IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC92202

RUTH MENDENHALL

Plaintiff/Appellant

v.

PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD

Defendant/Respondent

RESPONDENT'S SUBSTITUTE BRIEF

TRANSFERRED APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
Honorable Maura McShane, Presiding

BROWN & RUPRECHT, PC

John L. Hayob, Mo. # 24518
jhayob@brlawkc.com
Diane Hastings Lewis, Mo. #61143
dlewis@brlawkc.com
911 Main, Suite 2300
Kansas City, Missouri 64105-5319
(816) 292-7000 Telephone
(816) 292-7050 Facsimile
ATTORNEYS FOR PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD

TABLE OF CONTENTS

TABLE OF AUTHORITIES…….3

JURISDICTIONAL STATEMENT …….5

STATEMENT OF FACTS ……...6

POINTS RELIED ON ……..10

ARGUMENT ……11

A. STANDARD OF REVIEW ……11

B. INTRODUCTION ……..12

C. ARGUMENT …….14

1. The Hartford Policy's Employee Indemnification and Employer's Liability Exclusion negates coverage for Mr. Mendenhall because he was an employee and not a temporary worker. .. ……12

a. The term "furnished" unambiguously requires that a third party have authority and control over a worker in order to furnish the worker and the term is not subject to different interpretations in that context……14

b. The Family Center did not have authority or control over Mr. Mendenhall's employment, and therefore it could not "furnish" Mr. Mendenhall to Mr. Walker. ……....18

c. Other cases support the proposition that one must have authority or control over the worker in order to "furnish" the worker to an employee…….……28

D. CONCLUSION ……...29

CERTIFICATE OF COMPLIANCE ……32

CERTIFICATE OF SERVICE …… 33

APPENDIX

TABLE OF AUTHORITIES

Cases

AMCO Ins. Co. v. Dorpinghaus, No. 05-1296, 2007 WL 313280 (D. Minn. Jan. 12, 2007) 10, 15, 17, 20, 21, 27, 28

Apex Oil Co. v. Beldner, 567 S.W.2d 336 (Mo. Ct. App. 1978) 24

Bituminous Cas. Corp. v. Mike Ross, Inc., 413 F. Supp. 2d 740 (N.D. W. Va. 2006) 17

Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005) 10, 15, 28

Burlington Insurance Co. v. De Vesta, 511 F. Supp. 2d 231 (D. Conn. 2007) 17, 28

Burns v. Smith, 303 S.W.3d 505 (Mo. banc 2010) 11

Com. of Pa. v. Local 542, Int'l Union of Operating Engineers, 619 F. Supp. 1273 (E.D. Pa. 1985) *aff'd sub nom. Com. of Pa. v. Local Union 542, Int'l Union of Operating Engineers*, 807 F.2d 330 (3d Cir. 1986) 25

Empire Fire and Marine Insurance Company v. Jones, 739 F. Supp. 2d 746 (M.D. Pa. 2010) 10, 17, 18, 19, 22, 24, 28

Gavan v. Bituminous Casualty Corporation, 242 S.W.3d 718 (Mo. banc 2008) 10, 14, 15, 16, 25, 27

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993) 11

Lane v. Residential Funding Corp., No. C96-3331 MMC, 2000 WL 1448582 (N.D. Cal. June 6, 2000) 25

Monticello Ins. Co. v. Dion, 65 Mass. App. 46, 836 N.E.2d 1112 (Mass. App. 2005) 17, 27

Nat'l Indem. Co. of S. v. Landscape Mgmt. Co., Inc., 963 So.2d 361 (Fla. Dist. Ct. App. 2007) 17

Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co., 853 N.Y.S.2d 870 (N.Y. Sup. Ct. 2008), aff'd, 61 A.3d 655 (N.Y. App. Div. 2009) 17

Poage v. State Farm Fire & Cas. Co., 203 S.W.3d 781 (Mo. App. S.D. 2006) 11

Rhiner v. Red Shield Insurance Co., 208 P.3d 1043, 228 Or. App. 588 (Or. App. 2009) 17, 28

Rodriguez v. Gen. Accident Ins. Co. of Am., 808 S.W.2d 379 (Mo. banc 1991) 11

Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129 (Mo. banc 2007) 11

U.S. ex rel. Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co., 08-CV-1685 W AJB, 2010 WL 3489348 (S.D. Cal. Sept. 3, 2010) 23

Villalobos v. N. Carolina Growers Ass'n, Inc., 252 F. Supp. 2d 1, 12 (D. P.R. 2002) 24

Western Pacific L-C Corp. v. Tidewater Contractors, Inc., 2008 WL 906285 (E.D. Cal. 2008) 24

Woods Constr. Co. v. Pool Constr. Co., 348 F.2d 687, 689 (10th Cir. 1965) 24

Other Authorities

Merriam-Webster Online, http://www.merriam-webster.com/dictionary/refer, (last accessed Jan. 18, 2012) 16

Steven P. Perlmutter, *The Law of "Leased Worker" and "Temporary Worker" Under a CGL Policy*, 45 Tort Trial & Ins. Prac. L.J. 761 (2010) 26, 28

Webster's Third New International Dictionary 923 (1986) 16

Statutes

R.S.Mo. § 379.200 8

R.S.Mo. § 537.065 8

JURISDICTIONAL STATEMENT

Hartford agrees with Mrs. Mendenhall's statement of jurisdiction.

