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

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

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INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys is a non-profit, professional organization of approximately 1,400 trial lawyers in Missouri. For more than half a century, MATA members have advanced the interest and protected the rights of individuals throughout the State of Missouri. MATA members have dedicated themselves to promoting the administration of justice, preserving the civil justice system, and ensuring that the citizens of Missouri have access to our courts.

MATA members commonly represent persons injured in automobile collisions and individuals seeking to collect insurance coverage under the respective automobile policy or policies in question. MATA members and their current and future clients are interested in ensuring that coverage for the negligent operation of an automobile continues to be required coverage under the Motor Vehicle Financial Responsibility Law (MVFRL), R.S.Mo. § 303.190. MATA and its members believe the decision handed down by this Court will have significant future impact on the collectability of judgments for those injured in automobile crashes, and therefore has implications beyond the facts of this individual case.

CONSENT OF PARTIES

Consistent with Rule 84.05(f)(2), MATA has received consent for the filing of this brief by both Appellants and Respondents, pursuant to the stipulation filed by the parties with the Court on February 1, 2018.

JURISDICTIONAL STATEMENT

MATA Adopts the Appellant's jurisdictional statement.

STATEMENT OF FACTS

MATA adopts the statement of facts set forth in Appellant's brief. To the extent that any specific facts are pertinent to the arguments raised by MATA, they are cited specifically below in the section of argument at issue.

ARGUMENT

I. MISSOURI LAW HAS CONSISTENTLY AND FOR GOOD REASON FOCUSED UPON WHETHER THE PERSON DRIVING THE VEHICLE HAS PERMISSION TO USE THE VEHICLE AND NOT WHETHER THEY HAVE PERMISSION TO OPERATE IT IN A CERTAIN CONDITION OR MANNER

A. Introduction

The issue before the Trial Court, and now before this Court, is whether so-called rules will be allowed to eliminate coverage under the Motor Vehicle Financial Responsibility Law (MVFRL), section 303.190. The public policy as expressed in section 303.190 for the last forty plus years has been to ensure compensation for persons injured by negligent drivers, including those given permission to drive the vehicle even if they did so negligently. Here, BNSF had rules which held an employee did not have authority to get into or operate a company vehicle if they were under the influence. Appellants Appendix (A222). The potential consequences of allowing, for the first time, rules on the condition of the driver, or how they drive, to eliminate permission to use the vehicle are far reaching. Liability coverage, by its very nature only comes into play when a driver is found to be at fault in causing an accident through negligent/unlawful operation of a motor vehicle. To allow rules precluding such negligent or unlawful operation to void permission will result in circumvention of the statute, such that permission under the statute will be so circumscribed as to be nearly meaningless. Here, the rules or policies relate to work rules of the

employer. However, once such a standard is adopted, the rule could just as easily be a family rule, or instruction among friends. If the Court adopts the standard advocated by Amicus MODL and Respondents, elimination of coverage by rule will become the norm, and section 303.190 will be rendered obsolete as it relates to permissive drivers.

While the present situation involves intoxication, BNSF had similar rules which would similarly revoke authority to operate the vehicle if an employee were to speed, not wear their seatbelt, run a stop sign, drive in a careless and imprudent manner, or violate any traffic law regarding the operation of the vehicle. (A229-230). Like the rule against intoxication, these rules were limitations not on whether the person had been given permission to use the vehicle, but instead on the way they operate the vehicle, or the condition a person is in when they operate the vehicle. (A230).

Authorizing limitations on how, or in what condition, someone can operate a vehicle, as opposed to whether a that person has been given permission to use the vehicle, will have far reaching repercussions to all individuals who are injured in automobile accidents. It is for these very reasons that courts interpreting Missouri law uniformly for the last 68 years have refused to allow such restrictions to undo the coverage required under section 303.190, the Motor Vehicle Financial

Responsibility Law (MVFRL).[1] To change the law and allow such restrictions going forward would allow elimination of coverage for anyone but the named insured in nearly every conceivable situation. Every child who operates a parent's vehicle under the influence will have no coverage if there is a family policy precluding them from getting into the car if they have been drinking. Every truck driver who does not get eight hours of sleep as required by a company policy will be uninsured for the injuries they cause when they fall asleep on the road while driving the company truck. As BNSF tacitly conceded in this case, every victim of a crash involving a BNSF employee who violates any rule of the road such as speeding, running a stop sign, or even failing to wear their seat belt will find there is no coverage for their injuries, despite the employee having been given general permission to use the vehicle.

