

the driver (Shannon Norton) and passenger (Wallace Hopkins) of the Honda died in the accident. While Mrs. Kinnaman-Carson survived, she sustained serious injuries.

At the time of the accident the Honda was owned by ABC Specialty, Inc., a towing company, doing business as “ABC Tow.” ABC Tow acquired title to the Honda after it had towed the automobile to its storage facility and no one had claimed it.

The Honda was stored on ABC Tow’s lot prior to the accident. At some point in the summer of 2004, Wallace Hopkins unlawfully took the Honda from the lot.² Soon thereafter, Ms. Norton caused the accident while driving the Honda in an intoxicated state, with Mr. Hopkins as a passenger.

On August 27, 2005, Mrs. Kinnaman-Carson filed suit, alleging, *inter alia*, that Ms. Norton and ABC Tow were negligent, thereby causing her damages. Mrs. Kinnaman-Carson’s husband, Randy Carson, was also a named plaintiff, alleging loss of consortium. Subsequently, the Carsons filed an amended petition that alleged additional theories of recovery against ABC Tow, including negligent hiring, training and supervision of its employees, and negligent implementation of security measures to prevent the unauthorized use of stored vehicles.

Prior to trial, the Carsons and ABC Tow entered into an agreement pursuant to § 537.065,³ wherein ABC Tow agreed to allow the Carsons to take a judgment against ABC Tow in an amount not to exceed \$ 1.7 million, with the understanding that the Carsons would not

Jackson County, and therefore that venue was proper. *See State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. banc 1994).

² The parties dispute whether Mr. Hopkins was an employee of ABC Tow on the date of the accident, or was rather a former employee. There is also apparently some confusion in the record as to whether the Honda was on ABC Tow’s lot, or was instead at another entity’s facility, at the time of its unauthorized taking. On the view we take of this case neither issue is relevant.

³ All statutory references are to the RSMo 2000 and 2007 Cumulative Supplement.

levy or execute this judgment against ABC Tow. On August 29, 2006, the Carsons tried their claims in the underlying lawsuit, as they pertained to ABC Tow, in the Circuit Court of Jackson County. After hearing evidence, the trial court entered judgment finding ABC Tow liable and awarding Mrs. Kinnaman-Carson and Randy Carson damages of \$1,074,128.00 and \$300,000.00, respectively.

On October 16, 2006, the Carsons filed their Petition for Equitable Garnishment Relief and/or Damages against Westport. The Carsons alleged that at the time of the accident ABC Tow was insured under a general liability insurance policy issued by Westport, No. WCP102000430500. In the only count at issue in this appeal, the Carsons sought to garnish the Westport Policy to satisfy their judgment in the underlying lawsuit.

Westport filed a motion for summary judgment on June 8, 2007. While it acknowledged that it had issued a liability insurance policy to ABC Tow, Westport argued that the Carsons' damages were not covered under the Policy's unambiguous terms, which excluded from coverage "[b]odily injury' or 'property damage' arising out of the ownership [or] use" of any automobile "owned or operated by or rented or loaned to any insured."

The circuit court granted Westport's motion on August 22, 2007.

The Carsons appeal, alleging both that the Westport Policy's automobile exclusion does not defeat their coverage claim, and that Westport waived the coverage exclusion by its actions in response to their suit against ABC Tow.

II. Standard of Review

"The standard of review for an appeal from summary judgment is essentially de novo." *Sinhold v. Mo. State Employees' Retirement Sys.*, 248 S.W.3d 596, 597 (Mo. banc 2008)(citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). "The Court will uphold summary judgment if 'there is no genuine dispute of

material fact and the movant is entitled to judgment as a matter of law.” *Id.* (quoting *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006)).

III. Analysis

A. Whether the Carsons’ Damages Were Excluded under the Policy.

The Carsons’ first three Points Relied On argue that the Westport Policy did not exclude their claim against ABC Tow from coverage. In interpreting an insurance policy, the language “will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.” *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. banc 1992). “If a policy is found unambiguous, the rules of construction will not be applied and absent public policy to the contrary, the policy is enforced as written.” *Shelter Mut. Ins. Co. v. Ballew*, 203 S.W.3d 789, 794 (Mo. App. W.D. 2006). “An exclusion provision in an insurance policy, by definition, excludes risk. It has no function to endow coverage but rather limits the obligation of indemnity.” *Harold S. Schwartz & Assocs., Inc. v. Cont’l Cas. Co.*, 705 S.W.2d 494, 498 (Mo. App. E.D. 1985).

