Appeal No. SC96740

IN THE SUPREME COURT OF MISSOURI

RICKY GRIFFITTS,

Plaintiff-Appellant,

v.

OLD REPUBLIC INSURANCE COMPANY, *et al.*,

Defendants-Respondents.

Appeal from the Circuit Court of Greene County
Thirty-First Judicial Circuit
Judge Jason Brown

BRIEF OF AMICUS CURIAE MISSOURI ORGANIZATION OF DEFENSE LAWYERS

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INTERESTS OF THE AMICUS CURIAE

Background and Purpose of the Organization

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 attorneys involved in defending civil litigation, including insurance coverage disputes.

Two of MODL's stated goals are to eliminate court congestion and delays in civil litigation, and to promote improvements in the administration of justice. To that end, MODL members work to advance and exchange information, knowledge, and ideas among themselves, the public, and the legal community to enhance the skills of civil defense lawyers and elevate the standards of trial practice in this state.

The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individual Missouri citizens. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort, insurance, and contract litigation involving individual and corporate clients, so as to maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

The Organization's Interest in This Particular Case

In this case, MODL supports the position of BNSF Railway and Old Republic that section 303.190.2(2) RSMo should be applied to hold that at the time of the underlying vehicle accident, James Campbell was not covered by the insurance policy at issue, such that there can be no recovery for Ricky Griffitts under that policy.

Respectfully, as further discussed in this amicus brief, this Court has the obligation to interpret statutes and contracts in accordance with the plain language of the words used. Unfortunately, due to some historic cases involving distinguishable facts, some courts in Missouri have deviated from a plain-language interpretation regarding permissive-use cases and the interpretation of omnibus clauses in insurance policies.

Under the plain language of section 303.190.2(2), insurance policies must provide omnibus coverage to any person using an insured automobile with the permission of the named insured. In several cases from the 1970s and 1980s involving insurance policies that concerned themselves with the "operation" of vehicles, some courts began to differentiate between the "use" of a vehicle and the "operation" of a vehicle. But, when (as here) the applicable statutory language and the pertinent contractual language do not contain the word "operate" (or a form thereof), there is no need to differentiate between the "use" and "operation" of a vehicle, and the Court should adhere to the plain language of the statute and the contract at issue—rather than inserting or discussing additional, absent terminology. A plain-language review is essential for maintaining predictability in the insurance market. Insurance companies and their insureds look to the plain language of their agreements when making decisions.

The Organization's Conclusion and Recommendation to the Court

MODL urges the Court to apply section 303.190.2(2) and the insurance policy at issue in line with their plain language, and to hold that (A) the trial court did not commit clear error in finding, as a matter of fact, that Mr. Campbell was not a permissive user of BSNF's vehicle at the time of the accident; therefore, (B) there is no insurance coverage

in connection with the underlying accident. Furthermore, as BNSF and Old Republic contend in their substitute brief, even if the Court were to engage in the "use versus operate" analysis, the Court should reach the same conclusion.

CONSENT OF THE PARTIES

Both Appellant and Respondents have consented to the filing of this brief by MODL, in conformity with Rule 84.05(f)(2).

STATEMENT OF FACTS

MODL adopts the statement of facts set forth in BNSF's and Old Republic's brief. To the extent any facts are pertinent to its argument, MODL refers to such facts as part of the argument below.

ARGUMENT

I. Under a plain-language review, the word "operate" plays no role in the application of section 303.190.2(2) and the insurance contract at issue, which does not provide coverage in connection with the underlying accident.

The BNSF employee manual contains an explicit ban on using or possessing alcohol while on BNSF property, on duty, or operating BNSF vehicles. (Ex. A317). According to Appellant, this case turns on whether this restriction is a restriction on the "use" of a company vehicle, or if it is a restriction on the "operation" of a company

vehicle. But review of the statutory and contractual language at issue demonstrates that any such distinction is unnecessary.[1]

a. Standard of Review

This case involves the application of statutory and contractual language. The statute at issue is section 303.190.2(2), which mandates omnibus coverage in insurance contracts. The contract at issue is the insurance policy issued by Old Republic to BNSF as named insured. Statutory and contract interpretation are both matters of law, reviewed *de novo*. *Macon Cnty. Emer. Servs. Bd. v. Macon Cnty. Comm.*, 485 S.W.3d 353, 355 (Mo. banc 2016) ("questions of statutory interpretation are reviewed *de novo*"); *Piatt v. Indiana Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 792 (Mo. banc 2015) ("The interpretation of an insurance policy is an issue of law, subject to *de novo* review").

