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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 REPLY BRIEF OF APPELLANT

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Abbreviations (other than case reporters):

LF -- Legal File (referenced by page number)

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

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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.

Shelter's Substitute Brief of Appellant, as well as Respondents' Substitute Brief, both describe the way in which the farmowners policy lists the policy's exclusions. In this Reply, Appellant will not repeat its description, but to summarize, the farmowners policy includes a list of exclusions that apply to both Coverage E (Personal Liability) and coverage F (Medical Payments); exclusions that apply to Coverage E, only; and exclusions that apply to Coverage F, only. (*LF, Vol. IV, Pg. 43-47*).

The trial court's ruling in favor of Respondents on the issue of liability coverage under the farmowners policy construes the plain language of Shelter's policy based on Respondents' unreasonable alternative interpretation. Respondents have contrived an alternative construction of the plainly worded policy terms and argue that the mere existence of the alternative should trigger the rule of favorable construction. However, a court may only apply the rule of favorable construction to *reasonable* alternative constructions where two or more alternate interpretations of the policy create an ambiguity. *See Lero v. State Farm Fire & Cas. Co.*, 359 S.W.3d 74, 82 (Mo. App.

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2011)(emphasis added); *Gavan v. Bituminous Cas. Corp*., 242 S.W.3d 718, 720 (Mo. 2008). "An unreasonable alternative construction will not render the term ambiguous." *Gavan*, 242 S.W.3d at 720.

The exclusion which operates to bar coverage for Matthew Vasseur under the farmowners policy for the lawsuit brought by his mother for the death of his father is commonly referenced as a "household" exclusion. Its purpose is to prevent the type of collusion that may arise when family members make claims against one another. 8 COUCH ON INSURANCE § 114:26. More broadly, the household exclusion precludes coverage in circumstances where an insured and family member could cooperate to create liability for which a carrier would be bound to provide indemnity.

In this case, Matthew Vasseur alleges that the farmowners policy issued to his parents entitles him to be defended and indemnified against a wrongful death action brought by his mother and arising from the death of his father. At the same time, Matthew Vasseur, as the surviving son of Elmer Vasseur, is a member of the statutory class entitled to share in any recovery resulting from that very suit under V.A.M.S. Sections 537.080 and 537.095. So, Matthew Vasseur is in the unique position of being a plaintiff entitled to share in any recovery obtained against him. Jeanie Vasseur is a named insured under the farmowners policy as well as a named plaintiff in the wrongful death action for which coverage is sought under that policy. (*LF, Vol. IV, Pg. 44*) This puts her in the position of making a liability claim against her own son as an insured under her own farmowners liability insurance policy. Any reading of the farmowners policy that could allow the Vasseurs to profit by suing themselves is objectively *unreasonable* and

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contrary to the plainly worded household exclusion applicable to the policy's liability coverage.

Respondents do not dispute that the policy contains a household exclusion applicable to liability coverage (*LF, Vol. IV, Pg. 43-47*). Further, Respondents concede that the exclusion itself is unambiguous, as phrased. Nevertheless, they argue that even though the policy clearly states a household exclusion applicable to liability coverage, it should be discarded because a nearly identical exclusion is also listed for a different coverage. In this way, Respondents' suggested reading of the farmowners policy allows the existence of liability coverage to be determined by a variable unrelated to liability coverage.

Alternately, Respondents claim that only the exclusions listed as applicable to both liability and medical payments coverage should be applied where the insured purchases both coverages. Specifically, the trial court held, that an "average consumer" could reasonably conclude that if she purchased both liability and medical payments coverage, only the set of exclusions applicable to both coverages should be enforced and those listed as specifically applicable to only liability coverage would no longer apply. (*LF, Vol. IV, Pg. 556*)

The argument of Respondents described in the preceding paragraph is the entire foundation for the trial court's ruling in awarding liability coverage. The trial court, hypothesizing the expectations of the "average consumer" opined that, "if you spend the extra premium dollars and buy both coverages E and F, the household exclusion will not apply to you." (*LF, Vol. IV, Pg. 556*) The farmowners policy cannot be reasonably

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construed to offer coverage for which exclusions are waived as a purported inducement to purchase more coverage.