The above are only a few examples of the consequences of allowing a restriction such as authorized by the Trial Court in this case. To ensure compensation for victims of motor vehicle crashes, consistent with Missouri law and

[1] It is axiomatic that contract terms seeking to avoid public policy, particularly as stated by the Legislature, are unenforceable. *See Sheets v. Hill Bros. Distributors, Inc.*, 379 S.W.2d 514, 518 (Mo. 1964) (per curiam); *see also* Restatement (Second) of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

public policy, respectfully the Court should not change Missouri law to allow for such operation rather than use restrictions.

B. Missouri's distinction between limitations on use and operation is not accidental, but instead with the express and acknowledged purpose of preventing limitations or restrictions on how the vehicle is used from circumventing the requirement under the MVFRL that permissive users be given coverage under the policy.

R.S.Mo. § 303.190 is the Motor Vehicle Financial Responsibility Law (MVFRL). It is incorporated by operation of law into every policy of insurance. *Ragsdale v. Armstrong*, 916 S.W.2d 783, 785 (Mo. Banc 1996). Under the MVFRL every policy "shall" provide coverage for every person who is using the vehicle with either "express or implied permission." In deciding the issue of permissive use, the "public policy" expressed in the statute to extend coverage for those injured by "negligent motor vehicle operators" must be given significant consideration. *United Fire & Cas. v. Tharp*, 46 S.W.3d 99, 108 (Mo. App. S.D. 2001).

Amicus MODL's brief asks the Court to ignore almost 70 years of precedent on the basis that Missouri's continued distinction between restrictions on operation rather than use is nothing more than accidental carryover by numerous courts, including this Court, which did not really understand the statute at issue. Respectfully, review of the cases from this Court, and the Courts of Appeal, show these Courts understood full well the distinction and the importance of ensuring that

rules or restrictions on operation not be allowed to circumvent the statutory requirement that permissive users be provided coverage.

While Amicus MODL's brief appears to argue that Missouri law on restrictions by work rules or operation began in the 1970s, that is simply not the case. As early as 1950, the Eighth Circuit Court of Appeals decided a matter nearly identical to this case, holding that under Missouri law, a work rule which prohibited use of an automobile after drinking alcohol could not invalidate coverage. Please see *New York Cas. Co. v. Lewellen*, 184 F.2d 891 (8th Cir. 1950). In *Lewellen*, as in this case, the policy had an omnibus insured clause which provided coverage for anyone whose "actual use of the automobile is with the permission of the named insured." *Id.* at 892. Like the present case, the putative insured was an employee of the owner of the vehicle, who would drive the vehicle to and from work, and to job sites. *Id.* at 893. Similarly, the company had a policy that no employee could "drive any of the equipment or trucks when they were drinking." *Id.* Further, similar to BNSF's rule that an employee could not be in the vehicle if they had alcohol in their system, the company rules in *Lewellen* required that any person who did take a drink while out with a company vehicle must leave it parked, and notify the owner. *Id.* Finally, like Mr. Campbell, the employee in *Lewellen* was aware of these rules prior to the accident in question. *Id.*

On the night of the accident, the employee Mr. Lewellen had several drinks, and got into an accident. *Id.* The insurer took the position that having violated the

company rules on drinking and operating company equipment, and not parking the vehicle, the employee was not a permissive user. *Id.* The Eighth Circuit, relying on the then existing financial responsibility act held that violation of such rules are not sufficient to terminate permission for the use of the vehicle. *Id*. at 894. As the Financial Responsibility Act served the purpose of providing coverage for those injured in automobile accidents, the public policy of the state required coverage, despite such work rules. *Id.* The determination that the public policy of Missouri requires coverage for use whether a rule precluding operation under certain circumstances exists is thus of considerably longer standing than the 1970's.

