being contacted by unemployed bricklayers looking for work. (L.F. 150-151).

Bryan Gavan testified by affidavit and by deposition (both may be found in the Legal File and at A2 and A7). He testified that in January of 2000, he went to a Ste. Genevieve construction site in search of work. (L.F. 128). When he arrived at the site, he approached Mike Uding, the foreman on the job. (L.F. 128). Mike Uding is a cousin of Tim Uding and considered a “permanent employee” by Tim Uding. (L.F. 149). Mr. Gavan testified that Mike Uding hired him for the job. He was told he might work as long as two to three months. (L.F. 128). Mr. Gavan testified that he worked at several jobsites for Ste. Genevieve. (L.F. 128). His affidavit states that he starting working for Ste. Genevieve at a Kohl’s store in Arnold, Missouri, and then at an elementary school in Chesterfield, Missouri. (L.F. 192). Ste. Genevieve ran out of work in March of 2000, so Mr. Gavan then worked for another contractor, Hykamp Masonry, for about three weeks. (L.F. 129, 192). Gavan testified that he was paid by Hykamp during this period of time. (L.F. 129). After working for Hykamp, he began to work for Ste. Genevieve again in April. (L.F. 129, 192). He was moved to several different sites. (L.F. 192). Mr. Gavan

was injured on May 15, 2000, while working on a Kohl's store at Gravois Bluff in Fenton, Missouri. (L.F. 129). He was employed for just several weeks at Ste. Genevieve before being injured. His affidavit states that following his injury, he was not provided with light duty employment, which would be provided to a permanent employee that was injured. (L.F. 193).

It is important to note that all the witnesses recognized a distinction between permanent employees ("company men") who consistently worked for Ste. Genevieve and bricklayers such as Bryan Gavan, who were hired for a particular job or to meet an increased work load. None of the witnesses considered Bryan Gavan a permanent employee or one of the "company men" that is consistently employed by Ste. Genevieve. (L.F. 142). Further, no evidence was presented that refuted the testimony that Mr. Gavan was hired to meet a temporary increase in workload.

Other evidence supporting the fact that Mr. Gavan was hired to meet short-term workload conditions includes the affidavit of Mr. Don Brown, the Business Manager of Bricklayers' Local Union No.1 of Missouri, and the Collective Bargaining Agreement with Bricklayers' Local Union No. 1. (Affidavit at L.F. 195, Agreement at 196-210 and both in Appendix). According to Mr. Brown, a bricklayer's employment with a contractor is considered temporary employment, ending when a project is complete or when the contractor no longer has work to keep the bricklayer employed. (L.F. 195). His affidavit states that most employment of bricklayers is considered temporary to fulfill short-term workload conditions. (L.F. 195). Ste. Genevieve is a signatory of the Collective Bargaining Agreement with Bricklayers' Local Union No. 1, hereinafter

“Agreement.” (L.F. 149). The Agreement insures, inter alia, that bricklayers who work for multiple employers on a temporary basis still receive benefits such as pension, disability and vacation. (L.F. 199-202). The Agreement, as a whole, reinforces the concept that employment is temporary. (see Agreement L.F. 196-210). It requires a contractor to hire only union bricklayers and assures the contractor that the bricklayer supplied will be properly trained. (L.F. 197, 203-204, 229-230). It facilitates hiring bricklayers for short periods of time by giving the contractor assurance that the bricklayer is not only properly trained and experienced, but that the bricklayer will receive all necessary and legal benefits, as well as abide by a defined working code (see L.F. 211-230), incorporated into the Agreement. (L.F. 209).

Collectively, the testimony and affidavits shed valuable light on bricklayers’ work. The life of a construction worker, contrary to the view of Bituminous, is often filled with multiple short-term assignments. While some workers have the good fortune to be hired permanently by a company, most bricklayers do not find permanent employment and they move from company to company over the course of their careers. (L.F. 125, 195). This underscores the Union’s vital role. Because workers are rarely permanent, normal benefits of long-term employment (health insurance, pensions, disability, etc.), are not provided directly by their employers. Having the Union train and supply bricklayers and provide benefits allows companies like Ste. Genevieve to hire experienced bricklayers for short periods to meet increases in work load. The Union exists because most of its members are working in temporary assignments. The affidavit of Don Brown details

how the Union fulfills its obligation to furnish qualified temporary help when it is needed. (L.F. 195).