When interpreting statutes and contracts, the general rule of interpretation is to give the language its "plain meaning." *Piatt*, 461 S.W.3d at 792. For statutes, this rule means giving "effect to legislative intent as reflected in the plain language of the statute." *State ex rel. Richardson v. Green*, 465 S.W.3d 60, 64 (Mo. banc 2015) (internal quotations omitted). "It is presumed that each word, clause, sentence, and section of a statute will be given meaning and that the legislature did not insert superfluous

[1] As amicus curiae, MODL focuses upon why the Court should engage in plain-language review of the statutory and contractual language at issue. Nevertheless, for the reasons stated in BNSF's and Old Republic's brief, MODL agrees a "use versus operate" analysis should yield the same result in this case: an affirmance of the trial court's judgment.

language." *Macon*, 485 S.W.3d at 355. Alternatively, when a statute is silent the Court should "not add words … under the auspice of statutory construction." *Id.* If a plain language interpretation is sufficient to understand a statute, "[t]here is no room for construction even [if] the court may prefer a policy different from that enunciated by the legislature." *Am. Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 90 (Mo. banc 2000) (quoting *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995)). A plain-language interpretation is essential for maintaining predictability and consistency, something particularly valuable for laws affecting economic activity such as the purchasing and issuance of insurance contracts. *Arden Carmichael, Inc. v. Cnty. of Sacramento*, 93 Ca.App.4th 507, 517 (Cal. App. 2001).

Similarly, an insurance contract should be interpreted according to its plain language and through the lens of "an ordinary person of average understanding if purchasing insurance." *Piatt*, 461 S.W.3d at 792 (quoting *Allen v. Continental W. Ins. Co.*, 436 S.W.3d 548, 553-54 (Mo. banc 2014)). Absent ambiguity in the plain language of the contract, the Court should not apply any other principles of contract interpretation. *Id.* As is true for both contract interpretation and statutory interpretation, the plain language of a document can be ascertained through the use of a dictionary. *Richardson*, 465 S.W.3d at 64.

In sum, for purposes of its review of this matter, the Court should ascertain the plain language of the relevant statute and insurance contract without adding or subtracting any words.

b. Applicable Statutory and Contractual Language

Section 303.190.2(2) applies in this case because it mandates that all motor vehicle liability insurance policies contain what is commonly referred to as an omnibus clause: a clause extending coverage beyond the named insured. Specifically, this statute mandates that insurance policies "insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured." Section 303.190.2(2). In other words, insurance policies must cover permissive users of a vehicle.

In conformity with this statutory mandate, the BNSF insurance policy at issue contained the following language:

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 …

(Ex. A96). For purposes of this case, the relevant words in the statute and insurance policy are "using" and "permission." Because neither the policy nor the statute define these words, we look to the dictionary for their plain-language meanings. "Use" is defined as "to put into action or service." *Webster's Third New Int'l Dictionary* 2523 (2002). "Permission" is defined as "the act of permitting: formal consent: authorization." *Webster's Third New Int'l Dictionary* 1683 (2002). Finally, "permitting" is defined as "to consent to expressly or formally: grant leave for or the privilege of: allow, tolerate."

Webster's Third New Int'l Dictionary 1683 (2002). Putting these terms together in the context of the statute and insurance policy at issue, a person is an "insured" under the policy's omnibus clause so long as he or she is putting a vehicle into action or service with the consent of or as a privilege granted by the named insured.

c. Relevant Facts as Found by the Trial Court

This case revolves around the actions of James Campbell, a former employee of BNSF Railway. ¶ 34.[2] Campbell was employed as a foreman on a tie gang, which is a group of workers who travel the region and replace railroad ties. ¶¶ 35-35. BNSF issued him a company car so he could travel the region. ¶¶ 36, 38. While at home in Tennessee, he was allowed to use his assigned company vehicle, but not for personal use. ¶ 45.

