No. SC95093

SUPREME COURT OF MISSOURI

JEANIE VASSEUR, ET AL
Respondents

v.

SHELTER MUTUAL INSURANCE COMPANY

Appellant

APPEAL FROM THE
CIRCUIT COURT OF TEXAS COUNTY, MISSOURI
No. 11TE-CC00087

TRANSFER FROM THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT
No SD33552

SUBSTITUTE BRIEF OF APPELLANT

Wm. Clayton Crawford MO # 41619
Grant D. Henderson MO # 61878
FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.
1200 Main St., Ste 2200
Kansas City, Missouri 64105
Telephone: (816) 472-7474
Facsimile: (816) 472-6262
Email: ccrawford@fwpclaw.com
Email: ghenderson@fwpclaw.com
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Abbreviations (other than case reporters):

LF -- Legal File (referenced by page number)

R.S.Mo. -- Revised Statutes of Missouri (referenced by section)

Mo. Const. -- Constitution of the State of Missouri (referenced by Article and Section)

Mo. Sup. Ct. R. -- Missouri Supreme Court Rule

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Texas County, Missouri holding that liability coverage in the amount of $100,000 and medical payments coverage in the amount of $1,000 is payable under a farmowners insurance policy issued by Shelter Mutual Insurance Company ("Shelter") to Elmer and Jeanie Vasseur for damages arising from the death of Elmer Vasseur and also holding that three auto insurance policies issued by Shelter to Elmer and Jeanie Vasseur provide uninsured motorist coverage in the combined amount of $75,000, medical payments coverage in the amount of $1,000, and accidental death coverage in the combined amount of $30,000, for damages arising from the death of Elmer Vasseur. Specifically, the Court ordered Shelter to pay a total of $207,000 to Respondents.

The final judgment of the trial court from which this appeal is taken was entered on August 22, 2014, and it disposed of all issues and all parties. *(LF, Vol. VI, Pg. 60)* The Notice of Appeal was filed on September 25, 2014. *(LF, Vol. VI, Pg. 64)*The Missouri Court of Appeals, Southern District, had jurisdiction to hear Appellant's appeal of the Judgment, exercised that jurisdiction, and issued its decision on May 19, 2015. *Shelter v. Jeanie Vasseur, et al.*, WL 2394696 (Mo. App. S.D. May 19, 2015). This Court has jurisdiction to hear Appellant's appeal pursuant to Mo. Sup. Ct. R. 83.04 because Appellant timely filed its Application for Transfer to this Court, paid the necessary filing fee on June 25, 2015, and on September 22, 2015, this Court ordered the case transferred from the Missouri Court of Appeals, Southern District.

STATEMENT OF FACTS

This is an appeal from the final judgment of the Circuit Court of Texas County, Missouri. The Circuit Court ruled that liability coverage in the amount of $100,000 and medical payments coverage in the amount of $1,000 is payable under a farmowners insurance policy issued to Elmer Vasseur for damages arising from the death of Elmer Vasseur. The trial court also ruled that three auto insurance policies also issued by Shelter provide uninsured motorist coverage in the combined amount of $75,000, medical payments coverage in the amount of $1,000, and accidental death coverage in the combined amount of $30,000, all for losses or damages arising from the death of Elmer Vasseur.

A. THE ACCIDENT & THE INSURANCE POLICIES

On August 8, 2010, thirteen-year-old Matthew Vasseur was operating a 2006 Honda TRX 500 TM all-terrain vehicle along Missouri State Highway AA in Texas County, Missouri with his father Elmer Vasseur as his passenger. (*LF, Vol. IV, Pg.* 44-45) When Matthew Vasseur failed to effectively negotiate a curve, the ATV he was operating veered and struck a sign. (*LF, Vol. IV, Pg.* 44-45) Matthew's father, Elmer Vasseur was killed in the accident. (*LF, Vol. IV, Pg.* 44)

The late Mr. Vasseur and his wife, Respondent Jeanie Vasseur, were named insureds on three auto insurance policies and one farmowners insurance policy issued by Shelter. (*LF, Vol. IV, Pg.* 43) Elmer, Jeanie, and Matthew Vasseur all lived at 9904 Lynch Drive, Bucyrus, Missouri 65444-8105. (*LF, Vol. IV, Pg.* 42)

B. THE VASSEURS' INSURANCE CLAIMS

Following the accident, Respondent Jeanie Vasseur made a liability claim against her own minor son Matthew, claiming that the child negligently caused the death of his father, Respondent's husband. (*LF, Vol. V, Pg. 1*). Respondents claim that the Shelter farmowners policy provides liability coverage to Matthew for the wrongful death claim asserted by his mother as well as medical payments benefits. As Jeanie Vasseur is a named insured under that policy, her wrongful death claim puts her in the unusual position of making a liability claim against her own son as an insured under her own farmowners liability insurance policy[1]. Shelter's position is that neither its liability coverage nor medical payments coverage applies to Jeanie Vasseur's claims on the grounds that both are plainly excluded under "household" exclusions contained in the farmowners policy. The parties' dispute over the applicability of the "household" exclusions is the subject of Appellant's first and second Points on Appeal.

Respondents further claim that each of three auto policies provide uninsured motorist, medical payments and accidental death coverage for damages arising from the death of Mr. Vasseur. Shelter's position is that none of the three coverages claimed by Respondents under the auto policies apply to cover the Vasseurs' loss because the damages claimed did not arise from the operation, use, or maintenance of a "motor vehicle," as such term is defined by the Shelter auto policies. Shelter defines "motor

[1] Prior to judgment, Respondents' Petition was amended to add additional Class 1 statutory Plaintiffs to Jeanie Vasseur's claim for the wrongful death of Elmer Vasseur.

vehicle" to mean a "vehicle originally designed for operation on public roadways." The parties' dispute as to whether the all-terrain vehicle ("ATV") involved in the accident is a "vehicle originally designed for operation on public roadways," is the subject of Appellant's third, fourth and fifth Points on Appeal.

Respondents further seek to collect both liability coverage under the Shelter farmowners policy *and* uninsured motorist coverage under three Shelter auto policies. Shelter denies that either coverage is applicable. In the alternative, if the Court holds that liability coverage is available to the alleged tortfeasor, Matthew Vasseur for Shelter's farmowners policy, the existence of such coverage necessarily precludes uninsured motorist coverage for the same accident and damage under Shelter's auto policies. The parties' dispute over whether uninsured motorist coverage may be collected when liability coverage is also available for the same accident is the subject of Appellant's sixth Point on Appeal.