On appeal, the pertinent facts are largely undisputed; the primary dispute instead revolves around the interpretation of the language of the Westport Policy’s automobile exclusion. The exclusion states, in relevant part:

2. Exclusions

This insurance does not apply to:

...

g. Aircraft, Auto or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

It is evident that the Carsons’ collision with a Honda Civic owned by ABC Tow was the cause of the “bodily injury” and “property damage” for which they seek to recover. The Carsons nevertheless argue that coverage exists because ABC Tow’s liability in the underlying lawsuit was predicated on theories of recovery independent of the “use” or “ownership” of the automobile. But when examining the Carsons’ claims – be they for negligent hiring, training, or supervision of employees, and/or for negligent adoption and implementation of security measures – each is bottomed on the claim that ABC Tow negligently performed, or failed to perform, some action which would have prevented the unauthorized use of a vehicle ABC Tow owned, and which ultimately caused the Carsons’ damages. None of ABC Tow’s allegedly negligent acts or omissions would (or could) have caused the Carsons any injury independent of Ms. Norton’s unauthorized use of ABC Tow’s car. Accordingly, we conclude that the Carsons’ “claims are not incidental to claims arising out of the use or ownership of an automobile,” and therefore that they are excluded under the clear and unambiguous language of the Wesport Policy. *Am. Family Mut. Ins. Co. v. Co Fat Le*, 439 F.3d 436, 441 (8th Cir. 2006) (Missouri law).

The Carsons claim that coverage exists despite the policy’s auto exclusion because they have alleged theories under which ABC Tow’s acts or omissions in failing to prevent the unauthorized use of the vehicle constituted an independent or concurrent cause of their damages. “Under Missouri law, the concurrent cause doctrine ‘provides that when an insured risk and an excluded risk constitute concurrent proximate causes of an injury, a liability insurer is liable so

long as one of the causes is covered by the policy.’” *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007)(quoting *Co Fat Le*, 439 F.3d at 439).⁴ To determine whether Ms. Norton’s automobile use and ABC Tow’s alleged negligence constituted independent, concurrent proximate causes, we must “examine whether each alleged cause could have independently brought about the injury.” *Id.* (citing *Co Fat Le*, 439 F.3d at 439).

Our review of a series of prior Missouri cases leads us to conclude that ABC Tow’s alleged negligence was not a concurrent proximate cause of the Carsons’ injuries, since the assertedly negligent acts were only directed at preventing unauthorized use of ABC Tow’s automobiles and did not independently pose a threat of harm to the Carsons; ABC Tow’s claimed negligence only contributed to the harm the Carsons suffered when its vehicle was used in a manner resulting in the accident. In *Hartford Casualty Insurance Co. v. Budget Rent-A-Car of Missouri, Inc.*, 864 S.W.2d 5 (Mo. App. W.D. 1993), we ruled squarely on this issue in the context of a similar automobile exclusion in a general liability insurance policy. *Id.* at 6-7. In *Hartford*, the underlying plaintiffs’ decedent was involved in a car crash after a third party stole a shuttle bus from Hartford insured Budget Rent-A-Car, and then proceeded to drive the stolen vehicle while intoxicated, causing the fatal accident. Although the wrongful death plaintiffs alleged that Budget was negligent in supervising its employees and in allowing an intruder “to be on the Budget premises while intoxicated without law enforcement agencies being called to remove him,” *id.* at 6, we concluded that no coverage existed by virtue of the automobile exclusion.

⁴ In *Green v. Penn-America Insurance Co.*, 242 S.W.3d 374 (Mo. App. W.D. 2007), we recently questioned whether “the concurrent cause doctrine is the law of this jurisdiction” but ultimately decided to “leave that issue for a future court to resolve.” *Id.* at 383-84 & n.12. Because we conclude that the Carsons did not allege a viable garnishment claim against Westport even assuming the availability of the concurrent cause doctrine, we follow *Green* and leave the status of that theory for another day.

[A]ny negligence on the part of Budget in failing to have [the intruder] removed from the premises would not result in liability on Budget were it not for the use of the shuttle by [the intruder]. . . . When liability depends upon the negligence of [the intruder] in operating the shuttle bus, coverage of the shuttle bus at the time of the accident is specifically excluded by the exclusionary clause. In short, liability on the part of Budget can only be founded on the ownership and use of the shuttle bus. It is these elements, ownership and use of the shuttle bus, which are specifically excluded by the exclusionary clause. Therefore, the exclusionary clause clearly excludes coverage for the accident alleged in the [underlying] petition.

