IN THE SUPREME COURT OF MISSOURI

No. SC96740

RICKY GRIFFITTS
Appellant

vs.

OLD REPUBLIC INSURANCE COMPANY
and BNSF RAILWAY COMPANY
Respondents

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THE HONORABLE JASON BROWN
GREENE COUNTY CASE NO. 1331-CC00421

SUBSTITUTE RESPONSE BRIEF OF RESPONDENTS OLD REPUBLIC INSURANCE COMPANY AND BNSF RAILWAY COMPANY

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TABLE OF CONTENTS

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF BNSF RESPONDENTS ON THE ISSUE OF PERMISSIVE USE BECAUSE THE TRIAL COURT'S FACTUAL FINDINGS THAT BNSF'S COMPANY RULES WERE RULES OF PERMISSION ESTABLISHED THAT CAMPBELL NEVER HAD PERMISSION TO USE THE VEHICLE AT THE TIME OF THE ACCIDENT, APPELLANT GRIFFITTS DID NOT CHALLENGE THE FACTUAL FINDINGS, THE FINDINGS DICTATED THE LAW TO BE APPLIED, AND THE TRIAL COURT PROPERLY APPLIED THE LAW IN RENDERING JUDGMENT FOR BNSF RESPONDENTS.

POINT II

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS AS THE JURISDICTION OF A TRIAL JUDGE IS GOVERNED BY THE MISSOURI CONSTITUTION, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S UNTIMELY MOTION IN THAT THERE WAS AMPLE BASIS FOR CONCLUDING THAT APPELLANT WAIVED HIS RIGHT TO TRANSFER GIVEN THAT APPELLANT

FIRST FILED HIS MOTION AFTER THE JUDGMENT BECAME FINAL.

POINT III

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE INVOKED BY THE COURT AT ITS DISCRETION, AND THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT THE DOCTRINE WAS INAPPLICABLE IN THAT IT EXPRESSLY FOUND THAT RESPONDENT BNSF'S POSITION IN THE PERMISSIVE USE CASE WAS NOT INCONSISTENT WITH BNSF'S EARLIER POSITION IN THE SEPARATE FEDERAL CASE INVOLVING THE ISSUE OF *RESPONDEAT SUPERIOR*.

POINT IV

THE ENTRY OF JUDGMENT FOR RESPONDENTS WAS PROPER BECAUSE THE TRIAL COURT DETERMINED THAT COLLATERAL ESTOPPEL WAS INAPPLICABLE IN THAT RESPONDENT OLD REPUBLIC WAS NOT A PARTY TO THE EARLIER FEDERAL CASE ON THE ISSUE OF *RESPONDEAT SUPERIOR*, AND THE DOCTRINES OF *RESPONDEAT SUPERIOR* AND PERMISSIVE USE INVOLVE SEPARATE FACTUAL AND LEGAL ELEMENTS.

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

JURISDICTIONAL STATEMENT

This appeal follows a bench trial on the sole issue of whether James Campbell,[1] a former BNSF employee, had permission to use a BNSF vehicle on March 16, 2009. Following a two-day bench trial, Judge Brown entered judgment in favor of Respondents on the sole issue of permissive use. (L.F. 762).

Griffitts appealed to the Missouri Court of Appeals, Southern District, which affirmed the trial court's judgment. *See Griffitts v. Old Republic Ins. Co.*, No. SD34753, 2017 WL 4129046 (Mo. App. S.D. Sept. 19, 2017). Griffitts filed an application for transfer, which the court of appeals denied.

Griffitts subsequently filed an application for transfer in this Court. On December 19, 2017, this Court sustained the application. This Court has jurisdiction pursuant to Missouri Constitution, Article V, Section 10.

[1] At trial, over Respondent BNSF's objection, Campbell was "realigned as a plaintiff." (T. 8:18-11:4). Campbell did not timely appeal the judgment in favor of BNSF Respondents.

STATEMENT OF FACTS

Respondents Old Republic Insurance Company and BNSF Railway Company[2] (collectively referred to herein as BNSF Respondents) disagree with Appellant Griffitts's Statement of Facts. Appellant Griffitts chose to include only select facts to recount his own version of the events and included argument, contrary to Missouri's governing rules. Missouri Supreme Court Rule 84.04(c); *Prater v. City of Carl Junction*, 345 S.W.3d 261, 263 (Mo. App. S.D. 2011). BNSF hereby submits its own Statement of Facts.

A. At the time of the accident at issue, Campbell had a replacement vehicle for his work with BNSF as his regularly assigned vehicle was in the shop.

In March 2009, Campbell was working as the foreman of a tie gang[3] for BNSF in Springfield, Missouri, although he lived in Tennessee. (T. 183, 189). BNSF provided Campbell a company-provided truck to use for his job. (T. 191). On March 13, 2009, Campbell received permission from his supervisor, Mr. Wright, to use the truck to commute between his job in Springfield and his home in Tennessee. (T. 246-47). When at home, Campbell did not have permission to use the truck for personal use. (T. 199).

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[2] Where the arguments are applicable to both Respondents, they are referred to collectively as the "BNSF Respondents." Because BNSF, not Old Republic, was the defendant in the prior federal court proceeding involving the issue of *respondeat superior*, references to "Respondent BNSF" in that context will refer to BNSF individually.

[3] A "tie gang" is a group that moves from location to location to perform maintenance and repair work.

On March 14, while in Tennessee, Campbell took the truck to a repair facility to address problems with the electrical system. (T. 213-14). A replacement vehicle, a 2008 Chevrolet Silverado pickup, was provided to Campbell through ARI via Enterprise Rental. (T. 214-15). Campbell was able to use the Silverado to travel to Springfield. (T. 246-47). BNSF considered the rental truck company property and required Campbell to comply with BNSF rules and policies while operating it. (T. 246). Campbell was aware of BNSF's policies, and was required to explain them to employees that he supervised. (T. 244-46).

B. On March 16, 2009, on his day off, Campbell became intoxicated after he returned to Springfield, and was involved in a collision with Griffitts while driving the replacement vehicle.

On March 16, 2009, Campbell had the day off from work. (T. 218-19). He traveled from his home in Tennessee back to Springfield in the Silverado. (*Id*.) When Campbell arrived in Springfield, he parked the truck at his motel with the intention of leaving it for the rest of the day. (T. 250-51). At approximately 5:00 p.m., Campbell met up with others at the motel where he ate barbecue, played video games, and drank alcohol—including beer, whiskey and Coke, and vodka. (T. 219-220, 280-81, 303). Campbell's supervisor, Robert Wright, was not present. (T. 246).

After drinking at the motel, Campbell became intoxicated and Roy Donaldson, a co-worker and assistant foreman, and another co-worker escorted Campbell back to his room. (T. 281-82; A. 249). Campbell had a bottle of alcohol and was slurring his speech. (A. 249). Donaldson instructed Campbell to stay in his room and Campbell fell asleep. (A 250; T. 281-82).

Campbell woke up and left his motel room around 8:30 p.m. (T. 282, L.F. 929). Campbell drove off in the Silverado heading north on Glenstone, the street adjacent to the motel. (L.F. 929). Less than two minutes later, Campbell ended up in the Ruby Tuesday's parking lot after colliding with Griffitts. (T. 281-82; L.F. 929). Ruby Tuesday's was on the same side of the street as the motel, and Campbell could see the restaurant from the motel. (T. 281). When the police responded, Campbell admitted that he had been drinking "recently," that he felt intoxicated, and that he had "a few beers" prior to driving. (L.F. 929; T. 279-280). Campbell was arrested and subsequent testing revealed that his blood alcohol content was 0.182%—more than twice the legal limit. (L.F. 929; T. 278). Ultimately, Campbell pled guilty to felony leaving the scene of an accident and felony second degree assault for causing injury. (L.F. 921). He was ordered to pay Griffitts $45,000 in restitution. (L.F. 917).

C. BNSF investigated the incident and dismissed Campbell.

After the accident, BNSF gave Campbell written notice that it was conducting an investigative hearing regarding Campbell's conduct on March 16, 2009, and that Campbell had a right to call witnesses. (T. 252; A. 279-315). On March 25, 2009, BNSF conducted an investigative hearing in which Campbell was represented by his union chair. (T. 252; A. 279, 282-284). Campbell did not call any witnesses. (*Id.*). Campbell testified at the

hearing that he did not comply with BNSF drug and alcohol policies[4] or rules[5] when he operated the Silverado while intoxicated. (T. 251-53; A. 234, 308-10, 313). Campbell admitted that his actions were "wrong" and that he "made a mistake." (T. 252; A. 313). Campbell also admitted that he was not authorized to use the Silverado at the time of the accident. (T. 252-53; A. 308-10, 313). He later made that same admission in this case. (T. 245-46, 302).

In April 2009, BNSF notified Campbell by letter that he was dismissed for violating BNSF Maintenance of Way Rule 1.5 for "unauthorized use of a company-provided vehicle while off duty and under the influence of alcohol on Monday, March 16, 2009" and for

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[4] BNSF's Policy on the Use of Alcohol and Drugs in effect at the time of the accident provided that "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 . . . Report for duty or remain on duty or on property with a blood or breath-alcohol concentration greater than or equal to .02%; Report or remain on duty or on property while exhibiting symptoms of alcohol[.]" (L.F. 474).

[5] BNSF's Maintenance of Way Rule 1.5 in effect at the time of the accident provided that "[t]he use or possession of alcoholic beverages while on duty or company property is prohibited. Employees must not have any measurable alcohol on their breath or in their bodily fluids when reporting for duty, while on duty, or while on company property." (L.F. 545).

violating BNSF's Drug and Alcohol Policy. (L.F. 546-47). Campbell signed the letter and wrote that "I understand I broke a rule[.]" (*Id.*).

D. The collision spawned numerous proceedings among various parties.

In 2010, Griffitts sued Campbell and BNSF for his injuries in state court. (L.F. 959-67). Griffitts never served Campbell in that action, nor was Old Republic named as a party in that action. (*Id.*; *see also* L.F. 970). Griffitts alleged that BNSF was responsible for Campbell's conduct based on *respondeat superior*. (L.F. 963-67). BNSF removed the case to federal court. (L.F. 968-69). After removal, Judge Dean Whipple granted summary judgment for BNSF on Griffitts's *respondeat superior* claim and found that Campbell was not in the course and scope of his employment at the time of the collision. (L.F. 166-174).

In 2011 and 2012, Griffitts filed two separate lawsuits against Campbell in Greene County alleging negligent and intentional conduct and seeking damages. (L.F. 175-178, 181-183). Neither BNSF nor Old Republic were parties to those lawsuits, both of which were before Judge Fitzsimmons. (L.F. 175, 181). As part of those proceedings, Campbell answered interrogatories and testified in his deposition that he had no recollection of the events of March 16 from the time he fell asleep in his motel room until the next morning. (L.F. 549, 775; T. 274-75).

In December 2012, after litigating the Greene County cases for more than a year, Campbell alleged that he was entitled to defense and indemnification under BNSF's

insurance policy through Old Republic.[6] (L.F. 179). Prior to that time, Campbell had been receiving a defense from an insurance policy issued by Enterprise. (T. 258-59).

In January 2013, Griffitts and Campbell entered into a Section 537.065, RSMo. agreement for resolution of the Greene County Litigation between them, which would allow them to then seek recovery against BNSF Respondents. (T. 263-67, L.F. 931-35). BNSF Respondents were not advised of the agreement, nor the hearing that resulted in the judgment for $1.475 million, which included a credit for $25,000 paid by Enterprise. (L.F. 55, 931-35). In March 2013, immediately after learning of the judgment, BNSF Respondents moved to intervene and set aside the judgment. The trial court denied the motions, and the court of appeals affirmed. *See Griffitts v. Campbell*, 426 S.W.3d 684 (Mo. App. S.D. 2014), *transfer denied*.

