IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC96740

RICKY GRIFFITS,

Appellant,

vs.

OLD REPUBLIC INSURANCE COMPANY AND BNSF RAILWAY COMPANY,

Respondents.

Appeal from the Circuit Court of Greene County, Missouri

31st Judicial Circuit

The Honorable Jason Brown, Judge

Greene County Case No. 1331-CC00421

APPELLANT RICKY GRIFFITTS' SUBSTITUTE BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

A. Cases:

B. Statutes and Constitutional Provisions:

C. Missouri Court Rules:

D. Other Authority:

III. JURISDICTIONAL STATEMENT

The issue in this appeal is whether the Trial Court erred in entering its Amended Judgment finding that, under the omnibus insuring clause contained in Old Republic's automobile liability insurance policy, Mr. Campbell was not a *permissive* user of a vehicle provided by his employer, BNSF, because he drove a BNSF vehicle while under the influence of alcohol, a violation of BNSF's internal company alcohol rules. *See* L.F. 49; App. A3. The Missouri Court of Appeals, Southern District, had jurisdiction to hear Appellant's appeal of the Amended Judgment. The Southern District exercised that jurisdiction and issued its Opinion on September 19, 2017 in Griffitts v. Old Republic Ins. Co., *et al.*, 2017 Mo. App. LEXIS 941, SD34753 (Mo. App. Sept. 19, 2017). This Court has jurisdiction to hear this appeal pursuant to Rule 83.04 because, after Appellant timely filed his Application for Transfer to this Court and paid the prescribed filing fee on October 18, 2017, this Court, on December 19, 2017, sustained Appellant's Application and ordered the case transferred.

IV. STATEMENT OF FACTS

In early March of 2009, James Campbell was an employee of BNSF working in Springfield, Missouri, which was away from his home in Tennessee. L.F. 819; TR 189. BNSF provided Mr. Campbell with a company truck to use while out of town and for the purpose of driving back and forth to work when near his home. L.F. 820-821; TR 191; 194-209. Mr. Campbell had general permission to use the company vehicle for anything while traveling away from home while on the road for work with BNSF. TR 194-204; 229; 247; 248. He could use the truck to get meals, buy supplies, entertain himself and for any other use for which he would use his own, personal vehicle. *Id.* Roy Donaldson, an assistant roadmaster, testified:

> Q. Pretty much anything that you need to do while you're out of town that you would have done in your personal vehicle, you are allowed to do it with your company vehicle because that's all you've got?
>
> A. Correct.

App. A267. Roger Honeycutt, a former roadmaster, assistant director of maintenance production and division engineer for BNSF, represented BNSF at Mr. Campbell's disciplinary hearing following the wreck with Appellant. App. A219.; L.F. 662-663. Mr. Honeycutt testified that a company provided vehicle could be used generally by the employee, but there were restrictions on drinking and driving, speeding, and running stop signs. App. 233-234. There was no evidence of any prohibited use of the company vehicle. *See generally* TR, L.F, and App.

During the weekend before the accident at issue, Mr. Campbell's regularly assigned company vehicle was put in the shop for repair in Tennessee. L.F. 821; App. A119. BNSF provided Mr. Campbell with a replacement vehicle, a Chevy Silverado, which was rented by ARI on behalf of BNSF from Enterprise for Mr. Campbell's use. *Id.*; App. A120-212. On March 16, 2009, Mr. Cambpell drove the BNSF provided Chevy Silverado from Tennessee to the Eagle's Lodge motel in Springfield, Missouri which is where Mr. Campbell was staying for work with BNSF. L.F. 823; App. A122-123.

After arriving at the motel at around 2:30 to 3:00 in the afternoon, Mr. Campbell joined other BNSF employees at a bar-b-que where he consumed alcohol. L.F. 735; App. A122; A165.; TR 219-220. App. 124-125. Sometime between 6:00 and 6:30 pm, two other BNSF employees walked Mr. Campbell back to his room. L.F. 736; 823; TR 221; App. A125; A249. Mr. Campbell had a bottle of alcohol with him when he was walked back to his room. L.F. 823; App. A249. There was no evidence that anyone took Mr. Campbell's bottle from him. *See generally* TR, L.F and App. After going into his room, Mr. Campbell fell asleep and then awoke a few hours later feeling hungry. L.F. 823-824; TR 221; 222-223; App. A126; A168; A177. To satisfy his hunger, he left his room, got in the BNSF provided Chevy and drove to the Ruby Tuesday's restaurant. L.F. 50; 89; 121; 634; 635; 644; 688; 701; 736; 737 fn. 1; 738; 739; 741-742; TR 221-222; App. A126-A127; A148; A177; A193; A195. Just before he arrived at Ruby Tuesday's, Mr. Campbell ran into the back of Appellant's vehicle and ultimately ended up in the Ruby Tuesday's parking lot. L.F. 824; *See also Id.* Mr. Campbell was arrested and convicted of driving while intoxicated as a result of the wreck with Appellant. L.F. 824. Mr.

Campbell's operation of the Chevy while intoxicated was in violation of two of BNSF's policies. *See e.g.* L.F. 825. The first policy is BNSF's "Policy on the Use of Alcohol and Drugs" which states:

> While on BNSF property, on duty, or operating BNSF work equipment or vehicles, no employee may:
>
> - Use or possess alcohol;
>
> ***
>
> - Report for duty or remain on duty or on property when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
> - Report for or remain on duty or on property with a blood or breath-alcohol concentration greater than or equal to 0.02%;
> - Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs.

App. A317. The second is the BNSF Maintenance of Way Operating Rules "Drugs and Alcohol" policy which states:

> Drugs and Alcohol
>
> The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property. The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may

adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

App. A318. Mr. Campbell acknowledged that he broke BNSF's rules regarding alcohol and drinking and driving company vehicles. *See e.g.* TR 285-286; App. A320. Mr. Campbell was fired by BNSF for drinking and driving. TR 287; App. A233; A319-A320.

Appellant originally filed a lawsuit against Mr. Campbell and BNSF alleging that Mr. Campbell was in the course and scope of his employment with BNSF at the time of the wreck. *See* L.F. 734 *et seq*. BNSF removed the original case to federal court and filed a *Motion for Summary Judgment*. *See Id*. In its *Suggestions in Support* of its *Motion for Summary Judgment*, BNSF stated the following:

- "During the afternoon and evening, Campbell used an outdoor barbeque grill at the motel and consumed copious amounts of alcohol before getting into the Silverado and driving in the direction of a Ruby Tuesday restaurant for dinner." L.F. 632.
- "At approximately 8:30 pm, on March 16, 2009, Campbell drove the Silverado from the motel northbound on Glenstone Avenue in the direction of a Ruby Tuesday restaurant." L.F. 635.
- "Campbell's driving of the Silverado for the personal purpose of getting dinner was not known to, sanctioned, approved, directed or requested by BNSF." L.F. 635.

- "When James Campbell left the Eagles Lodge Motel on March 16, 2009 in search of a place to eat, it can hardly be argued he did so 'to further the business or interests of his employer.'" L.F. 644.
- "Rather, Campbell leaving the motel for dinner 'arose from some external independent or personal motive." L.F. 644.

Attached to BNSF's Motion for Summary Judgment was the Affidavit of William Henderson. Mr. Henderson's Affidavit states:

- "I, William C. Henderson, was a Senior Claims Representative in March 2009." L.F. 687.
- "On March 18, 2009, I spoke with BNSF employee James M. Campbell regarding the accident of March 16, 2009, in which Campbell was involved." L.F. 687.
- "Campbell said he woke up and was hungry and left the motel on the way to Ruby Tuesday to get something to eat." L.F. 688.

The statements that Mr. Henderson was referring to in his Affidavit came from a recorded interview of Mr. Campbell conducted by Mr. Henderson on March 18, 2009. App. 115-157. In addition, BNSF's *Suggestions in Support* attached a statement of Mr. Campbell taken by Mr. Henderson within two days of the accident which contained the following:

> Q. Alright. So when you awoke, what happened then?
>
> A. I felt hungry and I put my boots back on and I went out into the, got into the truck and Ruby Tuesday's is right next door. I guess it would be a few blocks away from the hotel. And I was on my way over there . . . .

L.F. 701; App. 126.

BNSF succeeded in obtaining Summary Judgment on the issue of *respondeat superior* and Judgment was entered against Appellant. L.F. 734-742. Judge Dean Whipple wrote an Order granting BNSF's Summary Judgment which set forth his findings. *Id.* Judge Whipple's Order states:

"He awoke approximately two hours later feeling hungry, so he got into his rental vehicle and drove toward Ruby Tuesday's restaurant." L.F. 736. Judge Whipple continued, "*en route* to the restaurant, Campbell's vehicle collided with Plaintiff's vehicle, which was stopped at a traffic light." *Id.* In ruling that the "coming and going" rule was inapplicable, Judge Whipple found "the rule and its exceptions do not apply here because Campbell was traveling from his hotel room to a restaurant on his day off. He was not going to or from work nor did his trip to the restaurant have any dual work purpose." L.F. 737 n. 1. Judge Whipple found that "the general rule is that the employer-employee relationship is suspended while the employee is going to and from meals, even though he is driving the employer's car, unless the employer receives some direct benefit from the employee's use of the car." L.F. 738. Judge Whipple held:

> Under the particular facts and circumstances, Campbell was not acting within the course and scope of his employment when he drove to Ruby Tuesday's on the night of the accident. Campbell's actions in driving to the restaurant were not done to further the business interests of BNSF. The general rule is that an employee is not acting within the scope of his employment when he is going to and from meals. Although an employee traveling on business is acting within the

scope of his employment by stopping to eat, Campbell was not traveling on business at the time. He was driving to a restaurant on a personal day off . . . .

L.F. 739. Judge Whipple concluded "Plaintiff cannot recover from BNSF under the doctrine of *respondeat superior* and his claims against BNSF must be dismissed." L.F. 741-742.

After the original federal case was dismissed, Appellant filed suit against Mr. Campbell in Greene County, Missouri. *See* L.F. 52. During the course of the case against Mr. Campbell, Mr. Campbell gave a deposition and answered interrogatories to the effect that he did not remember where he was going at the time of the wreck with Appellant. TR 274-275. The case between Mr. Campbell and Appellant was resolved by a bench trial and the Court entered its Judgment following the bench trial. L.F. 55-56. Following the Judgment, Appellant filed the case below, pursuant to § 379.200 RSMo., naming the insurers, Old Republic and BNSF, as well as Mr. Campbell as defendants. L.F. 49. The trial in the case below was limited to the issue of permissive use. TR 1; App. A5. Specifically, the issue was whether Mr. Campbell was a permissive user under the omnibus insuring clause of Respondent Old Republic Insurance Company's automobile liability insurance policy at the time of the collision with Appellant. App. A5. Respondent's omnibus insuring clause states:

1. Who Is An Insured

   The following are "insureds":

   a. You for any covered "auto".

   b. Anyone else while using with your permission a covered "auto" you

own, hire or borrow . . . .

App. A5; A96. The insurance policy at issue was issued by Respondent Old Republic to Respondent BNSF as its named insured. App. A86. Respondent BNSF is also an insurer in this case under the fronting policy in that "BNSF's deductible under the policy was equal to the limits of Old Republic's liability under the policy." Griffitts v. Campbell, 426 S.W.3d 684, 686 (Mo. App. 2014). Respondent BNSF has consistently maintained that it is an insurer for the purposes of this case which is why BNSF was a party to the underlying action brought under § 379.200 RSMo. *See e.g.* L.F. 128-144.