Id. at 6-7.

Similarly, *In re Estate of Murley*, 250 S.W.3d 393 (Mo. App. S.D. 2008), recently found no coverage due to a similar automobile exclusion where a shower unit fell out of the bed of a pickup truck while the truck was traveling on a highway; the shower unit struck another vehicle, injuring its occupants. In *Murley*, the injured parties argued that the automobile exclusion was inapplicable because their injuries arose from the insured's negligent failure to properly secure the shower unit in his truck, separate from his operation of the vehicle itself. After reviewing numerous Missouri cases, the Southern District rejected the injured parties' arguments and found no coverage, because negligence in securing the load could only cause injury when the truck was operated.

In the case at bar, however, there is no evidence in the record before us that Wilson . . . could have been injured by Forbes' mere failure to properly secure the shower unit in the pickup truck while it was located at Don's residence in Nixa. This failure to secure the load necessarily had to be coupled with, and was, therefore, dependent upon the operation of the truck in order to transport the shower unit, thereby putting the shower unit in motion and in proximity to Wilson. Thus, on the record before us, the failure to secure the load within the truck in such a fashion as to prevent it from leaving the vehicle was merely in preparation for and incidental to the use and operation of the truck.

. . . .

Conversely, there is no evidence in the record before us that, while the truck was sitting stationary at the residence in Nixa and not otherwise being used, the manner in which the shower unit was situated in the bed of the pickup truck or the manner in which it was or was not secured to the pickup truck posed any risk

of injury to anyone. It was only at the time that the shower unit was placed in motion by the operation of the truck in transporting it to Kimberling City that the manner in which it was secured to the vehicle posed a risk of injury to Wilson . . . Thus, the act of negligently failing to secure the load within the pickup truck is dependent upon, not independent of, the use of the truck to transport the load.

Id. at 400-01 (citation omitted). Other cases have similarly held that an automobile exclusion bars coverage for claims where an insured's allegedly negligent acts could only pose a threat of harm to a plaintiff when combined with the operation of an automobile. *See Co Fat Le*, 439 F.3d at 440 (plaintiffs sued homeowners after their decedent died from carbon monoxide intoxication after car left running in homeowners' garage; no coverage where inadequately ventilated garage "is not an inherently dangerous condition," but instead "became dangerous only when the automobile was left running in the garage while the garage door was closed"); *Am. States Ins. Co. v. Porterfield*, 844 S.W.2d 13, 15, 16 (Mo. App. W.D. 1992) (no coverage for employer's alleged negligence "in the supervision of his employees in the proper method of hitching [a] trailer to a truck," where injuries caused when trailer became unhitched while traveling on highway); *see also, e.g., Hunt v. Capitol Indem. Corp.*, 26 S.W.3d 341, 345 (Mo. App. E.D. 2000) (finding no coverage under assault and battery exclusion for lounge owner's alleged failure to protect assault victim from known dangerous individuals; "Without the underlying assault and battery, there would have been no injury and therefore no basis for plaintiffs' action against Haverfield for negligence.").

In this case, ABC Tow's alleged negligence all involves measures which would – in the Carsons' view – have prevented the unauthorized use of the Honda Civic. Thus, in their briefing the Carsons argue that "[t]he negligence in this case is the failure to [take measures] . . . to prevent unauthorized third persons from gaining access to" ABC Tow's vehicles. By definition, it is only when ABC Tow's alleged negligence was combined with the unauthorized use of a stored vehicle that any risk of injury to the Carsons was presented. None of ABC Tow's

allegedly negligent acts (*e.g.*, failing to restrict access to the keys for stored vehicles) presented any risk or danger to the Carsons until the Honda was operated on a highway on which they were also traveling. “Thus, the act of negligently failing to secure the [vehicle] is dependent upon, not independent of, the use of the [vehicle],” *Murley*, 250 S.W.3d at 401, and the concurrent causation doctrine is inapplicable.⁵