E. Griffitts filed this action seeking recovery from the BNSF Respondents for the agreed judgment with Campbell.

In March 2013, Griffitts filed the current equitable garnishment proceeding under Section 379.200 against BNSF, Old Republic, and Campbell. (L.F. 49). Griffitts alleged that Campbell was a permissive user under the Old Republic policy and, thus, that the BNSF Respondents were liable for the $1.475 million judgment against Campbell. (L.F.

[6] The policy was a "fronting policy" meaning that Old Republic guaranteed the amounts due while BNSF assumed the risk of loss as a self-insured. The policy provided coverage for BNSF vehicles, including those "leased, hired, rented or borrowed" and covered anyone "using with [BNSF's] permission a covered 'auto' you own, hire, or borrow[.]" (L.F. 65).

50-51). The BNSF Respondents opposed the relief and sought, among other things, a declaratory judgment that Campbell was not a permissive user. (L.F. 128-144). Campbell admitted the allegations in Griffitts's petition and sought coverage under the policy. (L.F. 89-90, 121-23).

In April 2013, Campbell filed a Motion for Change of Judge. (L.F. 92). The court subsequently transferred the case to Division 23 in December 2013. (L.F. 10). The day after transfer, the BNSF Respondents filed an Application for Change of Judge from Division 23. (L.F. 10). Over Griffitts's objection, the case was transferred to Judge Jason Brown.[7] (L.F. 11).

The parties continued to litigate the case in Judge Brown's court over the next three years. (L.F. 10-48). In 2014, the trial court stayed all proceedings and discovery between the parties except for the issue of permissive use. (L.F. 16).

In September 2016, the trial court conducted a two-day bench trial on the issue of permissive use. (L.F. 42). The court realigned Campbell and Griffitts as plaintiffs due to their unity of interest. (T. 8-10). In November 2016, the trial court entered a 38-page

[7] Subsequently, Division 23 became a division devoted solely to juvenile matters and all civil matters were transferred to other divisions, including Judge Brown's division. (L.F. 48).

"Judgment, Findings of Fact and Conclusions of Law" that found Campbell was not a permissive user and entered judgment for BNSF and Old Republic. (L.F. 762-99).[8]

In rendering judgment for BNSF Respondents, the trial court examined Section II(A)(1)(b) of the fronting policy at issue. The policy provides that an "insured" includes "anyone else while using with your permission a covered 'auto' you own, hire or borrow[.]" As "permission" is not defined in the policy, the trial court referenced the dictionary definition as follows:

> The Webster's Dictionary definition of permission includes the simple definition of "the right or ability to do something that is given by someone who has the power to decide if it will be allowed or permitted;'' the full definition includes the ''art of permitting" or "formal consent: authorization."

(L.F. 764, 779, 793).

The trial court determined that Campbell did not and could not gain permission or "formal consent: authorization" to enter the Silverado the evening of March 16, 2009 because he had consumed alcohol in violation of BNSF rule that, "**[w]hile** on BNSF property, . . . or **operating BNSF work equipment or vehicles, no employee may: Use**

[8] On November 23, 2016, the trial court amended the judgment to explicitly dismiss the BNSF Respondents' counterclaims. (L.F. 809). However, the amended judgment made clear that "IN ALL OTHER RESPECTS, THE JUDGMENT OF 11/10/16 REMAINS UNMODIFIED AND IN FULL FORCE AND EFFECT." (*Id.*).

or possess alcohol" or "remain on . . . property[.]" (L.F. 65, 474; T. 285-86, 302). The trial court found that the rule was one of authorization or permission. (L.F. 798) ("MOW Rule 1.5 and BNSF's Drug and Alcohol Policy are not mere rules of operation, but rather foundational and fundamental barriers to any authorization/permission, which barriers Campbell was aware of and recognized on March 16, 2009."). (*Id.*)

In rendering judgment in favor of BNSF Respondents, the trial court made express findings, unchallenged by Appellant in the court of appeals or in this Court, in determining that Campbell did not have express or implied permission to use the BNSF vehicle after drinking:

> 101. Prior to his consumption of alcohol, Campbell had express, restricted permission to use the Chevrolet Silverado for the limited purposes described above.
>
> 102. Compliance with the alcohol policies was a foundational pre-condition to any extent of permission Campbell had to use the Silverado.
>
> 103. Campbell was not authorized to get into, or, use or operate the Silverado vehicle with alcohol on his breath or in his system.
>
> 104. Campbell violated BNSF alcohol policies when he entered the Silverado after drinking alcohol and was highly intoxicated.

105. Therefore, in any event, as discussed below, even were Campbell's purpose to go eat food, the Court finds his high degree of intoxication and clear breaches of the alcohol policies prohibited him from ***any*** use of the vehicle, regardless of his purpose or destination.

* * *

22. No evidence was presented that Campbell, or any employee, was permitted to use a company vehicle to go drink alcohol; to use in any fashion a company vehicle after drinking alcohol; or, that alcohol policies were not strictly enforced.

50. Campbell's intended destination is itself not determinative of the question of whether he had express permission to operate the vehicle because, according to BNSF policy, there are **no** permitted destinations or uses of a company vehicle if an employee has used alcohol. Rather, sobriety is a condition of permission. . . . Accordingly, the Court finds that there was no express permission for Campbell to use or operate the vehicle at the time of the accident on March 16, 2009.

(L.F. 776, 782, 795) (emphasis in original).

The trial court's judgment was also based upon Campbell's admissions that he failed to follow BNSF's policies and lacked authority to operate the vehicle on March 16:

> 65. Campbell admitted that he had to comply with a number of rules implemented by BNSF, including MOW Rule 1.5 and BNSF's Policy on the Use of Alcohol and Drugs.
>
> * * *
>
> 88. At the investigative hearing, Campbell testified and admitted that he did not comply with BNSF policies, including MOW Rule 1.5 and BNSF's Drug and Alcohol Policy, at the time he used the Silverado after drinking on March 16, 2009. Campbell also admitted that he was "wrong" and "made a mistake."
>
> 89. Campbell also admitted at the hearing that he was not authorized to use the Silverado on the evening of March 16, 2009.
>
> 90. Campbell agreed at trial that he did not have BNSF authority to even ***get into*** the Silverado after he had been drinking alcohol.

(L.F. 770, 773) (emphasis in original).

On November 30, 2016, Griffitts filed a notice of appeal of the trial court's judgment in favor of BNSF Respondents.[9] (L.F. 810-12).

F. After the trial court's plenary power expired, Griffitts moved to transfer the case, alleging that the trial court lacked subject matter jurisdiction.

More than two months after filing his notice of appeal, Griffitts filed a Motion to Transfer Case to Division 23, arguing that the 2013 transfer to Judge Brown was improper and, thus, divested the trial court of subject matter jurisdiction. (L.F. 852-54). BNSF responded, stating in part: (1) Rule 51 is not a jurisdictional rule; (2) Griffitts waived any argument by litigating before Judge Brown for more than three years without complaint; and (3) the trial court lacked power to rule because its plenary power expired. (L.F. 898-903). The trial court denied Griffitts's Motion because it was untimely, Griffitts waived the argument, Griffitts and Campbell were aligned in interest at all times, the trial court lacked the power to transfer, and Division 23 was solely a juvenile division. (L.F. 48).

G. Griffitts appealed and the court of appeals affirmed the trial court's judgment.

Griffitts appealed to the Missouri Court of Appeals, Southern District. Griffitts's appeal raised six points: (1) a challenge to the trial court's subject-matter jurisdiction based on the allegedly improper transfer to Judge Brown; (2) a claim that the trial court improperly failed to follow *stare decisis* based on the court of appeals' opinion in *United Fire & Casualty Co. v. Tharp*, 46 S.W.3d 99 (Mo. App. S.D. 1999); (3) a claim that the

[9] Campbell did not appeal.

trial court erroneously applied the law because a violation of a BNSF company rule could not terminate Campbell's permission to use the BNSF vehicle while intoxicated; (4) a claim that the trial court failed to apply judicial estoppel; (5) a claim that the trial court failed to apply collateral estoppel; and (6) a challenge to the trial court's factual finding that Campbell was traveling to get more alcohol at the time of the accident.

The appellate court affirmed the judgment and held, among other things, that Griffitts's Points 2 and 3 were not preserved and that Points 4 through 6 were "immaterial to the outcome." (Op. at 6-15). The appellate court concluded that, even if Point 3 had been preserved, the trial court's judgment and factual findings were supported by evidence and that the trial court "did not misapply the law in finding that [Campbell] was using the Silverado without BNSF's permission at the time of the collision." (Op. at 6-13). The court of appeals also rejected Griffitts's jurisdictional challenge and held that Griffitts had waived his challenge to the transfer. (Op. at 15-18).

The court of appeals denied Griffitts's post-judgment request for transfer. Griffitts subsequently applied for transfer in this Court, which was granted on December 19, 2017.

POINTS RELIED ON

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF BNSF RESPONDENTS ON THE ISSUE OF PERMISSIVE USE BECAUSE THE TRIAL COURT'S FACTUAL FINDINGS THAT BNSF'S COMPANY RULES WERE RULES OF PERMISSION ESTABLISHED THAT CAMPBELL NEVER HAD PERMISSION TO USE THE VEHICLE AT THE TIME OF THE ACCIDENT, APPELLANT GRIFFITTS DID NOT CHALLENGE THE FACTUAL FINDINGS, THE FINDINGS DICTATED THE LAW TO BE APPLIED, AND THE TRIAL COURT PROPERLY APPLIED THE LAW IN RENDERING JUDGMENT FOR BNSF RESPONDENTS. [10]

Coursen v. City of Sarcoxie, 124 S.W.3d 492 (Mo. App. S.D. 2004)

Loven v. Greene County, 94 S.W.3d 475 (Mo. App. S.D. 2003)

Sauvain v. Acceptance Indem. Ins. Co., 437 S.W.3d 296 (Mo. App. W.D. 2014)

[10] Because Griffitts improperly changed his Point on appeal, BNSF Respondents have modified their Point to address the changes made by Griffitts.

POINT II

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS AS THE JURISDICTION OF A TRIAL JUDGE IS GOVERNED BY THE MISSOURI CONSTITUTION, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S UNTIMELY MOTION IN THAT THERE WAS AMPLE BASIS FOR CONCLUDING THAT APPELLANT WAIVED HIS RIGHT TO TRANSFER GIVEN THAT APPELLANT FIRST FILED HIS MOTION AFTER THE JUDGMENT BECAME FINAL.

City of Kansas City v. Powell, 451 S.W.3d 724 (Mo. App. W.D. 2014, *transfer denied*)

JCW v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

State ex rel. Auto Owners Ins. Co. v. Messina, 331 S.W.3d 662 (Mo. 2011)

Missouri Constitution, Article V, Section 14

Rule 51.01, Mo. R. Civ. P.

POINT III

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE INVOKED BY THE COURT AT ITS DISCRETION, AND THE TRIAL COURT PROPERLY EXERCISED

ITS DISCRETION IN CONCLUDING THAT THE DOCTRINE WAS INAPPLICABLE IN THAT IT EXPRESSLY FOUND THAT RESPONDENT BNSF'S POSITION IN THE PERMISSIVE USE CASE WAS NOT INCONSISTENT WITH BNSF'S EARLIER POSITION IN THE SEPARATE FEDERAL CASE INVOLVING THE ISSUE OF *RESPONDEAT SUPERIOR*.

