No. SC97511

SUPREME COURT OF MISSOURI

LESLIE SEATON

Respondent

v.

SHELTER MUTUAL INSURANCE COMPANY

Appellant

Appeal from the Circuit Court of St. Louis County, Missouri
15SL-CC03927

Transfer from the Missouri Court of Appeals, Eastern District
ED105895

BRIEF OF *AMICUS CURIAE* MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF APPELLANT

Filed by Consent

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This brief is submitted by the Missouri Organization of Defense Lawyers. MODL is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and optimizing the quality of services the legal profession renders to society. To that end, MODL members work to advance and exchange legal information, knowledge, and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing individual, municipal, and corporate defendants in civil litigation. As an organization composed entirely of Missouri attorneys, MODL promotes the establishment of fair and predictable laws affecting tort litigation that will maintain the integrity and fairness of litigation for both plaintiffs and defendants.

In this case, MODL supports the position of appellant Shelter Mutual Insurance Company that two of its three insurance policies afford no underinsured motorist coverage for this specific claim because Chelsea Seaton was not an insured for that coverage under those two policies. More broadly, however, MODL supports the application of consistent rules of insurance policy interpretation in the Missouri courts. Not only are consistent interpretations of insurance policies crucial to insurers and insureds alike, but so is a consistent manner of interpretation. Differing approaches to policy interpretation, with a well-reasoned, longstanding standard applied in one case only to be followed by abandonment of that standard and the announcement of a new test in the next, allows neither insurers nor insureds any measure of confidence that they know what their contract promises and requires. Lack of consistency in the law benefits no one; hence, the historical concept of *stare decisis*. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "Considerations in favor of *stare*

decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." *Id* at 828.

MODL recognizes that this Court reviews the decision of the circuit court rather than critiquing the analysis of the appellate court. However, the manner in which the appellate court approached the issue of policy interpretation deviated so significantly from well-reasoned rules followed in this Court for decades that MODL, in the interest of promoting the concerns mentioned, was moved to file this brief. MODL's goal with this brief is to promote the continued, consistent application of the standards set down in previous cases, on which insureds and insurers regularly and necessarily rely. These include not treating an endorsement to a policy as a separate, stand-alone contract. A policy endorsement is merely a part of one whole contract, and provisions outside the four corners of the endorsement—but still within the contract as a whole—cannot be ignored in order to find coverage where it may be desired but does not exist nor to eliminate coverage where it is rightly owed. The standards followed in Missouri that this Court should continue to apply, and thereby offer potential litigants a reliable level consistency, also include enforcing a policy's definitions of its own terms, as opposed to ignoring those definitions in order to construe a different meaning preferred by one party in litigation or another. They also include not allowing the so-called "give-and-take rule" to swallow a contract's provisions such that most of the contract is ignored, simply because one party or another has leapt to subjective conclusions based solely on a declarations page. Insureds in Missouri have always been responsible for reading their insurance policies. Policy language taken as a whole, rather than portions of a declarations page, a selected endorsement, or an isolated provision, should govern policy interpretation.

To be clear, MODL is not advocating a change in the law. These standards are already established and are relied upon daily by insureds and insurers. They should be followed by this Court here.

ARGUMENT

I. Endorsements to an insurance policy are not separate contracts. They are merely a part of the policy as a whole and must be read and understood as such.

The appellate court treated the UIM endorsement in Shelter's policy as if it was a separate contract and not part of a whole policy of insurance. Terms used in the UIM endorsement were defined in the main body of the policy, but those definitions were effectively ignored because the court apparently viewed the UIM endorsement as if it was a separate contract. Missouri courts have never treated policy endorsements this way. Nor should they.

Certain requirements are imposed on automobile liability policies by virtue of the Motor Vehicle Financial Responsibility Law. With regard to endorsements and what makes up a policy, the MVFRL provides that "[t]he policy, the written application thereof, if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the entire contract between the parties." *See* R.S.Mo. § 303.190.6(4). By statute, an endorsement in an auto policy is not a separate, self-contained contract but part of one whole contract between insured and insurer.