The plain language of the policy makes it abundantly clear that, regardless of whether the household exclusion stated in the list of exclusions applicable to liability coverage also applies to medical payments coverage; it plainly and unequivocally applies to liability coverage. Thus, the trial court was in error in considering Respondent's alternative explanation for the use of separate exclusion lists, much less giving such explanation the effect of overcoming plain and ordinary policy language. *See Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. 2010.

Respondents' Substitute Brief casts a wide net in search of a precedent that could lend legitimacy to their alternative reading of clear and unambiguous policy language, and notably comes up short. In the absence of relevant authority, Respondents cite *Benahmed v. Houston Cas. Co*., an unreported decision of the United States Court of Appeals for the 6th Circuit applying Ohio law. *Benahmed*, 486 Fed.Appx. 508 (2012).

Benhamed held that the coverage endorsement at issue was ambiguous in its expression of which exclusions, listed elsewhere in the policy, were applicable to the coverage provided by the endorsement. *Id.* at 516. The dispute concerned which provisions applicable to the main policy form of the Houston Casualty policy had been incorporated into the endorsement. *Id*. Specifically, the language, which the 6th Circuit held ambiguous, stated that the endorsement "is subject to the same exclusions as are applicable to Coverages B, C, D, and E of this Policy." *Id*. No particular exclusion was specifically identified as applicable to the coverage provided by the endorsement. The

court therefore agreed with the insured that the quoted sentence could reasonably be interpreted as referring to only those exclusions which applied to all four of the coverages listed. *Id.*

Benhamed did not hold that a particular exclusion's applicability to the relevant endorsement was dependent on an unrelated variable tied to the amount of coverage purchased by the insured. *Benhamed* did not hold that the policy offered a free insured risk with the purchase of another line of coverage. The endorsement at issue in *Benhamed* was ambiguous because it did not articulate with any particularity which exclusions were applicable to the coverage it provided. *See, generally, Id.* In contrast, the relevant portion of the farmowners policy at issue in this case reads, "Under Personal Liability **we** do not cover: . . . **bodily injury** to . . . **you**." (*LF, V. IV, Pg. 43-47*) The ambiguity identified in *Benhamed* is simply not present here.

Respondents also argue that the manner in which the farmowners policy lists other exclusions lends support to their alternate interpretation. This is incorrect as Respondents' argument depends on an unreasonable interpretation of the policy language, just as it does with respect to the household exclusion. The first example put forward in Respondents' Substitute Brief relates to the manner in which the following exclusions are stated.

Exclusions – Section II

Under Personal Liability and Medical Payments To Others, we do not cover:

…

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2) **bodily injury** to a **farm employee** other than an **insured farm employee**, arising out of and in the course of employment by an **insured**.

Under Personal Liability we do not cover:

…

6) sickness, disease or death of a **residence employee** or **farm employee** unless written claim is made or suit is brought within 36 months after the end of the policy term.

(*LF, Vol. IV, Pg. 47, 48*)

It is Respondents' contention that these exclusions are somehow inconsistent, unless the list of exclusions stated as applicable to both coverages supersedes the list of exclusions specifically applicable to liability coverage. The fallacy of this argument is that the two exclusions excerpted above are neither identical nor inconsistent. It is possible for both, either, or neither to apply to a particular loss. There is no principle of Missouri law holding that the scope of separate exclusions may not overlap. The exclusion applicable to both medical payments and liability coverage excepts bodily injury to an "**insured farm employee**" whereas the exclusion applicable to liability coverage, only, does not include any such exemption. Also, the exclusion applicable to both coverages applies only to injuries sustained in the "course of employment," whereas the exclusion applicable to liability coverage only does not state such a requirement.

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Next, Respondents compare the following two exclusions and again insist that a conflict arises from the fact that the scope of the two exclusions may overlap.

Exclusions – Section II

Under Personal Liability and Medical Payments To Others, we do not cover:

…

3) **bodily injury** or **property damage** arising out of the rendering or failing to render professional services.

…

Under Medical Payments to Others **we** do not cover:

…

4) any person while on the **insured premises** because a **business** is conducted or professional services are rendered on the **insured premises**.