In March 2009, Campbell was assigned a project in Springfield, Missouri. ¶ 47. His supervisor gave him permission to use the company vehicle while out of town for purposes such as getting food and going to a convenience store.[3] ¶ 48. As for the Springfield project, he was permitted to drive to Springfield the day before the project

[2] All references in this section are to the underlying trial court judgment in *Griffitts v. Old Rep. Ins. Co.*, Cause No. 1331-CC00421 (Greene Cnty. Cir. Ct., Nov. 10, 2016).

[3] Though Appellant asserts Campbell had unfettered rights to use the vehicle while out of town, this assertion was disputed at trial and was not a fact found by the trial court. Rather, the trial court found that Campbell had "express, restricted permission to use" the vehicle for "limited purposes." ¶ 101.

began. ¶ 47. Around 5:00pm on March 16, 2009, when he arrived in Springfield, he got together with a group of friends and enjoyed several alcoholic beverages. ¶ 72. Later, around 7:45pm, a couple of his employees had to escort him to his hotel room. ¶ 73. He was left in his room and told to sleep. ¶¶ 73-75. But he only slept for a short period of time, left his room (unbeknownst to anyone else) around 8:30pm, and entered his vehicle. ¶ 77. Shortly thereafter, he collided with several other vehicles, jumped a curb, and wound up in a parking lot. ¶ 77. Police discovered he had a .182% blood alcohol content, over twice the legal limit. ¶ 81.

Griffitts was injured as a result of the traffic accident caused by Campbell. Griffitts seeks monetary damages under the omnibus clause of BNSF's insurance policy because an employee was driving the company vehicle at the time of the accident. As discussed above, the policy's omnibus clause provides insurance coverage for this accident so long as Campbell was using the vehicle with the permission of the named insured (BNSF). Though there is no question BNSF allowed Campbell to use the vehicle for his work in Springfield, the Court must determine (as further discussed in subpoint (d) below) whether the trial court committed clear error in finding he was a permissive user at the time of the accident. This is the operative question because it determines whether Griffitts is permitted to collect monetary damages under BNSF's insurance policy. As the party seeking coverage, Griffitts has the burden of proving it exists. *Auto Club Inter-Ins. Exch. v. Chamberlain*, 839 S.W.2d 378, 382 (Mo. App. 1992).

d. The pertinent facts have already been determined by the trial court and are substantially supported by the record: Campbell was not a permissive user of the company vehicle on the night of March 16, 2009, and the trial court did not commit clear error in so finding.

Whether a person is a permissive user is a factual matter. *Universal Underwriters Ins. Co. v. Davis*, 697 S.W.2d 189, 194 (Mo. App. 1985) (citing *Wells v. Hartford Acc. & Indem. Co.*, 459 S.W.2d 253, 258 (Mo. banc 1970)). As such, the trial court's determination of that factual matter should not be set aside absent a finding of clear error. *See Hawkeye-Security Ins. Co. v. Bunch*, 643 F.3d 646, 649, 651 (8th Cir. 2011) (applying Missouri law, and emphasizing that "whether an individual had permission to use a vehicle under an omnibus clause is always a question of fact" that, when determined by the trial court in a bench trial, is reviewed "for clear error"); *M.F.A. Mut. Ins. Co. v. Alexander*, 361 S.W.2d 171, 178-79 (Mo. App. 1962) (noting a trial court's finding of fact will not be set aside unless it is "clearly wrong").

Here, the trial court determined—as a matter of fact—that Campbell did not have unfettered rights regarding the use of the company vehicle. ¶ 48-49. Additionally, Campbell admitted that company rules dictated how and when he was allowed to use the vehicle. ¶¶ 65, 67, 83. Such rules included Maintenance of Way Operating Rule ("MOW") 1.5 and BNSF Vehicle Policy Manual section 3.1. In particular, MOW 1.5 states as follows:

> The use or possession of alcoholic beverages while on duty or on company property is prohibited. Employees must not have any measurable alcohol in

[*sic*] their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property.

Along those same lines, section 3.1 of the BNSF Vehicle Policy Manual states as follows:

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%;

Together, these rules explicitly prohibit BNSF employees from using alcohol before or while on duty or on company property, including company vehicles.