Berger v. Emerson Climate Techs., 508 S.W.3d 136 (Mo. App. S.D. 2016)

New Hampshire v. Maine, 532 U.S. 742, 250 (2001)

Papa John's USA v. Allstate Ins. Co., 366 S.W.3d 116 (Mo. App. W.D. 2012)

Vinson v. Vinson, 243 S.W.3d 418 (Mo. App. E.D. 2007)

POINT IV

THE ENTRY OF JUDGMENT FOR RESPONDENTS WAS PROPER BECAUSE THE TRIAL COURT DETERMINED THAT COLLATERAL ESTOPPEL WAS INAPPLICABLE IN THAT RESPONDENT OLD REPUBLIC WAS NOT A PARTY TO THE EARLIER FEDERAL CASE ON THE ISSUE OF *RESPONDEAT SUPERIOR*, AND THE DOCTRINES OF *RESPONDEAT SUPERIOR* AND PERMISSIVE USE INVOLVE SEPARATE FACTUAL AND LEGAL ELEMENTS.

Cooperative Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571 (Mo. banc 2017)

Morgan v. State Farm & Cas. Co., 344 S.W.3d 771 (Mo. App. S.D. 2011)

Papa John's USA v. Allstate Ins. Co., 366 S.W.3d 116 (Mo. App. W.D. 2012)

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

ARGUMENT

POINT I[11]

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF BNSF RESPONDENTS ON THE ISSUE OF PERMISSIVE USE BECAUSE THE TRIAL COURT'S FACTUAL FINDINGS THAT BNSF'S COMPANY RULES WERE RULES OF PERMISSION ESTABLISHED THAT CAMPBELL NEVER HAD PERMISSION TO USE THE VEHICLE AT THE TIME OF THE ACCIDENT, APPELLANT GRIFFITTS DID NOT CHALLENGE THE FACTUAL FINDINGS, THE FINDINGS DICTATED THE LAW TO BE APPLIED, AND THE TRIAL COURT PROPERLY APPLIED THE LAW IN RENDERING JUDGMENT FOR BNSF RESPONDENTS.

A. Summary of Issue

Under Missouri law, a motor vehicle policy containing an omnibus insurance clause must provide coverage in accordance with Missouri's Motor Vehicle Responsibility Law (MVFRL). The MVFRL only requires coverage – which the fronting policy issued by Old

[11] The issues originally raised in BNSF's court of appeals brief in Point I responded to Point VI in Griffitts's court of appeals brief. Griffitts's substitute brief abandons that issue, so Point I now corresponds to Griffitts's Substitute Brief Point I. *See* Mo. S. Ct. R. 83.08(b).

Republic provided – when a driver has the express or implied permission to be driving the vehicle at the time of the accident. Mo. Rev. Stat. § 303.190. (*See also* Appellant's Appendix at A. 86). The trial court correctly held that Campbell was not a permissive user based on his admitted violation of BNSF rules prohibiting use of company vehicles after using alcohol.

Relying on irrelevant and distinguishable authority, Griffitts asks this Court to ignore those violations and extend MVFRL coverage based on the flawed premise that Campbell—who was admittedly intoxicated at the time of the motor vehicle accident involving Griffitts—had "broad" and "general" permission to use the vehicle that effectively could never be revoked. Under Griffitts's theory, the MVFRL requires insurance carriers to cover employees who, either on their personal time or work time, use company vehicles in ways that are expressly prohibited by company rules (and Missouri criminal law). However, the trial court found (and Griffitts does not challenge) that Campbell had only "express, restricted permission to use the Chevrolet Silverado for . . . limited purposes" that did not include operating a vehicle while intoxicated.[12] (L.F. 770;

[12] Campbell was driving a 2008 Silverado, which was a replacement vehicle rented through Enterprise because his regularly provided vehicle was in the shop for repairs. (T. 214-15). Campbell was responsible for following BNSF policies, as well as enforcing them with the employees he supervised. (T. 244-46; L.F. 474, 545). Under the policies, the rental truck was BNSF property, and employees operating rental vehicles had to comply with BNSF policies, including the zero-tolerance policy regarding alcohol use. (*Id.*). Campbell was

see also Campbell's admissions at A. 2-6). Neither § 303.190, RSMo. nor public policy mandates that insurers extend coverage to non-permissive users such as Campbell who admitted that he was not authorized to operate a company vehicle at the time of the accident. Because the trial court correctly applied the plain language of the MVFRL and the Old Republic policy to the evidence, this Court should affirm the trial court's judgment.

B. Standard of Review

In reviewing a Point on appeal, the Missouri Supreme Court Rules provide that "[a] party . . . shall not alter the basis of any claim that was raised in the court of appeals brief." Mo. S. Ct. R. 83.08(b). If a claim was not raised on the original appeal, there is nothing for this court to review. *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. 1999) (citation omitted); *see also Sun Aviation, Inc. v. L-3 Communications Avionics Sys., Inc.*, 533 S.W.2d 820 (Mo. banc 2017) (altered points in Substitute Brief "are not preserved for review in this Court.").

Even if Point I is reviewable, a judgment in a bench trial is to be affirmed if there is substantial evidence to support it, it is not against the weight of the evidence, and it does not erroneously declare or apply the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc

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dismissed from employment following the accident for violation of BNSF Rule 1.5 for "unauthorized use of a company-provided vehicle while off duty and under the influence of alcohol on March 16, 2009" and for violating BNSF's Drug and Alcohol Policy. (*Id.*, L.F. 546-47).

1976); *Coursen v. City of Sarcoxie*, 124 S.W.3d 492, 495 (Mo. App. S.D. 2004). The "trial court's judgment is presumed valid[,] and the burden is on the appellant to demonstrate its incorrectness." *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 303 (Mo. App. W.D. 2014) (internal quotation omitted).

C. Griffitts failed to preserve Point I because he impermissibly altered the claim made in the court of appeals and failed to challenge any factual findings.

Griffitts did not preserve his Point for appeal because his Substitute Brief impermissibly alters the Point raised in the court of appeals in two significant ways.[13] *See Blackstock, supra*, 994 S.W.2d at 953. First, Griffitts's Point now includes a claim that the trial court "erroneously declared" the law, which was not presented to the appellate court. (Griffitts Subst. Br. at 18, 20). Second, Griffitts now claims that the issue involves a company's "vehicle operational rule" rather than simply a "company rule" as he argued in the appellate court. (Griffitts Subst. Br. at 18, 20; Griffitts COA Br. at 20, 47).

[13] In addition to abandoning any challenge to the trial court's factual findings, Griffitts's Substitute Brief also drops his accusations, made in the court of appeals briefing, that the trial court's "Amended Judgment is so replete with error, misquotes, half-quotes, fabrications, misstatements of fact, [and] misstatements of law . . . that it appears to be written by an advocate for BNSF and Old Republic, not an impartial trial judge." (Griffitts COA Br. at 85).

These changes likely are in response to Southern District's determination that this issue was "unpreserved because the argument that follows provides no support for the claim raised in the point[.]" (Op. at 7). This is significant because, as the appellate court recognized, Griffitts's prior Point did not include the argument that he now wants this Court to address:

> Point 3 asserts that the trial court erroneously applied the law because the violation of a company rule could never terminate an employee's permission to use a company vehicle. But the argument following the point claims instead that the specific rules relied on by the trial court were rules related to the *operation* of the Silverado, not to the *use* of the Silverado. In other words, rather than explaining why a company rule can never terminate permission to use a company vehicle, Plaintiff argues that because the particular BNSF rules entered into evidence at trial restricted the operation of the Silverado, and "there was no restriction on the *use* of a BNSF company vehicle in evidence[,]" then Campbell had BNSF's permission to use the Silverado at the time of the accident.
>
> Issues raised in the argument section of a brief that do not appear in the point relied on are not preserved for appellate review. Similarly, when the argument provides no support for

> the issue actually raised in the point relied on, that issue is deemed abandoned.

(Op. at 7) (emphasis in original and citation omitted).

By omitting from his Substitute Brief Point VI from his court of appeals brief, Griffitts abandoned any challenge to the trial court's lengthy factual determinations. Because Griffitts cannot challenge the trial court's determination that Campbell was not a permissive user of the vehicle, the judgment in favor of the BNSF Respondents must stand. *See Loven v. Greene County*, 94 S.W.3d 475, 478 (Mo. App. S.D. 2003) ("An appellant's failure to challenge a finding and ruling that would support the conclusion complained about is fatal to an appeal."); *Nelson v. Emmert*, 105 S.W.3d 563, 567 (Mo. App. S.D. 2003) ("Defendants' argument fails, however, because it ignores essential fact findings by the trial court (unchallenged by Defendants) that support the imposition of a constructive trust in favor of Plaintiff."). Because Griffitts improperly changed his Point and failed to challenge the factual findings supporting the trial court's judgment, he has preserved nothing for review and this Court should affirm.

D. Missouri's Motor Vehicle Financial Responsibility Law does not mandate coverage, where, as here, a driver lacks permission to use the vehicle.

Even if Griffitts preserved for review the claimed error in Judge Brown's application of the law, his claim that the trial court's judgment violates the policies expressed in the MVFRL ignores the plain language of the statute, cases interpreting the statute, and the evidence in this case. Specifically, Section 303.190 requires that an

insurance policy in Missouri "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*." Mo. Rev. Stat. § 303.190 (emphasis added). Thus, the question of whether coverage is required does not arise unless and until a driver is shown to have either express or implied permission from the insured. Griffitts does not challenge the trial court's conclusion that Campbell had only "express, restricted permission to use the Chevrolet Silverado for . . . limited purposes[.]" (L.F. 770). Missouri's public policy on insurance was *not* intended to restrict an employer's ability to have rules prohibiting use of its vehicles after an employee consumed alcohol. Indeed, allowing an employer to have such rules is completely consistent with Missouri's public policy of keeping impaired drivers off the road.

In *State Farm Fire & Cas. Co. v. Ricks*, a case that Griffitts does not mention, the Eastern District rejected the same public policy argument that Griffitts advances—that the MVFRL favors expansive rather than restrictive coverage—by pointing out that if the statute does not require the type of coverage sought, there is no public policy against excluding it. 902 S.W.2d 323, 325 (Mo. App. E.D. 1995) ("Because [the driver] had no permission, express or implied, the MVFRL did not require the owner to have liability insurance which covered [the driver's] use of the vehicle. The policy is not against public policy for excluding liability coverage for his accident.").

Other Missouri decisions also have held that non-permissive users are properly excluded from coverage. *Marchand v. Safeco Ins. Co. of Am.*, 2 S.W.3d 826, 827 (Mo. App. E.D. 1999) (upholding non-permissive use exclusion under uninsured motorist

coverage); *Am. Std. Ins. Co. of Wis. v. Stinson*, 404 S.W.3d 303, 309 (Mo. App. E.D. 2012) (definition of insured including only permissive users was unambiguous in excluding non-permissive users from definition of insured). In doing so, Missouri courts have reflected a public policy allowing insurance companies to exclude non-permissive users from coverage.

BNSF's policies are entirely consistent with the foregoing authorities. BNSF's explicit policies prevented an admittedly intoxicated employee—with full knowledge of BNSF's rules—from entering, using, or operating a BNSF vehicle at all. As a result, he could not have permission. As the majority opinion in *Hall v. Wilkerson*—a case cited by Griffitts—recognized, under these circumstances, permission becomes a question of fact for the trial court that will not be reversed on appeal if it is supported by the evidence. 926 F.2d 311, 315-16 (3d Cir. 1991); *see also Nautilus Ins. Co. v. I-70 Used Cars, Inc.*, 154 S.W.3d 521, 528 (Mo. App. W.D. 2005).[14] Here, the trial court expressly found that Campbell was not a permissive user, and that finding is unchallenged by Griffitts. There is substantial support for the trial court's factual findings, especially considering the presumptions in favor of the judgment. *See Coursen*, 124 S.W.3d at 495. In reaching its decision, the trial court properly evaluated and distinguished *United Fire & Casualty*

[14] *See also Universal Underwriters Ins. Co. v. Davis*, 697 S.W.2d 189, 194 (Mo. App. W.D. 1985). Permission may be express or implied based on a pattern of conduct or lack of objection that indicates consent. *Safeco Ins. Co. of Am. v. Smith*, 318 S.W.3d 196 (Mo. App. W.D. 2010).