(*LF, Vol. IV, Pg. 47, 48*)

The exclusion applicable to both coverages plainly applies to damages "arising out of" the rendering or failing to render a professional service. The exclusion applicable only to medical payments coverage is both broader and narrower. It applies to damages to any person who is on the insured premises because professional services are rendered there, but it also applies to damages to any person on the insured premises because a business is conducted on said premises. If a claimant suffers bodily injury on the insured premises because professional services were negligently rendered, medical payments coverage would be excluded under both exclusions. If the claimant's bodily injury suffered on the insured premises arose from a business conducted on said premises,

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medical payments coverage would be excluded only under the exclusion applicable solely to that coverage.

Moreover, the exclusion applicable to medical payments coverage only is narrower in that it only applies to damages sustained on the insured premises. In contrast, the exclusion applicable to both medical payments coverage and liability coverage applies to damages sustained anywhere. If a claimant suffers bodily injury away from the insured premises and caused by the negligent rendering of professional services, medical payments coverage would be excluded under the exclusion applicable to both coverages, but would not be excluded under the exclusion applicable only to that coverage.

At the conclusion of their Substitute Brief, Respondents set forth a series of arguments wherein they simply suggest other ways that Shelter *might have* stated its exclusions and then declare the alternate hypothetical language to be clearer. These arguments ignore the rules of contract interpretation and construction as developed by this Court. As a threshold matter, unless an ambiguity is first found within the language of the exclusion, Missouri courts need not indulge hypothetical alternate language. "Unless the court finds ambiguity [in an insurance policy], it does not resort to other principles of interpretation to resolve the dispute." *Piatt v. Indiana Lumberman's Mutual Ins. Co*., 461 S.W.3d 788, 792 (Mo. 2015).

Respondents seek to use "other principles of interpretation" to establish the ambiguity and in this endeavor, they run afoul of longstanding Missouri law. Specifically, Respondents argue that Shelter could have better stated its household

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exclusion's applicability to liability coverage by including it in the insuring agreement or in a separate endorsement. Appellant takes no position on whether Respondents' alternate proposal more clearly conveys the meaning of the policy exclusion. Because the policy plainly states that liability coverage is excluded for damages arising from the death of an insured, it is of no consequence that the plainly worded exclusion could have possible been stated with even greater clarity. The singular test for "ambiguity" is whether the term in question is "reasonably open to different constructions." *Gavan*, 242 S.W.3d at 721. This Court will give terms their plain and ordinary meaning unless it is clear the parties intended a different meaning. *Id.* at 720. Respondents' argument depends on a much more demanding test under which policy language is ambiguous if there is any way that it *could have* been stated that *would have* been clearer.

Moreover, in arguing that clarity requires that an insuring agreement also include all damages to be excluded, Respondents argue that coverage exclusions are *per se* ambiguous under Missouri law. This is not the case. "While a broad grant of coverage in one provision that is taken away by a more limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent." *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 163 (Mo. 2007).

There is but one reasonable interpretation of the exclusionary provision at issue, which states in pertinent part, "Under Personal Liability **we** do not cover: . . . **bodily injury** to . . . **you**." is that the policy does not "cover" "**bodily injury**" to "**you.**" Since "**you**" in this case is Elmer Vasseur, the policy's liability coverage does not include

bodily injury (including death) to Elmer Vasseur. 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.

Respondents concede in their Substitute Brief that the trial court erred in awarding medical payments to Respondents under the farmowners policy.

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

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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 standard of review with respect to Point III is *de novo* in that Appellant seeks reversal of the trial court's judgment on the basis that it erred as a matter of law in its interpretation of insurance policy language and erred as a matter of law with respect to its interpretation of the Motor Vehicle Financial Responsibility Law ("MVFRL"). Nevertheless, the trial court's ruling that the "**All Terrain**" Vehicle is a "motor vehicle," i.e., "originally designed for use on public roadways," is unsupported by any evidentiary finding, is against the weight of the evidence, and is subject to reversal under any standard of review.

