
IN THE MISSOURI SUPREME COURT

SC 94075

Adam Dutton, Appellant

v.

American Family Mutual Insurance Company, Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Case Number 1116-CV08343
The Honorable Marco A. Roldan

Respondent American Family Mutual Insurance Company's Substitute Brief

---

Christopher J. Carpenter #41572
Tracy M. Hayes #58555
Sanders Warren & Russell, LLP
40 Corporate Woods, Suite 1250
9401 Indian Creek Parkway
Overland Park, KS 66210
913-234-6100 (phone)
913-234-6199 (fax)
cj.carpenter@swrllp.com
t.hayes@swrllp.com

Susan Ford Robertson #35932
J. Zachary Bickel #58731
The Robertson Law Group, LLC
1903 Wyandotte, Suite 200
Kansas City, MO 64108
816-221-7010 (phone)
816-221-7015 (fax)
zachb@therobertsonlawgroup.com
susanr@therobertsonlawgroup.com

Attorneys for Respondent American Family Mutual Insurance Company

Table of Contents

Table of Cases and Authorities

Cases

Missouri Statutes

Statement of the Issues

The issue before this court is whether the Motor Vehicle Financial Responsibility Law ("MVFRL") should be interpreted, and American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. banc 2001) should be extended, to require that every owner's policy that contains an insuring clause affording coverage for "a loss" pay MVFRL coverage at a minimum, and that any exclusions of limitations are inapplicable or invalid.

Appellant Adam Dutton ("Dutton") was involved in a motor vehicle accident with Barbara Hiles on May 25, 2009. At the time of the accident, Hiles was operating a 2007 Nissan Maxima ("Nissan") that she personally owned and that was insured by Respondent American Family Mutual Insurance Company ("American Family"). Hiles also owned a 2003 Ford F-250 ("Ford") insured by a separate policy with American Family. The Ford was not involved in the accident that injured Dutton. American Family paid Dutton the full policy limits for the policy covering the Nissan. Dutton filed the underlying declaratory judgment action against American Family to determine if the separate American Family policy insuring the Ford provided coverage for the May 25, 2009 accident.

Dutton filed a motion for summary judgment raising two arguments as to why coverage should be afforded under the Ford policy. The trial court entered judgment against Dutton on both issues when it determined: 1) that while every owner's liability policy issued in Missouri must meet the minimum requirements of the MVFRL, there is no requirement in the MVFRL that each owner's liability policy must provide the

minimum limits under the MVFRL when the vehicle covered by the owner's policy is not involved in the accident; and 2) the anti-stacking language in the "other insurance" clause in the American Family policy is valid and not ambiguous.

Dutton appealed the trial court's judgment, and in a 6-5 split, the appellate court's majority and dissenting opinions reveal a deep, irreconcilable divide. The majority concludes that every motor vehicle "owner's" policy must provide minimum limits of liability coverage pursuant to MVFRL §393.190 R.S.Mo. and Hargrave, and that the MVFRL defeats any exclusion or anti-stacking language. (Majority Opinion. at 5, 6.) The dissenting opinions disagree because: 1) the majority reversed the trial court's judgment based on an argument never advanced by Dutton or presented to the trial court; and 2) the majority was incorrect in its extension of Hargrave in determining whether a vehicle is "designated" under an owner's policy within the meaning of §303.190.2 by reliance on the policy insuring provision, which describes when an insured, not a vehicle, is covered.

American Family sought transfer for this Court to answer the question: Should the MVFRL be interpreted, and American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. banc 2001) be extended, to require that every owner's policy that contains an insuring clause affording coverage for "a loss" pay MVFRL coverage at a minimum, and that any exclusions of limitations are inapplicable or invalid.

Jurisdictional Statement

American Family agrees with Dutton's jurisdictional statement.

Statement of Facts

American Family offers the following additions to Dutton's statement of facts. Dutton's motion for summary judgment pleadings requested a finding of coverage for two reasons: 1) he argued that every owner's liability policy issued in Missouri must meet the minimum requirements of the MVFRL, citing, Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010) and American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. banc 2000); and 2) the Ford policy's "other insurance" clause was ambiguous as it conflicts with other anti-stacking language in the policy and it contains a broad grant of coverage with no limiting or qualifying language. (L.F. 37-41.)