The opinion in *Helkamp v. American Family Mutual Ins*., 407 S.W.2d 559 (Mo. App. 1966) cited by Amicus MODL in its brief did consider the words "use" and "operate" in conjunction in that case. It did so, however, because the policy's omnibus clause provided that an insured person included "any other person using such automobile with the permission of the named insured, provided his operation or, if not operating, his other actual use thereof, is within the scope of such permission". *Id*. at 562. The policy in *Helkamp*, therefore, used the words interchangeably for coverage, so the Court similarly considered operation or permission as either would provide coverage. *Helkamp*, however, did not involve whether a rule or restriction on operation could invalidate coverage. The decision, therefore, has nothing to do with the issue before this Court, whether a policy which attempted to restrict coverage based on operation would comport with the MVFRL.

The Court in *Allstate Ins. Co v. Hartford Accident & Indemnity Co*., 486 S.W.2d 38 (Mo. App. 1972) did consider use and operation. However, it did not do so in regard to the issue of whether a restriction on operation could remove or void permission, as the driver in question was a "second permittee." *Id*. at 40. Indeed, in *Allstate*, the Court held there was no contention that the driver was "operating" the vehicle with the permission of the insured. The Court in deciding whether a second permittee was covered, however, did identify that use and operation are two very different things. *Id.* at 43.

The next case where the Court was called upon to decide the actual issue here, whether restrictions or rules could invalidate "use" of a vehicle, rather than operation, was *Farm Bureau Mutual Ins. Co. v. Broadie*, 558 S.W.2d 751 (Mo. App. 1977). In *Broadie*, the Court gave an expansive explanation of the history of the "use" and "operation" distinction up to that point, noting that "use" is much broader, and affords coverage despite rules about who may operate the vehicle or how they may operate it. In *Broadie*, the omnibus provision, like the MVFRL, provided coverage for anyone whose use was "with the permission of the named insured." *Id*. at 753. Citing *Allstate*, Supra, the Court noted that there is a distinction between coverage for use and coverage for operation, with use being "of much broader scope and application than 'operate' or drive'." *Id*. at 754.

Noting the provision in question had the "standard" use omnibus clause, the Court held the issue was whether the use, driving it for "running around," was

permitted, which the Court held under the evidence it clearly was. *Id*. at 754. Importantly, the Court held that a restriction that the driver who did not have a driver's license not be allowed to drive the vehicle did not defeat coverage. *Id*. at 755. Finding that such a restriction was a restriction on operation rather than use, the Court clearly and explicitly held such instructions or restrictions on operation were "wholly immaterial in this case." This was because permission to "use" the vehicle extends to permitted uses, not permitted operations. *Id*. The restriction that a non-licensed driver not be allowed to drive the vehicle, was thus a restriction on operation, and did not touch upon the broader issue of "use." *Id*. The *Broadie* Court, therefore, purposefully and with great care, explained the distinction under Missouri law that omnibus coverage for "use" is not affected by restrictions on operation. *Id*. As the MVFRL mandates coverage for "use" rather than operation, the distinction explained in *Broadie* was not a mistake or an unintended consequence of policy language. Instead, it was a purposeful and well-thought-out analysis of whether rules regarding operation could void coverage.

This Court considered a similar issue in *Weathers v. Royal Indemnity Co*., 577 S.W.2d 623 (Mo. Banc 1979). Contrary to Amicus MODL's argument, the decision in *Weathers* was not premised primarily on the policy language of the insurance policy, but instead the required coverage under the MVFRL. In deciding the case, the *Weather*s Court first noted that R.S.Mo. §303.190(2) (1969) mandated that every policy have an omnibus clause to broaden coverage complying with the statute. *Id*. at

625. Such broad language requires the coverage be afforded to anyone "using any such motor vehicle" with express or implied permission. *Id*. The Court then noted that the Royal Indemnity policy had an omnibus clause that included using and operating in it.[2] *Id*. However, as the statute speaks broadly to Use rather than Operation, this Court held the critical issue was that any provision in the policy which was more restrictive than the statute would be invalid for non-compliance with § 303.190. *Id*. This language makes clear the Court in *Weathers* was not "confused," or only using the distinction because the policy had the word operate in it. Instead, the Court was drawing a clear distinction between the statutorily required coverage for use, and any restriction which attempts to limit this broad coverage requirement (operation).