In the underlying case, Appellant's *Petition for Equitable Garnishment* was filed on March 25, 2013 in the Circuit Court of Greene County, Missouri. L.F. 6; 49. James Campbell, a defendant in the underlying action, filed his *Application for Change of Judge* on April 3, 2013 and refiled the Application on September 26, 2013 after the case was remanded from federal court. L.F. 7; 92; 124. Mr. Campbell's *Application for Change of Judge* was granted on December 5, 2013 and the case was transferred to Judge Mark Fitzsimmons, Division 23 of the Circuit Court of Greene County, Missouri. L.F. 10. On December 6, 2013, Respondents BNSF and Old Republic, also defendants in the underlying action, after the case was transferred to Judge Fitzsimmons, filed their *Application for Change of Judge*. L.F. 10; 204. Appellant filed his written objection to Respondents' *Application for Change of Judge* on December 9, 2013. L.F. 11; 206. Over Appellant's objection, Respondents' *Application for Change of Judge* was sustained and the case was transferred to Judge Jason Brown, Division 22, of the Circuit Court of Greene County, Missouri. L.F. 11; 208. Following the order granting Respondents'

Application, Judge Brown presided over the case, including the bench trial. L.F. 11-48. Appellant filed a *Motion to Transfer* on February 1, 2017. L.F. 852. The Trial Court denied Appellant's *Motion to Transfer* on February 9, 2017. Appellant then filed a *Petition for Writ of Mandamus* which was denied by the Court of Appeals on February 22, 2017 in State ex rel. Griffitts v. Brown, SD34874.

On November 30, 2016, the Amended Judgment of the Trial Court was appealed to the Court of Appeals, Southern District. The Southern District issued its Opinion affirming the Amended Judgment of the Trial Court on September 19, 2017. Following the Opinion of the Southern District, Appellant timely filed his Application for Transfer which was sustained by this Court on December 19, 2017.

V. POINTS RELIED ON

POINT I

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously declared and applied the law by finding that a violation of a BNSF company rule terminated Mr. Campbell's status as a permissive user of a BNSF provided vehicle under the omnibus insuring clause of Old Republic Insurance Company's automobile liability insurance policy in that Missouri law does not permit the violation of a company's vehicle operational rule to terminate an employee's permission to use a company vehicle under an omnibus insuring clause in an automobile liability insurance policy.

Allstate v. Sullivan, 643 S.W.2d 21 (Mo. App. 1982)

Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977)

United Fire & Cas. Co. v. Tharp, 46 S.W.3d 99 (Mo. App. 1999)

Weathers v. Royal Indemnity, 577 S.W.2d 623 (Mo. 1979)

POINT II

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court did not have the ability to proceed in that the Trial Court received the case as the result of an improper application for change of judge filed by Respondents that was erroneously granted over Appellant's objection.

Rule 51.05

State ex rel. Manion v. Elliott, 305 S.W.3d 462 (Mo. banc 2010)

State ex rel. Smith v. Journey, 533 S.W.2d 589 (Mo. banc 1976)

POINT III

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously applied the law in that the doctrine of judicial estoppel mandated the finding that James Campbell was traveling to a restaurant to get dinner at the time of the collision with Appellant.

Brooks v. Fletcher, 337 S.W.3d 137 (Mo. App. 2011)

Parrott v. Severs Trucking, LLC, 422 S.W.3d 478 (Mo. App. 2014)

POINT IV

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously applied the law in that the doctrine of collateral estoppel mandated the finding that James Campbell was traveling to a restaurant to get dinner at the time of the collision with Appellant.

James v. Paul, 49 S.W.3d 678 (Mo. banc 2001)

Wilkes v. St. Paul Fire & Marine Ins. Co., 92 S.W.3d 116 (Mo. App. 2002)

VI. ARGUMENT

POINT I

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously declared and applied the law by finding that a violation of a BNSF company rule terminated Mr. Campbell's status as a permissive user of a BNSF provided vehicle under the omnibus insuring clause of Old Republic Insurance Company's automobile liability insurance policy in that Missouri law does not permit the violation of a company's vehicle operational rule to terminate an employee's permission to use a company vehicle under an omnibus insuring clause in an automobile liability insurance policy.

Allstate v. Sullivan, 643 S.W.2d 21 (Mo. App. 1982)

Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977)

United Fire & Cas. Co. v. Tharp, 46 S.W.3d 99 (Mo. App. 1999)

Weathers v. Royal Indemnity, 577 S.W.2d 623 (Mo. 1979)

A. Standard of Review:

"The appropriate standard of review in judge tried cases is governed by Rule 73.01 as interpreted in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)." Huff v. Director of Revenue, 778 S.W.2d 334, 335 (Mo. App. 1989). "In Murphy, the court held that the [judgment of the] trial court will be sustained unless 'there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Id.* (*quoting* Murphy, 536 S.w.2d at 32).

B. Neither Missouri law nor Missouri public policy permit the violation of a company rule to vitiate insurance coverage under an omnibus insuring clause in an automobile liability insurance policy.

The Trial Court erroneously declared and applied the law in concluding that, as a result of Mr. Campbell's violation of BNSF's company rule, Mr. Campbell was not a permissive user under the Old Republic insurance policy omnibus insuring clause. L.F. 850-851. A violation of a restriction on the operation of a vehicle, such as BNSF's policy against operating a vehicle while intoxicated, does not terminate permission to use the vehicle. This is because Missouri law recognizes the distinction between a restriction on the *use* of a vehicle and a restriction on the *operation* of a vehicle. United Fire & Cas. Co. v. Tharp, 46 S.W.3d 99, 103 (Mo. App. 1999). While there were restrictions on the *operation* of BNSF company vehicles in evidence, there were no restrictions on the *use* of a BNSF company vehicle in evidence. *See generally* TR and L.F; App. A316-A318. The Trial Court erred in failing to recognize and apply the operation/use distinction.

At the time of the accident, Mr. Campbell, while under the influence of alcohol, was driving the Chevy truck provided to him for his use by BNSF. TR 191; 194-209; L.F. 820-821. BNSF had rules against drinking and driving as well as rules against use or possession of alcohol while on BNSF property. L.F. 818; App. A316-A318. Mr. Campbell violated BNSF's rules and readily admitted that he violated BNSF's rules regarding drinking and driving and alcohol on company property. *See e.g.* TR 285-286; App. A320. Mr. Campbell was fired by BNSF for violating BNSF's alcohol rules. TR 287; App. A233; A319-A320.

BNSF rules dictate that BNSF did not permit its employees to operate its company vehicles under the influence of alcohol. The BNSF "Policy on the Use of Alcohol and Drugs" states:

> While on BNSF property, on duty, or operating BNSF work equipment or vehicles, no employee may:
>
> - Use or possess alcohol;
>
> ***
>
> - Report for duty or remain on duty or on property when his or her ability to work safely is impaired by alcohol, controlled substances or illegally obtained drugs;
> - Report for or remain on duty or on property with a blood or breath-alcohol concentration greater than or equal to 0.02%;
> - Report for or remain on duty or on property while exhibiting symptoms of alcohol or illicit or illegally obtained drugs.

App. A317. The BNSF Maintenance of Way Operating Rules "Drugs and Alcohol" policy states:

> Drugs and Alcohol
>
> The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property. The use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may

adversely affect safe performance is prohibited while on duty or on company property, except medication that is permitted by a medical practitioner and used as prescribed. Employees must not have any prohibited substances in their bodily fluids when reporting for duty, while on duty, or while on company property.

App. A318. Obviously, as it pertains to alcohol and company vehicles, the purpose of the rules is to prevent the operation of a company vehicle by an employee under the influence of alcohol. While BNSF and its attorneys couch the rule as a use restriction, the true nature of the rules is a restriction on the operation of vehicles while under the influence of alcohol.

Regardless of BNSF's alcohol rules, Mr. Campbell had permission to use the vehicle as his own while on the road for BNSF. TR 194-204; 229; 247; 248; App. A267; A233-A234. Common sense dictates that BNSF employees with company provided vehicles are permitted to generally use the company vehicles while away from home and on the road. BNSF employees were not expected to tow a company vehicle to a job site, were not expected to remain in their hotel rooms when not on the clock for BNSF, and certainly not expected to hitchhike in order to travel to obtain meals, supplies and entertainment. Rather, as the evidence at trial demonstrated, BNSF employees had general permission to use their company vehicles while on the road away from home. TR 194-204; 229; 247; 248; App. A266-A267; A233-A234. Accordingly, the issue in this case is whether violation of the above quoted rules by operating a BNSF company vehicle while intoxicated terminates preexisting general permission to use a BNSF company vehicle.

In Allstate v. Sullivan, Sullivan rented a car from Budget and got into a wreck while driving the rental car while intoxicated. Allstate v. Sullivan, 643 S.W.2d 21, 22 (Mo. App. 1982). Budget was the named insured under an insurance policy issued by Allstate. *Id.* The Allstate policy also had an omnibus insuring clause extending coverage to "any other person while using an owned automobile . . . with the permission of the Named Insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . ." *Id.* The rental agreement between Budget and Sullivan stated:

> 2. The following restrictions are cumulative and each shall apply to every use, operation or driving of vehicle. Under no circumstances should vehicle be used, operated or driven by any person: . . .
>
> (f) While under the influence of intoxicants or narcotics . . . .

Id. The rental agreement further provided that the insurance coverage did not apply if the above quoted rule was violated. *Id.* Sullivan signed the agreement including a box that stated that he agreed to be bound by the terms and conditions of the agreement, which included the above quoted rule. *Id.* The Sullivan Court found that the implications of such a restrictive rule by Budget being engrafted onto an insurance policy raised significant public policy concerns. *Id.* "It is the public policy of this state to assure financial remuneration for damages sustained through the negligent operation of motor vehicles on the public highways of this state not only by the owners of such automobiles but also by all persons using such vehicles with the owner's permission, express or

implied." *Id.* at 22 (*citing* Winterton v. VanZandt, 351 S.W.2d 696 (Mo. 1961)). The Sullivan Court found that:

> the manifestation of this public policy is found in the Motor Vehicle Safety Responsibility Law, Sec. 303.010, RSMo 1978 *et seq*. and in particular Sec. 303.190.2(2). That provision mandates that any policy issued to comply with the Safety Responsibility Law include an omnibus clause to provide liability insurance not only for the named insured but also for "any other person . . . using any such motor vehicle . . . with the express or implied consent of such named insured."

Id. at 22-23 (*citing* Weathers v. Royal Indemnity Co., 577 S.W.2d 623 (Mo. banc 1979)). The Sullivan Court continued, "as stated in Weathers the statute mandates that the omnibus clause protect any person using the vehicle with the permission of the named insured ***whether or not the actual operation of the vehicle is within the framework of that permission***." *Id.* at 23. "Any policy providing less protection is contrary to the public policy of this state." *Id.* The Sullivan Court concluded that "the public policy of this state mandates the same." *Id.* The Sullivan Court, citing to Weathers v. Royal Indemnity Co. and Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977), ultimately held that "Sullivan was *using* the car with the permission of Budget, whether or not he was operating within the constraints of Budget's permission." *Id.* (emphasis original). In reaching this holding, the Sullivan Court warned of the potential implications of engrafting extraneous restrictions on an omnibus insuring clause contained within an insurance policy. *Id.*

> In determining the extent of coverage here we must be aware of the serious consequences of allowing restrictions in the rental agreement to determine the coverage to be provided. The liability protection for which the lessee has paid could be reduced to a nullity by rental provisions prohibiting operation of the car "negligently" or contrary to any statute or ordinance.