In his statement of uncontroverted facts Dutton alleged that Hiles was the owner of both the Nissan and the Ford and that both were insured under separate policies. (L.F. 38.) He alleged that the Nissan was "listed" on the American Family policy that he had already recovered the policy limits on (the Nissan policy), and that the Ford was the vehicle "listed" on the policy for which he sought coverage (the Ford policy). (L.F. 38.)

In his summary judgment pleadings, Dutton did not allege or request the trial court find that coverage is afforded because: 1) the Ford policy provides coverage for the policyholder's "use of a car;" 2) that the use of the car contemplates a "private passenger car;" and 3) that the Nissan was a "private passenger car" under the Ford policy. (L.F. 37-41.)

In his summary judgment pleadings, Dutton never asserted or requested the trial court to make a determination that §303.190.2(1) R.S.Mo. requires the owner's policy of

liability insurance "shall designate", by explicit description or appropriate description, all motor vehicles with respect to which coverage is to be granted and the American Family policy explicitly described the covered vehicles as the car named in the declaration (the Ford truck) and a private passenger car (the Nissan). (L.F. 37-41.) In his summary judgment pleadings, Dutton never alleged or requested the trial court find the policy's coverage for the use of a "passenger car" was ambiguous. (L.F. 37-41.)

Despite these issues being absent in Dutton's pleadings, they form the basis of the majority opinion reversing the trial court's judgment and finding coverage is afforded under the Ford policy. (Majority Opinion at 7-15.) The majority finds:

> Now, the facts of our case and the language of the insurance contract at bar must be applied to the mandate of the MVFRL. Section 303.190.2(1) requires that the owner's policy of liability insurance "shall designate by explicit description or by appropriate reference *all motor vehicles* with respect to which coverage is thereby to be granted." (emphasis added to denote plurality of term.) As noted above, in this case, the insurance contract explicitly describes the covered vehicles, *inter alia*: (1) the car named in the declarations (i.e. Ford truck); and, (2) the private passenger car (i.e. Nissan sedan) that Hiles was "in use of" at the time of the accident. Thus, the policy falls squarely within the purview of section 303.190.2(1) of MVFRL. Minimum liability coverage of $25,000 is thus mandatory under 303.190.2(2). (Majority Opinion at 12.)

The majority concludes that after finding "the Ford owner's policy includes coverage of Hiles' operation of the private passenger car involved in the accident, the Nissan, and the MVFRL applies to the Ford policy, we next turn to the policy's exclusions." (Majority Opinion at 15.)

The dissenting opinions disagreed with the majority opinion for several reasons, including, that the basis upon which the majority finds coverage was never asserted by Dutton. (Dissenting opinion authored by Judge Ahuja at 3-6.) "Dutton has not argued that Hiles' Nissan Maxima was a "designated" vehicle under the F-250 policy; to the contrary, Dutton has explicitly rejected the majority's conclusion that the F-250 policy "designated" any vehicle beyond the F-250 itself." (Ahuja dissent at 3.) "Given Dutton's multiple, explicit acknowledgments that the F-250 truck is the only vehicle "designate[d]" under the policy at issue, we cannot reverse the trial court's grant of summary judgment based on a conclusion, first suggested in the majority opinion, that the Maxima was 'designated' in the F-250 policy." (Ahuja dissent at 4.)

Argument

I.

The trial court correctly determined that there is no requirement in the MVFRL, or in this Court's interpretive cases, that every owner's liability policy must provide the minimum limits under the MVFRL when the owned vehicle is not involved in the accident.

The trial court correctly determined that there is no requirement in the MVFRL, or in this Court's interpretive cases, that every owner's liability policy must provide the minimum limits under the MVFRL when the owned vehicle is not involved in the accident. On appeal, the appellate court, in its majority opinion, reversed the trial court based on reasons never advanced by Dutton. Now, in his opening brief, Dutton requests that this Court reverse the trial court's judgment for the reasons first found by the appellate court, but never asserted by Dutton before the trial court. This Court should affirm the trial court's judgment because it correctly analyzed the MVFRL and this Court's interpretive cases to find that there is no requirement that every motor vehicle owner's liability policy must provide the minimum limits, even when the owned vehicle is not involved in the accident. The issues raised by Dutton for the first time on appeal are not preserved and should not form a basis for relief.