C. PROCEDURAL HISTORY & THE TRIAL COURT'S RULING

On March 3, 2011, Appellant filed a Petition for Declaratory Judgment in the Circuit Court of Texas County, Missouri naming Respondents as Defendants and filed a First Amended Petition on August 17, 2011. *(LF, Vol. II, Pg. 1)* Shelter seeks a declaration that it owes no duty to defend or indemnify Matthew Vasseur against allegations for damages arising from the death of his father under Shelter's farmowners policy; that the farmowners policy does not provide medical payments coverage for damages arising from injuries to or the death of Elmer Vasseur; that uninsured motorist coverage is not available under the three auto policies for damages arising from the ATV

accident; that medical payments coverage is similarly unavailable under the auto policies; and that accidental death coverage is unavailable under the auto policies for the death of Elmer Vasseur. Shelter filed its Motion for Summary Judgment on February 11, 2013 and Respondents filed a Cross-Motion for Summary Judgment on March 11, 2013. *(LF, Vol. IV, Pg. 64, 85)*

The Circuit Court of Texas County issued an Order on November 20, 2013 denying Shelter's motion, while granting Respondents' motion in part, and denying it in part. (*LF, Vol. IV Pg. 167*) The trial court held in favor of Respondents on the coverages sought under Shelter's farmowners policy and deferred a ruling on the coverages sought under the auto policies. (*LF, Vol. IV, Pg. 167*) Shelter then requested and obtained leave of the trial court to file a Second Amended Petition to conform to the trial court's initial Order granting partial summary judgment in favor of Respondents regarding liability coverage under the farmowners policy. (*LF, Vol. IV, Pg. 179*) Shelter filed its Second Amended Petition on April 25, 2014, which alleged that uninsured motorist coverage cannot exist for the same accident, if liability coverage was available for the alleged motorist from any source. (*LF, Vol. V, Pg. 1*)

Argument on the remaining issue of coverage took place on May 6, 2014 at which time Shelter made an oral motion asking the trial court to reconsider its entry of partial summary judgment in favor of Respondents and to enter judgment in favor of Shelter on all coverages sought. (*LF, trial transcript, Pg. 40*) In the alternative, Shelter moved the trial court to hold that the availability of liability coverage for Matthew Vasseur (made available by the trial court's November 20, 2013 Order) necessarily precluded the

applicability of uninsured motorist coverage under the auto policies. (*LF, trial transcript, Pg. 40*) On August 22, 2014, the Circuit Court of Texas County entered judgment in favor of Respondents on all coverages under both the farmowners policy and the three auto policies. (*LF, Vol. VI, Pg. 60*)

The August 22, 2014 Order incorporates by reference the trial court's earlier Order granting partial summary judgment in favor of Respondents under the Shelter farmowners policy. (*LF, Vol. VI, Pg. 61*) Specifically, the trial court held that an ambiguity rendered the "household" exclusions in the farmowners policy unenforceable and that liability coverage in the amount of $100,000 and medical payments coverage in the amount of $1,000 was therefore due. (*LF, Vol. VI, Pg. 60-63*) With respect to the auto policies, the trial court found that the ATV was a "motor vehicle when being used on a public roadway," and that damages arising from the operation of the ATV were therefore covered under those policies in the combined amount of $75,000 in uninsured motorist coverage, $30,000 in accidental death coverage, and $1,000 in medical payments coverage. (*LF, Vol. VI, Pg. 60-63*) In regard to the uninsured motorist coverage issue, the trial court found that ". . . because Matthew Vasseur did not have an auto liability policy which complied with the requirements of the Motor Vehicle Safety Responsibility Law the uninsured motorist statutes apply." The trial court so held even though it also ruled that the liability of the motorist, Matthew Vasseur, was *insured* for his negligent operation of the ATV under the farmowners policy. (*LF, Vol. VI, Pg. 62*) Judgment was entered in favor of Respondents and against Appellant in the amount of

$207,000. (*LF, Vol. VI, Pg. 63*) This appeal followed, with Shelter filing its Notice of Appeal on September 26, 2014. (*LF, Vol. VI, Pg. 64*)

The Missouri Court of Appeals, Southern District issued its opinion on May 19, 2015. *Shelter v. Jeanie Vasseur, et al.*, WL 2394696 (Mo. App. S.D. May 19, 2015). Thereafter, Shelter sought rehearing pursuant to Mo. Sup. Ct. R. 84.17, or, in the alternative, transfer to this Court pursuant to Mo. Sup. Ct. R. 83.02 on June 2, 2015. The Court of Appeals denied rehearing and/or transfer on June 10, 2015. Shelter then sought transfer to this Court pursuant to Mo. Sup. Ct. R. 83.04 on June 25, 2015 and this Court, on September 22, 2015, ordered the case transferred.

POINTS RELIED ON

1. The trial court erred in granting summary judgment to Respondents on the issue of liability coverage to Matthew Vasseur under the farmowners policy for damages arising from injuries to and the death of Elmer Vasseur, because such coverage is excluded under the policy, in that Exclusion (9) plainly and unambiguously excludes coverage for damages arising from bodily injury to or the death of a named insured and Elmer Vasseur was a named insured under the policy.

The principal authorities supporting Point I include:

American Family Mut. Ins. Co. v. Wemhoff, 972 S.W.2d 402 (Mo. App. 1998);

American Motorists Ins. Co. v. Moore, 970 S.W.2d 876 (Mo. App. 1998);

State Farm Fire & Cas. Co. v. Berra, 891 S.W.2d 150 (Mo. App. 1995);

St. Paul Fire & Marine Insurance Company v. Warren, 87 F.Supp.2d 904 (E.D. Mo. 1999);

2. The trial court erred in granting summary judgment to Respondents on the issue of medical payments coverage under the farmowners insurance policy by ruling that the policy provides medical payments coverage for damages arising from injuries to Elmer Vasseur, because the insuring agreement limits the scope of coverage to those other than insureds and because coverage for bodily injury to insureds is expressly excluded under the policy, in that the insuring agreement does not provide coverage to insureds and Exclusion (2) plainly and unambiguously excludes coverage for bodily injury to any insured and Elmer Vasseur was a named insured under the policy.

The principal authorities supporting Point II include:

American Family Mut. Ins. Co. v. Wemhoff, 972 S.W.2d 402 (Mo. App. 1998);

American Motorists Ins. Co. v. Moore, 970 S.W.2d 876 (Mo. App. 1998);

State Farm Fire & Cas. Co. v. Berra, 891 S.W.2d 150 (Mo. App. 1995);

St. Paul Fire & Marine Insurance Company v. Warren, 87 F.Supp.2d 904 (E.D. Mo. 1999);

3. The trial court erred in entering judgment in favor of Respondents on the issue of uninsured motorist coverage under three auto insurance policies by ruling that the policies provide uninsured motorist coverage for damages arising from the operation an all-terrain vehicle, because the requirements for such coverage as stated in the policies are not satisfied, in that uninsured motorist coverage is only applicable to damages arising from the operation of an uninsured "motor vehicle" and an all-terrain vehicle is not a "motor vehicle" as defined by the policies.

The principal authorities supporting Point III include:

Meeks v. Berkbuegler, 632 S.W.2d 24 (Mo. App. 1982);

State Farm v. Stockley, 168 S.W.3d 598 (Mo. App. 2005);

Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997);

4. The trial court erred in entering judgment in favor of Respondents on the issue of accidental death coverage under three auto insurance policies by ruling that the policies provide accidental death coverage for damages arising from the operation an all-terrain vehicle, because the requirements for such coverage as stated in the policies are not satisfied, in that accidental death coverage is only applicable to damages arising from the death of an insured while occupying an "auto" and an all-terrain vehicle is not an "auto" as defined by the policies.

The principal authorities supporting Point IV include:

Meeks v. Berkbuegler, 632 S.W.2d 24 (Mo. App. 1982);

State Farm v. Stockley, 168 S.W.3d 598 (Mo. App. 2005);

Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997);

5. The trial court erred in entering judgment in favor of Respondents on the issue of medical payments coverage under three auto insurance policies by ruling that the policies provide medical payments coverage for damages arising from the operation an all-terrain vehicle, because the requirements for such coverage as stated in the policies are not satisfied, in that medical payments coverage is only applicable to damages relating to bodily injury to an insured arising from the occupancy, use, or maintenance, of an "auto," and an all-terrain vehicle is not an "auto" as defined by the policies.