Company v. Tharp, 46 S.W.3d 99 (Mo. App. S.D. 2001). (*See* Appellant's Appendix at A. 29-30).

1. There were ample factual and legal findings supporting the trial court's determination.

Section II(A)(1)(b) of the fronting policy at issue provides that an "insured" includes "anyone else while using with your permission a covered 'auto' you own, hire or borrow[.]" (Appellant's Appendix at A. 86). Permission is not defined in the fronting policy so the trial court properly determined that the definition to be applied, where a policy term is not defined, is the ordinary meaning, which can be determined by reference to the dictionary definition. *Farmland Indus. v. Rep. Ins. Co.*, 941 S.W.2d 505, 508 (Mo. banc 1997). (*See also* Appellant's Appendix at A. 21). The trial court cited the following dictionary definition:

> "the right or ability to do something that is given by someone who has the power to decide if it will be allowed or permitted;'' the full definition includes the ''art of permitting" or "formal consent: authorization."

(L.F. 764, 779, 793; Appellant's Appendix at A. 21).

Campbell did not and could not gain permission or "formal consent: authorization" to enter the Silverado the evening of March 16, 2009 because he had consumed alcohol in violation of the BNSF rule that, "**[w]hile** on BNSF property, . . . or **operating BNSF work equipment or vehicles, no employee may: Use or possess alcohol**" or "remain on . . . property[.]" (L.F. 65, 474; T. 285-86, 302; A. 6). That rule is not merely a rule of operation

but, as the trial court's unchallenged findings provided, a rule of authorization or permission. (L.F. 798; Appellant's Appendix at A. 35-36) ("MOW Rule 1.5 and BNSF's Drug and Alcohol Policy are not mere rules of operation, but rather foundational and fundamental barriers to any authorization/permission, which barriers Campbell was aware of and recognized on March 16, 2009."). (*Id.*)

The trial court's position is also consistent with Missouri law as interpreted by the Eighth Circuit in *Hawkeye-Security Insurance Co. v. Bunch*, 643 F.3d 646 (8th Cir. Mo. 2011), which held that an employee cannot give permission to use a vehicle in situations where the "use of the vehicle would not have been sanctioned by the company if [driver] had been [drinking]."

As the trial court found, unlike *Tharp, supra*, "Campbell agreed at trial that he did not have BNSF authority to even ***get into*** the Silverado after he had been drinking alcohol." (L.F. 773; T. 302) (emphasis in original). In making such a determination, the trial court focused on Campbell's admissions that he failed to follow BNSF's policies and lacked authority to operate the vehicle on March 16:

> 65. Campbell admitted that he had to comply with a number of rules implemented by BNSF, including MOW Rule 1.5 and BNSF's Policy on the Use of Alcohol and Drugs.
>
> * * *
>
> 88. At the investigative hearing, Campbell testified and admitted that he did not comply with BNSF policies,

including MOW Rule 1.5 and BNSF's Drug and Alcohol Policy, at the time he used the Silverado after drinking on March 16, 2009. Campbell also admitted that he was "wrong" and "made a mistake."[15]

89. Campbell also admitted at the hearing that he was not authorized to use the Silverado on the evening of March 16, 2009.

90. Campbell agreed at trial that he did not have BNSF authority to even ***get into*** the Silverado after he had been drinking alcohol.

(L.F. 770, 773; Appellant's Appendix at A. 15) (emphasis in original).

Campbell's claimed source of express permission from his supervisor to run personal errands does not overcome Campbell's repeated admissions as the evidence established that no one at BNSF had authority to suspend the BNSF prohibition of use of vehicles when employees have alcohol in their system. (T. 302; Appellant's Appendix at A. 222, 230; *see also* A. 2-6). For example, Campbell admitted that his supervisor had never given him permission to get into any vehicle after Campbell had been drinking:

Q. Sir, Mr. Wright never gave you permission to get into any vehicle after you had been drinking, did he?

[15] Campbell testified at the trial in this case that he could not step foot into a BNSF vehicle if he had alcohol on his breath. (T. 246, 252-53, 302; A. 2).

A. No, ma'am.

Q. In fact, **you knew that the BNSF policies did not allow or give you any permission** to operate a vehicle after you had been drinking, did it?

A. **Correct, ma'am**.

(T. 302; emphasis added; *see also* A. 6).

Further, Campbell's attorney elicited testimony from BNSF supervisor Roger Honeycutt that even if the President of BNSF personally called Campbell and told him he was authorized to go to the airport and pick someone up, Campbell could not do so if he had been drinking. (Appellant's Appendix at A. 230).

Griffitts's assertion that Honeycutt's testimony amounts to an admission that a violation of any BNSF rules—such as failing to buckle seatbelts, speeding, or smoking while driving—would exclude insurance coverage is unsustainable. (Griffitts Subst. Br. at 32). The trial court flatly rejected Griffitts's attempts to equate the rules: "The Court rejects the suggestion by Campbell and Griffitts that the prohibition against using a vehicle at all after consuming alcohol is similar to the prohibition regarding using a seatbelt or speeding. Here, Campbell did not qualify as an insured, i.e., a 'permissive user' at the time of the accident, because his prior status as a restricted permissive user was abruptly and dramatically altered once he consumed alcohol, which extinguished his foundational qualification to use the vehicle for any alleged purpose." (L.F. 797-98; Appellant's Appendix at A. 39; *see also* A. 2-6).

Griffitts's repeated attempts to distinguish between rules of "use" or "operation" should be rejected. The fronting policy refers to "permission," which is completely

consistent with the MVFRL. (Appellant's Appendix at A. 86). Campbell never obtained the limited permission necessary to use the Silverado when he entered it without authorization after drinking because BNSF's policies prohibited any employee from being on or operating BNSF property after consuming alcohol.[16] (Appellant's Appendix at A. 35-36). Neither Section 303.190 nor *Tharp* compel a different result.

2. The trial court properly distinguished other cases cited by Griffitts.

The trial court considered and explicitly distinguished those cases cited by Griffitts in which courts have found that public policy mandates coverage. (Griffitts's Subst. Br. at 24-30). For example, the trial court determined that *Allstate v. Sullivan*, 643 S.W.2d 21 (Mo. App. E.D. 1982), a car rental case in which the alcohol policy was printed in small type on the reverse side of the rental agreement, presented a different scenario:

> Far different from Campbell, the evidence showed that Sullivan wasn't even aware of the provision and that no Budget employee had pointed it out. Although the court adopted Weathers' use vs. operation analysis, the opinion highlights other distinctions from the facts here, by stating, *(T)here is no claim that Sullivan was utilizing the vehicle for a purpose prohibited by the rental agreement ..... As in Weathers,*

[16] The burden of proving that coverage exists is on the person seeking coverage. *Auto Club Inter-Ins. Exch. v. Chamberlain*, 839 S.W.3d 378, 382 (Mo. App. 1992).

> *Sullivan's rental of the car was for a broad, almost unfettered use*. *Id.* at 23. Moreover, the Court then expressed consumer protection concerns, remarking that *the car rental (industry) has become commonplace and a lucrative business*. *Id.* at 22-24. Clearly, Campbell was not a consumer of BNSF unfamiliar with its alcohol policies - he was one of its foremen who taught the policies to his tie gang.

(L.F. 789-87) (emphasis in original).

Similarly, the trial court distinguished *Weathers v. Royal Indemnity*, 577 S.W.2d 623 (Mo. 1979), in which this Court determined that a passenger's driving a rental car was within the permission granted to the renter because it was consistent with the broad, unfettered use contemplated by the rental agreement. (L.F. 784-85). The trial court concluded, however, that this was markedly different from this case:

> These facts in *Weathers* stand in stark contrast to those here where Campbell had restricted, conditional use of the vehicle that was certainly not unfettered. No superior to Campbell knew or had reason to know that he would seek to use the vehicle after he become intoxicated and was escorted to his hotel room and told to stay there. No one else was present, knew, benefitted or was convenienced by his secreted, wholly unnecessary trip in search of more alcohol. And, the instant

> facts do not involve Campbell permitting some other person to drive the truck with him present as a passenger.

(L.F. 784-85).

This Court's decision in *Royal Indemnity Company v. Shull*, a case that Griffitts cites for the first time in his Substitute Brief, also does not change the proper analysis. 665 S.W.2d 345 (Mo. banc 1984) (Griffitts Subst. Br. at 28 n. 2). *Shull* involved an insurance policy "virtually identical to that used in *Weathers*" and, like *Weathers*, was based upon "the realities of automobile rental under modern conditions." *Shull*, 665 S.W.2d at 347. Nothing in *Shull*, however, suggests that an employer cannot condition permission to use company vehicles (and thus qualify as an insured) on sobriety. Furthermore, *Shull* also recognizes that when, as here, a rental car insurance policy provides coverage for an accident, Section 303.190 is satisfied. Griffitts received compensation of $25,000 under the Enterprise policy and the restitution of $45,000 ordered to be paid by Campbell. (L.F. 55).

The case of *Farm Bureau Mutual Insurance Co. v. Broadie* also is distinguishable. 558 S.W.2d 751 (Mo. App. S.D. 1977). As the trial court explained, *Broadie* involved a finding that, "because a grandfather had permitted his grandson and his friend to take the pickup, and, it was fairly inferable that he knew the boys would use it to go see two young ladies in the neighborhood, . . . such use was actually contemplated by the grandfather, regardless of which boy actually drove the vehicle." (L.F. 785; Appellant's Appendix at A. 27). This case presented a different analysis because, as the trial court found, "after Campbell was put to bed and told to stay in his room, no superior (let alone, peer) of

Campbell assumed that, given his intoxication, he would use or operate the vehicle to go drink or purchase more alcohol." (*Id.*).

3. The trial court did not depart from 40 years of Missouri law.

Griffitts's Substitute Brief adds several pages decrying the trial court's alleged "departure from forty years of uniform Missouri law" and an ensuing list of potential consequences that must be disregarded because they are based upon the incorrect assumption that Campbell had broad and general permission to use the vehicle at the time of the accident. As demonstrated by the trial court's unchallenged finding that Campbell had restricted and limited permission to use the vehicle, the judgment is completely consistent with Missouri law, which only requires coverage of permissive users under the MVFRL. (Griffitts Subst. Br. at 30-35; Appellant's Appendix at A. 15, 18). Further, Griffitts was not without compensation as he received compensation under the rental car policy and from Campbell. (L.F. 55, 931-35).

Griffitts's claims regarding the impact on "rental car companies" is misplaced. Authority from both this Court and the courts of appeals outline rental companies' obligations. Nothing in this case has any effect on those. BNSF's alcohol rules, which prohibit employees from even being on BNSF property after consuming alcohol, are markedly different than rules like seatbelts, smoking, and the employee code of conduct preventing negligence.

On the record in this case, the trial court correctly concluded that BNSF's explicit policies prevented an admittedly intoxicated employee—with full knowledge of the

rules—from entering, using, or operating a BNSF vehicle at all. There is substantial support for the trial court's factual findings, especially considering the presumptions in favor of the judgment. *See Coursen*, 124 S.W.3d at 495.

E. The trial court properly distinguished *Tharp* because it presented a factually different scenario that required a different legal analysis.[17]

Despite Griffitts's protests, *Tharp* focused on an issue unlike the one in this case: whether alcohol use while operating a company vehicle—with the apparent knowledge and acquiescence of the employee's supervisor—revoked express permission previously given. The issue in this case, however, is significantly different: whether an employee's intoxication—which was indisputably without the knowledge of the employee's supervisor—prevented him from obtaining authorization to use a company vehicle in the first place given his knowing violation of company rules that prohibited operation of company property with alcohol in his system.