Standard of review

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine dispute as to the facts" and that "the facts as admitted show a

> legal right to judgment for the movant." The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. The propriety of summary judgment is purely an issue of law, and this Court's review is essentially de novo.

Bob DeGeorge Assocs., Inc. v. Hawthorn Bank, 377 S.W.3d 592, 596 (Mo. banc 2012), *quoting*, ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. banc 1993). The interpretation of an insurance policy is a question of law that this Court determines de novo. Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129, 132 (Mo. banc 2007).

Also relevant to the standard of review is that this Court will not address any "claims, arguments or remedies" until they have been presented to and ruled upon by the trial court. City of Kansas City, Missouri v. Chastain, 420 S.W.3d 550, 557 (Mo. banc 2014); Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 36 (Mo. banc 1982). In the context of cases on review from a request for summary judgment, the review is limited to the issues put before the trial court. Sheedy v. Missouri Highways and Transp. Com'n, 180 S.W.3d 66, 70 (Mo.App. 2005). "An issue not presented to the trial court is not preserved for appellate review." Id., quoting Barner v. The Missouri Gaming Co., 48 S.W.3d 46, 50 (Mo.App. 2001). "Thus a party is bound by the position he or she took in the trial court, and we can review the case only upon those theories." Id.; City of Cuba v. Williams, 17

S.W.3d 630, 632 (Mo.App. 2000); Scott v. Edwards Transp. Co., 889 S.W.2d 144, 147 (Mo.App. 1994).

Dutton's argument that coverage under the Ford policy exists because the Nissan was a "private passenger car" and therefore a "designated vehicle" under the Ford policy is not preserved, as it is raised for the first time on appeal.

In Point One of Dutton's opening brief, he asserts that the trial court erred in entering judgment in favor of American Family because Hiles is the named insured and she is legally liable for Dutton's damages "due to her use of a private passenger car." (Dutton brief at 15-26.) He argues that the Ford policy defines "use" of a car to include "ownership" and "use", and that Hiles owned the Nissan and was using it at the time of the accident. He argues that the definition of "car" includes not only the named insured vehicle, but also a "private passenger car." (Dutton brief at 25.) Dutton alleges that pursuant to the Ford policy, the vehicle does not have to be listed on the declarations page in order for the policy to afford coverage. (Dutton brief at 25.)

This argument is insupportable because Dutton never advanced it in any of his pleadings before the trial court, and it is not preserved for this Court's review. Chastain, 420 S.W.3d at 557; Lincoln, 636 S.W.2d at 36. Dutton's motion for summary judgment pleadings requested a finding of coverage for two reasons: 1) he argued that every owner's liability policy issued in Missouri must meet the minimum requirements of the MVFRL, citing, Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010) and American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. banc 2000); and 2) the Ford policy's

"other insurance" clause was ambiguous as it conflicts with other anti-stacking language in the policy and it contains a bread grant of coverage with no limiting or qualifying language. (L.F. 37-41.)

In his statement of uncontroverted facts Dutton alleged that Hiles was the owner of both the Nissan and the Ford and both were insured under separate policies. (L.F. 38.) He alleged the Nissan was "listed" on the American Family policy that he had already recovered the policy limits on (the Nissan policy), and the Ford was the vehicle "listed" on the policy for which he sought coverage (the Ford policy). (L.F. 38.)

In his summary judgment pleadings, Dutton did not allege or request the trial court find that coverage is afforded because: 1) the Ford policy provides coverage for the policyholder's "use of a car;" 2) that the use of the car contemplates a "private passenger car;" and 3) that the Nissan was a "private passenger car" under the Ford policy. (L.F. 37-41.)

In his summary judgment pleadings, Dutton never asserted or requested the trial court to make a determination that §303.190.2(1) R.S.Mo. requires the owner's policy of liability insurance "shall designate" by explicit description or appropriate description all motor vehicles with respect to which coverage is to be granted, and the American Family policy explicitly described the covered vehicles as the car named in the declaration (the Ford truck) and a private passenger car (the Nissan). (L.F. 37-41.) In his summary judgment pleadings, Dutton never alleged or requested the trial court find the policy's coverage for the use of a "passenger car" was ambiguous. (L.F. 37-41.)

