SC #95093

SUPREME COURT OF MISSOURI

JEANIE VASSEUR, et al. ,

Respondents,

v.

SHELTER MUTUAL INSURANCE CO.,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF TEXAS

COUNTY, MISSOURI, No. 11TE – CC00087

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS,

SOUTHERN DISTRICT #SD 33552

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Respondents concur that this appeal is properly lodged in the Supreme Court pursuant to this Court's Rule 83.04 and its Mandate of Transfer on September 22, 2015.

STATEMENT OF FACTS

Finding Appellant's Statement of Facts incomplete, Respondents supply the following additions and corrections.

The trial court ruled the issues of the farmowners policy liability and medical payments coverages on cross-motions for summary judgment with Joint Stipulated Facts numbered 1 through 41 inclusive (L.F. 426- 436). Because this Court's *de novo* review accepts the facts as presented to the trial court, the relevant facts for purposes of Appellant's Points I and II are those set forth in items 1-41 inclusive, with their referenced exhibits.

After the court determined that there were contested issues of material facts and denied summary judgment to all parties as to the issues of uninsured motorist, accidental death, and medical payments coverages under the three auto policies, the parties filed trial briefs. A bench trial was held on the remaining issues on the auto policies, as recited in the judgment appealed from on August 22, 2014 (L.F. 824-827).

At the bench trial, Appellant offered, and the Court received into evidence without objection, the entire Joint Stipulated Facts, ¶¶1 - 84 inclusive (Tr. 3-4; L.F. 426 et seq.), as well as the Highway Patrol report on the fatal incident, the relevant policies, the

owner's manual for the 2006 Honda TRX 50TM ATV operated by Matthew Vasseur, and three dictionary definitions of the terms "road" and "roadway" (Tr. 3-5).

The court allowed Shelter to file a Second Amended Petition which, according to Appellant's counsel, "takes into [account] this Court's interlocutory order on the parties' summary judgment motions previously filed and asserts an additional defense based on the law of the case as it stands with respect to that order" (Tr. 6). The Second Amended Petition alleged that if Matthew Vasseur was entitled to liability coverage under the farmowners policy, the ATV was not "uninsured" and, thus, no uninsured motorist coverage was available under the auto policies. The Vasseurs then filed their Answer to the Second Amended Petition in open court (Tr. 6).

Shelter called no witnesses, standing entirely on the pleadings, the stipulated facts, and the exhibits (Tr. 7). Although Appellant's Statement of Facts makes no mention of any evidence having been presented by the Vasseurs at the trial, the Vasseurs introduced Exhibits A through G, comprising Shelter's Amended Response to Requests for Admissions concerning use of ATVs and various official publications depicting and explaining the operation of ATVs in National Forest lands (Tr. 9). In its Amended Responses to Requests for Admissions, Shelter admitted:

"1. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on a hard flat surface.

2. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on a hard flat surface for vehicles to travel on.

3. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on a hard flat surface for vehicles to travel on maintained by a governmental entity or agency including its adjacent right of ways.

4. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on a hard flat surface for vehicles, people and animals to travel on.

5. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on a hard flat surface for vehicles, people and animals to travel on maintained by a governmental entity or agency including its adjacent right of ways.

6. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on trails in state forests.

7. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on trails in national forests.

8. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on trails in state forests maintained by a governmental entity or agency.

9. That the 2006 Honda TRX 500 TM all terrain vehicle was originally designed for operation on trails in national forests maintained by a governmental entity or agency." (L.F. 810-11).

The Vasseurs also asked the court to take judicial notice of R.S.Mo. § 307.198, governing required equipment on an ATV. (Tr. 8). Section 307.198 R.S.Mo. provides in relevant part,

"**All-terrain vehicles, equipment required – penalty**

1. Every all-terrain vehicle, except those used in competitive events, shall have the following equipment:

(1) A lighted headlamp and tail lamp which shall be in operation at **any time in which an all-terrain vehicle is being used on any street or highway in this state** pursuant to section 304.013, RSMo;

(2) An equilateral triangular emblem, to be mounted on the rear of such vehicle at least two feet above the roadway **when such vehicle is being operated upon any street or highway** pursuant to section 300.348 RSMo, or 304.013, RSMo. . .” (emphasis ours)

Vasseurs then called one witness, Brian Powers, a Honda ATV dealer and personal owner/operator of the same Honda make and model involved in the accident underlying this litigation. Powers’ testimony included the following:

“Q. Tell the Court your background with regard to sales of Honda ATVs.

A. I’ve been a Honda dealer for almost – well, until 20 – December 31st of 2009, I was a dealer for 16 years with Honda.”

(Tr. 10-11)

“Q. What types of license did you have to have to sell ATVS?

A. Specific licenses, required to have a Missouri motor vehicle dealer license is the main requirement. Of course, you’ll have your county and city license as well, retail sales license, things of that nature.”

(Tr. 11)

"Q. Could you tell the Court how many Honda ATVs you've sold over your 18 years in the business?

A. Close to 20,000."

(Tr. 11)

"Q. Okay. Did you serve on any special committees or counsels for Honda?

A. Yes. I was on the Honda Counsel of Excellence for nine years, which is a – it's kind of a privilege and you are invited to join the counsel, kind of be a part of their business going forward.

Q. Okay. Did you receive regular memorandums from Honda on a daily basis?

A. Daily."

(Tr. 12)

"Q. Did you have to have a thorough understanding of the use of the product and how the product was designed and how it was to be used?

A. Yes, absolutely.

Q. Have you had any experience, Mr. Powers, in connection with the design of an ATV?

A. I have."

(Tr. 12)

"Q. Okay. Are ATVs, like the Honda ATV that's at issue in this case, are they designed for use on – on roadways if we define roadways to include the adjacent right of way?

A. Absolutely.

Q. Commonplace to see ATVs being ridden on the adjacent right of ways for highways in this state?

A. Yes, and in some cities they're on city streets.

Q. Have you operated an ATV like the Honda ATV on a city street?

A. Yes, I have, with a city permit."

(Tr. 13)

"Q. You purchased a city permit, then, to be able to operate that ATV right down the city street just as other motorists might drive a car or pickup down the city street?

A. That's correct, and I believe you can still do it in Cabool here in Texas County.

Q. Are the ATVs originally designed to be used on streets?

A. They're - they're designed to be used on roads and trails. Yes, I would say they are.

Q. Most of the time they come out with a soft kind of a tread, is that right, Mr. Powers?

A. That's correct.

Q. Are ATVs that are used on streets, on paved surfaces, did you commonly replace the tires with street tires?

A. Often we would put on a harder tread, Department-of-Transportation approved hard tread for street use because the tire that's on them right now, most of your government maintained roads and trails now are hard, compact dirt, and the - the tire that's on them right now is really designed for the - those types of roads and

trails. However, there is a street tire available for them, and we have put many, many street kits on ATVs, so yes."

(Tr. 14)

"Q. Okay. And you felt comfortable doing them and replacing the tires knowing full well that the use would be on a public street?

A. That's specifically what the wheel and tire was made for."

(Tr. 15)

"Q. Would you yourself have operated and obtained city permits to operate an ATV on city streets if you thought that the ATV was not designed for use on public roadways?

A. No, sir."

(Tr. 15)

"Q. Do you consider, in the 20,000 ATVs that you've sold over about 18 years, that the ATV was, in fact, a motor vehicle designed for use on public roadways?

