IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC96740

RICKY GRIFFITS,

Appellant,

vs.

OLD REPUBLIC INSURANCE COMPANY AND BNSF RAILWAY COMPANY,

Respondents.

Appeal from the Circuit Court of Greene County, Missouri

31st Judicial Circuit

The Honorable Jason Brown, Judge

Greene County Case No. 1331-CC00421

APPELLANT RICKY GRIFFITTS' SUBSTITUTE REPLY BRIEF

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A. James Campbell Had Broad, General Permission To Use The Rental Truck:

Despite Respondents' unsupported protests to the contrary, the only evidence at trial was that James Campbell had broad, general permission to use the truck that BNSF rented from Enterprise for Mr. Campbell's use. The only restriction that Respondents or the Trial Court identify is that Mr. Campbell wasn't allowed to drive the truck while intoxicated. There is no dispute as to the rule against driving while intoxicated. Drinking and driving was clearly prohibited by BNSF both in its policies and as a matter of common sense. It doesn't even need to be said, let alone written down in a company policy, that a vehicle entrustor doesn't authorize the person entrusted with the entrustor's vehicle to operate it while intoxicated.

Nowhere in the record was there any evidence of any prohibition of James Campbell's use of the vehicle at the time of the wreck. *See generally* TR, L.F., Appendix. Respondents seemingly concede this point in their "Statement of Facts" in their statement that "[w]hen at home, Campbell did not have permission to use the truck for personal use. (T. 199)." Respondents' Substitute Brief at p. 14. Had there been one scintilla of evidence that Mr. Campbell did not have general permission to use the BNSF provided vehicle as his own (a/k/a personal use) *when on the road*, Respondents would have cited it. The reason Respondents didn't point out to this Court any such evidence is

twofold: (1) there is no such evidence; and (2) Respondents did not dispute that Mr. Campbell had broad, general permission to use the truck while on the road for BNSF.

The fourteen pages of transcript following the sentence that Respondents chose to put in their Brief regarding the restriction on personal use while at home demonstrate that Mr. Campbell had broad, general permission to use the truck. TR 199-213. The testimony of all Respondents' witnesses, all high level officials of BNSF, Howard Stuart, Roy Donaldson and Roger Honeycutt, demonstrates that Mr. Campbell had broad, general permission to use the truck. TR 158-168; App. A267; App. A219; App. 233-234. The absence of testimony, exhibits, or evidence of any nature, whatsoever, pertaining to any prohibition on Mr. Campbell's personal use of the truck for any purpose while on the road for BNSF demonstrates that Mr. Campbell had broad, general permission to use the truck for any purpose or object he desired. *See generally* TR and L.F. Howard Stuart, BNSF's division engineer, confirmed that there was no policy, procedure or rule that would have prohibited the personal use of a company vehicle while on the road. TR 119; 132-133; 158-168. Roy Donaldson, BNSF's assistant production roadmaster, testified that an employee with a company vehicle could use the company vehicle while out of town for pretty much anything that the employee would use a personal vehicle to do. App. A248; A267. Roger Honeycutt, a division engineer for BNSF and the supervisor of Mr. Campbell's boss, testified that company provided vehicles could be used generally by employees while on the road for BNSF. App. A219; A233-234. Further, the nature of Mr. Campbell's permission to use the truck while on the road can be summarized from Mr. Campbell's testimony:

Q. For all intents and purposes, that's your vehicle; is that right?

A. Yes, sir.

Q. You were authorized to use that vehicle?

A. Yes, sir.

Q. There was [sic] no limitations, written or otherwise, that they ever gave you that restricted your use of that vehicle; is that true?

A. No, there wasn't any. That's true. Yes, sir.

TR 242-243. Mr. Campbell's unimpeached testimony on this topic was entirely consistent with BNSF's own managerial/executive employees. Finally, it bears repeating that Respondents do not suggest that Mr. Campbell's testimony on this subject is not accurate. Additionally, vehicles provided by BNSF to its employees were considered fringe benefits. TR 157. As a fringe benefit, employees, including James Campbell, had to pay income taxes for the use of their company vehicles which demonstrates that the vehicles could be and were put to personal uses. *Id.* Accordingly, there was substantial, overwhelming, unquestioned, unimpeached, and uncontested evidence that Mr. Campbell had broad, general permission to use the truck and there was no evidence to the contrary.

Finally, any finding made by the Trial Court with regard to the breadth of Mr. Campbell's permission would be irrelevant to its "Ultimate Conclusion" that Mr. Campbell was not a permissive user of the vehicle because he violated BNSF's alcohol

rule by operating the vehicle while intoxicated.[1] The Trial Court based its erroneous decision on Mr. Campbell's violation of BNSF's alcohol rule. Any argument that any other legal conclusion rendered by the Trial Court as to the scope of Mr. Campbell's permission is binding is incorrect in that such findings would be surplusage.[2] "[Appellate Courts] may strike surplusage from the findings when the remainder of the finding disposes of the controversy." Brown v. Rollet Bros. Trucking Co., 291 S.W.3d 766, 777 (Mo. App. 2009) (citations omitted). The Trial Court's erroneous judgment is premised on the erroneous finding that Mr. Campbell's violation of an operational rule against drinking and driving retroactively rendered him a non-permissive user. L.F. 798. This finding disposes of the controversy, albeit erroneously.

Finally, in addition to being completely immaterial, impertinent, and irrelevant to the Trial Court's "Ultimate Conclusion," the Trial Court's characterization of the scope of Mr. Campbell's permission is a legal conclusion which is not binding on the Court. The Trial Court's characterization of Mr. Campbell's permission as somehow limited is a legal conclusion. "[Appellate Courts] are not bound by the trial court's legal conclusions." Brown, 291 S.W.3d at 772 (citations omitted). The evidence at trial, as

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[1] The Trial Court's "Ultimate Conclusion" was that "[t]he credible and totality of the evidence relevant to this case establishes that sobriety was a pre-condition for Campbell to use a company-provided vehicle, including the Silverado." L.F. 798.

[2] Surplusage is an irrelevant or superfluous matter. Websters New World College Dictionary, 1347 (3rd ed., 1996).

cited and outlined above, demonstrated that Mr. Campbell could use the truck as his own while on the road. There was no evidence to the contrary. The only legal conclusion that can be drawn from this uncontested evidence is that Mr. Campbell had broad, general permission to use the truck.

B. Appellant Did Not Abandon An Argument:

Respondents, hoping to avoid the Court's review of the merits of the underlying Amended Judgment, suggest to this Court that Appellant abandoned any challenge to the finding that "Campbell had only 'express, restricted permission to use the Chevrolet Silverado for . . . limited purposes.'" Respondents' Substitute Brief at p. 32. This is a curious argument considering what is actually written in Appellant's brief. Appellant, on at least a dozen occasions in his Substitute Brief, stated, with specific references to the record on appeal, that Mr. Campbell had broad, general permission to use the BNSF provided vehicle. Appellant's Substitute Brief at pp. 9, 21, 23, 29, 31, 41, 45, 60, 61, 67, 71. Given what is actually contained in Appellant's Substitute Brief, there cannot be any serious contention that Appellant waived any argument or position regarding the scope of Mr. Campbell's permission. Further, the majority of Appellant's Brief relies on the uncontested and unchallenged fact that Campbell had broad, general permission to use the truck while on the road, like he was at the time of the wreck. Respondents don't claim otherwise. Rather, they claim that Appellant doesn't challenge the Trial Court's conclusion of law regarding the nature of Mr. Campbell's permission.

Further, the Trial Court's conclusion cited by Respondents is part of the misapplication of law that Appellant appeals. The Trial Court erroneously concluded that

an operational rule (don't drive while under the influence) was a use restriction. Based on this erroneous finding, the Trial Court found that Campbell had limited permission to use the truck, that limitation being that he wasn't allowed to drive it while intoxicated. The Trial Court could have placed whatever label it wanted to on Campbell's permission to use the truck, none of which make any difference under the facts contained in the record on appeal. Finally, Respondents did not challenge the fact that Campbell had broad, general permission to use the truck. Surely if this was even arguable, Respondents would at least offer some statement or argument about it. They didn't because all of the evidence at trial supported the undisputed fact that Mr. Campbell had such broad, general permission. In other words, because Mr. Campbell clearly had broad, general permission, the scope of his broad, general permission to use the vehicle like he would use his own personal vehicle was and is a non-issue.

C. Appellant Did Not Alter The Basis Of His Appeal:

Again, seeking to avoid review of the correctness of the Trial Court's ruling, Respondents assert that Appellant violated Rule 83.08(b). This simply is not true. Appellant asserted all of the arguments and positions in his Appellant's Brief filed with the Court of Appeals. Appellant addressed the change of judge issue at Point I, *stare decisis* and the failure to recognize, declare and follow Missouri law and public policy in Point II, Missouri's "use" versus "operation" distinction, Missouri law regarding omnibus insuring clauses and Missouri public policy in Point III, judicial estoppel in Point IV, and collateral estoppel in Point V. *See* Appellant's Brief. The Substitute Brief filed with this Court is a more concise version of what was presented to the Court of Appeals.

Respondents' specific complaints are that Appellant altered the basis of his appeal by asserting that the Trial Court erroneously declared the law, that the case involves a "company operational rule," and that there is no reference to subject matter jurisdiction in the Point addressing the change of judge issue. To be clear, these matters were addressed, at length, in Appellant's Brief and Appellant's Reply Brief filed in the Court of Appeals. Appellant's Brief at Point III, B pp. 48-55 (addressing "use" vs. "operation" and the nature of BNSF's operational rules; Points II and III pp. 32-71 (addressing the Trial Court's error in declaring the law, setting forth the law of Missouri, and addressing how the law of Missouri should have been applied); Point I at p. 22-32 (addressing the change of judge issue); *See also* Appellant's Reply Brief (addressing all issues that Respondents' claim were altered). Regardless of the fact that no position was altered, Appellant respectfully requests that this Court address the actual controversy in this case.

D. Respondents Primary Arguments Are Procedural/Technical In Nature:

Appellant is not going to spend unnecessary time addressing Respondents' mistaken procedural arguments that attempt to convince this Court to avoid addressing the merits of this appeal. Respondents make such arguments given that the facts of the case and the law of Missouri dictate that Mr. Campbell was a permissive user of the vehicle under Old Republic's omnibus insuring clause. The law in Missouri is clear as set forth in Weathers, Shull, Sullivan, Broadie, Tharp, and § 303.190 RSMo.[3] The

[3] Weathers v. Royal Indemnity, 577 S.W.2d 623 (Mo. banc 1979); Royal Indemnity v. Shull, 665 S.W.2d 345 (Mo. banc 1984); Allstate v. Sullivan, 643 S.W.2d 21 (Mo. App.

application of Missouri law to this case is likewise clear. Mr. Campbell's operation of the truck while drunk was a violation of BNSF's rules. His rule violations took him outside the course and scope of his employment with BNSF and cost him his job with BNSF. What his rule violation didn't do was retroactively remove his broad, general permission to *use* the truck, even though his *operation* of the truck while intoxicated was not within the framework of that broad grant of permission. Because of the clarity of Missouri law, Respondents understandably are seeking for this Court to refuse to address the merits of this appeal. Appellant respectfully requests that the Court address the merits of this appeal.

E. *Respondeat Superior* Is Different From Permissive Use:

Respondents' arguments in Point I of their brief suggest that the standards for *respondeat superior* are the same as the standards for permissive use under an omnibus insuring clause. Respondents' Substitute Brief at p. 31-54. Respondents refer to BNSF's rules for its employees as well as employer's rules for employees generally in fashioning its argument that insurance companies shouldn't have to cover employees who break company rules.[4] Fortunately for the citizens of Missouri, Respondents are incorrect.

1982); Farm Bureau Mut. Ins. Co. v. Broadie, 558 S.W.2d 751 (Mo. App. 1977); United Fire & Casualty Co. v. Tharp, 46 S.W.3d 99 (Mo. App. 1999).

[4] For example, Respondents state "[u]nder 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

Whether an employer is liable for the tortious acts of its employees is subject to much stricter rules than whether someone is a permissive user under an omnibus insuring clause. The doctrine of *respondeat superior* provides that "an employer is liable for the torts committed by its employees while they are acting within the scope of employment." Thornburg v. Fed. Express Corp., 62 S.W.3d 421, 429 (Mo. App. 2001) (citations omitted). Accordingly, in order for an employer to be vicariously liable, the negligent act must be committed by an employee and in the course and scope of the employee's employment with the employer. *See Id.* Obviously, if an employee in committing a negligent act was violating a company rule while off duty, in this case a rule against drinking and driving a company provided vehicle while off the clock, the employee would not be in the course and scope of his employment. Defendant's arguments confuse the doctrine of *respondeat superior* for what is actually at issue in this case, permissive use under an omnibus insuring clause in a liability insurance policy.

The standard for permissive use under an omnibus insuring clause is much less restrictive because omnibus insuring clauses are mandated by § 303.190.2(2) RSMo., which is part of Missouri's MVFRL. This Court in Weathers declared that omnibus

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Missouri criminal law)." Respondents' Substitute Brief at p. 32. This is the first of many instances in which Respondents argue to the Court that employment rules, which are certainly pertinent to whether or not someone is the course and scope of employment, are applicable to whether an employee is a permissive user under an omnibus insuring clause contained in a liability insurance policy that is supposed to comply with the MVFRL.

insuring clauses must be liberally interpreted because Missouri's public policy requires the same. Weathers, 577 S.W.2d at 626. "Omnibus coverage provisions are intended to extend, not restrict, coverage afforded and such intention is salutary." *Id.* at 626 (citations omitted). "Such extension is accomplished by enlarging the number and variety of insured classes." *Id.* Missouri's MVFRL "mandates that the omnibus clause protect any person using the vehicle with the permission of the named insured whether or not the actual operation of the vehicle is within the framework of that permission." Sullivan, 643 S.W.2d at 23. Accordingly, a person can be operating a vehicle in violation of the vehicle entrustor's rules, such as rules against operating the vehicle after drinking, and still be using the vehicle with the entrustor's permission. Sullivan, 643 S.W.2d 21; Broadie, 558 S.W.2d 751; Shull, 665 S.W.2d 345; Tharp, 46 S.W.3d 99; Weathers, 577 S.W.2d 623. Thus, in order for use to be permissive under an omnibus insuring clause, the only requirement is that the vehicle user is using the vehicle for a purpose that is not prohibited. In this case, Mr. Campbell was using the truck to travel somewhere, just like he would have used his own, personal vehicle. Mr. Campbell was using the truck with the permission of BNSF, but his actual operation of the truck (with a measurable amount of alcohol in his system) was not within the framework of that permission.

F. Prohibitions On Use Vs. Restrictions On Operation:

As mentioned above, there is a distinction between the *use* of a motor vehicle and the *operation* of a motor vehicle in the context of permissive use under an omnibus insuring clause. "Use" is the employment of the vehicle for some purpose or object, such as going to get a meal, cruising the streets, going to purchase alcohol, going to a movie or

traveling somewhere. Weathers, 577 S.W.2d at 627. "Operation" is the driver's direction and control of the mechanism for the purpose of propelling the vehicle, such as putting the key in the ignition, starting the vehicle, keeping a careful lookout, driving sober, driving non-negligently, driving at or under the speed limit, being a defensive driver, stopping at stop signs, etc. *Id.* On page 17 of their Brief, Respondents finally concede that Mr. Campbell's *operation* of the truck was in violation of a company rule. Respondents' Substitute Brief at p. 17. Specifically, Respondents concede that "Campbell testified at the hearing that he did not comply with BNSF drug and alcohol policies or rules when he ***operated*** the Silverado while intoxicated. (T. 251-53; A. 234, 308-10, 313)." *Id.* (emphasis added). Of course Respondents' concession is unnecessary given that Missouri case law holds that violations of rules against driving drunk are operational rules (*e.g.* Sullivan and Tharp), the fact that the truck wasn't being used for a prohibited purpose or object, there was no prohibited purpose or object in evidence, and that common sense dictates that BNSF's alcohol rules are meant to prevent operation of BNSF provided vehicles while intoxicated. As explained in every Missouri case that ever addressed the issue, *use* is not rendered non-permissive by virtue of violating a rule pertaining to the *operation* of a vehicle, in this case, violating a rule pertaining to operating a BNSF provided vehicle while intoxicated.

Respondents incredulously suggest that the "use" versus "operation" distinction doesn't apply to their policy as it does for every other policy issued in Missouri for, at least, the past four decades. Respondents' Substitute Brief at p. 42. This proposition, of course, is not supported by any citation to any authority, because there is none.

Additionally, Respondents' failure to make any counter argument to Appellant's position that BNSF's alcohol policies amount to operational restrictions (as opposed to use prohibitions) should be treated as a concession of this point.

G. BNSF's Alcohol Rule Was A Restriction On The Operation Of BNSF Provided Vehicles:[5]

At trial, Respondents took the positon that "all vehicle use is required to be reasonable, safe, and in accordance with BNSF rules and policies." TR at 82. BNSF had vehicle policies against being negligent, careless, speeding, running a stop sign, violating any other "rule of the road" or any violation of state law which could possibly cause an accident. L.F. 767; App. A229-A230. Without any explanation, Respondents now assume the untenable position that these operation rules are different from the alcohol rules. Respondents' Substitute Brief at 42. Respondents conclude that "Campbell did not qualify as an insured, i.e., a 'permissive user' at the time of the accident, because his

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[5] In Sullivan, the Court determined that the following rule was an operational restriction, not a use prohibition:

> Under no circumstances should vehicle be used, operated or driven by any person . . . [w]hile under the influence of intoxicants or narcotics."

Sullivan, 643 S.W.2d at 22-23. The Sullivan Court found that a driver who violated this rule by driving the vehicle while under the influence of alcohol was using the vehicle with the owner's permission regardless of whether he was operating the vehicle within the constraints of that permission. *Id.* at 23.

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." *Id.* at 42. Following Respondents' logic, if an employee sped, the employees status as a permissive user would be "abruptly and dramatically altered once he [exceeded the speed limit] which extinguished his foundational qualification to use the vehicle for any alleged purpose." Likewise, if an employee drove negligently, the employee's status as a permissive user would be "abruptly and dramatically altered once he [drove negligently] which extinguished his foundational qualification to use the vehicle for any allege purpose." Respondent's position that was adopted by the Trial Court is exactly what the Court in Sullivan cautioned against:

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

Sullivan, 643 S.W.2d at 23. Likewise, Respondents' position that was adopted by the Trial Court is exactly what this Court in Weathers cautioned against. "[I]f the named insured permitted the use of the vehicle and at the same time prohibited its negligent or unlawful operation, it would defeat the very purpose of the policy." Weathers, 577 S.W.2d at 629 (citations omitted). Accordingly, BNSF's rules, such as its rule against operating a BNSF provided vehicle while intoxicated (which is both negligent and unlawful), are operational restrictions, not use prohibitions. To treat these operational

restrictions as use prohibitions would be irreconcilable with decades of binding precedent and Missouri's MVFRL and would defeat the very purpose of Old Republic's liability insurance policy.

H. State Farm Fire & Cas. Co. v. Ricks:

Respondents argue that the case of State Farm v. Ricks stands for the proposition that Missouri's MVFRL does not favor expansive coverage. Respondents' Substitute Brief at p. 37. A simple reading of the Ricks case reveals that Respondents are wrong. The Ricks case does not state, assume, or otherwise imply that the MVFRL does not favor an expansive coverage. *See* State Farm Fire & Cas. Co. v. Ricks, 902 S.W.2d 323 (Mo. App. 1995). Ricks involved a collision between two non-permissive users of their respective vehicles. *Id.* at 324. The driver of one of the vehicles, Andre Smith, woke up the vehicle owner and asked the vehicle owner for permission to use the vehicle. *Id.* The vehicle owner refused. *Id.* Refusing to take no for an answer, Mr. Smith swiped the keys, departed with the vehicle and ultimately got into a wreck. *Id.* In some circles this behavior is called stealing. The Court found that Mr. Smith was not a permissive user which makes sense given that car thieves, by definition, don't have permission to use the vehicle that they stole. *Id.* at 325. The other vehicle was entrusted to Larry Thomas by the vehicle owner with the condition that only Mr. Thomas was to drive the vehicle. *Id.* at 324. Mr. Thomas took the vehicle and turned it over to his girlfriend, Angela Griffin, to drive. *Id.* The vehicle owner "specifically told Angela Griffin that she was not allowed to drive the car." *Id.* Under these circumstances, the Court found that Ms. Griffin was not a permissive user since the vehicle owner forbade her from driving the

vehicle and forbade Mr. Thomas from entrusting the vehicle to anyone else. *Id.* at 326. This case does not stand for the proposition that the MVFRL does not favor expansive coverage. As quoted above[6], this Court has held that the MVFRL law, particularly § 303.190.2(2) RSMo., favors an expansive, liberal interpretation of omnibus insuring clauses to accomplish the goal of expanding the universe of people covered under such clauses. Weathers, 577 S.W.2d at 626.

I. Missouri Law, Not Foreign Authority Should Control The Decision In This Case:

Respondents assert that an Eighth Circuit federal case and a case from an intermediate appellate court in Tennessee (that specifically rejected Missouri law), are authority for Respondents' position in this case that an operational rule violation changes an employee's status from a permissive user of a vehicle to a non-permissive user under an omnibus insuring clause. Respondents go as far as to point out that Appellant didn't mention the federal case. The reason why the federal case wasn't mentioned is that there is no need to look to the case law from federal courts because Missouri case law provides binding authority on the law of permissive use under omnibus insuring clauses.[7]

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[6] *Supra* p. 13-14.

[7] § 303.190 RSMo., Sullivan, 643 S.W.2d 21; Broadie, 558 S.W.2d 751; Shull, 665 S.W.2d 345; Tharp, 46 S.W.3d 99; Weathers, 577 S.W.2d 623.

Likewise there is no need to examine, let alone rely on, the case law of Tennessee.[8] "[O]pinions of courts of other states, even on similar facts, do not have controlling effect." Tharp, 46 S.W.3d at 107-108 (citations omitted). "Like witnesses, foreign authority should be weighed and not counted." *Id.* (citations omitted). The courts of this state are bound by earlier judicial decisions from superior courts of this state when the same point arises again in litigation and where the same or an analogous issue was decided in an earlier case. Rothwell v. Director of Revenue, 419 S.W.3d 200, 206 (Mo. App. 2013) (citations omitted). Such prior cases from the courts of this State "stand as authoritative precedent unless and until [they are] overruled." *Id.* In Missouri, on the issue of permissive use under an omnibus insuring clause, those cases that have not been overruled that stand as authoritative precedent are Sullivan, Broadie, Shull, Tharp, and Weathers. Therefore, Respondents' reliance on Hawkeye-Security Insurance Co. v. Bunch, 643 F.3d 646 (8th Cir. Mo. 2011) and Lambright is unpersuasive, unnecessary, and improper.

J. § 303.190 RSMo. Requires Every Policy To Provide The Mandatory Coverage:

[8] This is especially true given that Lambright specifically rejected Missouri law. Lambright v. Nat'l Union Fire Ins. Co., 173 S.W.3d 756, 767 (Tenn. App. 2005) (declining to adopt Tharp because Missouri law was not in conformity with Tennessee law).

Respondents suggest that because the insurer for the rental car company that rented the car to Campbell paid $25,000.00 to Appellant, Missouri's MVFRL was satisfied with respect to Old Republic's liability insurance policy that paid nothing to Appellant. Respondents' Substitute Brief at 45. In support of this incorrect statement, Respondents cite to Royal Indemnity v. Shull. Shull says nothing of the sort. Shull addressed whether there was coverage under a rental car company's liability policy, not whether the payment under one applicable liability policy satisfied the responsibilities of another liability insurer under its own liability policy. Shull, 665 S.W.2d at 347. Further, Respondents' argument that MVFRL is satisfied when one of multiple insurance policies pays has been specifically rejected by this Court.

> There is no language in section 303.190 that would restrict the minimum liability payments to a single insurance policy. There are no words anywhere in the statutory scheme of the MVFRL that provide that an insured party is to receive only one statutory limit of $25,000 in compensation if they are insured under multiple polices. The plain language of the section 303.190.2 indicates that every owner's policy issued in this state must provide the minimum liability coverage to comply with Missouri law . . . [H]ad the state legislature intended the result argued for by [Old Republic and BNSF], it could have easily included language restricting the minimum liability protection to only one policy or only one statutorily required minimum payment.

American Std. Ins. Co. v. Hargrave, 34 S.W.3d 88, 92 (Mo. banc 2000). § 303.190.2(2) RSMo. requires that a liability insurance policy:

> Shall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle . . . subject to limits . . . with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to . . . one person in any one accident . . . .

Id. Old Republic failed and refused to insure James Campbell, who was using the BNSF's provided rental truck with BNSF's permission, against the loss from liability imposed by law to Appellant for, at least, $25,000.00. Accordingly, § 303.190.2(2) RSMo. has not been satisfied by Respondents' insurance policy.

K. Missouri Law Does Not Permit An Employee's Violation Of An Employer's Policy To Render The Employee's Use Of A Vehicle Non-Permissive Under An Omnibus Insuring Clause:

Respondents represent to this Court that Missouri law "often bases the question of permissive use on the employer's policies." Respondents' Substitute Brief at 53. This statement is not true and the cases that Respondents cited in support of this representation to the Court offer no support for this representation.

The first case Respondents cite in support of their proposition is Hawkeye-Security Insurance Co. v. Bunch, 643 F.3d 646 (8th Cir. Mo. 2011). This is an 8th Circuit Court of Appeals case that is not binding and, to the extent is conflicts with Sullivan, Broadie, Shull, Tharp and Weathers, is not even persuasive given the abundance of Missouri law on the topic. In Bunch, the 8th Circuit addressed a second permittee

situation vastly different from the facts of this appeal. In Bunch, an employee entrusted a company vehicle to an intoxicated non-employee to use for a personal purpose. Bunch, 643 F.3d at 651. In Bunch, the employer, in addition to its rule against drinking and driving, prohibited employees from entrusting company vehicles to non-employees (which is not at issue in this appeal) and prohibited the personal use of company vehicles (which is not the case in this appeal). *Id.* The non-employee to whom the company vehicle was entrusted to use for a personal errand was found to not be a permissive user of the company vehicle. *Id.* Given this factual background, the 8th Circuit held "[w]e conclude that [the employee] did not have authority to give [the non-employee] permission to drive the vehicle as a second permittee." *Id.* The Bunch case contains the following quote, "Missouri courts often ***review*** company policies in determining whether permission had been granted." *Id.* (citations omitted) (emphasis added). The Bunch case does not state that Missouri Courts often ***base*** the question of permissive use on employer's policies as Respondents represent to this Court that it does. *Id.* There is a world of difference between the term "base" and the term "review," a distinction of which Respondents are undoubtedly aware. Any suggestion to the contrary is disingenuous.

The second case Respondents cite is Nautilus Ins. Co. v. I-70 Used Cars, Inc., 154 S.W.3d 521 (Mo. App. 2005). Nowhere does Nautilus state that permissive use questions are based on employers' policies. Nautilus did not involve an employer entrusting a company vehicle to an employee. *Id.* at 524; 529 ("[the driver] was not an employee of Mr. Dietzel's or I-70 Used Cars. . ."). Nautilus did not even address an employer's

policy. The facts of Nautilus simply offer no support for Respondents' representation to the Court.

In Nautilus, a car dealer retained a gentleman to detail its cars. *Id.* at 524. The dealer would turn over the cars to the detailer who would drive them to his residence, detail the cars, and return them to the dealer. *Id.* At issue in Nautilus was the detailer's shenanigans on what was probably the last time he detailed cars for the dealer. *Id.* at 525. The detailer was entrusted with a vehicle to detail by the dealer. *Id.* Rather than take the car home, the detailer instead drove the dealer's car to another city where he bought some beer. *Id.* He drove to a buddy's house where he drank some of the beer. *Id.* After drinking some of the beer, the detailer and his buddy hopped in the dealer's car and drove to another friend's house where they drank more beer. *Id.* Next, the detailer and his buddy left their friend's house, but realized that they had left the beer and their cigarettes behind. *Id.* The detailer turned around in the middle of the road, hit a fence, and, with slurred speech and smelling of alcohol, explained to the fence owner that he was trying to follow his girlfriend (there was no girlfriend). *Id.* The detailer then went back to the friend's house and retrieved his misplaced beer and cigarettes. *Id.* After departing the second time, beer and cigarettes in hand, the detailer was involved in the fatal collision at issue. *Id.* The Court found that the detailer was not a permissive user of the dealer's vehicle. *Id.* at 531. In reaching this conclusion, the Court did not examine any of the dealer's policies.

The third case cited by Respondents is State Farm v. Scheel, 973 S.W.2d 560 (Mo. App. 1998). Again, Scheel provides no support for Respondents' representation to the

Court regarding employer's policies forming the basis of the courts' permissive use determinations. The Scheel case didn't involve an employer/employee entrustment. The Scheel case didn't involve an employer's policy. Rather, the Scheel case involved a situation in which a son took his parents' vehicle without asking permission and then got into a wreck in the vehicle he had taken without permission. *Id.* at 562. Under the circumstances of the case in which the son commandeered his parents' vehicle without even asking for permission even though he was forbidden from driving the vehicle, the son was found to not be a permissive user of the vehicle. *Id.* at 570.

The fourth and final case cited by Respondents is Universal Underwriters Ins. Co. v. Davis, 697 S.W.2d 189 (Mo. App. 1985). Like the other three cases, Davis does not support what Respondents represent that it supports. Nowhere in the Davis opinion is there any indication that permissive use issues are resolved based on employers' policies. No employer policy was addressed in Davis. Rather, Davis addressed a demonstrator car entrusted to a car salesman by the salesman's car dealer employer pursuant to a contract entitled "Employee Demonstrator Agreement." *Id.* at 190-191. The agreement provided that the demonstrator car was to be used to advertise the car as a "showroom on wheels," was to be used only for certain purposes, and that "[m]embers of the employee's family are prohibited from using the automobile for personal use." *Id.* at 191. The salesman entrusted the car to his son to drive to a social function. *Id.* at 190. The second permittee son was involved in an accident in the demonstrator car. *Id.* The Court found that because the demonstrator car was entrusted with the salesman for the purpose of

advertising the car, the salesman's presence in the car was required for use to be permissive. *Id.* at 194. In holding that the son's use was not permissive, the Court found:

> The car was the salesman's sample to use in attracting sales prospects and for sales demonstrations. Quite obviously, that purpose was to be served only when Davis as the salesman was present to answer inquiries and procure sales leads.