Thus, the evidence presented by Plaintiff makes it clear that Mr. Gavan was not considered an employee under the definition provided by the policies issued by Defendants. The evidence shows Mr. Gavan was a temporary worker hired to fulfill the need for more bricklayers during a period of increased workload. Missouri case law also supports this conclusion.

Martinez, et al. v. National Union Fire Insurance Co., 126 S.W.3d 1 (Mo.App.E.D. 2003), provides precedent that supports the conclusion that Mr. Gavan was a temporary worker and not a co-employee under the Bituminous policies. (L.F. 268-277). In Martinez, the Eastern District Court of Appeals affirmed a judgment in favor of an injured union ironworker based on the finding that the plaintiff was a temporary worker. (L.F. 268). The Court of Appeals believed that an extended opinion would be of no precedential value, and therefore one was not published. However, the opinion of the trial court should be somewhat instructive for this Court as the facts are very similar. (see L.F. 269-277).

In Martinez, the plaintiff and two co-workers were injured when a crane operated by a co-worker tipped over while lifting a cellular tower. Martinez sued the crane operator. (L.F. 269). All of the co-workers worked for the same employer. (L.F. 271). The employer had a general liability policy with National Union Fire Insurance Company. (L.F. 270). National Union, relying on language identical to the language in the case at bar, refused to defend the crane operator on the basis that the crane operator

and the plaintiff were co-employees. (L.F. 270). The plaintiff obtained a judgment against the crane operator and filed a declaratory judgment action and equitable garnishment action against the insurer, as Mr. Gavan did. (L.F. 269). The trial court found that the plaintiff, while being employed by the same employer of the crane operator, was a “temporary worker” under the terms of the policy and so the co-employee exclusion was not applicable. The Eastern District Court of Appeals agreed, upholding the trial court’s judgment. (L.F. 268).

The facts and the reasoning of the Martinez case are applicable to the instant action. In Martinez, the plaintiff, based in St. Louis, was working for National Steel Erectors, an out-of-town company that traveled through the St. Louis area from time to time erecting cellular telephone towers. (L.F. 271). Martinez would work for National Steel when they worked in St. Louis. The trial court reviewed the facts of the case in the context of Missouri’s established rules on interpreting insurance contracts. Analyzing the facts of the case, the trial court in Martinez held that Mr. Martinez, who was hired through the union to work for the employer on a job-by-job basis, was a “temporary worker” as defined under the National Union policy, and therefore was not excluded from coverage under the co-employee exclusion. (L.F. 274-276). Thus, the crane operator, while being employed by the same employer as plaintiff, was still covered for injuries he caused the plaintiff since the plaintiff was not a “co-employee,” as that term was defined under the policy. (L.F. 276-277).

The evidence of Bryan Gavan’s employment is nearly identical to that of the plaintiff in Martinez. The insurance language is also identical. (see L.F. 270-271).

Following the reasoning of the Martinez court, this Court should reverse the decision of the circuit court granting summary judgment to Defendants Bituminous Companies and should enter judgment in favor of Plaintiff, Bryan Gavan.

**B. BRYAN GAVAN WAS “FURNISHED”**

As stated above, the policies issued by Defendants Bituminous Companies define “temporary worker” as “a person who is furnished to you [Ste. Genevieve] to substitute for a permanent ‘employee’ on leave or to meet seasonal or short-term workload conditions.” (L.F. 58). Defendants argued that since Bryan Gavan was not “furnished” to Ste. Genevieve, he fails to meet the definition of “temporary worker.” This argument lacks merit.

The “furnished to” language of the definition of “temporary worker” has now been interpreted by two Missouri appellate courts. In American Family Mutual Ins. Co. v. As One, et al., 189 S.W.3d 194, 198 (Mo. App. S.D. 2006), the Missouri Court of Appeals for the Southern District held that the term “furnished” in a general liability policy does not mean a third person must furnish the specific worker. In As One, the plaintiff was injured while operating a bucket truck for a company called “As One.” Id. at 196.