This concept is not limited to auto policies nor the MVFRL's reach, however. As this Court has held, "Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies." *See* *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156, 163 (Mo.banc 2007). "The insurance contract includes the form policy, the declarations, and any endorsements and definitions." *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 107-108 (Mo.App.2009) (*citing* *Todd*, 223 S.W.3d at 163; Eric Mills Holmes, 4 Holmes' Appleman on Insurance 2d, §20.1, at 151 (1998)). "When endorsements are attached to the policy at the time of its issuance with authority of the company and in accordance with the agreement of the parties, they are part of the contract." *Christensen v. Farmers Ins. Co., Inc.*, 307 S.W.3d 654, 659 (Mo.App.2010) (*citing* *Empire Fire & Marine Ins. Co. v. Brake*, 472 S.W.2d 18, 23 (Mo.App.1971)). "An endorsement is designed to

amend the form policy to suit the needs of the insured or the insurer or to satisfy particular state requirements." *Grable*, 280 S.W.3d at 108 (*citing* Donald S. Maleda & Arthur L. Flitner, Commercial General Liability, 109 (3rd Ed.1990)). "The terms and conditions of the policy are modified and altered to the extent called for by the endorsement." *Id* (*citing* Holmes, *supra*, at 153-154; Lee R. Russ & Thomas F. Segalla, 2 Couch on Insurance, §21:22 (3rd Ed.2008)).

Thus, the Missouri legislature, this Court, the appellate court, and leading commentators all agree: An endorsement is not a separate contract. It is but a part of the insurance contract as a whole, and it only modifies the base policy form "to the extent called for by the endorsement." Necessarily, where an endorsement is silent on a matter, what is stated in the base policy form remains controlling and is as much a part of the contract as the endorsement's own language. The entire policy, not just isolated provisions and not just an endorsement, must be read as a whole to determine the parties' intent as to coverage; an endorsement may not be recast as a stand-alone policy so as to read it in isolation. "Words or phrases in a policy must be interpreted in the context of the policy as a whole and cannot be considered in isolation." *Shelter Mut. Ins. Co. v. Sage*, 273 S.W.3d 33, 36 (Mo.App.2008) (*citing* *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo.banc 2007)). "Seeming contradictions in an insurance policy must be harmonized if reasonably possible." *Id* (*citing* *Haggard Hauling & Rigging Co. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 401 (Mo.App.1993)). "These rules apply equally when comparing endorsements and language in the body of the policy; they should be construed together unless they are in such conflict they cannot be reconciled." *Id* (*citing* *Pickthall v. Freistatt Mut. Ins. Co.*, 84 S.W.3d 111, 113 (Mo.App.2002)).

There are sound reasons why an endorsement should be viewed as merely part of the whole policy rather than as a separate, self-contained agreement.

First, brevity and ease of reading are important factors. Where an endorsement adds an additional coverage type not found in the base policy form, that coverage may be stated far more succinctly. If the endorsement was deemed a separate contract, every single term and condition having anything to do with the coverage would need to be restated in that

endorsement, greatly increasing the length of the policy package and leading to confusing duplication. When the endorsement is properly considered as just part of a whole contract, on the other hand, terms defined in the base policy form that have the same meaning in the endorsement need not be redefined. Important conditions about duties of cooperation and cancellation need not be restated. Considering insureds are expected and presumed under Missouri law to read their insurance policies, brevity and the avoidance of confusion due to unnecessary duplication go far beyond convenience of drafting and printing of the policy.

Second, endorsements often do not add a new type of coverage but, instead, merely amend the terms of a coverage existing in the base policy form, such as by eliminating an exclusion or modifying the base policy form provisions and conditions to comply with the requirements of the specific state in which it is issued. If the endorsement is not part of the contract as a whole and is treated as its own instrument containing all of its own terms, that would be impossible. Instead, the legislature, courts, and commentators all recognize that changes are sometimes necessary, either for regulatory compliance or to meet the needs of an insured or insurer, especially if those changes do not warrant completely rewriting the base policy form modified by the endorsement.

These are common-sense principles that have been long followed by Missouri courts, which highlights a third reason: Consistency. Insureds throughout the state have already purchased insurance policies that they understand to function in a specific way based on endorsements being treated as part of the whole contract. Insurers have issued policies relying on not only the courts' treatment of endorsements in this manner but also the mandates of the MVFRL in the case of auto policies. Turning this fundamental concept on its head now would have the effect of rewriting existing contracts between insurers and insureds, likely to the unexpected detriment of one or the other.