Campbell admitted he was familiar with these rules. ¶ 65. Moreover, he admitted it was his job as foreman to teach his employees these rules. ¶¶ 66-67. He knew he broke the rules, and admitted he was not authorized to use the company vehicle on the evening of March 16, 2009. ¶ 88-89. Indeed, he acknowledged he lacked permission "to even get into the [vehicle] after he had been drinking alcohol." ¶ 90.

Presented with these facts, the trial court had to determine whether BNSF gave Campbell consent or authority to put the company vehicle into action or service on the evening of March 16, 2009, when he got behind the wheel of the vehicle after consuming

numerous alcoholic beverages and ultimately caused a collision. In other words, was Campbell a permissive user of the company vehicle on March 16, 2009, such that BNSF's omnibus clause would provide him insurance coverage for the accident? The trial court determined this factual matter and answered in the negative, a finding that was not clearly wrong and did not involve clear error, as further discussed below.

Because there were few oral statements made concerning the extent of BNSF's permission for Campbell to use the company vehicle, the trial court turned to BNSF's policies regarding the use of motor vehicles. MOW 1.5 and section 3.1 of the Vehicle Policy Manual are instructive because they provide comprehensive information and guidelines on how and when employees can use company vehicles. Section 3.1 provides that employees may not possess alcohol while using work vehicles, and may not be on company property with a BAC greater than 0.02%. Here, Campbell's body possessed an excessive amount of alcohol (substantially greater than 0.02%) while he was using a company vehicle and on company property (the vehicle). Moreover, MOW 1.5 provides that employees may not have alcohol on their breath or in their bodily fluids while on company property. Again, Campbell had a high level of alcohol in his body when he entered the company vehicle, and admitted he had no authority to step foot into it that evening.

These company policies provide clear guidance on the scope of permission granted to Campbell regarding the company vehicle. Campbell's supervisor told him he could use the vehicle to get food or go to the convenience store while he was out of town, but the company rules provided additional guidance regarding Campbell's lack of

permission to use the company vehicle if he decided to drink alcohol. Appellant argues it is absurd to think Campbell's use of his only vehicle while out of town was limited, but the trial court found (again, as a factual matter) that limits did exist. Like any responsible driver, Campbell had the option of calling a taxi if he wished to get a beer or other alcoholic beverage. The trial court's finding of fact that Campbell was not a permissive user on the night of March 16, 2009 does not shock the conscience (or one's sense of justice) and is neither clearly erroneous nor clearly wrong.

Under section 303.190.2(2), an insurance policy must include an omnibus clause providing coverage to any driver using a vehicle with the permission of the named insured. Consistent with that mandate, BNSF's insurance policy extended coverage to persons using a company vehicle with the permission of BNSF. In this situation, the BNSF rules and policies explicitly denied permission for employees to use company vehicles after consuming alcohol. Therefore, the trial court determined as a matter of fact that Campbell was not a permissive user at the time of the accident. That finding is not clearly erroneous or clearly wrong. As such, Appellant cannot seek compensation under BNSF's insurance policy. BNSF, like other named insureds—and Old Republic, like other insurance companies—should be able to rely on the plain language of the insurance policy issued; moreover, BNSF should be able to rely on its explicit guidelines on the use of its vehicles. The Court should affirm the trial court's judgment.

II. The Court should not apply a "use versus operate" test (as Appellant insists) when deciding whether coverage applies, because that test is not rooted in the statutory language at issue and stems from inapplicable cases.

Appellant urges the Court to apply a "use versus operate" test to determine whether insurance coverage applies. Under that test, restrictions on the use of a vehicle must be classified as "use restrictions" or "operation restrictions." A violation of a "use restriction" would mean the omnibus policy does not provide coverage; a violation of an "operation restriction" would have no effect on determining whether coverage applies.

Even if a "use versus operate" test is appropriate in certain situations, this case does not present such a situation. Here, the pertinent statute and insurance policy employ the word "using." Neither the statute nor the policy employs language that would require a "use versus operate" test. Moreover, the cases cited by Appellant in support of a "use versus operate" test are factually and materially different from this case.