American Family issued an automobile policy on the bucket truck, and filed a declaratory judgment action requesting the court to declare that the injured party, as an employee of As One, was excluded from coverage because of an employee exclusion. Id. The injured party claimed that he was a “temporary worker,” as defined in the policy, and therefore not subject to the employee exclusion. Id. American Family argued that the worker was not “furnished” as required under the definition of “temporary worker,” and therefore

could not be considered a “temporary worker.” Id. at 197. The trial court agreed with American Family, and entered summary judgment against the worker. The Southern District reversed.

The Southern District held that the term “furnished to” does not mandate that a third entity supply the worker to the insured. The As One Court examined the language in the general liability policy, and found no specific reference in the definition of temporary worker that required the worker to be hired through a third party. Id. at 198-199. This was in sharp contrast to the definition of “leased worker,” which specifically required the employee to be hired through a third party. Applying the plain definition of “furnish” and the notably absent requirement that the worker be furnished by a third party, the Southern District held that there was no requirement that the injured party had to be furnished by someone else. Id. In short, the Court found that the “worker furnishes himself to work.” Id. at 198.

The Eastern District held that the analysis of As One applied to this case. Gavan v. Bituminous Casualty Corp., No. ED88258 slip op. at 7 (Mo.App.E.D., June 12, 2007). Judge Patricia Cohen reviewed the analysis of As One in the context of the instant case, and concluded that the policies in both cases were substantially similar. Judge Cohen noted that the Bituminous policies, like the policies in As One, did not require that a third party supply the worker. She also noted that in the definition of a “leased worker” the policy did require the employee to be supplied by a labor leasing firm. Since the Bituminous policy did not require a third party to supply a temporary worker, it would be inappropriate to judicially create such a requirement. The Eastern District agreed with

the Southern District that, under the policy language, a worker could furnish himself to the job site.

The Eastern District also addressed Bituminous' complaint that such an interpretation would render the term "furnish" useless. Quite simply, when viewed "in the context of the entire applicable phrase [which must be done under Missouri construction principles], it is obvious that the appropriate focus is on the reason the person is going to work for the employer, and not who, if anyone, provides the person." Id. at 7. If Bituminous intended the phrase to mean who provided the worker, it could have stated so by simply adopting language used in the definition of leased worker. The Eastern District adopted the reasoning of the Southern District in reversing the trial court. Contrary to assertions made by Bituminous in its Application for Transfer, Missouri courts have been consistent in deciding this issue.

Recent other decisions have been critical of this very policy for similar reasons. In Bituminous Casualty Corp. v. Ross, 413 F.Supp. 740 (N.D. W.Va. 2006), the court closely examined the Bituminous exclusionary clause at issue in this case. The court concluded that both "furnished" and "short-term work load conditions" were ambiguous. Id. at 745. In so holding, the court made the following observations:

The phrase "furnished to" is not defined by the policy and is reasonably susceptible to multiple meanings. To qualify under this definition, does the worker have to be "furnished" by a temporary employment agency? Or can another individual "furnish" a person to the insured merely by recommending him?

The policy's only help in answering these questions is found in its definition of "leased worker," which means a worker who is "leased" to the insured by a labor leasing firm pursuant to a contract. The policy's contemplation of workers being leased under contract in defining another kind of worker lends support for the finding that "furnished to" in the context of a "temporary worker" does not necessarily mean "furnish to" by a temporary agency. If "furnish to" required a temporary employment agency's placement, the policy should read accordingly. The policy's use of the phrase, however, also could reasonably mean the furnishment of a worker by any third party, which the defendant contends is the case. Based upon the words of the insurance policy alone, it is impossible for the court to determine what is meant by the phrase "furnish to."

In addition, no definition exists in the policy the phrase "short-term work load conditions." Does this phrase mean a worker can work only one hour to be considered "temporary?" Five hours? Ten hours? One day? Ten days? Four months? Six months? One year? This question is impossible to answer based on the language in the policy.

Id. at 745.

The Ross court's analysis of "furnish" is identical to that of the court in As One. There is no requirement in the policy that a third party furnish the worker. Viewed against the backdrop that exclusionary clauses in insurance contracts are strictly construed against the insurer, Gavan has established that he was "furnished" to meet short-term work load conditions.