Despite these issues being absent in Dutton's pleadings, they formed the basis of the majority opinion reversing the trial court's judgment and finding coverage is afforded. (Majority Opinion at 7-15.) The majority opinion states:

> Now, the facts of our case and the language of the insurance contract at bar must be applied to the mandate of the MVFRL. Section 303.190.2(1) requires that the owner's policy of liability insurance "shall designate by explicit description or by appropriate reference *all motor vehicles* with respect to which coverage is thereby to be granted." (emphasis added to denote plurality of term.) As noted above, in this case, the insurance contract explicitly describes the covered vehicles, *inter alia*: (1) the car named in the declarations (i.e. Ford truck); and, (2) the private passenger car (i.e. Nissan sedan) that Hiles was "in use of" at the time of the accident. Thus, the policy falls squarely within the purview of section 303.190.2(1) of MVFRL. Minimum liability coverage of $25,000 is thus mandatory under 303.190.2(2). (Op. at 12.)

The majority concludes that after finding "the Ford owner's policy includes coverage of Hiles' operation of the private passenger car involved in the accident, the Nissan, and the MVFRL applies to the Ford policy, we next turn to the policy's exclusions." (Majority Opinion at 15.)

The dissenting opinions disagreed with the majority opinion for several reasons, including, the basis upon which the majority finds coverage was never asserted by Dutton. (Dissenting opinion authored by Judge Ahuja at 3-6.) "Dutton has not argued

that Hiles' Nissan Maxima was a "designated" vehicle under the F-250 policy; to the contrary, Dutton has explicitly rejected the majority's conclusion that the F-250 policy "designated" any vehicle beyond the F-250 itself." (Ahuja dissent at 3.) "Given Dutton's multiple, explicit acknowledgments that the F-250 truck is the only vehicle "designate[d]" under the policy at issue, we cannot reverse the trial court's grant of summary judgment based on a conclusion, first suggested in the majority opinion, that the Maxima was 'designated' in the F-250 policy." (Ahuja dissent at 4.)

This Court should decline to reverse the trial court's judgment on the basis of any argument the Nissan is a "private passenger car" that is "therefore designated by reference" in the Ford policy as requested by Dutton. (Dutton brief at 26.) This argument was never presented to the trial court and cannot form the basis for reversal when it is asserted for the first time in Dutton's brief before this Court.

The MVFRL does not require the stacking of owner policies for vehicles owned, but not involved in the accident.

In his preserved point, Dutton argues that the MVFRL requires that every motor vehicle liability policy provide the minimum limits--even for owned vehicles not involved in the accident. The trial court correctly rejected Dutton's argument. The Nissan policy provided the required minimum coverage, which has been paid to Dutton. The purpose of the MVFRL has been accomplished. There is nothing in the statute, interpretive cases or the American Family policies to support a contrary result.

Section 303.190 R.S.Mo. states in relevant part:

1. A "motor vehicle liability policy" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance…
2. Such owner's policy of liability insurance:

   (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted.

   (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits, exclusive of interest and costs, with respect to each such motor vehicle... (emphasis added) (App. A-1.).

Dutton asserted in his uncontroverted material facts, both American Family policies had an explicit description and designation of one motor vehicle covered or insured under each policy. (L.F. 37-41.) Nothing in §303.190.2(2) requires conforming an owner's policy to provide any liability coverage for operation of a vehicle not designated in the policy as a covered, designated vehicle. Precedent supports this interpretation. Sisk v. American Family Mut. Ins. Co., 860 S.W.2d 34, 35 (Mo.App. 1993) (the court distinguishing between an "operator's policy" that must afford coverage

for the named insured's use of a non-owned vehicle and an "owner's policy" that had so similar requirement in the MVFRL); Shelter Mut. Ins. Co. v. Ridenhour, 936 S.W.2d 857, 858-589 (Mo.App. 1997) (the court denying coverage sought on an additional policy noting that "owner's policies" commonly exclude coverage for a vehicle owner's operation of other vehicles).

Dutton argues that the minimum liability coverage mandated by MVFRL must be provided regardless of the number of policies relying upon America Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. banc 2000) and Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010).