Specifically, the trial court ruled that the auto policies did not comply with the requirements of the MVFRL and that therefore, "the uninsured motorist statutes apply." (*LF, Vol. VI, Pg. 60*) This is an erroneous interpretation of a statute to be reviewed *de novo*. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). Further, the trial court ruled that the subject ATV "was a motor vehicle when being used on a public roadway." (*LF, Vol. VI, Pg. 60*) This was not a finding of fact but the application of facts to the language of the insurance policies. The policies, as a matter of law, cannot be interpreted to allow for an ATV to fall within the policy definition of "motor vehicle." The trial court misconstrued the policy language and in so doing, erred as a matter of law with respect to a matter of contract interpretation. Because the interpretation of a contract is a matter of law for the court, the trial court's interpretation of the relevant insurance policies is subject to *de novo* review. *Id.*

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There is no uninsured motorist coverage ("UM") available under any of the three Shelter auto insurance policies for damages arising from the all-terrain vehicle ("ATV") accident at issue because the ATV in question is not a "motor vehicle." Thus, it was not an "uninsured motor vehicle" as defined by the three policies. "Motor vehicle" means "a self-propelled land vehicle originally designed for operation on public roadways." (*LF, Vol. IV, Pg. 52-53*) Accordingly, the determining factor for UM coverage under the policies is whether the ATV was a "vehicle *originally designed* for operation on public roadways."[1]

The word "designed" plainly "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). The ATV, originally designed for "off road use only," was not "originally designed for operation on public roadways." (*LF, Vol. IV, Pg. 80*) The trial court did not address the "original design" of the ATV. Instead, it misinterpreted the policy definition of "motor vehicle" by looking to the ultimate use of the ATV, instead of its "original design."

[1] Neither in the trial court's final Judgment nor anywhere else did the trial court make a finding of fact that the ATV was "originally designed" for use on public roadways. The trial court's ruling is based on its determination that the ATV was a "motor vehicle" *when* being operated on public roadways. Only if the trial court misinterpreted the policy definition of "motor vehicle" could such a finding be relevant to its determination.

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In holding that the ATV qualified as a "motor vehicle" under the auto policies, the trial court gave no meaning to the definition of "motor vehicle" contained in those policies. That definition turns on the subject's "original design." (*LF, Vol. IV, Pg. 52-53*) Plainly, the purpose for which an object is "originally designed" cannot be determined by how the object is subsequently used. As to its original design, the ATV either was or was not originally designed "for operation on public roadways." The trial court found, however, that sometimes the ATV was "originally designed for operation on public roadways" and sometimes was not "originally designed for operation on public roadways," by ruling that the ATV is a "motor vehicle" when it is ". . . used on a public roadway." (*LF, Vol. VI, Pg. 63*) The original design of an ATV cannot be determined, and certainly cannot change depending on its use.

The trial court's holding that the ATV's "original design" can essentially change from moment to moment depending on its actual use 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. Respondents also make much of their "evidence" that because the ATV operates on "trails" and "trails" share characteristics with "roads," the ATV was originally designed for operation on a public roadway. The problem with this line of reasoning is that "original design" is not determined by capability.

As if to highlight the inherent flaw in this line of reasoning, Respondents in footnote 2 of their Substitute Brief quote the ATV operator's manual as stating, "Operating this ATV on public streets, roads or highways could cause you to collide with

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another vehicle. **Never operate this ATV on any public street, road or highway, even a dirt or gravel one**." (emphasis added). While the quoted language should put to rest any suggestion that the ATV was originally designed to operate on a public roadway, Respondents argue that in warning users not to use the ATV on public roadways, the manual can be read as conceding that the ATV was originally designed for such use. By this same logic, any product warning stating that the product is not to be ingested would prove the product was originally designed for ingestion. There is no reasonable basis for any such argument.

In contrast to the ruling in the trial court's final Judgment, Appellant's position is that the "original design" of the ATV must bear some relation to its "origin" and to its "design." Appellant does not dispute that the ATV is capable of operating on a public roadway. Nor does Appellant dispute that at the time of the accident giving rise to this litigation, the ATV was in fact being operated on a public roadway. It is Appellant's position that the ATV was not "originally designed" for such use. The limitation of original design is plainly demonstrated by the warning in the operator's manual: "**Never operate this ATV on any public street, road or highway, even a dirt or gravel one.**" This admonition could not be clearer. (emphasis added). The trial court's ruling that the ATV is a "motor vehicle" is the result of an erroneous interpretation of the definition of "motor vehicle" contained in the Shelter policies. Accordingly, this ruling should be reviewed *de novo* and reversed.

Even if the trial court's determination that the ATV is a "motor vehicle" under the applicable policy definition can be characterized as a finding of fact, such determination

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is unsupported by any evidence from the original designer. Notwithstanding the evidence offered by a former ATV dealer, the designer's intent is clear from its owner's manual. Any finding to the contrary was against the weight of the evidence presented.