The Bituminous policies do not state that a "temporary worker" must be furnished by a third party. (L.F. 58, 84). As stated in Reese, 173 S.W.3d at 299, "Where a term is used in one phrase of a policy, its absence in another phrase is significant." Thus, the absence of a requirement that the "temporary worker" be furnished by a third party is significant and further supports the contention that a person may be furnished by himself. Therefore, the fact that Mr. Gavan presented himself to the Ste. Genevieve construction site in order to be hired is consistent with the definition of "temporary worker

Even without the holding in As One, there was uncontroverted evidence that Gavan was furnished to Ste. Genevieve. There is ample evidence to support a finding that Mr. Gavan's Union, Bricklayers' Local Union No. 1, furnishes "temporary workers," such as Bryan Gavan, to contractors, such as Ste. Genevieve. The affidavit of Don Brown, the Business Manager of Bricklayers' Local Union No. 1 of Missouri, states that when a company needs bricklayers on its job site, the company may contact the union hall, which will furnish names of trained journeyman bricklayers who are unemployed and on the referral list. (L.F. 194). Only properly trained, card carrying members will be referred by the Union to prospective employers. (L.F. 195).

Mr. Gavan and Mr. Uding testified about the relationship between the bricklayers' union and the employers. This relationship supports a finding that Mr. Gavan was furnished to Ste. Genevieve by his union. Mr. Gavan testified that he became a member of Bricklayers Local No. 1 in St. Louis, Missouri, in 1986. (L.F. 125). The union trained him to be a bricklayer through the apprenticeship program. Through this program, Mr. Gavan went to training once a week during school hours for nine months. His apprenticeship lasted three and one-half years. (L.F. 125). Mr. Uding testified that Ste. Genevieve is and has always been a union company, meaning they only hire union members. (L.F. 149). Uding testified that when he is in need of bricklayers he may contact the local union. (L.F. 151). Mr. Gavan testified that when he was hired by Ste. Genevieve in 1996, Don Brown, the business agent at the union, referred him to Ste. Genevieve because they had a job in Imperial, Missouri. (L.F. 126).

As previously stated, Ste. Genevieve is a signatory of the Collective Bargaining Agreement with Bricklayers' Local Union No. 1, hereinafter "Agreement." (L.F. 149; Agreement at L.F. 196-210). As a signatory to this agreement, Mr. Uding was required to hire only union bricklayers, and the union furnished qualified, well-trained bricklayers. (L.F. 155). Mr. Uding testified that if he has an issue with a bricklayer's work he will call the union hall to send a business agent out to talk to the bricklayer and check his work. (L.F. 155). The Agreement sets forth the compensation to be paid and defines the rights of each worker to pension, disability and vacation payments. (L.F. 199-202). It sets forth the hours and days of the work week and the holidays to be observed. (L.F. 207). If an employer wants bricklayers to work beyond the times and days set forth in the

Agreement, the employer is required to receive permission from the Secretary of the Union. (L.F. 207). The Agreement further requires signatory companies like Ste. Genevieve to make payments directly to the union for maintaining the apprenticeship program. (L.F. 203). Ste. Genevieve pays for the training of the workers the union provides. The Agreement provides that an employer must make his records available for inspection by the union. (L.F. 206). Mr. Uding testified that a bricklayer's health insurance and benefits transfer from local to local, and if a bricklayer is working in a geographical area that has a different local union, his hours transfer to his home union. (L.F. 155). As such, the union "furnished" Mr. Gavan to Ste. Genevieve.

The Agreement between the bricklayers and the different employers is one of temporary employment. The agreement, as a whole, reinforces the concept that employment is temporary. (see Agreement L.F. 196-210). It requires a contractor to hire only union bricklayers and assures the contractor that the bricklayer supplied will be properly trained. (L.F. 197, 203-204, 229-230). It facilitates hiring bricklayers for short periods of time by giving the contractor assurance that the bricklayer is not only properly trained and experienced, but that the bricklayer will receive all necessary and legal benefits, as well as abide by a defined working code (see L.F. 211-230), incorporated into the Agreement. (L.F. 209).

The evidence provided by Plaintiff established that Mr. Gavan is a "temporary worker" under the Bituminous Companies' policies issued to Ste. Genevieve and in full force and effect at the time of Mr. Gavan's injury. The evidence proved that Mr. Gavan was furnished to Ste. Genevieve to fulfill short term workload conditions. As such, the

circuit court improperly granted Defendant Bituminous Companies' motion for summary judgment and erred in denying Plaintiff's cross-motion for summary judgment. The Circuit Court's ruling should be reversed and judgment should be entered in favor of Plaintiff, Mr. Gavan.