The principal authorities supporting Point V include:

Meeks v. Berkbuegler, 632 S.W.2d 24 (Mo. App. 1982);

State Farm v. Stockley, 168 S.W.3d 598 (Mo. App. 2005);

Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997);

6. The trial court erred in entering judgment in favor of Respondents on the issue of uninsured motorist coverage under three auto insurance policies after granting summary judgment to Respondents on the issue of liability insurance coverage under the farmowners insurance policy by ruling that the availability of liability insurance coverage to alleged tortfeasor Matthew Vasseur did not preclude the availability of uninsured motorist coverage under the auto policies, in that the auto policies provide uninsured motorist coverage only for damages caused by the use of an "uninsured motor vehicle," and if Matthew Vasseur is entitled to liability coverage under the farmowners policy, the all-terrain vehicle was not an "uninsured motor vehicle" as defined by the auto policies.

The principal authorities supporting Point VI include:

Hill v. Government Employee Ins. Co., 390 S.W.3d 187 (Mo. App. 2012);

Stotts v. Progressive Classic Ins. Co., 118 S.W.3d 655 (Mo. App. 2003);

§303.010, R.S.Mo.

ARGUMENT

SUMMARY OF ISSUES PRESENTED & STANDARD OF REVIEW

This insurance coverage dispute centers on Respondents' efforts to collect five different coverages under four separate insurance policies, issued by Shelter to Elmer and Jeanie Vasseur, all for losses relating to the death of Elmer Vasseur. With respect to both coverages sought under the farmowners policy, Shelter must show that the household

exclusions in its policy apply to bar Respondents' claims for both liability and medical payments coverage. With respect to the three coverages sought under each auto policy, Respondents are all "first-party" insureds seeking to collect direct compensation in the form of uninsured motorist, medical payments, and death benefits arising from the death of Elmer Vasseur.

The farmowners policy contains an exclusion under Coverage E - Personal Liability and a similar exclusion under Coverage F – Medical Payments to Others both of which clearly and unambiguously exclude coverage for damages arising from bodily injury to or the death of an insured. Respondents argue that those exclusions are ambiguous and therefore unenforceable. The issue to be decided is whether the insurance contract should be enforced as written based on its plain and unambiguous terms.

Respondents seek three coverages under three Shelter auto insurance policies. Each coverage requires Respondents to prove, as an element of coverage, that Respondents' damages were caused by the use of a "motor vehicle," defined by the policies as "a self-propelled land vehicle originally designed for operation on public roadways." In this case, it is undisputed that the Respondents' damages arose from the operation of an "all-terrain" vehicle ("ATV"). Shelter's position is that the ATV in question is not a "motor vehicle" because it was not "originally designed for operation on public roadways." The issue to be decided is whether the all-terrain vehicle is a "motor vehicle" as that term is defined by the policies.

Alternately, if this Court affirms the trial court's ruling declaring that the liability coverage in farmowners policy extends to cover Matthew Vasseur in the wrongful death

action brought against him by his mother, such ruling should bar Respondents from collecting uninsured motorist coverage under their three Shelter auto policies. Shelter's position is that, pursuant to the clear and unambiguous terms and conditions Shelter's auto policies, *uninsured* motorist coverage under the policies is available only for damages caused by a motorist that is *not insured*. If Matthew Vasseur is *insured* under the farmowners policy, he was not an *uninsured* motorist. Therefore, the all-terrain vehicle he was operating was not an *uninsured* motor vehicle as defined by Shelter's policy and under Missouri law. The issue to be decided on appeal is whether uninsured motorist coverage under the three auto policies can be available to Respondents even if the alleged tortfeasor was insured.

Shelter appeals the trial court's final judgment in favor of Respondents. With respect to liability and medical payments coverage under the farmowners policy, the trial court's judgment was denominated as an entry of summary judgment. With respect to uninsured motorist, medical payments, and accidental death coverage under the auto policies, the trial court entered judgment as a matter of law following a bench trial. With respect to each coverage awarded Respondents under all policies, the issues on appeal concern whether the trial court correctly applied Shelter's contractual terms and relevant Missouri uninsured motorist statutes to its findings of fact.

Such issues present questions of law for the Court. *See Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 106 (Mo. App. 2009) ("When the underlying facts are not in question, disputes arising from the interpretation and application of insurance contracts are matters of law for the court"). Thus, appellate review is *de novo*. *See Id.* (applying

de novo standard in reviewing summary judgment in coverage dispute); *In re Estate of Blodgett v. Mitchell*, 95 S.W.3d 79, 81 (Mo. 2003) ("When considering an appeal from a grant of summary judgment, 'review is essentially de novo.'") (*citing ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993)); *State Farm Mut. Auto. Ins. Co. v. Esswein*, 43 S.W.3d 833, 838 (Mo. App. 1999) ("appellate review is de novo, and no deference is given to the trial court's interpretation of the contract").

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THE ISSUE OF LIABILITY COVERAGE TO MATTHEW VASSEUR UNDER THE FARMOWNERS INSURANCE POLICY FOR DAMAGES ARISING FROM INJURIES TO AND THE DEATH OF ELMER VASSEUR, BECAUSE SUCH COVERAGE IS EXCLUDED UNDER THE POLICY, IN THAT EXCLUSION (9) PLAINLY AND UNAMBIGUOUSLY EXCLUDES COVERAGE FOR DAMAGES ARISING FROM BODILY INJURY TO OR THE DEATH OF A NAMED INSURED AND ELMER VASSEUR WAS A NAMED INSURED UNDER THE POLICY.

The farmowners policy at issue is Policy No. 24-72-003123225-2, and the applicable policy form is FO-3 (10-86). (*LF, Vol. IV, Pg. 43*) The Insuring Agreement for Coverage E states in part:

> **COVERAGE E-PERSONAL LIABILITY**
>
> **We** will pay all sums arising out of any one loss which an **insured** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** and caused by an **occurrence** covered by this policy.

(*LF, Vol. IV, Pg. 45*)

Insured is defined on page 2 of the farmowners policy as:

8. "**Insured**" means: (a) **you**; (b) **your** relatives residing in **your** household; and (c) any other person under the age of 21 residing in your household who is in **your** care or the care of a resident relative.
* * *

(*LF, Vol. IV, Pg. 44*)

On pages 14-15 of the farmowners policy, the following pertinent exclusion is found:

EXCLUSIONS – SECTION II * * * Under Personal Liability, **we** do not cover: * * * 9. **Bodily injury** to: (a) **you**: (b) **your** relatives residing in **your** household; and (c) any other person under the age of 21 residing in **your** household who is in **your** care or the care of a resident relative.

(*LF, Vol. IV, Pg. 47*)

"You" is defined as "the **insured** named in the Declarations and spouse if living in the same household." (*LF, Vol. IV, Pg. 46*)

Elmer Vasseur is listed as a Named Insured in the farmowners policy Declarations. (*LF, Vol. IV, Pg. 43*) Accordingly, Exclusion 9 "the household exclusion" plainly precludes liability coverage under the farmowners policy for bodily injury (including death) to Elmer Vasseur. Because coverage is affirmatively excluded, Shelter does not owe a duty to defend Matthew Vasseur against the wrongful death action brought by his mother. The trial court's ruling to the contrary therefore is in error.

Numerous Missouri cases have upheld household exclusions similar to those contained in the Shelter policy. *See, e.g., American Family Mut. Ins. Co. v. Wemhoff*, 972 S.W.2d 402 (Mo. App. 1998); *American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876 (Mo. App. 1998); *State Farm Fire & Cas. Co. v. Berra*, 891 S.W.2d 150 (Mo. App. 1995); *St. Paul Fire & Marine Insurance Company v. Warren*, 87 F.Supp.2d 904 (E.D. Mo. 1999). The purpose of the exclusion is to protect against collusion. 8 COUCH ON INSURANCE § 114:26. In this case, Shelter's exclusions are clear, unambiguous, and should be enforced.