Respondents also argue, and the trial court also held, that the MVFRL mandates UM coverage for ATVs. This argument was asserted without success in *Meeks* and is equally unpersuasive here. The only time a Missouri appellate court has had the opportunity to address the question of whether the MVFRL mandates UM coverage for off-road vehicles; the Court of Appeals concluded that the MVFRL "clearly does not include off-road vehicles in its definition of motor vehicles." *Meeks*, 632 S.W.2d at 27.

The MVFRL incorporates the definition of "motor vehicle" from Section 303.020. *Id.*; Section 379.203, R.S.Mo. 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*; Section 303.020(5), R.S.Mo. The ATV is not a "motor vehicle" under the MVFRL for the same reason it is not a "motor vehicle" under the Shelter policies. The ATV was not "designed" for use on public roadways. Misuse of the ATV, against the manufacturer's unequivocal instructions, does not alter its "design."

While it is not clear whether the argument is in support of the trial court's interpretation of the insurance policies or its interpretation of the MVFRL, Respondents

cite a number of decisions for the proposition that "an ATV is a motor vehicle when operated on public roadways." (Resp. Br. Pg. 40) None of the cases cited support such proposition.

Respondents offer *Rice v. Fire Ins. Exchange*, 946 S.W.2d 40 (Mo. App. 1997) in support of the statement that an ATV is "a 'motor vehicle' when operated on public roadways." *Rice* involved no such determination. The finding that the subject ATV was a "motor vehicle" under the policy at issue was based on that particular policy's definition of "motor vehicle." The definition in *Rice* specifically included "motorized land vehicles ***designed for recreational use off public roads***." *Id.* at 42 (emphasis added). This bears repeating. To support their argument that the ATV is a "motor vehicle" because it was "originally designed for operation on public roadways," Respondents have cited a case holding that an ATV is a "motor vehicle" because it was "designed for recreational use ***off public roads***." *Rice* simply does not support the argument for which it is cited.

Next, Respondents cite *Morgan v. State Farm Fire and Cas. Co.*, 344 S.W.3d 771 (Mo. App. 2011) accompanied by the following summary of its holding, "homeowners policies did not provide coverage where the ATV accident occurred on a public road and thus fell within the motor vehicle exclusion." (Resp.Br. Pg. 40). In reality, the three part holding of *Morgan* addressed issues related to waiver, res judicata, and collateral estoppel. *Id*. The issue of whether an ATV should be considered a "motor vehicle" under the State Farm policy was not raised, discussed, or considered in *Morgan.* The exclusion barring coverage is only mentioned in that portion of the opinion describing the procedural posture of the case. *Id*. at 774.

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Stronger ex rel. Stronger v. Riggs, 85 S.W.3d 703 (Mo. App. 2002) is also cited as analogous authority in support of Respondents' position with its holding characterized as, "riding lawnmower was a 'motor vehicle' where it was being used on the street." (Resp.Br. Pg. 40) *Riggs* did hold that a lawnmower was a "motor vehicle" as defined by Section 301.010, R.S.Mo. but the statutory definition of "vehicle" which *Riggs* applied read, "any mechanical device on wheels, designed primarily for use, ***or used***, on highways . . ." *Id.* at 707 (emphasis added). The *Riggs* opinion itself clearly articulates how it is distinguished from this case. "***The mower was not 'designed primarily for use . . . on highways*** . . . However, 'designed primarily for use' is separated from the term "used" by the disjunctive 'or,' which in its ordinary sense marks an alternative which generally corresponds to the word 'either.'" *Id.* at 708 (emphasis added). "Or used," the language upon which the holding in *Riggs* is based, does not appear in the definitions of "motor vehicle" at issue here. As such, *Riggs* does not provide an analogy.

Respondents next offer *Covert v. Fisher*, 151 S.W.3d 70 (Mo. App. 2004) and *State v. Powell*, 306 S.W.2d 531 (Mo. 1957). Both concerned the definition of "motor vehicle" under the Missouri DWI statute. *Covert* involved a golf cart and *Powell* involved a farm tractor. The definition of "motor vehicle" applied in both cases was "any self-propelled vehicle not operated exclusively upon tracks." *Covert*, 151 S.W.3d at 74; *Powell* 306 S.W.2d at 533. This definition does not resemble the definition of "motor vehicle" at issue in this case and as such, neither *Covert* nor *Powell* support the argument for which they are cited.