## POINT II

**II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS  
BITUMINOUS CASUALTY CORP. AND BITUMINOUS FIRE &  
MARINE INSURANCE CO.'S MOTION FOR SUMMARY  
JUDGMENT BECAUSE AN ISSUE OF MATERIAL FACT REMAINED  
IN THAT EVIDENCE PRESENTED BY DEFENDANTS BITUMINOUS  
CASUALTY CORP. AND BITUMINOUS FIRE & MARINE  
INSURANCE CO. DIRECTLY CONFLICTED WITH EVIDENCE  
PRESENTED BY PLAINTIFF BRYAN GAVAN ON WHETHER  
BRYAN GAVAN WAS A TEMPORARY WORKER.**

### SCOPE OF REVIEW

The scope of review for Point II is the same as that set forth in Point I, as such it is not restated.

### ARGUMENT

In its order sustaining Defendants' Motion for Summary Judgment, the trial court found “that there were no genuine issues as to any material fact.” (L.F. 353). The issue the trial court had to resolve was whether Bryan Gavan was an “employee” or a “temporary worker” under the policy language. Whether Plaintiff was an “employee” or a “temporary worker” was a question of fact. While Plaintiff believes the evidence clearly established that Plaintiff was a “temporary worker,” an alternative argument is that the evidence presented by Plaintiff and the conflicting evidence presented by Defendants presented a question of fact that was not resolved. Contrary to the trial

court's finding, there was a genuine issue of material fact as to whether Plaintiff was a temporary worker. The Eastern District agreed with this analysis and remanded the case for a factual determination of whether Gavan was hired to meet short-term workload conditions.

A review of the temporal sequence of motions and affidavits will illustrate how a question of fact was created. Defendants filed their motion for summary judgment on December 21, 2005. (L.F. 172) The motion contended that, by operation of law, Bryan Gavan was an employee as defined by Missouri cases. (L.F. 160). No mention of Plaintiff's status as a temporary worker was raised.

On January 23, 2006, Plaintiff filed a cross-motion for summary judgment, contending that Plaintiff's status as a temporary worker avoided the co-employee exclusion upon which Defendants relied. (L.F. 181-183). Plaintiff filed supporting affidavits and exhibits. (L.F. 189-277). The affidavit of Bryan Gavan outlined his employment history with Ste. Genevieve and detailed his experience as a temporary worker. (L.F. 191-193). Mr. Gavan stated he was hired "to meet short-term work load conditions." (L.F. 193).

The affidavit of Don Brown, Business Manager of Bricklayers' Local Union No. 1 of Missouri, confirmed those facts. (L.F. 194-195). His affidavit stated that employment of a bricklayer with a contractor is considered temporary employment. He further stated that "most employment of bricklayers is considered temporary to fulfill short-term work load conditions." (L.F. 195).

The testimony of Tim Uding, Vice President and “riding boss” of Ste. Genevieve, also verified that the work was temporary: “Our work load determined how many people we keep on hand.” (L.F. 251). He testified that Bryan Gavan was not part of his permanent work force. (L.F. 250-251).

Thereafter, on April 17, 2006, Defendants filed a reply memorandum and attached an affidavit of Tim Uding. (L.F. 294-306). In that affidavit, and for the first time, Mr. Uding stated that Bryan Gavan “was not furnished to Ste. Genevieve Building Stone Company to substitute for a permanent employee on leave or to meet seasonal or short-term work load conditions.” (L.F. 305). This affidavit directly contradicted the affidavits filed by Plaintiff and arguably contradicted Mr. Uding’s prior deposition testimony. At the very minimum, it created a genuine issue as to Brian Gavan's employment status.