Respondents do not argue that the exclusion is inapplicable under the pertinent factual circumstances. Nor do they argue that the exclusion is ambiguous, as phrased. Rather, Respondents argue, and the trial court held, that the exclusion should not be enforced because of the order in which three separate groups of exclusions are stated

within the farmowners policy. Essentially, Respondents seek to manufacture an ambiguity by proposing an alternate meaning for the subject policy's plain terms. Because the alternative meaning is not supported or even suggested by any language found in the insurance contract, or any objectively reasonable interpretation of the policy language, no ambiguity is present. The policy therefore should be enforced as written.

If the language of an insurance contract is clear and unambiguous, courts do not have the power to rewrite the contract for the parties and must construe the contract as written. *Madison Block Pharmacy, Inc. v. U.S. Fidelity & Guar. Co.*, 620 S.W.2d 343, 346 (Mo. 1981). The courts' function is to construe, not make, insurance contracts. *Central Surety & Ins. Corp. v. New Amsterdam Cas. Co*, 222 S.W.2d 76, 80 (Mo. 1949). Courts should "refuse to create an ambiguity under the policy language where none exists so as to construe the imaginary ambiguity in such a way to reach a result which some might consider desirable but which is not otherwise permissible under the policy or the law." *Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 142 (Mo. 1980).

The farmowners policy includes multiple exclusions that apply to both Coverage E (Personal Liability) and Coverage F (Medical Payments). The policy also states exclusions that apply to Coverage E, only, and other exclusions that apply to Coverage F, only. This information is conveyed to the reader of the policy in a simple and logical way. The policy states without qualification, which exclusions apply to which coverages. For example, to convey which types of damages will be excluded under Coverage E (Personal Liability), the policy reads, "Under Personal Liability **we** do not cover: . . ." and then lists the exclusions. The household exclusion is listed as applicable to

Coverage E. (*LF, Vol. IV, Pg. 47*) To reiterate, the policy reads, "Under Personal Liability **we** do not cover: . . . **bodily injury** to . . . **you**." (*LF, Vol. IV, Pg. 43-47*) An ordinary insured would reasonably understand a provision stating "Under Personal Liability **we** do not cover: . . . **bodily injury** to . . . **you**" to mean that under Personal Liability coverage, the insurer will not cover liability for bodily injury to "**you**," the insured.

Respondents argue that since they purchased both Coverage E and Coverage F, only the exclusions that apply to both coverages are enforceable with respect to either coverage. Respondents argue that the exclusions which apply to Coverage E, only, and those specifically applicable to Coverage F, only, are somehow unenforceable because Respondents did not purchase only Coverage E or only Coverage F. Respondents would have this Court interpret the farmowners policy in such a way that exclusions expressly and unequivocally applicable to Medical Payments Coverage would be nullified, if the insured also purchases Personal Liability Coverage and vice versa. There is no language whatsoever in the policy to support any such inventive interpretation.

Nor is Respondent's position in line with the reasonable expectations of an ordinary insured. An ordinary insured would understand the plain language of the policy to include some exclusions applicable just to Medical Payments Coverage and others applicable just to Personal Liability and a third group applicable to both Medical Payments and Personal Liability Coverage. Nothing in the policy even suggests that exclusions applicable only to Personal Liability are ineffective just because the policy consolidates additional exclusions that apply to both Personal Liability and Medical

Payments Coverage. Thus, the specific household exclusion applicable to Matthew Vassuer's personal liability applies here, even if it does not apply to both the personal liability and medical payments coverages.

Respondents cannot manufacture an ambiguity in an otherwise unambiguous contract simply by conjuring up an alternative interpretation of its terms. *See*, *Killian v. Tharp*, 919 S.W.2d 19, 22 (Mo. App. 1996). There mere fact that the parties disagree "over the interpretation of the terms of a contract does not create an ambiguity." *Missouri Exp Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 625 (Mo. App. 2004) (citing *Stotts v. Progressive Classic Ins. Co.,* 118 S.W.3d 655, 662 (Mo. 2003)). An ambiguity exists only if the language is *reasonably and fairly* open to different constructions. *American Nat. Property & Cas. Co. V. Wyatt*, 400 S.W.3d 417, 420 (Mo. App. 2013)(emphasis added). With respect to the farmowners policy, there is a reasonable and obvious construction of directly applicable exclusion upon which Shelter relies. Respondents have failed to identify contrary language or any other reasonable bases on which the Court should have ignored the plain terms of the policy. Instead, Respondents asked the trial court to use its inventive powers to supply language not found in the farmowners policy limiting application of the unambiguous exclusions.

Specifically, Respondents' ambiguity argument requires the Court to supply language indicating that the set of exclusions following the phrase, "Under Personal Liability, **we** *do* not cover" do not apply to bar coverage if the insured purchased both Personal Liability and Medical Payment Coverage. No such language exists anywhere in the policy. Nowhere does the policy suggest when both bodily injury and medical

payments coverages exist, only the exclusions applicable to both coverages should apply to either. "Courts may not create an ambiguity to distort the language of a policy which is unambiguous… 'A Court may not use its inventive powers to create an ambiguity where none exists or rewrite a policy to provide coverage for which the parties never contracted absent a statute or public policy requiring coverage.'" *Melborn v. County Mut. Ins. Co.* 75 S.W.3d 321, 324-325 (Mo. App. 2002) (citations omitted). The trial court's holding that the household exclusion is unenforceable and that liability coverage is applicable, is in error and should be reversed.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THE ISSUE OF MEDICAL PAYMENTS COVERAGE UNDER THE FARMOWNERS INSURANCE POLICY BY RULING THAT THE POLICY PROVIDES MEDICAL PAYMENTS COVERAGE FOR DAMAGES ARISING FROM INJURIES TO ELMER VASSEUR, BECAUSE THE INSURING AGREEMENT LIMITS THE SCOPE OF COVERAGE TO THOSE OTHER THAN INSUREDS AND BECAUSE SUCH COVERAGE IS EXCLUDED UNDER THE POLICY, IN THAT THE INSURING AGREEMENT DOES NOT PROVIDE FOR COVERAGE TO INSUREDS AND EXCLUSION (2) PLAINLY AND UNAMBIGUOUSLY EXCLUDES COVERAGE FOR BODILY INJURY TO ANY INSURED AND ELMER VASSEUR WAS A NAMED INSURED UNDER THE POLICY.

Medical Payments Coverage (Coverage F) is excluded under the farmowners policy for bodily injury to Elmer Vasseur. The insuring agreement for Coverage F states in part:

> **COVERAGE F – MEDICAL PAYMENTS TO OTHERS**
>
> **We** will pay the reasonable expenses incurred for necessary medical, surgical, x-ray and dental services, prosthetic devices, eye glasses, hearing aids and pharmaceuticals, and ambulance, hospital, licensed nursing and funeral services . .
>
> .
>
> * * *
>
> **We** do not cover injury to **insureds** or residents of the **insured premises**, except a **residence employee** or **insured farm employee**.

(*LF, Vol. IV, Pg. 50-51*)

On page 15 of the farmowners policy, the following pertinent exclusion is found:

> Under Medical Payments To Others, **we** do not cover:
>
> * * *
>
> 2. **bodily injury** to any **insured** under parts (a), (b), and (c) of definition of **insured**.