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Finally, Respondents cite *State v. Laplante*, 148 S.W.3d 347 (Mo. App. 2004) which also involved the DWI statute and in this instance, whether a motor bike was a "motor vehicle." *Laplante* noted the absence of a definition of "motor vehicle" within the statute under which the defendant was convicted, then based its determination that a motor bike is a "motor vehicle" ***under the DWI statute*** on public policy considerations. *Id.* at 350 (emphasis added). Specifically, *Laplante* held that, " . . . the statute's evident purpose – to protect the public from intoxicated drivers – compels us to include Appellant's mini-bike within the meaning of motor vehicle ***as used in the statute***." *Id.* (emphasis added). In the absence of a controlling definition of "motor vehicle," the *Laplante* court was left to supply what the legislature omitted. In contrast, the policies at issue in this case as well as the MVFRL do provide a controlling definition of "motor vehicle."

The basis upon which Respondents seek to distinguish *Meeks* and *State Farm v. Stockley*, 168 S.W.3d 598 (Mo. App. 2005) goes to the heart of the parties' dispute over the definition of "motor vehicle." Respondents argue that *Meeks* and *Stockley* are distinguishable because, "neither involved an accident on a public highway." (Resp. Br. Pg. 41) This statement is both true and inapposite. Whether an ATV is, or is not, a "motor vehicle," based on its "original design" cannot turn on whether the accident giving rise to the question occurred on a public highway.

Meeks held that a dune buggy was clearly designed to be used primarily off road. *Meeks*, 632 S.W.2d at 26. A dune buggy is much like an ATV in that it is capable of operation on public roadways, but is not designed for that purpose. The question before

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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*.

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. 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*. *Stockley* held that a four wheeled tug was not designed for such use. *Id*. The court in *Stockley* looked to the owner's manual to determine the original intent of the tug's designers. *Id.* Nothing in the *Stockley* opinion could lead an ordinary reader to conclude that the decision could have been different had the accident giving rise to the dispute occurred on a public roadway.

Finally, Appellant recognizes that the Illinois cases cited by Respondents support the position that ***Illinois*** law, prior to 2003, likely required uninsured motorist coverage for ATVs. The contrast between such authority and Missouri law, however, is quite clear. Under *Meeks*, Section 379.203 R.S.Mo. incorporates the definition of "motor vehicle" found in Section 303.020(5) R.S.Mo. and quoted above. Respondents recognize on page 27 of their Brief before the Court of Appeals, that the Illinois legislature's amendment of the definition of "motor vehicle" to include the language "designed for use on public highways," actually removed ATVs from the category of vehicles for which uninsured motorist coverage is mandated. As the court held in *Meeks*, the language "designed for use upon a highway" is part of the definition of "motor vehicle" under the MVFRL.

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These words should be as dispositive of this issue in Missouri as the same words apparently are now in Illinois.

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 and because it is not a "motor vehicle," there is no uninsured motorist coverage for damages arising from the ATV accident. 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.

For the reasons discussed in the preceding Point on Appeal, which discussion is incorporated here 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 under the three auto policies to Respondents 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.

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

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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."

If Mathew 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, the trial court's ruling with respect to liability coverage under the farmowners policy was made in error. In the alternative, if this Court finds, *de novo,* that the farmowners policy did obligate Shelter to defend Mathew Vasseur against the wrongful death suit brought by his mother, the existence of that obligation necessitates a ruling that uninsured motorist coverage is unavailable under the auto policies.

If, as the trial court held, Matthew Vasseur is insured 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. "A legal right to recover under the uninsured motor vehicle insurance and a legal right to recover against the liability carrier cannot coexist. They are

mutually exclusive." *Rister v. State Farm Mut. Auto. Ins. Co.*, 668 S.W.2d 132, 137 (Mo. App. 1984).