A. According to the motor vehicle dealer manual in the State of Missouri, in RSMo, I believe it's Section 300, the Missouri Motor Vehicle Commission, Department of Revenue states the all-terrain vehicle is a motor vehicle and they are – they are – the only government body that controls the licensing of all-terrain vehicles is the Motor Vehicle Commission through the Department of Revenue.

They only govern motor vehicles. That's it. They don't govern lawn mowers or anything, you know, utility vehicles. They govern motor vehicles.

This document is open for anyone to read on the Department of Revenue's site. If you look it up, it's called the Motor Vehicle Dealer Manual and it specifically states what is and is not a motor vehicle."

(Tr. 21-22)

"Q. Okay. And you – you believe – it's your opinion that they are designed for and were originally designed for use on public roadways, including the adjacent right of ways and the trails around our State parks –

A. I do."

(Tr. 22)

"Q. Did your business offer insurance when you sold Hondas previously?

A. What type of insurance?

Q. Liability insurance.

A. Um, we often sent out – we referred our – we didn't offer specifically. We did refer them down to some of the insurance agencies for motor vehicle coverage and your company, I believe, Shelter was one of them."

(Tr. 24)

"Q. Did you – did you personally meet with any Shelter representative about the types of insurance policies they were selling on these ATVs, specifically the type that Mr. Vasseur was driving?

A. Actually, I had insurance on that specific vehicle that I owned through Shelter Insurance.

Q. And it's your test – and was it an in-line ATV like –

A. It's the exact same ATV.

Q. And it's your testimony to this Court that you had an automobile liability policy?

A. I had all-terrain vehicle, motor vehicle liability – or liability policy through Shelter Insurance for the ATV.

(Tr. 24-25)

The case was taken under advisement and judgment was entered in favor of Respondents on August 22, 2014. (L.F. 824-827)

POINTS RELIED ON

I. The trial court properly granted summary judgment for the Vasseurs under the farmowner policy Liability Coverage E, because no household exclusion appears in the Applicable Exclusion Group "A" governing policies insuring both Liability (Coverage E) and Medical Payments (Coverage F), and the Vasseur policy contains both coverages; because Shelter's argument that Group A are additional exclusions that apply to both Personal Liability and Medical Payments Coverage results in irreconcilable conflicts and make no sense when reading the policy as a whole; and because if Shelter intended to exclude bodily injury to any insured under Coverage E – Personal Liability, they should have said so in their Insuring Agreement as they did in their Coverage F – Medical Payments to Others Insuring Agreement.

Principal Supporting Authorities

Benahmed v. Houston Cas. Co., 486 Fed.Appx. 508 (6th Cir. 2012)

Shiddell v. Bar Plan Mutual, 385 S.W.3d 478 (Mo. App. W.D. 2012)

Wasson v. Shelter Mut. Insur. Co., 358 S.W.3d 113 (Mo. App. 2012)

II. Without waiving their above arguments as to the household exclusion, the Respondents agree with Appellant's argument that because the Insuring Agreement for Coverage F – Medical Payments to Others limits the scope of the coverage to those other than insured, the trial court erred in granting summary judgment to Respondents on the issue of medical payments coverage

III. The trial court did not err in granting judgment for the Vasseurs on their uninsured motorist claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

Principal Supporting Authorities

In re Moore, 251 B.R. 380 (W.D. Mo. 2000)

Roberts v. Country Mutual Ins. Co, 596 N.E. 2d 185 (Ill. App. 1992)

IV. The trial court did not err in granting judgment for the Vasseurs on their accidental death claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of

ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

V. The trial court did not err in granting judgment for the Vasseurs on their medical payments claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

VI. The trial court properly entered judgment in favor of the Vasseurs on their uninsured motorist and farmowners coverage because the ATV was an "uninsured motor vehicle," as defined by the auto policies, in that Matthew Vasseur was not an insured under a motor vehicle liability policy, the ATV was not insured under any motor vehicle liability policy, and the farmowner liability coverage is not within the scope of Missouri's uninsured motor vehicle or financial responsibility statutes.

Principal Supporting Authorities

Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137 (Mo. banc 1980)

Hendrickson v. Cumpton, 632 S.W.2d. 512 (Mo.App.1982)

Stotts vs. Progressive Classic Ins. Co., 118 S.W3d 655 (Mo. App. W.D. 2003)

ARGUMENT

I. The trial court properly granted summary judgment for the Vasseurs under the farmowner policy Liability Coverage E, because no household exclusion appears in the Applicable Exclusion Group "A" governing policies insuring both Liability (Coverage E) and Medical Payments (Coverage F), and the Vasseur policy contains both coverages; because Shelter's argument that Group A are additional exclusions that apply to both Personal Liability and Medical Payments Coverage results in irreconcilable conflicts and make no sense when reading the policy as a whole; and because if Shelter intended to exclude bodily injury to any insured under Coverage E – Personal Liability, they should have said so in their Insuring Agreement as they did in their Coverage F – Medical Payments to Others Insuring Agreement.

Standard of Review

Shelter's Points I and II challenge the trial court's granting of summary judgment to the Vasseurs under the liability and medical payments coverages of the farmowner policy. Shelter had sought a declaratory judgment that these coverages fell within a "household exclusion." Because Exclusion Set "A," governing policies with both liability and medical payments coverages, contains no household exclusion (L.F. 432-34), and the Vasseur policy included both coverages, the trial court found that summary judgment should be entered in favor of Respondents.

Under Missouri law, the "Courts are not to interpret the provisions of an insurance policy in isolation, but rather are to examine the policy as a whole." *Wasson v. Shelter*

Mut. Insur. Co., 358 S.W.3d 113 (Mo. App. 2012). Whether an insurance policy is ambiguous is a question of law. *Todd v. Missouri United School lns. Council*, 223 S.W.3d 156, 160 (Mo. banc 2007) (quoting *Martin v. U.S. Fidelity and Guar.Co.*, 996 S.W.2d 506,508 (Mo. banc 1999)). "A policy is ambiguous if 'there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy.'" *Merlyn Vandervott Investments, PLC v. Essex Ins. Co., Inc*., 309 S.W.3d 333, 336 (Mo. App. S.D. 2010) (quoting *Seeck v. Geico Gen.Ins. Co*., 212 S.W.3d 129,132 (Mo. banc 2007).

Language in an insurance policy is ambiguous if it is reasonably open to different constructions, and the language used will be viewed in the light of the meaning that would ordinarily be understood by a layman who bought and paid for the policy." *Hobbs v. Farm Bureau Town & Country Ins. Co.*, 965 S.W.2d 194,197-98 (Mo. App. E.D. 1998). "If the [policy] is ambiguous, it will be construed against the insurer." *Peters v. Employees Mut. Cas. Co*., 853 S.W.2d 300,302 (Mo. banc 1993), *Hartford Underwriters Ins. Co. v. Ledbetter*, 353 S.W.3d 645, 650 (Mo. App. S.D. 2011).

Where an insurer seeks to deny coverage based on a policy exclusion, the burden of establishing that the exclusion applies lies with the insurer." *Shiddell v. Bar Plan Mutual*, 385 S.W.3d 478, 483 (Mo. App. W.D. 2012). A policy exclusion will be "strictly construed against the insurer, and if an exclusionary clause is ambiguous, the court must adopt the construction favorable to the insured." *Rice v. Shelter Mutual Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009). In matters of liability and uninsured motorist coverage, the insured's reasonable expectations are controlling. *Assurance Co. of America v.*

Security Ins. Co., 384 S.W.3d 224, 235 (Mo. App. E.D. 2012) (liability); *Rice*, *supra* at 46.