STATEMENT OF FACTS

Ruth Mendenhall's claim arises out of an accident occurring on March 8, 2007, in which her husband, Len Mendenhall, was operating a truck and dump trailer ("Truck and Trailer") owned by The Family Center of Farmington, Inc. ("The Family Center") on a farm owned by Jay Walker and his wife, Dawn Walker (collectively the "Walkers"). (LF 178, ¶ 1) While Mr. Mendenhall was working on the Walkers' farm, the Truck and Trailer tipped over onto him causing his death. (LF 178, ¶ 1) The Walkers operated the farm ("Farm") under the name 4-J Farms in their individual capacities as a sole proprietorship. (LF 179, ¶ 3) Mr. Walker was also the sole shareholder and President of The Family Center, which sells and leases equipment to the public, including farm equipment. (LF 178, ¶ 2)

The Family Center's Truck and Trailer was insured under a business automobile liability policy issued by Property and Casualty Insurance Company of Hartford ("Hartford") to The Family Center ("Hartford Policy"). (LF 179, ¶¶ 5, 6; LF 253-338) The Hartford Policy included liability coverage for bodily injury, but excluded bodily injury to employees arising out of and in the course of the employee's employment. (LF 307) The Walkers purchased separate coverage for their farm operations ("Farm Mutual Policy") from the Farm Mutual Insurance Company of St. Francois County ("Farm Mutual"). (LF 179 ¶ 4; LF 186-252) The Farm Mutual Policy is a liability policy that covers Mr. Walker's liability to farm employees, specifically for bodily injuries sustained by a farm employee while engaged in the employment of a person covered by the policy. (LF 179 ¶ 4; LF 228-229)

Mr. Mendenhall applied for a position of a "driver/mechanic" with The Family Center in May of 2006. (LF 180, ¶ 8; Appellant's Appendix, A-27, ¶ 4) He was interviewed, and the interviewer, Gary Fraley, indicated that Mr. Mendenhall "would be good" for the position; presumably a driver/mechanic position, however Mr. Walker's affidavit is not specific on that point. (Appellant's Appendix, A-28, ¶ 5-6) Mr. Mendenhall was not ultimately hired by The Family Center at that time or any time in the future. (LF 180, ¶ 8) Mr. Mendenhall was later hired by Mr. Walker to work on the Walkers' Farm a few days after his application was submitted to The Family Center. (LF 180, ¶ 8) The record does not anywhere reflect that Mr. Walker would not have hired Mr. Mendenhall but for the Family Center's "vetting and recommendation." (Appellant's Substitute Brief, 4; Appellant's Appendix, A-27-28) Mr. Mendenhall was not provided to the Walkers by an employment service. (LF 180, ¶ 9) He received his paychecks and W-2 forms from the Walkers through the Farm payroll, and was not paid by The Family Center. (LF 180, ¶¶ 8, 9)

As owner and President of The Family Center, Mr. Walker had permission from The Family Center for the use of the Truck and Trailer for his personal use. (LF 181, ¶ 12) On March 8, 2007, at the direction of Mr. Walker, Mr. Mendenhall used the Truck and Trailer to haul rock to the Farm. (LF 181, ¶ 13, 14) While dumping the last load, the Truck and Trailer tipped over onto Mr. Mendenhall, causing his death. (LF 181, ¶ 13, 14)

Mrs. Mendenhall filed suit in the Circuit Court of St. Francois County, Missouri, Case No. O7SF-CC00568 against The Family Center and the Walkers, alleging the Defendants were liable for Mr. Mendenhall's death. (LF 181-182, ¶ 15; LF 543-550)

Farm Mutual, as insurer of the Jay Walker d/b/a 4-J Farms farm operations, hired counsel to defend Mr. Walker in the case. (LF 182, ¶ 16) Mr. Walker also tendered the claims made against him by Mrs. Mendenhall to Hartford, alleging he was covered under the Hartford Policy. (LF 182, ¶17) Hartford agreed to share certain costs with Farm Mutual, subject to a full and complete reservation of rights to deny coverage for any judgments or settlements incurred against or entered into by Jay Walker. (LF 182, ¶17; LF 552-560)

Prior to entry of judgment in Case No. 07SF-CC00568 on December 8, 2009, Mrs. Mendenhall dismissed her claims against Mrs. Walker and settled her claims against The Family Center. (LF 182, ¶ 15) Ruth Mendenhall was paid $50,000 in consideration for the settlement of her claims against The Family Center. (LF 182, ¶ 15) Mr. Walker and Mrs. Mendenhall entered into an agreement under R.S.Mo. § 537.065, pursuant to which Mr. Walker confessed judgment in exchange for Mrs. Mendenhall's agreement that she would execute the judgment only against the proceeds from the Hartford Policy issued to The Family Center. (LF 182, ¶18; LF 561-567) Farm Mutual was not included in the § 537.065 agreement, and Mrs. Mendenhall elected not to pursue recovery from Farm Mutual under the Farm Mutual Policy. (LF 561-566) The court ultimately entered judgment against Mr. Walker in the amount of $840,000. (LF 183, ¶ 19; LF 568)

Following the entry of judgment, Mrs. Mendenhall filed the subject action for equitable garnishment pursuant to R.S.Mo. § 379.200, against Hartford seeking to apply the proceeds of the Hartford Policy in satisfaction of the above-referenced judgment. (LF 183, ¶ 20) Farm Mutual was not named as a party to the equitable garnishment action. (LF 94-98) Both Mrs. Mendenhall and Hartford filed Motions for Summary Judgment.