Hargrave and Karscig do not support reversal because these cases involved non-owned vehicles being used at the time of the accident

Dutton's reliance upon Hargrave and Karscig is unpersuasive, because in both of these cases the vehicle involved in the accident was a non-owned vehicle. In Karscig, Jennifer McConville was driving her parents' car with their permission when she was involved in an accident that injured Karscig. The per-person policy limit was paid to Karscig under the parents' owner's policy. Jennifer was also a named insured on another operator's policy (Jennifer's policy) for a vehicle that was owned by her parents. The insurance company denied liability coverage under Jennifer's policy. This Court determined that Jennifer's policy did provide coverage after determining that it was an operator's policy and that exclusionary language in the policy conflicted with §303.190.3. Karscig, 303 S.W.3d at 503. Section 303.190.3 states:

> 3. Such operator's policy of liability insurance shall insure the person named therein against loss from the liability imposed upon him or her by law for damages arising out of the use by him or her of any motor vehicle not owned by him or her,…subject to the same limits of liability as are set forth with respect to any owner's policy of liability insurance. (App. A-1.)

Because §303.190.3 requires an operator's policy to provide coverage to the insured against any liability arising out of the use of "any" motor vehicle not owned by the insured, Jennifer's policy must insure her for the accident that occurred while she was operating her parent's vehicle. Karscig has little relevance because it involved an "operator's" policy analyzed under §303.190.3, while the analysis in this case involves two "owner's" policies governed by §303.190.2.

Hargrave also involved a non-owned vehicle operated at the time of the accident. Ms. Hargrave and her children were injured while she was driving her father's vehicle. The applicable policy limit was paid under the policy covering her father's vehicle. Ms. Hargrave was also insured under a vehicle owned by her husband. The insurance company took the position that the MVFRL requirements had been met because coverage was provided by the father's policy and therefore, the household exclusion was enforceable to void coverage. This Court determined that the partial invalidity of the household exclusion created by the MVFRL applied to both policies and found coverage under the policy that covered her husband's vehicle. Hargrave, 34 S.W.3d at 12, 13.

Both cases involved the operation of a non-owned vehicle at the time of the accident. In DeMeo v. State Farm Mut. Ins. Co., 686 F.3d 607, 610-611 (8th Cir. 2012), the appellate court concluded both cases stand for the proposition that if an insured has paid for coverage while operating a non-owned car as part of an owner's policy, and if that coverage applies to a particular accident, public policy as reflected in the MVFRL requires that at least that the mandatory minimum limit be paid. However, the MVFRL does not stretch to require or obligate an individual to purchase more than what is required by §303.190.2 as Hiles is not obligated to provide any other liability coverage except the coverage provided for by the owner's policy on the Nissan. See §303.190.7 (any policy that grants coverage required for a motor vehicle policy may also grant any lawful coverage in excess of or in addition to the coverage specified, but such coverage "shall not be subject to the provisions of this chapter.") This Court should affirm the underlying judgment in favor of American Family.

"The public policy of this state is satisfied when there is an owner's policy of liability insurance sufficient to meet the minimum requirements of Missouri's financial responsibility law." First National Ins. Co. of American v. Clark, 899 S.W.2d 520, 523 (Mo. banc 1995) (because there was an owner's policy in effect, no operator's policy on the same vehicle was required by the MFRL); O'Roarke v. Esurance Ins. Co., 325 S.W.3d 395, 398 (Mo.App. 2010) (the MVFRL only requires $25,000 for each insured vehicle involved in an accident, not $25,000 multiplied by the number of vehicles insured under one policy).

Dutton is attempting to stack liability policies. It is the public policy of Missouri to stack uninsured coverage, but no such mandate exists for liability coverage. See Cameron Mut, Ins. Co. v. Madden, 533 S.W.2d 538, 545 (Mo. banc 1992); Gibbs v. National General Ins. Co., 938 S.W.2d 600, 606 (Mo.App. 1997) (appellate court noting the conceptually dissimilar types of coverage between uninsured and liability coverage and noting that Missouri courts have repeatedly held that the regular use exclusion is valid when used in a liability policy); Schuster v. Shelter Mut. Ins. Co., 857 S.W.2d 381 (Mo.App. 1993).

The MVFRL requirements with respect to owner's policies, do not require policies to cover the use of an owned vehicle not involved in the accident. Section 303.190.2(1) and (2) requires that the owner's policy designate "all motor vehicles with respect to which coverage is thereby to be granted." The declarations page of the policy insuring the accident vehicle lists only the Nissan.

The statute applies to the facts of this case—the Nissan must insure Hiles against loss from liability imposed for damages arising out of the use of "such" motor vehicle. The Ford was not involved in the accident and Section 303.190.2(1) and (2) do not require coverage from the Ford policy. The trial court correctly determined that the MVFRL does not mandate coverage for the non-accident vehicle.