As the trial court recognized, *Tharp* involved a situation in which the Driver had express permission to use the van to get meals and the presence and apparent acquiescence

[17] The argument on pages 35-45 of Griffitts's Substitute Brief was originally a separate Point II in Griffitts's court of appeals brief. (Griffitts COA Br. at 32-46). However, the court of appeals found that the Point was "not preserved for appellate review because it" "claim[ed] the entire judgment as the error challenged." (Op. at 6). By omitting that Point in the Substitute Brief, Griffitts also has abandoned it here. Mo. S. Ct. R. 83.08(b). Regardless, as explained, even if reviewed, Griffitts's argument is incorrect.

of his supervisor to drive with non-employees as occupants and purchase and drink alcohol. (L.F. 787). It was apparently undisputed that the employer expected and intended that employees would use the vehicle for personal errands and entertainment. (*Id*. at 102 & n.1). Such permission came directly from the president of the Driver's employer. (*Id.*).

Here, there was no permission to use company vehicles after drinking; to the contrary, Campbell admitted that BNSF policies prohibited it and prevented him from obtaining permission. (L.F. 770, 773, 776, 782, 792-93, 795; T. 284-85, 302; A. 2-6). Indeed, as the trial court found, "[n]o evidence was presented that Campbell's supervisor, or anyone else with authority at BNSF, knew, authorized or turned a blind eye to Campbell's use of the vehicle after consuming alcohol" and Griffitts cites none. (L.F. 793). Similarly, the trial court also found that "[t]here was no evidence that BNSF had any practice or course of conduct allowing employees to use company vehicles, including rental or replacement vehicles, to get food after drinking alcohol." (L.F. 797).

Campbell's claimed source of express permission from his supervisor to run personal errands did not give the supervisor authority to override the BNSF prohibition of use of vehicles when employees have alcohol in their system. (T. 302; A. 222, 230). Campbell in fact admitted that his supervisor had never given him permission to get into any vehicle after Campbell had been drinking. (T. 302; A. 6).

As Griffitts recognizes, *stare decisis* only applies when a court announces "a principle of law applicable to a *certain state of facts*" and then encounters a different case in which the "facts are *substantially the same*." *Rothwell v. Dir. of Revenue*, 419 S.W.3d 200, 206 (Mo. App. W.D. 2013) (emphasis added). That principle did not, as Griffitts

contends, require the trial court to blindly follow the *Tharp* decision. Instead, because this case presents significantly different circumstances, the trial court properly rejected *Tharp* based on the evidence. (L.F. 335-36, 787-88). As the trial court found, unlike *Tharp*, "Campbell agreed at trial that he did not have BNSF authority to even ***get into*** the Silverado after he had been drinking alcohol." (L.F. 773; T. 302; A. 6) (emphasis in original).

Further, in *Tharp*, the court concluded that the driver had *express* permission to use the company vehicle at the time of his accident. *Id.* at 106. However, the court declined to examine whether the driver had implied permission. *Id*. ("Under the circumstances, any discussion or opinion by this court about whether Hyman had implied permission to use the van would be merely advisory.").

Tharp also is distinguishable because it is unclear whether the driver knew about the employer's alcohol policy. At most, the opinion suggests that it was "posted in 1995" and only "prohibited [employees] from drinking *while engaged in the work of the company*." *Tharp*, 46 S.W.3d at 102 (emphasis added). There is no description of the amount the Driver in *Tharp* drank or the degree of his intoxication, let alone whether he was even aware of the alcohol policy. (L.F. 787).

Here, however, BNSF's policy prohibited employees from being on *any* BNSF property after consuming alcohol—whether on duty or off—and the evidence was undisputed that Campbell not only knew of BNSF's policy prohibiting him from operating a vehicle with alcohol in his system, but also was tasked with explaining BNSF's policies

to employees that he supervised.[18] (T. 244-46, 302; Appellant's Appendix at A. 12). Indeed, Campbell even arranged designated drivers for his employees when they went drinking. (T. 251). Campbell admitted his knowledge and his failure to comply at every turn—the investigative hearing, upon his dismissal, and at trial in this case. (T. 244-46, 285-86, 302; A. 1-6). Griffitts also offered no evidence showing that BNSF *ever* knowingly or willingly allowed its employees to operate vehicles while intoxicated. *See Davis, supra,* 697 S.W.2d at 194. Thus, the trial court properly distinguished *Tharp,* and the trial court's judgment should be affirmed.

F. Authority from the Eighth Circuit and other jurisdictions supports the trial court's judgment.

In addition to the differences between this case and *Tharp,* other authority, most of which Griffitts does not address, supports the trial court's judgment. (L.F. 782-92). Significantly, Griffitts never mentions *Bunch,* a case wherein the Eighth Circuit applied

[18] The trial court concluded that Campbell was not credible. (Appellant's Appendix at A. 37). "Credibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part, or all of the testimony of any witness," and the appellate court must "defer to the trial judge's superior opportunity to assess the witnesses' credibility." *Coursen* at 495 (citation omitted); *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014).

Missouri law, including *Tharp*, to find a driver's lack of permission under analogous circumstances.

In *Bunch*, *supra*, an employee with limited authority to use a company vehicle gave permission to an intoxicated third party to use the vehicle. 643 F.3d at 646. Subsequently, the third party had an accident while driving the vehicle. The employee contended that she had authority to authorize the use of the vehicle. The court rejected this argument, noting that permission to use the vehicle "must come from the named insured or someone having authority to bind him in that respect." *Id.* at 650.

Furthermore, the *Bunch* court stated that "[i]nternal company rules also indicate that [the employee] did not have authority to allow [the third-party driver] to use the vehicle on this occasion." *Id.* at 651. The court noted that personal use of company vehicles was restricted and that "there was to be no drinking and driving[.]" *Id*. Because the employee knew that the driver had been drinking and admitted that "she knew that his personal use of the vehicle would not have been sanctioned by the company if he had been [drinking]," the employee lacked authority to give permission to use the vehicle. *Id*.

As in *Bunch*, there is no evidence that anyone—including Campbell's supervisor—had authority to permit use in contravention of BNSF's Policy or that anyone attempted to authorize Campbell's actions. (T. 302; *see also* Appellant's Appendix at A. 230). At most, any grant of permission from BNSF to Campbell was limited to the confines of BNSF's Policy on company vehicle use. And, like *Bunch*, BNSF's policies, which Campbell admitted that he knew about and violated, prohibited any operation of a vehicle after

consuming alcohol. (A. 2, 6; *see also* Appellant's Appendix at A. 15). Thus, there could be no permission or authority.

Judge Brown also correctly examined authority from outside Missouri, as well as other jurisdictions, most of which Appellant does not address. (L.F. 783-95). When, as here, there is no specific controlling authority from Missouri state courts, courts may look to judicial decisions from other jurisdictions' decisions "when the facts are similar . . . and are based on 'sound principles and good reason.'" *Tharp*, 46 S.W.3d at 105; *Eyerman v. Mercantile Trust Co., N.A.*, 524 S.W.2d 210, 217 (Mo. App. 1975). Thus, the trial court properly relied upon courts in other jurisdictions that have considered permissive use under similar circumstances.

The trial court examined a Tennessee Court of Appeals decision "with facts . . . much closer to those here." (L.F. 788-89). The decision held that consumption of alcohol in violation of an employer's express rules prohibiting use of company vehicles while intoxicated is "fatal to the driver's status as a permissive user under the omnibus clause of an insurance policy." *Lambright v. Nat'l Union Fire Ins. Co.*, 173 S.W.3d 756, 766 (Tenn. Ct. App. 2005); (L.F. 788-89). There, the Employer provided employee Eberly a company-owned vehicle. Eberly, who was on call 24 hours per day, was not only permitted, but also was required, to drive his service vehicle to and from his home and place of work. *Id.* at 757. His employer also maintained a policy prohibiting the use of a company-owned vehicle at any time that the driver had consumed or was consuming alcohol. *Id.*

On the date in question, Eberly was returning home and stopped by a bar where he consumed four cans of beer. *Id.* at 758. After leaving the bar, he was involved in a motor vehicle accident and his blood alcohol content level was measured at .15. *Id.* Following a bench trial, the court ruled that Eberly's operation while intoxicated was a slight deviation from his permission and thus permitted. *Id.* The appellate court disagreed, stating 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." *Id.* Given the factual similarities, the trial court did not err by relying upon *Lambright*.

Griffitts criticizes *Lambright* because it adopted policies that the *Tharp* court rejected. However, the trial court made clear that it was the factual analysis—not the policies—that drove its discussion of *Lambright*. (L.F. 788-89). And, as the trial court recognized, "*Lambright* emphasizes the point that the issue of permissive use is always fact-driven." (L.F. 789). This determination is completely consistent with Missouri law, which often bases the question of permissive use on the employer's policies. *See Bunch*, 643 F.3d at 651; *Nautilus Ins. Co.*, 154 S.W.3d at 528-29; *State Farm v. Scheel*, 973 S.W.2d 560, 567-68 (Mo. App. W.D. 1998); *Davis*, 697 S.W.2d at 194. In sum, these cases further support the trial court's determination that Campbell's knowing violation of BNSF's express alcohol policies prevented him from ever obtaining permission.

The trial court also correctly analyzed Campbell's use of the vehicle on the night of the occurrence in light of his knowing violation of BNSF's rules, which were conditions that prevented him from even obtaining permission to use the vehicle in the first place. *See*

Lambright, *supra*, at 758. The facts show that sobriety was a precondition of permission. (T. 101-2; 245-46, 252-53, 302; A. 1-6). Thus, Campbell was not a permissive user and no coverage is afforded under the fronting policy issued by Respondent Old Republic.

Because BNSF's rules prevented Campbell from obtaining permission to use the vehicle given his admitted intoxication, § 303.190 does not apply. Consistent with Missouri cases interpreting that provision, public policy is not implicated by BNSF's rules. The trial court correctly applied the law and properly rendered judgment for BNSF Respondents and this Court should affirm its judgment.

POINT II

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS AS THE JURISDICTION OF A TRIAL JUDGE IS GOVERNED BY THE MISSOURI CONSTITUTION, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S UNTIMELY MOTION IN THAT THERE WAS AMPLE BASIS FOR CONCLUDING THAT APPELLANT WAIVED HIS RIGHT TO TRANSFER GIVEN THAT APPELLANT FIRST FILED HIS MOTION AFTER THE JUDGMENT BECAME FINAL.

A. Summary of Issue

Appellant claims that Judge Brown had no authority to act, asserting the application of Rule 51.05. Appellant first took this position after litigating for more than three years in front of Judge Brown and losing a trial on the merits, claiming that the December 2013

decision to transfer this case from Division 23 to Judge Brown—a decision made by a different judge—rendered everything that happened in the past three years "void." (Griffitts Subst. Br. at 46-47). Nothing in Rule 51.05 supports Griffitts's position and, regardless, by litigating the case through trial and judgment before complaining, Griffitts waived any claim of error. This Court should affirm the trial court's judgment.

B. Standard of Review

In reviewing matters in a substitute brief, the Court is to determine whether a position previously delineated in an appellate brief is excluded from the substitute brief. *See* Mo. S. Ct. R. 83.08(b) ("Any material included in the court of appeals brief that is not included in the substitute brief is abandoned."); *see also State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 691 (Mo. banc 2005) ("Inexplicably, Zobel has abandoned the jurisdictional argument in his briefs before this Court and, instead, presents this Court with two fundamentally different points. . . . [T]he decision to abandon the arguments presented to the circuit court and the court of appeals nonetheless runs afoul of the premise of orderly litigation that underlies the rule.").

