SC 90080

IN THE SUPREME COURT OF MISSOURI

MARK KARSCIG
and JENNIFER MCCONVILLE,

Appellants,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Respondent.

Appeal from the Circuit Court of Pettis County, Missouri
Associate Circuit Judge Division 6
The Honorable Robert M. Liston

SUBSTITUTE BRIEF OF RESPONDENT AMERICAN FAMILY MUTUAL INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF FACTS

In addition to facts listed in Appellants' Statement of Facts, Respondent American Family Mutual Insurance Company ("American Family") offers the facts set forth below as material to the Court's resolution of this appeal.

American Family agreed that its Policy Number 7440-9123-03-55-FPPA-MO (the "1998 Pontiac Policy"), covering the vehicle driven by Appellant McConville in the accident, provided coverage and has already paid the liability limits of this policy to Appellant Karscig on behalf of Appellant McConville. 3 LF 403-04; 7 LF 1301, 1320.[1] At issue in this appeal, however, is one additional policy of liability insurance which American Family has in place with Appellant McConville for an entirely separate vehicle that was not involved in the accident. *See id.*

Appellants assert that Policy Number 7440-9123-07-67-FPPA-MO (the "1990 Pontiac Policy") provides coverage for the accident, in addition to the 1998 Pontiac Policy. 1 LF 36-37 at ¶¶7-8; 1 LF 200 to 2 LF 201 at ¶¶13-14; 2 LF 238 at ¶ 35; 1 LF 72 at ¶¶6-7. American Family disagrees, claiming that the damages resulting from the accident do not fall within the coverage provided by the 1990 Pontiac Policy because of a well-settled exclusion in that policy and because of an enforceable "anti-stacking" provision. 3 LF 447-59.

[1] The legal file will be cited by page as "[Volume #] LF [Page #]."

In Exclusion #9, the 1990 Pontiac Policy excludes coverage for the use of certain vehicles:

> [t]his coverage does not apply to:
>
> * * * *
>
> 9. Bodily injury or property damage arising out of the use of any vehicle, other than your insured car, which is owned by or furnished or available for regular use by you or any resident of your household.

(hereinafter "Exclusion #9") A5; 3 LF 425 (original emphasis omitted). Further, the 1990 Pontiac Policy contains an "anti-stacking" provision which states that the maximum amount American Family will pay as a result of any given accident is $25,000.00 "no matter how many vehicles are described in the declarations, or insured persons, claims, claimants, policies or vehicles are involved." A5; 3 LF 425 (original emphasis omitted).

On October 12, 2005, Appellant McConville resided with her parents in their home. 2 LF 241; 2 LF 327.

Contrary to Appellants' Statement, American Family's denial of coverage under the 1990 Pontiac Policy was not based *solely* upon Exclusion #9; American Family also denied coverage based upon the 1990 Pontiac Policy's prohibition against the "stacking" of liability policies. 3 LF 447-59.

POINT RELIED ON

I. The Circuit Court correctly entered summary judgment because as a matter of law the 1990 Pontiac Policy does not provide—and the Motor Vehicle Financial Responsibility Law ("MVFRL") does not mandate that it provide—liability coverage for this accident involving a different vehicle, in that: (1) the 1990 Pontiac Policy expressly prohibits stacking, and this Court held in *First National Insurance Co. v. Clark* that the MVFRL does not mandate stacking of liability insurance policies; (2) the 1990 Pontiac Policy is an owner's policy that meets the definitional requirements of Mo. Rev. Stat. § 303.190, which expressly provides that any additional provisions are not governed by the statute; and/or (3) provisions restricting coverage to specified vehicles, as Exclusion #9 does, have been repeatedly upheld by Missouri courts and stand unaffected by decisions partially invalidating household exclusion clauses, a different exclusion not at issue here. (Response to Appellants' Point I.)

First National Ins. Co. v. Clark, 899 S.W.2d 520 (Mo.banc 1995)

Shelter Mut. Ins. Co. v. Ridenhour, 936 S.W.2d 857 (Mo.App.E.D. 1997)

Sisk v. American Family Mut. Ins. Co., 860 S.W.2d 34 (Mo.App.E.D. 1993)

Whitehead v. Weir, 862 S.W.2d 507 (Mo.App.W.D. 1993)

Mo.Rev.Stat. § 303.025

Mo.Rev.Stat. § 303.190

ARGUMENT

Introduction

Despite Appellants' contention to the contrary, the legislative mandates of the Motor Vehicle Financial Responsibility Law, Mo. Rev. Stat. § 303.010, *et seq.* ("MVFRL") have been fully satisfied in this case. The MVFRL "establishes a mandate for maintenance of financial responsibility by owners of motor vehicles and, *absent owner's coverage*, requires operators to maintain financial responsibility when operating a vehicle owned by another." *First National Ins. Co. v. Clark*, 899 S.W.2d 520, 522 (Mo.banc 1995) (emphasis added). The purpose of the MVFRL "is to make sure that people who are injured on the highways may collect damage awards, *within limits*, against negligent motor vehicle operators." *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479, 482 (Mo.banc 1992) (emphasis added). In this case, those duties were fulfilled, and the legislative purpose was satisfied, for several reasons.

First, the owner of the accident vehicle fulfilled his obligation of financial responsibility by purchasing an owner's policy to insure the vehicle and persons operating it with permission. Mo.Rev.Stat. §§ 303.190.1, 303.025. Second, because the owner of the accident vehicle supplied financial responsibility with an owner's policy, the operator had no obligation under the MVFRL. *Clark*, 899 S.W.2d at 522; Mo.Rev.Stat. § 303.025. Moreover, the record here shows the operator was aware of the owner's policy on the accident vehicle (8 LF 1434), thereby negating the possibility of an MVFRL violation by operating "a motor

vehicle owned by another with the knowledge that the owner has not maintained financial responsibility." Mo.Rev.Stat. § 303.025.1. Finally, the injured person has received statutorily sufficient compensation by payment of the policy limits from the owner's policy on the accident vehicle.

Thus, the mandate and purpose of the MVFRL have been fulfilled. Nevertheless, Appellants ask this Court to override legislative intent and contractual terms by creating a new judicial mandate for the stacking of liability insurance policies—here, a separate policy purchased from American Family to cover a vehicle that was not involved in this accident. Yet, even as they press this Court for a new mandate, Appellants appear reticent to speak of "stacking" in this forum in light of this Court's holding in *Clark*, where "[t]he issue ... [was] whether the [MVFRL] requires the stacking of automobile liability coverage." 899 S.W.2d at 20. Based upon a thorough analysis, this Court unanimously found no statutory mandate for stacking. *Id.* at 520-23. This precedent dates back almost fifteen years and has been followed as recently as six months ago. *See National Union Fire Ins. Co. v. Maune*, 277 S.W.3d 754 (Mo.App.E.D. 2009). *Clark* is on all fours with the circuit court's decision and is the most direct route to affirmance. *See* Section I, *infra*.

Stare decisis is not the only principle to suffer at the hands of Appellants. They also disregard the words of the MVFRL in their efforts to extract money from a policy written to cover a vehicle not involved in this accident. The 1990 Pontiac Policy meets the definition of an owner's policy under Section 303.190.2

of the MVFRL, so there is no statutory basis for mandating additional coverage. It is neither an operator's policy nor some strange new hybrid not defined by statute. Once again, the Missouri courts have considered and rejected similar attempts to recast an owner's policy as an operator's policy. *See* Section II, *infra.*

Finally, Appellants are mistaken in their contention that *American Standard Insurance Company v. Hargrave*, 34 S.W.3d 88 (Mo.banc 2001), somehow mandates abrogation of exclusions such as those at issue here in automobile liability policies issued by a single insurer. *Hargrave* involved two policies by two different insurers, addressed an entirely different exclusion (a household exclusion), and said nothing about stacking. This Court in *Hargrave* repeatedly framed the only issue before it as bound up with the existence in each policy of the household exclusion clause, which had specifically been found to be invalid. 34 S.W.3d at 89-90, 92. Instead, the issue here involves Exclusion #9, and settled precedents from all three appellate districts have repeatedly enforced such provisions precluding an insured from insuring all of his or her vehicles by purchasing a policy on just one car. *See, e.g., Sisk v. American Family Mut. Ins. Co.*, 860 S.W.2d 34 (Mo.App.E.D. 1993); *State Farm Mut. Auto. Ins. Co. v. Bainbridge*, 941 S.W.2d 546, 549-50 (Mo.App.W.D. 1997); *Schuster v. Shelter Mut. Ins. Co.*, 857 S.W.2d 381, 384-85 (Mo.App.S.D. 1993). The result the Appellants seek here would require reversal of these and similar cases. It defies precedent, logic, and common sense for Appellants to imply that *Hargrave*

overruled several cases (*Sisk, Bainbridge, Schuster* and *Clark*) and mandated a concept (stacking) none of which is mentioned in *Hargrave*. *See* Section III, *infra*.

In summary, Appellants ask this Court to engage in statutory distortion, rather than statutory interpretation. Appellants seek to mandate that insurers who issue owner's policies be forced to assume the obligations of an operator's policy. Neither Missouri law in general, nor the MVFRL in particular, mandate any such result. Instead, both the MVFRL and Missouri case law establish a public policy favoring freedom of contact as to any insurance matters outside the narrow confines of the MVFRL. *See, e.g., Budget Rent A Car v. Guaranty Nat. Ins. Co.*, 939 S.W.2d 412, 415 (Mo.App.E.D. 1996) ("To the extent not specifically required by the Motor Vehicle Financial Responsibility Law, or other governing statutes, parties are free to contract as to terms of liability insurance."). Inherent in the notion of freedom of contract must also be the right of freedom from the compelled contract advocated by Appellants.

I. The Issues Here have Already Been Decided by This Court in *Clark*.

The issue presented in this case has already been decided by this Court. In *First National Insurance Company v. Clark*, 899 S.W.2d 520, 522 (Mo. banc 1995), this Court rejected the contention that a "non-owned vehicle provision of the policy … violates public policy, and that the [MVFRL] requires stacking of all of the insured's liability policies." Instead, this Court held as follows:

> The public policy of this state is satisfied when there is an owner's policy of liability insurance sufficient to meet the minimum

> requirements of Missouri's financial responsibility law. § 303.025. It is sufficient to say that because there was an owner's policy in effect, no operator's policy of liability insurance on the same vehicle is required by the Missouri financial responsibility law. Thus, the exclusion in the operator's provision of the Mustang policy [i.e., the vehicle not involved in the accident] will be enforced as written.

Id. at 523.

Just as in this case, the issue in *Clark* was the ability of the injured party to "stack," or recover under both, policies for the same accident. In examining this issue, the *Clark* court assessed the validity of the "stacking" exclusion in the policies and whether this exclusion (if valid) was contrary to Missouri public policy. *Id.* The *Clark* court answered both questions in favor of the insurer and rejected the injured driver's effort to "stack" the policies. *Id.* at 521-23.

First, the *Clark* court found that the "anti-stacking" clause in the policies effectively precluded the injured person from "stacking" the coverage of both policies for the same accident, if it did not violate Missouri public policy. *Id.* at 521. Second, in a detailed analysis, the *Clark* court rejected the assertion that a prohibition on the stacking of liability insurance policies violated Missouri public policy. In reaching this conclusion, the *Clark* court noted that uninsured motorist coverages were to be stacked, yet relied upon the fundamental differences between uninsured motorist coverage and liability insurance in reaching its decision. It noted that uninsured motorist coverage "is bodily injury insurance [for the

policyholder herself] which protects against such injury inflicted by the negligence of any uninsured motorist." *Id.* at 522 (quoting *Tucker v. Government Employees Ins. Co.*, 288 So. 2d 238, 242 (Fla. 1973)). "The Court reasoned that the insured had purchased [uninsured motorist] coverage, paid the premiums required and was entitled to all of the coverage he had purchased to cover his injuries. To have held otherwise would have permitted the insurer to collect multiple premiums for the same level of risk." *Id.* at 521.

This Court in *Clark* found a substantial difference between this policy rationale for uninsured motorist coverage and liability insurance. The latter "relates to the use and operation of a particularly described motor vehicle or class of motor vehicles." *Id.* at 522 (citations and quotations omitted). The court found that liability insurance is in direct response to Missouri law "establish[ing] a mandate for maintenance of financial responsibility by owners of motor vehicles" for the costs of accident-related injuries inflicted on others. *Id.* at 523. Thus, in liability insurance, Missouri law is focused on ensuring that other drivers receive a minimum level of financial relief for accidents, *id.*, while Missouri uninsured motorist law ensures that policyholders themselves get all the benefits for which they paid, *id.* at 521. Thus, as long as one policy on the vehicle provides the statutory minimum liability coverage required under Missouri law, the *Clark* court held that Missouri public policy does not require "stacking" liability coverages. *Id*.

Similarly, in this case, there is no dispute that the damages resulting from the accident were within the coverage provided by the 1998 Pontiac Policy, covering the accident vehicle. Pursuant to *Clark*, the minimum requirements of Missouri's financial responsibility law have been met by this owner's policy. Neither the MVFRL nor Missouri public policy requires that any other policy pay those or any additional damages; therefore, the valid "anti-stacking" provision will be enforced as written.

The enforceability of "anti-stacking" provisions was reaffirmed only six months ago by the Eastern District Court of Appeals in *National Union Fire Insurance Company v. Maune*, 277 S.W.3d 754 (Mo.App.E.D. 2009). In *Maune*, the plaintiff sought to recover the policy limits of liability coverages on each of three vehicles where only one had been involved in the accident, claiming that the household exclusion in the liability policy covering the accident vehicle was ambiguous and that Missouri law allowed the stacking of liability coverages. *Id.* at 755-56. The insurance company argued that the household exclusion unambiguously limited coverage to only $25,000.00 and that the anti-stacking provisions within the policy precluded the three liability policy limits from being stacked. *See id.* The trial court entered summary judgment in favor of the insurance company, finding that coverage was limited to only the $25,000 limits of the accident vehicle policy and enforcing the other policies' anti-stacking language. *Id.* at 756.

The Court of Appeals affirmed, disregarding the Maunes' contention that the decision in *American Standard Insurance Company v. Hargrave*, 34 S.W.3d 88 (Mo. banc 2000), "effectively" allowed liability policies to be stacked. *Id.* at 760. *See also* Section III, *infra*. It enforced the anti-stacking language contained within the liability policies regardless of where it was located. *Id.* "In interpreting an insurance policy, we are to read the policy as a whole." *Id.* (citing *Todd v. Missouri United Ins. Council*, 223 S.W.3d 156, 163 (Mo. banc 2007)). Because "[t]he policy contains explicit anti-stacking language," the court denied the point on appeal. *Id.*

Just as in *Clark* and *Maune*, the insurance policy at issue here contractually precludes stacking of liability coverages. The 1990 Pontiac Policy specifically limits American Family's liability to $25,000.00 in any given accident "*no matter how many. . . policies* or vehicles are involved." A5; 3 LF 425 (emphasis added). Therefore, the maximum amount owed by American Family for the October 12, 2005 accident is the $25,000 per person limit owed under the policy covering the 1998 Pontiac which was involved in the October 12, 2005 accident. To hold otherwise would render the "anti-stacking" provision illusory. *See Cano v. Travelers Ins. Co.*, 656 S.W.2d 266 (Mo. banc 1983) (holding that construction of an insurance policy which renders a portion of it illusory should not be indulged).

II. The MVFRL Does Not Mandate Coverage by the 1990 Pontiac Policy.

In an attempt to encourage the Court to impose upon American Family a contractual obligation to furnish coverage of the accident under the 1990 Pontiac

Policy, Appellants over simplify and misapply key portions of the MVFRL. Vehicle owners, and to a lesser extent, their operators, bear the statutory obligation of demonstrating financial responsibility; among various methods mentioned in the statute, liability insurance is the most common. *See generally Clark*, 899 S.W.2d at 522. The MVFRL defines a "motor vehicle liability policy" as either "an owner's policy *or* an operator's policy." Mo.Rev.Stat. § 303.190.1 (emphasis added). It then mandates the core attributes of each. *Id.* at § 303.190.2 & .3. However, the statute does not mandate that an insurance company issuing a "motor vehicle liability policy" offer both an owner's policy *and* an operator's policy. *See id.* at § 303.190.1. That is apparently left to the marketplace, as are the availability and terms of any additional or supplemental coverage beyond the core statutory requirements.

Indeed, the statute specifically contemplates and permits insurance companies to add other provisions or policy features that will not be subject to the MVFRL:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or addition to the coverage specified for a motor vehicle liability policy and *such excess or additional coverage shall not be subject to the provisions of this chapter*. With respect to a policy which grants such excess or additional coverage, the term "motor vehicle liability

policy" shall apply only to that part of the coverage which is required by this section.

Mo.Rev.Stat. § 303.190.7 (emphasis added).

Initially, in their brief, Appellants argue that the 1990 Pontiac Policy is an "operator's policy" which, under the MVFRL, must provide coverage to the named insured for "damages arising out of the use by him or her of any motor vehicle not owned by him or her." Mo.Rev.Stat. § 303.190.3. Appellants argue that, because the 1990 Pontiac Policy excludes coverage to Ms. McConville for damages arising out of the use of certain vehicles owned by residents of her household, it violates the MVFRL's requirements for an operator's policy, and Exclusion #9 cannot be enforced. This argument is an incorrect analysis of the MVFRL and contravenes well-settled Missouri case law.

Put simply, the 1990 Pontiac Policy is an owner's policy because it meets the statutory definition of an "owner's policy." *See Shelter Mut. Ins. Co. v. Harter*, 940 S.W.2d 555, 557 (Mo.App.S.D. 1997) (finding liability policy that meets the minimum requirements of an owner's policy set by the MVFRL "fits [the] description" of an owner's policy, satisfies the intent of the legislature, and is not an operator's policy). The MVFRL defines an "owner's policy" as one that

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits. . .

Mo.Rev.Stat. § 303.190.2.

The 1990 Pontiac Policy meets both of these requirements. First, it states that it grants coverage with respect to the 1990 Pontiac and certain non-owned vehicles. A1-A11; 3 LF 421-31. Second, it lists Jennifer McConville as the named insured and insures any other person using the1990 Pontiac with the express or implied permission of Jennifer McConville against liability for damages arising out of the use of the 1990 Pontiac up to the statutorily required minimums of $25,000 per person and $50,000 per occurrence. *See id.* As such, the 1990 Pontiac Policy meets the statutory definition of an "owner's policy."

The court in *Shelter Mutual Insurance Company v. Ridenhour*, 936 S.W.2d 857 (Mo.App.E.D 1997), was presented with a similar question and, in finding that a particular liability policy was an owner's policy, rather than an operator's policy, looked to the specific provisions of the policy to determine whether the parties had intended an owner's policy or an operator's policy. *See id.* at 859. The *Ridenhour* court relied upon the fact that the policy contained two exclusions

which were consistent with the statutory definition of an owner's policy but which were inconsistent with the statutory definition of an operator's policy. *Id.* Among those provisions is what the court referred to as the "drive other cars" clause which allowed the insured to be covered during the occasional use of cars not owned by him, but which excluded from coverage the use of those vehicles "owned in whole or in part by, or furnished or available for regular use of, either you or any resident of your household." *Id.* Noting that this exclusion is "common in an owner's policy" and is "not consistent with the requirements of an operator's policy," the *Ridenhour* court determined the policy to be an owner's policy. *Id. See also Sisk*, 860 S.W.2d at 36 (finding that, because section 303.190 contains separate requirements for both owner's and operator's policies and because the policy at issue met the requirements of an owner's policy, *Halpin* only required it to comply with the definition of an owner's policy in § 303.190.2); *Wilson v. Traders Ins. Co.*, 98 S.W.3d 608, 616 (Mo.App.S.D. 2003) (same).

Similarly, in the instant appeal, the very presence of Exclusion #9 (which is nearly identical to the provision discussed by the *Ridenhour* court) is evidence that the 1990 Pontiac Policy is not and was never intended by the parties to be an operator's policy. Rather, Appellant McConville purchased an owner's policy and the commensurate coverage provided by such a policy. This contract of liability insurance provides all statutorily mandated coverage of an owner's policy and, thus, may lawfully exclude coverage to Appellant McConville while operating a vehicle owned by a resident of her household.

Appellants attempt to transform the 1990 Pontiac Policy into an operator's policy with four arguments that do not withstand scrutiny.

First, Appellants contend that the 1990 Pontiac Policy "did not state whether it was an 'owner's policy' or 'operator's policy.'" Appellants' Substitute Brief at 10. However, neither the MVFRL nor Missouri case law requires an insurance policy to identify whether it is an owner's policy or an operator's policy. *See State Farm Mut. Auto. Ins. Co. v. Scheel*, 973 S.W.2d 560, 565-66 (Mo.App.W.D. 1998) (finding no ambiguity created where policy is not expressly designated as either an owner's or operator's policy under Mo.Rev.Stat. § 303.190).

Second, Appellants argue that because "Jennifer McConville did not own the 1990 Pontiac. . . the policy issued to her could not have been an 'owner's policy.'" Appellants' Substitute Brief at 10. However, the statutory definition of an owner's policy does not limit coverage to the person holding legal title to the vehicle. To the contrary, the statutory definition of "owner's policy" never uses the defined term "owner" but only states that an owner's policy must "insure *the person* named therein. . . ." Mo.Rev.Stat. § 303.190.2(2) (emphasis added). Had the legislature intended an owner's policy to only be available for purchase by, or coverage of, the titled owner of the vehicle, it could have so mandated by using the term "owner" in place of the term "person" in the MVFRL's definition of "owner's policy." It did not, so the Court cannot, under the guise of interpretation, substitute language into the statute that does not exist. *See, e.g., State v. Burns*,

978 S.W.2d 759, 761 (Mo. banc 1998) ("Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature.").

This result was confirmed by *Whitehead v. Weir*, 862 S.W.2d 507, 508 (Mo.App.W.D. 1993), where the court determined that owners of a vehicle involved in an automobile accident maintained financial responsibility for the vehicle, as required by the MVFRL, through a liability policy in *their son's name*. *Id.* In *Whitehead*, the parents of a motorcyclist who was killed in an accident with a motor vehicle sought uninsured motorist benefits under the policy for the motorcycle and, as part of that argument, claimed the owners of the motor vehicle had not maintained financial responsibility (i.e. were "uninsured") because the policy was in their son's name. *Id.* at 507-08. The appellate court found that the parents and owners of the vehicle in question had maintained financial responsibility through a policy of insurance that met the requirements of the MVFRL, even though their son—who did not own the vehicle—was listed as the policyholder. *Id.*

Third, and equally unavailing, is Appellants' attempt to transform the 1990 Pontiac Policy into some new "hybrid" policy, not provided for by the MVFRL. There is no statutory mandate in the MVFRL or elsewhere that a person have *both* an operator's *and* an owner's policy or that a particular liability policy meet the definition of both an operator's and an owner's policy. Mo.Rev.Stat. § 303.190.1 (a "'motor vehicle liability policy' as said term is used in this chapter shall mean an owner's *or* an operator's policy of liability insurance. . .") (emphasis added).

See also Sisk, 860 S.W.2d at 36 ("Either [an owner's or operator's policy] may satisfy the requirements of the MVFRL."). On the contrary, Missouri courts have consistently held that, "[i]n order to comply with the MVFRL one must have a policy which is *either* an owner's policy *or* an operator's policy." *Ridenhour*, 936 S.W.2d at 858 (emphasis added). "Nothing in Chapter 303 requires a policy to be both an owner's and an operator's policy." *Id*. (citations omitted). *See also Scheel*, 973 S.W.2d at 567 ("The upshot of these holdings is that under §303.190, coverage provided by *either* an owner's *or* an operator's policy satisfies the requirements of the MVFRL.") (citations and quotations omitted) (emphasis added).

Fourth and finally, even if the 1990 Pontiac Policy were found to be both an owner's and an operator's policy, there is still no interpretation of the MVFRL to support Appellants' suggestion that the owner's portion of the policy, rather than the operator's, is the excess or additional coverage contemplated by the statute. *See* Appellants' Substitute Brief at 15. The MVFRL is concerned with the maintenance of financial responsibility through either an owner's or an operator's policy. Mo.Rev.Stat. § 303.190.1. Once such financial responsibility has been achieved through one of these two types of policies, the MVFRL has no other interest in, or application to, the policy. *Id.* at § 303.190.7. The 1990 Pontiac Policy meets the definition of an owner's policy; therefore, the legislative mandate

has been satisfied, and the MVFRL has no further function to serve with regard to any other coverage provided by the policy.[2]

The MVFRL was never intended to be a straight jacket for automobile insurance policies. It merely prescribes the core terms for either an owner's policy or an operator's policy, to which additional provisions may be added as the makers may desire. Mo.Rev.Stat. § 303.190.7; *Halpin*, 823 S.W.2d at 483 (noting that §303.190.7 "manifests to insureds that they have no basis for expecting coverage in excess of the requirements of § 303.190.2). Accordingly, the circuit court properly concluded that any damages resulting from the accident were not within the coverage provided by the 1990 Pontiac Policy, and its decision should be upheld.

III. The *Hargrave* Decision is Irrelevant to the Question Presented.

Appellants' reliance on *American Standard Insurance Company v. Hargrave*, 34 S.W.3d 88 (Mo. banc 2000), is entirely misplaced. *See* Appellants' Substitute Brief at 15-17. *Hargrave* did not discuss stacking, did not overrule *Clark*, and did not consider either of the exclusions at issue here.

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[2] Even assuming the MVFRL could be construed as establishing some priority or rank as between an owner's policy and an operator's policy, an owner's policy would be primary given the statute's initial focus on financial responsibility by owners. Mo.Rev.Stat. § 303.025.

In *Hargrave*, the parents of the minor plaintiff sought to recover under a liability policy covering one of the parents issued by American Standard Insurance Company ("American Standard"). *Hargrave*, 34 S.W.3d at 89. The plaintiff was injured in an automobile accident that occurred while his mother was driving her father's vehicle. *Id.* State Farm Insurance Company ("State Farm"), who issued the insurance policy covering the accident vehicle, paid the $25,000 limits of its policy. *Id.* Mrs. Hargrave was also an insured on a liability insurance policy issued to her husband by American Standard. *Id.* American Standard denied coverage, contending that its household exclusion clause (which excluded coverage for injuries to the insured or a member of the insured's household) was fully enforceable. *Id.* American Standard's argument was that the MVFRL was only required to be met once and that State Farm's payment had satisfied this requirement. *Id.* Thus, it argued that, even though the household exclusion clause was found to be invalid up to $25,000 in *Halpin*, 823 S.W.2d at 479, it was fully enforceable when the policy at issue provided coverage pursuant to its "excess" clause after the limits provided by another policy had been exhausted. *Id.* Significantly, American Standard did not rely on an exclusion comparable to Exclusion #9 and could not rely on a provision against stacking because it had only issued one of the policies.

The trial court entered summary judgment in favor of Mrs. Hargrave, finding that, to the extent the injuries exceeded the amount paid by the State Farm policy, the American Standard policy provided up to $25,000 in liability coverage

pursuant to its "excess clause." *Id.* The Supreme Court affirmed. *Id*. Relying upon the "partial invalidity" of the household exclusion effected by *Halpin*, the *Hargrave* court determined that, even where a policy's coverage is implicated solely through an "excess clause," the household exclusion was still not fully enforceable. *Id*. at 91-92.

There is nothing in *Hargrave* that is in conflict with the circuit court's decision in this case. Notably, the set of circumstances present in *Hargrave* is significantly different than that here. Unlike in *Hargrave,* Appellants have not claimed entitlement to the proceeds of the 1990 Pontiac Policy pursuant to its "excess clause," and American Family's position is not based on another company's payment of the statutory minimum.

Even more fundamentally, Exclusion #9 has never been found to be invalid in any amount, whereas the household exclusion at issue in *Hargrave* has been found to violate Missouri's public policy abrogating intra-family tort immunity and held to be unenforceable up to the minimum limits set in the MVFRL. *See Halpin*, 823 S.W.2d at 482. The two exclusions serve different purposes and raise different legal issues.

Household exclusion clauses are designed to exclude any claim by the policyholder, the vehicle operator or anyone in their households. *Halpin*, 823 S.W.2d at 480. For example, the household exclusion in *Halpin* reads as follows:

> This coverage does not apply to . . . [b]odily injury to:
>
> a. You, a relative or any other person injured while operating your

insured car;

b. Any person related to you and residing in your household; or

c. Any person related to the operator and residing in the household of the operator.

Id. Thus, if a household exclusion clause fully applied, no policyholder, driver, or member of either of their families could recover under a policy if the driver's negligence caused their injuries. *Id.*

The *Halpin* court found the household exclusion clauses contrary to public policy under the MVFRL because they prevent the driver, the policyholder, and their household members from *ever* recovering under the insurance policy. *Halpin*, 823 S.W.2d at 482. "The purpose [of § 303.025] would be incompletely fulfilled if the household exclusion clause were fully enforced. The exclusion applies not only to spouses or children but to others who never had the benefit of any doctrine of immunity, such as parents, siblings, and live-in domestics." *Id.* The *Hargrave* court, far from extending this doctrine to other exclusion clauses, merely confirmed that household exclusion clauses were invalidated in all policies for purposes of minimum coverage even if multiple insurance companies provided policies covering the same accident. *Hargrave*, 34 S.W.3d at 91-92.

By contrast, Exclusion #9 applies only to specified *vehicles*. It precludes coverage for "the use of any vehicle, other than your insured car, which is owned by or furnished or available for regular use by you or any resident of your household." A5; 3 LF 425. This exclusion does not try to prohibit recovery by a

driver, policyholder or their household members. Nor does it limit the individuals entitled to recover under the policy in any manner. Instead, it only excludes the policyholder's (or her household member's) other cars from coverage for reasons that are entirely consistent with the statutory objective that every automobile have insurance coverage. As one commentator has explained, these coverage exclusion clauses exist "to require that you cannot insure all your vehicles by purchasing a policy on just one car." David C. Knieriem, *Liability Coverage in Missouri Personal Auto Policies*, 60 J.Mo.B. 164, 166 (2004). Thus, Appellants advocate a rule that would create perverse incentives against the responsible purchase of automobile insurance for each vehicle, thereby subverting the MVFRL.

In addition to misconstruing this Court's decision in *Hargrave*, Appellants' argument also conflicts with opinions by all three districts of the Court of Appeals. For example, in *Sisk v. American Family Mutual Insurance Company*, 860 S.W.2d 34 (Mo.App.E.D. 1993), the court found that an exclusion identical to Exclusion #9 complied with Missouri law and public policy. In reaching this conclusion, the *Sisk* court closely analyzed *Halpin v. American Family Mutual Insurance Company*, 823 S.W.2d 479 (Mo. banc 1992). Though recognizing that *Halpin* requires insurance policies to provide the minimum "coverage indicated in § 303.190," the court noted that § 303.190 contains separate requirements for both owner's and operator's policies. *Id.* at 36. Because the policy in *Sisk*, like the one here, was an owner's policy (*see* Section II, *infra*), the *Sisk* court found that

Halpin required only that it comply with § 303.190.2 pertaining to owner's policies. *Id. See also Wilson*, 98 S.W.3d at 616 (same).

Indeed, the other two Missouri appellate districts have also expressly upheld coverage exclusions equivalent to Exclusion #9. *See State Farm Mut. Auto. Ins. Co. v. Bainbridge*, 941 S.W.2d 546, 549-50 (Mo.App.W.D. 1997) (finding similar "non-owned" vehicle exclusion did not violate Missouri public policy under the MVFRL); *Schuster v. Shelter Mut. Ins. Co.*, 857 S.W.2d 381, 384-85 (Mo.App.S.D. 1993) (same). Thus, the validity of Exclusion #9 has already been specifically addressed and upheld by numerous decisions of Missouri courts.

The premiums charged by American Family for all of the insurance policies provided to the McConville family members were based upon the contractual understanding that Exclusion #9 was in place limiting American Family's risk from an accident involving one of the vehicles to the limits of only one liability policy. There was no contractual agreement or expectation that there would be insurance coverage beyond the limits of one policy or that the liability limits of all policies would be implicated in an accident involving only one vehicle. Under Appellants' reasoning, a policyholder could own ten cars and could obtain coverage for all ten vehicles by purchasing a policy and paying a premium for only one of them. Alternatively, the owner could insure and pay the premiums for each for the minimum of $25,000 per person, and, in the event of an accident involving only one, receive ten times (or $250,000) the liability protection that he

contracted and paid for. This result is not only illogical and contrary to the statutory scheme of liability insurance set up by the MVFRL, it would also fundamentally change the basic tenets upon which liability insurance has long been based in Missouri.

Given the legislative choices expressed in the MVFRL, the *Clark*, *Sisk*, *Bainbridge* and *Schuster* precedents, and the substantial material difference between the present coverage exclusion and the household exclusion clause in *Halpin* and *Hargrave*, the circuit court's opinion was correct and should be affirmed.

CONCLUSION

For any or all of the reasons set forth above, Respondent American Family respectfully requests that the judgment of the circuit court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 6,256 words; and

4. The copy of this brief submitted to the Court in electronic format on CD-ROM has been scanned for viruses and is virus free.

David R. Frye

CERTIFICATE OF SERVICE

On this ___ day of July 2009, I hereby certify that two copies of the above and foregoing together with a copy of this brief on CD-ROM were served via United State Mail, postage prepaid, on the following:

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