Hartford argued that the Hartford Policy excluded coverage for Mrs. Mendenhall's judgment because Mr. Mendenhall was an "employee" of Mr. Walker at the time of the accident. (LF 584-596) Mrs. Mendenhall responded that Mr. Mendenhall was not excluded from coverage because he was a "temporary worker" rather than an "employee." (LF 644-654) The trial court granted Hartford's Motion for Summary Judgment, finding that Mr. Mendenhall was not a "temporary employee" because he was not "furnished to" Mr. Walker by an employment service, and hence, was not furnished to Mr. Walker by a third party. (LF 671-677)

Mrs. Mendenhall appealed the trial court's conclusion that Mr. Mendenhall was not a "temporary worker" and the case was considered by the Missouri Court of Appeals for the Eastern District. (Appellant's Appendix, A-1-9) The Court of Appeals reversed the trial court's granting of summary judgment, but transferred the case to the Missouri Supreme Court pursuant to Rule 83.02 due to the general interest and importance of the question presented. (Appellant's Appendix, A-1-9)

POINTS RELIED ON

1. **The trial court correctly granted summary judgment in favor of Hartford and denied summary judgment to Mrs. Mendenhall because Mr. Mendenhall was Mr. Walker's employee, and therefore expressly excluded from coverage under the Hartford Policy, pursuant to the Hartford Policy's Employee Indemnification and Employer's Liability exclusion.**

Empire Fire and Marine Insurance Company v. Jones, 739 F. Supp. 2d 746 (M.D. Pa. 2010)

Gavan v. Bituminous Casualty Corporation, 242 S.W.3d 718 (Mo. banc 2008)

AMCO Ins. Co. v. Dorpinghaus, No. 05-1296, 2007 WL 313280 (D. Minn. Jan. 12, 2007)

Brown v. Indiana Ins. Co., 184 S.W.3d 528 (Ky. 2005)

ARGUMENT

1. The trial court correctly granted summary judgment in favor of Hartford and denied summary judgment to Mrs. Mendenhall because Mr. Mendenhall was Mr. Walker's employee, and therefore expressly excluded from coverage under the Hartford Policy pursuant to the Hartford Policy's Employee Indemnification and Employer's Liability exclusion.

A. STANDARD OF REVIEW

The standard of review of a trial court's grant of a motion for summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The standard of review is the same for cross-motions for summary judgment. *Poage v. State Farm Fire & Cas. Co.*, 203 S.W.3d 781, 783 (Mo. App. S.D. 2006). The interpretation of an insurance contract and the determination whether coverage provisions are ambiguous are questions of law that the court also reviews *de novo*. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). The court gives meaning to the language of the insurance contract which would be understood by an ordinary person. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). Courts are "not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc 1991).

B. INTRODUCTION

The only issue in this case is whether the policy issued by Hartford to The Family Center provided coverage for the judgment obtained by Mrs. Mendenhall against Mr. Walker in the wrongful death action arising out of Mr. Mendenhall's death while he was working on the Walkers' Farm.

The Hartford Policy expressly excludes coverage pursuant to the Employee Indemnification and Employer's Liability exclusion, which excludes coverage for:

> a. An "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
>
> (2) Performing the duties related to the conduct of the "insured's" business; or
>
> b. The spouse, child, parent, brother or sister of the "employee" as a consequence of Paragraph a. above.

(LF 308)

The Hartford Policy further defines "employee":

> "Employee" includes a "leased worker." "Employee" does not include a "temporary worker."
>
> …
>
> "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."

…

"Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

(LF 315, 316)

The parties agree that Mr. Mendenhall was employed by Mr. Walker for short-term workloads. The only dispute in this case is whether Mr. Mendenhall was "furnished" to Mr. Walker such that he would be a "temporary worker" as defined in the Hartford Policy. Mrs. Mendenhall claims that Mr. Mendenhall was "furnished to" the Walkers' Farm from Mr. Walker's business, The Family Center. However, Mr. Mendenhall was never employed by The Family Center, he was never paid by The Family Center, and The Family Center did not have any control over Mr. Mendenhall or his decision to accept or reject Mr. Walker's offer of employment. Mrs. Mendenhall's argument rests on the fact that a Family Center employee—at the most—recommended Mr. Mendenhall to Mr. Walker. Mr. Mendenhall was not a "temporary worker" because he was merely referred by one of Mr. Walker's businesses to another of Walker's businesses and was not "furnished" by an employment agency, by any other third party in the business of supplying workers to others, or by anyone with the ability to control Mr. Mendenhall's employment.

Indeed, the trial court's decision is supported by many cases that recognized that the "temporary worker" exception to Employee Indemnification and Employer's Liability

Exclusions in liability policies is limited to workers who were furnished—not merely referred—by a third-party entity with control over the worker's employment.

C. ARGUMENT

1. The Hartford Policy's Employee Indemnification and Employer's Liability Exclusion negates coverage for Mr. Mendenhall because he was an employee and not a temporary worker.

a. The term "furnished" unambiguously requires that a third party have authority and control over a worker in order to furnish the worker and the term is not subject to different interpretations in that context.