The appellate court seems to have improperly considered the UIM endorsement to be a separate contract. On that basis, it distinguished Shelter's policies from the policies in *Taylor v. Owners Ins. Co.*, 499 S.W.3d 351 (Mo.App.2016), where the court interpreted the policies in exactly the manner Shelter appears to urge in this case. This highlights the

problem and emphasizes the reasons why Missouri law should not change and endorsements should continue to be viewed as mere parts of a whole insurance contract. The appellate court reasoned:

> In addition, the policy language at issue in *Taylor* was clearly distinct from the present case. The *Taylor* court considered an exclusion for owning a vehicle in the "COVERAGE" section of the uninsured motorist provision. Unlike the underinsured motorist coverage definition in the present case, this general definition of "relative" was contained within the actual uninsured motorist coverage provisions in the policy itself and not in a separate underinsured motorist endorsement purchased by an insured which contained no such limiting provision. […] In this matter, if Shelter intended to so limit its underinsured motorist coverage, the exclusionary definition should have been clearly set forth in the separate endorsement itself.

[*Appendix, at A11-A12 (without internal citations)*] The distinction drawn by the appellate court between Shelter's policies and the *Taylor* case is without basis. The court used labels like "separate endorsement" and "policy itself" to conclude the same issue should be decided differently here than it was just two years ago when, in reality, there was no material difference. An endorsement is not a separate contract existing apart from the whole contract. It is a part of the contract as a whole and must be read and interpreted as such. *Dutton v. American Family Mut. Ins. Co.*, 454 S.W.3d 319, 324 (Mo.banc 2015) ("Insurance policies are read as a whole, and the risk insured against is made up of both the general insuring agreement as well as the exclusions and definitions.") (*citing Todd*, 223 S.W.3d at 163).

II. Defined terms should be given their defined meanings. Definitions in the contract between an insurer and insured should not be ignored, and they cannot be avoided by an insured choosing not to read the policy.

It has been a fundamental of insurance law for decades in Missouri that, when a term used in an insurance policy is defined by that policy, the policy's definition is controlling. "The general rule is that definitions in an insurance policy are controlling as

to the terms used within the policy." *Sage*, 273 S.W.3d at 38 (*citing Bowman ex rel. Bowman v. General Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1, 5 (Mo.App.2005)). "If a term is defined in a policy, the court will look to that definition rather than looking elsewhere." *Id* (*citing Hrebec v. Aetna Life Ins. Co.*, 603 S.W.2d 666, 671 (Mo.App.1980)); *also State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523, 526 (Mo.banc 1995) (*citing Rodriguez v. General Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo.banc 1991); *McManus v. Equitable Life Assur. Soc. of U.S.*, 583 S.W.2d 271, 272 (Mo.App.1979)); *Mansion Hills Condominium Ass'n v. American Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo.App.2001) (*citing Hobbs v. Farm Bureau Town & Country Ins. Co. of Mo.*, 965 S.W.2d 194, 197 (Mo.App.1998)); *Cowin v. Shelter Mut. Ins. Co.*, 460 S.W.3d 76, 79 (Mo.App.2015) (*citing Vega v. Shelter Mut. Ins. Co.*, 162 S.W.3d 144, 147 (Mo.App.2005)). Insurers like Shelter commonly insert into their policies definitions of selected words used in those policies. Insureds and insurers alike rely on those definitions in order to establish their intended meanings of those defined words.

This is not to say an insurer may define policy terms with impunity. The definition itself must still be "reasonably clear and unambiguous." *Mansion Hills*, 62 S.W.3d at 638. In declining to enforce definitions in the Shelter policies, however, the appellate court did not determine the definition itself was unclear or ambiguous. And, no reason for such a conclusion is readily apparent. Instead, the appellate court reasoned that the definition, despite being clear in and of itself, should not be enforced because it did not reflect the definition a layperson might attach to the defined term in the absence of a policy definition.