Respondents agree that as to Point I, the granting of summary judgment is reviewed *de novo* on appeal.

The Applicable Exclusion Set Contains No Household Exclusion

As the trial court correctly noted,

"Section II of the farmowner policy provides either Coverage E —PERSONAL LIABILITY, Coverage F —MEDICAL PAYMENTS TO OTHERS, or both Coverage E and Coverage F. (Ex.3 and JSF p.25). Thus, there are three options of coverage under Section II. The insured can choose to purchase:

(1) Both Coverage E and F or;

(2) Just Coverage E and not Coverage F or;

(3) Just Coverage F and not Coverage E. (Ex.#3, p. l).

Under Section II there are also three groups of exclusions, to-wit:

(1) the first group of eight exclusions which states that "*Under Personal Liability and Medical Payments to Others, we do not cover*," (hereinafter referred to as the Group A exclusions);

(2) the second group of nine exclusions which states that "*Under Personal Liability, we do not cover*," (hereinafter referred to as the Group B exclusions) and

(3) the third group of five exclusions which states that "*Under Medical Payments to Others, we do not cover*," (hereinafter referred to as the Group C exclusions).

(Ex.#3,p. 14-15 and JSF p.30)."

(L.F. 554-555, referencing L.F. 432-34).

Shelter argues that, "The farmowners policy includes multiple exclusions that apply to ***both*** Coverage E (Personal Liability) and Coverage F (Medical Payments). The policy also states exclusions that apply to Coverage E ***only***, and other exclusions that apply to Coverage F ***only***." (App.Br. 16, emphasis added). Shelter goes on to argue that with respect to what they call the "third group applicable to both Medical Payments and Personal Liability Coverage", (referred to herein as the Group A exclusions) that "the policy consolidates additional exclusions that apply to both Personal Liability and Medical Payments Coverage." (App. Br. 17) Logically, therefore, accepting Shelter's own argument, if the household exclusion was one of those "additional exclusions that apply to both Personal Liability and Medical Payments Coverage," that exclusion would necessarily appear in Group A, but would be absent from Groups B and C. Instead, the exclusion is present in B and C, yet absent from A.

That is precisely the problem which the trial court had with Shelter's policy, wherein the trial court found that, "Shelter's interpretation only makes sense if all of the exclusions common to both Coverages E and F are set forth in Group A, and are not included in either Group B or Group C. However, this is not so with respect to the

specific exclusion litigated in the case at bar; i.e. the household exclusion." (Order, p. 6; L.F. 557)

It should be noted at the outset, that Shelter has never explained why it was necessary to have two different household exclusions, one for Coverage E and another for Coverage F. Though at first glance the two exclusions may appear different, they are in fact the same. By comparison, the two household exclusions read as follows:

Coverage E – Personal Liability Exclusion	**Coverage F – Medical Payments to Others Exclusion**
9. **Bodily injury** to: (a) **you:** (b) **your** relatives residing in **your** household; and (c) any other person under the age of 21 residing in **your** household who is in **your** care or the care of a resident relative.	2. **bodily injury** to any **insured** under parts (a), (b) and (c) of definition of **insured**.

(L.F. 64)

When one then goes to the definition of any **insured** under parts (a), (b) and (c), the policy reads:

> 8. "**Insured**" means:
>
> (a) **you**;
>
> (b) **your** relatives residing in **your** household; and
>
> (c) any other person under the age of 21 residing in **your** household who is in **your** care or the care of a resident relative.

(L.F. 51)

The trial court correctly found that the household exclusion set forth in Group B is identical to the household exclusion set forth in Group C. (L.F. 558) Since by Shelter's own argument and acknowledgment, "the policy consolidates additional exclusions that apply to both Personal Liability and Medical Payments Coverage," the trial court also correctly found, "If the intent of the policy is to list the common exclusions under Group A, then the household exclusion would have been listed in Group A and not listed in either Group B or Group C." (L.F. 558) Shelter cannot explain why, if the household exclusion was intended to apply to ***both*** the liability and med pay coverages of the farmowners policy, as they argue no such exclusion was placed within Group A, yet the same identical household exclusion was set forth in Groups B and C.

As found by the Court, "The choice of Shelter to list the household exclusion in the Group B exclusions and again in the Group C exclusions, and to omit it in the Group A exclusions, lends credence to the policy interpretation advanced by the Vasseurs, that a policyholder purchasing both coverages E and F gains the benefit of a narrower set of policy exclusions." (Order, p. 7; L.F. 558)

Respondents' research has revealed shockingly little law where multiple groups of exclusions was discussed or even an issue on appeal. Such was the situation, however, in *Benahmed v. Houston Cas. Co.*, 486 Fed.Appx. 508 (6th Cir. 2012) (applying Ohio law). As stated by the court,"[p]olicy exclusions must be clear to combat the general presumption that a claim is included in a policy. **[I]n order to defeat coverage, the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question.**" Id. at 515 (citations omitted; emphasis added). In *Benahmed*, as here, multiple exclusion sets purportedly applied to various coverages in various ways, but were susceptible of various interpretations, none of which was "blatantly incorrect" while all were "plausible." Owing to this ambiguity, the court construed the exclusions against the drafter. Id. at 516.

Shelter's argument that Group A are additional exclusions that apply to both Personal Liability and Medical Payments Coverage results in irreconcilable conflicts and make no sense when reading the policy as a whole

As discussed above, if Shelter's argument that Group A are additional exclusions that apply to both Personal Liability and Medical Payments Coverage, then why wasn't the household exclusion, which they argue applied to both Coverages E and F, not included in Group A? The household exclusion is nowhere to be found in Group A. In fact, ***other*** exclusions appearing in Group B and Group C ***do*** also appear in Group A. By

way of example, please see the "farm employee" exclusion and the "professional services" exclusion.

The "farm employee" exclusion appears in Group A and Group B, with different wording and different meaning in each. By way of example, the "farm employee" exclusion in the two different groups reads as follows:

1) Group A, paragraph 2- "**bodily injury** to a **farm employee** other than an **insured farm employee,** arising out of and in the course of employment by an insured."

2) Group B, paragraph 6 – "sickness, disease or death of a **residence employee** or **farm employee** unless written claim is made or suit is brought within 36 months after the end of the policy term."

(Exhibit 3, pgs. 14-15)

Under Group A, **bodily injury** (which by policy definition includes death) to a **farm employee** is excluded. By contrast, however, under Group B, the death of a farm employee is excluded only if a written claim or suit is not brought within 36 months after the end of the policy term. The two different **farm employee** exclusions are in direct conflict with one another. So which exclusion applies?

Applying Shelter's interpretation that the third group (Group A) are additional exclusions that apply to both Personal Liability and Medical Payments coverage (App. Br. 17), the Group A exclusion would have to then be added to Group B, creating an irreconcilable conflict. Shelter's interpretation cannot be right, for it creates an internal conflict which cannot be resolved. The only way that anyone, especially an ordinary

consumer, could reconcile the irreconcilable disparity between the Group A farm employee exclusion and the Group B farm employee exclusion would be that if they purchased both Personal Liability and Medical Payments Coverage, the Group A farm employee exclusion applied and if they purchased Personal Liability only, the Group B farm employee exclusion would apply.