Id. The Trial Court below allowed restrictions in BNSF's internal policies to determine the coverage to be provided under the Old Republic insurance policy. Specifically, the Trial Court permitted Old Republic Insurance Company to avoid Missouri's financial responsibility law and its accompanying duties to defend and indemnify because Mr. Campbell was drunk driving in violation of BNSF's Rules. This is exactly the type of result that the Court in Sullivan cautioned against. It should be noted that BNSF's two Drug and Alcohol policies (the ones Mr. Campbell was fired for violating) are followed by a policy on Conduct which states BNSF employees must not be "careless of the safety of themselves or others" or "negligent." App. 318. Following the Trial Court and Respondents' reasoning, there would not be coverage under the omnibus insuring clause if a BNSF employee was careless or negligent in causing a motor vehicle accident which is also a clear violation of Missouri's public policy, § 303.190.2(2) RSMo., and is the exact result that the Sullivan Court warned against.

In Weathers v. Royal Indemnity, this Court considered the effect of a prohibition against permitting others to drive a rental car contained in a Hertz rental agreement. Weathers v. Royal Indemnity, 577 S.W.2d 623, 624-27 (Mo. 1979). In Weathers, Walker rented a vehicle from Hertz. *Id.* at 624. The Hertz rental agreement stated that only

certain people could be permitted to drive the car by Walker. *Id.* at 627. Walker permitted Davis to drive the rental car, but Davis was not within the class of people who Walker could permit to drive the car pursuant to the Hertz rental agreement. *Id.* While driving the car, Davis was involved in a wreck with Weathers. *Id.* at 624. Royal Indemnity denied coverage for Davis maintaining that Davis was not an additional insured under Royal's omnibus insuring clause because Davis did not have permission to use the vehicle. *Id.* at 624.

This Court in Weathers noted that the manifestation of public policy found in Missouri's Vehicle Financial Responsibility Law "particularly in § 303.190.2(2)[1], ***supports a liberal interpretation of automobile liability insurance omnibus clauses***." *Id.* at 625 (emphasis added). "Omnibus coverage provisions are intended to extend, not restrict, coverage afforded and such intention is salutary." *Id.* at 626 (*quoting* Hauser v. Hill, 510 S.W.2d 765, 768 (Mo. App. 1974)). "Such extension is accomplished by enlarging the number and variety of insured classes." *Id.* With this background, the Weathers Court found that a restriction on the operation of a vehicle is not the same as a restriction on the use of a vehicle for the purposes of an omnibus insuring clause. *Id.* at 627-628.

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[1] § 303.190.2(2) states that an automobile liability insurance policy "[s]hall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the . . . use of such motor vehicle. . ."

Use is said to involve its employment for some purpose or object of the user. *Operation* of the vehicle, on the other hand, is said to involve the driver's direction and control of its mechanism for the purpose of propelling it as a vehicle.

Id. at 627 (emphasis original). This distinction is the law in Missouri.[2]

In Farm Bureau v. Broadie, the Court found that the violation of an express restriction by the named insured on who could operate the insured's truck did not operate to terminate permission to use the truck under an omnibus insuring clause. Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977). Specifically, this Court held:

> The act forbidden here related to the *operation* of the pickup, not to the *use* which might be made of it. It is our considered opinion that because the use had been permitted, it is immaterial how the vehicle was operated. We have held and continue to hold that insurance contracts will be construed strictly against the insurance carrier because such contracts are contracts of adhesion, and, the insured having given his permission for a particular use, the [insurer] will not be heard to

[2] Royal Indemnity v. Shull, 665 S.W.2d 345 (Mo. banc 1984) involved essentially the same fact pattern, insurance policy and prohibition on letting others drive as was at issue in Weathers. This Court in Shull reaffirmed the law in Missouri that set forth in the Weathers decision holding that the violation of the rental company's rule regarding who could operate the vehicle did not vitiate coverage under the omnibus insuring clause of the insurer's liability insurance policies. Shull, 665 S.W.2d at 347-48.

complain that the operation of the vehicle in performance of the permitted use was conducted in a way forbidden by the named insured.

Id. at 755 (emphasis original). Applying Broadie and in consideration of the fact that it is immaterial how the vehicle is operated for the purpose of coverage under an omnibus insuring clause, Mr. Campbell clearly was **using** the vehicle with permission of BNSF. He was operating the vehicle under the influence which was forbidden by BNSF. However, BNSF's operating rules are immaterial to Mr. Campbell's status under the omnibus insuring clause of Old Republic's insurance policy. He was a permissive user who violated restrictions on the operation of the vehicle. His operational violations cost him his job with BNSF, but did not terminate his status as a permissive user under the Old Republic omnibus insuring clause.

The application of the principles of law declared by the Supreme Court in Weathers and Shull, as well as the Courts of Appeals in Tharp, Sullivan, and Broadie, dictate that Mr. Campbell was using the rental truck with the permission of BNSF. Mr. Campbell was provided a rental truck to generally use while he was on the road away from home. TR 194-204; 229; 247; 248; App. A267; A233-A234. At the time of the wreck, Mr. Campbell was using the truck within the scope of his permission, but his operation of the truck under the influence of alcohol was in violation of BNSF's company rules. *See e.g.* L.F. 825. The correct decision that properly applies Missouri law is that Mr. Campbell was operating the vehicle in violation of BNSF's rules pertaining to intoxication on alcohol while operating a company vehicle. However, just like Walker and Davis in the Weathers case, just like Sullivan in the Allstate case, and just like the at-

fault drivers in the Shull, Broadie and Tharp cases, Mr. Campbell was using the truck with BNSF's general permission and thus was an additional insured under Old Republic's omnibus insuring clause and § 303.190.2(2) RSMo.

The law in Missouri for that past 40 years is abundantly clear – a violation of an operational rule, such as Mr. Campbell's violation of BNSF's no alcohol policies, does not render permissive use of an entrusted vehicle non-permissive. The sound reason behind the above referenced uniform case law is that, when examining whether use is permissive for the purpose of coverage under an omnibus insuring clause mandated by § 303.190.2 RSMo.[3], the term "use" is construed broadly so as to advance Missouri's public policy of ensuring financial remuneration for the damages caused by the negligent motorists.[4] To permit rule violations, whether characterized as use restrictions, operation restrictions, or prerequisites to use, to transform otherwise permissive use into non-permissive would defeat, not advance, Missouri's public policy as expressed in the Motor Vehicle Financial Responsibility Law.

In addition to the departure from forty years of uniform Missouri law occasioned

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[3] *See* footnote 1 *supra*.

[4] "Omnibus coverage provisions are intended to extend, not restrict, coverage . . . . Such extension is accomplished by enlarging the number and variety of insured classes. . . . It is of course true that the 'additional insured' clause was written in the policy for the primary purpose of extending not limiting liability." Weathers, 577 S.W.2d at 626 (citations omitted).

by the Trial Court's Amended Judgment, the Trial Court's Amended Judgment, if permitted to remain intact, represents a substantial departure from Missouri's public policy with serious negative implications for the users of Missouri's roads. Victims of those who are injured by drivers who have broad general permission to use a vehicle will no longer have coverage for their injuries if the permissive driver has broken any rule or policy of the insured entrustor. This is in direct contradiction to long standing Missouri policy of ensuring "that persons injured on Missouri's highways, whether they be owners, operators, occupants of the insured's vehicle, occupants of other vehicles, or pedestrians, may collect at least minimal damage awards against negligent motor vehicle operators." *See e.g.* Yates v. Progressive Preferred Ins. Co., 331 S.W.3d 324 (Mo. App. 2011) (*quoting* American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 90 (Mo. banc 2000); *see also* § 303.010 RSMo. *et seq*.

The consequences of the Trial Court's Amended Judgment, if declared to represent the law and public policy of Missouri, will have significant negative unintended consequences for Missouri motorists. Here, Mr. Campbell admittedly had broad general permission to use the vehicle. The Trial Court's Amended Judgment in this case is an invitation to insurers and their insureds to exclude coverage under nearly every imaginable circumstance of negligence which can cause a car wreck despite such broad general permission.

Here, BNSF had rules not only on operating the vehicle or being on company property while intoxicated, but also being negligent, careless, speeding, running a stop sign, any other "rule of the road" or any violation of state law which could possibly cause

an accident. L.F. 767; App. A229-A230. BNSF also had rules against failing to buckle up before beginning operation of the vehicle and even smoking while driving the company vehicle. *Id.* Respondents openly admitted that each and every one of these rules was the same as the rule against intoxication and would exclude coverage if the rule against intoxication could void coverage. App. A230. The logical extension of the Trial Court's Amended Judgment is that a user of non-owned vehicle will now only be permissive as long as the user doesn't do anything to cause an accident. Indeed, under the BNSF rules at issue, the violation would not even need to be causative, as smoking or failing to wear a seatbelt in most cases would not be causative of the accident, but would still be a rule violation voiding coverage under the Court of Appeals' decision. A new rule of law that will allow insurers and vehicle owners to condition permission on not doing anything that can cause a wreck is a drastic and unwarranted departure from long standing Missouri law.

In light of the Trial Court's Amended Judgment, violations of an entrustor's rules by a vehicle entrustee results in loss of a previous broad and general grant of permission to use the loaned vehicle. Without permission to use the loaned vehicle, the entrustee becomes uninsured under the automobile liability insurance policy omnibus insuring clause. The innocent victims of these operators who had been given permission to use the vehicle, just not negligently, will be left without compensation for their injuries. This is contrary to not only long standing Missouri law, but also well-established public policy. Automobile liability insurers in conjunction with companies in the business of entrusting vehicles are likely already altering their rules to mimic BNSF's rules so as to retroactively remove

permission if a driver gets into an accident as approved by the Court of Appeals' Opinion.