Even assuming that Point II is reviewable, the standard of review is abuse of discretion, not a *de novo* review as Griffitts contends. Griffitts's motion to transfer was denied, and denial of a motion to transfer a case is reviewed for an abuse of discretion. *State ex rel. Auto Owners Ins. Co. v. Messina*, 331 S.W.3d 662, 664 (Mo. 2011)*; State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232 (Mo. 2005)*; see also Burgett v. Thomas*, 509 S.W.3d 840, 845–46 (Mo. App. W.D. 2017); *City of Kansas City v. Powell*, 451 S.W.3d 724 (Mo. App. W.D. 2014, *transfer denied*); *K.L.W. v. D.R.P.*, 131 S.W.3d 400, 404 (Mo.

App. W.D. 2004) (quoting *McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462, 486 (Mo. App. W.D. 2003)). "An abuse of discretion is committed if the trial court's decision defies logic under the circumstances, is sufficiently arbitrary and unreasonable to shock the conscience of the court, and exhibits a dearth of careful consideration." *Id.* (quoting *Betts–Lucas v. Hartmann*, 87 S.W.3d 310, 328 (Mo. App. W.D. 2002).

C. Griffitts failed to preserve anything for review under Point II.

This Court has nothing to review under Point II because in Point II of Griffitts's substitute brief, he drops any reference to "subject matter jurisdiction," which was the basis for Griffitts's Point in the court of appeals. (Griffitts COA Br. at 22). By omitting references to "subject matter jurisdiction," Griffitts abandoned the basis for the argument in the court of appeals and preserved nothing for review. *See State ex rel. Zobel*, *supra*, 167 S.W.3d at 691.

D. Even if Point II is reviewable, the trial court properly rejected Griffitts's post-judgment attempt to invalidate the entire proceedings before Judge Brown.

Even if Point II is reviewable, his Point does not warrant reversal. After the court of appeals rejected Griffitts's argument, he changed positions in this Court—dropping his argument that an alleged violation of Rule 51.05 deprived the trial court of subject-matter jurisdiction—and now claims that any failure to follow Rule 51.05 denied the trial court the "ability to proceed." (Griffitts Subst. Br. at 46).

No matter what label is applied, Griffitts's argument fails for multiple reasons: (1) Rule 51.01 is not a jurisdictional rule; (2) in the absence of a jurisdictional rule, the trial court does not lose the ability to proceed; and (3) by litigating the case before Judge Brown without objection, Griffitts waived any complaints. Regardless, because Griffitts's and Campbell's interests were aligned in this action, Campbell's prior request to transfer the case did not deprive the BNSF Respondents of their right to seek a later transfer. Because the trial court did not abuse its discretion in denying Griffitts's late-filed motion to transfer, this Court should affirm the judgment in favor of BNSF Respondents.

1. Rule 51.01 does not deprive a trial court of the ability to proceed.

Although Griffitts's Point II is careful to omit any reference to the trial court's jurisdiction, his argument is unmistakably a jurisdictional one. According to Griffitts, the trial court has no "ability to proceed in the underlying case" because a prior court's allegedly improper grant of a motion to change judge rendered everything that happened in Judge Brown's court void. (Griffitts Subst. Br. at 46-51). However, no Missouri court has reached this conclusion. Nor could it because Rule 51.01 is not a jurisdictional rule.

By claiming that the trial court's judgment is "void," Griffitts necessarily is attacking the trial court's subject-matter jurisdiction because, as this Court has explained, "[c]ourts favor finality of judgments, so the concept of a void judgment is narrowly restricted." *Goins v. Goins*, 406 S.W.3d 886, 891 (Mo. banc 2013). "A judgment is void . . . only if the circuit court that rendered it (1) lacked subject matter jurisdiction; (2) lacked personal jurisdiction; or (3) entered the judgment in a manner that violated due process." *Id.* Griffitts never has claimed that the trial court lacked personal jurisdiction or that the

transfer violated due process. Thus, the only conclusion is that Griffitts's Point challenges subject-matter jurisdiction without reference to that concept.

Nothing in Rule 51.05 can deprive a trial court of subject matter jurisdiction because that is derived directly from Missouri's Constitution. As explained in *JCW v. Wyciskalla*, 275 S.W.3d 249, 253-254 (Mo. banc 2009):

> Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case. . . . [T]he subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. Article V, section 14 sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that "[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal."

(Emphasis added).

Indeed, in *Wyciskalla*, this Court rejected arguments, like Griffitts's, that transform statutes and procedural rules into jurisdictional limitations:

> Elevating statutory restrictions to matters of "jurisdictional competence" erodes the constitutional boundary established by Article V of the Missouri Constitution . . . and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If "jurisdictional competence" is recognized as a

> distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. . . . [T]he courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called "jurisdictional competence."

Id. at 254.

Thus, after *Wyciskalla*, lower courts have clarified that Rule 51.05 does not implicate jurisdiction:

> [N]othing in Rule 51.05 "shall . . . be construed to limit the jurisdiction of the courts of Missouri." Thus, even assuming she was entitled to a change of judge, the failure of the trial court to grant her request did not result in a loss of jurisdiction.

City of Kansas City, *supra*, 451 S.W.3d at 742. (internal citations omitted).[19]

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[19] *See Charron v. Missouri Board of Probation & Parole*, 373 S.W.3d 26, 28-29 (Mo. App. W.D. 2012) (holding that Rule 51.05 implicated judge's "authority" rather than "jurisdiction"); *see also State ex rel. Acuity v. Thornhill*, 516 S.W.3d 400 (Mo. App. E.D. 2017) ("Respondent lacked the *authority* to deny Relator's change of judge request") (emphasis added); *State ex rel. Waack v. Thornhill*, 515 S.W.3d 839 (Mo. App. E.D. 2017)

Indeed, Rule 51.01 explicitly rejects an interpretation that would affect a trial court's jurisdiction:

> These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein.

Rule 51.01, Mo. R. Civ. P. Because nothing in Rule 51.05 implicates jurisdiction, Griffitts's contention that the transfer proceedings rendered the trial court's judgment "void" is incorrect.

Griffitts's citation to this Court's decision in *State ex rel. Manion v. Elliott* does not change the analysis. 305 S.W.3d 462, 463 (Mo. banc 2010). *Manion* recognizes that 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." *Id.* This rule makes sense: a judge that is required to transfer a case under Rule 51.05 cannot make other orders before transferring the case. What *Manion* does not hold, however, is that a trial judge to whom a case is allegedly improperly transferred loses all authority to act.

In sum, there is no basis to determine that an allegedly incorrect grant of a motion to transfer deprived the trial court of the ability to hear this case or enter judgment. Further, there is no legal basis to claim that the trial court's judgment is void.

(Relator properly cited § 517.061 as the law applicable to her application for change of judge in this case and Respondent was without *authority* to deny it.") (emphasis added).

2. The trial court correctly determined that Griffitts waived any complaint about transfer to Judge Brown, but, even if the determination was incorrect, it was harmless error.

Because Rule 51 does not limit the jurisdiction of the courts of Missouri, a trial court's alleged failure to comply with Rule 51 is an error that can be waived. The trial court properly concluded that Griffitts waived any complaints to the transfer to Judge Brown in this case by proceeding, without objection, for more than three years through trial on the merits. (L.F. 11-48). *See, e.g., State v. Brookshire*, 353 S.W.2d 681, 683-84 (Mo. 1962) ("This defendant invoked the jurisdiction of the Circuit Court . . . by filing seven motions of affirmative relief[.]"); *State v. Perkins*, 95 S.W.2d 75, 77 (Mo. banc 1936) ("[N]o logical reason can be advanced why the right to a change from the judge cannot be waived after the change has been granted."); *State ex. rel Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. S.D. 1996) ("A party may waive the right to disqualify a judge if it is clear from the record that a trial or hearing has commenced or the cause taken under submission."); *Heintz v. Hudkins*, 824 S.W.2d 139, 146 (Mo. App. S.D. 1992) ("[W]e hold that Plaintiff, by her conduct, waived any contention that Judge Dickerson was not the judge to whom the case was assigned.").

As the Western District Court of Appeals recently explained, allowing a party—like Griffitts—to submit the case to the factfinder and then complain about transfers would undermine the entire proceeding:

> Here, not only had the dispositive proceeding been submitted to the trial court, the trial court had already ruled upon the

> dispositive issue and entered judgment. To permit Father to obtain a change of judge after judgment has been entered by the trial court would subvert the proceedings below and produce an absurd result. This we will not do.

Burgett, 509 S.W.3d at 846; *see also Heller v. Aldi, Inc.*, 851 S.W.2d 82, 85 (Mo. App. E.D. 1993) ("Rule 51.05, relating to application for change of judge, is not to be construed as subverting proceedings already begun by a trial court. We find no error in the denial of plaintiff's application as untimely."); *Jenkins v. Andrews*, 526 S.W.2d 369, 371-73 (Mo. App. 1975) (holding that otherwise proper Rule 51.05 motion was properly denied after trial court had begun to consider merits of the case).

Judge Brown's determination of waiver is supported by the undisputed record. The docket report in the legal file includes *thirty-seven pages* of filings and docket entries *after* the case was transferred to Judge Brown in December 2013. (L.F. 11-48). During that time, Griffitts filed numerous motions, sought (and received) affirmative relief, tried the case on the merits to Judge Brown in a bench trial, filed post-trial briefing and a request to amend the judgment, and filed a notice of appeal from the judgment, all before raising the issue of Judge Brown's supposed disqualification. (*Id.*) This adequately supported the trial court's waiver finding.[20]

[20] Griffitts offers no justification for his failure to complain other than to summarily conclude that he "never had the ability to waive an objection to the ability of the Trial Court

Even if it was not waived, any error was harmless because the case ultimately would have been transferred to Judge Brown. As Judge Brown explained in denying the Motion to Transfer:

> [E]ven if the subject Change of Judge Motion was denied and the case had remained in Division 23, by operation of Administrative Orders then in effect, Division 23's civil matters were transferred (pursuant to Judge Fitzsimmons' retirement) to Division 26, and subsequently (if not yet set for jury trial) to Division 3, the instant division.

(L.F. 48). Thus, there can be no harm from the transfer from Division 23 to Judge Brown.

Griffitts asks this Court to do what it cannot—cause this civil matter to be transferred to Division 23, even though Division 23 only accepts juvenile cases. (Griffitts Subst. Br. at 50-51). Because Griffitts waived this issue and, regardless, the relief that he seeks could not be granted, the trial court did not err by denying the motion to transfer back to Division 23, and this Court should affirm the judgment.

3. Because Griffitts's motion was untimely, the trial court lacked the ability to act on it.

The trial court also could not grant the relief Griffitts seeks because, as it recognized, the motion to transfer was "untimely and the Court lacked jurisdiction over the same."

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to proceed" and "never waived his objection to the case being improperly transferred." (Griffitts Subst. Br. at 48).

(L.F. 48). This is because, under Civil Procedure Rules 75.01 and 81.05, the Amended Judgment became final thirty days after entry when Griffitts did not file any "after-trial motions." Mo. R. Civ. P. 75.01; 81.05(a). At that point, the trial court truly lost "jurisdiction" over the case and any subsequent orders would have been void. *See Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 468-69 & n.5 (Mo. banc 2011) ("After the expiration of the 30 days provided by Rule 75.01, the trial court is divested of jurisdiction, unless a party timely files an authorized after-trial motion. Following divestiture, any attempt by the trial court to continue to exhibit authority over the case, whether by amending the judgment or entering subsequent judgments, is void.") (internal citations omitted); *Williston v. Mo. Dep't of Health & Senior Servs.*, 461 S.W.3d 867, 869-70 (Mo. App. W.D. 2015) (The judgment in this case was entered on July 21, 2014, and the circuit court lost jurisdiction over the case 30 days after its entry.").