This can be seen by the very next section of the Court's opinion, which consistent with Missouri law from that day to this, stated that the public policy manifested in the Motor Vehicle Safety Responsibility Law, particularly that of § 303.190 providing coverage for those injured by permissive users, requires a liberal interpretation to find coverage. *Id.* at 625-626. The Court therefore held that as to

[2] This clearly distinguishes *Weathers* from cases such as *Helkamp*, as the *Weather's* Court was very clear it was drawing a distinction between "use" and "operation" based upon the mandatory requirements of the MVFRL. Having decided that every policy must provide coverage for permissive "use", the Court made clear that permissive use could **not** be conditioned on operational concerns.

use, the driver in question had broad permission to use the vehicle. *Id*. at 627. The Court next distinguished "operation" as not being within the required expansive statutory mandate of use, and held that a restriction on operation or driving of the vehicle did not comport with the statute, and thus could not preclude coverage. *Id*. The company rule that the vehicle could not be operated by anyone but the named driver thus could not be used to exclude coverage. *Id*. In doing so, the Court found *Brodie supra* on point, and held it properly stated Missouri law as to what coverage is required by the MVFRL's provision on permissive users. *Id*. at 628. In words very compelling given the facts of this case, the Court held that operation restrictions could not be allowed to exclude coverage, or else they would swallow this broad public policy. Specifically, the Court warned:

> Under appellee's contention, if 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. Therefore, the 'actual use' of the vehicle within the meaning of the policy cannot reasonably relate to the particular manner of its operation.

Id. at 629.

There is nothing about the Court's decision in *Weathers* that exhibits any misunderstanding of the issues or of the statutory requirements for coverage for permissive users. Instead, the Court considered at length the statute, its purpose, and existing case authority, and determined that restrictions on operation such as do not

drive negligently or unlawfully, could not be used to avoid coverage. In every situation where liability insurance is called into play, the at fault driver will have operated negligently or unlawfully.[3] As the *Weathers* Court warned, allowing rules precluding operation in such a manner would eviscerate the public policy of the State of Missouri under the MVFRL. Here, just as the Court warned in *Weathers*, Mr. Campbell drove negligently and unlawfully. However, these work rules precluding him from doing so do not invalidate coverage for his use of his company vehicle, that he rented, kept the keys for, and was the only person who drove. As the *Weathers* court warned, allowing such restrictions will result in the death knell of mandatory coverage for permissive users.

Amicus MODL's brief likewise fails to discuss or even cite this Court's next opinion on this matter, *Royal Indemnity Co. v. Shull*, 665 S.W.2d 345 (Mo. Banc 1984). While Amicus MODL appears to argue the *Weathers* opinion should be discounted

[3] Indeed in some municipalities, simply being negligent is the basis for a misdemeanor criminal offense. *See* City of Columbia Municipal Ordinance 14-161 ("Notwithstanding other provisions of this chapter, the driver of any vehicle shall at all times exercise the highest degree of care to avoid striking or colliding with any vehicle, cycle or pedestrian upon any roadway and shall, when approaching any stopped or parked vehicle, child, any obviously confused or incapacitated person or any other pedestrian on a roadway, exercise the highest degree of care to avoid injury or damage.").

because it was a "4-3 vote with the deciding vote case by a special judge"[4], the Court in *Shull* in a 6-1 decision affirmed *Weathers* as the clear law of Missouri. As the *Shull* Court confirmed, restrictions on operation could not invalidate the much broader coverage required for "use" under the statute. Further, the Court, in *Shull*, also rejected the argument raised by Amicus MODL that *Weathers* was premised upon the fact the original renter while not driving was in the car, holding that the fact that the lessee of the vehicle was not in the car for the trip in question was not "significant". *Id.* at 347. Instead, the court relying on *Weathers* and Section 303.190.2 held that required omnibus coverage cannot be eliminated by restrictions on operation, as the statutory term is to be given its broadest intendment. *Id.* at 347-348.