In the context of rental car companies, if the company has a rule that precludes driving while intoxicated, speeding, running a red light, following too closely, or any other activity which can result in an accident, the driver suddenly is uninsured if the driver violates a rental car company's rule.[5] Such "don't drive negligently" rules, for the first time in the history of Missouri, will become conditions precedent to permission and are thus engrafted onto the automobile liability insurance policy. Further, while the Amended Judgment deals with alcohol, its potential reach is not so limited. For example, under the Amended Jugment, each of the following rules would remove coverage after the accident if the driver violated a rule that:

1. Prohibits entering or driving the vehicle while in possession of a cellular telephone or device;
2. Prohibits entering or driving the vehicle unless the operator had, at least, eight hours of sleep the night before;
3. Prohibits a trucker from entering or driving a tractor trailer unless the trucker has had at least 10 consecutive hours off duty and otherwise in compliance with all of the other time standards set forth in 49 C.F.R. 395.3.
4. Prohibits entering or driving the vehicle if the operator has any measurable blood alcohol content, has consumed any amount of alcohol, or ingested any other illicit

[5] Until the opinion at issue, Missouri had soundly rejected every such attempt. *See* Weathers v. Royal Indemnity, Royal Indemnity v. Shull, and Allstate v. Sullivan.

substance;

5. Prohibits entering or driving the vehicle if carrying passengers; and/or

6. Prohibits entering or driving the vehicle if the operator is under 21 or over 65.

While the above are examples, the litanies of exclusions that the Amended Judgment (if found to be a correct recitation of Missouri law) will engender are nearly infinite. If the Amended Judgment is correct, businesses that provide vehicles to employees to drive such as trucking companies, delivery companies, taxi companies, or companies that issue company vehicles to employees are now free to engraft any conceivable restriction on the entrustee's entry into or operation of the vehicle and call it a prerequisite to permission. The result is that the motoring public of Missouri will lose the mandated coverage required by Missouri public policy to compensate for exactly such injuries caused by such drivers.[6]

Further, the Court of Appeals Opinion eliminates insurance coverage for drunk driver's victims under many scenarios. To borrow from Judge Fullam's dissenting opinion in Hall v. Wilkerson, 926 F.2d 311 (3rd Cir. 1990):

> The decision of the majority in this case is tantamount to ruling that . . . persons injured by drunken drivers have no recourse to liability insurance proceeds unless the culpable driver was the owner of the vehicle or a member of the owner's family. For

[6] Indeed, coverage is lost even under informal vehicle entrustments. For example, there would be no coverage for damages caused by a child's negligent vehicle operation if the child violates the parent's rule pertaining to the parent's automobile (which every teenager since the advent of automobiles has done).

it is no doubt a condition of every loan of an automobile – whether made explicit, or merely implied -- that the lender does not wish the borrower to drive it while intoxicated.

Hall, 926 F.2d at 316. Surely the public policy of Missouri has not changed from ensuring compensation to such victims of drunk drivers to ensuring that the drunk driver victims receive no compensation. For these reasons, this Court should reaffirm Missouri's public policy and reverse the Amended Judgment of the Trial Court.

C. The Trial Court failed to follow the precedent set forth in United Fire & Casualty Co. v. Tharp

The law in Missouri is that the violation of a company rule against drinking and driving a company vehicle does not vitiate insurance coverage under an omnibus insuring clause because such a violation on the operation of a vehicle does not terminate the driver's permission to use the vehicle. United Fire & Cas. Co. v. Tharp, 46 S.W.3d 99, 107 (Mo. App. 1999); New York Cas. Co. v. Lewellen, 184 F.2d 891 (8th Cir. 1950); *see also* Allstate Ins. Co. v. Sullivan, 643 S.W.2d 21 (Mo. App. 1982); Weathers v. Royal Indemnity, 577 S.W.2d 623 (Mo. 1979); Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977); Royal Indemnity v. Shull, 665 S.W.2d 345 (Mo. banc 1984). Further, Missouri's public policy most strongly mandates that every automobile liability insurance contract should furnish coverage coextensive with liability under the conditions of and in, at least, the amounts specified in Missouri's motor vehicle financial responsibility law set forth in § 303.010 RSMo. *et seq*. *See e.g.* Tharp, 46 S.W.3d at 108; Halpin v. American Family Mut. Ins. Co., 823 S.W.2d 479, 482 (Mo. banc 1992); Wilson

v. Traders Ins. Co., 98 S.W.3d 608, 617 (Mo. App. 2003). Despite this blackletter law, the Trial Court found that the case of United Fire & Casualty Co. v. Tharp, a case with substantially the same facts and issues as this case, was not controlling. Instead of applying the principles of law set forth in Tharp, the Trial Court relied heavily on a Tennessee Court of Appeals case, Lambright v. National Union Fire Ins. Co. of Pittsburg, in reaching its ultimate conclusion that Campbell's use was not permissive under the omnibus insuring clause contained in Old Republic's liability insurance policy. Lambright, 173 S.W.3d 756 (Tenn. App. 2005). In accord with Tennessee's law and for the first time in Missouri's history, the Trial Court further found that the violation of a company policy on the operation of a vehicle terminated Mr. Campbell's permission to use the vehicle. The Trial Court erred in declaring the law.

1. The Doctrine of Stare Decisis

In its erroneous Amended Judgment, the Trial Court disregarded the principle of *stare decisis* and, instead of following Missouri law and Missouri public policy, adopted the law as declared by an intermediate appellate court of the middle district of Tennessee. L.F. 839-41. "The doctrine of *stare decisis* directs that, **once a court has laid down a principle of law applicable to a certain state of facts, it must adhere to that principle, and apply it to all future cases, where facts are substantially the same**; regardless of whether the parties and property are the same." Rothwell v. Director of Revenue, 419 S.W.3d 200, 206 (Mo. App. 2013) (internal quotations and citations omitted) (emphasis added). "A court's decision has *stare decisis* effect upon a lower court or one of the same rank, but not upon a court higher in rank than the court in which

the decision is cited as precedent." State ex rel. KCP&L Greater Mo. Operations, Co. v. Mo. Public Service Commission, 408 S.W.3d 153, 169 n.9 (Mo. App. 2013) (*quoting* 20 AM. JUR. 2D Courts § 142 (2005)). "The doctrine of *stare decisis* promotes security in the law by encouraging adherence to previously decided cases." Rothwell, 419 S.W.3d at 206. (citations omitted). "Under the doctrine of *stare decisis*, **a court follows earlier judicial decisions when the same point arises again in litigation and where the same or an analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled.**" *Id.* (citations omitted) (emphasis added). This basic cornerstone of jurisprudence was not followed by the Trial Court.[7]

2. United Fire & Casualty Co. v. Tharp

In Tharp, Dennis Hyman, an employee of Sunshine Lighting Company, was visiting Springfield to install light fixtures at an Osco. Tharp, 46 S.W.3d at 101-102. While working at Osco, Mr. Hyman met Angela Monday, who was an employee of Osco. *Id.* at 102. When work ended, Mr. Hyman, Ms. Monday, Jeff Waller (Hyman's supervisor), and a friend of Ms. Monday's all left the Osco together in a vehicle driven by

[7] If Tharp is no longer the law in Missouri, it was not the Trial Court's role to create new law by breaking from existing precedent as set forth by the superior courts of this State. Rather, if the law in Missouri has shifted from Tharp and all of the other cases that have ever addressed the issue of permissive use under an omnibus insuring clause, it is this Court that should declare the change in Missouri law.

Ms. Monday's friend. *Id.* The foursome drove to a liquor store where Mr. Hyman purchased a half-pint of whiskey. *Id.* After driving around for a while, Ms. Monday's friend dropped Ms. Monday and Mr. Hyman off at the Osco where Ms. Monday and Mr. Hyman got into a service van owned by Sunshine Lighting Company and drove away. *Id.* After leaving the Osco, Mr. Hyman and Ms. Monday drove to a party where they stayed for approximately two and one half hours. *Id.* After leaving the party, Mr. Hyman was driving the van with Ms. Monday as a passenger. *Id.* They were driving to a restaurant to get something to eat and, while en route to the restaurant, collided with a vehicle in which Robert Tharp as a passenger. *Id.* Mr. Tharp died as a result of the collision. *Id.*

At issue in Tharp was whether Mr. Hyman's use of the van was with the permission of his employer in light of Mr. Hyman's violation of two company rules: (1) a company rule prohibiting non-employee passengers (Ms. Monday); and (2) Mr. Hyman's violation of a company rule against drinking and driving. *Id.* The omnibus insuring clause at issue in Tharp is identical to the omnibus insuring clause in this case. *Id.*; App. A96. In Tharp, "the omnibus clause in [the insurer's] policy [was] found under the heading, 'Who Is An Insured'" and provided that "insureds are: 'a. You for any covered 'auto;' b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow . . . .'" Tharp, 46 S.W.3d at 102. In this case, Respondents' omnibus clause is found under the heading, "Who Is An Insured" and provides that "the following are 'insureds': 'a. You for any covered 'auto'; b. Anyone else while using with your permission a covered 'auto' you own, hire or borrow . . . ." App. A96. Accordingly, the

issue in Tharp is identical to the issue in this case (permissive use), the omnibus insurance clauses at issue are identical, and the facts are identical (both Mr. Hyman and Mr. Campbell violated company rules in drinking and driving and the respective insurers both attempted to avoid coverage based on an argument that a violation of a company rule against drinking and driving terminates one's status as a permissive user under an omnibus insuring clause). Tharp, 46 S.W.3d at 101-102; L.F. 815; See e.g. L.F. 554. Pursuant to the doctrine of *stare decisis*, Tharp should have been followed by the Trial Court.

In Tharp, the insurer argued that Mr. Hyman's "act of driving the van after drinking alcohol either (1) terminated his permission to use the van as a matter of law, or (2) presented a factual question of whether Hyman's violation of the 'no alcohol while driving' rule was a deviation from the permitted use so 'substantial' as to terminate his right to use the van for any purpose." *Id.* at 106-107. The Tharp Court following Allstate Ins. Co. v. Sullivan and New York Cas. Co. v. Lewellen, found that "the violation of a rule concerning the use of firm equipment by its employees while drinking is not sufficient to terminate automatically the employer's express permission for the actual use of the vehicle at the time an accident occurs." Tharp, 46 S.W.3d at 107 (*quoting* Lewellen, 184 F.2d 891 (8th Cir. 1950); *see also* Sullivan, 643 S.W.2d 21 (Mo. App. 1982)). The Tharp Court held "relying on Sullivan and Lewellen, we find the omnibus clause in Employer's policy extended coverage to Hyman for this accident despite his violation of Employer's rule against drinking alcohol while driving the van." Tharp, 46 S.W.3d at 107. Tharp declined to adopt authority from other jurisdictions that held that

an employee's violation of company rules against driving under the influence of alcohol to be a substantial deviation from the employee's permission to use a company vehicle, thus terminating the status of such an employee as a permissive user under an omnibus insuring clause. *Id.* at 107. The Court in Tharp went on to note that opinions of other states, even with similar facts, do not have controlling effect. *Id.* at 107-108. Tharp confirmed that the Sullivan and Lewellen cases are more in line with Missouri's public policy regarding liability coverage for negligent motor vehicle operators and recited Missouri's public policy as declared by this Court in Halpin v. American Family Mut. Ins. Co.. *Id.* at 108 (*citing* Halpin, 823 S.W.2d 479, 482 (Mo. banc 1992).

> The plain purpose of the 1986 amendment [to Missouri's financial responsibility law] is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators. This protection extends to occupants of the insured vehicle as well as to operators and occupants of other vehicles and pedestrians. . . . We believe that the legislature had a purpose of requiring motor vehicle liability policies to provide coverage coextensive with liability, subject to the statutory limits. We should give effect to the pervasive purpose even though the method of expression may be inartistic.

Halpin, 823 S.W.2d at 482. Thus, the Trial Court's finding in contravention of Missouri law as set forth by this Court in Tharp was also a finding in contravention of Missouri public policy which does not permit the violation of an employer's policy on the operation of a vehicle while intoxicated to terminate the driver's permission to use the vehicle. The proper application of Missouri law as set forth by the Court in Tharp,

mandates that the Amended Judgment should be reversed and Judgment entered in favor of Appellant.