Because a "use versus operate" test is not mandatory, especially in this situation, the Court merely needs to (1) determine whether the trial court's factual finding that Campbell was not a permissive user was clearly erroneous or clearly wrong; and then (2) apply the plain language of the statute and contract at issue to determine whether coverage existed in connection with the underlying accident on the night of March 16, 2009. As explained in Point I above, there is competent and substantial evidence in the record to support the trial court's factual finding that Campbell was not a permissive user. As such, under the statute and insurance policy at issue, there is no coverage and the trial court's judgment should be affirmed.

a. In the 1960s, Missouri courts routinely abided by the plain language of section 303.190.2(2) and made no reference to any "use versus operate" dichotomy.

When looking back, an observer will note that cases from the 1960s generally made no distinction between the words "use" and "operate" when applying section 303.190. For example, in *Helmkamp v. Am. Fam. Mut. Ins. Co.*, the Springfield Court of Appeals applied the words "use" and "operate" interchangeably, finding no difference. 407 S.W.2d 559, 570-71 (Mo. App. 1966). At that time, the relevant portions of section 303.190 read the same as now, and only contained the word "use." Therefore, courts simply had to decide whether the driver of the vehicle was a permissive user. Just as the statute mandates, emphasis was placed on permission and whether a particular use fell within the permission granted. *Id.* at 571. There was no distinction made between "use" and "operate."

b. In the 1970s, Missouri courts began distinguishing between "use" and "operate" because insurance policies had begun to use both words.

Things began to change in the 1970s. Missouri courts faced a number of cases in which the insurance policies at issue drew a distinction between "use" and "operate." For example, in *Allstate Ins. Co. v. Hartford Acc. & Indem. Co.*, the Court of Appeals reviewed an insurance policy with an omnibus clause containing the following language: "any other person using such 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." 486 S.W.2d 38, 40 (Mo. App. 1972). Thus, "in

this setting," the two words were "of quite different meaning." *Id.* at 43. The court was obliged to determine whether a vehicle was being driven by a permissive user, and whether it was being operated in accordance with the permission granted by the named insured.

The *Allstate* case appears to be one of the first cases making a distinction between "use" and "operate." The court noted that up to that time, most omnibus clauses only referred to the "use" of a vehicle. *Id.* at 44. Later, however, many omnibus clauses began referring to the "operation" of a vehicle. *Id.* Therefore, "operate" only became relevant when the word began appearing in omnibus clauses. *Id.*

This Court waded into the arena in 1979 when it decided the case of *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623 (Mo. banc 1979). Since 1979, *Weathers* has become an oft-cited case in the realm of permissive-use and omnibus clauses. By a 4-3 vote with the deciding vote cast by a special judge, the Court issued an opinion distinguishing between the word "use" and the word "operate." But the Court made this distinction only because it was presented an insurance policy and an omnibus clause that included the words "using," "operating," "use," "operation," and "operations," among other forms of the words "use" and "operate." In particular, the policy contained the following language: "any person while using (vis-à-vis Operating) the automobile … provided the actual Use (vis-à-vis Operation) of the automobile is … with the permission of the (named insured)." *Id.* at 625. Additionally, the insurance contract at issue contained back-to-back paragraphs listing *uses* that were not permitted, and then listing *operations* that were not permitted. *Id.* at 627. One paragraph stated several ways in which the

vehicle could not be *used*, such as for towing other vehicles. *Id.* Another paragraph listed several ways in which the vehicle could not be *operated*, such as by a driver under 21 years of age. Thus, the words "use" and "operate" (and many forms thereof) were employed extensively in the policy, and had different meanings.

One operation restriction contained in the *Weathers* insurance policy stated as follows: "Vehicle shall NOT be Operated by any person except Customer and the following Authorized Operators …" *Id.* Walker was an authorized operator but Davis was not. When the accident occurred, however, Davis was driving the vehicle and Walker was in the passenger seat. *Id.* at 624-25. Nevertheless, the Court concluded the insurance policy provided coverage because at the time of the accident, Walker was still using the vehicle—he was sitting in the passenger seat benefiting from the vehicle's operation—even though Davis' driving was an unpermitted operation of the vehicle. Therefore, the omnibus clause provided insurance coverage. *Id.* The Court reached this holding by examining the plain language of the insurance policy, which extensively employed forms of the words "use" and "operate" in different contexts.