The Missouri Supreme Court sided with the overwhelming majority of courts in finding that the phrase "furnished to" as found in the definition of "temporary worker" in the Hartford Policy is not ambiguous as to the requirement that a third party be involved in furnishing, providing, or supplying the worker. *Gavan v. Bituminous Casualty Corporation*, 242 S.W.3d 718, 721 (Mo. banc 2008) (citations omitted). Mrs. Mendenhall now claims that "furnished," as used in the Hartford Policy is still ambiguous because the definition of "temporary worker" could be interpreted to mean that (1) *any* third party can furnish a person to the insured to qualify that person as a temporary worker; or (2) only a third party in the business of supplying workers to others can furnish a person to the insured. (Appellant's Substitute Brief, 17) This distinction is unimportant because regardless of the type of third party "furnishing" the worker, the third party must have sufficient authority and control over the worker such that its actions meet the definition of "furnish."

The court in *Gavan* stated that "[c]onsistent with the weight of authority, this Court holds that the term "furnished to," in context and in its plain and ordinary meaning, is not ambiguous and necessarily implies that a third party has been involved in providing or supplying the worker to the insured." *Gavan*, 242 S.W.3d at 721. Notably, in reaching this conclusion, the court in *Gavan* cited and relied on cases which also required that the furnishing third-party have some authority or control over the worker or rejected the proposition that a mere referral could constitute "furnishing." *Gavan*, 242 S.W.3d 720-721 (citing *Allen*, 850 A.2d 1047, 1057; *Brown*, 184 S.W.3d 528, 538; and *Dorpinghaus*, 2007 WL 313280, at *3). These cases are as persuasive on the issue of the action required to "furnish" a worker as they were on the issue of whether a third party was necessary to furnish the worker.

The two points Mrs. Mendenhall now argues are pivotal in this case—whether "furnished" requires (1) *any* third party to furnish a person to the insured to qualify that person as a temporary worker; or (2) only a third party which employs the worker or is in the business of supplying workers to others can furnish a person to the insured—are not contradictory. Rather, the important consideration is the necessary degree of control over the person to be furnished. In order to "furnish" a person, the third party must have sufficient authority and control over the person such that it can supply the person as a worker to the insured. A third party that merely refers a person to an insured is not furnishing, supplying, or providing anything more than an employment lead. To make the term "furnished" synonymous with a simple referral renders the language of the

policy nearly as meaningless as the interpretation allowing self-furnishing. *See, e.g. Meeks*, 540 F.3d 869, 875.

"Furnish" is defined as "[t]o provide or supply with what is needed, useful or desirable." *Gavan v. Bituminous Cas. Corp.*, 242 S.W.3d 718, 721 (Mo. banc 2008) (citing Webster's Third New International Dictionary 923 (1986)). Logically, no individual or entity can furnish, provide, or supply something over which it has no control. Mr. Mendenhall had no relationship with Mr. Fraley or The Family Center aside from submitting his application for employment. Accordingly, neither Mr. Fraley nor The Family Center had any control over Mr. Mendenhall such that they could "furnish" him to Mr. Walker. Rather, Mr. Fraley simply referred Mr. Mendenhall to Mr. Walker, and Mr. Mendenhall accepted Mr. Walker's subsequent offer of employment. "Refer" is defined as "to send or direct for treatment, aid, information, or decision." (Merriam-Webster Online, http://www.merriam-webster.com/dictionary/refer, (last accessed Jan. 18, 2012)). This is precisely what occurred in this case. Mr. Mendenhall applied for a job at The Family Center and was not hired, but his application was directed to Mr. Walker who offered him the job on his farm.

As the employer's liability exclusion for temporary workers at issue in this case is a common liability policy exclusion, many courts have considered whether the "temporary worker" definition is ambiguous and have analyzed the meaning of the "furnished to" requirement. As noted by the Court of Appeals, three cases support Mrs. Mendenhall's position that any action by any third party satisfies the "furnish" requirement: *Bituminous Cas. Corp. v. Mike Ross, Inc.*, 413 F. Supp. 2d 740 (N.D. W.

Va. 2006); *Nat'l Indem. Co. of S. v. Landscape Mgmt. Co., Inc.*, 963 So.2d 361 (Fla. Dist. Ct. App. 2007); and *Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co.*, 853 N.Y.S.2d 870 (N.Y. Sup. Ct. 2008), aff'd, 61 A.3d 655 (N.Y. App. Div. 2009).

The facts and analysis of other cases support Hartford's argument that a third party must have authority or control over the worker in order to "furnish" the worker to another employer: *Empire Fire and Marine Insurance Company v. Jones*, 739 F. Supp. 2d 746 (M.D. Penn. 2010); *AMCO Ins. Co. v. Dorpinghaus*, No. 05-1296, 2007 WL 313280 (D. Minn. Jan. 12, 2007); *Burlington Insurance Co. v. De Vesta*, 511 F. Supp. 2d 231, 233 (D. Conn. 2007); *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528 (Ky. 2005); *Nationwide Mutual Ins. Co. v. Allen*, 83 Conn. App. 526, 850 A.2d 1047 (2004).