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. L.A.C. v. Ward Parkway Shopping Center, Co., 75 S.W.3d 247, 256 (Mo. 2002). However, where the record contains competent evidence demonstrating two plausible but contradictory accounts of the essential facts, a genuine issue of material fact exists. Id. (citing Martin v. City of Washington, 848 S.W.2d 487, 492 (Mo. 1993)). In the landmark decision of ITT Commercial Financial Group v. Mid-America Marine Corp., 854 S.W.2d 371, 380 (Mo. 1993), this Court held that the purpose of summary judgment is to terminate litigation about which there is no genuine factual dispute and where the prevailing party can be determined as a matter of law. However, where the record contains competent materials that evidence two plausible, but contradictory accounts of essential facts, summary

judgment is not appropriate. Id. at 382. Furthermore, the non-movant is accorded the benefit of all reasonable inferences from the record. Martin v. City of Washington, 848 S.W.2d 487, 489 (Mo. banc 1993). The burden of persuasion that there is no material fact at issue is upon the moving party. ITT Commercial Financial Group, 854 S.W.2d at 368.

The existence and extent of an employment relationship is a question of fact and must be decided on the particular facts of each case. Baker v. Texas & Pacific Railway Co., 359 U.S. 227, 228 (1959). The Baker Court recognized that a person's employment status could be described in a variety of ways. The Court held that the issue of employment status is for the jury unless reasonable persons could not reach differing conclusions on the effect of the evidence and its inferences. Baker was cited with approval by this Court in Turpin v. Chicago, Burlington & Quincy Railroad Co., 403 S.W.2d 233, 238 (Mo. banc 1996). The most common employment questions found in a review of Missouri decisions is whether an individual is an independent contractor or an employee. Missouri courts have consistently held that when the evidence and inferences support both sides of the question, it is one to be decided by a jury. *See* Ferguson v. Pony Express Courier Corp., 898 S.W.2d 129 (Mo.App.W.D. 1995).

In the instant action, the only question before the trial court was whether the co-employee exclusion of Defendants' policies was applicable. That question, in turn, could only be answered if there was absolutely no question that Bryan Gavan was an "employee" and not a "temporary worker" as defined by Defendants' policies.

Defendants admitted that Brace and Gotsch were employees of Ste. Genevieve (L.F. 167-

168), but Bryan Gavan presented competent and compelling evidence that he was a “temporary worker” as defined in the policies. (L.F. 189-277). As stated previously, in the policies issued by Defendants “[t]emporary worker’ means a person furnished to you to substitute for a permanent ‘employee’ on leave or to meet seasonal or short-term workload conditions.” (L.F. 58, 84). The conflicts of material facts will be presented in two parts: 1) those related to whether Plaintiff was hired to meet short-term workload conditions, and 2) those related to whether Plaintiff was furnished to Ste. Genevieve.

**A. WAS BRYAN GAVAN HIRED TO MEET SHORT-TERM  
WORKLOAD CONDITIONS?**

Plaintiff offered affidavits of Bryan Gavan and Don Brown which stated unequivocally that Bryan Gavan was a temporary worker hired to meet short-term work load conditions. (L.F. 193, 195). Although Tim Uding’s deposition testimony supported a finding that Bryan Gavan was a temporary worker, his affidavit stated specifically that Bryan Gavan was not hired to meet short-term work load conditions. (L.F. 305). Thus, there were two contradictory accounts of the same facts.

The affidavit of Mr. Uding also conflicts with Mr. Gavan’s testimony and affidavit. Bryan Gavan testified that after he began working for Ste. Genevieve in January of 2000, they ran out of work for him. (L.F. 191-192). This is consistent with Bryan Gavan’s testimony that he was told Ste. Genevieve would have work for him for about two to three months. (L.F. 128). Gavan then worked for Hykamp Masonry for three weeks in March of 2000. (L.F. 129, 192). During this time, he was paid by Hykamp. (L.F. 129). In April of 2000, he began working for Ste. Genevieve again due to

a short-term increase in work, i.e. the Gravois Bluff shopping center project. (L.F. 129, 152, 192). He was injured about a month later. (L.F. 129, 192). The affidavit of Tim Uding states Mr. Gavan worked for Ste. Genevieve from January 19, 2000 to May 15, 2000. It states that “for a short period in February, Bryan Gavan was loaned to another contractor.” (L.F. 305). It also states that Ste. Genevieve continued to pay Gavan during this period. (L.F. 305). This contradiction in the facts relates directly to whether Gavan was a temporary worker. There is no basis upon which to find in favor of Defendants as a matter of law on the face of these contradictory facts.