Here, because Griffitts did not file post-trial motions, the time period to seek relief from the judgment in the trial court lapsed on December 23, 2016—thirty days from the entry of the Amended Judgment. But, Griffitts filed the motion to transfer in February of 2017—more than two months after the Amended Judgment, and after he had already filed his notice of appeal of the Amended Judgment. (L.F. 47-48). As a result, the trial court could no longer rule upon the motion to transfer and, thus, properly denied it.

4. The unity of interest between Campbell and Griffitts negated any alleged error.

Finally, there was no error in transferring the case from Division 23 to Judge Brown in 2013 because, as the trial court determined, "the interests of Campbell and Griffitts have

been aligned and adverse to that of BNSF and Old Republic at all material times." (L.F. 48). Thus, the fact that Campbell previously obtained a change did not foreclose BNSF Respondents from seeking a later transfer.

The basis for Griffitts's complaint is that Rule 51.05 limits each "class" of litigants (*e.g.* plaintiffs, defendants, intervenors) to one change of judge. According to Griffitts, because both Campbell and BNSF were defendants, this prohibited BNSF's request after Campbell's had been granted. (Griffitts Subst. Br. at 50-51). Rule 51.05(d) does limit each "class" of litigant to only one change of judge. However, no authority suggests that a court cannot look beyond the parties' designations in pleadings to determine whether parties belong to the same "class" for purposes of the Rule. *See Jenkins*, 526 S.W.2d at 371-73 (holding that courts are not necessarily bound by literal terms of Rule 51.05 in determining whether request is proper).

Indeed, courts have leeway under Rule 51.05 in determining whether a party is included in a particular "class" of litigants that may seek transfer. *See, e.g., State ex rel. Board of Regents of Sw. Mo. State Univ. v. Bonacker*, 765 S.W.2d 341, 342-47 (Mo. App. S.D. 1989) (en banc) ("Having ruled earlier that the absence of the term 'garnishor' from the list of classes of litigants in paragraph '(d)' of Rule 51.05 does not bar a garnishor from obtaining a change of judge in a garnishment proceeding, we hold that SMSU was entitled to the change of judge requested in its application[.]"); *State ex rel. Campbell v. Kohn*, 606 S.W.2d 399, 401 (Mo. App. E.D. 1980) (en banc) ("Under either the statute or the rule

authorizing a party to disqualify the judge, we have adhered to a rule of liberal construction in favor of the right to disqualify.").[21]

From the very beginning of this case, Campbell admitted the allegations in Griffitts's petition and, at every turn, argued in favor of Griffitts and against the BNSF Respondents. (L.F. 89-90, 121-23, 128-44, 194-99, 200-03, 313-28, 410-23, 484-90, 580-627, 743-61). This unity of interest and position between Campbell and Griffitts also led the trial court to realign Campbell as a plaintiff for trial. (T. 2-9).

Griffitts's citation to *State ex rel. Smith v. Journey* is unavailing because there the Court was not asked to consider a situation in which a defendant actually was aligned with the plaintiff. 533 S.W.3d 589 (Mo. banc 1976). Instead, the question was whether the prior grant of a defendant's request for change of venue foreclosed a later request for change of judge by the same defendant and another defendant—both of whom were unquestionably adverse to the plaintiff. *Id.* There was no error in transferring the case from Division 23 to Judge Brown, Judge Brown had jurisdiction and authority to enter judgment, and the trial court's judgment should be affirmed.

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[21] *See also In re Estate of Boeving*, 388 S.W.2d 40, 50 (Mo. App. 1965) ("[W]hile the right to a change of venue or to disqualify the judge does not exist except as granted by the rule, we are of the opinion that, as was true under the antecedent statute, the rule should be construed liberally in favor of the right to grant such change of venue or disqualification, insofar as the applicability of the rule to particular classes of civil proceedings is concerned.").

POINT III

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE INVOKED BY THE COURT AT ITS DISCRETION, AND THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT THE DOCTRINE WAS INAPPLICABLE IN THAT IT EXPRESSLY FOUND THAT RESPONDENT BNSF'S POSITION IN THE PERMISSIVE USE CASE WAS NOT INCONSISTENT WITH BNSF'S EARLIER POSITION IN THE SEPARATE FEDERAL CASE INVOLVING THE ISSUE OF *RESPONDEAT SUPERIOR*.

A. Summary of Issue

Decrying a "mockery of the judicial system," Griffitts's Point III and IV spend nearly 20 pages discussing judicial and collateral estoppel as it allegedly pertains to the issue of whether Campbell was traveling to a restaurant to get dinner. (Griffitts Subst. Br. at 51-71). Griffitts's assertion is based on his contention that BNSF took one position in the federal case involving the issue of *respondeat superior* in which Old Republic was not a party, and another in this case which involves the question of permissive use. BNSF did not take contrary positions. Further, Griffitts ignores the fact that the issues of permissive use and *respondeat superior* are completely different. None of these arguments ultimately matter, however, because Griffitts agrees that the issue of Campbell's intended

destination—the issue for which Griffitts claims estoppel—is irrelevant to the question of permissive use. (Griffitts Subst. Br. at 60-61, nn. 14-15; *see also* Op. at 13-15).

B. Standard of Review

Although Griffitts correctly states the standard of review of a judge-tried case, the standard of review regarding the application of judicial estoppel is abuse of discretion as it is an equitable doctrine invoked by a court in its discretion. *New Hampshire v. Maine*, 532 U.S. 742, 250 (2001). As the United States Supreme Court has stated, "judicial estoppel cannot be reduced to a precise formula[.]" *Id.*

In a bench trial, any errors with the trial court's findings of fact are not grounds for reversal so long as the findings do not "materially interfere[] with appellate review." *In re Wilma G. James Trust*, 487 S.W.3d at 47. Instead, the reviewing court "will affirm if the record supports the judgment or if the court makes findings that substantially comply with a party's requests." *Plager v. Plager*, 426 S.W.3d 689, 693 (Mo. App. E.D. 2014); *see also Nautilus Ins. Co.*, 154 S.W.3d at 527 ("[T]he judgment indicates that the trial court properly applied the law and exercised the 'necessary judicial consideration' of the dispositive issue before it, any irregularities in the judgment are not grounds for reversal").

C. Judicial estoppel is inapplicable.

Judicial estoppel is inapplicable to the issue of whether Campbell was traveling to a restaurant to get dinner as the issues of permissive use and *respondeat superior* are completely different. As the court stated in *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. App. E.D. 2007), when a party takes positions in cases involving different issues, its prior position is not "clearly inconsistent" for judicial estoppel purposes.

The sole issue before the federal court was *respondeat superior*, not permissive use. Under Missouri law, these are distinct issues:

> ***Legal responsibility for the use of a car is not synonymous with permissive use of the car.***

Papa John's USA v. Allstate Ins. Co., 366 S.W.3d 116, 120 (Mo. App. W.D. 2012) (emphasis added; citations omitted).

The trial court did not err because it properly rejected Griffitts's judicial estoppel arguments in determining that the federal proceeding involved *respondeat superior*—a different issue than the permissive use question in this case. (Appellant's Appendix at A. 20). BNSF has consistently stated, from the time of the accident, that Campbell was not authorized to use the vehicle at the time he collided with Griffitts after consuming large amounts of alcohol. (Appellant's Appendix, A. 222, 279-315, 319). Indeed, BNSF's federal court summary judgment motion was not based on Campbell's unsworn statement that he was driving to Ruby Tuesday's to get something to eat. Rather, BNSF expressly stated that "[t]he linchpin of BNSF's argument in favor of summary judgment involves the 'course and scope element' of a *respondeat superior* claim" and that "Campbell's activities in the afternoon and evening of March 16, 2009 were entirely social in nature and he was not due to report for duty with BNSF until the following morning." (L.F. 640). BNSF went on to state in part "[t]hat Campbell's activities on the night of March 16, 2009 were outrageous. . . . By consuming enough alcohol to register over twice the legal limit of blood alcohol content, . . . Campbell . . . violated the express written policy of his employer." (*Id.*) Thus, BNSF's position has been consistent throughout the proceedings.

As the Southern District recently explained:

> There is no precise formula for determining whether judicial estoppel applies, but three considerations have commonly been used to guide the determination: "(1) a party's later position was clearly inconsistent with its earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) . . . the party asserting inconsistent positions would derive an unfair advantage or impose an unfair detriment on the opposing party."

Berger v. Emerson Climate Techs., 508 S.W.3d 136, 142–43 (Mo. App. S.D. 2016) (internal citations omitted).

Indeed, in one of the seminal cases on judicial estoppel from the First Circuit Court of Appeals, the court succinctly held that judicial estoppel is "playing fast and loose with the courts" "when **intentional** self-contradiction is being used as a means of obtaining unfair advantage." *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (emphasis added). There was no playing fast and loose by BNSF, and no intentional self-contradiction in BNSF's position in the federal court on the issue of *respondeat superior*.

Because BNSF's request for relief in federal court turned on Campbell's overall activities rather than his specific destination, BNSF did not "succeed[] in persuading a court to accept that court's earlier position" as required to apply judicial estoppel. *Berger*, 508 S.W.3d at 142–43. For purposes of course and scope, Campbell's ultimate destination

was not a deciding fact given that it was undisputed that *all* of his activities on the night of March 16, 2009 were social. Indeed, the federal court only briefly mentioned the restaurant visit in its order, which largely relied upon the fact that Campbell was on his day off. (L.F. 166-74).

Regardless, Griffitts affords no explanation of how the trial court's contrary finding regarding Campbell's destination makes a difference to the judgment in this case.[22] Griffitts specifically admitted as much in Points III and IV of his brief:

> Again, given that he had general permission to use the truck, it doesn't matter where Mr. Campbell was going. Because the Trial Court thought it did matter where Mr. Campbell was going and based its decision on this "fact," this matter is being addressed in this brief.
>
> * * *
>
> Again, it does not matter where Mr. Campbell was going given his general permission to use the vehicle. However, to the

[22] At the trial before Judge Brown, Campbell repeatedly gave contradictory testimony; given Campbell's changing story, the trial court made an express determination—a determination to which this Court must defer—that **Campbell was not credible**. (L.F. 775-76, 778); *Coursen, supra*, 124 S.W.3d at 495.

> extent that it does matter and because it was important to the Trial Court, this matter is addressed in this Brief.

(Griffitts Subst. Br. at 60-61 nn. 14-15, 67 n. 17).

The trial court[23] and the BNSF Respondents agree with Griffitts that Campbell's ultimate destination is irrelevant to the question of permissive use. (L.F. 454, 465, 501 & n. 2); (Griffitts Subst. Br. at 60-61, nn. 14-15). Similarly, the court of appeals held that Campbell's destination was "not a fact necessary to support the judgment" and was

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[23] Contrary to Griffitts's argument, the trial court's findings agreed with his position that destination was irrelevant to permissive use:

> [E]ven were Campbell's purpose to go eat food, the Court finds his high degree of intoxication and clear breaches of the alcohol policies prohibited him from ***any*** use of the vehicle, regardless of his purpose or destination
>
> * * *
>
> Campbell's intended destination is itself not determinative of the question of whether he had express permission to operate the vehicle because, according to BNSF policy, there are ***no*** permitted destinations or uses of a company vehicle if an employee has used alcohol. Rather, sobriety is a condition of permission.

(L.F. 776, 795) (emphasis in original).

"immaterial to the outcome." (Op. at 13-15). Thus, any alleged error would be harmless and not grounds for reversal. *See In re Wilma G. James Trust*, 487 S.W.3d 37, 47 (Mo. App. S.D. 2016, *transfer denied*).