According to Respondents, "liability coverage under a farmowner policy does not count for purposes of the UM statute." This is an arbitrary distinction wholly unsupported by Missouri law. "[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)(emphasis added)(c*iting, Arnold v. American Family Mut. Ins. Co.*, 987 S.W.2d 537, 540-541 (Mo. App. 1999). If Matthew Vasseur is insured for the tort claims arising from the death of his father, regardless of the source, he is not an "uninsured motorist."

Like Respondents, the insured in *Stotts* presented a novel argument for a technical loophole with respect to the meaning of "uninsured." The Stotts argued for uninsured motorist coverage in the absence of an applicable owner's policy (vehicle specific policy), regardless of the existence of an applicable operator's policy (driver specific policy). *See generally Stotts*, 118 S.W.3d at 664-665. *Stotts* held as follows:

> . . . 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

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> 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)

In *Arnold*, the underlying plaintiff asserted separate causes of action against the intoxicated driver for negligent operation of a vehicle and against the vehicle's owner for negligent entrustment of that vehicle to the intoxicated driver. *Arnold*, 987 S.W.2d at 538. The driver was insured and was therefore not an uninsured motorist, but the vehicle owner had no insurance and, therefore, no coverage existed for the owner for the tort of negligent entrustment. *Id.* at 541. It was the absence of insurance coverage for a particular tort which prompted the court to hold that Arnold was entitled to uninsured motorist coverage for damages recoverable in the prosecution of that tort. *Id.*, *See also*, *Whitehead v. Weir*, 862 S.W.2d 507, 508 (Mo. App. 1993).

Respondents rely on *Hendrickson v. Crumpton*, 632 S.W.2d 512 (Mo. App. 1982) but such reliance is misplaced as that case involved a tortfeasor *without* insurance for the tort alleged. *Hendrickson* was also decided on the grounds that a motor vehicle's insured status turns on whether liability coverage is available *to a particular tortfeasor for a particular tort*. *Id.* (emphasis added) As in *Arnold*, the court in *Hendrickson* found that the existence of liability coverage for claims against a driver did not preclude uninsured motorist coverage for separate claims against an uninsured owner for the tort of negligent entrustment. *Id.* at 514. *Hendrickson* did not involve an argument that uninsured

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motorist coverage can be triggered in the absence of a claim against a defendant who is without insurance for that claim.

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. The trial court held that Mathew Vasseur is entitled to liability coverage in that action under the farmowners' policy issued to his parents. (*LF, Vol. VI, Pg. 60-63*) If the tortfeasor, Mathew Vasseur, is insured under the farmowners policy for his negligent operation of the ATV as asserted by Respondent, he is not simultaneously an uninsured motorist under the three Shelter auto policies. Therefore, the "vehicle" he was operating was not an "uninsured motor vehicle."

Moreover, each of the three Shelter 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*) Missouri's 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, four times the amount necessary. (*LF, Vol. VI, Pg. 60-63*). If this Court affirms the trial court's determination of coverage for Matthew Vasseur under Shelter's farmowners policy, Mathew Vasseur is "a person who meets the requirements of [the] applicable financial responsibility law" with respect to his negligent operation of the ATV. Thus, the ATV cannot be an uninsured

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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 Mathew Vasseur is entitled to liability coverage is in error and should be reversed.

CONCLUSION

For the reasons set forth herein and in Shelter's Substitute Brief of Appellant, Shelter respectfully requests that this 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 Mathew Vasseur in the wrongful death suit; (ii) the farmowners policy does not provide medical payments coverage to Respondents; (iii) the three auto policies do not provide uninsured motorist coverage to Respondents for the damages arising from the ATV accident; (iv) the 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 the 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; finding as a matter of law that the existence of liability coverage for Mathew Vasseur under the farmowners policy precludes the applicability of UM coverage under the three auto policies for damages arising from the ATV accident. Additionally, Shelter requests that this Court enter an Order taxing appellate costs in favor of Shelter pursuant to Mo. Sup. Ct. R. 84.18; and granting to Shelter such further relief as this Court deems just and proper.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

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

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

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

3. This Reply Brief of Appellant, excluding the cover page, signature blocks, Affidavit of Service, this Certificate of Compliance, and the Appendix, contains 7,749 words, as determined by the word-count tool contained in the Microsoft Word software with which this Reply Brief of Appellant was prepared

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed electronically this 13th day of November, 2015 via CM/ECF in the Supreme Court of Missouri, with notice of same being electronically served by the Court to the following:

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