3. United Fire & Casualty Co. v. Tharp is not distinguishable

The facts before the Trial Court were substantially the same as the facts before the Court of Appeals in Tharp. Mr. Campbell was an employee of BNSF working in Springfield, Missouri, which was away from his home. L.F. 819; TR 189. Mr. Hyman was an employee of Sunshine Lighting Company working in Springfield, Missouri which was away from his home. Tharp, 99 S.W.3d at 101-102. Mr. Campbell was provided with a BNSF company truck to use while out of town and for the purpose of driving back and forth to work when at home. L.F. 820-821; TR 191; 194-209. Mr. Hyman was provided with a Sunshine Lighting Company van to use while out of town. Tharp, 99 S.W.3d at 102. Mr. Campbell, after consuming alcohol, awoke feeling hungry and drove the BNSF provided vehicle to a restaurant. L.F. 50; 89; 121; 634; 635; 644; 688; 701; 736; 737 fn. 1; 738; 739; 741-742; TR 221-222; App. A126-127; A148; A177; A193; A195. Mr. Hyman, after consuming alcohol at a party, drove the Sunshine Lighting Company provided van to a restaurant. Tharp, 99 S.W.3d at 102. On the way to the restaurant, Mr. Campbell collided with Appellant's vehicle. L.F. 824. On the way to the restaurant, Mr. Hyman collided with the Tharp vehicle. Tharp, 99 S.W.3d at 102. Mr. Campbell's operation of the BNSF vehicle after drinking was in violation of BNSF's policy. See e.g. L.F. 825. Mr. Hyman's operation of the Sunshine Lighting Company's vehicle after drinking was in violation of Sunshine Lighting Company's policy. Tharp, 99 S.W.3d at 102. Respondents, the insurers in this case, contend that Mr. Campbell's

operation of BNSF's vehicle after consuming alcohol in violation of its policy terminated Mr. Campbell's permission to use the BNSF provided vehicle. *See e.g.* L.F. 554. United Fire, the insurer for Sunshine Lighting Company, contended that Mr. Hyman's operation of the Sunshine Lighting Company vehicle after consuming alcohol in violation of its company policy terminated Mr. Hyman's permission to use the Sunshine Lighting Company provided vehicle. Tharp, 99 S.W.3d at 106-107. The Tharp opinion involves essentially the same fact pattern and involves the exact same issue of law. The inescapable similarities mandated that the Trial Court adhere to the Tharp opinion pursuant to the doctrine of *stare decisis*.[8] *See e.g.* Rothwell, 419 S.W.3d at 206.

4. The Tennessee case relied on by the Trial Court is not controlling, the Tennessee case specifically found that Tharp was not in accord with Tennessee law, and the Tennessee Court specifically declined to follow Missouri law as set forth in Tharp

[8] The Trial Court went to extraordinary lengths to distinguish the Tharp Opinion. The Trial Court used selective paraphrasing of the Tharp Opinion, "inferred" facts into the Tharp Opinion in order to factually distinguish the Tharp Opinion, and even suggested that the Court of Appeals failed to engage in a thoughtful analysis of the issues in reaching its holding. Other than to bring the treatment of Tharp by the Trial Court to this Court's attention, the details of the Trial Court's affront to binding precedent are omitted from this Brief.

After a strained attempt to distinguish Tharp, the Trial Court found the Tennessee case of Lambright v. National Union Fire Insurance Co. of Pittsburg, to be more authoritative and factually similar than Tharp. L.F. 840-841. The Trial Court's refusal to follow Missouri law and its reliance on this Tennessee opinion is misplaced. The Lambright Opinion of the Tennessee Court of Appeals addressed Tharp, and, after making the determination that Missouri law and Tennessee law are different, declined to follow Tharp. To state that more succinctly, the Tennessee Court of Appeals, in Lambright, refused to adopt Missouri law set forth in Tharp because Tennessee's law is different from Missouri's law.

In Lambright, the Tennessee Court of Appeals was faced with deciding whether an employee who consumed alcohol and drove a company vehicle was a permissive user under an omnibus insurance clause of the employer's insurance policy. Lambright, 173 S.W.3d at 758-764. In Lambright, the Tennessee Court of Appeals examined cases from various jurisdictions on the issue of the effect of intoxication on the status of an employee who is operating a company vehicle as a permissive driver under omnibus insuring clauses. *Id.* The primary cases that the Tennessee Court reviewed were Margerum, Warner Trucking, and Barfield[9] on one hand, and Tharp on the other. *Id.* at 759-264. The Tennessee Court had to choose whether to adopt the rule that "driving under the

[9] The actual case citations are as follow: General Accident Ins. Co. of Am. v. Margerum, 544 A.2d 512 (Pa. Super. 1988); Warner Trucking, Inc. v. Carolina Cas., 686 N.E.2d 102 (Ind. Sup. 1997); Barfield v. Royal Ins. Co. of Am., 492 S.E.2d 688 (Ga. App. 1997).

influence of an intoxicant, in and of itself, in violation of express rules of the employer is fatal to the driver's status as a permissive user under the omnibus clause" as declared in the cases of Margerum, Warner Trucking, and Barfield. *Id.* at 766. The Tennessee Court of Appeal's other option was to adopt Missouri's law as declared in Tharp that the violation of an employer's rule against an employee drinking alcohol and driving a company vehicle does not remove the employee's status as a permissive user under the omnibus clause of the employer's policy. Lambright, 173 S.W.3d at 763. The Tharp Court also resolved the issue of whether or not to adopt the rule from Margerum, Warner Trucking and Barfield. Tharp, 46 S.W.3d at 107-108. In resolving this issue in light of Missouri's public policy, the Court in Tharp, expressly declined to adopt Margerum, Warner Trucking, and Barfield. Id. at 108. Specifically, this Court held:

> This court adopts the views expressed in Sullivan and Lewellen rather than those stated in Margerum, Warner Trucking, and Barfield. We do so in the belief that Sullivan and Lewellin are in harmony with Missouri's public policy concerning liability coverage for negligent motor vehicle operators.

Id. at 108. In contrast, the Tennessee Court of Appeals in Lambright, adopted Margerum, Warner and Barfield in holding:

> We believe that the policy most in conformity with existing Tennessee law and the more sound policy is to follow Margerum, Warner and Barfield in holding that driving under the influence of an intoxicant, in and of itself, in violation of express rules of the employer is fatal to the driver's status as a permissive user under the omnibus clause of an insurance policy.

Lambright, 173 S.W.3d at 767. Accordingly, Lambright actually supports the fact that Tharp is the law in Missouri given that the Court in Lambright recognized that Tharp is Missouri law and then declined to adopt Missouri law in Tennessee. Lambright, 173 S.W.3d at 767. The Trial Court erred in declaring the law because Tharp is the law in Missouri.

D. Conclusion:

The Trial Court's conclusion that Mr. Campbell's violation of BNSF's alcohol policy terminated his status as a permissive user under the omnibus insuring clause cannot be reconciled with Missouri public policy, § 303.010 RSMo. *et seq.*, Sullivan, Tharp, Weathers, Shull or Broadie. BNSF's rule against the operation of a company vehicle after drinking is not a use restriction. Instead, Mr. Campbell had general permission from BNSF to use the vehicle.[10] BNSF's policies regarding the operation of company vehicles were merely constraints on Mr. Campbell's operation of the company vehicle, not restrictions on the use of the company vehicles. Such constraints on operation are immaterial to permissive use under Respondents' omnibus insuring clause. Contrary to the Trial Court's ruling, a violation of a constraint on the operation of a

[10] There were absolutely no restrictions on Mr. Campbell's *use* of the rental truck in evidence. Rather, all such rules and policies were restrictions on the *operation* of the truck. Mr. Campbell could have been going anywhere, not just Ruby Tuesdays and he still would not have lost his status as a permissive user under the omnibus insuring clause of the Old Republic policy.

vehicle does not terminate permission to use a vehicle. The law in Missouri is clear and the latest pronouncement by a Missouri appellate court, United Fire & Casualty Co. v. Tharp, prior to the trial in the underlying matter was disregarded. Further, Tharp is substantially similar to the case below, is an opinion that follows Missouri public policy and is the law in Missouri as set forth in Weathers, Shull, Sullivan, and Broadie. Had the Trial Court properly declared the law, followed the law, and applied the law to the facts of this case, Mr. Campbell would have been found to be a permissive user under the Old Republic omnibus insuring clause. The Amended Judgment must be reversed and this case remanded with specific instructions to the Trial Court to enter Judgment in favor of Appellant in accord with the law of Missouri.

POINT II

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court did not have the ability to proceed in that the Trial Court received the case as the result of an improper application for change of judge filed by Respondents that was erroneously granted over Appellant's objection.

Rule 51.05

State ex rel. Manion v. Elliott, 305 S.W.3d 462 (Mo. banc 2010)

State ex rel. Smith v. Journey, 533 S.W.2d 589 (Mo. banc 1976)

A. Standard of Review

"Missouri Supreme Court rules are to be interpreted in the same fashion as statutes." Joshi v. Ries, 330 S.W.3d 512, 514-15 (Mo. App. 2010) (*quoting* Dynamic Computer Solutions, Inc. v. Midwest Mktg. Ins. Agency, L.L.C., 91 S.W.3d 708, 713

(Mo. App. 2002)). "Statutory interpretation is a question of law, which [appellate courts] review *de novo*." *Id.* at 515 (*citing* Lindquist v. Mid-Am. Orthopaedic Surgery, Inc., 269 S.W.3d 508, 510 (Mo. App. 2008). Appellate courts apply "*de novo* review to questions of law decided in court-tried cases." Pearson v. Koster, 367 S.W.3d 36, 43 (Mo. banc 2012) (*citing* StopAquila.org v. City of Peculiar, 208 S.W.3d 895, 899 (Mo. banc 2006)). "With respect to such questions, 'the appellate court reviews the trial court's determination independently, without deference to that court's conclusions.'" *Id.* at 43-44 (*quoting* Moore v. Bi-State Dev. Agency, 132 S.W.3d 241, 242 (Mo. banc 2004)).

B. The Trial Court never acquired the ability to proceed in the underlying case because the Trial Court received the underlying case as the result of Respondent BNSF and Old Republic's improper *Application for Change of Judge.*

The facts relevant to this point are easily discerned from Appellant's Legal File. Appellant's *Petition* was filed on March 25, 2013 in the Circuit Court of Greene County, Missouri. L.F. 6; 49. James Campbell, a defendant in the underlying action, filed his *Application for Change of Judge* on April 3, 2013 and refiled the *Application* on September 26, 2013 after the case was remanded from federal Court.[11] L.F. 7; 92; 124. Defendant Campbell's *Application for Change of Judge* was granted on December 5, 2013 and the case was transferred to Judge Mark Fitzsimmons, Division 23 of the Circuit

[11] The underlying case was wrongfully removed to federal court by the Respondents on March 29, 2013 and remanded to state court on September 18, 2013. L.F. 7; 113-120.