The majority opinion's analysis should be rejected as it misapplied the MVFRL's purpose in separating the requirements for owner's and operator's policies.

At the heart of the majority opinion is its interpretation of Hargrave in requiring every owner's policy, which insuring clause affords coverage for a loss, regardless of whether or not it was involved in the accident or loss to pay MVFRL coverage limits. The dissent finds that the majority improperly reads Hargrave to require every owner's policy whose insuring clause affords coverage for "a loss" to pay MVFRL coverage, at a minimum. The majority reasoned the Nissan (the vehicle operated at the time of the accident) is a "designated vehicle" under the Ford policy because the insuring clause in that owner's policy provides coverage for the insured's operation of "any car." The dissent concludes:

> The majority opinion thus improvidently equates whether a *vehicle* is "designated" in an owner's policy as required by section 303.190.2 with whether the policy's insuring clause contractually affords 'coverage to an *insured*.' Left uncorrected, the majority opinion will be cited to require stacking of MVFRL coverage from multiple owner's policies based solely on whether the policies provide ***coverage of an insured***. This is not consistent with legislative intent, nor with a proper reading of Hargrave. (Martin dissent at 1, 2 (original emphasis).)

The dissent continues by explaining that section 303.190.2(1) provides an owner's policy shall "designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is hereby granted." (emphasis provided in the opinion at 2.) Section 303.190.2(2) provides the owner's policy must name the insured and any permissive driver of the designated vehicle "against loss from liability imposed

by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles." (emphasis provided in Martin dissent at 2.) The dissent argues:

> Plainly, section 303.190.2 is written from the perspective of designation of a *vehicle*, not coverage of an *insured*, and requires MVFRL to be paid only if an owner's policy designates (or covers) *the vehicle* which caused a loss. The majority's construction of Hargrave shifts the focus on section 303.190.2 from whether an owner's policy designates coverage for a specific vehicle to whether an owner's policy affords overage of an insured." (Martin dissent at 2.)

The majority's conclusion that the Nissan was "designated" under the Ford policy is a linchpin of its analysis: the majority only finds the other owned vehicle exclusion invalid because it purportedly conflicts with the coverage required by section 303.190.2 for "designated" vehicles; however, Dutton never argued that the Hiles' Nissan was a "designated" vehicle under the Ford policy. Throughout the case, Dutton repeatedly acknowledged and asserted that the Ford policy only lists, names or designates the Ford F-250 as an insured vehicle, and that there are no other vehicles listed in the Ford policy as insured vehicles. (L.F. 37-41.)

The majority opinion recognizes that Hiles' two separate policies insure different vehicles. According to the majority, "Hiles complied with section 303.025.1 by maintaining an owner's policy on each of her two vehicles." (Majority Opinion at 9.) The dissent properly expressed alarm at the majority's actions which are contrary to precedent

that prohibits the appellate court from *ex mero motu* constructing arguments for an appellant which the appellant has not explicitly made, and in fact, has explicitly repudiated. (Ahuja dissent at 3-6.) The dissent concludes that given the multiple admissions that the Ford is the *only* vehicle designated under the policy at issue, the majority went beyond appropriate review in reversing the trial court's grant of summary judgment based on a conclusion that was first suggested in the majority opinion. The majority's opinion is necessarily inconsistent with precedent including Glass v. First Nat'l Bank of St. Louis, 191 S.W.3d 662 (Mo. banc 2006); Estate of Downs v. Bugg, 244 S.W.3d 729 (Mo.App. 2007); Willis v. Mo. Farm Bureau Servs. Inc., 396 S.W.3d 451, 454 (Mo.App. 2013).

The majority's analysis should be rejected because as the dissent concludes, the majority opinion is "necessarily inconsistent" with Todd v. Mo. United Sch. Ins. Council, 223 S.W.3d 156 (Mo. banc 2007); Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010); and State Farm Mut. Auto. Ins. Co. v. Western Cas. & Sur. Co., 477 S.W.2d 421 (Mo. banc 1972). The majority concludes every motor vehicle "owner's" policy must provide minimum limits of liability coverage pursuant to MVFRL §393.190 and Hargrave, and the MVFRL defeats any exclusion or anti-stacking language. (Ahuja dissent at 5, 6.)