(*LF, Vol. IV, Pg. 51*)

There is no dispute Elmer Vasseur was both an insured and a resident of the insured premises under the farmowners policy. (*LF, Vol. IV, Pg. 40-45*) Because the

Medical Payments To Others insuring agreement clearly and unambiguously excludes damages arising from bodily injury to insureds or residents of the insured premises, there can be no medical payments coverage under Coverage F for bodily injury suffered by Elmer Vasseur.

Moreover, in addition to the insuring agreement for Coverage F, which expressly limits the coverage to those other than "**insureds**" the above-quoted exclusion also plainly applies to affirmatively bar coverage for bodily injury to an insured. Again, there is no dispute that Elmer Vasseur is an "**insured**" under the policy. (*LF, Vol. IV, Pg. 40-45*) Therefore, no medical payments coverage exists for "**bodily injury**" to Elmer Vasseur (including death).

The trial court's ruling to the contrary does not even address the plain and unambiguous language of the Insuring Agreement. The trial court's judgment on the Medical Payments Coverage is wholly based on the same theory as its ruling on liability coverage, which is addressed in the preceding Point on Appeal. Respondents argue and the trial court ruled, that the household exclusion should not apply to Coverage F because it is listed in the set of exclusions applicable only to Coverage F and not to both Coverage E and Coverage F. Shelter's response to this argument is set forth in the preceding Point on Appeal and is incorporated here.

In addition to the household exclusion, the trial court's award of medical payments benefits is in error because it ignores the clear and unambiguous language in the Medical Payments To Others Insuring Agreement precluding medical payments coverage for an "**insured,**" independent of any exclusion. The Insuring Agreement of

Coverage F states up front, "[w]e do not cover injury to **insureds** or residents of the **insured premises**. . ." (*LF, Vol. IV, Pg. 50-51*). Thus, Respondents' medical payments claim falls outside the pertinent Insuring Agreement *and* is expressly excluded. The trial court's ruling that Respondents are entitled to Medical Payments benefits under the farmowners policy is therefore erroneous and should be reversed.

POINT III

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS ON THE ISSUE OF UNINSURED MOTORIST COVERAGE UNDER THREE AUTO INSURANCE POLICIES BY RULING THAT THE POLICIES PROVIDE UNINSURED MOTORIST COVERAGE FOR DAMAGES ARISING FROM THE OPERATION AN ALL-TERRAIN VEHICLE, BECAUSE THE REQUIREMENTS FOR SUCH COVERAGE AS STATED IN THE POLICIES ARE NOT SATISFIED, IN THAT UNINSURED MOTORIST COVERAGE IS ONLY APPLICABLE TO DAMAGES ARISING FROM THE OPERATION OF AN UNINSURED "MOTOR VEHICLE" AND AN ALL-TERRAIN VEHICLE IS NOT A "MOTOR VEHICLE" AS DEFINED BY THE POLICIES.

There is no uninsured motorist coverage available under any of the three subject auto insurance policies for damages arising from the all-terrain vehicle ("ATV") accident that is the subject of this litigation because the ATV in question is not a "motor vehicle," and thus not an "uninsured motor vehicle" as defined by the three auto policies. The trial court's ruling to the contrary in its final judgment is in error. Such error, for which Shelter seeks reversal, concerns the proper interpretation of an insurance contract, and related uninsured motorist statutes is entirely a matter of law, and is subject to *de novo*

review. *Sheedy v. Missouri Highways and Transp. Comm'n*, 180 S.W.3d 66 (Mo. App. 2005).

The named insureds on each of the three relevant auto policies are Elmer and Jeanie Vasseur. (*LF, Vol. IV, Pg. 44*) The policy form for each of the policies is A-20.8-A. (*LF, Vol. IV, Pg. 44*) uninsured motorist coverage is found under Part IV – Coverage E, Uninsured Motor Vehicle Liability Coverage. The insuring agreement for Coverage E states:

> INSURING AGREEMENT FOR COVERAGE E
>
> If an **insured** sustains **bodily injury** as a result of an **accident** involving the **use** of an **uninsured motor vehicle** and the **owner** or **operator** of that vehicle is legally obligated to pay some, or all, of the **insured's** resulting **damages**, **we** will pay the **uncompensated damages**, subject to the limit of **our** liability stated in this coverage.

(*LF, Vol. IV, Pg. 52*)

The following is the policy definition of "uninsured motor vehicle:"

> (50) **Uninsured motor vehicle** means:
>
> (a) a **motor vehicle** that is not covered by a liability bond or insurance policy, applicable to the **accident**;
>
> (b) a **hit-and-run motor vehicle**; or

> (c) a **motor vehicle** insured by a liability insurer which, because of its insolvency, is unable to make payment with respect to the legal liability of its insured up to the minimum limits of liability insurance coverage specified in the applicable **financial responsibility law**. This subsection applies only if that liability insurer becomes insolvent within two years after the **accident** date.
>
> * * *

(*LF, V. IV, Pg. 52-53*)

"Motor vehicle" means "*a self-propelled land vehicle originally designed for* ***operation on public roadways***." (*LF, Vol. IV, Pg. 52-53*) Accordingly, the threshold requirement for uninsured motorist coverage under the policies is whether the ATV was a "vehicle originally designed for operation on public roadways." The ATV was originally designed for "off road use only," and plainly was not "originally designed for operation on public roadways." (*LF, Vol. IV, Pg. 80*)

Certainly the owner's manual for the 2006 TRX 500 TM Fourtrax Foreman ATV (the subject ATV) is the best and most objective source of information to ascertain the ATV's purpose, as designed. To that end, Shelter directs the Court's attention to page 47 of that manual:

> **Off-Road Use Only**

> Your ATV and its tires are **designed** and manufactured for off-road use only, not for pavement. Riding on pavement can affect handling and control. You should not ride your ATV on pavement.

(*LF, Vol. IV, Pg. 80*)

Additionally, in a large "warning" box, the manual reads:

> "Operating this ATV on paved surfaces may seriously affect handling and control of the ATV, and may cause the vehicle to go out of control . . . [n]ever operate the ATV on any paved surfaces, including sidewalks, driveways, parking lots and streets."

(*LF, Vol. IV, Pg. 80*)

As these passages demonstrate, the specific ATV involved in the accident clearly was not designed or manufactured to be used or operated on a public roadway. The manual contains numerous other warnings and symbols to the same effect, as follows:

Page of Instruction Manual	**Warning**
Inside Opposite Cover	For Off-Road Use Only. This vehicle is designed and manufactured for off road use only.

Inside Opposite Cover	This vehicle does not conform to Federal Motor Vehicle Safety Standards or US EPA On Highway Exhaust Emission regulations, and operation on public streets, roads, or highways is illegal.
Introduction	Your Honda was designed as a recreational ATV for off-road use by one rider only.
A few words about safety	The entire manual is filled with important safety information. Read it carefully
3	Your ATV is designed and manufactured for off-road use only. The tires are not made for pavement and the ATV does not have turn signals and other features required for use on public roads. If you need to cross a paved or public road, get off and walk your ATV across.
6	Warning labels: never operate on public roads – a collision can occur with another vehicle; never use on public roads [along with a picture of an ATV rider on a public road, circled, with a slash through it, indicating that ATV is not to be driven on public roads]; this Category U (utility) ATV is for off road use only.
8	Warning label: never operate on public roads – a collision can occur with another vehicle; never use on public roads [along with a picture of an ATV rider on a public road, circled, with a slash through it, indicating that ATV is not to be driven on public roads].