The same conflict appears with respect to the "professional services" exclusion which appears in Group A and Group C. By way of example, the disparate professional services exclusionary provisions are as follows:

> Group A, paragraph 3 – "**bodily injury** or **property damage** arising out of the rendering or failing to render professional services."
>
> Group C, paragraph 4 – "any person while on the **insured premises** because a **business** is conducted or professional services are rendered on the **insured premises**."

(Exhibit 3, pgs. 14-15)

The Group A professional services exclusion is an outright, unqualified, unrestricted exclusion period. Again by contrast, the Group C professional services exclusion would apply only while a person was on the insured premises because of a business which was being conducted or professional services being rendered on the insured premises. So again, which exclusion would apply?

Again, applying Shelter's argument that with the "third group applicable to both Medical Payments and Personal Liability Coverage. . . consolidates additional exclusions that apply to both Personal Liability and Medical Payments Coverage" (App. Br. 17)

makes no sense. To follow Appellant's argument would be to have two irreconcilable professional services exclusions to the medical payments coverage – one an outright unqualified exclusion and the other to apply only when professional services are being rendered on the insured premises. Appellant's interpretation, therefore, cannot be correct.

The only way to reconcile the irreconcilable conflict between the wording of the two different "professional services" exclusions appearing in Groups A and C would be that for those purchasing both Personal Liability and Medical Payments to Others coverage, it would be the Group A exclusion which applied, and for those insureds who purchased Medical Payments only, but not Personal Liability coverage, it would be the Group C professional services exclusion which applied.

Reading the policy as a whole, which we must under *Wasson*, *supra*, with three options for coverage, and three groups of exclusions, the only logical interpretation an ordinary consumer could reach would be that if both coverages were purchased, the Group A exclusions apply, if Personal Liability only is purchased, the Group B exclusions apply, and if Medical Payments only is purchased, the Group C exclusions apply. Because the policy must be read as a whole, that is the only interpretation which makes sense because Appellant's interpretation creates internal conflicts which cannot be resolved.

At the very least the policy is ambiguous. Since the ambiguity pertains to a policy exclusion, the burden of proof is on Appellant, and the Court must adopt the construction

favorable to the insured and against the insurer. *Peters, Ledbetter, Shiddell, Rice,* and *Benahmed, supra.*

If Shelter truly intended that the Group A exclusions were common to both Coverages E and F, and simply in addition to Groups B and C, then there were any number of plain and simple fixes available to the drafter, Shelter, to have easily remedied the confusion. By way of example, fixes would include the following:

Fix #1 – The use of two groups of exclusions, rather than three

Rather than using three different groups of exclusions for two different coverages, Shelter should have used two groups of exclusions for two different coverages. All Shelter had to do was have one group of exclusions which applied to Coverage E – Personal Liability and another groups of exclusions which applied to Coverage F – Medical Payments to Others. Had that been done, an ordinary lay person who had a liability claim could simply read all of the exclusions pertaining to liability coverage and, likewise, an insured making claim for medical payments coverage could read the list of exclusions applicable to medical payments coverage. Simply put, there would be one list of exclusions for the Personal liability coverage and a second list of exclusions for the Medical Payments to Others coverage. The current Group B Exclusions for Personal Liability coverage consisting of 9 paragraphs would simply add the Group A list consisting of 8 exclusions at the end, renumbered as 10-17. Likewise, the current Group

C exclusions for Medical Payments to Others consisting of 5 paragraphs would also add the Group A list of 8 paragraphs at the end, renumbered as paragraphs 6-13.[1]

Fix #2 – The use of "in addition to the above exclusions" language

If, as argued by Shelter, the Group A exclusions were "additional exclusions which applied to both Personal Liability and Medical Payments Coverage" (App. Br. 17), the plain and simple use of "in addition to the above exclusions" language could have remedied the problem. By way of example, if Shelter wanted to use three groups of exclusions for the two different coverages, they could and should have used "in addition to the above exclusions" language as illustrated by the following:

Current Group B language	**Use of "in addition to the above exclusions" language**
Under Personal Liability **we** do not cover. . .	Under Personal Liability, *in addition to the above exclusions*, **we** do not cover. . . OR

[1] For this fix and the other two examples set forth hereinafter, Shelter would need to resolve the internal conflicts and disparity in the two different "farm employee" exclusions in Groups A and B and the two different "professional services" exclusions set forth in Groups A and C.

	In addition to the above exclusions, Under Personal Liability, **we** do not cover. . .

Likewise, the same fix as to Coverage F Medical Payments Coverage to Others would be as follows:

Current Group C language	**Use of "in addition to the above exclusions" language**
Under Medical Payments to Others **we** do not cover. . .	Under Medical Payments to Others, *in addition to the above exclusions*, **we** do not cover. . . OR *In addition to the above exclusions*, Under Medical Payments to Others, **we** do not cover. . .

Fix #3 – The use of "the following exclusions are added and will also apply" language used in their own FO-3 EARTHQUAKE ENDORSEMENT

If, as argued by Shelter, the Group A exclusions were "additional exclusions that apply to both Personal Liability and Medical Payments coverage" (App. Br. 17), all Shelter had to do was to use the exact same language they used in their own FO-3 **EARTHQUAKE** ENDORSEMENT where their policy states:

> FO-3 **EARTHQUAKE** ENDORSEMENT
>
> * * *
>
> **"EXCLUSIONS – SECTION I".** The following exclusions are added and will also apply to **claims** made under this endorsement:
>
> ADDITIONAL EXCLUSIONS UNDER SECTION I
>
> **We** do not cover. . .
>
> * * *
>
> B-422.34-B

(L.F. 76)

Shelter knew how to do it. If they wanted to add additional exclusions, all they had to do under **EXCLUSIONS – SECTION II**, was to track the same language they used in "**EXCLUSIONS – SECTION I**" in their "**EXCLUSIONS – SECTION II**" as follows:

EXCLUSIONS – SECTION II

Under Personal Liability, *the following exclusions are added and will also apply to* ***claims*** *made under this endorsement:*

ADDITIONAL EXCLUSIONS UNDER COVERAGE E – PERSONAL LIABILITY

We do not cover. . .

Likewise, Shelter would do the same regarding their Medical Payments to Others Coverage, stating:

EXCLUSIONS – SECTION II

Under Medical Payments to Others, *the following exclusions are added and will also apply to* ***claims*** *made under this endorsement:*

ADDITIONAL EXCLUSIONS UNDER COVERAGE F – MEDICAL PAYMENTS TO OTHERS

We do not cover. . .

If Shelter Intended to Exclude Bodily Injury to any Insured Under Coverage E – Personal Liability, They Should have said so in Their Insuring Agreement as They Did in Their Coverage F – Medical Payments to Others Insuring Agreement

As Appellant argues under Point II, the Insuring Agreement for Coverage F-Medical Payments to Others expressly provides that Shelter does not cover injury to its **insureds**. Shelter correctly points out the following language from the Insuring Agreement as to Coverage F – Medical Payments to Others,

> **COVERAGE F – MEDICAL PAYMENTS TO OTHERS**
>
> **We** will pay the reasonable expenses incurred for necessary medical, surgical, x-ray and dental services, prosthetic devices, eye glasses, hearing aids and pharmaceuticals, and ambulance, hospital, licensed nursing and funeral services. . .
>
> * * *
>
> **We** do not cover injury to **insureds** or residents of the **insured premises**, except a **residence employee** or **insured farm employee.**

(Appellant's Brief, p. 20)

By comparison, however, the Insuring Agreement as to Coverage E – Personal Liability conspicuously fails to incorporate the language, "**We** do not cover injury to **insureds** or residents of the **insured premises**, except a **residence employee** or **insured farm employee**" or anything even close to it.