In doing so, the appellate court effectively created a new standard for insurance policy interpretation—both with regard to enforcing policy definitions and in identifying ambiguities—and deviated from established Missouri law. The deviation becomes clear in light of the fact that the Missouri courts (in cases involving Shelter, no less) have already determined a rule to govern the situation where a word may have a technical meaning when used in an insurance contract but a different meaning to a layperson. "If a conflict arises between a technical definition of a term and the meaning of the term which would reasonably be understood by the average lay person, the lay person's definition will be

applied, unless it is obvious the technical meaning was intended." *Cowin*, 460 S.W.3d at 79 (*citing Vega*, 162 S.W.3d at 147). Said another way, "When interpreting insurance policy language, courts give a term its ordinary meaning unless it plainly appears that a technical meaning was intended." *Mendenhall v. Property & Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 93 (Mo.banc 2012). In *Mendenhall*, this Court determined that it did not plainly appear a technical meaning of a term was intended because that term was not defined in the policy. When a term is defined, on the other hand, it could not be more clear what meaning was intended. The intended meaning is the meaning the parties' contract expressly states a term should have. Thus, the rule regarding conflicts between a word's technical definition and the definition a layperson might attach has no application to terms defined in a policy.

To be sure, if a layperson's definition of a term in an insurance policy always controlled, even where there is a policy definition, there would be no point to defining any term in any policy. If the policy definition is the same as the layperson's definition, there would be no need for a policy definition. If the definitions are inconsistent, the policy definition would not be enforced. Yet, this Court has recognized that "[d]efinitions […] are necessary provisions in insurance policies." *See Todd*, 223 S.W.3d at 163. Missouri already has rules applicable in cases like this. Policy definitions are controlling, and that does not change merely because a layperson would attach a different definition than is stated in the policy. Perhaps if the Shelter policies lacked definitions it would be appropriate to defer to a layperson's definition, which would be the ordinary meaning found in a dictionary. *See Mendenhall*, 375 S.W.3d at 92. But, that is not what the Court has before it in the present case.

Additionally, it appears there has been a growing amount of litigation in recent years not necessarily about the meaning of defined terms or technical terms but, instead, involving disputes over the meaning of ordinary terms. It seems giving meaning to common, everyday words not defined in policies has become increasingly difficult. This is true even with the aid of dictionaries, such as where different publishers define the same

word in different ways. The opinion by this Court in *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo.banc 2013), is a telling example.

Nathaniel Manner was hurt while riding a motorcycle and sought UIM coverage. The coverage issue before the Court turned in part on whether Manner owned the motorcycle. The insurers argued he did. Manner argued he did not. The word "owned" was not defined in the policies, so the parties had no contractual definition to help guide them prior to or during the litigation. Manner pointed out that he was in the process of purchasing the motorcycle from his uncle, but he had not yet made all the required payments and the uncle still retained the title. On the other hand, Manner did have possession of the motorcycle and had purchased an insurance policy on it. The insurers argued those facts were enough to demonstrate Manner owned the motorcycle, but the Court disagreed:

> Insurers cite no authority for their proposition that an insurable interest is equivalent to ownership, and this Court has found none. Such a definition could lead to conflicting claims and confusion because persons other than an owner can have sufficient interest in property to insure it. […]
>
> While the insurance policies at issue could have defined "owned," for purposes of the underinsured motorist endorsement, to include all those who have an insurable interest in the vehicle, they did not do so. The insurers chose to use the term "owned" in the policies' underinsured motorist endorsement but not to define it. The term accordingly will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.
>
> "Owner" is defined generally as "one that has the legal or rightful title whether the possessor or not." Additionally, "own" often is defined as "belonging to oneself or itself" or "to have or hold as property or appurtenance: have rightful title to, whether legal or natural: possess." While the meaning of "owned" may vary in particular circumstances, case law similarly indicates that it usually involves establishing either title or the power to voluntarily destroy, encumber, sell, or otherwise dispose" of the property.

See *Id* at 62-63 (internal citations omitted). At least two important points can be taken from this.

First, as mentioned, determining the meaning of even simple, common terms such as "owned" can prove difficult in the absence of a policy definition. Resort is often made to dictionaries, which can provide multiple different meanings. Different definitions among those this Court mentioned for the words "owner" and "own" in *Manner* could have been supportive of either party's position. Certainly, some of the definitions referred to holding legal title as argued by Manner, but possession was a possible definition that would have been consistent with the insurers position. And, this is a term that most laypersons would probably agree have a simple meaning. It seems reasonable to believe the meaning of a word like "owned" does not occupy the minds of most Missourians on a day-to-day basis because it is such a common term. Yet, a dispute developed that reached this Court because the parties, in the absence of a policy definition, could not agree on the word's meaning. A policy definition would have eliminated this. Courts and litigants alike should favor policy definitions, not cut them down, because they offer a level of certainty. When there is a controlling policy definition, disputes about the meanings of words can be avoided.

Second, this Court implicitly recognized in *Manner* that an insurance policy can define a word as something other than what a layperson might expect or anticipate, and that definition can still be enforceable. As the Court indicated, the policies "could have defined "owned" […] to include all those who have an insurable interest in the vehicle" even though that definition was not what the Court determined to be the ordinary meaning that would be understood by a layperson and was not consistent with any of the dictionary or caselaw definitions noted by the Court. *See* *Id*. It was the insurers' choice not to define the word "insured" that led to the litigation. Had the insurers defined "insured," that definition would have been controlling.

Nor can it be said that a policy definition should not be enforced because an insured might need to read the contract to be reminded what a given term means, as the appellate court suggested. "It has been the law in Missouri for over a century that an insured has a

duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon, and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction therewith." *Jenkad Enterprises, Inc. v. Transportation Ins. Co.*, 18 S.W.3d 34, 38 (Mo.App.2000) (*citing* *American Ins. Co. v. Neilberger*, 74 Mo. 167, 173 (Mo.1881); *Steward v. Mutual Life Ins. Co. of Baltimore*, 127 S.W.2d 22, 23-24 (Mo.App.1939)). The law for almost 140 years in Missouri has been that insureds are required to read their insurance policies. A policy definition cannot be ignored on the basis that it would require an insured to actually read the contract he or she enters with an insurer. This is especially true where, as with Shelter and most insurers, words defined in the policy are set apart with bold-face type or quotation marks, sending an easy signal to the insured that the word has a special meaning in the policy.

* * * * *

A case involving Shelter from 2005 further illustrates the concerns discussed in this and the previous section of this brief, as well as how they should be handled in accordance with longstanding Missouri law.

In *Vega*, *supra*, Chastity Vega owned a 1993 Dodge Shadow. Her husband, John Vega, owned a 1988 Chevrolet S-10 pickup. The vehicles were insured by separate policies issued by Shelter, one issued to Chastity on her Shadow and the other issued to John on his S-10. Chastity was driving her Shadow when she was hurt in an accident with an underinsured motorist. Shelter denied Chastity's demand for UIM coverage because the Shadow policy simply did not include UIM coverage and because the UIM coverage in the S-10 policy did not apply when an insured (putatively Chastity) was occupying a vehicle owned by that insured (the Shadow) that was not an "insured auto" as defined by the S-10 policy, which the Shadow was not.

The UIM coverage in John's policy was provided by an endorsement, which is where one could find the exclusion on which Shelter relied. Terms used in that exclusion were not defined in the endorsement but were defined in the base policy form. (Other terms were defined in the endorsement. The court noted, "[W]ords in the policy in bold type face

are defined in the definitions section of the policy. The UIM endorsement contains an 'Additional Definitions' section defining certain words and phrases for purposes of their use in the UIM endorsement." *See* Vega, 162 S.W.3d at fn. 5.) Chastity wanted the exclusion in the UIM endorsement interpreted in a way that was inconsistent with the base policy form's definitions of words used in the endorsement's exclusion. The court reasoned:

> The problem with Chastity's argument is that it overlooks the definitions contained in the policy and the endorsement. If a term in an insurance policy is clearly defined in the policy, this definition is controlling. *State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523, 525-526 (Mo.banc 1995).
>
> The UIM endorsement defines **insured auto** to mean either: (a) the **described auto**, or (b) "a **non-owned auto** while being operated by **you.**" The Dodge Shadow was not an **insured auto** because it was not the **described auto** (defined in the policy as "the vehicle described in the Declarations"); the 1988 Chevy S10 pickup is the **described auto** in John's Shelter policy. Likewise, the Dodge Shadow was not an **insured auto** under John's Shelter policy because it was not a **non-owned auto** (meaning any auto *other than* the one described in the Declarations *or* an auto owned in whole or in part by any resident of the household of the insured named in the Declarations or his or her spouse). Chastity owned the Dodge Shadow, and she was a resident of the household of the insured named in the Declarations, that being John Vega. Finally, the definition of "**insured auto**" further reinforces this by specifically providing that "**insured auto**" does not include "any auto ... owned by a resident" of the household of the insured named in the Declarations. Thus, Chastity's contention that the use of the indefinite article "an" before the term "**insured auto**," as opposed to the definite article "the," is without merit. In fact, because of the definitions in the policy, that choice of words is irrelevant.

See Id at 149-150 (emphasis original).

While the precise coverage issue in this case may not be exactly the same as in *Vega*, the overarching concepts and applicable rules are. An insured claimed the benefits of UIM

coverage provided by endorsement to a policy. That endorsement was a part of the policy as a whole, not a separate contract unto itself. Important words used in the UIM endorsement were not defined in the endorsement, but they were defined in the base policy form. Because the endorsement was a part of the policy as a whole, the definitions in the base policy form still determined the meaning of those words. The insured was not permitted to disregard the definitions, whether found in the UIM endorsement or in the base policy form. The definitions were controlling as to the meaning of defined terms. This is all well-established Missouri law that should not be abandoned now.

III. The give-and-take rule does not empower an insured to avoid her contract's mandates and limitations by reaching conclusions as to how coverages might apply based solely on a policy's declarations.

Although the give-and-take rule has surfaced frequently in insurance cases recently, it found its place in the Missouri case books 30 years ago. In *Lutsky v. Blue Cross Hosp. Service, Inc., of Mo.*, 695 S.W.2d 870, 875 (Mo.banc 1985), this Court stated, "If a contract promises something at one point and takes it away at another, there is an ambiguity." That point in the *Lutsky* decision was cited one year later in *Behr v. Blue Cross Hosp. Service, Inc., of Mo.*, 715 S.W.2d 251, 256 (Mo.banc 1986). As the rule appeared to become something of a crutch for claimants and insured persons attempting to create ambiguities in order to gain coverage, this Court seemingly attempted in 2007 to rein it in.

In *Todd*, *supra*, the Court addressed the argument that an exclusion limiting coverage creates an ambiguity because it takes away coverage granted elsewhere in a policy. First, the Court acknowledged the general principle that, "when a contract promises something at one point and takes it away at another there is an ambiguity." *See* *Todd*, 223 S.W.3d at 162 (*citing* *Behr*, 715 S.W.2d at 256). However, the Court then explained, "Taken out of context, the language used by the Court in *Behr* might be confusing." *See* *Id*. "Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks." *Id* at 162-163. "While a broad grant of coverage in one provision that is taken away by a more

limited grant in another may be contradictory and inconsistent, the use of definitions and exclusions is not necessarily contradictory or inconsistent. *Id* at 163. Indeed, definitions and exclusions are "necessary provisions in insurance policies." *Id*. As demonstrated by *Todd*'s explanation of when the give-and-take rule is meant to apply, ambiguity arises when one grant of coverage is more limited than another. The rule deals with incompatible coverage grants, not exclusions or limiting provisions in definitions that reduce or eliminate coverage otherwise granted elsewhere.

Litigants seeking coverage are often heard to say that an insurance policy is ambiguous because an exclusion or limiting provision in a definition eliminates coverage that might be available in its absence. Such a rationale would render all exclusions and limiting definitions, which are necessary parts of insurance policies according to this Court, unambiguous and unenforceable. This cannot be.

The principle set forth in *Todd* was followed with succinct reasoning in *Grable*, *supra*. The appellate court stated there:

> Finally, the endorsement is not ambiguous on the theory that it takes away coverage that was promised in the form policy. The Missouri Supreme Court has addressed this argument and clarified that exclusions and definitions do not make an insurance policy ambiguous because they limit or exclude coverage given in the form policy. Insurance policies customarily include definitions that limit words used in granting coverage as well as exclusions that exclude from coverage otherwise covered risks. Definitions, exclusions, conditions and endorsements are necessary provisions in insurance policies.

See *Grable*, 280 S.W.3d at 108-109 (internal quotations omitted) (*citing* *Todd*, 223 S.W.3d at 162-163). An exclusion or limiting provision in a definition does not create an ambiguity under the give-and-take rule, and it is to be enforced as written. *Madison Block Pharmacy, Inc. v. United States Fidelity & Guar. Co.*, 620 S.W.2d 343, 346 (Mo.banc 1981) (if the language of an insurance contract is clear and unambiguous, courts do not have the power to rewrite the contract for the parties and must construe the contract as written).

Arguments are also made by litigants in search of coverage that, based on the give-and-take rule, an exclusion or limitation on coverage unenforceable because it "takes away" coverage granted in a policy's declarations. The holding in *Todd* refutes this. Even if a declarations page could be considered a promise of coverage, although in reality it contains no promises or grants of coverage and simply provides data referenced by the other parts of a policy, there would be no ambiguity. That is the law as explained by this Court in *Todd* and, specifically with regard to the declarations theory, in other cases since.

In *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215 (Mo.banc 2014), an insured seeking uninsured motorist coverage argued a partial exclusion rendered Shelter's policies ambiguous because they reduced coverage below the limits set forth in the declarations. First, this Court cited the general proposition in *Todd* that the "mere presence of an exclusion does not render an insurance policy ambiguous." *Id* at 221. Next, the Court turned more specifically to the declarations theory. "At the outset, the policies' declarations pages do not grant any coverage." *Id*. "The declarations state the policy's essential terms in an abbreviated form, and when the policy is read as a whole, it is clear that a reader must look elsewhere to determine the scope of coverage." *Id* (*citing Todd*, 223 S.W.3d at 160; *Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749, 751 (Mo.banc 1987) ("the 'declarations' are introductory only and subject to refinement and definition in the body of the policy")). Simply stated, a policy's declarations alone cannot form the "give" necessary to invoke the give-and-take rule. *See also Progressive Northwestern Ins. Co. v. Talbert*, 407 S.W.3d 1, 12-13 (Mo.App.2013); *Naeger v. Farmers Ins. Co., Inc.*, 436 S.W.3d 654, 660 (Mo.App.2014); *Dutton*, 454 S.W.3d at 325 ("To stop reading the policy at the coverage provisions, without regard to exclusions, would lead to absurd results. […] Owners and insurers alike would be surprised to learn that their purchase of insurance on a single motor vehicle made them the insurer of all passenger cars"); *Yager v. Shelter Mut. Ins. Co.*, 460 S.W.3d 68, 75 (Mo.App.2015) (the plaintiff "is simply mistaken in arguing that the coverage summary provided on a policy's declarations page can create an ambiguity when construed in connection with the policy's actual terms"); *Maxam v. American Family Mut. Ins. Co.*, 504 S.W.3d 124, 127-129 (Mo.App.2016); *Estate of*

Hughes v. State Farm Mut. Auto. Ins. Co., 485 S.W.3d 357, 362 (Mo.App.2016); *Geico Cas. Co. v. Clampitt*, 521 S.W.3d 290, 293 (Mo.App.2017); *Carter v. Shelter Mut. Ins. Co.*, 516 S.W.3d 370, 373 (Mo.App.2017); *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 617-618 (Mo.banc 2017); *Swadley v. Shelter Mut. Ins. Co.*, 513 S.W.3d 355, 357-358 (Mo.banc 2017); *Progressive Max Ins. Co. v. Hopkins*, 531 S.W.3d 649, 653 (Mo.App.2017).

There are sound reasons why this conclusion has been reached consistently by Missouri courts since claimants and insureds began making this argument near the beginning of this decade.

First, the declarations theory rests on the assumption that a claimant or insured should be allowed to read a policy's declarations, stop at the end of the declarations, form a conclusion as to the scope and amount of coverage based only on the declarations, and then claim the rest of the policy does no more than create ambiguities. The theory suggests claimants and insureds should be allowed to read a policy's declarations in total isolation from the remainder of the policy. But, that does not square with any of the established rules of policy interpretation.

An insurance contract "should be construed as a whole." *Dieckman v. Moran*, 414 S.W.2d 320, 321 (Mo.1967). "The entire policy must be considered in determining the intention of the parties and not detached provisions or clauses." *Doty v. American Nat'l Ins. Co.*, 165 S.W.2d 862, 869 (Mo.1942); *also Rice v. Fire Ins. Exch.*, 897 S.W.2d 635, 637 (Mo.App.1995). "[W]hen analyzing an insurance contract, the entire policy and not just isolated provisions or clauses must be considered." *Versaw v. Versaw*, 202 S.W.3d 638, 643 (Mo.App.2006) (*citing Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 77 (Mo.banc 1998)). "Courts should not interpret policy provisions in isolation." *Ritchie v. Allied Prop. & Cas. Co.*, 307 S.W.3d 132, 135 (Mo.banc 2009) (*citing Seeck*, 212 S.W.3d at 133). "Proper interpretation requires that we seek to harmonize all provisions of the policy to avoid leaving some provisions without function or sense." *Kyte v. American Family Mut. Ins. Co.*, 92 S.W.3d 295, 299 (Mo.App.2002). "Further, we evaluate policies by reading the policy as a whole." *Hall v. Allstate Ins. Co.*, 407 S.W.3d 603, 607 (Mo.App.2012). "We do not evaluate policy provisions in isolation." *Id*. The list of cases

reaffirming this principle goes on and on, yet the declarations theory would have the Court to do the exact opposite.

Second, as a practical matter, the declarations theory of ambiguity under the give-and-take rule does not work. Every limitation and exclusion applicable to a policy's coverages would have to be stated in the declarations to be effective. Ironically, this would result in declarations that would perfectly resemble the whole policy as it already exists in normal situations. The declarations would be many pages long, as everything found in the policy forms would need to be stated in the declarations. A limiting provision in a definition or an exclusion found at page 15 of the base policy form, for example, would be found on page 15 of the declarations. And, if an insured is not willing under existing law to read beyond the declarations despite the duty to do so, there is no reason to think the same insured would read through all of the declarations once they become many pages long. It is a nonsensical theory.

Third, the declarations theory would eliminate all predictability and consistency. Person A might review a declarations page and leap to one conclusion, while Person B might review the same declarations and leap to a different conclusion about available coverage. If the give-and-take rule was to be applied in this manner, identical policies would likely be interpreted in many different ways in different cases based on the varying subjective beliefs of the insured in each. That is what the declarations theory is, after all. It is an argument for subjective policy interpretation, just with a different label. A subjective approach to interpretation has been soundly rejected by this Court. *See* *Burns v. Smith*, 303 S.W.3d 505, 511-512 (Mo.banc 2010). There is no reason for that to change now.

CONCLUSION

Insurers writing policies in Missouri, as well as Missouri insureds purchasing policies, should be able to have some measure of confidence that the same rules followed historically with regard to policy interpretation will continue to be followed in the event of litigation. Insureds and insurers alike rely on the announced standards for insurance contract interpretation. Those include: (i) an endorsement is a part of the policy as a whole and should be read as such, as opposed to an endorsement being a stand-alone contract wherein all contractual provisions must be repeated; (ii) the definitions given by the parties to terms in a policy are controlling, largely—if not entirely—because they represent the best indication of the parties' intent, and those definitions cannot be disregarded because one party or another refuses to read the contract; and (iii) ambiguities cannot be created by an insured subjectively leaping to conclusions based on a policy's declarations alone and then claiming everything contrary to those conclusions takes away coverage "given" in the declarations. These rules have been long followed in Missouri, and MODL urges the Court to follow them here rather than deviating on an *ad hoc* basis as did the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Rule 84.06(c) that:

(i) This brief complies with the limitations contained in Rule 84.06(b); and

(ii) Excluding the cover, this Certificate of Compliance, the Certificate of Service, and signature blocks, this brief contains 6,519 words, as determined by the "word count" tool included in the Microsoft Word software with which the brief was prepared.

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CERTIFICATE OF SERVICE

I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that, on this 28th day of January, 2019, I electronically filed the foregoing using the Missouri Courts eFiling System, which will send notice of electronic filing. I further certify that, on said date, I placed a true and accurate copy of the foregoing for delivery via U.S. Mail to:

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