48	You should never ride your ATV on public streets, roads or highways, even if they are not paved. Drivers of street vehicles may have difficulty seeing and avoiding you, which could lead to a collision. In many states, it is illegal to operate ATVs on public streets, roads and highways.
48	Operating this ATV on public streets, roads or highways could cause you to collide with another vehicle. Never operate this ATV on any public street, road or highway, even a dirt or gravel one.
Back Cover	Never use on public roads [along with a picture of an ATV rider on a public road, circled, with a slash through it, indicating that ATV is not to be driven on public roads]
Back Cover	Never operate on public roads – a collision can occur with another vehicle.

(*LF, Vol. IV, Pg. 80-82*)

In awarding uninsured coverage to Respondents, the trial ignored the manual and held that the ATV was a "motor vehicle" if " . . . used on a public roadway." (*LF, Vol. VI, Pg. 63*) The ruling is an adoption of Respondents' argument that the ATV was designed for use on public roadways because at the time of the accident, it was in fact being used on a public roadway. In other words, the basis for the trial court's determination of the ATV's "original design" was not its designers' actual intent but by the manner in which the end-user chose to operate the ATV at the time of the accident. This is inherently

contradictory to the term "original design." By the same logic, a car would *cease to be* a "motor vehicle" while being used anywhere but on a public roadway. In contrast to Respondents' unworkable "ultimate use" theory of "original design," Appellant maintains that the "original design" of the ATV must bear some relation to its "origin" and "design."

There is no dispute that State Highway AA, the road on or near which Matthew Vasseur was operating the ATV, is a public roadway. (*LF, Vol. IV, Pg. 45*) The actual use of the ATV at the time of the accident is not determinative or even relevant to the intended design of the ATV, however. "Original design" necessarily pre-dates use of the ATV. The intent of the vehicle's designers cannot be retroactively altered or even determined by the operator's ultimate use of the ATV. The "original design" of a vehicle remains constant regardless of how or where an operator chooses to use the vehicle. A truck can be driven on railroad tracks, but that does not make it a train.

As used in the Shelter policies, the word "designed" is unambiguous. *State Farm v. Stockley*, 168 S.W.3d 598 (Mo. App. 2005). Unless a word is specifically defined in a policy, the Court must give terms their ordinary meaning. *Farmland Industries, Inc. v. Republic Ins. Co.,* 941 S.W.2d 505 (Mo. 1997). The word "designed" clearly "implies the plans of those individuals who engineered the vehicle originally plus the plan of any person who significantly modified the vehicle." *Meeks v. Berkbuegler,* 632 S.W.2d 24, 26 (Mo. App. 1982).

Meeks held that a dune buggy was clearly designed to be used primarily off road. *Id.* A dune buggy is much like an ATV in that it can, i.e. is capable of operation on

public roadways, but it was not designed for that purpose. Continuing with a flawed theme, Respondents argue that *Meeks* is distinguishable because the dune buggy accident at issue in that case did not occur on a public roadway. Again, this distinction is immaterial and illusory. The question before this Court is the same as was the question decided in *Meeks*; whether the subject vehicle was "originally designed" for use on a public roadway. *Meeks* held that the dune buggy was not designed for such use. *Id.* Neither is an ATV.

Stockley is also analogous. *Stockley* held that a four wheeled tug used to transport baggage at Lambert International Airport was not designed for use on public roadways. *Stockley,* 168 S.W.3d at 601. In reaching this determination, the *Stockley* court examined, among other evidence, the operator's manual. *Id.* The question before the court in *Stockley* was the same as is that before this court in the present case, whether the subject vehicle was "originally designed" for use on a public roadway. *Id.* As was the case with State Farm in *Stockley*, Shelter looked to the ATV owner's manual to determine the intent of its original design. The numerous provisions of the manual excerpted above clearly and repeatedly stating that the ATV was not designed for use on public roadways, were ignored by the trial court.

Additionally, Missouri's Motor Vehicle Financial Responsibility Law, as applied to uninsured motorist coverage, does not require an ATV to be covered by an auto policy. *Meeks,* 632 S.W.2d at 27 (The MVFRL "clearly does not include off-road vehicles in its definition of motor vehicles"). Thus, the rights and liabilities of the parties are defined by

contract, i.e., the terms of Shelter's policies. Such terms including specifically the definition of "**motor vehicle**" bar Respondents' claims.

The MVFRL adopts the definition of "commercial motor vehicle" found in Section 301.010 R.S.Mo., but incorporates the definition of "motor vehicle" from Section 303.020. *Id* at 27; Section 379.203 R.S.Mo. Thus under the MVFRL, "motor vehicle" means, "a self-propelled vehicle which is designed for use upon a highway, including trailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, well drillers and motorized bicycles, as defined in Section 307.180, R.S.Mo.), and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails." *Id*; R.S.Mo. 303.020(5).

In the trial court and in the Court of Appeals, Respondents made much of the fact that, at least prior to 2003, Illinois likely required uninsured motorist coverage for ATVs when being used on public roadways. Appellant does not dispute this interpretation of the law of a foreign jurisdiction as it used to be. More significant, however, is the language employed by the Illinois legislature when it changed that state's law. As previously conceded by Respondents, the Illinois legislature's amendment of the definition of "motor vehicle" to include the language "designed for use on public highways" served to remove ATVs from the type of vehicles for which uninsured motorist coverage is mandated in that state. Accordingly, Respondents must concede that the operative effect of the phrase "designed for use on public highways," is that it clearly omits ATVs from the statutory mandate in Illinois and in Missouri.

The ATV was not "originally designed for operation on public roadways." Because the ATV was not so designed, it is not a "motor vehicle" as defined by the three Shelter auto policies. Because an ATV is not a "motor vehicle" by policy definition or by statutory definition, there is no Shelter uninsured motorist coverage for damages arising from the ATV accident here. The trial court's ruling awarding uninsured motorist coverage to Respondents is therefore in error and should be reversed.

POINT IV

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS ON THE ISSUE OF ACCIDENTAL DEATH COVERAGE UNDER THREE AUTO INSURANCE POLICIES BY RULING THAT THE POLICIES PROVIDE ACCIDENTAL DEATH COVERAGE FOR DAMAGES ARISING FROM THE OPERATION AN ALL-TERRAIN VEHICLE, BECAUSE THE REQUIREMENTS FOR SUCH COVERAGE AS STATED IN THE POLICIES ARE NOT SATISFIED, IN THAT ACCIDENTAL DEATH COVERAGE IS ONLY APPLICABLE TO DAMAGES ARISING FROM THE DEATH OF AN INSURED WHILE OCCUPYING AN "AUTO" AND AN ALL-TERRAIN VEHICLE IS NOT AN "AUTO" AS DEFINED BY THE POLICIES.

The auto policies do not provide coverage for the accidental death of Elmer Vasseur for the same reason that those policies do not provide uninsured motorist coverage for the same damages. The trial court's ruling to the contrary in its final judgment is in error. Such error, for which Shelter seeks reversal, concerns the proper interpretation of an insurance contract, is entirely a matter of law, and is subject to *de novo* review. *Sheedy*, 180 S.W.3d 66.