Clearly, Shelter knew how to draft an insuring agreement that it did not provide coverage to its **insureds**. Their inclusion of an exception of coverage to their **insureds** under Coverage F and their failure to include a similar or like-kind exception in the Insuring Agreement for Coverage E would lead an ordinary consumer insured to conclude that the Shelter policy did in fact cover injury or bodily injury liability coverage to its insureds. If Shelter intended to carve out an exception in their liability coverage for injury or bodily injury to their **insured**, they should have said so in their insuring agreement for Coverage E – Personal Liability just as they did in their insuring agreement for Coverage F – Medical Payments to Others. They could have said under Coverage E, just like they did only a few lines below under Coverage F, "**We** do not cover injury to **insureds** or residents of the insured premises, except a **residence employee** or **insured farm employee**." (L.F. 62)

In the end, either no household exclusion applies to Vasseurs, who purchased both coverages, or at the very least the policy language is ambiguous. Either way, the policy must be construed in favor of liability coverage.

II. Without waiving their above arguments as to the household exclusion, the Respondents agree with Appellant's argument that because the Insuring Agreement for Coverage F – Medical Payments to Others limits the scope of the coverage to those other than insured, the trial court erred in granting summary judgment to Respondents on the issue of medical payments coverage.

Appellant raises two basis for review as to the trial court's granting of summary judgment in favor of Respondents on the issue of medical payments coverage on the farmowners policy. Appellant's first argument is based on the Insuring Agreement itself that under Medical Payments to Others the Shelter policy does not cover bodily injury to any insured and, therefore, there is no medical payments coverage for bodily injury to Elmer Vassuer independent of the household exclusion. (App. Br. 20-22) Having further researched and considered the matter, Respondents agree with Appellant that under the Insuring Agreement for Coverage F – Medical Payments to Others, which differs from the Insuring Agreement for Coverage E – Personal Liability, since Elmer Vasseur was the insured, no coverage is owed.

III. The trial court did not err in granting judgment for the Vasseurs on their uninsured motorist claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

Standard of Review

In Appellant's SUMMARY OF ISSUES PRESENTED & STANDARD OF REVIEW, Shelter states that, "the issues on appeal concern whether the trial court correctly applied Shelter's contractual terms and relevant Missouri uninsured motorist statutes to its findings of facts." (App. Br. 12) Under Point III, Appellant then states, "Such error, for which Shelter seeks reversal, concerns the proper interpretation of an insurance contract, and related uninsured motorist statutes is entirely a matter of law and is subject to *de novo* review." (App. Br. 22-23). This Court's review is not entirely a matter of law and it is not *de novo.*

This is the same error committed by Shelter in the Appellate Court below, where Shelter argued that they were entitled to a *de novo* review under Points III-VI. Shelter's reliance on *Sheedy v. Missouri Highways and Transport. Comm'n,* 180 S.W.3d 66 (Mo. App. 2005) is misplaced because *Sheedy* was a review of the rulings of a trial court on cross motions for summary judgment, not a bench trial by the court.

The judgment entered by the trial court as to coverage under the auto policies (Appellant's Points III-VI) must be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The ATV was Designed for Operation on Public Roadways

By way of procedural history and background, the parties appeared for hearing and argument on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment on October 24, 2013, and after taking the motions under advisement, the court entered its Order on November 20, 2013, granting summary judgment in favor of Respondents on the farmowners policy, but overruling Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment on the automobile insurance policies (Order; L.F. 552-63) As to the auto policies, the Order of the trial court stated, "Though the Owners Manual is evidence relevant to the issue, it is not dispositive and is not the only source of proof of the purposes for which the Honda ATV was originally designed. Therefore, as to the claim for uninsured motorist coverage under Shelter's three policies, the Court finds that genuine issues of material fact remain, precluding the issuance of a summary judgment." (L.F. 562)

After the bench trial on the auto policies and after taking the case under advisement, the trial court entered Judgment stating, "After having heard, received and considered the evidence and the legal briefs of the parties," the court adjudged "that the

2006 Honda TRX 500 All Terrain Vehicle was a motor vehicle when being used on a public roadway." (L.F. 825). Although Appellant refers to entering judgment as a matter of law, the judgment was based on the facts, as well as the law. Had the court chosen to expound on its written judgment, it would have reached the same result on any number of legal and factual grounds.

Shelter argues that because the ATV owner manual cautions users not to ride it on public roads (App.Br. 25-27), the vehicle is, therefore, not originally designed for operation on public roadways. According to Shelter, the owners manual "is the best and most objective source of information to ascertain the ATV's purpose" (App. Br. 24) Respondents disagree as did the trial court below. In fact, the owners manual does not even mention "original design." In the trial below, the best evidence and the only direct evidence on the issue of the ATV's "original design" was Shelter's Amended Responses to Requests for Admissions and the testimony of Respondents' expert witness, Brian Powers, neither of which is discussed anywhere in Appellant's brief.

While Appellant acknowledges in its Statement of Facts that the court entered judgment following a bench trial (App. Br. 12), Appellant makes no mention whatsoever of any of the evidence presented by Respondents at the bench trial. Despite the Rule 84.04(c) requirement that the Statement of Facts shall be a fair and concise statement of the facts relevant to the questions presented, Appellant ignores the Rule. Appellant says not one word about its Amended Responses to Requests for Admissions or the testimony of Respondents' expert witness, Brian Powers. A brief which emphasizes facts favorable to the Appellant and omits facts essential to the Respondent does not comply with the

Rule. *Vodicka v. Upjohn Co*., 869 S.W.2d 258, 263 (Mo. App. S.D. 1994). Likewise, a brief does not substantially comply with the Rule when it highlights facts that favor the Appellant and omits facts supporting the judgment. *Osthus v. Countrylane Woods II Homeowners Ass'n*, 389 S.W.3d 712, 715 (Mo. App. E.D. 2012).

In any event, Respondents put in evidence Shelter's Amended Responses to Requests for Admissions, in which Shelter admitted, among other facts:

"3. That the 2006 Honda TRX 500 ATV all terrain vehicle was originally designed for operation on a hard flat surface for vehicles to travel on maintained by a governmental entity or agency including its adjacent right of ways." (L.F. 810)

So what is a "hard flat surface for vehicles to travel on maintained by a governmental entity or agency including its adjacent right of ways"? The answer is obvious – it is a public road. Having admitted request #3, Shelter has admitted that the ATV was originally designed for operation on a public road.

Respondents also put in evidence for consideration by the trial court, the testimony of Respondents' expert witness, Brian Powers. Mr. Powers had been a Honda dealer for 16 years, had sold close to 20,000 Honda ATVs and had a thorough understanding of the use of the product, how the product was designed and how it was to be used. (Tr. 10-12) He testified that the Honda ATV that was at issue in this case was designed for use on roadways (Tr. 13, 14 and 22) He, himself, had operated an ATV like the one involved in this case on a city street with a city permit. (Tr. 13) He testified further that the Department of Transportation had approved hard tread for street use, and that he had put many street tire kits on ATVs. (Tr. 14) Interestingly also, Mr. Powers testified that when

he sold Hondas they referred their purchasers to some insurance companies, including Shelter, for liability insurance on ATVs, and that he himself had motor vehicle liability insurance through Shelter on the exact same ATV. (Tr. 24-25) In other words, although Shelter sells motor vehicle liability insurance on ATVs, none was sold and no policy was issued on the ATV being operated at the time Elmer Vasseur was killed.

The ATV was an Uninsured Motor Vehicle as Defined by Shelter's Policy

Not only was the ATV an uninsured motor vehicle, as proven by the above evidence of Respondents, but the ATV clearly qualifies as an uninsured motor vehicle under the terms of Shelter's policy. The insuring agreement for Coverage E states:

> INSURING AGREEMENT FOR COVERAGE E
>
> If an **insured** sustains **bodily** injury as a result of an **accident** involving the **use** of an **uninsured motor vehicle** and the **owner** or **operator** of that vehicle is legally obligated to pay some, or all, of the **insured's** resulting **damages**, **we** will pay the **uncompensated damages**, subject to the limit of o**ur** liability stated in this coverage.

(L.F. 190)

The following is the policy definition of "uninsured motor vehicle:"

(50) **Uninsured motor vehicle** means:

(a) a **motor vehicle** that is not covered by a liability bond or insurance policy, applicable to the **accident**;

(b) a **hit-and-run motor vehicle**; or

(c) a **motor vehicle** insured by a liability insurer which, because of its insolvency, is unable to make payment with respect to the legal liability of its insured up to the minimum limits of liability insurance coverage specified in the applicable **financial responsibility law**. This subsection applies only if that liability insurer becomes insolvent within two years after the **accident** date.

* * *

(L.F. 307)

A "motor vehicle" is then defined as follows:

(24) **Motor vehicle** means a self-propelled land vehicle originally designed for **operation** on **public roadways.**

Motor vehicle does not mean:

(a) A farm-type tractor, except while it is being **used** on a **public roadway**; or

(b) Any vehicle while it is being utilized as a dwelling, display area, sales area or storage area.

(L.F. 304)

The policy then defines "public roadways" as follows:

> (37) **Public roadway** means a roadway maintained by a governmental entry or agency including its adjacent right of ways. The fact that the general public has access to a roadway does not itself make that roadway a **public roadway**.

(L.F. 305)

Since an adjacent right of way counts as a public roadway under the policy definition itself, the ATV was clearly designed for operation of public roadways. The travel portion of many public roadways themselves (forget the adjacent right of ways) are often not paved, but surfaced with dirt or gravel,[2] such as those crossing State and Federal lands, not to mention the county dirt roads which cover this state.

[2] Page 48 of the manual, quoted at App.Br. 27, warns: "Operating this ATV on public streets, roads or highways could cause you to collide with another vehicle. Never operate this ATV on any public street, road or highway, even a dirt or gravel one." Because the danger contemplated here is that of collision with another vehicle, rather than any hazard of dirt or gravel surfaces for an "all terrain" vehicle, the trial court could reasonably find that the Honda was designed for use on public streets, roads and highways forest trails which, while open to the general public, are infrequently traveled.

Due to its own policy definition of a "public roadway," Shelter's Amended Responses to Requests for Admissions, and the testimony of Brian Powers, Shelter cannot seriously argue that the Honda ATV was not originally designed for operation on public roadways, and no warnings in the Honda owner manual can change the fact.

The ATV is a Motor Vehicle as Defined by Missouri Statutes

Missouri's uninsured motorist law is set forth in §379.203 R.S.Mo. which states:

> "No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, R.S.Mo., any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, R.S.Mo., for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. . ."

In its Amended Substitute Brief filed herein, Appellant argues that "The MVFRL adopts the definition of 'commercial motor vehicle' found in Section 301.010 R.S.Mo., but incorporates the definition of 'motor vehicle' from Section 303.020. *Id.* at 27; Section 379.203 R.S.Mo."

Missouri's uninsured motorist law, §379.203 R.S.Mo. , uses the term "motor vehicle" several times, but does not define it. It does, however, refer to §301.010, the definitional statute quoted *supra*. The statutory definition of a "motor vehicle" contained in §301.010 R.S.Mo. is, "any self-propelled vehicle not operated exclusively upon tracks, except farm tractors." The Honda ATV is a "motor vehicle" as defined in §301.010 R.S.Mo.

Elsewhere, as this Court is aware, our legislature has defined "motor vehicle" in various ways for various purposes. For example, the definition of a "motor vehicle" set forth in §303.020 R.S.Mo. uses the phrase "designed for use upon a highway" language, reading as follows:

> (5) "**Motor vehicle"**, a self-propelled vehicle while is designed for use upon a highway, except trailers designed for use with such vehicles, traction engines, road rollers, farm tractors, tractor cranes, power shovels, well drillers and motorized bicycles, as defined in section 307.180, RSMo, and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails; . . .

The Shelter policy definition of "motor vehicle" tracks the §303.020 definition, changing only "designed for use upon a highway" to read "originally designed for operation on public roadways." Whether the applicable definition of a motor vehicle is that found at 301.010 R.S.Mo. or 303.020 R.S.Mo. is not, however, an issue this Court must decide. Regardless, the outcome of the case is the same.

Assuming Appellant to be correct that the §303.020 R.S.Mo. definition applies, the ATV not only meets the policy definition, but it meets that statutory definition as well. After defining a "motor vehicle" as a self-propelled vehicle which is "designed for use upon a highway," the legislature then defines a "street" or "highway" as follows:

> (13) **"Street"** or **"highway"**, the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic.

The "entire width between property lines of every way. . .when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic," is of course including the adjacent right of ways in its definition of a "street" or "highway" just as Shelter has included "the adjacent right of ways" in its policy definition of a "public roadway." Just as the ATV meets the policy definition, since "public roadways" include the adjacent right of way, it also meets the statutory definition since "highway" includes the entire width between the property lines of every way.

Since the policy definition and the statutory definition of a motor vehicle are synonymous, if the Honda ATV meets the definition of one, it meets the definition of the

other. In other words, the ATV either meets the definition of both or it meets the definition of neither. Under the evidence presented to the trial court, the ATV meets the definition of both.

An ATV is a Motor Vehicle When Operated on Public Roadways

The trial court correctly held (as governing Missouri case law constrained it to hold) "that the 2006 Honda TRX 500 All Terrain Vehicle was a motor vehicle when being used on a public roadway." (L.F. 825). Missouri case law consistently considers such a self-propelled vehicle to be a motor vehicle when operated on public roadways. E.g. *Rice v. Fire Ins. Exchange*, 946 S.W.2d 40 (Mo. App. S.D.1997) (a three-wheeler recreational vehicle being operated on a public road satisfied the definition of a "motor vehicle" in a homeowners policy); *Morgan v. State Farm Fire and Cas. Co.*, 344 S.W.3d 771, 775 (Mo. App. S.D. 2011) (homeowners policies did not provide coverage where the ATV accident occurred on a public road and thus fell within an motor vehicle exclusion); *Stonger v. Ries*, 85 S.W.3d 703 (Mo. App. W.D. 2002) (riding lawnmower was a "motor vehicle" where it was being used on a street; *Covert v. Fisher*, 151 S.W.3d 70 (Mo. App. E.D.2004) (golf cart was a motor vehicle when being driven on a public highway); *State v. Powell*, 306 S.W.2d 531-533-34 (Mo. 1957) (farm tractor being operated on public highway was a motor vehicle under DWI statute); *State v. Laplante*, 148 S.W.3d 347, 350-51 (Mo. App. S.D. 2004) (mini-bike was a motor vehicle under DWI law when operated on public street).

The Cases Relied on by Appellant did not Involve an Accident on a Public Road

Shelter's citation of the same two authorities it offered to the trial court and Appellate Court are distinguishable and not controlling, since neither involved an accident on a public highway. The case principally relied on by Shelter is *Meeks v. Berkbuegler*, 632 S.W.2d 24 (Mo. App. E.D. 1982), which was not a roadway accident at all, but an off-road accident between a motorcycle and a dune buggy. State Farm maintained that the dune buggy was designed mainly for use off public roads, and, because the accident occurred off public roads, the dune buggy was not an uninsured motor vehicle. *Id.* at 26. The State Farm policy specially excluded from its definition of an "uninsured motor vehicle" a motor vehicle designed for use mainly off public roads except when such off-road vehicles were being used on a public road stating:

> "An uninsured motorist vehicle does not include a land motor vehicle:
>
> 5. designed for use mainly off public roads **except while on public roads.**" (emphasis ours) *Id.* at 26.

The Shelter policy, by comparison, contains no off-road vehicle exception to its policy definition of an "uninsured motor vehicle". (JSF #45 and Ex. #4, p. 8; Ex. #5, p. 8; Ex. #6, p. 8). The *Meeks* case plainly held:

> "The Motor Vehicle Safety Responsibility Law does not require compliance of owners and operators of **off-road vehicles involved in off-road accident** such as this." (emphasis ours) *Id.* at 27.

The Court went on to state:

> "Respondent may, therefore, exclude such vehicles **when off public roads** from its uninsured motor vehicle coverage . . ." (emphasis ours) *Id.* at 27.

The Court in Meeks concludes its opinion by making the distinction for an accident that happens on a public road stating:

> "The only case involving similar policy and statutory language is Rooney v. Detroit Automobile Inter-Insurance Exchange, 94 Mich. App. 448, 288 N.W.2d 445 (1979). In that case the insured was involved in an accident with a snowmobile. The accident, however, occurred on a public road. The court determined **the insurer had to provide uninsured motorist coverage because the accident happened on a public road**" (emphasis ours). *Id.* at 27.

Subsequent cases interpret and cite the *Meeks* case for the proposition that, "the purpose of the Motor Vehicle Safety Responsibility Act is to ensure that people who are injured ***on the highways*** may collect damage awards." *State ex rel Toastmaster v. Mummert*, 857 S.W. 2d 869, 872 (Mo. App. E.D. 1993).

State Farm vs. Stockley, 168 S.W.3d 598 (Mo. App. E.D. 2005) is once again a case involving **an accident which did not occur on a public road**. The accident giving rise to the suit in *Stockley* occurred on an airport tarmac. In reaching its decision that the airport tarmac was not a public road the Court stated:

> "A road to which the general public is prohibited from entering unless they are properly credentialed based on their need to be in the area

cannot, under the common and usual meaning of the term, be considered a public road." *Id.* at 603.

In the instant case, there is no dispute that State Highway AA, where Matthew Vasseur was operating the ATV, was a public roadway. (App. Br. 28) Appellant fails to cite a single Missouri case, and indeed there is none to be found, which has ever held that any motorized vehicle when being operated on a public road was not a motor vehicle.

The Missouri Legislature Could Have Excluded an ATV from its Definitions of a Motor Vehicle, but Has Not

In re Moore, 251 B.R. 380, 381 (W.D. Mo. 2000) (ignored by Shelter in its briefing here and below) also provides support for the decision reached by the trial court. In *Moore*, the issue was whether an ATV qualified as a motor vehicle for purposes of a bankruptcy exemption statute. The court discussed that the term "motor vehicle" had been defined in several different places in Missouri statutes, (by footnote enumerating some ten different statutes) noting that in none of the statutory definitions was an ATV excluded from the definition of a motor vehicle. As stated in *Moore*, "common sense" dictates that an ATV is a 'motor vehicle' under Missouri law, since "[An ATV] is a self-propelled vehicle, having its own motor and steering mechanism. While . . . it is primarily used as a recreational vehicle, it may be used to carry goods and it certainly is used to carry passengers (i.e., a driver). In Missouri, the operation of an ATV is prohibited on the public highways except in certain specified instances, §304.013, but for purposes of titling, perfection of liens and encumbrances, and transfer, ATVs are treated

in the same manner as motor vehicles, §301.700. **None of the statutory definitions of motor vehicles excludes all-terrain vehicles from those definitions**, so it would appear that the Missouri General Assembly considers ATVs to be motor vehicles."[3] *Id*. at 382. The court went on to find, "**If the legislature had intended to exclude ATVs from the sweep of the term 'motor vehicle'. . . it could easily have said so, but did not**. For instance, the General Assembly could have allowed the exemption for 'all *licensed* motor vehicles' or for 'all motor vehicles *except all-terrain vehicles.'* However, it did not do so. . ." *Id.* at 382. (emphasis ours)

Likewise, in *Roberts v. County Mutual Ins. Co.*, the court found that "**If an ATV was not to be considered a motor vehicle for purposes of the uninsured motorist statute, the legislature could have provided an exclusion**." 596 N.E. 2d 185,187 (Ill. App. 1992) (emphasis ours).

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[3] Section 304.013.1(2) expressly permits the operation of an all-terrain vehicle on the highways of this state for agricultural purposes, and the Vasseurs used their Honda ATV for agricultural purposes, and were, in fact, doing so at the time of the accident, trapping and hauling minnows down the highway to their farm ponds. (L.F. 478 and 508) Therefore, the Vasseurs' use of an ATV on the highway was a legally permitted use under §304.013.1(2) R.S.Mo. Why would the Missouri legislature authorize the use of an ATV on the highways of this State if an ATV was not designed for use on public roads and highways?

Shelter Could Have Excluded an ATV from its Definition of a Motor Vehicle, But Did Not

Had Shelter wanted to exclude an ATV from coverage under their policy they should have said so. As held in *American Family Mut. Ins. Co. v. Peck,* 169 S.W.3d 563, 567 (Mo. App. W.D. 2005).

> **"In sum, the three-wheeled vehicle at issue is not excluded from coverage by its vehicular classification because the policy exclusion does not specifically exempt ATV's."**

Likewise, the Shelter policy defines a "motor vehicle" as follows:

> (24) **Motor vehicle** means a self-propelled land vehicle originally designed for **operation** on **public roadways.**
>
> **Motor vehicle** does not mean:
>
> (a) A farm-type tractor, except while it is being **used** on a **public roadway**; or
>
> (b) Any vehicle while it is being utilized as a dwelling, display area, sales area or storage area.

(L.F. 304)

Shelter chose to exclude from the definition of a "motor vehicle" a farm-type tractor, except "when it is being **used** on a **public roadway**". (L.F. 304). Shelter could have just as easily excluded the ATV from its definition of a "motor vehicle" or an

"Uninsured motor vehicle" but did not. Having failed to specifically exempt or exclude ATVs from its definition of a "motor vehicle" or an "uninsured motor vehicle", Shelter should not now be heard to argue that coverage is excluded.

IV. The trial court did not err in granting judgment for the Vasseurs on their accidental death claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

Because the argument in Point III foregoing (uninsured motorist coverage) is equally applicable to Shelter's Point IV (accidental death benefits) that argument is herein incorporated by reference without restatement in haec verba. The only thing different about Appellant's Point IV when compared to Point III is that under the insuring agreement for Coverage D the death must result from bodily injury sustained while occupying an **auto** or when struck by an **auto**. (App. Br. 32). It is a distinction without a difference, however, because an "auto" is defined as a "**motor vehicle** with at least four wheels" which takes us right back to the definition of a motor vehicle which has been fully briefed above. Respondents will not repeat that argument herein, but incorporate it by reference. The review of the trial court judgment is not *de novo*. See *Murphy v. Carron, supra.*

V. The trial court did not err in granting judgment for the Vasseurs on their medical payments claims, because the ATV was originally designed for operation on public roadways; because the ATV was an "uninsured motor vehicle" as defined by the auto policies, in that the policy definition of "public roadway" includes "adjacent right of ways"; because the ATV is a motor vehicle as defined by Missouri statutes; and because an ATV when operated on a public roadway is a motor vehicle.

Because the argument in Point III and Point IV above is equally applicable to Shelter's Point V (medical payments coverages), Respondents' argument under Points III and IV is herein incorporated by reference without restatement in haec verba. Again, although the insuring agreement reads slightly different, it is a distinction without a difference, because it again references bodily injury which directly results from an accident arising out of the occupancy, use, or maintenance of an **auto**, which traces back to the definition of a **motor vehicle**. Since Respondents have previously addressed those issues, the argument need not be repeated here and is incorporated herein. The standard of review is set forth in *Murphy v. Carron, supra.*

VI. The trial court properly entered judgment in favor of the Vasseurs on their uninsured motorist and farmowners coverage because the ATV was an "uninsured motor vehicle," as defined by the auto policies, in that Matthew Vasseur was not an insured under a motor vehicle liability policy, the ATV was not insured under any motor vehicle liability policy, and the farmowner liability coverage is not within the scope of Missouri's uninsured motor vehicle or financial responsibility statutes.

On the eve of trial, perhaps recognizing that its position on the uninsured motorist coverage was not well taken, Shelter filed a Second Amended Petition alleging that if Matthew Vasseur enjoyed liability coverage under the farmowner policy for his operation of the ATV, then the ATV was not an "uninsured motor vehicle" and Vasseurs could not have things both ways (liability coverage under the farmowners policy and UM coverage under the auto policies).

In support, Shelter relied (and continues to rely) on *Stotts vs. Progressive Classic Ins. Co.*, 118 S.W3d 655 (Mo. App. W.D. 2003), citing *Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137 (Mo. banc 1980). However, as the trial court properly found, and as *Stotts* makes plain, "the term [uninsured motor vehicle] as used by the legislature refers to a vehicle whose operator or owner did not have in effect at the time of the accident **an automobile liability policy** (emphasis ours) with respect to the motor vehicle involved in the accident." *Id.* at 666 (quoting *Harrison*). In other words, ***liability coverage under a farmowner policy does not count for purposes of the UM statute.***

Similarly, in *Harrison*, "because the tortfeasor ***did in fact have an automobile liability policy*** **which complied with the requirements of Motor Vehicle Safety**

Responsibility Law . . . the uninsured motorist statute [had] no application. *Stotts* at 666. In the case before the Court, because the tortfeasor, Matthew Vasseur, did **not** have an automobile liability policy which complied with the Motor Vehicle Safety Responsibility Law, the uninsured motorist statute **does** have application.

Contrary to Shelter's argument, Missouri case law recognizes **that a negligent operator's personal liability insurance does not foreclose uninsured motor vehicle coverage**. *Hendrickson v. Cumpton*, 632 S.W.2d. 512, 515 (Mo.App.1982): "§379.203 ... is an 'uninsured motor vehicle' statute, not an 'uninsured motorist' statute [citations omitted]. We have, therefore, determined that because defendant Shy owned the automobile, and carried no insurance on same as protection against his negligent acts concerning such ownership, there existed no ***automobile liability insurance*** policy which insured his vehicle ... We now hold that the **personal** liability insurance for the negligence of an operator of a motor vehicle **does not foreclose the availability of the uninsured motor vehicle coverage** for the owner's negligent entrustment of his automobile." (emphasis ours).

The relevant Chapter 303 RSMo. financial responsibility provisions are:

Section 303.025.1, "No person shall operate a motor vehicle owned by another with the knowledge that the owner has not maintained financial responsibility unless such person has financial responsibility which covers the person's operation of the other's vehicle."

Section 303.025.2 , "A motor vehicle owner shall maintain the owner's financial responsibility in a manner provided for in section 303.160, or with a **motor vehicle**

liability policy which conforms to the requirements of the laws of this state." (emphasis ours)

Section 303.160 R.S.Mo. provides in relevant part that "Proof of financial responsibility, when required under this chapter with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle, may be given by filing: (1) A certificate of insurance as provided in section 303.170 or section 303.180."

Section 303.170 continues, "Proof of financial responsibility may be furnished by filing with the director the written certificate of any insurance carrier duly authorized to do business in this state certifying that there is in effect **a motor vehicle liability policy** for the benefit of the person required to furnish proof of financial responsibility." (emphasis ours)

For lack of **a motor vehicle liability policy** covering either the ownership or operation of the ATV, the uninsured motorist statute deems the UM coverages of the three Vasseur auto policies applicable to the claims brought by the Vasseurs.

In the *Stotts* case, the named tortfeasor had an automobile liability insurance policy on his vehicle which complied with the Motor Vehicle Safety Responsibility Law. In the case before the Court, Matthew Vasseur did not. Neither the owner (Adam Vasseur), nor the operator (Matthew Vasseur) had in effect a motor vehicle liability policy as required by Chapter 303. In *Stotts* and *Harrison*, **either the vehicle owner or the vehicle operator** maintained an **automobile liability policy** compliant with the MVSRL. Here, neither the owner nor the operator maintained an automobile liability policy and, as a result, the ATV is an uninsured motor vehicle.

The Vasseurs paid the premiums for their auto policies and separate premiums for their farmowners policy. Only in an unusual scenario like the one at bar would the coverages of both policies converge in application to the same loss. The judgment entered by the trial court not only follows the law, it grants Vasseurs the benefit of their bargain and prevents an unjust windfall for Shelter.

Under current statutory and case law, the Shelter policy, and public policy, the Vasseurs are entitled to the protections of the compulsory uninsured motorist coverages which they purchased from Shelter. Under the applicable standard of review for court-tried cases as pronounced in *Murphy v. Carron*, *supra* the judgment of the trial court must be affirmed.

Conclusion

The trial court properly granted summary judgment for Respondents on their farmowner policy claims for liability coverage because the applicable set of exclusions for those insureds who purchase both Coverage E (Personal Liability) and Coverage F (Medical Payments) failed to include the household exclusion. The trial court also properly entered judgment for the Vasseurs on the uninsured motorist, accidental death, and medical payments coverages of their auto policies because the Honda ATV was designed for operation on public roadways, the ATV was a motor vehicle as defined by both the Shelter auto policies and Missouri statutes, and because an ATV is a motor vehicle when causing bodily injury or death in its operation on a public roadway.

For these reasons, the judgment of the trial court should be affirmed as to the liability coverage under the farmowners policy and affirmed as to the uninsured motorist, accidental death, and medical payments coverage under the auto policies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. This Substitute Brief of Respondent includes the information required by Missouri Supreme Court Rule 55.03;

2. This Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);

3. This Substitute Brief of Respondent, excluding the cover page, signature blocks, Certificate of Service, and this Certificate of Compliance, contains 12,591 words, as determined by the word-count tool contained in the Microsoft Word software with which this Brief was prepared.

/s/ H. Lynn Henry
H. Lynn Henry

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was provided to the following attorneys of record via electronic case filing (ECF) this 3rd day of November, 2015:

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