Id. Again, nowhere in this second permittee case is there any support for Respondents' representation regarding the law of Missouri.

Missouri law does not "often base[] the question of permissive use on the employer's policies." None of the cases cited by Respondents even come close to supporting this false proposition.[9] Rather, the law in Missouri is that a vehicle entrustor's rules are not to be engrafted into a liability insurance policy in order to determine the extent of coverage. *See* Sullivan, 643 S.W.2d at 23. More specifically, the law in Missouri is that a vehicle entrustor's policy/rule that states, "[u]nder no circumstances should vehicle be used, operated or driven by any person . . . [w]hile under the influence of intoxicants or narcotics," is irrelevant to a Court's determination of whether the use of the entrusted vehicle is permissive. *Id.* at 23. Appellant concedes that an employer's/entrustor's rules and policies can be considered, but that such rules and policies must be considered in light of the surrounding circumstances and, if they pertain

[9] In fact, the law of Missouri is the opposite – the Courts of Missouri never base permissive use questions on employer's policies.

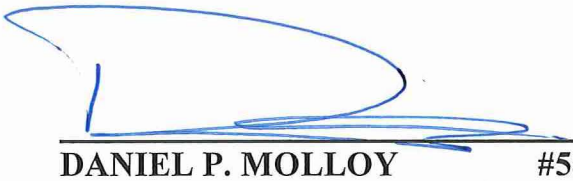
to the operation of the vehicle, are irrelevant to the issue of whether the use of the vehicle was permissive under an omnibus insuring clause mandated by Missouri's MVFRL.

IV. CONCLUSION

James Campbell, per the uncontested evidence, had broad, general permission to use the BNSF provided vehicle for anything he would use his own personal vehicle to do. He could use the company provided vehicle to go get some dinner, go get more alcohol, aimlessly cruise the streets, go to a movie, see the sights and sounds of Springfield's nightlife, test out the four-wheel drive capabilities of the truck, drive to get some cigarettes, or anything else. At the time of the wreck with Appellant, Mr. Campbell was intoxicated and operating a BNSF provided vehicle, in clear violation of BNSF's alcohol policies. However, the violation of an alcohol policy does not make Mr. Campbell's use of the vehicle non-permissive. Rather, it was the manner of his operation of the truck (while intoxicated and negligently) that was in violation of BNSF's rules. Regardless of how BNSF's alcohol rules were phrased, the rules were restrictions on the operation of BNSF vehicles. Sullivan, 643 S.W.2d at 21-23. Because Missouri recognizes a distinction between restrictions on the use and restrictions on the operation of a vehicle for the purpose of permissive use under an omnibus insuring clause and because driving while intoxicated rules are operational, Mr. Campbell's violation of BNSF's alcohol rules did not make his use of the BNSF truck non-permissive. Rather, due to his broad, general permission to use the vehicle, Mr. Campbell was a permissive user of the vehicle. The Trial Court's Amended Judgment must be reversed and the case remanded for entry of judgment in favor of Appellant. Alternatively, the Amended Judgment must be

reversed and the case remanded with instructions for the Trial Court to transfer the case to the proper division of the Circuit Court of Greene County, Missouri for further proceedings consistent with the Opinion of this Court.

CORBETT LAW FIRM, P.C.



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V. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Appellant's Substitute Reply Brief* was delivered by email and via the electronic filing system on this 23rd day of February, 2018, to the following attorneys:

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

The undersigned hereby certifies that the foregoing *Substitute Reply Brief* complies with the limitations contained in Rule 84.06(b). There are 6,799 words (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature blocks, and appendix) and 586 lines in the foregoing brief according to the Word Count tool in Microsoft Word for Windows, the word processing software used to prepare the foregoing brief. The brief is being filed in the Missouri Supreme Court via the electronic filing system and is being served on counsel for Respondents via said filing and via e-mail.

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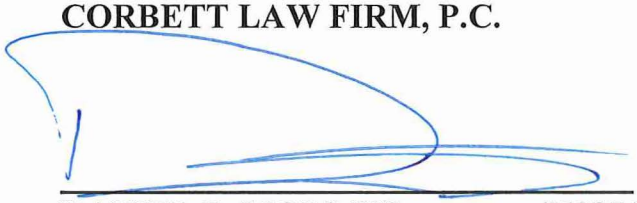

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