Coverage D provides benefits to compensate for the death of an insured, if that death results from injuries sustained while the insured was occupying an "auto." An ATV is not an "auto" and thus the requirements for coverage as stated in the insuring agreement are not met. The insuring agreement for Coverage D states:

> INSURING AGREEMENT FOR COVERAGE D
>
> **We** will pay the death benefit stated in the **Declarations** for this coverage if an **accident** causes the **insured's** death. The death must result directly, and independently of all other causes, from **bodily injury** sustained:
>
> (1) while **occupying** an **auto**; or
>
> (2) when struck by an **auto**.

(*LF, Vol. IV, Pg. 57*)

An "auto" is defined as a "***motor vehicle*** *with at least four wheels*." (*LF, Vol. IV, Pg. 53*) "Motor vehicle" means "*a self-propelled land vehicle originally designed for* ***operation*** *on* ***public roadways***." (*LF, Vol. IV, Pg. 53*)

For the reasons discussed in the preceding Point on Appeal, which discussion is incorporated by reference, the ATV involved in the accident was not "originally designed for operation on public roadways." Therefore, the ATV is not a "motor vehicle" and thus not an "auto." Because Elmer Vasseur did not die "while occupying an auto" or "when struck by an auto," Coverage D does not provide benefits for damages arising from his death. The trial court's ruling awarding accidental death coverage to Respondents under the three auto policies is in error and should be reversed.

POINT V

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS ON THE ISSUE OF MEDICAL PAYMENTS COVERAGE UNDER THREE AUTO INSURANCE POLICIES BY RULING THAT THE POLICIES PROVIDE MEDICAL PAYMENTS COVERAGE FOR DAMAGES ARISING FROM THE OPERATION AN ALL-TERRAIN VEHICLE, BECAUSE THE REQUIREMENTS FOR SUCH COVERAGE AS STATED IN THE POLICIES ARE NOT SATISFIED, IN THAT MEDICAL PAYMENTS COVERAGE IS ONLY APPLICABLE TO DAMAGES RELATING TO BODILY INJURY TO AN INSURED ARISING FROM THE OCCUPANCY, USE, OR MAINTENANCE, OF AN "AUTO," AND AN ALL-TERRAIN VEHICLE IS NOT AN "AUTO" AS DEFINED BY THE POLICIES.

The auto policies do not provide coverage for medical payments related to bodily injury sustained by any insured in the ATV accident giving rise to this suit. The policies only provide medical payments coverage for the treatment of injuries sustained by an insured while occupying, maintaining, or using an "auto." Again, an ATV is not an "auto" and thus the requirements for medical payments coverage as stated in the insuring agreement are not met. The trial court's ruling to the contrary in its final judgment is in error. Such error, for which Shelter seeks reversal, concerns the proper interpretation of an insurance contract, is entirely a matter of law, and is subject to *de novo* review. *Sheedy*, 180 S.W.3d 66.

The insuring agreement for Coverage C states:

INSURING AGREEMENT FOR COVERAGE C

> Subject to the limit of **our** liability for this coverage stated in the **Declarations**, **we** will pay the **reasonable charges** for **necessary goods and services** for the treatment of **bodily injury** sustained by an **insured**, if such **bodily injury** directly results from an **accident** that arises out of the **occupancy**, **use**, or **maintenance**, of an **auto**.

(*LF, Vol. IV, Pg. 55-56*)

An "auto" is defined as a "***motor vehicle*** *with at least four wheels*." (*LF, Vol. IV, Pg. 53*) "Motor vehicle" means "*a self-propelled land vehicle originally designed for* ***operation*** *on* ***public roadways***." (*LF, Vol. IV, Pg. 53*)

For the reasons discussed in the two preceding Points on Appeal, which discussions are fully incorporated here, the ATV involved in the accident was not "originally designed for operation on public roadways." Therefore, the ATV is not a "motor vehicle" and thus not an "auto." The damages claimed by Respondents did not result from an accident arising ". . . out of the occupancy, use, or maintenance of an auto." Accordingly, the trial court's ruling awarding medical payments coverage to Respondents is in error and should be reversed.

POINT VI

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS ON THE ISSUE OF UNINSURED MOTORIST COVERAGE UNDER THREE AUTO INSURANCE POLICIES WHILE ALSO GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THE ISSUE OF LIABILITY INSURANCE COVERAGE UNDER THE FARMOWNERS INSURANCE

POLICY BY RULING THAT THE AVAILABILITY OF LIABILITY INSURANCE COVERAGE TO ALLEGED TORTFEASOR MATTHEW VASSEUR DID NOT PRECLUDE THE AVAILABILITY OF UNINSURED MOTORIST COVERAGE UNDER THE AUTO POLICIES, AS THE AUTO POLICIES PROVIDE UNINSURED MOTORIST COVERAGE ONLY FOR DAMAGES CAUSED BY THE USE OF AN "UNINSURED MOTOR VEHICLE," AND IF MATTHEW VASSEUR IS ENTITLED TO LIABILITY COVERAGE UNDER THE FARMOWNERS POLICY, THE ALL-TERRAIN VEHICLE WAS NOT AN "UNINSURED MOTOR VEHICLE."

Simply stated, Respondents cannot have it both ways. Either Matthew Vasseur is "insured" against liability for the death of his father Elmer, or he is "uninsured." Under no reasonable application of the law can Matthew Vasseur be an insured uninsured motorist. If Matthew Vasseur is insured under the farmowners policy, he cannot simultaneously be "uninsured" under the three auto policies. As set forth in Appellant's first Point on Appeal, Shelter maintains that the trial court's ruling with respect to liability coverage under the farmowners policy was made in error. In the alternative, if this Court holds that the farmowners policy does obligate Shelter to cover Matthew Vasseur for the wrongful death suit brought by his mother, such holding requires that uninsured motorist coverage be unavailable under Shelter's auto policies. The trial court's ruling to the contrary in its final judgment is in error. Such error, for which Shelter seeks reversal, concerns the proper interpretation of an insurance contract, is entirely a matter of law, and is subject to *de novo* review. *Sheedy*, 180 S.W.3d 66.

The two coverages at issue, liability and uninsured motorist, are mutually exclusive. If, as the trial court held, Matthew Vasseur is entitled to liability coverage for

claims arising from the death of his father, he was not "uninsured." Uninsured motorist coverage is only available to compensate an insured for damages caused by a tortfeasor completely lacking liability coverage. Generally, *if* a tortfeasor has no insurance coverage, uninsured motorist coverage applies under all auto liability policies covering the injured party. *See, Hill v. Government Employee Ins. Co.*, 390 S.W.3d 187 (Mo. App. 2012)(emphasis added). This is coverage required by statute. Section 303.010 R.S.Mo. "[T]he issue of whether a vehicle is considered "uninsured" does not turn solely on whether there is an owner's or operator's policy in effect at the time of the accident. Rather, it turns on the underlying tort liability alleged and whether there is coverage for that particular tort." *Stotts v. Progressive Classic Ins. Co.*, 118 S.W.3d 655, 664-665 (Mo. App. 2003) (*citing, Arnold v. American Family Mut. Ins. Co.*, 987 S.W.2d 537, 540-541 (Mo. App. 1999)).