Similarly absent from discussion in Amicus MODL's brief, the Court of Appeals in *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21 (Mo. App. 1982) applied *Weathers* as the proper standard of law when interpreting § 303.190 and the required coverage for omnibus insureds. In *Sullivan*, the putative insured leased a vehicle from Budget Rent-A-Car, and then later got into an accident while intoxicated. The policy had language regarding both use and operation, and the Court held that any attempt to restrict coverage by operation limitations would be in violation of § 303.190. *Id*. at 22-23. As the public policy of Missouri, expressed in § 303.190 is to ensure compensation for persons injured by negligent drivers, any attempt to place a

[4] Please see page 20 of Amicus MODL's Brief.

restrictive interpretation on such coverage is invalid. *Id*. Considering the issue at hand, the Court noted that there was a specific rule that stated:

Under no circumstances should vehicle be used, operated or driven by any person:

(f) while under the influence of intoxicants or narcotics.

Id. at 22.

Further, there was express language that no coverage applied while the vehicle was being used, driven or operated in violation of any of the rules, including Rule (f). *Id*. The driver likewise signed an agreement that he would be bound by these conditions. *Id*. Considering this restriction, the Court held that despite the rule's wording of "use or operation," the alcohol prohibition was a restriction on operation, which provided less coverage than required under the omnibus insured statute. *Id.* at 23. The Court, in language equally applicable to this case, held that it must be aware of the "serious consequences of allowing restrictions" which could reduce to a nullity the coverages at issue. Considering the restriction on using or operating a vehicle after having consumed alcohol, the Court warned acceptance of the alcohol exclusion would lead to similar exclusions "prohibiting the operation of the car negligently or contrary to any statute or ordinance." *Id*.

The statutory basis for the distinction between "use" and "operation" was thus well established by the time of the decision in *Universal Underwriters v. Davis*, 697 S.W.2d 189 (Mo. App. 1985). This statutory basis, and the underlying policy concern

of allowing an exception to swallow the rule remains valid to this day. The distinction between operation and use is thus well-established law, with significant reasoning behind it, in complete compliance with Missouri law on the MVFRL. Argument to the contrary ignores this Court and the Courts of Appeals admonitions that allowing operation exceptions to the statute would eviscerate the rule by excluding those who drive intoxicated, who speed, who run stop lights, or who otherwise drive carelessly or are negligent. Please see also *State Farm Mutual Auto Ins. Co. v. Liberty Mutual Ins. Co.*, 883 S.W.2d 530 (Mo. App. E.D. 1994) (Trial Court erred as a matter of law in finding in court tried case that restriction on operation could eliminate coverage for permissive user under broad omnibus insured statutory language).

This distinction premised upon the need to prevent loss of coverage for rules or prohibitions which would severely restrict the broad grant of coverage under the MVFRL has continued to this day, for the same valid reasons. The Court in *Tharp*, 46 S.W.3d at 99, like the present case (and *Lewellen* and *Sullivan supra*) dealt with company rules prohibiting intoxication. In *Tharp*, similar to this case, the employer had a rule which prohibited employees from being on the job while drinking. *Id*. at 102. The Court held that violation of an employer's "no alcohol" rule related to the operation of the vehicle, and not the use, whether or not it was couched in terms of no alcohol while on the job, or any other way. Relying on the long line of well-thought-out precedent before it, the Court held that rules prohibiting use of the vehicle while intoxicated were actually rules on operation, and not use. As such, as a

matter of law, the statute and the policy required coverage. *Id.* at 106-107. In doing so, the Court rejected authority from other states which were not in keeping with the long line of Missouri cases and Missouri public policy requiring coverage under such circumstances.

Contrary to the argument raised by Amicus MODL, the distinction between operation and use is statutory, and focuses on the statutorily required coverage for use. That is why attempted restrictions which relate to the operation rather than use have been found invalid. This is not a dichotomy by happenstance as argued by Amicus MODL, but instead a purposeful and well-reasoned approach to interpretation of the statute which has survived as *stare decisis* for the last 40 years.