A fact finder could find, from all the evidence, that Bryan Gavan was in fact hired to meet short-term work load conditions. The record demonstrates that he was hired by Ste. Genevieve because of their increased workload. (L.F. 152). He was not hired as a permanent employee. He was told he may get as much as a few months work. (L.F. 128). When work slowed down several weeks before his injury, he went to work for another employer, Hykamp. (L.F. 129) Tim Uding testified that the workload determines how long and how many bricklayers were needed. (L.F. 150). Bryan Gavan had come back to Ste. Genevieve for about a month before he was injured. Neither he nor Tim Uding ever considered him a permanent employee. (L.F. 149, 192). Certainly, reasonable minds could conclude that Bryan Gavan was hired "to meet short-term workload conditions."

#### **B. WAS BRYAN GAVAN FURNISHED TO STE. GENEVIEVE?**

Plaintiff believes this Court should follow the holding of As One, 189 S.W.3d at 198-199, which provides that “furnished,” as used in the definition of “temporary worker,” does not require that the worker be “furnished” by a third party and that a

worker can furnish himself. This reasoning was adopted in toto by the Eastern District in this case. However, should this Court choose not to follow the precedent set by As One, sufficient evidence was presented to create a question of fact as to whether Bryan Gavan was furnished to Ste. Genevieve by the bricklayers' union.

Mr. Gavan testified that he became a member of Bricklayers Local No. 1 in St. Louis, Missouri, in 1986. (L.F. 125). The union trained him to be a bricklayer through the apprenticeship program. Through this program, Mr. Gavan went to training once a week during school hours for nine months. His apprenticeship lasted three and one-half years. (L.F. 125). Mr. Gavan testified that he first worked for Ste. Genevieve in 1996. At that time, he contacted his union hall in search of work and was later called by the union business agent and referred to Ste. Genevieve because they had a project in Imperial, Missouri. (L.F. 126).

Mr. Uding's testimony presents evidence establishing that Mr. Gavan was furnished to Ste. Genevieve by the union. Mr. Uding testified that Ste. Genevieve is and has always been a union company, meaning they only hire union members. (L.F. 149). He testified that when he is in need of bricklayers he may contact the local union. (L.F. 151). Mr. Uding testified that Ste. Genevieve is a signatory of the Collective Bargaining Agreement with Bricklayers' Local Union No. 1, hereinafter "Agreement." (L.F. 149, Agreement at L.F. 196-210). As a signatory to this agreement, Mr. Uding was contractually bound to hire only union bricklayers, and the union furnished qualified, well-trained bricklayers. (L.F. 155). Mr. Uding testified that if he has an issue with a bricklayer's work he will call the union hall to send a business agent out to talk to the

bricklayer and check his work. (L.F. 155). He testified that he pays money to the union to help fund the apprenticeship program and he pays the workers' benefits directly to the union. (L.F. 155). Mr. Uding stated that Ste. Genevieve also must abide by the "working code" which is incorporated into the Agreement. (L.F. 156). The working code prescribes the bricklayers' starting time, the length of lunch break and quitting time. (L.F. 156). He also stated that the steward on the job, who is often appointed by the union hall, monitors the job site to make sure the working code is being followed. (L.F. 156). He testified that if a bricklayer has a problem on the job site, he will go to the steward or may go to the business agent at the union hall if the steward is unable to handle the problem. (L.F. 156). Mr. Uding testified that a bricklayer's health insurance and benefits transfer from local to local and if a bricklayer is working in a geographical area with a different local union, his hours transfer to his home union. (L.F. 155).

The Agreement which defines the relationship between employers and the bricklayers also provides ample evidence that the union "furnished" Bryan Gavan. The Agreement states that the union is the exclusive representative of bricklayers, such as Bryan Gavan, and that all employees of signatories to the Agreement must be members of the union. (L.F. 196-197). The Agreement sets forth the compensation to be paid and defines the rights of each worker to pension, disability and vacation payments. (L.F. 199-202). It sets forth the days and hours of the work week and the holidays to be observed. (L.F. 207). If an employer needs bricklayers to work beyond the times and days set forth in the Agreement, the employer is required to receive permission from the Secretary of the Union. (L.F. 207). The Agreement further requires signatory companies like Ste.