The Carsons cite a line of cases from the Eastern District which, they contend, supports their argument that their loss is in fact covered under the Policy. *See Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98 (Mo. App. E.D. 1995); *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204 (Mo. App. E.D. 1999); *Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1 (Mo. App. E.D. 2005). But these cases have been limited and distinguished by more recent decisions because “[i]n each case, the negligent act did not depend or rely upon the use of a vehicle to produce the injury, as is the case here.” *Murley*, 250 S.W.3d at 401-02; *see also Co Fat Le*, 439 F.3d at 440-41 (distinguishing *Centermark* and *Neal* on similar grounds); *Hunt*, 26 S.W.3d at 345. Thus, in *Centermark* the court held that the insured’s negligent failure to apprehend and subdue a third party (who later caused an accident when he drove the insured’s security vehicle without authorization), constituted an “allegation[] of negligence that appear[s] independent of ownership, maintenance, operation or use of an automobile.” 897 S.W.2d at 101. In *Neal*, the court found coverage for a claim of negligent supervision of a minor (who was killed in a car accident while unsupervised), on the theory that “[t]he claim for negligent supervision of a minor is unrelated to and can occur without the use of a vehicle.” 992 S.W.2d at 209. Finally, in *Bowan*, the court held that an automobile exclusion did not bar coverage where a disabled person was negligently secured in a vehicle, and was later injured when the vehicle was involved in an

⁵ Because the first paragraph of the automobile exclusion clearly bars coverage for the Carsons’ claims, we need not address the effect of the exclusion’s second paragraph.

accident, on the theory that “the failure to properly secure Bowan was an independent and distinct act of negligence that did not necessarily involve operation of the vehicle.” 174 S.W.3d at 6. Those cases are not controlling here, because (as explained above) ABC Tow’s asserted negligence could *only* produce injury when combined with automobile usage.⁶

The Carsons argue that our prior cases are distinguishable, because the automobile exclusion should only apply where a vehicle is being driven for a legitimate business purpose, or by an insured and/or authorized person. The Carsons’ argument cannot distinguish our decision in *Budget Rent-A-Car*, however; in that case – as here – a vehicle was being operated by a non-

⁶ Although we find the Eastern District’s decisions in *Centermark*, *Neal* and *Bowan* to be distinguishable for the reasons discussed in the text, we note that Westport raises colorable challenges to those cases’ interpretation of the automobile exclusion, and their consistency with decisions of this court which we are bound to follow. See *Capitol Indem. Corp. v. Haverfield*, 218 F.3d 872, 875 (8th Cir. 2000)(citing *Centermark*, and noting “split” between Eastern and Western District cases concerning similar coverage question arising under assault and battery exclusion). In particular, it may be difficult to reconcile this Court’s decision in *Budget Rent-A-Car* – which found no coverage for the insured’s allegedly negligent failure to prevent unauthorized use of a vehicle – with *Centermark*, which found coverage for a claim that could generally be described in the same way.

We also note that in *Centermark* and *Neal*, the courts found an automobile exclusion inapplicable because the particular *claim* or *theory of liability* asserted against an insured did not (necessarily) require attendant automobile usage to cause injury. See *Centermark*, 897 S.W.2d at 101 (“we find coverage based on the fact that there are *allegations of negligence* that appear independent” of automobile ownership or use (emphasis added)); *Neal*, 992 S.W.2d at 209 (noting that “[t]he liability of grandparents in this case will not be founded on the ownership and use of the vehicle” (emphasis added)). But the automobile exclusion at issue in those cases – like the exclusion at issue here – is triggered if the claimant’s “[b]odily injury’ or ‘property damage’ aris[es] out of [automobile] ownership [or] use.” As Westport notes, “[t]he exclusion is not about theories of the claim – it is about causes of bodily injury.” Whatever the liability theory, it could plausibly be argued that in *Centermark* and *Neal* – as here – the bodily injury “ar[o]s[e] out of” an automobile’s use; but for the operation of an automobile, no injury would have occurred.

Finally, there is a legitimate question whether *Centermark*, *Neal* and *Bowan* properly invoked the “concurrent causation” doctrine. At least according to Eighth Circuit decisions applying Missouri law, a “concurrent cause” is one which “could have independently brought about the injury.” *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007) (citing *Co Fat Le*, 439 F.3d at 439); *but see Byars v. St. Louis Pub. Serv. Co.*, 66 S.W.2d 894, 900 (Mo. 1933) (“concurrent causes are defined to be ‘causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either’” (citation omitted)). Although *Centermark*, *Neal* and *Bowan* observed that the insured’s alleged negligence *could have* caused injury independent of automobile usage, the injury in each case *in fact* occurred only because the insured’s allegedly negligent acts *were combined with* automobile use.

insured person without authorization. More significantly, the automobile exclusion itself draws no distinctions between authorized versus unauthorized, or business versus non-business, use. Instead, the exclusion bars coverage whenever “[b]odily injury’ or ‘property damage’ aris[es] out of the ownership [or] use . . . of any . . . ‘auto’ . . . owned or operated by or rented or loaned to any insured.” The fact that the exclusion separately bars coverage for bodily injury arising from the “entrustment to others” of an owned automobile confirms that “use” need not itself be authorized to be excluded. Contrary to the Carsons’ claims, *Centermark* does not adopt the limitations they suggest; to the contrary, *Centermark* notes that “[w]e need not reach the issue of whether the wording of the exclusionary clause was meant to apply to the use or operation of a vehicle without permission or authorization of the insured.” 897 S.W.2d at 101.

The Carsons also cite our decision in *Truck Insurance Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64 (Mo. App. W.D. 2005), for the proposition that “the exclusion would apply only if the use of the automobile was by an insured, something that Ms. Norton was not.” In *Truck Insurance*, however, the court found a duty to defend a wrongful death claim where the decedent was killed in an accident with one of the insured’s employees who was driving his wife’s vehicle, and who was allegedly not acting in the scope of his employment at the time. The court noted that the employee was only himself an insured “for acts within the course and scope of his employment.” *Id.* at 86. Thus, to the extent the employee was not an insured at the time of the fatal accident, and the vehicle which he was driving was not otherwise “owned or operated by or rented or loaned to any insured,” the automobile exclusion at least arguably did not apply, and “[t]here was at least the *potential* or *possibility* that there was coverage,” triggering the insurer’s defense obligation. *Id.* at 87. Here, of course, the automobile exclusion is triggered based on the undisputed fact that the Honda Civic causing the fatal accident was

owned by ABC Tow itself. Whether the driver of the vehicle was acting within the course and scope of employment for ABC Tow, or was herself an insured under the Westport Policy, is irrelevant.⁷

The Carsons' first three Points are denied.

B. Whether Westport Waived its Coverage Defense under the Automobile Exclusion by Agreeing To Defend ABC Tow without Reservation.

In Point IV, the Carsons argue that Westport waived the defense that the Carsons' loss was defeated by the Policy's automobile exclusion by "conceding coverage to ABC in that Westport Insurance had withdrawn its one and only reservation of rights and had agreed to represent its insured, ABC, without reservation."

In response to the Carsons' lawsuit against ABC Tow, Westport initially offered, in a letter dated August 15, 2006, to defend ABC Tow under a reservation of rights, an offer which ABC Tow refused. On September 22, 2006, Westport offered a defense without reservation. The thrust of the Carsons' argument is that Westport's September 22, 2006, letter conceded that the Policy covered the Carsons' damages, thus waiving any defense Westport had under the automobile exclusion.

Because the Carsons failed to raise this argument in opposition to Westport's motion for summary judgment, however, we find the issue waived. "An appellant's failure to preserve an issue at the trial court waives the issue, and it is not reviewable on appeal." *Ryan v. Maddox*, 112 S.W.3d 476, 479 (Mo. App. W.D. 2003). "Since [the Carsons] did not raise this issue in the trial court on the motion for summary judgment, [they are] precluded from making this argument on appeal." *D.E. Props. Corp. v. Food for Less, Inc.*, 859 S.W.2d 197, 201 (Mo. App. E.D.

⁷ We acknowledge that *Truck Insurance* held that the insurer also had a duty to indemnify the insured employer. *Id.* at 92. However, its brief analysis of the issue merely relied on the court's earlier holding – irrelevant here – that the insurer had a duty to defend.

1993). By failing to raise their waiver argument below, the Carsons denied Westport the opportunity to develop the facts concerning its coverage position(s) in the underlying lawsuit; we will not permit the Carsons to raise the waiver issue now, when Westport has no ability to meaningfully respond.⁸

IV. Conclusion

The judgment of the circuit court is affirmed.

Alok Ahuja, Judge

All concur.

⁸ At oral argument, the Carsons argued that they effectively raised the waiver issue before the circuit court because Westport's September 22, 2006, letter was included in the summary judgment record. We are hard pressed to determine how this preserved the issue for appeal. The trial court had no duty to independently scour the evidentiary record to develop an arguable legal basis to defeat summary judgment that counsel in no way raised.