Court of Greene County, Missouri. L.F. 10. On December 6, 2013, Respondents BNSF and Old Republic, also defendants in the underlying action, after the case was transferred to Judge Fitzsimmons, filed their *Application for Change of Judge*. L.F. 10; 204. Appellant filed his written objection to Respondents' *Motion for Change of Judge* because the change was improper under Rule 51.05 in that defendant Campbell had already obtained a change of judge thereby exhausting the right of all defendants to a change of judge as a matter of right pursuant to Rule 51.05(d). L.F. 11; 206. Despite Appellant's objection, the *Application for Change of Judge* was sustained and the case was transferred to Judge Jason Brown, Division 22, of the Circuit Court of Greene County, Missouri. L.F. 11; 208.

Following the order granting Respondents' *Application*, Judge Brown presided over the case, including the bench trial. L.F. 11-48. However, Judge Brown/the Trial Court never acquired the ability to proceed to hear the case because the *Application for Change of Judge* filed by Respondents BNSF and Old Republic was in contravention of Missouri law in that Mr. Campbell's *Application for Change of Judge* exhausted the right of all defendants to any additional change of judge. Rule 51.05(d). Appellant objected, in writing, to the improper change of judge, never had the ability to waive an objection to the ability of the Trial Court to proceed, and never waived his objection to the case being improperly transferred. Because the Trial Court never acquired the ability to proceed in the underlying case, the Amended Judgment is void and the case must be transferred from Division 22 to Division 23 for further proceedings.

Rule 51.05 states, in pertinent part:

(a) A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party. . .

***

(d) Application for change of judge may be made by one or more parties in any of the following classes: (1) plaintiffs; (2) defendants; (3) third-party plaintiffs (where a separate trial has been ordered); (4) third-party defendants; or (5) intervenors. ***Each of the foregoing classes is limited to one change of judge, and any such change granted any one or more members of a class exhausts the right of all members of the class to a change of judge. . . .***

Rule 51.05(a) and (d) (emphasis added). The pertinent portion of this rule, for the purpose of this Point, is subpart (d). Subpart (d) groups the parties into classes, one of which is defendants. Mo.R.Civ.P. 51.05(d). The rule then goes on to limit each class to one change of judge. *Id.* "[W]here a member of one of the classes has obtained a change . . . of judge he has exhausted the right of all members of the class to that change and thereafter none of its members may be granted any additional change . . . of judge." State ex rel. Smith v. Journey, 533 S.W.2d 589, 591 (Mo. banc 1976).

"The filing of a timely application for change of judge deprives the court of further authority to do anything in the case other than grant the application." State ex rel. Manion v. Elliott, 305 S.W.3d 462, 463 (Mo. banc 2010) (*citing* State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943 (Mo. banc 1986)). "Conversely, an untimely application for change of judge is properly denied on that basis by the trial court." *Id.* (*citing* State v. Owens, 759 S.W.2d 73, 74 (Mo. App. 1988)). The same analysis would apply to an

application filed by a member of one of the classes of parties after that class of parties had already exhausted its change of judge under Rule 51.05(d). Such an application is properly denied by a trial court and, by implication, is improperly granted. *See Id.*

In this case, Appellant was the plaintiff in the underlying case. BNSF, Old Republic and James Campbell were defendants and therefore occupied the same class under 51.05(d). A change of judge by one such class member exhausts and forever forecloses the right of all such class members to a change of judge under Rule 51.05 as a matter of right. State ex rel. Smith v. Journey, 533 S.W.2d at 591. In this case, defendant James Campbell was granted a change of judge thereby exhausting the right of all defendants to a change of judge. L.F. 10. Despite this clear rule, Respondents BNSF and Old Republic (defendants in the underlying action) sought a second change of judge. L.F. 10; 204. Appellant objected, in writing, to the second *Application for Change of Judge* for the defendants which was filed by the Respondents. L.F. 11; 206. Over Appellant's objection, the Court granted the second *Application for Change of Judge* and transferred the case to the Trial Court. L.F. 11; 208. Therefore, Respondent BNSF and Old Republic's change of judge was improper and, as such, the Trial Court/Judge Brown did not have the ability to proceed in the underlying case.

In this case, due to the improper assignment of this case to the Trial Court/Judge Brown, the Trial Court never acquired the ability to proceed in making any rulings in the underlying matter other than to sustain Appellant's timely objection and send the case

back to Division 23.[12] The Trial Judge did not have the ability to perform any act other than deny the improper second Application for Change of Judge and/or transfer the case back to the proper division of the Circuit Court of Greene County, Missouri and, accordingly, the Trial Court's Amended Judgment was entered by a Trial Judge lacking the ability to enter the Amended Judgment. Therefore, the Amended Judgment must be reversed and the case remanded for further proceedings consistent with the Opinion of this Court.

POINT III

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously applied the law in that the doctrine of judicial estoppel mandated the finding that James Campbell was traveling to a restaurant to get dinner at the time of the collision with Appellant.

Brooks v. Fletcher, 337 S.W.3d 137 (Mo. App. 2011)

Parrott v. Severs Trucking, LLC, 422 S.W.3d 478 (Mo. App. 2014)

A. Standard of Review:

[12] Respondents BNSF and Old Republic invited this error by filing and having granted their improper *Application for Change of Judge*. Appellant did absolutely nothing to occasion this procedural anomaly. The fact that the case was not before a Judge with the ability to proceed in the case warrants a reversal of the Amended Judgment and remand with instructions to the Trial Court to transfer the case to the proper Division of the Circuit Court of Greene County, Missouri.

"The appropriate standard of review in judge tried cases is governed by Rule 73.01 as interpreted in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)." Huff v. Director of Revenue, 778 S.W.2d 334, 335 (Mo. App. 1989). "In Murphy, the court held that the [judgment of the] trial court will be sustained unless 'there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Id.* (*quoting* Murphy, 536 S.w.2d at 32).

B. Respondents were judicially estopped from asserting that Mr. Campbell was not traveling to a restaurant to get dinner.

1. Respondents' contrary positions.

In a previous case, Respondent BNSF, as the employer of James Campbell, was sued under a *respondeat superior* theory of liability. L.F. 734-742. That case was removed to Federal Court where Respondent BNSF filed a Motion for Summary Judgment asserting that Mr. Campbell was not acting within the course and scope of his employment and/or agency when he was driving the BNSF provided vehicle at the time the wreck with Appellant. *See Id.*; L.F. 628-649. Specifically, Respondent alleged that Mr. Campbell was driving to Ruby Tuesday's to get dinner and therefore was not driving in the course and scope of employment with BNSF. *Id.* Respondent BNSF prevailed on its Motion for Summary Judgment and a Judgment was entered in favor of Respondent BNSF and against Appellant. L.F. 734-742. The Judgment by Judge Dean Whipple was premised on the factual finding that Mr. Campbell traveling to Ruby Tuesday's restaurant to eat dinner. L.F. 736; 737 n. 1; 738; 739; 741-742.

When it no longer suited their purposes, Respondents denied that Mr. Campbell was traveling to Ruby Tuesdays to eat dinner. In addition to being false, the problem with Respondents' position was that Respondents previously asserted, relied on, and prevailed in convincing a federal court of the opposite position to the substantial detriment of Appellant. L.F. 628-649; 734-742. Respondents can't have it both ways. The Trial Court erred in permitting Respondents to assume their new contrary position and then erred by finding as a fact and basing its Amended Judgment on the finding that Mr. Campbell wasn't traveling to Ruby Tuesday's to eat dinner.

2. The Doctrine of Judicial Estoppel.

"The doctrine of judicial estoppel exists to prevent parties from playing fast and loose with the court[s]," which is exactly what Respondents succeeded in doing in the underlying case. Brooks v. Fletcher, 337 S.W.3d 137, 143 (Mo. App. 2011) (*citing* State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 404 (Mo. App. 1998)). The Trial Court erred in permitting Respondents to play fast and loose with the facts and in permitting Respondents to make a mockery of the judicial system. Fortunately, the doctrine of judicial estoppel exists to preserve the integrity of the Courts and to prevent the type of injustice that Respondents foisted upon Appellant and upon which the Trial Court placed its stamp of approval.

"Judicial estoppel provides that 'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'"

Taylor v. State, 254 S.W.3d 856, 858 (Mo. banc 2008) (*quoting* Zedner v. United States, 547 U.S. 489 (2006); Davis v. Wakelee, 156 U.S. 680, 689 (1895)); *see also* State Board of Accountancy v. Integrated Financial Solutions, LLC, 256 S.W.3d 48, 54 (Mo. banc 2008); Brooks v. Fletcher, 337 S.W.3d 137 (Mo. App. 2011). "Judicial estoppel applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time." Parrott v. Severs Trucking, LLC, 422 S.W.3d 478, 486 (Mo. App. 2014) (*quoting* Strable v. Union Pac. R.R. Co., 396 S.W.3d 417, 421 (Mo. App. 2013); Vinson v. Vinson, 243 S.W.3d 418, 422 (Mo. App. 2007)).

> While judicial estoppel cannot be reduced to a precise formula, the United States Supreme Court has indicated that whether judicial estoppel applies requires the consideration of three factors: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id.

3. The application of the Doctrine of Judicial Estoppel to the underlying case.

Prior to the underlying equitable garnishment action, Appellant filed a lawsuit against BNSF and Campbell alleging that Campbell was in the course and scope of his employment and/or agency with BNSF at the time of the accident. L.F. 628-649. Respondent BNSF filed a Motion for Summary Judgment arguing that Campbell was not in the course and scope of his employment with BNSF at the time of the accident. *Id.* Respondent BNSF alleged in its Motion for Summary Judgment and Suggestions in Support that:

- "During the afternoon and evening, Campbell used an outdoor barbeque grill at the motel and consumed copious amounts of alcohol before getting into the Silverado and driving in the direction of a Ruby Tuesday restaurant for dinner." L.F. 632.
- "At approximately 8:30 pm, on March 16, 2009, Campbell drove the Silverado from the motel northbound on Glenstone Avenue in the direction of a Ruby Tuesday restaurant." L.F. 635.
- "Campbell's driving of the Silverado for the personal purpose of getting dinner was not known to, sanctioned, approved, directed or requested by BNSF." *Id.*
- "When James Campbell left the Eagles Lodge Motel on March 16, 2009 in search of a place to eat, it can hardly be argued he did so 'to further the business or interests of his employer.'" L.F. 644.
- "Rather, Campbell leaving the motel for dinner 'arose from some external independent or personal motive." *Id.*

Attached to BNSF's Motion for Summary Judgment was the Affidavit of William Henderson. Mr. Henderson's Affidavit states:

- "I, William C. Henderson, was a Senior Claims Representative in March 2009." L.F. 687.
- "On March 18, 2009, I spoke with BNSF employee James M. Campbell regarding the accident of March 16, 2009, in which Campbell was involved." *Id.*
- "Campbell said he woke up and was hungry and left the motel on the way to Ruby Tuesday to get something to eat." L.F. 687.

Also attached to BNSF's Motion for Summary Judgment was the transcript of the statement that Mr. Campbell gave to Mr. Henderson on March 18, 2009 (two days after the wreck at issue). The following is a quote from that statement:

> Q. Alright. So when you awoke, what happened then?
>
> A. I felt hungry and I put my boots back on and I went out into the, got into the truck and Ruby Tuesday's is right next door. I guess it would be a few blocks away from the hotel. And I was on my way over there . . . .

L.F. 701.