If an issue has been decided, the question is one of *stare decisis*, which requires adherence to such precedent. *James v. Missouri Highway Patrol*, 505 S.W.3d 378, 381 (Mo. App. E.D. 2016). The principle behind adherence to prior decisions promotes stability in the law by ensuring predictable results. *Al-Hawarey v. Al-Hawarey*, 460 S.W.3d 40, 42 (Mo. App. E.D. 2015). *Stare decisis* is thus a "cornerstone" of the American legal system. *State v. Byers*, 396 S.W.3d 366, 368 (Mo. App. S.D. 2012). The Supreme Court therefore does not write on a blank slate, but instead *stare decisis* plays a significant role in the decision before the Court. *AAA Laundry & Linen Supply Co. v. Director of Revenue*, 425 S.W.3d 126, 128 (Mo. banc 2014).

This is especially true in regard to judicial construction of a statute, as there is a "strong presumption" that such interpretations have continued validity. *Hinton v.*

Sigma-Aldrich Corp., 93 S.W.3d 755 (Mo. App. E.D. 2002). A party therefore bears a much greater burden when asking the Court to abandon an established judicial construction of a statute, as the legislature is free to amend the statute if it does not agree with the interpretation adopted by the Court. *Id.*; *accord Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 711 (Mo. banc 2015) (holding that *stare decisis* and legislative deference both support continued reliance on prior statutory construction). Therefore, the construction which has long been part of a statute should be followed unless it is shown to plainly and clearly be wrong. *Williams v. Williams*, 30 S.W.2d 69, 71 (Mo. 1930).

Here, the interpretation placed on §303.190 for many decades has been uniform and consistent that restrictions on operation cannot preclude the mandatory coverage for permissive users. There have been no legislative changes to alter this construction, and the public policy to provide coverage in such circumstances remains the same today as when *Weathers*, *Shull, Sullivan*, and *Tharp* were decided. There is no reason to step away from this long line of precedent Instead, as noted by the Courts in *Weathers* and *Sullivan*, there is considerable reason to continue to follow this construction of the statute, as failure to do so will allow such a newly created exception to swallow the rule.

II. THE CONCERNS IDENTIFIED BY THE LONG LINE OF COURTS WHICH HAVE ADDRESSED THIS ISSUE WILL COME TO FRUITION IF THE WORK RULES IN THE INSTANT CASE ARE ALLOWED TO EXCLUDE COVERAGE

As early as 1950, the Eighth Circuit Court of Appeals was concerned that allowing restrictions on permission based upon negligent conduct which could lead to an accident would result in significant harm to the public policy of Missouri as expressed by the then-in-place omnibus insured statute. This Court in no uncertain terms addressed exactly what the consequences would be of allowing such restrictions to void statutory coverages in *Weathers v. Royal Indemnity Co.*, 577 S.W.2d 623 (Mo. Banc 1979). In words equally applicable to the case presently before the Court, this Court stated:

> Under appellee's contention if 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**. Therefore, the 'actual use' of the vehicle within the meaning of the policy cannot reasonably relate to the particular manner of its operation.

Id. at 629, emphasis added.

This concern with the significant effect allowing work rules or limitations on how or what condition the operator is in when driving has continued to permeate Missouri law, which consistently has rejected any attempt to erode the statutory

requirement that all permissive use must be covered, As such, work rules or individual restrictions on how a vehicle is used or the condition of the person while using it have been held to be irrelevant, and contrary to the MVFRL anytime they are cited to try and void coverage.

The Court in *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21 (Mo. App. 1982) discussed this exact concern when invalidating a similar no alcohol rule under §303.190. In language eerily similar to the concerns should the lower court's judgment stand, the Court in *Sullivan* held that any appellate court interpreting this statute must be aware of the "serious consequences" of allowing such restrictions which by effect would reduce to a nullity the statutorily required coverage. The *Sullivan* Court warned acceptance of the alcohol exclusion would lead to similar exclusions "prohibiting the operation of the car negligently or contrary to any statute or ordinance". *Id.*

Here, that is not simply a prognostication, but a fact. The Trial Court specifically found that Mr. Campbell declined insurance coverage offered by the rental agency at the direction of BNSF's leasing agent, ARI. Legal File (LF 769) ¶¶ 50-53. Despite that, when Mr. Campbell was in a wreck, coverage was denied based upon violation of a work rule. While BNSF's position was that Mr. Campbell was not authorized or given permission to drive the vehicle because he was intoxicated, that was not the only such rule BNSF candidly admitted existed to preclude coverage in almost any accident.