Additionally, the *Weathers* decision largely rested on it being a "different driver" case, meaning the permissive user was in the vehicle but a different person was driving it. *See id.* at 628-30. The Court relied on precedent from Maryland and Georgia, as well as *American Jurisprudence* (a national secondary source) for the proposition that omnibus clauses apply so long as the permissive user is within the vehicle. *Id.* "[T]he mere act of turning the wheel over to [a] companion" did not exclude a permissive user from being

an insured individual under the insurance policy at issue. *Id.* at 630. The omnibus clause still applied because the permissive user was still using the vehicle. *Id.*

The statute and policy at issue here, unlike the policy in *Weathers*, does not employ the word "operate" or any form of that word. Instead, the policy only employs the word "using." As such, *Weathers* is distinguishable and does not mandate the application of a "use versus operate" test in this case.

c. After the *Weathers* decision, some courts began applying the "use versus operate" test without taking proper account of the material facts.

Weathers was a case in which the "use versus operate" dichotomy made sense in light of the language contained in the insurance policy at issue there. Nevertheless, after *Weathers* was decided, some courts began routinely differentiating between the "use" of a vehicle and its "operation."

This routine differentiation can largely be attributed to the case of *Universal Underwriters v. Davis*. There, the Court of Appeals wrote a thorough opinion outlining the history of permissive-use cases, but framed *Weathers* as a case *requiring* the "use versus operate" test in *all* permissive-use cases. 697 S.W.2d at 191-93. "The *Weathers* court first concluded that then Section 303.190.2(2), RSMo.1969 obligated the insurer to provide omnibus coverage to all persons using the insured vehicle with express or implied consent of the owner," and noted there was a "distinction between use and operation." *Id.* at 192. Unfortunately, the *Universal Underwriters* court overlooked the fact that *Weathers* distinguished between "use" and "operate" only because the insurance policy at issue in *Weathers* employed both words. *Id.*

Though it did not need to employ a "use versus operate" test to reach the correct result, the *Universal Underwriters* court recognized there are limitations to a person's covered use of a vehicle. The case involved a car company employee who was to drive a demonstrator car around as a "showroom on wheels." *Id.* at 191. The company specifically directed him not to allow family members to use the vehicle. *Id.* In reviewing the insurance policy at issue, the court recognized it was different than the policy in *Weathers*. *Id.* at 193. In particular, the omnibus policy in *Universal Underwriters* extended coverage to "any other person using an owned auto … within the scope of your permission," with "your" defined as the car company. *Id.* at 190. Additionally, the use restriction was well-known by the employee and was set out in a written agreement; these facts too were different than the facts in *Weathers*. *Id.* at 193. As such, when the employee allowed his son to drive the demonstrator car, the omnibus policy did not apply because the written and known prohibition on family members driving the vehicle had been violated. *Id.* at 193-94. That written and known prohibition clearly expressed that the car company did not give permission for the son to drive the car. *Id.*

Even though the *Universal Underwriters* court did not need to apply a "use versus operate" test and incorrectly stated that this Court *requires* application of the test in *all* permissive-use cases, the court at least took proper account of language that limited coverage.

Universal Underwriters was not the only case in which a court treated *Weathers* as requiring the "use versus operate" test whenever there is a question of permissive use.

Appellant has cited a number of cases treating the test as mandatory. But, none of those cases take proper account of the facts involved in *Weathers* and why this Court applied the test there. Moreover, there are other Missouri cases (discussed below) in which courts (correctly) did *not* apply the test.

To avoid confusion in this area of the law, the Court has an opportunity in this case to not only engage in plain-language review (for the reasons stated in Point I above), but also to clarify that this type of review should be the norm in permissive-use cases.

d. Many Missouri cases have refused to apply a "use versus operate" test.

Notably, the "use versus operate" test has not been treated as mandatory, despite the *Universal Underwriters* court's statement that the test must be employed. Over the years there have been numerous permissive-use cases in which courts properly applied the plain language of section 303.190.2(2) and the insurance policies at issue.