Further, there can be no "unfair advantage" to BNSF or "unfair detriment" to Griffitts. As discussed, BNSF's position has not been "inconsistent" in either proceeding. *See Parrott v. Severs Trucking, LLC*, 422 S.W.3d 478, 486 (Mo. App. S.D. 2014) (citations omitted). Absent an inconsistent position, there cannot be an "unfair detriment" or "unfair advantage" resulting to Griffitts if Judge Brown did not estop BNSF from asserting their current position.[24] And, given Griffitts's insistence (and the trial court's findings) that destination is not relevant to the question of permissive use, it is impossible to conclude that Griffitts could suffer any detriment from the trial court's failure to apply judicial estoppel. If there is any unfairness here, it would be to Old Republic, which was never a party in the federal case. The trial court correctly exercised his discretion in refusing to invoke the doctrine of judicial estoppel, and the Amended Judgment in favor of Respondents should be affirmed.

POINT IV

THE ENTRY OF JUDGMENT FOR RESPONDENTS WAS PROPER BECAUSE THE TRIAL COURT DETERMINED THAT COLLATERAL ESTOPPEL WAS INAPPLICABLE IN THAT

[24] There can be no unfair detriment to Campbell because he did not appeal and is, thus, no longer a party.

RESPONDENT OLD REPUBLIC WAS NOT A PARTY TO THE EARLIER FEDERAL CASE ON THE ISSUE OF *RESPONDEAT SUPERIOR*, AND THE DOCTRINES OF *RESPONDEAT SUPERIOR* AND PERMISSIVE USE INVOLVE SEPARATE FACTUAL AND LEGAL ELEMENTS.

A. Summary of Issue

As with Point III, Griffitts asserts that collateral estoppel applies based on his contention that BNSF's position on Campbell's destination in the federal court case involving the issue of *respondeat superior* was different than the position it took in the garnishment proceedings involving permissive use. As explained above, BNSF's position was not contradictory. Regardless, the issues of permissive use and *respondeat superior* are completely different, and Campbell's destination had no bearing on the permissive use determination.

B. Standard of Review

A judgment in a bench trial will be affirmed if there is substantial evidence to support it, it is not against the weight of the evidence, and it does not erroneously declare or apply the law. *Murphy, supra,* 536 S.W.2d at 32.

C. Collateral estoppel does not apply to Old Republic or BNSF.

The trial court did not erroneously declare or apply the law in rejecting Griffitts's complaints about the trial court's failure to apply collateral estoppel to the issue of Campbell's alleged destination. As discussed, *respondeat superior* and coverage are distinct issues. *See Papa John's USA*, *supra*, 366 S.W.3d at 120. Thus, the issue in the

federal lawsuit was whether BNSF, the only defendant who was served in that case, was responsible for Campbell's actions at the time of the accident under the doctrine of *respondeat superior*, not permissive use. Campbell did not claim he was a permissive user until nearly *three years after* the federal court proceeding commenced, and more than two years after summary judgment in the issue of *respondeat superi*or was entered in favor of BNSF[25] (L.F. 179, 960-67). Further, the specific issue of Campbell's destination was not central to the determination in the federal proceeding, because as discussed under Point IV, no party in the federal proceeding claimed that Campbell's activities on March 16 were anything other than social or personal non-business activities on his day off.

Like judicial estoppel, any error is harmless because the trial court's finding did not ultimately affect the judgment.[26] Additionally, there was no error in overruling Griffitts's request for collateral estoppel because in the federal proceeding (1) the issue of Griffitts's destination was not fully and fairly litigated; (2) the question of coverage and permissive use was not at issue; and (3) Old Republic was not a party.

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[25] Any attempt by Griffitts to now claim that the question of Campbell's coverage could have been raised in the federal proceeding is contrary to his position before the court of appeals in the appeal from the underlying Griffitts/Campbell proceeding in which the court of appeals rejected the BNSF Respondent's attempts to intervene post-judgment to litigate the coverage issues. *See Griffitts v. Campbell*, 426 S.W.3d 684 (Mo. App. S.D. 2014).

[26] Because the argument regarding the lack of harm from the alleged error is the same as Point IV, the BNSF Respondents incorporate it by reference.

As this Court recently reiterated, collateral estoppel requires that the following factors are all satisfied:

> (1) whether the issue decided in the prior adjudication was identical to 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.

Cooperative Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 581 (Mo. banc 2017) (quoting *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001)). "Offensive collateral estoppel"—when "a plaintiff uses the prior adjudication of an issue to prevent the defendant from challenging a fact necessary to the plaintiff's case"—"is disfavored by courts, and it will not be applied when doing so would be inequitable in light of these four factors." *Cooperative Home Care*, 514 S.W.3d 581-82 & n.10. Applying these principles to the undisputed record in this case, Griffitts cannot obtain the collateral estoppel that he seeks.

The first factor does not support collateral estoppel because the issues in the federal action and this proceeding are not identical. A central element of collateral estoppel is issue preclusion, meaning that the issue decided in the prior adjudication is **identical** to that in the present adjudication. *Wilkes v. St. Paul Fire & Marine Ins. Co.*, 92 S.W.3d 116,

120 (Mo. App. 2002). As BNSF Respondents have established, the issues of *respondeat superior* and collateral estoppel are different. Further, the specific issue of Campbell's destination was not central to the determination in the federal proceeding, because as discussed under Point III, no party in the federal proceeding claimed that Campbell's activities on March 16 were anything other than social or personal non-business activities on his day off.

The second factor, whether the prior adjudication resulted in a judgment on the merits, does not weigh in Griffitts's favor because the prior adjudication resulted as a judgment only on *respondeat superior*—not permissive use. Permissive use was not even an issue between Campbell and BNSF until more than three years after the accident, and well after Judge Whipple issued summary judgment in favor of BNSF. (L.F. 179, 960-67).

The third factor, party identity, also cuts against collateral estoppel because Old Republic was not a party to the federal proceeding and the issue of permissive use was never raised. (L.F. 166-79, 962-70). Collateral estoppel principles operate "only against those between whom the matter adjudicated upon was in issue." *Jefferson v. Lyon Sheet Metal Works*, 376 S.W.3d 37, 45 (Mo. App. E.D. 2012). When a party had no opportunity to participate in summary judgment proceedings, it is not bound by them. *Id.* Thus, when an insurer is not a party or has no opportunity to raise coverage in a prior action, it cannot be collaterally estopped from contesting coverage in a later equitable garnishment proceeding. *Morgan v. State Farm & Cas. Co.*, 344 S.W.3d 771, 780-81 (Mo. App. S.D. 2011).

Old Republic was not a party, coverage was not at issue in the federal proceeding, and Griffitts even argued against the BNSF's Respondents' attempts to litigate coverage issues in the underlying Griffitts/Campbell matter. *Griffitts*, 426 S.W.3d at 684. Because the first time that Old Republic had any opportunity to raise its coverage defenses was in this action, it cannot be collaterally estopped. Additionally, because coverage was not raised in the federal proceeding, BNSF could not have litigated those issues and did not stand in privity with Old Republic. (L.F. 960-70).

Finally, collateral estoppel requires a "full and fair opportunity to litigate the issue." *Id.*; *see also James*, 49 S.W.3d at 682-83. In determining whether an opportunity was full and fair, courts look to several 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? *St. Louis Univ. v. Hesselberg Drug Co.*, 35 S.W.3d 451, 455-56 (Mo. App. E.D. 2000).

Because Old Republic was not a party and coverage was not at issue, it never had any opportunity or incentive to litigate the coverage issues. *See Morgan*, 344 S.W.3d at 780-81. The analysis for BNSF is similar. Given that the federal court's order was not decided on the question of Campbell's intended destination, that issue was never "fully and fairly litigated." Indeed, the federal court's order grounded its findings on the fact that

Campbell was conducting personal business on his day off: "BNSF did not require Campbell to be in Missouri on his day off; . . . Campbell's decision to be in Springfield at the time was purely discretionary;" . . . Campbell was not traveling to or from work. . . . The accident occurred on Campbell's day off after a social gathering where Campbell . . . consumed alcohol." (L.F. 177).

The issue of convenience plays no part in any analysis. BNSF could not raise coverage in the federal action because the federal action concluded in favor of BNSF long before Campbell ever claimed permissive user status. (L.F. 166, 179, 962-70). Further, when the BNSF Respondents tried to litigate coverage issues in the underlying Campbell/Griffitts proceeding, they could not. *Griffitts*, 426 S.W.3d at 684.

Although Griffitts purports to apply the factors, his arguments do not change the result. For example, for the identical issue factor, Griffitts summarily concludes that "the issue is the same" because BNSF and the federal court mentioned Campbell's alleged destination. (Griffitts Subst. Br. at 67; *Griffitts*, 426 S.W.3d at 684). However, given the differing legal issues, the fact that both parties mentioned Campbell's alleged destination as a background fact does not make it at issue. Similarly, Griffitts's recognition that the federal proceeding resulted in a judgment on the merits on *respondeat superior* does not equate to a judgment on the merits of all issues—including coverage. (Griffitts Subst. Br. at 68; *Griffitts*, 426 S.W.3d at 684). Griffitts's claims that BNSF and Old Republic were in privity also are unavailing because neither party could (or did) raise coverage or permissive user status in the federal proceeding and this Court rejected their attempts to do so prior to this action. (*Id.*). Finally, Griffitts's conclusion that BNSF and Old Republic

had an opportunity to litigate Campbell's destination in the federal proceeding is simply contrary to the record in this case or in that proceeding. (Griffitts Subst. Br. at 69-70; *Griffitts*, 426 S.W.3d at 684).

Thus, there is no basis to apply collateral estoppel in this proceeding and the trial court's judgment should be affirmed.

CONCLUSION

The changes in Griffitts's points and arguments related to permissive use and change of judge preserve nothing for review. Even if these alleged errors were preserved, however, the trial court's judgment still is correct. The issue in this case was whether Campbell could gain permission to use a BNSF vehicle based on his undisputed intoxication. There was not only substantial evidence in this case supporting the Final Amended Judgment, but also overwhelming evidence supporting the Findings of Fact and Conclusions of Law reached by Judge Brown that Campbell did not have BNSF's permission to operate the Silverado—findings that Griffitts does not challenge. Campbell admitted within a short time after the accident in March of 2009 that he could not enter a BNSF vehicle, which included the rented Silverado, if he had any alcohol on his breath. Public policy does not dictate a different result as Missouri's Motor Vehicle Responsibility Law only requires minimum insurance limits if someone operates a vehicle with the express or implied permission of the owner—Griffitts already received that coverage as a result of the accident. As Campbell was not a permissive user of the Silverado the evening of March 16, 2009, he does not come within the coverage of the fronting policy issued by Old Republic to BNSF, and the Final Amended Judgment in favor of BNSF Respondents should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND FILING

The undersigned certifies that a complete copy of Respondents' Substitute Response Brief was electronically filed this 13th day of February, 2018, with the Clerk of the Court using the E-filing system which sent notification of such filing to the following:

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Further, the undersigned certifies that: Respondents' Substitute Response Brief complies with the limitations contained in Rule 84.06(b); excluding the cover, certificate

[27] Counsel for Mr. Campbell did not timely file a notice of appeal, nor did he file a brief with the appellate court, and thus Respondents do not believe that he needs to be included in service. Nonetheless, because this Court shows the docket as Mr. Campbell having counsel, his counsel is included on this certificate.

of service-compliance, and signature block, there are 16,889 words in Respondents' Substitute Brief; I have signed the original brief and will maintain the original for a period of not less than the maximum allowable time to complete the appellate process; and that the information required by Rule 55.03 is contained herein.

/s/ Laurel E. Stevenson
Attorney of Record