Genevieve to make payments directly to the union for maintaining the apprenticeship program. (L.F. 203). The Agreement provides that an employer must make his records available for inspection by the union. (L.F. 206). As such, reasonable minds could conclude that the union “furnished” Mr. Gavan to Ste. Genevieve.

Defendants argued to the trial court that Bryan Gavan was not furnished to Ste. Genevieve. (L.F. 294-299). Defendants’ evidence included the testimony of Bryan Gavan, in which he stated that when he was rehired by Ste. Genevieve in January of 2000, he did not get the job through the union. (L.F. 297). Defendants also relied on the fact that Mr. Gavan was not provided by a temporary help arrangement. (L.F. 299). Defendants also presented the affidavit of Mr. Uding which stated simply that Mr. Gavan “was not furnished.” (L.F. 305). This evidence conflicted with Plaintiff’s evidence.

The evidence presented by Plaintiff and the conflicting evidence presented by Defendants created a genuine factual dispute about whether Mr. Gavan was “furnished” to meet “short-term workload conditions.” The trial court was not acting as a fact finder when it issued its ruling. To the contrary, the trial court specifically stated that there were no genuine issues of material fact in its ruling. (L.F. 353). Moreover, the Defendants’ motion for summary judgment contended that as a matter of law (as opposed to a question of fact) Defendants were entitled to a judgment. (L.F. 172-176). Given the contradictory nature of the factual evidence presented, the trial court erroneously determined that there were no material questions of fact.

It should be noted that the court in As One, 189 S.W.3d at 199, when faced with a similar conflict of evidence, remanded the case to the trial court with directions to resolve

such conflict. The As One court determined that the record demonstrated two plausible but contradicting accounts of essential facts: whether the Appellant was working for a finite period of time and whether it was to support or supplement the employer's work force. Id. at 199. As such, a jury had to resolve this question. Here, the trial court should have taken the same approach. Because there were affidavits in evidence which were contradictory in nature, the trial court should have declined to enter an order of summary judgment in favor of Defendants. Rather, the trial court should have ordered the matter be set for trial so that a fact finder could determine whether Bryan Gavan was a “temporary worker” or an “employee” of Ste. Genevieve Building Stone Company, as those terms are defined in the policies.

## CONCLUSION

The Circuit Court of the County of St. Louis erred in granting Defendants' Motion for Summary Judgment and denying Plaintiff Bryan Gavan's Cross-Motion for Summary Judgment. The evidence established that Bryan Gavan was a "temporary worker" under the definition used in the policies issued by Defendants. Because Bryan Gavan was a "temporary worker," he was not an "employee" and therefore not subject to the co-employee exclusion in the insurance policies. The policies therefore cover Mr. Brace and Mr. Gotsch for the judgments entered against them for the injuries caused to Bryan Gavan. As such, this Court should reverse the Circuit Court's grant of summary judgment for Defendants and grant Plaintiff's summary judgment. In the alternative, this Court should reverse the Circuit Court's grant of summary judgment and remand the case, as the Eastern District did, because a genuine issue of material fact remains as to whether Bryan Gavan was a "temporary worker."

IN THE SUPREME COURT OF MISSOURI

BRYAN GAVAN, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. ) No.: SC88764  
 )  
 BITUMINOUS CASUALTY )  
 CORPORATION, et al., )  
 )  
 Defendants/Respondents. )

**CERTIFICATE OF COMPLIANCE**

COME NOW counsel for Plaintiff/Appellant, and for their certificate of compliance, state as follows:

1. The undersigned do hereby certify that Plaintiff/Appellant’s Substitute Brief filed herein complies with the page limits of Rule 84.06(b) and contains 9,386 words of proportional type.
2. Microsoft Word was used to prepare Plaintiff/Appellant’s Substitute Brief.
3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of Plaintiff/Appellant's Substitute Brief and Appendix and one copy of the accompanying disk were mailed this 12<sup>th</sup> day of October, 2007, to: Joseph L. Lertz, Attorney for Defendants Bituminous, One City Centre, Suite 2001, St. Louis, MO 63101.

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Anna E. Spink

Subscribed and sworn to before me this 12<sup>th</sup> day of October, 2007.

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Notary Public

My Commission Expires: