**SC90442**

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**IN THE SUPREME COURT OF MISSOURI**

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**D. R. SHERRY CONSTRUCTION, LTD.,**

**Respondent,**

**vs.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**Appellant.**

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**On Appeal from the Circuit Court of Platte County**
**Honorable Owens Lee Hull, Jr., Circuit Judge**
**Case No. 05AE-CV03676**

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# SUBSTITUTE BRIEF OF THE RESPONDENT

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## Table of Contents

## Table of Authorities

### Cases

**Constitution of Missouri**



**Revised Statutes of Missouri**



**Missouri Supreme Court Rules**



**Other Authorities**

## Jurisdictional Statement

This is an appeal from a judgment entered against Appellant, an insurer, in the Circuit Court of Platte County, finding Appellant liable for breach of contract and vexatious refusal to pay, and awarding Respondent damages, interest, and attorney fees.

This case does not fall within the exclusive jurisdiction of this Court, pursuant to Mo. Const. Art. V, § 3. As such, Appellant filed a timely notice of appeal to the Missouri Court of Appeals, Western District. This case arose in Platte County. Pursuant to § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals. The case was designated as Case No. WD69631.

On August 4, 2009, the Court of Appeals issued an opinion reversing the judgment below. Respondent filed a Motion for Rehearing and an Application for Transfer, both of which the Court of Appeals denied. Thereafter, Respondent filed a timely Application for Transfer in this Court pursuant to Supreme Court Rule 83.04. On November 17, 2009, this Court sustained the application and transferred the case.

Therefore, pursuant to Mo. Const. Art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," jurisdiction lies in this Court.

## Statement of Facts

This case stems from an insurance contract between Respondent D. R. Sherry Construction, Ltd., and Appellant American Family Mutual Insurance Company. (Legal File 2; Transcript 293). Sherry is a Missouri corporation that develops and sells single family homes. (Tr. 67). Darrin Sherry is its president and sole shareholder. (Tr. 279).

Sherry had purchased a commercial general liability insurance policy from American Family. (Tr. 293). In 2003, the corporation employed a subcontractor to construct a foundation for a house in Platte County, Missouri. (Tr. 105). After the house was completed and sold, its new owners complained that their home was out of level and its walls were cracking. (Exhibit 16; Tr. 129). Engineers concluded that the foundation was as much as eight inches out of level because it had been built on bad soil at the time of construction. (Ex. 1, 28; Tr. 212, 213, 255-56, 607).

In 2004, Sherry filed a claim for this loss under its commercial general liability policy with American Family. (Tr. 247). The insurance company had made no decision by mid-2005. (Tr. 170). In the meantime, facing a lawsuit by the homeowners, Sherry repurchased the home. (Ex. 17; Tr. 172, 231). Eventually, the insurer reserved the right to disclaim coverage (Ex. 18; Tr. 161, 162), and Sherry filed an action against it for breach of contract and vexatious refusal to pay. (L.F. 2, 4). After a trial, a jury found for Sherry and awarded it $388, 958.25 in damages, interest, and attorney fees (L.F. 46), and the trial court entered judgment in Sherry's favor and against American Family for that amount. (L.F. 48). American Family appeals. (L.F. 136).

## A. The Policy

Between 1991 and 2003, Sherry purchased insurance policies from American Family, including a commercial general liability insurance policy. (Tr. 293).

American Family states that Mr. Sherry admitted at trial to having received a copy of "the insurance policy in question" during that period (Brief of Appellant 11), but this is untrue. He testified that he received documents he was led to *believe* were complete copies of the policy – Plaintiff's Exhibit 37 (Appendix A16-A57) – but which he later learned were not. (Tr. 314). He testified that June 2005 was the first time he had received a document as "thick" as Exhibit 41 or 48A, a "policy" containing the coverage language on which American Family seems to rely (a similar version of which the insurer introduced as its Exhibit A). (Tr. 314, 558). But none of these documents actually contains all the endorsements and exclusions to which it refers. (Exhibit 37, 41, 48A; Tr. 150, 168, 170, 295, 314, 522, 558-62). Sherry was not given a complete copy when it purchased insurance or paid premiums. (Tr. 314). It did not have one when the homeowners first demanded it repurchase the house. (Tr. 314). It did not have one when it agreed to repurchase the home. (Tr. 314).

There was no evidence that American Family ever even attempted to deliver a complete copy of either Exhibits 41 or 48A to Sherry. On their face, these documents were generated some three years after their purported effective dates. (Ex. 41, 48A). Only Exhibit 37 was generated during its coverage period. (*Cf.* Ex. 37, 41, and 48A).

As soon as the homeowners had notified Sherry of the damage to their house in August 2003, Mr. Sherry began repeatedly requesting a copy of the commercial general

liability policy. (Tr. 151, 314). In response, he eventually received several documents, including Exhibits 36, 37, 41, 48, and 48A. The documents display conflicting terms over their coverage dates and their premiums, as follows:

| Exhibit | Policy No. | Coverage Dates | Premium | Date Created |
|---|---|---|---|---|
| 36 | 24 x35041-16 | September 18, 2002 - September 18, 2003 | $8,106.00 | 7/03/2002 |
| 36 | 24 x35041-16 | September 18, 2001 - September 18, 2002 | $5,634.00 | 9/20/2001 |
| 48A | 24 x35041-16 | September 18, 2001 - December 5, 2002 | N/A | 5/27/2005 |
| 48 | 24 x35041-16 | September 18, 2001 - September 18, 2002 | $5,634.00 | 5/11/2005 |
| 48 | 24 x35041-16 | September 18, 2002 - September 18, 2003 | $8,106.00 | 5/11/2005 |
| 37 | 24 x35041-17 | December 5, 2002 - December 5, 2003 | $14,112.00 | 3/30/2005 |
| 41 | 24 x35041-17 | December 5, 2002 - September 18, 2003 | N/A | 5/27/2005 |
| 41 | 24 x35041-17 | December 5, 2002 - December 5, 2003 | $14,112.00 | 5/11/2005 |
| 47 | 24x2-9051-01 | N/A | N/A | N/A |

At trial, the American Family claims adjuster assigned to Sherry's case, Dean Barnhart, explained that the suffixes "-01," -16," and "-17" denote "record numbers" and not separate policies. (Tr. 495-96). As Mr. Barnhart explained, the "record numbers" represent successive versions of a policy that renews from year to year and further indicate a change in coverage terms, not simply the renewal period. (Tr. 495-96).

Both throughout the litigation and even now in its brief, American Family fails to identify which trial exhibit it believes is "the policy." Indeed, American Family only mentions the word "exhibit" ten times in its brief, and all in reference to Exhibit 1, an engineering expert's report it complains should have been excluded from evidence. (Br. of Appellant 49-51). The supposed "policies" the insurer provided to Sherry before and during this litigation contained overlapping coverage dates, conflicting endorsements, missing coverage endorsements, and charged premiums for coverage to damage to real property while only agreeing to pay for damages to "tangible property." (Tr. 558-67).

Exhibit 36 is a two-page document containing declarations pages for Policy No. 24x35041-16. Exhibit 37 is what Sherry received from American Family in response to a request for a complete copy of the insurance policy. (Appx. A16-A57). Exhibits 41 and 48A are affidavits and copies of insurance policies that Sherry received in response to Exhibit 38, a letter requesting an explanation of the numeric codes listed in Exhibit 37. (Appx. A58-A298). American Family later provided Exhibits 41 and 48A as addenda to its reservation of rights letter. (Tr. 157). On the front of both Exhibits 41 and 48A is an affidavit swearing they are "a true and correct copy of the contents of the policy." (Appx. A58, A168).

But these copies, as provided, facially were not "true and correct copies." (Tr. 558-62). They reference additional alphanumeric codes relating to endorsements and other sections that purport to affect or change the insurance agreement but were actually omitted from the copies of the "policies" provided. (Tr. 558-62). American Family admitted that it failed to include parts of the insurance agreement, but then concluded that the missing sections of the policy simply do not apply. (Tr. 575-76). For example, Exhibit 41 alone is missing sections IM 7016 Ed. 1.0, IM-7005 Ed. 1.0, IL00171198, IL 71240292, and IM5102 Ed. 1.0, to which it plainly refers.

Likewise, though Exhibits 48A (the "-16" policy) and 41 (the "-17" policy) purport to be "true and correct copies" covering the same dates, they display a great number of conflicting endorsements. The following endorsements are contained in Exhibit 41 but missing from Exhibit 48A: IM 5402 Ed 1.0, IM 7500 Ed 1.0, IM 5103 Ed 1.1, IM 1272 Ed 1.0. The following endorsements are contained in Exhibit 48A but missing from Exhibit 41: IM 70012 01, IM 70160799, IM 5508 06020, IM 70250899, IM 70341099, IM 55040901, IM 550109001, IM 51030901. These two "policies" cover the same dates, but contain different terms. (*Cf.* Appx. A58-A167 and A168-A298).

Exhibit 37, which is what American Family gave Mr. Sherry as his "policy" while he was paying premiums (Tr. 314), states the following as to what it would cover: "Our obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages." (Appx. A22, A51).

Mr. Sherry testified that he understood his corporation's policy with American Family would cover the loss at issue in this case. (Tr. 276-77). American Family had required Sherry to provide supplemental information regarding each house he built while it was paying premiums. (Tr. 314-15). Mr. Sherry also testified, "[E]very time I started a new house I had to call [American Family agent Gary Weaver] to secure coverage on that exact residence because he would need the lot number and whatever pertinent information on that home." (Tr. 315). He had spoken with Mr. Weaver "hundreds" of times about his insurance needs and coverage. (Tr. 317). Mr. Weaver had assured Mr. Sherry that "he was getting me coverage to cover myself, my business, my personal home, everything." (Tr. 317).

At trial, American Family's counsel identified Mr. Weaver as "the American Family agent that sold insurance policies to Darrin Sherry and his company." (Tr. 64). Counsel told the jury, "You will hear Mr. Weaver testify. He's going to tell you about his dealings with Darrin Sherry." (Tr. 65-66). But Mr. Weaver did not testify.

**B. The Home and the Homeowners**

In February or March 2003, Sherry employed a subcontractor to construct a foundation for a house at 13395 Sycamore Drive, in the Timber Park subdivision, immediately south of Platte City in Platte County, Missouri. (L.F. 3, Tr. 105). Sherry completed the home in August 2003 and sold it to third party homeowners. (Tr. 107). In 2004, Sherry received complaints from the homeowners that the home was out of level and that there were cracks in the walls. (Tr. 129). Their letter is Exhibit 16.

Engineering reports conducted in 2004 showed that the house was dramatically out of level – as much as eight inches. (Ex. 1, 6; Tr. 30). The parties do not dispute this fact: American Family's counsel told the trial court, "[T]he parties stipulated that the house is 8 inches or more out of whack. That's not the dispute." (Tr. 30). American Family readmits this in its brief. (Br. of Appellant 23). Later reports showed that the out-of-level condition was due to the movement of the home. (Ex. 1, 6, 7, 28; Tr. 216, 220). Experts concluded that the movement of the home was due, at least in part, to bad soil or poor soil conditions. (Ex. 1, 28; Tr. 607). These soil conditions existed at the time of construction. (Ex. 1; Tr. 212, 213, 255-56). One expert later testified that the repeated exposure to soil conditions over time led to the movement of the home, which in turn caused its damage. (Ex. 28 at 61-63; Tr. 229).

The homeowners hired attorneys, demanded that Sherry repurchase the home, and threatened it with a lawsuit. (Ex. 16, 35; Tr. 137). In July 2004, Mr. Sherry contacted American Family for assistance under his policy. (Tr. 131-34, 247, 251, 267). In response, Mr. Barnhart, whose job title at American Family is "quality assurance specialist," instructed Mr. Sherry to tell the homeowners to "put up or shut up." (Tr. 134-35). Thereafter, Sherry hired an attorney. (Tr. 132, 134). Through counsel, it made repeated requests to American Family for a copy of its commercial general liability insurance policy, but the insurer failed provide one. (Ex. 38; Tr. 166-67, 170). In March 2005, with no copy of the insurance policy and facing a lawsuit, Sherry entered into a contract with the homeowners to repurchase the home for $265,000.00, and then repurchased the home. (Ex. 17; Tr. 172, 231). The contract also contained both

subrogation rights and a confidentiality agreement. (Ex. 112; Tr. 590). In its out-of-level condition, however, the home would be unsellable. (Tr. 271). An expert report stated that the cost to repair the home exceeded its resale value. (Ex. 1; Tr. 214).

Examination of Platte County records indicated that a portion of the home was built on "fill dirt." (Tr. 407). Additional records show that concrete piers were installed under the home. (Tr. 258). These piers passed an inspection by Platte County officials. (Ex. 42; Tr. 354). There was no evidence that the piers were inadequate or that they failed to perform.

**C. Sherry's Commercial General Liability Claim**

Sherry first notified American Family of its claim in July 2004. (Tr. 247, 251). In December 2004, as it had been doing for months, it requested a copy of its insurance contract. (Ex. 36; Tr. 140). This time, American Family responded, but only provided Sherry with declarations pages. (Ex. 36; Tr. 140). American Family admits that Sherry contacted it on January 25, 2005, but maintains that this was the first date on which it was advised of the claim. (Br. of Appellant 10). Mr. Barnhart admitted he failed to record some conversations with Sherry or its attorney in American Family's file. (Tr. 553-54). He also admitted that he had no recollection as to when many of those conversations took place. (Tr. 552). Between July 2004 and April 2005, Sherry repeatedly demanded that American Family provide it with a copy of its policy. (Tr. 143-46, 150-51).

In April 2005, American Family finally provided Sherry with a 42-page document, Exhibit 37. (Tr. 151; Appx. A16). This document was similar to the one that America Family provided Sherry as the complete copy of his insurance policy when it sold Sherry

insurance. (Tr. 314). But none of the coverage language upon which American Family relies in its brief is contained within this policy. (*cf.* Appellant's Brief pp. 11-12 and Appx. A16-A57). The document referenced other numerous documents by alphanumeric codes. (Ex. 37; Appx. A16-A57).

Sherry immediately demanded explanations or copies of the documents to which these codes refer, but American Family did not provide any. (Ex. 38; Tr. 170). Instead, in June 2005, American Family sent Sherry a "reservation of rights" letter, together with affidavits and three versions of a policy number 24-x35041. (Ex. 18; Tr. 161, 162). Two of the versions, Exhibits 36 and 48A (Appx. A168), bear the two-digit "record number" suffix "-16," while the third version, Exhibit 41, bears the suffix "-17." (Appx., A58)

On July 29, 2005, Sherry replied rejecting the reservation of rights and demanding payment on its claim. (Ex. 46; Tr. 173). American Family then attempted to contact the homeowners, but they refused to talk due to the confidentiality agreement in the repurchase contract. (Tr. 551-52). On September 20, 2005, Mr. Barnhart notified Sherry's attorney of this situation, and the attorney provided a waiver of confidentiality to American Family two days later, along with additional documentation that American Family had requested. (Ex. 39; Tr. 173-74). After receipt of the waiver and documents, American Family took no further action. (Tr. 556-57). It never requested access to the house or make any attempt to investigate the claim. (Tr. 165). Mr. Barnhart testified that though American Family never specifically denied Sherry's claim, it never approved the claim, either. (Tr. 562-63).

## D. Proceedings Below

On November 29, 2005, with no further contact from American Family, Sherry filed an action against American Family in the Circuit Court of Platte County for breach of contract and vexatious refusal to pay. (L.F. 2, 4). Sherry also included a claim for negligent misrepresentation against Gary Weaver, the insurance agent through whom he purchased his American Family commercial general liability policy, (L.F. 6).

Thereafter, in October 2006, both parties filed motions for summary judgment, which were denied. (L.F. 145).[1] In December 2007, nearly two years after filing its answer, American Family asked for leave to amend its answer and assert a counterclaim for declaratory judgment. (L.F. 13). The trial court denied the motion, and the case went to a jury trial. (L.F. 149).

At trial, American Family introduced as its Exhibit A a copy of what it contended was its commercial general liability policy with Sherry. (Tr. 504). This document is the same as Plaintiff's Exhibit 41 (Tr. 558), one of the documents American Family provided to Sherry along with its reservation of rights letter. American Family contended that the following paragraph in that document details the coverage it actually extended to Sherry:

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[1] While American Family discusses the summary judgment proceedings in its brief (Br. of Appellant 8, 9, 24), it fails to include any relevant pleadings in the Legal File, and only includes Sherry's response in its Appendix. "Documents attached to a party's brief but not contained in the legal file are not part of the record and will not be considered on appeal." *Meyers v. So. Builders, Inc.*, 7 S.W.3d 507, 512 (Mo. App. S.D. 1999).

> We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. This insurance applies to bodily injury and property damage only if the bodily injury or property damage is caused by an occurrence that takes place in the coverage territory, and the bodily injury or property damage occurs during the policy period.

(Tr. 505; Appendix of Appellant A-22).

American Family originally had recorded Sherry's date of loss as August 15, 2003. (Tr. 537). It did so in Exhibit 47, "First Notice of Loss," which says it was created on January 25, 2005. At trial, Mr. Barnhart confessed that on May 9, 2005, while American Family believed that the coverage period expired on September 18, 2003, he manipulated the insurer's internal documents to state that Sherry's date of loss was October 1, 2003. (Ex. 47; Tr. 535-39). Mr. Barnhart admitted that his alteration of the date of loss was not based on any investigation or correspondence. (Tr. 552).

He testified as follows:

> Q: [Mr. Davey] So the date of loss that you picked, without any investigation, is October 1st of 2003; and lo and behold, we get an affidavit back that says no coverage as of October 1st of 2003. Isn't that the sequence of events? Do I have that down correctly?
>
> A: [Mr. Barnhart] Yes.
>
> …

Q: And somewhere in there you decide, without any investigation, that October 1st was the date of loss; it just happened to be about 13 days after American Family terminated the policy. Isn't that correct?

A: That is correct.

(Tr. 539, 552).

Sherry offered into evidence the expert report of Ken Sidorowicz, an engineer Sherry hired to investigate shortly after the homeowners first complained of the damage to their home, as Exhibit 1. (Tr. 212). American Family's counsel responded, "I have no objection, Your Honor," and the trial court admitted the exhibit. (Tr. 211). American Family's counsel later read portions of Mr. Sidorowicz's testimony into evidence (Tr. 437-41, 441-2). He also stated that he did not "have any quarrel" with Mr. Sidorowicz's expertise. (Tr. 435).

The insurer stipulated to the trial court that there was an insurance agreement between the parties, that Sherry's obligation under that agreement was to make premium payments, and that Sherry met that obligation. (Tr. 234). Much of the testimony concerned what certain words meant in Exhibits 41 and 48A. One of the words was "occurrence." The parties agreed that "occurrence" meant "accident:"

Q: [Mr. Cary] Accidents happen when somebody runs a stoplight or runs a stop sign, and there's an accident. This house failed and it failed badly, as you've said, because it was built out of level and because you built on fill without adequate supports to keep it from sinking in the ground. That ain't an accident. It's --

A: [Mr. Sherry] Sure. It's the same thing. The guys didn't do it on purpose. That -- that shows every other home in the neighborhood was done fine. Every other home that had piers is to date, to my knowledge, is fine. This one here went bad. That is an accident. If every home that had piers underneath of it failed, yes, I would tend to agree with you. But no, sir, this one home failed. The rest of them on each side, across the street, up the street, down the street are okay.

(Tr. 278). American Family admitted before trial that its policy required it to cover losses incurred in an "occurrence" or an "accident." (L.F. 23).

Another term at issue was "legally obligated." Mr. Barnhart testified that one possible meaning of "legally obligated" was entering into a contract:

Q. [Mr. Davey] If you enter a contract with somebody, would you agree with me that you're legally obligated to that person?

A. [Mr. Barnhart] I would say yes.

(Tr. 583).

At the close of the Sherry's evidence, American Family moved for a directed verdict on all of Sherry's claims. (Tr. 443-44). The trial court denied the motion as to the breach of contract and vexatious refusal claims, but dismissed the negligent misrepresentation claim against Mr. Weaver with prejudice. (Tr. 454-55).

At the jury instruction conference, the trial court proposed a verdict director modeled on MAI 26.06 (1981). (L.F. 39). When the court asked if the parties had any objections, American Family's counsel stated that "an adequate verdict directing

instruction could never be crafted" in this case. (Tr. 662-63). Counsel added, "The verdict director would somehow have to incorporate the law that's contained in the *Hawkeye* opinion that addresses the coverage issue in this case." (Tr. 662-63). He also stated, "I don't think this particular instruction adequately advised the jury about the applicable law regarding plaintiff's claim." (Tr. 662-63). He elaborated:

> So if … a verdict directing instruction were to be crafted, it would have to include, for instance, the "Mathis" decision which indicates that an occurrence is an accident. That's not contained in the verdict director that the Court gave in this case.

(Tr. 663). The trial court disagreed (Tr. 664), and submitted its proposed instruction to the jury as Instruction No. 6. (L.F. 38-39).

On January 31, 2008, the jury entered a verdict in Sherry's favor. (L.F. 46). It awarded Sherry $268,859.57 on its policy with American Family, $5,932.08 in interest, and $114,166.63 in attorney fees. (L.F. 46). Accordingly, the trial court entered judgment for Sherry in the amount of $388,958.28. (L.F. 48).

After judgment, American Family filed motions for judgment notwithstanding the verdict, a new trial, and remittitur. (L.F. 50, 78). The court denied all of them, and American Family appealed. (L.F. 135-36). On November 17, 2009, this Court transferred the appeal after opinion by the Missouri Court of Appeals, Western District.

## Response to Points Relied On

I. The trial court did not err in overruling American Family's motion for a directed verdict on Sherry's breach of contract claim, submitting Sherry's breach of contract claim to the jury, and overruling American Family's motion for judgment notwithstanding the verdict *because* when a contract is ambiguous on its face, its construction– while usually an issue of law for the trial court to decide – becomes a question of fact to be resolved by the jury, *in that* American Family failed to provide Sherry with a single insurance policy at any time, the various "policy" documents it did provide both during the periods of coverage and after – as well as the various "policy" documents it proffered at trial – varied so substantially as to coverage that they were incapable of constituting a complete and unambiguous written account of the parties' intent, and the parties' evidence of their intent was in dispute.

**(Response to Appellant's Point Relied On I)**

*Teets v. Am. Family Mut. Ins. Co.*, 272 S.W.3d 455 (Mo. App. E.D. 2008)

*Busch & Latta Painting Corp. v. State Hwy. Comm'n of Mo.*, 597 S.W.2d 189 (Mo. App. W.D. 1980)

*Graham v. Goodman*, 850 S.W.2d 351 (Mo. banc 1993)

*Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359 (Mo. banc 1991)

II. The trial court did not err in denying American Family's motion for directed verdict at the close of all the evidence and overruling American Family's motion for judgment notwithstanding the verdict or for a new trial *because* sufficient evidence supported the jury's verdict that American Family breached its insurance contract with Sherry *in that* evidence was introduced that (1) continuous exposure of the house to harmful soil conditions caused the damage to the home; (2) the damage occurred during the relevant coverage periods; (3) the damage resulted from an unforeseeable accident attributable to mistake; and (4) Sherry was legally obligated to the homeowner for that damage.

**(Response to Appellant's Points Relied On II and V)**

*Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. App. E.D. 2007)

*Scottsdale v. Ratliff*, 927 S.W.2d 531 (Mo. App. E.D. 1996)

*Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385 (Mo. App. E.D. 2007)

*Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454 (Mo. banc 2006)

III. The trial court did not err in submitting its verdict-directing instruction to the jury *because* the instruction hypothesized the disputed facts that required determination by the jury *in that* (1) the instruction required the jury to determine whether (A) there had been damage to the residence Sherry sold, (B) the cause of that damage was covered by the insurance policy American Family sold to Sherry, (C) Sherry had performed its obligations under the agreement, (D) American Family had failed to perform its obligations, and (E) Sherry was thereby damaged; and (2) American Family was not prejudiced as the only "omission" to which it objected was a fact that was not in dispute.

**(Response to Appellant's Point Relied On III)**

*Williams v. Daus*, 114 S.W.3d 351 (Mo. App. S.D. 2003)

*Weisman v. Herschend Enters., Inc.*, 509 S.W.2d 32 (Mo. 1974)

*Welch v. Hyatt*, 578 S.W.2d 905 (Mo. banc 1979)

*Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605 (Mo. banc 2008)

Rule 70.02

Rule 70.03

Rule 84.04

MAI 26.06

IV. The trial court did not err in admitting Plaintiff's Exhibit 1 *because* American Family expressly waived any objection to that exhibit and its motion to strike the exhibit was untimely *in that* American Family initially did not object to the admission of Exhibit 1, and only moved to strike it long after it was admitted without objection.

**(Response to Appellant's Point Relied On IV)**

*Citizens for Ground Water Prot. v. Porter*, 275 S.W.3d 329 (Mo. App. S.D. 2008)

*R & J Rhodes, LLC v. Finney*, 231 S.W.3d 183 (Mo. App. W.D. 2007)

*Oldaker v. Peters*, 817 S.W.2d 245 (Mo. banc 1991)

*Sherrod v. Dir. of Revenue*, 937 S.W.2d 751 (Mo. App. S.D. 1997)

V. The trial court did not err in denying American Family's motion for judgment notwithstanding the verdict or for a new trial *because* substantial evidence that American Family's refusal to pay Sherry's claim was without reasonable cause or excuse supported the jury's verdict that American Family vexatiously had refused to pay Sherry's claim *in that* evidence was introduced from which a reasonable juror could conclude that American Family was notified of Sherry's claim in July of 2004 and never took any steps to provide Sherry with an attorney, to inspect the premises, or to keep proper records of the claim, and that American Family intentionally manipulated its own documents to alter the reported date of loss so as to be outside of its perceived coverage period.

**(Response to Appellant's Point Relied On VI)**

*Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173 (Mo. App. E.D. 1998)

*Georgescu v. K-Mart Corp.*, 813 S.W.2d 298 (Mo. banc 1991)

*Marti v. Economy Fire & Casualty Co.*, 761 S.W.2d 254 (Mo. App. E.D. 1988)

§ 375.296, R.S.Mo.

§ 375.420, R.S.Mo.

## Argument

**Preface**

"In construing an insurance contract, the *entire policy and not detached provisions or clauses* must be considered." *Rice v. Fire Ins. Exch.*, 897 S.W.2d 635, 637 (Mo. App. S.D. 1995) (emphasis added). In this case, an entire written policy was never introduced before the trial court. American Family never provided one to Sherry. (Tr. 150-57, 168, 170, 295, 314, 522, 558-62). There never was any finding – nor was there any evidence – of what the entire written policy might have contained. American Family largely bases its arguments on a notion that its insurance agreement with Sherry was governed by a single, written policy, though it does not identify this document in the Record. That premise is untenable.

American Family has never explained why endorsements were missing from every "policy" document it ever provided to Sherry. Its only offers this: "American Family never made any reference to policy endorsements at trial. Therefore, any such endorsements are irrelevant to the resolution of the present matter." (Br. of Appellant 29). Essentially, American Family invokes a "because I said so" defense – that is, the missing language is irrelevant because American Family says it is irrelevant. The trial court specifically rejected this defense. (Tr. 453-55).

Not only is this position contrary to authority upon which American Family relies, *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. App. S.D. 1999), but it also fails to acknowledge that the missing sections may well have contained the Rosetta Stone that Sherry, the trial court, and the jury needed to unlock the mysteries of the insurance

coverage for which Sherry paid. Sherry and the trial court were deprived of any opportunity to make that determination, because apparently no complete copy of the policy exists or ever existed.

Now, on appeal, there is no comprehensive policy document in the Record that contains each of the endorsement forms it purports to include. American Family has relegated these missing sections to senicide, letting the missing endorsements drift away because they serve no useful purpose to it. American Family ignores the plain fact that the terms of its insurance agreement with Sherry were in dispute. It leaves no room for the possibility that the terms it "usually" incorporates into its agreements were not actually part of this agreement. In its brief, American Family repeatedly refers to the "number 17" policy. Noticeably, however, these references are not cited to any particular exhibit. Both Plaintiff's Exhibits 37 and 41 bear the policy number "-17". Yet Exhibit 37 is markedly different from Exhibit 41. Exhibit 37 is some 60 pages shorter than Exhibit 41. Exhibit 37 contains none of the "occurrence" or "legally obligated" language upon which American Family relies repeatedly throughout it brief. Sherry also introduced Exhibits 36 and 48A, which are policies that purport to cover the same dates and contain different terms in this manner.

Furthermore, the documents upon which American Family relied in denying coverage were created years after Sherry notified the insurer of its claim, making this contract one of adhesion. Because of both this and the ambiguity in the agreement, the policy must be construed in favor of coverage. Sherry had a reasonable expectation based upon the promises American Family made to it. "The reasonable expectation rule

of construction … [provides that] the objective reasonable expectations of adherents and beneficiaries to insurance contracts will be honored even though a thorough study of the policy provisions would have negated these expectations." *Robin v. Blue Cross Hosp. Serv., Inc*., 637 S.W.2d 695, 697 (Mo. banc 1982).

A trial court's "judgment will be affirmed if cognizable under any theory." *Business Men's Assur. Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). While the confusion among these exhibits is sufficient for this Court to affirm the judgment below, the simplest and most compelling theory under which the judgment should be affirmed is the fact that Sherry never was, and still never has been, provided a complete copy of its policy. (Tr. 314). Since both parties had their own understandings of what their agreement covered and what it did not, the contours of coverage could only be defined by resort to extrinsic evidence, which made coverage an issue of fact.

The uncontroverted testimony of Darrin Sherry during cross-examination reflected Sherry's understanding of what coverage American Family promised:

> Q. You gave a warranty to [the homeowners] when you sold them the house. You said you'd stand behind that house and fix it if it went bad. Aren't you now asking American Family to stand in your shoes, to … be that warranty for you?
>
> A [T]he warranty is … something that we do on every home. If I came to American Family and asked them to fix … every piece or part that went wrong with every home I built, yeah, that would be [that] scenario. This is a one-time isolated incidence. This is an accident. This is an occurrence …

> I haven't asked you on any other homes … [T]he dirt underneath the piers or the foundation settled . . . [T]here was a mistake. In an auto accident, somebody makes a mistake, an accident happens. That's what happened here. It was inspected. Everybody, to the best of their knowledge, did what they … could do, and it happened. It went bad … And you are my insurance company that's supposed to protect me in the case of an isolated incident. Something goes wrong, you're supposed to stand behind that for me. That was my promise and why I pay $30,000 a year in insurance premiums.

(Tr. 276-77). Mr. Sherry testified that American Family had required him to provide supplemental information regarding each house that he built. (Tr. 314-15).

Mr. Sherry further stated, "[E]very time I started a new house I had to call [American Family agent Gary Weaver] to secure coverage on that exact residence because he would need the lot number and whatever pertinent information on that home." (Tr. 315). Mr. Sherry had spoken with Mr. Weaver "hundreds" of times about his insurance needs and coverage and that Mr. Weaver had assured him that "he was getting me coverage to cover myself, my business, my personal home, everything." (Tr. 317). At trial, American Family's counsel identified Mr. Weaver as "the American Family agent that sold insurance policies to Darrin Sherry and his company." (Tr. 64). Counsel told the jury, "You will hear Mr. Weaver testify. He's going to tell you about his dealings with Darrin Sherry." (Tr. 65-66). But Mr. Weaver did not testify, and thus Mr. Sherry's testimony regarding their communications was uncontroverted.

The following are uncontroverted facts in this case: (1) there is not one, single set of documents that comprises a whole insurance agreement; and (2) the complete "policy" upon which American Family relied was never delivered to Sherry. The cumulative effect of these two facts is profound. Denying insurance protection to a Missouri resident because of language in some documents that were not even created until years after the insurance expired is offensive to the very basic notions of justice and fair play. The Record, the law, and common sense support both the trial court's rulings that American Family challenges on appeal and the jury's verdict.

Each of American Family's Points Relied On is without merit. This Court should affirm the trial court's judgment.

I. The trial court did not err in overruling American Family's motion for a directed verdict on Sherry's breach of contract claim, submitting Sherry's breach of contract claim to the jury, and overruling American Family's motion for judgment notwithstanding the verdict *because* when a contract is ambiguous on its face, its construction– while usually an issue of law for the trial court to decide – becomes a question of fact to be resolved by the jury, *in that* American Family failed to provide Sherry with a single insurance policy at any time, the various "policy" documents it did provide both during the periods of coverage and after – as well as the various "policy" documents it proffered at trial – varied so substantially as to coverage that they were incapable of constituting a complete and unambiguous written account of the parties' intent, and the parties' evidence of their intent was in dispute.

**(Response to Appellant's Point Relied On I)**

Standard of Review

Although American Family states its first Point Relied On as one issue, it actually raises two separate questions governed by different standards of review.

First, it claims the trial court erred in denying its motions for directed verdict and its motion for judgment notwithstanding the verdict. (Br. of Appellant 13, 21). "The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 (Mo. banc 2006). And, "In determining

whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Id.* at 457. "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Id.*

Second, American Family questions the trial court's decision that its policy with Sherry was facially ambiguous and required extrinsic evidence of its meaning to be submitted to the jury. "Since insurance policies are contracts, the rules of contract construction apply." *Penn-America Ins. Co. v. The Bar, Inc.*, 201 S.W.3d 91, 96 (Mo. App. W.D. 2006). "[T]he general rules for interpretation of other contracts apply to insurance contracts as well. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301-02 (Mo. banc 1993). "Where the language of the contract on its face is not clear or is ambiguous, and resort to extrinsic evidence is necessary … the construction of the agreement is for the jury under proper instructions from the Court." *Busch & Latta Painting Corp. v. State Hwy. Comm'n of Mo.*, 597 S.W.2d 189, 198 (Mo. App. W.D. 1980). "Whether a contract is ambiguous and the interpretation of the contract itself are issues of law that [this Court] review[s] *de novo*." *Teets v. Am. Family Mut. Ins. Co.*, 272 S.W.3d 455, 462 (Mo. App. E.D. 2008).

* * *

In its first Point Relied On, American Family argues that the trial court erred in submitting to the jury as a factual dispute the issue of what the parties intended their

insurance agreement to cover. The insurer argues that the question of whether its agreement with Sherry provided coverage for the property damage to the house at issue was a question of law that should have been resolved by the trial court alone, rather than a factual dispute requiring the jury's determination.

Indeed, in an ordinary insurance case – one in which the parties agree that a specific document constitutes their agreement but simply disagree about the meaning of the terms of that document – the question of coverage is a question of law to be resolved by the trial court. But this is anything but an ordinary dispute over an insurance contract. In this case, there was no single, identifiable document definitively comprising the insurance agreement between the parties. While the parties stipulated that Sherry and American Family entered into an insurance agreement, their dispute concerned which document, if any, actually constituted that agreement. Numerous trial exhibits in the Record contain various piecemeal insurance policies. But their coverage periods differ and overlap (sometimes even in the same document), their terms vary widely, their definitional sections diverge, and many are missing a great number of exclusion and endorsement forms to which they refer. No single document before the trial court provided a written record of the parties' intent in entering into their contract.

The law of Missouri is that, under these circumstances, where the parties cannot even agree about what words they contracted to, the construction of the insurance agreement's terms to determine the parties' intent – including over coverage – became a question of fact for the jury to decide based on the parties' extrinsic evidence. After reviewing that evidence, the jury decided that the agreement was what Sherry purported it

to be – that is, that the parties intended for American Family to cover the loss Sherry suffered in this case. The trial court could not make any legal determination as to what the parties intended the agreement would cover, because the absence of a complete, single, written contract made the entire insurance agreement facially ambiguous.

The trial court's decision to submit the question of the parties' intent as to coverage to the jury was not error. Indeed, the trial court would have erred had it done otherwise and assumed the fact-finding for itself.

**A. When the coverage terms of an insurance contract are susceptible of different meanings such that a trial court cannot determine the parties' intent as to what losses are to be covered, that intent becomes a question of fact requiring the jury's determination.**

"The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 901 (Mo. banc 1990). Pursuant to this rule, "Where there is no ambiguity in the contract the intention of the parties is to be gathered from it and it alone, and it becomes the duty of the court and not the jury to state its clear meaning." *Id.*

But when a contract is ambiguous such that the intent of the parties cannot be determined, the landscape of construing it is transformed. Rather than being a question of law, it becomes one of fact. "[W]here [a] contract is ambiguous and not clear, resort to extrinsic evidence is proper to resolve the ambiguity." *Id.* Of course, "A contract is not rendered ambiguous by the fact that the parties do not agree upon the proper construction

to be given it. A contract is ambiguous only when it is reasonably susceptible of different constructions." *Id.*

Thus, ambiguities in contracts are resolved in a two-step process. First, "the question as to whether a provision of a contract was ambiguous is initially a question for the court." *Graham v. Goodman*, 850 S.W.2d 351, 354 (Mo. banc 1993) (citations omitted). Second, having resolved that a provision is ambiguous, "The trial court must then determine from the evidence whether the surrounding circumstances are such that a fact issue exists for the jury to resolve. Only then is the case submitted to the jury for resolution of the fact issue." *Id.* As with any other type of contract, "in construing an insurance contract, the entire policy and not detached provisions or clauses must be considered." *Rice v. Fire Ins. Exch.*, 897 S.W.2d 635, 637 (Mo. App. S.D. 1995).

What is ultimately so confusing about this case is that an entire, written insurance policy was never introduced before the trial court. American Family never provided one to Sherry. (Tr. 150-57, 168, 170, 295, 314, 522, 558-62). There was no evidence, of what the entire, written insurance policy might have contained. The insurer stipulated to the trial court that there was an insurance agreement between the parties, that Sherry's obligation under that agreement was to make premium payments, and that Sherry met that obligation. (Tr. 234). American Family admitted before trial that its policy required it to cover losses incurred by an "occurrence" or an "accident." (L.F. 23). But without an actual, complete, written insurance agreement that the parties could point out to the trial court, there was no way for the trial court to determine their intent – that is, whether the parties intended the policy to cover the loss for which Sherry submitted its claim.

At trial, American Family contended, and seems to contend now, that the following paragraph from its Exhibit A (Plaintiff's Exhibit 41) comprised the parties' intent as to coverage:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. This insurance applies to bodily injury and property damage only if the bodily injury or property damage is caused by an occurrence that takes place in the coverage territory, and the bodily injury or property damage occurs during the policy period.

(Tr. 505; Appx. of Appellant A-22). But this document was prepared and delivered to Sherry years after the policy period it purports to reflect ended. Sherry never received a copy of it, and disputed American Family's contention that it was their "agreement."

Conversely, the only language regarding coverage contained in Plaintiff's Exhibit 37, the document that American Family *did* submit to Sherry while it was paying premiums, is this: "Our obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages."

As a result, the contract was susceptible of different constructions as to coverage. Its terms of coverage were wholly ambiguous. A resort to extrinsic evidence was proper to resolve that ambiguity. Trial courts are presumed to know the law. *Lane v. Lensmeyer,* 158 S.W.3d 218, 224 (Mo. banc 2005). The trial court in this case knew it

had no choice but to submit to the jury the question of the parties' intent as to coverage. The jury, as the finder of fact, would be able to view the various and different documents that the parties purported to be policies and piecemeal parts of policies and hear the testimony of the parties' witnesses, and could determine whether the parties intended their insurance agreement to cover Sherry's loss at issue. It did so in Sherry's favor.

**B. The trial court implicitly found that the coverage terms of the insurance agreement were ambiguous.**

Sherry recognizes that the trial court did not make an express finding of ambiguity to which it can point in the Record. But the law does not require that finding to be express. American Family cites to no authority mandating such an express finding. The fact that the trial court implicitly found as much is plain from the Record. When issues not raised by the pleadings are tried by express or implied consent of the parties, they are to be treated in all respects as if they had been raised in the pleadings. *Biehle v. Frazier*, 232 S.W.2d 465, 467 (Mo. banc 1950).

At the close of the plaintiff's evidence, American Family moved for a directed verdict. (Tr. 443-44). In response, Sherry's counsel argued that, as part of presenting a submissible case on the issue of breach of contract, there was an issue of fact as to coverage, because "we don't even know which policy is at issue here, the documents that they say that they provided as a full and complete copy of the policy weren't in fact provided." (Tr. 449). He explained in detail how the lack of a single, identifiable policy made the question of coverage a question of fact, because without a definitive, written contract, the language of the "policy" was both patently and latently ambiguous, and the

parties' intent could not be determined. (Tr. 449). The trial court agreed, and denied American Family's motion. (Tr. 454-55).

Through American Family's extensive briefs on the issue (none of which it includes in the Record), the trial court was well apprised that the interpretation of unambiguous contracts is confined to the court, rather than the jury. But the trial court repeatedly rejected these arguments. (Tr. 447-55). By rejecting them and submitting the question of the parties' intent as to coverage to the jury, the trial court plainly agreed with Sherry that the lack of a complete, written insurance agreement made the parties' coverage intent ambiguous, requiring the jury to determine that question based on the parties' extrinsic evidence.

As such, this Court reviews *de novo* whether, under these circumstances, the terms of coverage were ambiguous, requiring the jury's resolution of the parties' intent.

**C. The insurance instruments between American Family and Sherry are patently and latently ambiguous as to which losses the parties intended their agreement would cover.**

"Ambiguities in written instruments may be of two kinds: (1) patent, arising upon the face of the documents, and (2) latent, arising when the words appear clear, but in context their meaning is uncertain." *Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991). In this case, the agreement's terms were both patently and latently ambiguous. The parties' intent as to coverage could not be a pure question of law.

**1. The various insurance agreement documents are patently ambiguous as to coverage intent.**

When interpreting whether a contract is ambiguous, "A trial court 'must consider the whole instrument and the natural and ordinary meaning of the language.'" *Teets v. Am. Family Mut. Ins. Co*., 272 S.W.3d 455, 462 (Mo. App. E.D. 2008) (citation omitted).

> A contract is only ambiguous if 'the disputed language, in the context of the entire agreement, is reasonably susceptible of more than one construction giving the words their plain and ordinary meaning as understood by a reasonable, average person.' An 'ambiguity must appear from the four corners of the contract' and 'extrinsic evidence cannot be used to create an ambiguity.'

*Id.*

In this case, because there was never any single, complete insurance policy before the trial court, the parties' agreement was wrought with ambiguity. Specifically, Exhibit 37, the "number 17" policy, is missing more than 40 endorsements and coverage forms that it describes, and the exhibit fails to set forth what was and was not covered by the agreement. It is this "policy" that American Family provided to Sherry for over a decade. (Tr. 314). At the very least, it establishes that there was an agreement between Sherry and American Family, and further that there was never a clear written definition of what losses American Family would or would not cover.

The threshold question of ambiguity must be resolved on the face of Exhibit 37. The trial court cannot have erred in concluding that the "policy" was ambiguous and

incomplete when, due to American Family's failings, the entire agreement was not before the court in the first place. American Family does not refer to Exhibit 41 or its Exhibit A. Instead, it now calls its appendix document "policy 24x35041-17." This makes the expression of intent as to coverage even more ambiguous. Both 41 and 37 bear the same policy number, coverage dates, and premiums, but only 41 contains the coverage language on which American Family relies. Exhibit 37 merely states that it would cover claims for property damage above the amount of its described deductible. (Appx. A22, A51). And neither contains all the endorsements or exclusions that it purports to incorporate.

The coverage language American Family seeks to make binding was created more than *three years* after American Family says the "policies" containing it were sold to Sherry. American Family insists that Mr. Sherry, on cross examination, "acknowledged … he had, in fact, received the insurance policy in question." (Br. of Appellant 11). But Mr. Sherry actually testified: (1) "I believe I got -- I thought I had the full policy" (Tr. 294); (2) "I don't learn until a year or so ago that the policies that I was receiving were not complete" (Tr. 295); and (3) referring to Exhibit 41, "I haven't received one that -- that thick" (Tr. 314). Mr. Sherry never had the opportunity to accept or reject any of the language upon which American Family relies. No document in the Record contains the coverage language American Family seeks to make binding on Sherry was not created years after the period it purports to cover. All of them are missing numerous endorsements and exclusions to which they refer. The expression of the parties' intent as to what the agreement would cover was ambiguous.

The burden was on American Family to prove by substantial evidence the existence of contract terms it seeks to make binding on Sherry. *Entwistle v. Mo. Youth Soccer Ass'n*, 259 S.W.3d 558, 575 (Mo. App. E.D. 2008). American Family did offer its Exhibit A, Plaintiff's Ex. 41, but Mr. Sherry denied ever having received that policy. (Tr. 314). Where a contract proponent fails to provide evidence of any discussion, offer, or acceptance with respect to the terms of the contract it alleges, the responding party cannot be bound to those terms. *Entwistle*, 259 S.W.3d at 575; *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715, 718 (Mo. App. S.D. 2008).

At best, American Family's recitations from Exhibit 41 and its stipulation that Sherry paid it premiums rise to the level of "some evidence." At worst, they are proof that American Family created documents after the loss and smack of fraud. Either way, the terms of coverage were patently ambiguous, justifying the trial court's decision to let the jury decide whether the parties intended that the loss at issue would be covered.

**2. The various insurance agreement documents are latently ambiguous as to coverage intent.**

Even assuming that a single, written document controls Sherry's current claim, which is not so, the written policy upon which American Family relies still was ambiguous. American Family does not identify to which exhibit it refers when discussing "the policy," and Sherry therefore will discuss generally the language containing Exhibits 41 and 48A, which are the same as American Family's Exhibit A. Page 1 of coverage form CG00 01 07 98 states:

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V- Definitions.

SECTION I • COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insurance agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

(Ex. 41, 48A).

Under this language, a word or phrase has a special meaning if it is in quotation marks. The phrase "legally obligated" is not in quotations, and therefore has no special meaning within the policy. But this phrase is a threshold element to an insured obtaining coverage under this insurance agreement. In its brief, American Family proffers one explanation of what "legally obligated" means: "If the lawsuit that had been threatened by the homeowners had been filed and if that lawsuit had resulted in a verdict and judgment against D.R. Sherry Construction Company, then at that point the company would have been 'legally obligated' to pay damages resulting from property damage." (Br. of Appellant 43).

Certainly, this is one possible meaning of this phrase. But it is not the *only* possible meaning of this phrase. Latent ambiguity arises "where the particular words, in themselves clear, apply equally well to two different objects." *Busch*, 597 S.W.2d at 197.

(quoting *Univ. City v. Home Fire & Marine Ins. Co*., 114 F.2d 288, 295 (8th Cir. 1940)). Likewise, as American Family points out, "[a]n ambiguity arises where there is *duplicity*, indistinctness, or uncertainty in the meaning of the words used in an insurance contract." (Br. of Appellant 28-29) (quoting *Kyte v. Am. Family Mut. Ins. Co*., 92 S.W.3d 295, 298-99 (Mo. App. W.D. 2002)) (emphasis added).

In this case, this duplicity exists. Though American Family says in once instance that "legally obligated" means a judgment, at trial its agent agreed that "legally obligated" also could mean entering into a contract:

> Q. [Mr. Davey] If you enter a contract with somebody, would you agree with me that you're legally obligated to that person?
>
> A. [Mr. Barnhart] I would say yes.

(Tr. 583).

As a third alternative, under the doctrine of *ejusdem generis*, "legally obligated" might connote a "suit," as referenced in the same paragraph. *Ejusdem generis* is a canon of construction under which, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). According to American Family in § V(17) of form CG 00 01 07 98 (Appx. of Appellant A-23; Ex. 41, 48A), a "suit" includes "any other alternative dispute resolution." In interpreting its own policy, American Family admitted that alternative dispute resolution encompasses mediation. (Tr. 570). Therefore, a third potential meaning of "legally obligated" is something more than a mere contract, but less than consummated litigation.

In any event, the phrase "legally obligated" "appl[ies] equally well to … different objects," *Busch*, 597 S.W.2d at 197 – or, in the context of this case, different outcomes. That this is ambiguous and should be resolved in favor of coverage is especially compelling in light of Missouri's overarching public policy that an insurance policy "will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citations omitted).

Another latent ambiguity is in § I.A of both Exhibits 41 and 48A, which refers to paying for "property damage." While the exhibits do provide a definition for this term, they inconsistently distinguish between various types of property. For example, of the total advance premium of $6,279.00, Sherry was charged $3,520.00 in premiums for coverage relating to "contractors-subcontractors work-in connection with building construction, reconstruction, repair or erection-one or two family dwellings," and an additional $6.00 for "real estate development property." (Ex. 41, 48A). These two categories of premiums are for real property. The definition of "property damage," however, refers only to injury to "tangible property." In contrast, the definition of "your product" refers specifically to "goods or products" other than real property. On its face, the "your product" exclusion does not apply to real property and coverage is provided consistent with the premiums charged.

Conversely, the "damage to property" exclusion refers generally to property, without designation of tangible or real property. It is unclear whether exclusion "j" purports to exclude damage to property, tangible property, or real property. If it does exclude damage to real property, then it is in contrast to both the premiums charged and

the "your work" exclusion, which otherwise provide coverage for damage to real property. This clause goes on to exclude coverage for "*premises* you sell…" (emphasis added). "Premises" is undefined in the exhibits. BLACK'S LAW DICTIONARY defines "premises" in the context of "estates and property" as "land with its appurtenances and structures thereon." 1180-81 (6th ed. 1990).

This section is an *exclusion*. In other words, the insurance agreement states that it does not apply to property damage to land for buildings that the policyholder sells. Sherry is in the business of developing residential real estate. It sells houses. The policy charges premiums and purports to provide coverage for real estate in one section, but then takes away that same coverage in another section. As a further demonstration of the ambiguity surrounding "property," the term "premises" is used in the commercial property coverage portion of Exhibits 41 and 48A (but not 37), where it specifically refers to Premises 002, as opposed to Premises 001, which is identified in the commercial liability part. (Appx. of Appellant A-82). In both instances, the term "premises" refers to a street address, leading to the inevitable conclusion that when the policy uses the word "premises," it is referring to land. The conclusion that "premises" refers to land (although treated separately from "building") can only be reached by reference to other, missing sections of the policy – sections that American Family characterizes as "irrelevant to the present lawsuit." (Br. of Appellant 29).

Of course, the term "premises" is not a bar or gateway to coverage in this case. Rather, it is one of many examples of how understanding the meaning of a word in a written instrument requires review of the entire instrument and, in the absence of a

complete policy in this case, this could not be done. American Family argues that the Court should disregard the missing sections of these policies because *it* did not rely on them. But Sherry may have needed to rely on them. There is no way Sherry or the trial court could ever know whether the missing language changed the meaning of other essential language that American Family insists is "consistent." (Br. of Appellant 28).

Therefore, even if the Court were not bound to view the evidence in a light most favorable to Sherry, and even if American Family were correct that Exhibit 41 (its Exhibit A) were the single policy, that document is wrought with ambiguity on the essential terms of what the parties actually intended it would cover and not cover. More importantly, because the policy was incomplete, it was impossible for the trial court to interpret it as a pure question of law. Whether the parties intended that American Family would cover Sherry's claimed loss was a question of fact for the jury to decide.

**3. *Opies Milk Haulers* does not apply.**

In *Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co.*, 775 S.W.2d 300 (Mo. App. W.D. 1988), the Court of Appeals reversed a judgment against an insurance company because the trial court had submitted to a jury the issue of whether the insurance policy covered the plaintiff's loss. American Family argues that *Opies* is analogous, and should apply to reverse the judgment in this case. (Br. of Appellant 22-23).

But American Family omits one crucial, distinguishing factor: unlike in this case, the trial court in *Opies* "did not find any ambiguity in the policy," and "there was no conflict in the evidence on the facts to be considered in resolving the question of

coverage." 775 S.W.2d at 302. Instead, in that case, both parties agreed on what the language of the insurance contract stated. *Id.* There was a single policy. *Id.*

Conversely, in this case, the trial court *did* find that the insurance policy's language was ambiguous, as shown by its rejection of American Family's motions for summary judgment, to add a declaratory judgment count, for directed verdict, and for judgment notwithstanding the verdict. Furthermore, the parties did not agree on which document even constituted the policy. Instead, there were multiple, diverging, conflicting exhibits, many of which were not even provided to Sherry prior to entering into or renewing the insurance agreement.

**D. American Family's "four responses" to Sherry's arguments that the insurance agreement was ambiguous as to coverage intent are untenable.**

American Family offers "four responses" to the notion that the insurance contract was ambiguous as to coverage intent and required the jury's resolution based on extrinsic evidence. (Br. of Appellant 26).

First, it suggests that the jury was not asked to resolve a factual dispute, and cites to the verdict director (L.F. 38-39) for support. The court found that the lack of a single policy made the entire contract ambiguous as to coverage and required extrinsic evidence to resolve that ambiguity. Accordingly, it asked the jury to determine, pursuant to MAI 26.06 (*see* Respondent's Point III, below), whether the cause of Sherry's loss "is specifically covered in plaintiff's insurance contract with defendant." (L.F. 38-39).

The parties disputed which document, if any, constituted their actual insurance agreement. The extrinsic evidence concerned whether the parties had intended that

American Family would cover Sherry's loss. The terms of coverage were ambiguous, and the court could not determine the parties' intent as a question of law. The jury thus was tasked with resolving that ambiguity as a question of fact. American Family's suggestion otherwise is without merit.

Second, American Family states flatly that the issue of whether a contract is ambiguous is a question of law. Of course, this is true. In this case, the trial court heard this question and answered, as a matter of law, that the language of the contract between Sherry and American Family was ambiguous as to its terms of coverage. Thus, "resort to extrinsic evidence [was] necessary," and "the construction of the agreement [was] for the jury [to decide] under proper instructions from the court." *Busch*, 597 S.W.2d at 198.

Third, American Family complains that neither the petition, any deposition, nor any interrogatory responses mentioned "ambiguity." It suggests instead that Sherry "dredged up the 'ambiguity' argument at trial as a means of prejudicing the jury against American Family; in reality, the argument had nothing to do with whether there is or is not coverage for plaintiff's claim under American Family's policy." (Br. of Appellant 26). Not only does American Family fail to explain why the lack of discussion over ambiguity in the petition and discovery documents should be transmuted into legal error by the trial court, but it also fails to mention the directed verdict arguments in which the parties discussed ambiguity at length (Tr. 443-55), as discussed above.

The parties could not even agree on which writing, if any, constituted the contract. This was not a case where the ambiguity was in a single word or phrase that the trial court could simply construe against the insurer and in favor of coverage. *See, e.g.*,

*Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992). This was not even a case of two competing policies, in which the jury could decide that one was the contract and one was not. Instead, there is no single, definitive, written policy at all. The question at issue was whether, based on the evidence submitted, the parties had intended that American Family would cover Sherry's loss. Under these circumstances, that was a question of fact that only the jury could resolve. *Teets*, 272 S.W. 3d at 462.

Finally, American Family asserts that all of the "factual disputes alleged by plaintiff are imaginary." (Br. of Appellant 26). But the Record belies otherwise. The absence of more than 40 endorsement forms in Exhibit 37 alone shows just how incomplete and ambiguous the insurance contract was.

American Family's only substantial attack on Plaintiff's claim of ambiguity addresses confusion among coverage dates. Citing to pages 497-98 of the Transcript, American Family states, "The evidence at trial established that the prior policy -- the so-called "Number 16" policy -- was initially in force from 9/18/01 to 9/18/02, but was extended to 12/5/02." (Br. of Appellant 26-27). But when asked why there were different dates, the insurer's witness, Mr. Barnhart, stated: "I don't know." (Tr. 498). Contrary to its contention, there was no testimony that this policy was "extended." Mr. Barnhart testified that it was *possible* that the affidavit coverage date would be different from the declarations page if, based upon *other* cases he "remembered," a policyholder requested an extension. (Tr. 498). But none of these statements "established" anything. They certainly did not establish that Sherry extended any policy.

Referring to the "number 16" policy and citing to pages 499-500 of the Transcript, American Family goes on to say, "The evidence further established that that policy was renewed for an additional year, at plaintiff's request, with a policy period to run from 12/5/02 to 12/05/03." (Br. of Appellant 27). But Mr. Barnhart was actually discussing policy "number 17." Also, the words "renew" and "request" do not appear in his testimony. There is no evidence that the "number 17" policy was ever renewed.

Moreover, American Family does not identify the "number 16" policy as Exhibit 48A. If it had, it would have to disclose that, about 30 pages in, the document contains a *second* common declarations page purporting to provide coverage under the policy from September 18, 2002, through September 18, 2003. While Exhibit 48A, the so-called "number 16" policy, purports to provide coverage as of August 15, 2003, so does Exhibit 41, the so-called "Number 17" policy. None of these dates are consistent with the one-year period that American Family attempts to use to explain away the glaring discrepancy in the documents. The insurer's failure to address this portion of Exhibit 48A is especially troubling given the following testimony by its agent, Mr. Barnhart:

> Q. All right. In terms of the No. 16 policy, the latest date that's referred to anywhere in there is sometime in 2002. Right?
>
> A. 12-5-2002.
>
> Q. All right. If the construction of this house that we're talking about started in March of 2003, does the number 16 policy have anything to do with this claim or this lawsuit?
>
> A. No.

Q. Can we set it aside and ignore it?

A. Yes.

(Tr. 499). American Family wholly fails to recite the actual text of Exhibit 48A (the "number 16" policy, rather than the "number 17" policy that it purports to be discussing), which plainly reflects coverage for the August 2003 date of loss. (Tr. 500).

A greater problem for American Family is that even though Mr. Barnhart testified he was "told" that Sherry requested new coverage, there was no evidence that the resulting policy was ever delivered to Sherry, let alone in time to reject the terms and acquire new coverage. (Tr. 578). Sherry cannot reasonably be expected to rely on it. *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697 (Mo. banc 1982). So, even if there was no discrepancy in the coverage dates, there was evidence that the policy changed, but no evidence of what it was changed from or what it was changed to. And there was no evidence that Sherry had any opportunity to review any such changed language. Indeed, the uncontroverted evidence is that the resulting documents were not even created until more than two years after the coverage expired. (Ex. 41, 48, 48A).

American Family then argues that Sherry's claim that the multiple policy documents make the agreement ambiguous is inept because the language among the various "policy" documents "was consistent and did not change." (Br. of Appellant 28). Again, however, the insurer fails to acknowledge or identify any exhibits. Exhibit 37 is policy number 24x35041-17. This "number 17" policy does not contain the terms "occurrence," "legally obligated," or "property damage." Similarly, Exhibit 41, also a "number 17" policy, is missing whole coverage forms.

It is perplexing and confusing as to which coverage form American Family refers in reciting the language on which it relies. No doubt, the trial court was equally as perplexed and confused. Page A-29 of American Family's Appendix is endorsement form CG 00 57 09 99, which plainly states that it replaces the other section that American Family recites from page A-22:

> This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART (OCCURRENCE VERSION)
>
> Paragraph 1. Insurance agreement of Section I - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following …

This replacement form refers to an "Occurrence Version," implying that there is a version of coverage version not based on an "occurrence." But at what point over the ten-year period Sherry was paying premiums to American Family did the insurer notify it that its insurance was being converted into an "occurrence" version? Even in its arguments, American Family confuses the so-called "consistent language." There is no evidence that this language was used anywhere within the insurance agreement with Sherry, let alone used consistently.

Which coverage endorsement is in play? Which constituted the unambiguous agreement from which the trial court could conclude, as a matter of law, whether the parties did or did not intend that there would be coverage for this loss? In construing an insurance contract, "the entire policy must be considered in determining the intention of the parties and not detached provisions or clauses." *Doty v. Am. Nat'l Ins. Co.*, 165

S.W.2d 862, 869 (Mo. banc 1942). In the absence of an entire policy from which coverage intent could be determined as a matter of law, the trial court had to submit that issue to the jury as a question of fact. *Teets*, 272 S.W.3d at 462.

American Family dismisses these manifold ambiguities by saying that the sections (or missing sections) of the policies to which Sherry refers are irrelevant, specifically the sections regarding notification, exclusions, and endorsements. But the notion that a conflict over the proper way for Sherry to notify American Family is irrelevant when the insurer specifically denies liability for vexatious refusal damages based upon the date it was notified is unreasonable. The exclusions and endorsements sections were necessary to understand the terms of coverage used in the context of the entire agreement. And though American Family may not have relied upon these sections, Sherry was denied the opportunity to rely upon them. Either way, their absence or conflict is relevant to the issue of ambiguity within the entire contract. *Teets*, 272 S.W.3d at 462.

American Family claims that a finding of ambiguity over the use of the word "property" stems from "confusion and plaintiff's mis-reading." (Br. of Appellant 29). It states that Sherry "failed to explain" the ambiguity. But at no time in this litigation has American Family explained why the various policy documents inconsistently distinguish between property, tangible property, goods, materials, real estate, buildings, and premises. If the policy is unambiguous in this manner, it should be easy to explain. Even American Family has trouble making sense of what the single policy, which has never materialized in this case, was supposed to mean. Therefore, what the parties intended in their insurance agreement was a necessary question of fact for the jury.

**E. Sherry presented a submissible case on its breach of contract claim.**

"A judgment NOV is a drastic action and should only be granted where reasonable and honest persons could not differ on a correct disposition of the case. *Dierker Assocs., D.C., P.C. v. Gillis*, 859 S.W.2d 737, 743 (Mo. App. E.D. 1993). The Court will interfere with a jury's verdict "only when there is a complete absence of probative fact" to support the verdict. *Yaeger v. Olympic Marine Co*., 983 S.W.2d 173, 185 (Mo. App. E.D. 1998).

A "submissible case" in a breach of contract action includes the following elements: (1) a contract between the plaintiff and the defendant; (2) rights of the plaintiff and obligations of the defendant under the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff. *Howe v. ALD Servs., Inc*., 941 S.W.2d 645, 650 (Mo. App. E.D. 1997). Sherry presented a submissible case on all of these elements. There was no "complete absence of probative fact" for any one of them.

American Family stipulated that there was an insurance agreement, under which Sherry's obligations were to make premium payments. (Tr. 234). It stipulated that Sherry met that obligation. (Tr. 234). American Family had an obligation to provide a defense and pay for certain losses, specifically to the house at issue in this case. (Tr. 133-34, 142, 290-91, 310-12, 316-17, 504-05). Sherry submitted a claim to American Family for a loss upon which a lawsuit was imminent, which American Family neither paid nor offered to defend. (Tr. 165-67, 173, 176). Sherry was damaged by American Family's breach. (Tr. 173, 231, 241). Plainly, Sherry made a submissible case for breach of contract, and the Court should affirm the trial court's judgment.

II. The trial court did not err in denying American Family's motion for directed verdict at the close of all the evidence and overruling American Family's motion for judgment notwithstanding the verdict or for a new trial *because* sufficient evidence supported the jury's verdict that American Family breached its insurance contract with Sherry *in that* evidence was introduced that (1) continuous exposure of the house to harmful soil conditions caused the damage to the home; (2) the damage occurred during the relevant coverage periods; (3) the damage resulted from an unforeseeable accident attributable to mistake; and (4) Sherry was legally obligated to the homeowner for that damage.

**(Response to Appellant's Points Relied On II and V)**

Standard of Review

American Family's second and fifth Points Relied On both allege that Sherry introduced "no evidence" of the elements of breach of contract, and thus the trial court erred in denying its motions for directed verdict, judgment notwithstanding the verdict, and a new trial. The insurer's fifth Point Relied On couches this in an argument that the jury's verdict was "against the weight of the evidence." (Br. of Appellant 19, 52). But when reviewing a jury's verdict,

> Questions as to the weight of the evidence are not subjects of appellate review. It is within the exclusive province of the trial court to determine if a jury's verdict is against the weight of the evidence. An appellate court interferes with a jury verdict only if there is a complete absence of probative facts to support a jury verdict.

*Yaeger v. Olympic Marine Co.*, 983 S.W.2d 173, 185 (Mo. App. E.D. 1998).

As to whether the trial court erred in denying American Family's motion for judgment notwithstanding the verdict, the standard of review "is essentially the same as for review of denial of a motion for directed verdict. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 (Mo. banc 2006). And, "In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Id.* at 457. "This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." *Id.*

* * *

In its second and fifth Points Relied on, American Family argues that the trial court erred in denying it a directed verdict, judgment notwithstanding the verdict, and a new trial on Sherry's breach of contract. It argues that Sherry introduced "no evidence" to meet its burden to prove the elements of breach of contract.

American Family's fifth Point Relied On argues only that the jury's verdict was "against the weight of the evidence." (Br. of Appellant 19, 52). The "weight of the evidence" is not a permissible subject during appellate review of a jury's verdict. *Yaeger*, 983 S.W.2d at 185. The Court should disregard American Family's fifth point of argument entirely, because it fails to present a submissible allegation of error. But to the

extent that American Family raises a question of whether there was substantial evidence,[2] the Record answers that there was.

As detailed in Respondent's Point I, above, the parties disputed the terms of the insurance agreement between Sherry and American Family to the point that the trial court could not determine their intent as to coverage. American Family argues that Sherry failed to introduce any evidence that there was an "occurrence" that left the insurer "legally obligated" to pay a sum to the homeowners, within the language of its "policy." But whether the terms "legally obligated" and "occurrence" were even part of the policy Sherry purchased was in dispute. In fact, these terms *do not* appear in Exhibit 37, the "policy" (missing numerous endorsements and exclusions) that Mr. Sherry received for all the years he was purchasing commercial general liability insurance from American Family.

The coverage paragraph mentioning those terms is only in American Family's Exhibit A (the "policy" it sent to Sherry's counsel along with its reservation of rights letter, which Sherry introduced as Exhibit 41), which it created in anticipation of legal

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[2] American Family does not actually present this question, and thus the Court should consider it abandoned. Appellant's fifth Point Relied On only contends that the verdict "was against the weight of the evidence." (Br. of Appellant 19). "[A]n argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002).

proceedings years after Mr. Sherry purchased the insurance. Because the existence of this language itself was in dispute, and was itself an issue of fact for the jury to decide, "occurrence" and "legally obligated" were not elements of Sherry's burden of proof.

But even if Sherry did face this burden, the Record shows that it was met. Sherry presented evidence that it was legally obligated to the homeowners as the result of an occurrence during the applicable coverage period.

**A. Sherry presented evidence that the damage to the home was an "occurrence" within meaning of the supposed "policy" on which American Family relies.**

Citing to its Exhibit A at page A-22 of its Appendix, [3] American Family argues, "The 'Insuring Agreement' of the insurance policy states, in part, that American Family will pay those sums that the insured becomes legally obligated to pay as damages because of property damage that is caused by an 'occurrence.'" (Br. of Appellant 34). But this language does not appear in Exhibit 37, the "policy" American Family provided to Sherry while Sherry was paying premiums to American Family for a commercial general liability policy.

Instead, Exhibit 37 maintains that American Family will pay for property damage losses incurred to any person, including an organization: "Our obligation under the Bodily Injury Liability and Property Damage Liability Coverage to pay damages on your

[3] A different endorsement within the same document expressly purports to supersede and replace this language. (Appx. of Appellant A-29).

behalf applies only to the amount of damages in excess of any deductible amounts stated in the schedule above as applicable to such coverages." (Ex. 37).

At trial, American Family only offered into evidence one version of the policy: its Exhibit A (Plaintiff's Exhibits 41), which, like Plaintiff's Exhibit 37, was missing numerous endorsements and exclusions. But the insurer did not object to the admission of the other "policy" documents as well. Whether the actual intent of the parties was that "American Family will pay [only] those sums that the insured becomes legally obligated to pay as damages because of property damage that is caused by an 'occurrence'" was in dispute as a matter of fact, and the jury was entitled to decide this for itself. It was not unambiguously part of the agreement, and the jury could decide whether the parties intended this. But even if this language were part of the policy, Sherry presented evidence to meet its terms.

American family argues that "occurrence" is an accident, and an "accident" is an "unforeseeable" event. It then accuses Sherry of having foreseen the accident because Mr. Sherry had an ownership interest in another company that placed fill dirt in the neighborhood at issue. It then contends that Mr. Sherry "admitted" it was foreseeable that a house built on fill dirt could settle. From this, American Family concludes that because Mr. Sherry had knowledge of fill dirt, and fill dirt may lead to settlement, his company also foresaw that this individual house would settle.

In so arguing, however, American Family only raises questions of fact: (1) could Sherry have foreseen the degree of settling and subsequent damage to the home, and if so, (2) was the damage sufficiently foreseeable so as to change the character of the loss

into a designed or expected event? The jury resolved these questions in Sherry's favor, based on the evidence.

"An 'accident' is not necessarily a sudden event; it may be the result of a process." *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 672 (Mo. App. E.D. 2007). The determinative inquiry is whether the insured foresaw or expected the injury or damages. *Id*. Mr. Sherry testified that his company did not foresee that the house it had built would suffer irreparable damage from settling. (Tr. 276-77). American Family did not rebut this testimony. It produced no evidence to support some alternative theory that Sherry knew or expected that this loss was going to occur. Indeed, courts have found that unforeseen and unintended settling resulting in structural damage to a building is an "occurrence" under the terms of an American Family commercial general liability policy. *See, e.g., Am. Family Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d. 65, 74-75 (Wis. 2003) (cited in *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 794-95 (8th Cir. 2005)).

American Family attempts to support its argument by misquoting the Record. It states, "Mr. Sherry admitted that he knew the house was built on fill dirt and he admitted that he knew that settlement was a foreseeable risk of building on such dirt." (Br. of Appellant 38). In reality, however, the *only* person who said this at trial was American Family's counsel. (Tr. 454, 579, 638). Instead, Mr. Sherry testified that *if* a house built on fill dirt *also* had insufficient piering, then it is foreseeable that that hypothetical house *could* sink. (Tr. 291-93). Mr. Sherry's supposed "admission" is inextricably tied to the sufficiency of piers. There was no evidence either that house in this case was improperly

piered or that the damage to it was caused by insufficient piering. The only evidence as to piering was that the piers in this case passed a county inspection. (Tr. 263).

Then, American Family suggests that Mr. Sherry sought to relieve his company of responsibility for the property damage by introducing evidence that the piering and other work on the house had been inspected and approved by county building inspectors and private engineers before the damage occurred. (Br. of Appellant 38). Sherry did not attempt to "relieve" itself due to the inspections. If anything, it relied on the inspection approvals as proof of the sufficiency of the piers, negating whatever foresight it might have possessed as to whether the house at issue would settle. But the presence or degree of Mr. Sherry's foresight was a question of fact. The jury may not have even reached it, because American Family premises its entire argument on a notion that fill dirt is the same as "bad soil." Nothing in the Record makes this correlation.

In any event, the focus of the inquiry is on Mr. Sherry's foresight, as the representative of his company. *Columbia Mut.*, 239 S.W.3d at 672. Mr. Sherry testified repeatedly, "I can't design a home to -- to do this." (Tr. 188, 194, 209-10, 229). American Family tried to recast "foreseeable" into "gamble." It accused Sherry of taking a gamble in building this house. Mr. Sherry responded, "If I would have gambled, I wouldn't have called for an inspection from the Platte County inspector that inspected those piers and deemed them to be correct to allow the foundation company to go ahead and pour them." (Tr. 263). The jury was free to reject American Family's baseless arguments that Mr. Sherry possessed advance knowledge that the house would settle.

American Family discusses *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. App. S.D. 1999), at length. It relies on that case for the proposition that "if plaintiff built the house out-of-level, that construction was not an 'accident'; it was instead the result of faulty, defective construction by plaintiff, for which there is no coverage." (Br. of Appellant 36).

In *Hawkeye*, a couple and a general contractor entered into a contract wherein the contractor would build a house for the couple. 6 S.W.3d at 421. The general contractor "hired subcontractors to perform most of the work." *Id.* The contract between the couple and the general contractor "specifically provided that [the general contractor] would be liable for any acts or omissions of the subcontractors." *Id.* The general contractor "also warranted that all of the work on the house would be of good quality and free from fault and defects." *Id.* Thereafter, when the house was nearing completion, the couple discovered numerous defects "in the house, both in materials and workmanship, that 'arose out of the work or operations' of [the] subcontractors." *Id.* The contractor had "failed to build [the] house in a workmanlike manner and in accordance with [the parties'] contract." *Id.* In response, the general contractor "'walked off and abandoned' the job site." *Id.*

The couple sued the general contractor for breach of contract and warranties. *Id.* The contractor notified its commercial general liability insurer of a claim due to the couple's lawsuit. *Id.* at 422. The insurer hired defense lawyers under a reservation of rights. *Id.* at 421-22. The contractor rejected the insurer's reservation of rights defense, the couple obtained a judgment against the contractor for damages, and the insurer then

sought a declaratory judgment against both the couple and the contractor that its commercial general liability policy did not insure the contractor against the couple's claims. *Id.* at 422. The trial court agreed, granted the insurer summary judgment, and both the couple and the contractor appealed. *Id.*

The Court of Appeals discussed the undisputed language of the insurance policy in detail, and affirmed the trial court based on that language. *Id.* at 422-27. It held that (1) coverage for "Products/Completed Operations" was part of the policy and, therefore, was not a missing coverage part for which the insured had paid; (2) the contractor's breach of contract and warranties was not an "accident" and thus was not an "occurrence"; and (3) a "Damage to Property" exclusion barred coverage. *Id.*

All the Court of Appeals' determinations were made based on the unambiguous, undisputed language of the insurance policy at issue. Indeed, it expressly noted that "the policy cannot be condemned as ambiguous." *Id.* at 424. Moreover, it premised its holding on the fact that the "uncontroverted facts establish that [the couple's] losses stem *solely* from [the contractor's] breach of his contractual obligations, breach of his express warranties, or breach of implied warranties in connection with this construction," which "cannot fall within the term 'accident.'" *Id.* (emphasis in the original) (citation omitted).

American Family argues that this case is analogous, and that "this Court should reach the same conclusion in the present case and find that American Family's policy does not provide coverage for plaintiff's claim." (Br. of Appellant 39). But in relying on *Hawkeye*, the insurer changes its argument from one based on the notion that property

damage could be foreseen because the house was built on fill, to one premised on a supposed breach of contract. (Br. of Appellant 39). Its position is untenable.

The differences between this case and *Hawkeye* are manifold. In *Hawkeye*, the damage stemmed "solely" from a breach of contract. There was no evidence in this case that Sherry failed to build the house in a workmanlike manner, in breach of a contract with the homeowners. Indeed, the evidence was that Sherry did "the right thing" by entering into a contract with the homeowners to repurchase the home. (Tr. 174). The damage in this case was that the house settled out-of-level, not that there were "numerous defects in the house, both in materials and workmanship." There was no evidence that Sherry "walked off and abandoned" any job site.

*Hawkeye* is also procedurally distinguishable from this case. That case stemmed from a breach of contract action against the contractor; the basis of the claim was "solely" a breach of contract dispute. The insurer initiated the coverage dispute that the Court of Appeals eventually decided and by requesting a declaratory judgment, on which it obtained summary judgment. Thus, there was no factual dispute; the builder even conceded that "the house was defectively constructed." *Hawkeye*, 6 S.W.3d at 426.

The report of American Family's expert, John Evans, did state that the problem with the house was attributable in part to out-of-level construction. Mr. Evans's report was controverted by the testimony of Frank Gragg. (Ex. 6; Tr. 318). Mr. Gragg explained, step-by-step, how he personally had checked the house for level at every phase of construction. (Tr. 318-46). The house was level when he arrived in April of 2003, it was level at every single phase of construction, and it was level when he walked off the

job site in May of 2003. Despite Mr. Evans's after-the-fact conclusions, there was sufficient evidence for the jury to conclude that the house was constructed level. *Hawkeye* is inapplicable. There plainly was a factual dispute as to the quality of construction in this case, which the jury resolved in Sherry's favor.

This case is more analogous to *Columbia Mut.*, 239 S.W.3d at 667. There, a couple hired a general contractor "to pour a concrete foundation for a house they intended to build." *Id.* at 669. The contractor obtained the concrete from a subcontractor. *Id.* "Soon after [the contractor] poured the concrete, the [couple] learned the concrete foundation did not meet the [county] Building Code's minimum concrete strength requirements, and the Building Commissioner issued a 'stop work order' on the [couple's] house." *Id.* Because "the sub-floor had been installed and the framing had commenced on the home," "[i]n order to correct the problem, the framing and sub-floor had to be removed and the foundation had to be removed and re-poured." *Id.* The couple filed suit against the contractor for breach of contract, breach of warranties, and products liability, though by the time of trial only the products liability count remained. *Id.*

The contractor turned the suit over to his commercial general liability insurer, who initially provided a defense but then denied coverage and withdrew entirely. *Id.* The contractor filed a third-party petition against the insurer, alleging vexatious refusal and bad faith. *Id.* at 670. Thereafter, the insurer requested a declaratory judgment that its policy did not cover the contractor's loss. *Id.* The trial court declared that there was coverage and that the contractor was liable to the couple, and the insurer appealed. *Id.*

On appeal, the insurer alleged that there was no "occurrence" or "property damage" within its policy. *Id.* at 671. It contended that the underlying claim was "solely a breach of contract case," and thus it did not trigger any duty to cover. *Id.* The Court of Appeals affirmed on the issue of coverage. *Id.* at 675. It held that the facts were distinguishable from a pure breach of contract action. Whereas a pure failure of a contract might not constitute an "occurrence," a loss is not attributable solely to a breach of contract when "a defective product was delivered in a dangerous condition to" a buyer. *Id.* at 672. Moreover, the loss was an "accident," because "neither the defect in the concrete nor the damage to the home was foreseeable." *Id.* There was also property damage, because the home was damaged such that it was effectively rendered "useless." *Id.* at 673. The case was not predicated on a breach of the construction contract, and the insurer had to provide coverage.

The same is true in this case. Sherry hired a subcontractor to build the home's foundation. After the home was sold, it was determined that the subcontractor had built the foundation on poor soil. The home was rendered useless, and the homeowners threatened a lawsuit. Sherry's commercial liability insurer refused to provide a defense, and instead told Sherry to "put up or shut up." The loss was not a breach of contract between Sherry and the homeowners. Rather, the house became defective due to the existence of a dangerous condition, and neither the defect nor the damage was foreseeable. (Tr. 187-88). This was an "occurrence." As well, under American Family's Exhibit A, its "policy" presumptively covers work performed by a subcontractor. (Appx.

of Appellant 16). This case is distinguishable from a breach-of-contract-loss case like *Hawkeye*, and American Family had to defend and provide coverage.

Plainly, there was evidence from which a reasonable juror could conclude that the damage to the home was an unforeseeable accident – an "occurrence" in American Family's parlance.

**B. Sherry presented evidence that it was "legally obligated" to the homeowner.**

As with an "occurrence," whether "legally obligated" was an element of the agreement that Sherry had to prove was in dispute. (Tr. 582-583). The jury resolved this question in Sherry's favor. But even Sherry did have to prove this element, it presented evidence that it was legally obligated to the homeowners.

At trial, Sherry produced a settlement agreement with the homeowners in which Sherry repurchased the home. (Tr. 231). That agreement obligated Sherry to pay the homeowners to repurchase the home. The insurer argues are that a "legal obligation" only arises where a judgment is taken against an insured. (Br. of Appellant 43). At trial, however, American Family's agent, Mr. Barnhart, admitted that an insured could become "legally obligated" if it enters into a contract. (Tr. 582-83). Now, however, it denies this.

But because the term "legally obligated" is undefined even in American Family's Exhibit A, and because, as Mr. Barnhart admitted, a legal obligation plainly can include a contractual obligation, there is ambiguity within the policy. Ambiguity within an insurance policy "must be strictly construed against the insurer" and in favor of coverage. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210-11 (Mo. banc 1992). An

insurance policy "will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997).

Mr. Sherry testified that his company negotiated the settlement agreement to avoid a lawsuit. (Tr. 267). American Family's agent, Mr. Barnhart, testified that mediation is a form of alternative dispute resolution that can result in a legal obligation under its policy. (Tr. 570). Negotiations to avoid a threatened lawsuit that culminate in a resolution of the claim are no different than a settlement entered into after an action is filed. This is exactly what Sherry did. Its "legal obligation" to pay the homeowners was something more than a simple contract made from its own volition.

Sherry is in the business of building and selling homes, not repurchasing them. It only repurchased the home at issue when it was threatened with a lawsuit for which American Family's only response was to tell the homeowners to "put up or shut up," and thereafter abandon Sherry entirely. Sherry had no choice but to enter into a settlement agreement to repurchase the home, and then bring this action against its insurer.

Either the jury rejected that the term "legally obligated" was a part of the agreement, as it was entitled to do, or it found that Sherry was "legally obligated" to the homeowners within the meaning of that term. Regardless, the jury resolved the question in Sherry's favor, based on the evidence. Sherry produced evidence to support the jury's determination, and American Family's argument otherwise is without merit.

### C. Sherry presented evidence that that the loss occurred during the applicable coverage period.

American Family argues that there was no evidence that Sherry's loss occurred during the applicable coverage period. The coverage dates under each of the partial policies before the trial court conflicted greatly, and the policies purported to overlap in some instances.

At trial, the parties disputed the insurance policy's end date. Whereas American Family contended that Sherry canceled its policy in September 2003 (Tr. 539), Sherry maintained that the policy ended on December 5, 2003, which is the end date in the declaration page of even the document that American Family now holds out as "the policy." (Ex. 48A; Appx. of Appellant 7). Because this Court views the evidence in a light most favorable to the judgment, *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 457 (Mo. banc 2006), it must view the policy has having ended on December 5, 2003. Sherry presented evidence that the property damage at issue occurred between December 5, 2002, and December 5, 2003. In fact, expert reports, direct testimony, and the insurer's own records establish the date of loss was August 15, 2003.

Mr. Sherry testified that it was not his intention to design a house to move, nor could he have done so. (Tr. 187-88). The movement of the home was the property damage at issue in this case. Indeed, as set out in Exhibit 31, the homeowners' demand, their main concern was the out-of-level condition that existed and that would continue to exist even after repairs. As explained in both Mr. Sidorowicz's expert report (Ex. 1) and

American Family's own reported "date of loss" (Tr. 537, 554), the correct date of loss was August 15, 2003. The damage occurred over time until it became apparent.

Mr. Barnhart, American Family's agent, testified that he initially recorded the date of loss as August 15, 2003. (Tr. 537). He then admitted to having changed the date of loss to October 1, 2003, without any investigation or cause:

> Q: So the date of loss that you picked, without any investigation, is October 1st of 2003; and lo and behold, we get an affidavit back that says no coverage as of October 1st of 2003. Isn't that the sequence of events? Do I have that down correctly?
>
> A: Yes.
>
> …
>
> Q: And somewhere in there you decide, without any investigation, that October 1st was the date of loss; it just happened to be about 13 days after American Family terminated the policy. Isn't that correct?
>
> A. That is correct.

(Tr. 539, 552).

Sherry began construction on the home in March of 2003, and sold it the following August. The coverage period was December 5, 2002, through December 5, 2003. (Ex. 48A). American Family recorded the date of loss as "August 15, 2003." (Tr. 537). This evidence, standing alone, is enough for a reasonable juror to conclude that both the loss and the damage occurred during the applicable coverage period.

**D. Because the house's out-of-level condition was progressive damage to property, rather than a personal injury that happened at a specific time, the fact that the damage may not have been discovered until after the coverage period is irrelevant.**

Sherry anticipates American Family will respond that the evidence that the property damage occurred during the coverage period was insufficient under *Shaver v. Ins. Co. of N. Am.*, which holds that "the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the alleged wrongful act was committed, but is the time *when the complaining party was actually damaged*." 817 S.W.2d 654, 657 (Mo. App. S.D. 1991) (emphasis in the original). But it is well-settled in subsequent authority that *Shaver*'s injury-in-fact doctrine does not apply to progressive injuries to property such as the loss at issue in this case. *See Scottsdale v. Ratliff*, 927 S.W.2d 531, 534 (Mo. App. E.D. 1996); *Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 393 (Mo. App. E.D. 2007). Though this Court has not yet settled this issue, the difference between the injury at issue in *Shaver* and the losses in this case, *Scottsdale*, and *Stark Liquidation* makes it more reasonable for the Court to determine that *Shaver*'s injury-in-fact doctrine is inapplicable.[4]

[4] It is unnecessary for the Court to reach this issue. The evidence at trial was that American Family itself recorded the date of loss as August 15, 2003, which occurred before the coverage period ended on December 5, 2003. Even if the jury believed Mr. Barnhart's forgery of October 1, 2003, the injury still occurred before December 5, 2003.

In *Shaver*, a general contractor constructed a building in the early 1970s. 817 S.W.2d at 655. More than a decade later, a plaintiff alleged that in 1981, he was severely injured by the contractor's negligence in constructing an air shaft in the building. *Id.* The contractor and the plaintiff settled the claim, and the plaintiff sought an equitable garnishment of two insurers with whom the contractor had commercial general liability policies between 1973 and 1975. *Id.* The trial court entered summary judgment against the plaintiff, and he appealed. *Id.*

Quoting *Kirchner v. Hartford Accident & Indem. Co.*, 440 S.W.2d 751, 756 (Mo. App. 1969), the Southern District of the Court of Appeals held that "the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the alleged wrongful act was committed, but is the time *when the complaining party was actually damaged*." 817 S.W.2d at 657 (emphasis in the original). Because the plaintiff's "injury occurred in 1981, more than five years after the expiration of the last policy period of the two policies which [were] the subject of [his] action," he had presented no evidence that there was an "occurrence" within the policy period of 1973-75. *Id.* at 657-58. Under the specific language of the insurance policy, which was not in dispute, injuries occurring after the period in which the contractor was operating in the building were excluded from coverage. *Id.* at 658.

The accident at issue in *Shaver* was the plaintiff's specific, bodily injury, which plainly occurred after the dates of coverage. The injury in *Shaver* was different than a situation in which "some damage … had taken place" and then "progressed up to the time

of discovery." *Scottsdale*, 927 S.W.2d at 534. "*Shaver* does not support the claim that progressive damage does not occur until it is discovered." *Id.*

In *Scottsdale*, a homeowner couple alleged that their home sustained property damage because an exterminator was negligent in inspecting it for termites. *Id.* at 532. The exterminator reported there were no termites. *Id.* A year later, the couple discovered that, in fact, their home was infested with termites. *Id.* The exterminator's commercial general liability insurer did not wish to defend against the claim, and sought a declaratory judgment that the allegations did not constitute an "occurrence" within the meaning of its policy with the exterminator, which was in place during the period in which the negligent inspection had taken place, but had expired by the time when the couple discovered the infestation. *Id.* The trial court granted summary judgment to the insurer, and the couple appealed. *Id.*

On appeal, the insurer argued that it was not obligated to defend "because 'the damage did not occur during the policy period, and, therefore, no occurrence resulted as defined by [the exterminator's] policy definition,' citing *Shaver*." *Id.* at 534. The Eastern District of the Court of Appeals disagreed:

> *Shaver* is not at all comparable. That case charged negligence in the design of a building by providing inadequate access space, as a result of which an employee of a maintenance firm was injured more than five years later. The homeowners appear to charge in their petition that some damage, or at least some infestation, had taken place when the inspection was made and that because steps to control the damage were not taken, it progressed up to

> the time of discovery. Some of this damage necessarily occurred while the policy was in force, and this is sufficient to require a defense. *Shaver* does not support the claim that progressive damage does not occur until it is discovered.

*Id.*

This case is analogous. Damage to the home – movement – occurred because the foundation was accidentally built on poor soil during the coverage period of Sherry's policy with American Family. Because steps to control this were not taken, it progressed up until the time of discovery. Damage necessarily occurred while the policy was in force, and this is sufficient to trigger the policy's coverage provisions.

*Shaver* does not support the claim that the progressive damage in this case did not occur until it was discovered, because there was evidence that the home's movement began shortly after the homeowners closed on the home. (Ex. 1). Further, Mr. Evans's testimony was he found that "There were foundation cracks and sheet rock cracks that do indicate movement from the time it was built." (Ex. 28, p. 13). The fact that this movement simply became apparent later cannot be a bar to coverage.

In *Shaver*, the Court of Appeals did not outline the facts of the underlying injury aside from saying that the plaintiff fell from a vent shaft. 817 S.W.2d at 655. But if he fell as a result of a defective construction design, then his damage first occurred when he hit the ground. The fall would have occurred over a very short period. In contrast, the house in this case moved over the past five years. The damage did not occur when the movement ends, but rather when it began. Due to the nature of the property, "moving"

equals "damage." Houses are not designed to move. (Tr. 187-88). The movement, as evidenced by both parties' experts, began at or near closing, which comports with American Family's recorded date of loss: August 15, 2003.

The Eastern District has thoroughly and rightly distinguished *Shaver* and similar personal injury cases "from those involving progressive damage to property." *Stark Liquidation*, 243 S.W.3d at 394. In *Stark Liquidation*, a farmer purchased apricot trees from a seller to plant on his farm. *Id.* at 389. "Over the next three years, although the trees grew and developed, they failed to yield 'commercial quantities' of apricots, and in fact, many of the trees failed to produce any apricots at all." *Id.* When the farmer explained this to the seller, the seller submitted a claim to its commercial general liability insurer with whom it had a policy at the time it sold the farmer the trees. *Id.* The insurer repeatedly denied coverage on the basis that the "occurrence" had not taken place within the applicable coverage period. *Id.* at 389-90. The farmer and the seller eventually settled, and then both sought a declaratory judgment that the insurer was bound to cover the loss. *Id.* at 390-91. The trial court granted them summary judgment. *Id.* at 391.

On appeal, the insurer argued that *Shaver* applied to bar coverage, because the "occurrence" of the apricot trees not bearing fruit occurred after the coverage period. *Id.* at 394. Citing *Scottsdale*, the Court of Appeals again disagreed:

> *Shaver* … is inapplicable to the present analysis, because it did not address the loss of use of land resulting from negligently sold crops, but rather involved physical injuries resulting from a negligently designed product. … Shaver and the personal injury line of cases [are distinguishable] from those

> involving progressive damage to property. … 'Shaver does not support the claim that progressive damage does not occur until it is discovered.' … Rather than restricting coverage only to the period of time after the plaintiff ha[s] discovered the damage, we interpret[] the injury as a continuing one, beginning at the time of the negligen[ce] and continuing up until discovery. Thus, we f[ind] that as a result of the continuing harm, 'some of this damage necessarily occurred while the policy was in force[.]'

*Id.*

In *Stark Liquidation*, the record reflected that there was "continuing damage" to the farmer's orchard caused by the apricot trees. *Id.* As a result of the tree-seller's negligence, the farmer lost the use of his land. *Id.* His loss *began* during the policies' period, continuing until he discovered that that the trees were unable to produce fruit as a result of the seller's negligence. *Id.* Accordingly, the insurer "had a duty to defend [the seller] against [the farmer's] lawsuit." *Id.*

Once again, this case is analogous. There was continuing damage to the home – movement – because the foundation accidentally was built on poor soil. As a result, the homeowners' house was unusable. The loss began during the period of Sherry's policy with American Family, continuing until the homeowners discovered that the house had settled out-of-level and was moving. Accordingly, American Family had a duty to defend against the homeowners' claims and, ultimately, to cover Sherry's loss.

The personal injury principles applied in *Shaver* are inapplicable to this case. Although this Court has never reached this issue, the United States Court of Appeals for

the Eighth Circuit "previously predicted that Missouri would apply an exposure theory of damages." *Nationwide Ins. Co. v. Cent. Mo. Elec. Coop., Inc.*, 278 F.3d 742, 747 (8th Cir. 2001) (citations omitted). Most American jurisdictions agree with the Eastern District's discussion of the difference between single, time-specific personal injury claims and progressive damage to land and fixtures. "[C]overage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages." *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 808 (4th Cir. 1998). In this case, both direct, expert evidence and American Family's own records and admissions establish that the property damage at issue occurred within the applicable coverage period. The fact that the homeowner did not discover the damage until after the policy period is of no consequence.

The Eastern District's analysis of this type of claim is also consistent with Missouri's public policy. The longstanding law of Missouri is that "insurance is designed to furnish protection to the insured, not defeat it." *Krombach*, 827 S.W.2d at 210 (citing *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623, 626 (Mo. banc 1979)); *see also Brugioni v. Maryland Cas. Co.*, 382 S.W.2d 707, 710-11 (Mo. 1964). Thus, an insurance policy "will be interpreted, if reasonably possible, to provide coverage." *Harrison* 956 S.W.2d at 270 (citations omitted). If an insurance company knows or could ascertain from a reasonable investigation that a claim is *potentially* within the scope of its policy's coverage, then it cannot refuse to extend coverage. *Truck Ins. Exch. v. Prairie Framing*, 162 S.W.3d 64, 79 (Mo. App. W.D. 2005).

The decisions in *Scottsdale* and *Stark Liquidation* make sense. Many types of commercial general liability insureds, including exterminators, crop-sellers, and residential developers, are engaged in businesses in which many potential claims will be progressive, rather than immediately apparent. The alternative to following *Scottsdale* and *Stark Liquidation* is to prohibit any progressive injury from *ever* being covered if its origin was within the applicable coverage period but it did not become apparent until afterward. That result, however, would contravene Missouri's public policy of construing insurance in favor of coverage where possible.

The "occurrence" and "legally obligated" language on which American Family relies was not part of the parties' agreement. Even if it were, there was evidence that the damage to the home was an "occurrence" that happened during the applicable coverage period, and that Sherry was "legally obligated" to the homeowner. This Court should affirm the judgment below.

III. The trial court did not err in submitting its verdict-directing instruction to the jury *because* the instruction hypothesized the disputed facts that required determination by the jury *in that* (1) the instruction required the jury to determine whether (A) there had been damage to the residence Sherry sold, (B) the cause of that damage was covered by the insurance policy American Family sold to Sherry, (C) Sherry had performed its obligations under the agreement, (D) American Family had failed to perform its obligations, and (E) Sherry was thereby damaged; and (2) American Family was not prejudiced as the only "omission" to which it objected was a fact that was not in dispute.

**(Response to Appellant's Point Relied On III)**

Standard of Review

"Whether a jury was properly instructed is a question of law that this Court reviews *de novo*. Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper. Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action." *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008) (citations omitted).

* * *

In its third Point Relied On, American Family argues that the trial court erred in submitting its verdict director, Instruction No. 6, to the jury. Specifically, the insurer argues that the verdict director was deficient for failing to define "an occurrence" as "an accident." But because it does not set forth that instruction in either its argument related

to that point relied on or its appendix, under Rule 84.04 its argument is not preserved for appeal. As well, it proposed no alternative, definitional instruction, and therefore failed to make a specific objection to the instruction, as required by Rule 70.03. Moreover, the parties agreed at trial that "occurrence" meant "accident." Not including something in the instruction that was not in dispute could not have been error. And even if it were, it could not have prejudiced the jury.

**A. American Family has not preserved its third Point Relied On for appeal.**

Under Rule 84.04(e), "If a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief." Additionally, under Rule 84.04(h)(3), "A party's brief shall contain or be accompanied by an appendix containing the following materials, unless the material has been included in a previously filed appendix: … (3) The complete text of any instruction to which a point relied on relates." Rule 84.04(h)(3). "Rule 84.04 is to be strictly enforced." *Sheehan v. N.W. Mut. Life Ins. Co.*, 103 S.W.3d 121, 132 (Mo. App. E.D. 2002).

Since 2008, Rule 84.04(h)(3) has also provided that "The inclusion of any matter in an appendix does not satisfy any requirement to set out such matter in a particular section of the brief, except that instructions set out in the appendix need not be included in the brief." Under this change, if an appellant complains of error in the submission of an instruction and does not include the instruction it in its Appendix, it still must set the instruction out in full in the argument portion of its brief. An appellant's failure to do this means that its point relating to the instructional error "is not preserved for review." *State v. Oxford*, 791 S.W.2d 396, 400 (Mo. banc 1990), *cert. denied*, 498 U.S. 1055 (1991).

In its third point relied on, American Family complains that the trial court erred in submitting its verdict director, Instruction No. 6, to the jury. (Br. of Appellant 17, 45). Plainly, this is a point that "relates to the giving, refusal or modification of an instruction." Rule 84.04(e). But nowhere in its argument over that point does American Family set forth the text of that instruction. (Br. of Appellant 45-48). Similarly, the instruction does not appear in its appendix. Although American Family did include the instruction in the Legal File (L.F. 38-39), this cannot cure its failure to set forth the instruction in its argument relating to its third point relied on. *Sheehan*, 103 S.W.3d at 132. Even if American Family were to include the text of the instruction in its Reply Brief, it could not cure this failure. *Daniel v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302, 310 (Mo. App. S.D. 2003). Additionally, American Family does not request plain error review of this issue, as it must under Rule 84.13(c) to obtain that review.

As a result, American Family's third Point Relied On, alleging error in the submission of Instruction No. 6 to the jury, "is not preserved for review." *Oxford*, 791 S.W.2d at 400. The Court should deny that point. But should the Court decide that the insurer has preserved that point, then the instruction was not error.

**B. The instruction followed MAI 26.06, and the insurer does not rebut the presumption that the approved instruction was proper; the failure to define a term that is not in dispute cannot be error, and was not prejudicial.**

Rule 70.03 requires a party to make "specific objections to instructions considered erroneous." "Where an alleged error on appeal relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal." *Giddens v.*

*Kan. City S. Ry. Co.*, 29 S.W.3d 813, 823 (Mo. banc 2000), *cert. denied*, 532 U.S. 990 (2001). Counsel for American Family made one specific objection in this case: he told the trial court that the verdict directing instruction was erroneous because it failed to instruct the jury that, under its insurance contract with Sherry, an "occurrence" was an "accident." (Tr. 662-63). But that is not what it argues before this Court.

American Family premises its instructional challenge on the applicability of several decisions defining the terms "occurrence" and "accident" in commercial general liability insurance policies. (Br. of Appellant 46-48). As discussed in detail in Point I, above, this body of authority does not govern the present dispute. The cases defining "occurrence" and "accident" within the context of typical commercial general liability policies cannot control a case in which the written "policy" never materialized as a single, complete, written agreement at any time before or or during trial. Whether the contract was what Sherry proffered or was what American Family proffered was a question of fact for the jury to determine, which Instruction No. 6 correctly set out. But even if the Court were to consider the cases upon which American Family relies as pertinent, the insurer's instructional challenge is still without merit.

"Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Rule 70.02(b). On review, an instruction given in accordance with MAI is presumed correct. *State v. Zink*, 181 S.W.3d 66, 73 (Mo. banc 2005).

In forming Instruction No. 6, the trial court utilized MAI 26.06. (L.F. 39). "[I]n a case where the terms of [a] contract [are] in dispute," it is error to "fail[] to utilize MAI 26.06, or some adaptation of it." *Busch & Latta Painting Corp. v. State Hwy. Comm'n*, 597 S.W.2d 189, 200 (Mo. App. W.D. 1980). In such a case, "plainly, MAI 26.06 [is] the appropriate verdict director." *Id.* In using it, the trial court "should set out the claim of the plaintiff as to the contract meaning in paragraph first and the claimed breach of defendant in paragraph third." *Id.*

Titled "Verdict Directing – Breach of Bilateral Contract – Terms and Breach in Issue," MAI 26.06 states:

> Your verdict must be for plaintiff if you believe:
>
> First, plaintiff and defendant entered into an agreement whereby plaintiff agreed *(set out plaintiff's agreement)* and defendant agreed *(set out defendant's agreement)*, and
>
> Second, plaintiff performed his agreement, and
>
> Third, defendant failed to perform his agreement, and
>
> Fourth, plaintiff was thereby damaged.

Instruction No. 6 plainly follows MAI 26.06. (L.F. 38-39). The only modification was to the first paragraph, which MAI itself requires the trial court to modify so as to set out the agreement of the parties that the plaintiff alleges existed and alleges that the defendant breached. The trial court did exactly this (L.F. 38-39), in language that was "simple, brief, impartial, free from argument, and [did] not submit to the jury or require findings of detailed evidentiary facts." Rule 70.02(b).

American Family does not argue that the instruction deviated from MAI. (Br. of Appellant 45-48). Instead, it objected – and argues now – that the trial court had not defined "occurrence" as "accident." The word "occurrence," of course, does not appear in MAI 26.06, nor is there room in MAI 26.06 for definitions. If the trial court had modified MAI 26.06 to include a definitional section, it would have deviated from MAI, which under Rule 70.02(b) it could not do. Under the 1981 Revision of MAI 26.06, the current version of this instruction, "an instruction of factors to be considered in construing [the] written contract" "is not required." *Auto Owners Mut. Ins. Co. v. Wieners*, 791 S.W.2d 751, 757 (Mo. App. S.D. 1990) (citing *Edgewater Health Care v. Health Sys.*, 752 S.W.2d 860, 866-67 (Mo. App. E.D. 1988)).

American Family seems to suggest that there should have been a separate instruction defining "occurrence" as it wished. But the Record does not indicate that the insurer proposed any separate instruction setting forth its desired definition of "occurrence." It is inappropriate for an appellant to attack the trial court for not giving a particular instruction when did not actually propose that the court do so. *Doe v. Alpha Therapeudic Corp.*, 3 S.W.3d 404, 419 (Mo. App. E.D. 1999).

Indeed, the insurer prefaced its objection to the verdict director with an opinion that "an adequate verdict directing instruction could never be crafted" in this case. (Tr. 662-63). This unconstructive statement did not amount to the specific objection required by Rule 70.03. Counsel added, "The verdict director would somehow have to incorporate the law that's contained in the *'Hawkeye'* opinion that addresses the coverage issue in this case." (Tr. 662-63). He also stated, "I don't think this particular instruction

adequately advised the jury about the applicable law regarding plaintiff's claim." (Tr. 662-63). Neither of those statements amounts to a specific objection advising the trial court of just what was wrong with its instruction.

The sole *specific* objection that counsel for American Family made to the instruction was this:

> So if … a verdict directing instruction were to be crafted, it would have to include, for instance, the "Mathis" decision which indicates that an occurrence is an accident. *That's not contained in the verdict director that the Court gave in this case*.

(Tr. 663) (emphasis added).

The actual instruction incorporates the word "coverage" (L.F. 38, 39). American Family's argument, therefore, seems to be that that "coverage," not "occurrence," is undefined in the instruction. But definitions of terms that were "given flesh and meaning during the course of trial" need not be repeated in an instruction. *Williams v. Daus*, 114 S.W.3d 351, 371 (Mo. App. S.D. 2003). Even American Family gave flesh and meaning to the term "coverage" by defining "occurrence" to mean "an accident." (Tr. 508-10).

Sherry did not dispute this. It agreed that "occurrence" meant "accident":

> Q: [Mr. Cary] Accidents happen when somebody runs a stoplight or runs a stop sign, and there's an accident. This house failed and it failed badly, as you've said, because it was built out of level and because you built on fill without adequate supports to keep it from sinking in the ground. That ain't an accident. It's --

> A: [Mr. Sherry] Sure. It's the same thing. The guys didn't do it on purpose. That -- that shows every other home in the neighborhood was done fine. Every other home that had piers is to date, to my knowledge, is fine. This one here went bad. That is an accident. If every home that had piers underneath of it failed, yes, I would tend to agree with you. But no, sir, this one home failed. The rest of them on each side, across the street, up the street, down the street are okay.

(Tr. 278).

"The purpose of the verdict directing instruction is to hypothesize propositions of fact to be found or rejected by the jury." *Lasky v. Union Elec. Co.,* 936 S.W.2d 797, 800 (Mo. banc 1997). A verdict directing instruction that assumes a disputed fact is erroneous. *Id.* But this error only occurs when "close scrutiny of the instruction demonstrates that it is calculated to lead the jury to believe assumed disputed facts." *Welch v. Hyatt,* 578 S.W.2d 905, 913-14 (Mo. banc 1979). American Family's only specific objection to the verdict directing instruction in this case was that it failed to inform the jury that an "occurrence" is an "accident." That proposition was not in dispute. (Tr. 276-77). "[I]t is not necessary to hypothesize facts about which there is no dispute." *Weisman v. Herschend Enters., Inc.,* 509 S.W.2d 32, 37 (Mo. 1974).

Moreover, even if the verdict director were written erroneously, American Family still would have to show how that error prejudiced it for that error to be reversible. "Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action." *Bach*, 257 S.W.3d at 608. The error American Family

specified in its objection was the failure of the instruction to inform the jury that the property damage at issue resulted from an accident. (Tr. 662-63). The insurer's only suggestion as to how this was prejudicial is that the instruction "did not adequately inform the jurors of the applicable law." (Br. of Appellant 48).

When assessing prejudice in an instruction, the inquiry is whether "the instruction when viewed with all the other facts … cause[d] confusion to the jury." *Welch*, 578 S.W.2d at 914. In this case, there is no basis for concluding that the jury was confused, because: (1) the only specific instructional error American Family claimed was the failure of the verdict director to inform jurors that "occurrence" means "accident;" and (2) the parties themselves agreed during trial that "occurrence" meant "accident." American Family has not shown that Instruction No. 6's failure to define "occurrence" as "accident" was prejudicial.

American Family has not preserved its alleged instructional error. Even if it had, it did not propose a different instruction and, indeed, suggested that no instruction could be proper. It therefore did not adequately raise the instructional error it alleges on appeal. Even if it did, it complains of a failure to put something in the instruction that was not in dispute, which cannot be error. And even if that were error, it was not prejudicial. Instruction No. 6 correctly followed MAI 26.06, and the trial court did not err in submitting it to the jury. The Court should affirm the trial court's judgment.

IV. The trial court did not err in admitting Plaintiff's Exhibit 1 *because* American Family expressly waived any objection to that exhibit and its motion to strike the exhibit was untimely *in that* American Family initially did not object to the admission of Exhibit 1, and only moved to strike it long after it was admitted without objection.

**(Response to Appellant's Point Relied On IV)**

Standard of Review

This Court reviews the admission or exclusion of evidence for abuse of discretion. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). "Substantial deference is shown a decision of the trial court as to the admissibility of evidence, which will not be disturbed absent a showing of abuse of discretion." *Id.* "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). "[I]f reasonable persons may differ as to the propriety of an action taken by the trial court, then it cannot be held that the trial court has abused its discretion." *Id.* Moreover, the Court reviews the admission of evidence "for prejudice, not mere error, and the trial court's decision will be reversed only if the error was so prejudicial that it deprived the [complaining party] of a fair trial." *Elliott v. State*, 215 S.W.3d 88, 93 (Mo. banc 2007).