Mr. Roger Honeycutt was called by BNSF to provide BNSF's position on authority and permission to use company vehicles. Appellant's Appendix (A218; A222). Specifically, Mr. Honeycutt testified Mr. Campbell was not authorized to use his own regularly assigned company vehicle because he was under the influence. Appellant's Appendix (A222), Pg. 21. Lines 11-17. Mr. Honeycutt, however, confirmed the exclusion of authority or permission was not limited to just intoxication. Instead, it likewise applied to speeding, failing to wear a seatbelt, running a stop sign, drive in a careless and imprudent manner, driving while smoking, or basically violating any traffic law. (TR 767), Trial Court's *Findings of Fact* ¶¶ 32-33; Appellant's Appendix (A229), p. 48-50. Therefore, under BNSF's rules and position, the same lack of authorization or permission would exclude coverage for every one of these negligent actions. Appellant's Appendix (A230), pp. 50-51. BNSF also conceded that these rules were thus rules of operation on how someone drives, and not whether they have authority to use the vehicle. Appellant's Appendix (A230); (TR 767) Trial Court's *Findings of Fact*, ¶33. Mr. Honeycutt candidly conceded that Mr. Campbell, based on his position with the company and having a company vehicle, had been given authority to <u>use</u> the truck, he simply was not authorized to do so while intoxicated or when speeding, or while committing any other negligent act. Appellant's Appendix (A231) pp. 54-55.

BNSF's clear position is the exact harm that the courts of this state have warned must not be allowed. While employees with work vehicles out of town have

permission to use it any way they would their own vehicles, they cannot do anything which would cause an accident. Appellant's Appendix (A229-231; A267); (TR 82) (Counsel for BNSF in opening statement confirming BNSF's position is that all vehicle use is required to be "reasonable, safe, and in accordance with BNSF rules and policies").

The consequences for just BNSF employees using company vehicles under the Trial Court's opinion would result in a drastic increase in uninsured drivers. The following are simply some of the circumstances that BNSF's rules would now invalidate coverage to injured motorists caused by their employees driving BNSF company vehicles:

1. Injury caused where the BNSF employee was speeding;
2. Injury caused by a BNSF employee failing to stop at a stop sign;
3. Injury caused by a BNSF employee who was driving without headlights or taillights;
4. Injury caused in a wreck where the BNSF employee was smoking;
5. Injury caused in a crash where the BNSF employee was not wearing his or her seatbelt;
6. Injury caused when any alcohol was in the person's system;
7. Any injury caused by failing to yield the right of way;
8. Any injury caused where the employee crossed the center line;
9. Any injury caused by an employee following another vehicle too closely;

10. Any injury caused by a BNSF employee failing to keep a careful lookout;

11. Any injury caused by a BNSF employee driving in a careless and imprudent manner;

12. Any injury caused by a BNSF employee while not using the highest degree of care.

13. Any injury caused by a BNSF employee accidently going down a one-way street the wrong way;

14. Any injury caused by a BNSF employee pulling out in front of another vehicle;

15. Any injury caused by a BNSF employee while doing anything else which violates a rule of the road.

As conceded by BNSF and found by the Trial Court, these rules all applied to Mr. Campbell at the time of the accident the same as the alcohol rule. As this Court in *Weathers* and the Court of Appeals in *Sullivan* warned, such serious and fatal consequences for the omnibus insured statute cannot be allowed. All of these rules, from alcohol to speeding to smoking, confuse operation with use. Using the "condition" to permission argument/Respondents' trial theme adopted by the Trial Court, the same thing would be true for anyone who got into a BNSF vehicle with a lit cigarette. The same is likewise true of failure to wear a seatbelt, as like intoxication, this "condition" is known even before the vehicle is started. The same argument would apply to the speeding rule as well. If a BNSF employee were to speed on his

way from his home many states away to the location of the work that week, they would know that for the hours they sped, they were in violation of company rules. Further, if asked, they would answer truthfully, just as Mr. Campbell did in this case, that they knew they did not have authority or permission to violate the rule, and that they had not been given permission to use the vehicle to violate a rule or traffic laws.

Indeed, under BNSF's argument adopted by the Trial Court, it is a violation of the rule eliminating coverage even if the employee who was intoxicated had a stone cold sober designated driver operate the vehicle back to the hotel, because it is a violation to simply be intoxicated in the vehicle. A rule which would void coverage for using a designated driver is beyond even the most fanciful concerns of the *Weathers* and *Sullivan* Courts.

While the above is drastic enough, the damage will not be limited to BNSF. Almost every employer has rules regarding operation of company vehicles. Trucking companies would no longer have coverage for their employees who cause a wreck while tired if the company rule precluded the driver from getting into and starting the vehicle if they had not had eight hours of sleep the night before. Pizza delivery companies who have rules against operating vehicles while any medication is in their employee's system would no longer have coverage for those they injure when their 18-year-old employee takes cough medicine during the winter while making deliveries. If the Court condones company rules as a way to exclude permissive use and coverage, business and insurers will both take the Court up on its invitation to

do an end run around R.S.Mo. § 303.190. The result will be the very thing the *Sullivan* and *Weathers* Courts warned could not be allowed, coverage for permissive users being the exception instead of the mandatory rule.

While the loss of coverage for businesses is the first thing that comes to mind, such a sea change in the law will not stop there. Any parent who warns their child not to drive drunk, or that they cannot take the family car if they have alcohol in their system, will face a denial of coverage as permission to use the vehicle was "conditioned" on sobriety. The same would be true for anyone who loaned their keys to a co-worker but told them it was "conditioned" on them agreeing they would obey all traffic laws.

No one, be it a business or a private individual, gives permission for someone to use their vehicle negligently, recklessly, or under the influence. If asked, a corporation, small business, or parent would admit they did not allow drinking and driving, speeding, running stop signs, or any of the other actions which cause accidents. For the first time to allow under the MVFRL an argument that violation of conditions on how one drives, or in what condition they are in when driving, precludes coverage will result in the broad expansive statutory coverage thus far required by Missouri law and public policy becoming "a nullity," which the courts of this State should not condone. *Sullivan*, at 23.

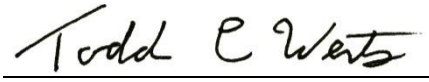
III. CONCLUSION

For decades Missouri public policy has been statutorily expressed in legislation that remains unchanged. This legislation requires coverage for anyone given permission to use a vehicle. Very considered and well thought out opinions by this Court, and the Courts of Appeal, have confirmed that to meet the purpose and language of the MVFRL, "use" must be interpreted broadly. In so doing, attempts to restrict permissive use by operational rules have been found void as in violation of the MVFRL. Respondents and Amicus MODL ask this Court to jettison this long-standing precedent, in favor of a standard which Missouri Courts have previously considered numerous times and found severely wanting.

In doing so, these Courts have warned in no uncertain terms that the standard advocated by Respondents would result in circumventing the statute, in direct contradiction to the language and the purpose of the MVFRL. It is just as true today, as when the *Weathers* and *Sullivan* Courts clearly held the argument raised by Respondents is contrary to Missouri law, and would result in disastrous consequences the Courts cannot and will not condone.

Respectfully submitted,

LEAR WERTS LLP



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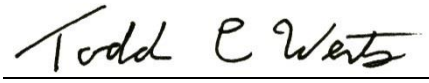
CERTIFICATION

Pursuant to Mo. R. Civ. Proc. 84.06(c), I hereby certify that this Appellant's Brief complies with Mo. R. Civ. Proc. 55.03 and with the requirements and limitations set forth in Rule 84.06(b) and the Local Rules of the Court. This brief contains 6,980 words according to the Microsoft Word system used to prepare the brief.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above brief was filed in PDF format with the Missouri Court Electronic Filing System on this 28th day of February, 2018.

Todd C. Werts