BNSF succeeded on Motion for Summary Judgment on the issue of *respondeat superior* and judgment was entered against Appellant. L.F. 734-742. Judge Dean Whipple wrote a detailed Order granting BNSF's Summary Judgment. *Id.* Judge Whipple's Order states "[h]e awoke approximately two hours later feeling hungry, so he got into his rental vehicle and drove toward Ruby Tuesday's restaurant." L.F. 736. Judge Whipple continued, "*en route* to the restaurant, Campbell's vehicle collided with Plaintiff's vehicle, which was stopped at a traffic light." *Id.* In ruling that the "coming and going" rule was inapplicable, Judge Whipple found "the rule and its exceptions do

not apply here because Campbell was traveling from his hotel room to a restaurant on his day off. He was not going to or from work nor did his trip to the restaurant have any dual work purpose." L.F. 737 n.1. Judge Whipple found that "the general rule is that the employer-employee relationship is suspended while the employee is going to and from meals, even though he is driving the employer's car, unless the employer receives some direct benefit from the employee's use of the car." L.F. 738. Judge Whipple held:

> Under the particular facts and circumstances, Campbell was not acting within the course and scope of his employment when he drove to Ruby Tuesday's on the night of the accident. Campbell's actions in driving to the restaurant were not done to further the business interests of BNSF. The general rule is that an employee is not acting within the scope of his employment when he is going to and from meals. Although an employee traveling on business is acting within the scope of his employment by stopping to eat, Campbell was not traveling on business at the time. He was driving to a restaurant on a personal day off. . . .

L.F. 739. Judge Whipple concluded "Plaintiff cannot recover from BNSF under the doctrine of *respondeat superior* and his claims against BNSF must be dismissed." L.F. 741-742.

In the case below, it no longer suited Respondents' position for Mr. Campbell to be traveling to Ruby Tuesday's to eat dinner. Shockingly, Respondents, having previously won summary judgment based in large part on the "UNDISPUTED

MATERIAL FACT"[13] that Mr. Campbell was driving to Ruby Tuesday's to eat dinner, changed their position to allege that Mr. Campbell wasn't driving to Ruby Tuesday's to eat dinner. "The doctrine of judicial estoppel exists to prevent parties from playing fast and loose with the court." Brooks v. Fletcher, 337 S.W.3d 137, 143 (Mo. App. 2011) (*quoting* State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 404 (Mo. App. 1998)). Clearly, Respondents were both fast and loose with the Court. As outlined above, judicial estoppel requires a finding of three factors. These are:

1. [A] party's later position must be clearly inconsistent with its earlier position.
2. [T]he party succeeded in persuading a court to accept that party's earlier position.
3. The party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Parrott, 422 S.W.3d at 486 (citations omitted). Applying the three factors, Respondents should have been estopped from maintaining their new position and the Court erred in applying the law in both permitting Respondents to do so and then adopting Respondents' new position as a factual finding upon which the Amended Judgment was based.

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[13] "UNDISPUTED MATERIAL FACTS" are Respondents' words, not Appellant's. L.F. 634.

"First, a party's later position must be clearly inconsistent with its earlier position." *Id.* Respondents' position in this case is that Campbell was not traveling to the Ruby Tuesday's to eat dinner. *See e.g.* L.F. 554-561. In the prior case, Respondents' position was that Campbell was traveling to the Ruby Tuesday's to eat dinner. L.F. 628-647. These positions are clearly inconsistent. To suggest otherwise is ludicrous.

"Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position." Parrott, 422 S.W.3d at 486. Respondents succeeded in persuading Judge Whipple of their position and Judge Whipple's granting of Respondents' Motion for Summary Judgment conclusively demonstrated that the Court did accept Respondents' prior position. To reiterate, Judge Whipple's Order granting BNSF's Motion for Summary Judgment concluding that Campbell was not acting within the course and scope of his employment states "[u]nder the particular facts and circumstances, Campbell was not acting within the course and scope of his employment when he drove to Ruby Tuesday's on the night of the accident. Campbell's actions in driving to the restaurant were not done to further the business interests of BNSF." L.F. 739. Had there been any question as to where Mr. Campbell was traveling in the federal case, Judge Whipple would have been constrained to find the existence of a genuine issue of material fact in dispute and deny Respondents' Motion for Summary Judgment. Respondents succeeded in persuading the Court that Mr. Campbell was driving to Ruby Tuesday's to eat dinner.

"A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing

party if not estopped." *Id.* Respondents, having previously obtained summary judgment on the basis that Campbell was driving to Ruby Tuesday's to eat dinner, cannot now change their position, years later, after protracted litigation, after numerous trips to and from federal court, after a previous visit with the Southern District Court of Appeals, after two Petitions for Writ, after extensive discovery has been conducted on the issue, after BNSF's spokesman provided sworn testimony via affidavit on this issue, and after Respondents' attorneys repeatedly made this representation to the Court, all to Appellant's substantial detriment. Respondents cannot now speak out of the other side of their mouths just because the issue has changed. Having acquiesced in Respondents' prior position as true (because it is), it clearly imposed an unfair detriment on Appellant for the Trial Court to permit Respondents to change their position, for the Trial Court to adopt the changed position of Respondents as a factual finding, and for the Trial Court to then rely on the changed position to find the issues against Appellant.

A final consideration, although not enumerated in any of the cases cited herein, is the integrity of the judicial system. Respondents won their summary judgment in the prior case based on the fact that Mr. Campbell was traveling to Ruby Tuesday's to eat dinner. In this case, they claim this isn't true, because, if it is, Appellant would have prevailed.[14] Unfortunately, the Trial Court went out of its way to find Mr. Campbell was

[14] Again, given that he had general permission to use the truck, it doesn't matter where Mr. Campbell was going. To the extent that it does matter and because the Trial Court

not traveling to a restaurant and then based its erroneous Amended Judgment on this flawed factual finding. Regardless, there is something fundamentally wrong with permitting Respondents to make such a mockery of the judicial system, which is exactly what they did.

The doctrine of judicial estoppel should be applied to prevent Respondents from asserting that Campbell was not traveling to Ruby Tuesday's to eat dinner at the time of the accident. The Amended Judgment of the Trial Court should be reversed and the case remanded for entry of judgment in favor of Appellant consistent with the finding that Campbell was going to Ruby Tuesdays to eat dinner.[15]

4. The Trial Court misapplied the law in its refusal to apply the Doctrine of Judicial Estoppel.

The Trial Court's Amended Judgment disposed of the doctrine of judicial estoppel as follows:

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thought that it mattered where Mr. Campbell was going and based its decision on this "fact", this matter is being addressed in this brief.

[15] As noted above, it doesn't matter where Campbell was going given that he had general permission to use the truck. In order to remain consistent, because it's the truth, and because Respondents are estopped to deny the same, Mr. Campbell should have been found to be traveling to Ruby Tuesdays to get dinner. Under the Trial's Court's analysis, if Mr. Campbell was on his way to get dinner, his use would have been permissive.

> The Court overrules both competing arguments of estoppel or res judicata arising from the Federal Court's prior grant of summary judgment on the different issue of whether Campbell was in the course and scope of his employment at the time of the wreck. In any event, based upon the summary judgment record before it at the time, the Federal Court found that Campbell "drove toward" and was "en route" to Ruby Tuesdays when the wreck occurred.

L.F. 830. The Trial Court completely missed the issue, misapplied the law, ignored Respondent BNSF's own admissions and statements in the prior federal case, and selected out of context quotes from Judge Whipple's prior Judgment in favor of Respondent BNSF and against Appellant.

First, the factual issue in the prior federal case was Mr. Campbell's intended destination. L.F. 734-742. If he was going to get a meal, he was not in the course and scope of his employment. Recognizing this, Respondent BNSF filed its Motion for Summary Judgment setting forth as a "STATEMENT OF UNCONTROVERTED MATERIAL FACT[16]" that "[a]t approximately 8:30 pm, on March 16, 2009, Campbell drove the Silverado from the motel northbound on Glenstone Avenue in the direction of a Ruby Tuesday restaurant." L.F. 635. The very next "STATEMENT OF

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[16] "A material fact in the context of summary judgment is one from which the right to judgment flows." Goerlitz v. City of Maryville, 333 S.W.3d 450, 453 (Mo. banc 2011) (*citing* ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. banc 1993) .

UNCONTROVERTED MATERIAL FACT" set forth by Respondent BNSF and omitted by the Trial Court from its Amended Judgment is that "***Campbell's driving of the Silverado for the personal purpose of getting dinner was not known to, sanctioned, approved, directed or requested by BNSF***." L.F. 635. In Respondent BNSF's own words, Mr. Campbell was going to Ruby Tuesday's for the personal purpose of getting dinner and, as a result, Respondent BNSF was entitled to a judgment as a matter of law. *Id.* If Campbell was going to the store to buy railroad spikes, he would be in the course and scope of his employment. If it was unknown to BNSF where Campbell was going and the record was void of any indication where Mr. Campbell was going, there would have been a factual dispute as to the purpose of his trip. Because Respondent BNSF knew where he was going and set forth as an undisputed material fact where they knew he was going, Respondent BNSF obtained a judgment as a matter of law. In other words, Respondents admitted that Mr. Campbell was going to Ruby Tuesdays to get dinner and there was no dispute to this material fact from which Respondent BNSF's judgment flowed.

The Trial Court's assertion that the fact of where Mr. Campbell was going was not before the Federal Court is simply not correct. In evidence before the Trial Court was Respondent BNSF's Suggestions in Support of its Motion for Summary Judgment and the material relied on in the Suggestions in Support. Respondent BNSF supported its STATEMENT OF UNCONTROVERTED MATERIAL FACT that Mr. Campbell was traveling to Ruby Tuesdays to get dinner, with Mr. Campbell's statement taken within two days of the wreck and the affidavit of its senior claims representative, William C.

Henderson. L.F. 628-649. The multiple citations to testimony, statements, and affidavits by Respondent BNSF are quoted above and had to be simply ignored by the Trial Court in its conclusion that the Federal Court only had before it in the summary judgment record at the time that Mr. Campbell was merely driving toward the Ruby Tuesdays. It was the Trial Court's job to weigh the evidence, not omit evidence from the scales and then rely on its omission of evidence in finding the issues against Appellant.

Further, the Trial Court's finding that the Federal Court found that Campbell was merely "driving toward" or "*en route*" to Ruby Tuesdays is based on the nitpicking of half-quotes out of context and is incomplete to the extent it is misleading. What Judge Whipple actually wrote is much different than the Trial Court's selective quotations. "He awoke approximately two hours later feeling hungry, so he got into his rental vehicle and drove toward Ruby Tuesday's restaurant." L.F. 736. Judge Whipple continued, "*en route to the restaurant*, Campbell's vehicle collided with Plaintiff's vehicle, which was stopped at a traffic light." *Id.* at 736 (emphasis added). In ruling that the "coming and going" rule was inapplicable, Judge Whipple found "the rule and its exceptions do not apply here *because Campbell was traveling from his hotel room to a restaurant* on his day off. He was not going to or from work *nor did his trip to the restaurant have any dual work purpose*." L.F. 737 n. 1 (emphasis added). Judge Whipple found that "the general rule is that the employer-employee relationship is suspended while the employee is going to and from meals, even though he is driving the employer's car, unless the employer receives some direct benefit from the employee's use of the car." L.F. 738. Judge Whipple held:

> Under the particular facts and circumstances, Campbell was not acting within the course and scope of his employment *when he drove to Ruby Tuesday's* on the night of the accident. *Campbell's actions in driving to the restaurant* were not done to further the business interests of BNSF. The general rule is that an employee is not acting within the scope of his employment *when he is going to and from meals*. Although an employee traveling on business is acting within the scope of his employment by stopping to eat, *Campbell was not traveling on business at the time. He was driving to a restaurant on a personal day off*. . . .