Still other cases contain dicta indicating support of the requirement that a third party have authority or control over a worker in order to "furnish" the worker to another employer: *Rhiner v. Red Shield Insurance Co.*, 208 P.3d 1043, 228 Or. App. 588, 593 (Or. App. 2009); *Northland Casualty Company v. Meeks*, 540 F.3d 869 (8th Cir. 2008); *General Agents Insurance Co. of America, Inc. v. Mandrill Corp., Inc.*, 243 F. App'x. 961 (6th Cir. 2007); and *Nautilus Ins. Co. v. Gardner*, No. 04–1858, 2005 WL 664358 (E.D. Pa. Mar. 21, 2005). Indeed, an employment or staffing agency is cited as an example of a furnishing third party. And, the facts of *Parra v. Markel International Insurance Co. Ltd*., 300 F. App'x 317, 2008 WL 4974299 (5th Cir. 2008) also suggest the court agrees that a mere referral does not constitute the "furnishing" of a worker.

The cases referred to clearly support the proposition that in order to "furnish" a worker to an employer, the third party must have sufficient authority and control over the

worker's employment situation. This type of relationship and level of control over a worker's employment—namely the ability to instruct the worker to perform labor for another employer—is simply most often found in the context of employment agencies, temporary staffing agencies, or manpower services. The key in interpreting "a person who is furnished to you" as contained in the Hartford Policy is not the type of third party doing the furnishing, rather it is the actions undertook to carry out "furnishing." And a mere referral of a worker to another employer does not satisfy the "furnish" requirement.

b. The Family Center did not have authority or control over Mr. Mendenhall's employment, and therefore it could not "furnish" Mr. Mendenhall to Mr. Walker.

The degree of control required to "furnish" a worker is clearly explained in *Empire Fire*, 739 F. Supp. 2d 746, 754. In *Empire Fire*, the injured worker at issue, Drumheiser, had initially worked for the Kalmans. The Kalmans recommended Drumheiser to Jones, who operated a trash-hauling business and occasionally needed help. Jones contacted Drumheiser based on the Kalmans' recommendation and offered him a job. Drumheiser accepted and proceeded to work for both the Kalmans and Jones. Drumheiser was injured when he fell off Jones' garbage truck. *Id.* at 749-750. During the subsequent lawsuit, Kalman testified that he was Drumheiser's primary employer, that he had no control over Drumheiser, and that he had "no right or authority to prevent him from working with anyone." *Id.* at 750.

Drumheiser proceeded to argue that Kalman had "furnished" him to Jones, and, therefore, he fit within the definition of "temporary worker" and was covered under the

insurance policy at issue, which was identical to the policy language in the Hartford Policy. The court resoundingly rejected this argument, focusing entirely on the degree of control one must have in order to "furnish" a worker:

> While the Kalmans were, quite clearly, Drumheiser's primary employers, the Kalmans did not supply or provide Drumheiser to Jones, inasmuch as **they had no control over Drumheiser**. Drumheiser could have just as easily refused Jones' offer of employment as he did accept it. Quite simply, **Drumheiser was not the Kalmans' property that they could supply, provide, or *furnish* to Jones**. Instead, they gave Jones a referral to Drumheiser and Jones contacted Drumheiser himself to set up the terms of Drumheiser's employment with Jones. Likewise, the Kalmans ultimately had no power to set the conditions of Drumheiser's employment with Jones, nor could they recall Drumheiser from that employment without his consent.

Empire Fire, 739 F. Supp. 2d 746, 754 (bolded emphasis added, italics in original). The facts of the case at bar are strikingly similar to *Empire Fire*. Just as Jones would not have met Drumheiser without the referral of the Kalmans, Mr. Walker would not have met Mr. Mendenhall without the referral of Mr. Fraley and The Family Center. However, neither the Kalmans nor Mr. Fraley or The Family Center had control over the respective workers. Mr. Mendenhall could have refused Mr. Walker's offer of employment. Mr. Mendenhall was not the property of Mr. Fraley or The Family Center such that they could supply, provide or furnish to Mr. Walker, and neither Mr. Fraley nor The Family Center

had the power to set the conditions of Mr. Mendenhall's employment with Mr. Walker or recall Mr. Mendenhall from that employment. Simply put, neither Mr. Fraley nor The Family Center could furnish Mr. Mendenhall to Mr. Walker because they had absolutely no control over him.

Other cases also consider the degree of control the alleged "furnisher" had over the worker, for example, *Dorpinghaus*, No. 05-1296, 2007 WL 313280, which also considers language regarding "temporary employees" identical to that contained in the Hartford Policy. Mrs. Mendenhall quotes a portion of *Dorpinghaus*, however the accompanying analysis is incomplete. In *Dorpinghaus*, Steven Dorpinghaus, the owner of Dorpinghaus Construction, asked his son, Tony, to help with some framing on one of Dorpinghaus Construction's projects. Needing extra help, Tony asked two friends, Richie and Tommy, to help with the project. Richie had his own "hardscape" construction business, and Tommy had his own lawn care and snow removal business. Neither were in the business of framing houses. Both negotiated their work and payment directly with Steven. Tony, Richie and Tommy were injured while performing the framing work when the scaffolding they were working on collapsed. *Id.* at *1-2.

All three sought coverage under Dorpinghaus Construction's commercial general liability insurance policy with AMCO Insurance Company, claiming that they were "temporary workers" because they had been "furnished to" Dorpinghaus Construction. AMCO disagreed and denied coverage. In the subsequent lawsuit, Richie and Tommy claimed they had been furnished by their friend Tony, or that they had been furnished by their respective businesses. The court rejected both of these arguments. In its analysis,

the court noted that "neither Richie nor Tommy had ever worked for Tony, making it difficult for Tony to furnish them to anyone. Not surprisingly, then, Richie and Tommy negotiated the terms of their arrangements directly with Steven Dorpinghaus." *Dorpinghaus*, at *7.

The facts of *Dorpinghaus* are directly analogous to this case. Just as Tony referred Richie and Tommy to his father to negotiate employment, Mr. Fraley referred Mr. Mendenhall to Mr. Walker to negotiate employment. Tony had no control over Richie or Tommy, therefore could not "furnish" them to anyone. *Dorpinghaus*, at *7. Likewise, Mr. Fraley and The Family Center had no control over Mr. Mendenhall and could not "furnish" him to Mr. Walker.

The *Dorpinghaus* court likewise rejected Richie and Tommy's arguments that their respective businesses "furnished" them to Dorpinghaus Construction. The court found relevant that "[n]either is in the business of providing temporary employees to do framing for construction companies" and that "there is no hint in this record that anyone regarded these businesses as having furnished employees to Dorpinghaus Construction in the manner of 'an employment agency, manpower service provider or any similar service.'" *Dorpinghaus*, at *8 (citing *Nationwide Mut. Ins. Co. v. Allen*, 850 A.2d 1047, 1057 (Conn. App. 2004). The facts and analysis of *Dorpinghaus* clearly establish that when evaluating whether a worker was "furnished" to an employer, the "furnisher" must have control over the worker to be furnished—more than a mere referral is required.

Similarly, the court in *Brown*, 184 S.W.3d 528, also rejected the argument now proposed by Mrs. Mendenhall that a worker could be "furnished" by a referral. In

Brown, the employer hired a migrant worker on the recommendation of a tobacco farmer, and hired a college student at the request of the student's parents. The plaintiffs asserted that these two employees were "temporary workers." *Id.* at 538. However, the court determined that in order for a worker to be a "temporary worker" within the scope of the exception, the worker must be "furnished" by the temporary help service such that he remained an employee of that temporary help service and did not become an employee of the insured. If the worker "is not 'furnished to' the entity by a temporary help service, that worker is simply the employee of that entity." *Id.* at 538. Again, merely learning of a worker's availability for employment—and even receiving a recommendation for a worker—does not rise to the level of "furnishing." There must be an element of control over the employment. *Empire Fire*, 739 F. Supp. 2d 746, 754. *See also Wausau*, 2007 WL 2900452 (Action Labor was undisputed third-party supplier of worker to insured where Action Labor paid worker's wages, provided worker with payroll documents and all income tax documentation, and contractually prevented the insured from offering employment to worker outside of the parties' contract).

Likewise, in *Allen*, the court concluded that a seasonal employee was not "furnished" to the employer because the employer "did not go to an employment agency, manpower service provider or any similar service to employ or to utilize [the employee's] services." As the employee "was not employed by anyone who lent or furnished him to [the employer] as an employee, the employee was not "furnished" and therefore, was not a "temporary worker." *Allen*, 850 A.2d 1047, 1057.

The Fifth Circuit Court of Appeals also considered a similar case in *Parra*, and concluded that an injured worker had not been "furnished to" the insured. 300 F. App'x 317. The plaintiff, Parra, was injured while working on an as-needed basis for the insured, Interamerican. The warehouse supervisor would contact Parra when temporary help was needed. Seeking to prove he was a "temporary worker," Parra argued that he was "furnished" to Interamerican by the warehouse supervisor. *Id.* at 319. The court concluded that the language "person who is furnished to you" required the involvement of a "third person rather than an agent or employee of the employer." *Parra*, 300 F. App'x at 319.

Similarly, in this case, Mr. Walker was the sole shareholder of The Family Center and owned the Farm with his wife. Although Mrs. Mendenhall claims that Mr. Mendenhall was "furnished" to Mr. Walker by The Family Center or by Mr. Fraley, an employee of The Family Center, The Family Center and Mr. Fraley are comparable to the warehouse supervisor in *Parra*. Just as the warehouse supervisor had no control over the worker, The Family Center and Mr. Fraley did not have control over Mr. Mendenhall such that he could be "furnished" to Mr. Walker. As such, The Family Center and Mr. Fraley are not proper parties to "furnish" Mr. Mendenhall such that he would be a "temporary worker" under the Hartford Policy.

Indeed, in other areas of the law, courts have recognized that an individual cannot furnish what he or she does not have the right to use or possess. *U.S. ex rel. Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co.*, 08-CV-1685 W AJB, 2010 WL 3489348 (S.D. Cal. Sept. 3, 2010). In *Ramona Equipment Rentals*, Ramona re-rented equipment

to a subcontractor on a construction site and sought payment for the re-rented equipment pursuant to a statute which allowed for recovery if Ramona "furnished" or "supplied" the re-rented equipment. *Id.* at *3-4. The court defined "furnish" as "to provide what is needed," and concluded that a plaintiff "must have some right in the thing being furnished or supplied," that is, "someone cannot receive compensation for supplying or furnishing equipment that they otherwise have no right to use or possess. *Id.* at *4. *See also Western Pacific L-C Corp. v. Tidewater Contractors, Inc.*, 2008 WL 906285 (E.D. Cal. 2008) (where individual failed to provide evidence that he had *any rights* in the property, he had not shown that he had "furnished" materials); *Apex Oil Co. v. Beldner*, 567 S.W.2d 336, 339 (Mo. Ct. App. 1978) (necessary element of the act of furnishing would include delivery of the oil to the purchaser's place of business); *Woods Constr. Co. v. Pool Constr. Co.*, 348 F.2d 687, 689 (10th Cir. 1965) (when plaintiff does not own materials that were furnished, plaintiff can only give whatever right he had acquired from the owner of the materials). These applications of "furnish" are in line with the analysis in *Empire Fire*, 739 F. Supp. 2d 746, providing that one cannot "furnish" a worker without the power to control the worker's employment.

Evaluating the interpretation of "referral" in other types of cases further clarifies that The Family Center merely referred Mr. Mendenhall to Mr. Walker. In *Villalobos v. N. Carolina Growers Ass'n, Inc.*, 252 F. Supp. 2d 1, 12 (D. P.R. 2002), the court noted that the relevant definition of "referral" was "the act of bringing to the attention of an employer an applicant or group of applicants who are available for specific job openings." This is exactly what occurred in this case. Mr. Fraley brought Mr.

Mendenhall's employment application to the attention of Mr. Walker and advised that Mr. Mendenhall "would be good" for the position, presumably a driver/mechanic position. Mr. Walker then hired Mr. Mendenhall to work on the Farm.

Similarly, in *Com. of Pa. v. Local 542, Int'l Union of Operating Engineers*, 619 F. Supp. 1273, 1276 (E.D. Pa. 1985) *aff'd sub nom. Com. of Pa. v. Local Union 542, Int'l Union of Operating Engineers*, 807 F.2d 330 (3d Cir. 1986), the court defined "referral" as "[hiring hall] dispatches by the union members which result in offers of employment from an employer-contractor," regardless of whether the employment offer is accepted. See also, *Gavan*, 242 S.W.3d 718 (court acknowledges worker had been referred from union hall in the past, but noted union membership is insufficient to meet "furnished to" requirement). In this case, The Family Center and Mr. Fraley simply introduced Mr. Walker and Mr. Mendenhall which resulted in Mr. Walker making an offer of employment to Mr. Mendenhall.

Also of note, *Lane v. Residential Funding Corp.*, No. C96-3331 MMC, 2000 WL 1448582 (N.D. Cal. June 6, 2000) cited regulations promulgated by the Department of Housing and Urban Development which defined "referral" as "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service." *Lane*, 2000 WL 1448582, *2. Mr. Fraley provided an oral statement directed to Mr. Walker which had the effect of influencing Mr. Walker to hire Mr. Mendenhall.

The distinction between "furnish" and "referral" becomes important because there are an endless number of ways in which an employer can learn of and hire a worker. As noted in a recent article analyzing the "temporary worker" exception,

> The reality of the workplace is that many employers obtain their workers either in response to advertisements that they place in a newspaper or on the Internet in response to recommendations from people they know or in response to people who come to them directly seeking employment. These people are classic employees to whom the exclusion is intended to apply.

Steven P. Perlmutter, *The Law of "Leased Worker" and "Temporary Worker" Under a CGL Policy*, 45 Tort Trial & Ins. Prac. L.J. 761, 785 (2010) (Attached hereto as Respondent's Appendix). Mr. Mendenhall simply applied for a job with The Family Center, and while pursuing that opportunity, was referred to a different job with Mr. Walker. The Family Center was not in the business of supplying farm workers to others and did not have authority or control over Mr. Mendenhall such that it could furnish, provide, or supply his labor to Mr. Walker. Nor was Mr. Mendenhall furnished by an employment agency, temporary staffing agency, manpower service, any other entity in the business of supplying workers, or by any person or entity with control over his employment. As such, Mr. Mendenhall was not "furnished" to Mr. Walker and was not a "temporary worker."

Restricting the ability to "furnish" a temporary worker to those who have the authority and control to do so is important in order to prevent employers from claiming a

worker was "furnished" when the worker was really merely "referred." The *Gavan* court found the reasoning employed by the Colorado Court of Appeals in *Carl's Italian Restaurant* noteworthy on this issue:

> If a person could furnish himself to an employer, every worker could choose to 'furnish himself' or be told to 'furnish himself' by his employer, and become a 'temporary worker' whenever such a classification would be convenient.

Gavan, 242 S.W.3d at 721 (quoting *Carl's Italian Restaurant*, 183 P.3d at 639). This is likewise a concern in the case at bar, where Mrs. Mendenhall argues that Mr. Mendenhall was "furnished" by Mr. Walker's other business to Mr. Walker's farm simply because the business referred Mr. Walker to the farm. Interpreting "furnished to" as proposed by Mrs. Mendenhall would prompt claims that one was "furnished" by a friend, by a relative, by one's own business, or by a referral. *See e.g. Dorpinghaus*, 2007 WL 313280 (workers not "furnished" by friend or by own businesses); *Monticello Insurance Co.*, 836 N.E.2d 1112 (sole proprietorship could not furnish owner); *Brown*, 184 S.W.3d 528 (farmer who recommended worker to landscaper did not "furnish" worker; parents who requested job for son did not "furnish" worker); *Parra*, 300 F. App'x 317 (worker could not be "furnished" by insured's warehouse supervisor).

Irrespective of whether the policy required the furnishing third party to be an employment agency, Mr. Fraley's and The Family Center's actions in introducing Mr. Mendenhall and Mr. Walker do not reach the level necessary for a third party to "furnish"

a temporary worker. As such, Mr. Mendenhall was an employee and not a "temporary worker" as defined in the Hartford Policy.

c. Other cases support the proposition that one must have authority or control over the worker in order to "furnish" the worker to an employer.

Finally, although *Brown*, 184 S.W.3d 528; *Dorpinghaus*, 2007 WL 313280; *De Vesta*, 511 F. Supp. 2d 231; *Allen*, 850 A.2d 1047; and *Empire Fire*, 739 F. Supp. 2d 746 specifically address the degree of control required before an individual or entity can "furnish" a worker, there are additional cases which do not reach the specific issue of the nature of the third party that must be involved in "furnishing" the worker to the insured, but indicate support for Hartford's position. See e.g. *Meeks*, 540 F.3d at 876; *Mandrill*, 243 Fed. Appx. 961; and *Rhiner*, 208 P.3d 1043, 1045. See also, Steven P. Perlmutter, *The Law of "Leased Worker" and "Temporary Worker" Under a CGL Policy*, 45 Tort Trial & Ins. Prac. L.J. 761, 766 (2010) (concluding that the majority line of cases holds that to be a temporary worker, the worker must be furnished to the client company by an employment-type agency) (Attached hereto as Respondent's Appendix).

In *Meeks*, although the court only addressed the issue of self-furnishing, it cited *Dorpinghaus* in support of its conclusion, specifically quoting the following as evidence of support: "[A] worker is not furnished to an insured unless a third party-*typically a staffing agency*-has been involved in providing or supplying the worker to the insured." *Meeks*, 540 F.3d at 876 (emphasis added) (quoting *Dorpinghaus*, 2007 WL 313280, at *4). Although dicta, the citation selected by the court in *Meeks* suggests that the 8th

Circuit supports the interpretation of "furnished" to require a third party with authority and control to furnish or supply workers to an employer—such as a staffing agency. See also *Mandrill*, 243 Fed. Appx. 961, 967 (characterizing split among courts, noting the "majority" of courts have held that "furnished to" "unambiguously requires the involvement of a third party, *such as a temporary staffing agency*" (emphasis added)).

Likewise, in *Rhiner*, the court characterized the question before it as whether "a person who is furnished to you" "encompasses a worker who plaintiff hired directly, *without the use of an employment agency or any other entity that supplies the worker*." 208 P.3d 1043, 1045 (emphasis added). Even though the court needed only to conclude that the worker could not furnish himself, the court in *Rhiner* notes that it agrees with the insurance company that there is only one plausible meaning, referencing the employment agency and suggesting that it would require a third-party entity with control over the worker to "furnish" the worker.

Therefore, although a few courts have addressed the precise issue in this case, dicta from cases considering related questions indicates that many courts would require an entity have control over a worker in order to be able to "furnish" the worker to another.

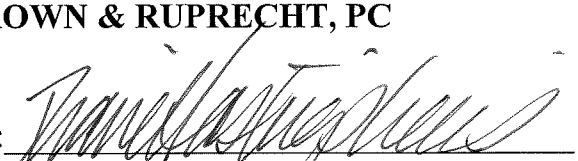
D. CONCLUSION

In conclusion, the trial court correctly concluded that Mr. Mendenhall was an employee of the Walkers and was not a "temporary worker" as defined in the Hartford Policy. Mr. Mendenhall was at best referred to Mr. Walker and was not "furnished" by an employment agency, temporary staffing agency, manpower service provider, any other

entity in the business of supplying workers, or any entity with the ability to control Mr. Mendenhall's employment. Hartford respectfully requests that this Court affirm the trial court's entry of summary judgment in its favor in its entirety.

Respectfully submitted,

BROWN & RUPRECHT, PC

By: 

John L. Hayob, Mo. # 24518
jhayob@brlawkc.com
Diane Hastings Lewis, Mo. #61143
dlewis@brlawkc.com
911 Main, Suite 2300
Kansas City, Missouri 64105-5319
(816) 292-7000 Telephone
(816) 292-7050 Facsimile
ATTORNEYS FOR RESPONDENT PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent's Substitute Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,274, exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

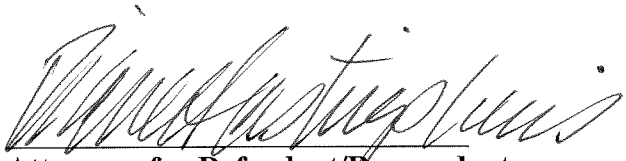
BROWN & RUPRECHT, PC

By: _____
John L. Hayob, Mo. # 24518
jhayob@brlawkc.com
Diane Hastings Lewis, Mo. #61143
dlewis@brlawkc.com
911 Main, Suite 2300
Kansas City, Missouri 64105-5319
(816) 292-7000 Telephone
(816) 292-7050 Facsimile
ATTORNEYS FOR RESPONDENT PROPERTY AND CASUALTY INSURANCE COMPANY OF HARTFORD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has, on the 23rd day of January, 2012, delivered a copy of this brief via e-filing and via U.S. mail to:

Mark E. Goodman
Amy L. Fehr
Capes, Sokol, Goodman & Sarachan, P.C.
7701 Forsyth Blvd., Twelfth Floor
St. Louis, Missouri 63105



Attorneys for Defendant/Respondent