In other words, if no liability coverage is available to a particular tortfeasor for a particular tort involving the use of a motor vehicle, uninsured motorist coverage may apply. If, however, liability coverage is available to the tortfeasor, regardless of its source, uninsured motorist coverage will not apply. In contrast with this fundamental principle, Respondents present a paradox in which Matthew Vasseur is simultaneously both "insured" and "uninsured." According to Respondents, "uninsured motorist" does not mean "motorist without insurance," but instead means "motorist without insurance specifically arising under an automobile policy." Missouri law does not support such an arbitrary and unnecessary distinction. Either a motorist is insured for liability or they are

not. Again, uninsured motorist coverage ". . . turns on the underlying tort liability alleged and whether there is coverage for that particular tort." *Id.*

The Uninsured Motorist Insuring Agreement common to the three auto policies states:

> INSURING AGREEMENT FOR COVERAGE E
>
> If an **insured** sustains **bodily injury** as a result of an **accident** involving the **use** of an **uninsured motor vehicle** and the **owner** or **operator** of that vehicle is legally obligated to pay some, or all, of the **insured's** resulting **damages**, **we** will pay the **uncompensated damages**, subject to the limit of **our** liability stated in this coverage.

(*LF, Vol. IV, Pg. 52*)

"Uninsured motor vehicle" is defined as: "a **motor vehicle** that is not covered by a liability bond or insurance policy, applicable to the accident." (*LF, Vol. IV, Pg. 52*)

Consistent with *Stotts*, a vehicle operated by a tortfeasor who is covered by, for instance, an operator's policy which provides liability coverage for the tort alleged, is not an uninsured motor vehicle. *Stotts*, 118 S.W.3d 655 at 658. That the liability coverage applies specifically to the operator and not the vehicle is immaterial. *Id.* The vehicle is in effect insured when operated by an insured driver. The insured in *Stotts* argued for uninsured motorist coverage in the absence of an applicable owner's policy on the

vehicle notwithstanding the existence of an applicable operator's policy covering the driver. *See generally, Id.* The *Stotts* Court held as follows:

> As noted, *supra,* the uninsured motorist provisions of the Stotts policy expressly provides that a motor vehicle is considered uninsured where "no bodily injury liability bond or policy applies at the time of the accident." Giving that language its plain and ordinary meaning, it is clear and unambiguous that if any liability policy provided coverage for the James' vehicle at the time of the accident, it was not uninsured for purposes of the uninsured motorist coverage of the Stotts policy. Thus, because it is undisputed that Schlosser had a liability policy that covered his negligent operation of the James' vehicle at the time of the accident, the vehicle was not an "uninsured motor vehicle" under the express terms of the policy. Hence, based solely on the express language of the policy, there would be no uninsured motorist coverage under the Stotts policy for the respondents' claimed loss for the wrongful death of their mother. *Id* at 663. (emphasis added)

Elmer Vasseur died as a result of injuries suffered when the ATV on which he was riding struck a road sign. (*LF, Vol. IV, Pg. 44*) All damages at issue in this case arise from that accident. Elmer's minor son Matthew was operating the ATV at the time of the accident. (*LF, Vol. IV, Pg. 44*) The trial court ruled that Matthew Vasseur is entitled to liability coverage for his negligence under the farmowners' policy issued to his parents. (*LF, Vol. VI, Pg. 60-63*) If the tortfeasor, Matthew Vasseur, is insured under the

farmowners policy, as a matter of law, the "vehicle" he was operating was not an "uninsured motor vehicle" and he cannot also have been an "uninsured motorist" under Shelter's auto policies.

Moreover, each of Shelter's three auto policies includes language specifically excluding from the definition of "uninsured motor vehicle," any "**motor vehicle owned** or **used** by a **person** who meets the requirements of any applicable **financial responsibility law**." (*LF, Vol. II, Pg. 169*) The applicable financial responsibility law mandates that all vehicle operators carry at least $25,000 per occurrence in liability coverage with respect to the operation of any specific vehicle. Section 303.010, R.S.Mo. The trial court held that the operator of the "vehicle" claimed by Respondents to be "uninsured," is actually entitled to $100,000 in liability coverage. (*LF, Vol. VI, Pg. 60-63*). If this Court affirms the trial court's award of liability coverage for Matthew Vasseur under the farmowners policy, Matthew Vasseur becomes "a person who meets the requirements of [the] applicable financial responsibility law" with respect to his operation of the ATV. Thus, the ATV cannot be an uninsured motor vehicle and Shelter's uninsured motorist coverage is unavailable. Accordingly, the trial court's ruling that Respondents can collect uninsured motorist benefits, even if Matthew Vasseur is entitled to liability coverage, was made in error and should be reversed.

CONCLUSION

The final judgment of the Circuit Court of Texas County awarding Respondents liability coverage and medical payments coverages under the farmowners policy, as well as uninsured motorist, accidental death, and medical payments coverages under three

auto policies, is in error and should be reversed. Liability and medical payments coverage under the farmowners policy is excluded because the claimed damages arise from bodily injury to an "**insured**" and resident of the "**insured premises.**" Under the three auto policies, none of the three coverages sought uninsured motorist, accidental death, or medical payments, are available because the claimed damages were not caused by an accident involving a "motor vehicle" as such term is defined by Shelter's auto policies and by statute. In the alternative, if Matthew Vasseur is entitled to liability coverage under the farmowners policy, which Shelter steadfastly denies, he was not "uninsured" for the purposes of awarding Defendants additional uninsured motorist coverage under Shelter's auto policies.

Shelter respectfully requests that the Court reverse the determinations of the trial court, finding as a matter of law that: (i) Shelter does not have a duty under the farmowners policy to defend Matthew Vasseur in the wrongful death suit and therefore no duty to indemnify such action; (ii) the farmowners policy does not provide medical payments coverage to Respondents; (iii) Shelter's three auto policies do not provide uninsured motorist coverage to Respondents for the damages arising from the ATV accident; (iv) Shelter's three auto policies do not provide accidental death coverage for damages relating to the death of Elmer Vasseur and arising from the ATV accident; and (v) that Shelter's three auto policies do not provide medical payments coverage for damages arising from the ATV accident. In the alternative, Shelter requests that the Court reverse, in part, the determinations of the trial court by holding, as a matter of law, that the existence of liability coverage under the farmowners policy for Matthew

Vasseur's negligence in causing Elmer Vasseur's death precludes uninsured motorist coverage for the same ATV accident. Additionally, Shelter requests that the Court enter an Order taxing appellate costs in favor of Shelter pursuant to Mo. Sup. Ct. R. 84.18; and granting to Shelter such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,
FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.

/s/ Wm. Clayton Crawford
WM. CLAYTON CRAWFORD # 41619
GRANT D. HENDERSON # 61878
3000 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 472-7474/Facsimile: (816) 472-6262
Email: ccrawford@fwpclaw.com
Email: ghenderson@fwpclaw.com
ATTORNEYS FOR APPELLANT SHELTER MUTUAL INSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Missouri Supreme Court Rule 84.06(c) that:

1. This Brief of Appellant includes the information required by Missouri Supreme Court Rule 55.03;

2. This Brief of Appellant complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);

3. This Brief of Appellant, excluding the cover page, signature blocks, Affidavit of Service, this Certificate of Compliance, and the Appendix, contains 10,944 words, as determined by the word-count tool contained in the Microsoft Word software with which this Brief of Appellant was prepared.

/s/ Wm. Clayton Crawford
Wm. Clayton Crawford MO # 41619
Grant D. Henderson MO # 61878
FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed electronically this 15th day of October, 2015 via CM/ECF in the Supreme Court of Missouri with notice of same being electronically served by the Court to the following:

Harold Lynn Henry
P.O. Box 617
West Plains, MO 65775-0617
Attorney for Respondent

and

Brad D. Eidson
Guardian Ad Litem
112 E. Main
P.O. Box 95
Houston, MO 65483-0095

/s/ Wm. Clayton Crawford
Wm. Clayton Crawford MO # 41619
Grant D. Henderson MO # 61878
FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.
Attorneys for Appellant