L.F. 739 (emphasis added). After outlining that Mr. Campbell was traveling to Ruby Tuesdays for a meal, Judge Whipple concluded "Plaintiff cannot recover from BNSF under the doctrine of *respondeat superior* and his claims against BNSF must be dismissed." L.F. 741-742. Either the Trial Court didn't read Judge Whipple's Order and Judgment (which was admitted in evidence) or the Trial Court purposefully omitted Judge Whipple's actual findings that benefited Appellant's position for some unknown reason. Either way, the Trial Court's finding that "based upon the summary judgment record before it at the time, the Federal Court found that Campbell "drove toward" and was "*en route*" to Ruby Tuesdays when the wreck occurred" is incomplete to the extent that it constitutes a substantial injustice to Appellant. The Trial Court must be reversed.

POINT IV

The Trial Court erred in entering its Amended Judgment in favor of Respondents because the Trial Court erroneously applied the law in that the doctrine of collateral

estoppel mandated the finding that James Campbell was traveling to a restaurant to get dinner at the time of the collision with Appellant.

James v. Paul, 49 S.W.3d 678 (Mo. banc 2001)

Wilkes v. St. Paul Fire & Marine Ins. Co., 92 S.W.3d 116 (Mo. App. 2002)

A. Standard of Review:

"The appropriate standard of review in judge tried cases is governed by Rule 73.01 as interpreted in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)." Huff v. Director of Revenue, 778 S.W.2d 334, 335 (Mo. App. 1989). "In Murphy, the court held that the [judgment of the] trial court will be sustained unless 'there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Id.* (*quoting* Murphy, 536 S.w.2d at 32).

B. Respondents were collaterally estopped from asserting their new position that Mr. Campbell was not traveling to a restaurant to get dinner.

In addition to being judicially estopped from asserting their new position, Respondents were also precluded from litigating the issue of where Mr. Campbell was traveling pursuant to the doctrine of collateral estoppel. The Trial Court erred in misapplying the law in its refusal to apply the doctrine of collateral estoppel. "Collateral estoppel, or issue preclusion, precludes the same parties, or those in privity with the parties, from relitigating issues that have been previously litigated." Wilkes v. St. Paul Fire & Marine Ins. Co., 92 S.W.3d 116, 120 (Mo. App. 2002) (*citing* Major v. Frontenac Industries, Inc., 968 S.W.2d 758, 761 (Mo. App. 1998)); *see also* Oates v. Safeco Ins.

Co., 583 S.W.2d 713, 719 (Mo. banc 1979). "Before giving preclusive effect to a prior adjudication under collateral estoppel principles, the Court must consider four factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." James v. Paul, 49 S.W.3d 678, 682-83 (Mo. banc 2001) (*citing* Oates, 583 S.W.2d at 719).

The first factor for the application of collateral estoppel is whether the issue decided in the prior adjudication is identical to the issue in the present adjudication. *Id.* Clearly, the issue is the same. The issue is whether Campbell was driving to Ruby Tuesday's to get dinner at the time of the accident.[17] In the prior adjudication, BNSF asserted as a "STATEMENT OF UNCONTROVERTED MATERIAL FACT" that Campbell was driving to Ruby Tuesday's to get dinner at the time of the accident. L.F. 635; 644. This fact formed the basis for Judge Whipple's granting of Respondent BNSF's Motion for Summary Judgment in favor of BNSF. L.F. 737; 739. As characterized by the Trial Court, the issue in this case is whether Campbell was driving to

[17] Again, it does not matter where Mr. Campbell was going given his general permission to use the vehicle. However, to the extent is does matter and because it was important to the Trial Court, this matter is addressed in this Brief.

Ruby Tuesday's to get dinner at the time of the accident. The issue in this case is identical to the issue in the prior adjudication. Thus, the first factor is satisfied in favor of the application of collateral estoppel.

The second factor is whether the prior adjudication resulted in a judgment on the merits. James, 49 S.W.3d at 682. It did. Respondent BNSF's Motion for Summary Judgment was granted resulting in a judgment on the merits against Appellant. L.F. 734-742. The second factor is satisfied in favor of the application of collateral estoppel.

The third factor is whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication. James, 49 S.W.3d at 682. "[P]rivity exists where the party sought to be precluded has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court." *Id.* at 683 (*citing* Cox v. Steck, 992 S.W.2d 221, 224 (Mo. App. 1999)). Respondents BNSF and Old Republic claim that their interests are identical. L.F. 128-144; *See also* Griffitts v. Campbell, 426 S.W.3d 684 (Mo. App. 2014). Essentially, BNSF's position is, and always has been, that it speaks for Old Republic because of the nature of the fronting policy issued by Old Republic to BNSF. *Id.* By Respondents' admission, they are in privity. *See e.g. Id.* Respondent BNSF was a party to the prior adjudication. *See e.g.* L.F. 734. Respondent Old Republic was in privity with Respondent BNSF. L.F. 128-144; Griffitts, 426 S.W.3d 684. The third factor is satisfied in favor of collateral estoppel.

The fourth factor is whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. James, 49 S.W.3d at 682; Wilkes, 92 S.W.3d at 122.

> In deciding this factor, [the courts] consider the following additional four factors: (1) did the party against whom collateral estoppel is asserted have a strong incentive to litigate the prior adjudication; (2) does the second forum afford the party against whom collateral estoppel is asserted procedural opportunities not available in the first action; (3) is the prior judgment, upon which collateral estoppel is based, inconsistent with one or more prior judgments; and (4) was the forum in the first action substantially inconvenient to the party against whom collateral estoppel is asserted.

Wilkes, 92 S.W.3d at 122 (*citing* St. Louis Univ. v. Hesselberg Drug Co., 35 S.W.3d 451, 455-56 (Mo. App. 2000)). Respondent BNSF had a full and fair opportunity to litigate the issue in the prior litigation and, in fact, litigated the issue to such an extent that it obtained a summary judgment based in large part on the issue of the purpose of Mr. Campbell's trip. L.F. 734. According to Respondents Old Republic and BNSF, Old Republic and BNSF have the exact same interest. L.F. 128-144; *See also* Griffitts, 426 S.W.3d 684 (describing the nature of the "fronting policy" at issue). Thus, Respondent BNSF's full and fair opportunity to litigate the issue is the exact same as Respondent Old Republic's full and fair opportunity to litigate the issue. Further, the factors enumerated in Wilkes all weigh in favor of the application of collateral estoppel. First, Respondent BNSF and, by implication, Respondent Old Republic, had a strong incentive to litigate

the issue of where Mr. Campbell was going at the time of the accident in the prior litigation. As set forth above, if Mr. Campbell was going to get work supplies, he would have been in the course and scope of his employment. Since he was going to get dinner, he was not and, therefore, BNSF and Old Republic prevailed in obtaining a judgment as a matter of law. L.F. 734-742. Second, there is no substantial difference in the procedural opportunities in the prior forum (federal court) and the underlying court.[18] Third, the prior judgment, upon which collateral estoppel is based, is not inconsistent with any prior judgment. However, the Amended Judgment issued by the Trial Court is inconsistent with the Judgment in the prior federal case. *Compare* A3-A41 *with* A77-A85. Fourth, the forum was not substantially inconvenient to either Respondent BNSF or Old Republic given that Respondent BNSF chose the forum by removing the prior case to federal court. The fourth factor is satisfied in favor of the application of collateral estoppel.

Respondents BNSF and Old Republic should not have been permitted to relitigate the issue of where Mr. Campbell was traveling at the time of the accident in this case and it was a misapplication of the law for the Trial Court to permit Respondents to do so. This error is further compounded by the fact that the Trial Court found that Mr. Campbell was not traveling to Ruby Tuesday's to get dinner and based its erroneous Amended

[18] Further, BNSF and Old Republic removed the action to federal court and thereby chose their forum.

Judgment on this finding.[19] The doctrine of collateral estoppel applies. At the time of the accident, Campbell was traveling to Ruby Tuesday's restaurant to get dinner. The Trial Court's Amended Judgment must be reversed and the case remanded for entry of Judgment in Appellant's favor.

[19] It doesn't matter where Mr. Campbell was going because he had general permission to use the truck. However, because it is the truth, because Respondents were estopped to deny it, and because the Trial Court based its erroneous Amended Judgment on this erroneous finding, it should have been found that Mr. Campbell was traveling to Ruby Tuesday's restaurant.

VII. CONCLUSION

The Trial Court erred in presiding over this case given that it never acquired the ability to do so. The Trial Court erred in declaring the law and applying the law in finding that Mr. Campbell's use of the BNSF provided vehicle was not permissive under the omnibus insuring clause in Old Republic's automobile liability insurance policy. The Trial Court failed to follow Missouri public policy and the law of Missouri as set forth in Tharp, Sullivan, Weathers, Shull and Broadie. The Trial Court failed to apply the doctrines of judicial estoppel and collateral estoppel, thereby permitting Respondents to take two contrary positions in two different cases and succeed in each case based on the respective contrary positions. The Trial Court engrafted a company rule regarding the operation of a vehicle under the influence of alcohol into an insurance policy thereby vitiating coverage under an omnibus insuring clause and violating § 303.190.2(2) RSMo. The Trial Court's Amended Judgment must be reversed and the case remanded with specific instructions to the Trial Court to enter a judgment in favor of Appellant in conformity with the facts of the case, evidence presented at trial, public policy and law of Missouri.

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VIII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate paper copy of the foregoing *Appellant's Brief*, along with this *Certificate of Service*, were delivered by U.S. mail and filed via the electronic filing system on this 5th day of January, 2018, to the following attorneys:

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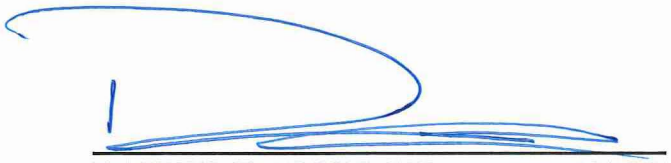

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IX. RULE 84.06(c) AND (g) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing *Appellant's Brief* complies with the limitations contained in Rule 84.06(b). There are 20,943 words (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature blocks, and appendix) and 1,603 lines in the foregoing brief according to the Word Count tool in Microsoft Word for Windows, the word processing software used to prepare the foregoing brief. The brief is being filed in the Supreme Court of Missouri via the electronic filing system and is being served on counsel for Respondent via said filing.

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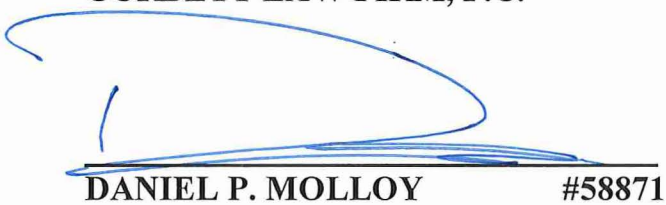

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