* * *

In its fourth Point Relied On, American Family argues that the trial court erred in admitting Plaintiff's Exhibit 1, a report by engineer Ken Sidorowicz. (Br. of Appellant

18, 49). The insurer argues that the admission of this evidence was error because it lacked a sufficient foundation. Whatever American Family's argument may be now, however, its counsel affirmatively told the trial court that it had "no objection" to the admission of Exhibit 1. Only later did American Family decide that the exhibit should have been excluded. But because it failed to object to Exhibit 1 when it was proffered, instead stating that it had no objection, the law of Missouri is that it affirmatively waived any further review of the trial court's decision to admit the exhibit into evidence.

"To preserve for appellate review an error regarding the admission of evidence, a timely objection must be made when the evidence is introduced at trial." *R & J Rhodes, LLC v. Finney*, 231 S.W.3d 183, 190 (Mo. App. W.D. 2007). "The general rule in Missouri is that a statement of 'no objection' when the evidence is introduced affirmatively waives appellate review of the admission." *Citizens for Ground Water Prot. v. Porter*, 275 S.W.3d 329, 344 (Mo. App. S.D. 2008) (citing *State v. Starr*, 492 S.W.2d 795, 801 (Mo. banc 1973)).

When evidence "is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection." *Sherrod v. Dir. of Revenue*, 937 S.W.2d 751, 753 (Mo. App. S.D. 1997). "Relevant evidence received without objection may properly be considered." *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81, 99 (Mo. App. S.D. 2005).

American Family expressly and unequivocally waived any objection to the admission of Exhibit 1. Sherry proffered the exhibit during the direct examination of its president, Darrin Sherry, and American Family's' counsel stated it had "no objection":

> Q: [Mr. Davey] I'm going to show you what's been previously marked as Plaintiff's Exhibit No. 1. Can you identify that, please?
>
> A: [Mr. Sherry] This is a Foundation Evaluation done on my behalf by the engineer Ken Sidorowicz.
>
> MR. DAVEY: Offer Plaintiff's 1.
>
> MR. CARY: *I have no objection, Your Honor.*
>
> THE COURT: One is admitted.

(Tr. 212-13) (emphasis added).

American Family's challenge to Exhibit 1 is further undermined by the fact that it read portions of Mr. Sidorowicz's deposition into evidence before eventually objecting to the admission of his report. (Tr. 437-41, 441-42). It also expressly conceded that Mr. Sidorowicz was an expert:

> MR. DAVEY: Well, first, these were answers to Mr. Cary's questions. Mr. Sidorowicz is an expert and he's an expert in foundations, and he can testify to the causes or what he sees from his evidence. He's certainly able to make that opinion. That's his job is to make opinions regarding foundations and the performance of those foundations.
>
> MR. CARY: *And I don't have any quarrel with that.*

(Tr. 435) (emphasis added).

In its brief, American Family suggests that Sherry's counsel had somehow sandbagged it into not objecting to Mr. Sidorowicz's. (Br. of Appellant 50). It acknowledges that it expressly waived any objection to the admission of the report, but explains that it did so "because counsel intended to use the report to cross-examine Mr. Sidorowicz during his live courtroom testimony." (Br. of Appellant 50). Because Mr. Sidorowicz did not testify at trial, American Family seems to believe that Sherry's counsel tricked it into waiving its objection to Exhibit 1. (Br. of Appellant 50).

This contention is utterly without support in the Record. If American Family needed Mr. Sidorowicz to testify, it was capable of securing his presence at trial. The Record does not show that Mr. Sidorowicz's absence from trial either was contrived by Sherry or was less disruptive of Sherry's trial strategy than it was of American Family's. American Family cites no authority holding that an express waiver of objection to the admission of evidence is undone when counsel mistakenly expects the trial to proceed a certain way. If the insurer wished to object to the admission of Plaintiff's Exhibit 1, it should have done so when the exhibit was offered. Now, on appeal, it is too late.

Sherry's counsel offered Mr. Sidorowicz's report into evidence as Exhibit 1 after Mr. Sherry identified the exhibit in his direct testimony. (Tr. 212). American Family's counsel told the Court, "I have no objection, Your Honor." (Tr. 212). As a result, it plainly and expressly waived objection to admission of that report as Plaintiff's Exhibit 1. It then read Mr. Sidorowicz's deposition testimony into evidence and acknowledged his status as an expert. The trial court did not abuse its discretion in admitting Plaintiff's Exhibit 1, and this Court should affirm its judgment.

V. The trial court did not err in denying American Family's motion for judgment notwithstanding the verdict or for a new trial *because* substantial evidence that American Family's refusal to pay Sherry's claim was without reasonable cause or excuse supported the jury's verdict that American Family vexatiously had refused to pay Sherry's claim *in that* evidence was introduced from which a reasonable juror could conclude that American Family was notified of Sherry's claim in July of 2004 and never took any steps to provide Sherry with an attorney, to inspect the premises, or to keep proper records of the claim, and that American Family intentionally manipulated its own documents to alter the reported date of loss so as to be outside of its perceived coverage period.

**(Response to Appellant's Point Relied On VI)**

Standard of Review

In its sixth Point Relied On, American Family argues that the jury's verdict awarding Sherry attorney fees for vexatious refusal to pay was "against the weight of the evidence." (Br. of Appellant 20, 55). But when reviewing a jury's verdict,

> Questions as to the weight of the evidence are not subjects of appellate review. It is within the exclusive province of the trial court to determine if a jury's verdict is against the weight of the evidence. An appellate court interferes with a jury verdict only if there is a complete absence of probative facts to support a jury verdict.

*Yaeger v. Olympic Marine Co*., 983 S.W.2d 173, 185 (Mo. App. E.D. 1998). A judgment notwithstanding the verdict is "a drastic action and should be granted only when

reasonable men would not differ on the correct disposition of the case." *Marti v. Economy Fire & Casualty Co*., 761 S.W.2d 254, 255 (Mo. App. E.D. 1988). Therefore, this "Court accepts as true the evidence and reasonable inferences therefrom in a light most favorable to the prevailing party and disregards contradictory evidence." *Georgescu v. K-Mart Corp.*, 813 S.W.2d 298, 299 (Mo. banc 1991).

* * *

American Family argues that the jury's award of attorney fees to Sherry for vexatiously refusing to pay Sherry's claim was "against the weight of the evidence." (Br. of Appellant 20, 55). The "weight of the evidence" is not a permissible subject during appellate review of a jury's verdict. *Yaeger*, 983 S.W.2d at 185. The Court should disregard American Family's sixth point of argument entirely because it fails to present a submissible allegation of error. But to the extent that American Family raises a question of whether there was substantial evidence,[5] the Record answers that there was.

American Family argues that the jury's verdict on vexatious refusal was improper because it "never denied [Sherry]'s claim," but rather Sherry "filed suit ten months after

[5] American Family does not actually present this question, and thus this Court should consider it abandoned. Appellant's sixth Point Relied On only contends that the verdict "was against the weight of the evidence." (Br. of Appellant 20). "[A]n argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002).

notifying defendant of the claim and [Sherry] effectively blocked [American Family]'s investigation of the claim with a confidentiality agreement." (Br. of Appellant 20, 55). It insists that "there was no evidence presented at trial that the insurance company refused to pay the claim 'without reasonable cause or excuse." (Br. of Appellant 57).

Though this is apparently American Family's take on the evidence, the jury saw it differently. American Family recites the relevant standard of review, but utterly fails to discuss the evidence appropriately under that standard. Viewing the evidence in a light most favorable to Sherry and disregarding all evidence and inferences to the contrary, as the Court will, there plainly was evidence from which a reasonable juror could have found that American Family's refusal to pay Sherry's claim was vexatious.

Section 375.296, R.S.Mo., provides as follows:

> In any action … against any insurance company, … if the insurer has failed or refused for a period of thirty days after due demand therefor prior to the institution of the action … to make payment under and in accordance with the terms and provisions of the contract of insurance, and it shall appear from the evidence that the refusal was vexatious and without reasonable cause, the … jury may … allow the plaintiff … attorney's fees as provided in section 375.420.

Section 375.420, R.S.Mo., provides as follows:

> in any action against any insurance company to recover the amount of any loss under a policy … if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court

> or jury may, in addition to the amount thereof and interest, allow the plaintiff … a reasonable attorney's fee.

American Family admits that the latter statute applies to it.[6] (Br. of Appellant 56). It acknowledges that if there was evidence from which a reasonable juror could conclude that it refused to pay Sherry's claim "without reasonable cause or excuse," then the award of attorney fees for vexatious refusal would be proper. (Br. of Appellant 56).

While American Family complains that a finding of vexatious refusal was erroneous because it "never denied [Sherry's] claim" (Br. of Appellant 57), the statutes do not require outright "denial." Instead, they require a "fail[ure] or refus[al] .. to make payment," § 375.296, and/or a "refus[al] to pay." § 375.420. American Family's adjuster, Dean Barnhart, admitted that though American Family never specifically denied Sherry's claim, it never approved the claim, either. (Tr. 562-63). Moreover, American Family sent Sherry a "reservation of rights" letter, reserving the right to disclaim coverage. (Tr. 537-38). Sherry rejected the reservation of rights and demanded payment

[6] American Family suggests, however, that § 375.296 does not apply to it. (Br. of Appellant 56). Section 375.296 expressly applies to "any insurance company, association or other insurer upon any contract of insurance issued or delivered in this state to a resident of this state, or to a corporation incorporated in or authorized to do business in this state." American Family is an insurance company that issued an insurance policy in Missouri to Sherry, a corporation authorized to do business in Missouri. Section 375.296 references § 375.420 as to attorney fees, and both sections apply to American Family.

(Ex. 46; Tr. 173), as it was entitled to do. *State Farm Mut. Auto Ins. Co. v. Ballmer*, 899 S.W.2d 523, 527 (Mo. banc 1995). That American Family "refused to pay" is plain; indeed, it devotes much of its brief to arguing why it should be allowed not to pay Sherry's claim. The only question for the purposes of this point of argument, then, is whether there was evidence at trial from which a reasonable juror could conclude that the insurer's refusal was "without reasonable cause or excuse."

Twice during trial, American Family's adjuster, Dean Barnhart, admitted that, without any cause or investigation, he had manipulated the insurer's own documents to alter the date of Sherry's loss so it would fall outside what the insurer believed was the coverage period. (Tr. 535-39, 552). Using that doctored date as its basis why it did not have to pay, American Family refused to pay. (Tr. 535-39, 552).

Mr. Barnhart, a "quality assurance specialist" at American Family (Tr. 456-57), admitted that he committed a dishonest act so that the insurer could disclaim coverage. This gross malfeasance cannot be "reasonable cause or excuse." It casts a pall of incredibility on all of American Family's evidence. "The jury is the sole judge of the credibility of the witnesses and the weight and value of their testimony and may believe or disbelieve any portion of that testimony." *Georgescu*, 813 S.W.2d at 299. The jury plainly disbelieved American Family's other, contrary evidence purporting to advance some reasonable cause or excuse. Standing alone, Mr. Barnhart's admission is sufficient to prove vexatious refusal to pay. But there is more.

American Family assures the Court that "[t]he evidence at trial established that plaintiff first notified American Family of a claim regarding this house on January 25,

2005." (Br. of Appellant 56). The evidence did not "establish" this at all. While that may have been the insurer's contention, the jury also did not believe it. Instead, it believed the evidence to the contrary. Mr. Sherry' testified that he knew he contacted American Family in July of 2004 because of a letter his attorney wrote. (Tr. 251). Additionally, he testified that he contacted American Family himself with respect to the homeowners' property damage in July of 2004. (Tr. 131-33). He recalled that he had discussed their claim with Mr. Barnhart at least twice during that month. (Tr. 133). Mr. Sherry described in detail the substance of his July 2004 conversations with Mr. Barnhart. (Tr. 133-34). The information Mr. Sherry provided to Mr. Barnhart was sufficient for Mr. Barnhart to advise him how to respond to the homeowner: "[H]e said … 'Tell [the homeowner] to put up or shut up.'" (Tr. 134).

Even accepting American Family's January 2005 date of notification, the jury's finding that American Family's refusal to pay was "without reasonable cause or excuse" is well grounded in the Record. The only action the insurer took in the five months after January of 2005 was to send a letter reserving the right to disclaim coverage. (Tr. 537-38). In fact, it did not even take any steps to investigate the claim until after it received Sherry's demand in July of 2005. (Tr. 485-86). Mr. Barnhart acknowledged that he did not assign a field adjuster to the claim until August 3, 2005. (Tr. 485). The insurer offers no explanation as to why an adjuster was not sent to investigate the claim seven months earlier, when American Family insists it first received notice. Furthermore, although American Family now states that it did not receive notice of the claim until January 25, 2005, its own internal claim file show documents being exchanged as early as January 4,

2005. (Tr. 547). The jurors could assess American Family's credibility as they saw it and, based on these inconsistencies, disbelieve the insurer's excuses of late notification.

Further evidence showed that American Family's reason for refusing to pay was "without reasonable cause or excuse." Although the insurer maintains that its custom is to maintain records of all correspondence on a claim, Mr. Barnhart admitted that his claim file did not have records of correspondence he acknowledged had taken place. (Tr. 537). When Mr. Sherry sought American Family's assistance with respect to the property damage claim that gave rise to this litigation, Mr. Barnhart advised him to dismiss the claim in a patently rude manner. (Tr. 133-34). Mr. Barnhart's position was that American Family would not help Mr. Sherry unless and until the homeowners filed a lawsuit. (Tr. 135). The jury plainly found that unreasonable, too.

American Family also argues that it had no obligation to act until after Sherry propounded a written demand for reimbursement. It insists that Sherry's confidentiality agreement in the repurchase contract with the homeowners stopped it from investigating the claim. The confidentiality agreement was not even drafted until March 2005, eight months after July 2004, the date Mr. Sherry testified he first contacted American Family about the claim, and two months after January of 2005, when American Family suggests it first received notification of the claim. Given this, American Family's argument that the confidentiality agreement stopped it from investigating Sherry's claim is untenable.

This cumulative evidence, combined with American Family's agent's admitted willingness to manipulate the insurer's own documents to avoid coverage, plainly was sufficient to support the jury's finding of vexatious refusal to pay and its resulting award

of attorney fees. The jury was entitled to draw its own conclusions as to credibility. It did so and found that American Family's refusal to pay Sherry's claim was without reasonable cause or excuse. It believed Mr. Sherry and disbelieved American Family, and its verdict awarding Sherry attorney fees under §§ 375.296 and 375.420, R.S.Mo., should not be disturbed. The Court should affirm the trial court's judgment.

## Conclusion

For the foregoing reasons, the Court should affirm the trial court's judgment.

Respectfully submitted,

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## Certificate of Compliance

I hereby certify that I scanned the enclosed CD-ROM for viruses using Norton AntiVirus 2008 and it is virus free, and that I used Microsoft Word 2007 for word processing. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that this brief contains 26,128 words.

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Attorney

## Certificate of Service

I hereby certify that on December 21, 2009, I mailed a true and accurate copy and CD-ROM of this Substitute Brief of the Respondent and its Appendix to the following:

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