For example, in two cases from the 1990s, courts applied the plain language of section 303.190.2(2) and simply determined whether the vehicle was being utilized by a permissive user. In *State Farm Fire & Cas. Co. v. Ricks*, the court determined coverage did not apply because a person (Andre Smith) took the vehicle without the owner's permission. 902 S.W.2d 323 (Mo. App. 1995). "Because Andre Smith had no permission, express or implied, the MVFRL did not require the owner to have liability insurance which covered Smith's use of the vehicle.… In the absence of ambiguity and in the absence of a statute or public policy requiring coverage, we must enforce the policy as written." *Id.* at 325. Similarly, in *State Farm Mut. Auto. Ins. Co. v. Sheel*, the court

determined a person did not have express or implied permission to drive his parent's car; as such, the omnibus policy did not apply. 973 S.W.2d 560 (Mo. App. 1998).

In addition, several cases since 2000 have properly engaged in plain-language applications of statutory and contractual language. In *Trow v. Worley*, the Court of Appeals based its decision regarding whether an omnibus clause applied on whether a person had permission to drive a vehicle. 40 S.W.3d 417, 421 (Mo. App. 2001). In 2011, the Eighth Circuit applied Missouri law in the case of *Hawkeye-Security Ins. Co.*, cited above. There, the court was presented with an omnibus clause containing the same language as the policy at issue here, and an employee manual prohibiting employees from allowing others to drive their company vehicles. 643 F.3d at 651. As a result, when an employee allowed another person to drive her vehicle, the omnibus clause did not apply. *Id.*

e. Public policy does not mandate providing compensation under the insurance policy at issue in this case.

Over the years, Missouri courts have adopted the policy position that the Motor Vehicle Financial Responsibility Law (MVFRL), and in particular section 303.190.2(2), are in place "to assure financial remuneration for damages sustained through the negligent operation of motor vehicles on the public highways of the state not only by the owners of such automobiles but also by all persons using such vehicles with the owner's permission." *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 154 (Mo. App. 2000). But, the MVFRL and section 303.190.2(2) do not require or grant limitless coverage under omnibus clauses. Instead, each word, clause, sentence, and section of the MVFRL is

given meaning, and no superfluous language will be added. *Macon*, 485 S.W.3d at 355. In the context of section 303.190.2(2), courts must recognize that the legislature chose to insert the requirement that omnibus clauses only extend coverage to persons using a vehicle with the permission of the named insured. This limitation on coverage is not superfluous language; moreover, it is "not against public policy [to] exclude liability coverage" when there is no permissive use. *Ricks*, 902 S.W.2d at 325.

Also not against public policy is predictability in the interpretation of contracts. Parties should be bound to the words used in their agreements. Old Republic and other insurance companies rely on their insurance policies being interpreted in line with their plain language, so that the companies are better able to predict and value the insured risks. Likewise, named insureds like BNSF value predictability when procuring affordable insurance coverage. A plain-language review is the most efficient way of providing this predictability, rather than a test that does not and should not apply.

For all of the above reasons and as stated in Point I, the Court should conclude that (1) the trial court did not commit clear error in determining that Campbell was not a permissive user of BSNF's vehicle at the time of the accident; and (2) consistent with the trial court's judgment, which should be affirmed, there is no insurance coverage in connection with the underlying accident.

CONCLUSION

The Court should apply the plain language of section 303.190.2(2) and the plain language of the omnibus clause in the insurance policy at issue. In doing so, the Court should conclude that only permissive users are covered by the policy, whose omnibus clause is consistent with the mandate of section 303.190.2(2). The Court should not apply the "use versus operate" test in a case that does not involve the word "operate" (or a form thereof) in the statute and policy at issue.

Here, as the trial court correctly found as a factual matter, Campbell was not a permissive user of BNSF's vehicle on the evening of March 16, 2009. Company policy explicitly prohibited employees from stepping foot in a company vehicle when under the influence of alcohol. Campbell was aware of this restriction and admitted he had no business getting into that vehicle. There is no insurance coverage in connection with the underlying accident, and Appellant cannot seek compensation under BNSF's insurance policy. The trial court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief contains 6,538 words, all inclusive, and fully complies with the provisions of Rules 55.03, 81.18, and 84.06.

I further certify that on February 13, 2018, a copy of this brief was served via the Court's electronic filing system upon the following counsel:

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