The dissenting opinions disagree and conclude the majority was incorrect in its extension of Hargrave and in its determination of whether a vehicle is "designated" under an owner's policy within the meaning of §303.190.2 by reliance on the policy insuring

provision, which describes when an insured, not a vehicle, is covered. The dissents find that the policy's explicit definition of the "insured car" should be decisive and warns that the majority opinion, if left uncorrected by this Court, will require stacking of MVFRL coverage from multiple owner's policies based solely on whether the policies provide coverage of an insured.

This Court's interpretation of the MVRFL will have far-reaching effects. For instance, an individual would only have to purchase insurance for one her vehicles, because based on the majority opinion, that one policy would have to cover all vehicles driven by the insured. This clearly was not the intent of the legislature. This Court should reject the majority's analysis and affirm the trial court's judgment in all respects.

II.

The trial court correctly found that the "other insurance" anti-stacking provision was valid and unambiguous and did not conflict with other anti-stacking language in the policy.

The trial court properly found that the anti-stacking "other insurance" provision in the American Family policy was valid and unambiguous. The clause did not conflict with other anti-stacking language in the policy. This court should make a similar finding and affirm the trial court's judgment.

Standard of review

American Family agrees with the standard of review and adds: When interpreting the language of a policy, this Court gives the language its plain or ordinary meaning, which is the meaning that the average layperson would understand. Shahan v. Shahan, 988 S.W.2d 529, 535 (Mo. banc 1999). Applying rules of construction is not necessary when a provision is clear and unambiguous, and courts are not permitted to create ambiguities to distort the language of an unambiguous policy. Id. Exclusionary clauses in insurance policies are strictly construed against the insurer; but if the language is unequivocal, it must be given its plain meaning, even if it restricts coverage. Killian v. Tharp, 919 S.W.2d 19, 21 (Mo.App. 1996).

Generally, "[a]n ambiguity in an insurance contract exists only where there is doubt or uncertainty as to its meaning and it is fairly susceptible to two interpretations." Earl v. State Farm Mutual Ins. Co., 820 S.W.2d 623, 625 (Mo.App 1992). In determining

whether a policy is ambiguous, the policy must be read as a whole. National Union Fire Ins. Co. of Pittsburge v. Muane, 277 S.W.3d 754, 758 (Mo.App. 2009). When determining the meaning of words and phrases of an insurance policy, a court will not read a phrase in isolation 'but will read the policy as a whole giving every clause some meaning if it is reasonably able to do so." Watters v. Travel Guard Intern., 136 S.W.3d 100, 108 (Mo.App. 2004). When determining whether an ambiguity exists, the key is whether the alternate construction advanced by the policyholder is "reasonable". If it is not a reasonable construction of the policy language, there is no ambiguity.

The trial court correctly rejected Dutton's argument that the "other insurance" anti-stacking provision was invalid and ambiguous.

Dutton, relying primarily upon the case Durbin v. Deitrick, 323 S.W.3d 122 (Mo.App. 2010), claims that the "other insurance" clause in the Ford policy is ambiguous and therefore American Family must pay under the Ford policy. However, the facts in Durbin differ from the instant case. Durbin involved the operation of a non-owned vehicle at the time of the accident. The insurer which issued the policy of the involved, non-owned vehicle operated by its employee (Deitrick) paid its limits. Durbin, 323 S.W.3d at 123. The employee personally owned four separate vehicles. Id. The carrier which issued the automobile liability coverage for the employee's personal vehicles paid the limits of one policy, but refused to pay the limits of the other three policies relying upon anti-stacking provisions in those policies. Id. The "other insurance" provision at issue, however, seemed to suggest that when the insured was operating a non-owned

auto/vehicle, the policies would be "excess" to other insurance (ostensibly, including excess to each other). The appellate court held that the "other insurance" provision created an ambiguity in the case where the insured was operating a non-owned auto, and as a result, the "other insurance" provision conflicted with the anti-stacking provision of the policies and the court allowed them to be stacked. Durbin, 323 S.W.3d at 127. Dutton's reliance upon Durbin is not persuasive because Hiles owned both the Nissan and the Ford.

The MVFRL requirements do not apply require stacking of the Ford policy. The unambiguous anti-stacking language does not violate the MVFRL and the anti-stacking language the Ford policy from providing coverage for Hiles' use of the Nissan.

The Ford policy has the following exclusions:

EXCLUSIONS

This coverage does not apply to:

…

9. **Bodily injury** or **property damage** arising out of the use of any vehicle, other than **your insured car**, which is owned by or furnished or available for regular **use** by **you** or any resident of your household. (L.F. 51.)

10. **Bodily injury** to:

(b) **You** or any person related to **you** and residing in your household. (L.F. 51.)

Each policy defines **you** and **your** as the policyholder shown in the declarations and spouse, if living in the same household. (L.F. 50.)

"Your insured car" means:

> a.. Any car described in the declarations and any private passenger car or utility car **you** replace it with. **You** must tell us within 30 days of its acquisition. (L.F. 50.)

Each policy contains the following LIMITS OF LIABILITY clause:

> The limits of liability shown in the declarations apply, subject to the following:
>
> 1. The bodily injury liability limit for "each person" is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one occurrence…
>
> We will pay no more than these maximums no matter how many vehicles are described in the declarations, or insured persons, claims, claimants, policies or vehicles are involved. (L.F. 51.)

Each policy contains the following language:

> OTHER INSURANCE
>
> If there is other auto liability insurance for a loss covered by this part, we will pay our share according to this policy's proportion of the total of all liability limits. But, any insurance provided under this part for a vehicle you do not own is excess over any other collectible auto liability insurance. (L.F. 51.)

> CONFORMITY WITH FINANCIAL RESPONSIBILITY LAWS. When we certify this policy as proof under any financial responsibility law, it will comply with the law to the extent of the required coverage… (L.F. 51.)

Each policy states:

> 2. Two or More **Cars** Insured. The total limit of our liability under all policies issued to **you** by us shall not exceed the highest limit of liability under any one policy. (L.F. 54.)

These exclusions apply and since the $25,000 was paid to Dutton from the Nissan owner's policy, the requirements of the MVFRL were met and payment from the Ford (non-accident vehicle) is not required by the MVFRL. The limits of liability provision is clear and unambiguous. The Ford policy cannot be added, combined or stacked with the Nissan policy.

The additional anti-stacking language as found in the "other policies" provision makes clear that American Family is only obligated to pay the $25,000 under the Nissan policy. "The public policy of this state is satisfied when there is an owner's policy of liability insurance sufficient to meet the minimum requirements of Missouri's financial responsibility law." First National Ins. Co. of American v. Clark, 899 S.W.2d 520, 523 (Mo. banc 1995) (because there was an owner's policy in effect, no operator's policy on the same vehicle was required by the MFRL): O'Roarke v. Esurance Ins. Co., 325 S.W.3d 395, 398 (Mo.App. 2010); DeMeo v. State Farm Mut. Ins. Co., 686 F.3d 607 (8th Cir. 2012). The trial court properly interpreted the MVFRL and the cases above described to

determine that the American Family "other insurance" provision was not invalid or ambiguous. The judgment should be affirmed.

Conclusion

This Court should affirm the judgment entered by the trial court in favor of American Family. As a matter of law, there was no coverage under the Ford policy and the anti-stacking language in the "other insurance" clause is valid and not ambiguous. Wherefore, for the above set forth reasons, Respondent American Family Mutual Insurance Company moves that this court affirm the trial court's judgment in all respects and for whatever further relief this court deems fair and just.

/s/ Susan Ford Robertson
Susan Ford Robertson #35932
The Robertson Law Group, LLC
1903 Wyandotte, Suite 200
Kansas City, MO 64108
816-221-7010 (phone)
816-221-7015 (fax)
susanr@therobersonlawgroup.com
zachb@therobertsonlawgroup.com

/s/ Christopher J. Carpenter
Christopher J Carpenter #41572
Tracy M. Hayes #58555
SANDERS WARREN & RUSSELL, LLP
40 Corporate Woods, Suite 1250
9401 Indian Creek Parkway
Overland Park, Kansas 66210
913-234-6100 (phone)
913- 234-6199 (fax)
cj.carpenter@swrllp.com
t.hayes@swrllp.com

Attorneys for Respondent American Family Mutual Insurance Company

Appendix—electronically filed separately

Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on July 7, 2014, a copy of Respondent's Substitute Brief and Appendix was served by electronic mail upon: Mr. Randall W. Brown at Randy@TEBlawfirm.com. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 6,678 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney