IN THE SUPREME COURT OF MISSOURI

ADAM DUTTON,	)	
	)	
Appellant,	)	
	)	**Case No. SC 94075**
vs.	)	
	)	
AMERICAN FAMILY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Respondent.	)	

On Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Marco A. Roldan
Case No. 1116-CV 08343

Transferred From the Missouri Court of Appeals Western District
Case No. WD 74940

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In this civil action, Appellant Adam Dutton seeks declaratory judgment holding that there is liability insurance coverage for injuries and damages sustained by Appellant in an auto accident under a policy of liability insurance issued by Respondent American Family Mutual Insurance Company which insured the tortfeasor Barbara Hiles. (LF 2-4).

On February 17, 2012, the trial court entered judgment in favor of Respondent American Family Mutual Insurance Company, holding that there was no liability coverage under the policy of insurance at issue. (LF 153; App. A1).

Pursuant to the Missouri Constitution, Article V, Section 3, jurisdiction was proper in the Missouri Court of Appeals Western District. On February 27, 2012, Appellant timely filed his Notice of Appeal to the Missouri Western District Court of Appeals. (LF 154-58). *See* Rule 81.04(a) and R.S.Mo. § 512.050 (1986). The Western District Court of Appeals issued its opinion on January 21, 2014. This Court has jurisdiction to hear this appeal, pursuant to the Missouri Constitution, Article V, Section 10, and upon application by Respondent, this Court granted transfer on April 29, 2014.

STATEMENT OF FACTS

Appellant Adam Dutton (hereinafter "Appellant") was injured in a motor vehicle accident with Barbara Hiles on May 25, 2009. (LF 105-6, ¶1-2). The accident occurred in Blue Springs, Jackson County, Missouri. (LF 105, ¶1).

Barbara Hiles was driving a 2007 Nissan Maxima at the time of the accident. (LF 106, ¶4). Barbara Hiles is liable for the damages sustained by Appellant in the motor vehicle accident on May 25, 2009. (LF 106, ¶3). The amount of Barbara Hiles' legal liability to Appellant for the damages sustained by Appellant equals or exceeds the limits of the policy at issue in this matter. (LF 106, ¶3).

On May 25, 2009, Barbara Hiles had two automobile liability insurance policies issued through Respondent American Family Mutual Insurance Company (hereinafter "American Family") as follows:

1) 2007 Nissan policy - Policy No. 2428-7830-03-83-FPPA-MO - issued to insured Barbara L. Hiles, which listed the 2007 Nissan that Barbara Hiles was driving at the time of the accident; and

2) 2003 Ford F-250 policy - Policy No. 2428-7830-02-80-FPPA-MO - issued to insured Barbara L. Hiles, which listed a 2003 Ford F-250 owned by Barbara Hiles. (LF 106, ¶4). This is the policy at issue in the case herein. (LF 106, ¶4).

The two above-listed insurance policies are the only liability insurance policies that were in effect on the date of the motor vehicle accident for Barbara Hiles. (LF 107, ¶5). Barbara Hiles was the owner of both of the vehicles listed and the named insured on both of the above-listed insurance policies. (LF 107, ¶5). The two above-listed insurance policies each have policy limits of $25,000 per person/$50,000 per accident. (LF 107, ¶6).

Appellant filed a lawsuit against Barbara Hiles for damages related to this accident, more specifically described in the Petition for Damages filed in the case styled *Adam L. Dutton v. Barbara L. Hiles*, Case No. 1016-CV36399, which was pending in the Circuit Court of Jackson County, Missouri. (LF 107-8, ¶7). Appellant made a settlement demand for $50,000, the combined policy limits for the two above-listed insurance policies to Barbara Hiles and her insurer American Family (LF 108, ¶8).

Appellant, Barbara Hiles and her insurer, American Family, finalized a settlement agreement on March 30, 2011. (LF 108, ¶9). Barbara Hiles, through her insurer, American Family, agreed to pay in settlement to Appellant, the $25,000 policy limits for the 2007 Nissan policy, the policy which listed the vehicle which Barbara Hiles was driving at the time of the accident, in exchange for the consideration listed in the settlement agreement. (LF 108-9, ¶10).

American Family declined to provide liability coverage to Barbara Hiles for the motor vehicle accident on May 25, 2009 under the Ford F-250 policy. (LF 109,

¶11). In the settlement agreement, the parties agreed that there was a dispute as to coverage under the Ford F-250 policy, and agreed that a declaratory judgment action would be the appropriate action to determine the applicable limits of liability coverage available to Barbara Hiles, if any, under the Ford F-250 policy for the injuries sustained by Appellant in the motor vehicle accident on May 25, 2009. (LF 109, ¶12).

Appellant is seeking the $25,000 limits of liability coverage in this action for the Ford F-250 policy. (LF 83; 108-09, ¶8-12).

American Family Policy Provisions

Both the Ford F-250 policy and 2007 Nissan policy have identical policy language. (LF 5-17, 25-36). The relevant policy provisions are as follows: (bold items included as in the policy):

* * *

DEFINITIONS USED THROUGHOUT THIS POLICY

3. **Car** means **your insured car**, a **private passenger car**, and a **utility car**

5. **Private passenger car** means a four-wheel car of the private passenger type.

9. **Use** means ownership, maintenance, or use.

12. **We**, **us** and **our** mean the company providing this insurance.

13. **You** and **your** mean the policyholder named in the declarations and

spouse, if living in the same household.

14. Your **insured car** means:

a. Any **car** described in the declarations and any **private passenger car** or utility trailer you replace with it…

* * *

PART I – LIABILITY COVERAGE

… **We** will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer**.

* * *

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.

* * *

LIMITS OF LIABILITY

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.

* * *

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.

* * *

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…

* * *

GENERAL PROVISIONS

3. 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.

11. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the state in which this policy is issued are changed to conform to those statutes.

(LF 5-17, 25-36).

On February 17, 2012, the trial court entered judgment in favor of American Family, holding that there was no liability coverage for this automobile accident under the Ford F-250 policy at issue. (LF 153; App. A1).

On February 27, 2012, Appellant timely filed his Notice of Appeal to the Missouri Western District Court of Appeals. (LF 154-58). The Western District Court of Appeals issued its opinion on January 21, 2014. This Court, upon application by Respondent, granted transfer on April 29, 2014.

POINTS RELIED ON

I. The trial court erred in entering judgment in favor of Respondent American Family Mutual Insurance Company because Missouri statutes and case law mandate that every owner's motor vehicle insurance policy issued in the state of Missouri must provide the minimum limits of liability coverage required by R.S.Mo. § 303.190, in that the 2003 Ford F-250 liability insurance policy issued by American Family to Barbara Hiles provides liability coverage in the amount of $25,000 to cover the damages sustained by Appellant in the motor vehicle accident on May 25, 2009, as Ms. Hiles is the named insured and she is legally liable for Appellant's damages due to her use of a private passenger car and any exclusions or limitations on minimum coverage are invalid

Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010)

American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88 (Mo. 2000)

R.S.Mo. § 303.190 (2000)

II. The trial court erred in entering judgment in favor of Respondent American Family Mutual Insurance Company because the "Other Insurance" clause in the Ford F-250 policy is ambiguous in that it conflicts with other anti-stacking language in the policy and it contains a broad grant of coverage with no limitations or qualifying language and this ambiguity should be decided in favor of coverage.

Durbin v. Deitrick, 323 S.W.3d 122 (Mo.App.W.D. 2010)

Seeck v. Geico Gen. Ins. Co., 212 S.W.3d 129, 132 (Mo. banc 2007)

Chamness v. Am. Fam. Mut. Ins. Co., 226 S.W.3d 199 (Mo.App.E.D 2007)

Lynch v. Shelter Mutual Ins. Co., 325 S.W.3d 531 (Mo.App.S.D. 2010)

ARGUMENT

I. The trial court erred in entering judgment in favor of Respondent American Family Mutual Insurance Company because Missouri statutes and case law mandate that every owner's motor vehicle insurance policy issued in the state of Missouri must provide the minimum limits of liability coverage required by R.S.Mo. § 303.190, in that the 2003 Ford F-250 liability insurance policy issued by American Family to Barbara Hiles provides liability coverage in the amount of $25,000 to cover the damages sustained by Appellant in the motor vehicle accident on May 25, 2009, as Ms. Hiles is the named insured and she is legally liable for Appellant's damages due to her use of a private passenger car and any exclusions or limitations on minimum coverage are invalid

A. Standard of Review

There is no dispute as to the material facts. This case involves the interpretation of an insurance policy, which is a question of law that the court reviews *de novo*. *Karscig v. McConville*, 303 S.W.3d 499, 502 (Mo. banc 2010)(*citing McCormack Baron Management Services, Inc. v. American Guarantee and Liability Ins. Co.*, 989 S.W.2d 168, 171 (Mo. banc 1999)).

B. The American Family Ford F-250 policy provides coverage as the Missouri Supreme Court has held that every owner's liability policy issued in Missouri must meet the minimum requirements of the MVFRL

The Missouri Supreme Court's rulings in *Karscig v. McConville*, 303 S.W.3d 499 (Mo. banc 2010) and *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88 (Mo. 2000) require insurance liability "stacking"[1] up to state minimums of $25,000 per person on owner's policies where multiple policies apply to a covered accident. These cases apply R.S.Mo. § 303.190, Missouri's Motor Vehicle Financial Responsibility Law (MVFRL).

The Ford F-250 policy is an owner's policy as Ms. Hiles is the named insured and owns the insured vehicle, the 2003 Ford F-250. *See Karscig*, 303 S.W.3d at 503; (LF 106, ¶4). The Ford F-250 policy applies to the accident and coverage is triggered as Ms. Hiles caused the accident while driving a private

[1] "'Stacking' refers to an insured's ability to obtain multiple insurance coverage benefits for an injury either from more than one policy, as where the insured has two or more separate vehicles under separate policies, or from multiple coverages provided for within a single policy, as when an insured has one policy which covers more than one vehicle." *Karscig*, 303 S.W.3d at 501, FN3 (*quoting Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 313 (Mo.App.1999)).

passenger car and she is legally liable to Appellant for damages. (LF 106, ¶3-4). The Ford F-250 policy must provide coverage at least up to the $25,000 minimum required by the MVFRL.

1. Missouri Motor Vehicle Financial Responsibility Law

R.S.Mo. § 303.190, Missouri's Motor Vehicle Financial Responsibility Law (MVFRL), provides in pertinent part that:

> 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 …, subject to limits, exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and, …; and
>
> 3. Such operator's policy of liability insurance shall insure the

> person named as insured 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, within the said territorial limits and subject to the same limits of liability as are set forth above with respect to any owner's policy of liability insurance.

2. *Karscig* and *Hargrave* hold coverage must be provided

a. *Karscig v. McConville*

The Missouri Supreme Court in *Karscig v. McConville*, 303 S.W.3d 499 (Mo. banc 2010) stated:

> The MVFRL requires each owner's and operator's policy issued in Missouri to provide minimum liability coverage of $25,000. It also does not restrict minimum liability payments to a single policy if coverage is provided under multiple policies. *Id.* at 500-501 (*citing American Standard Ins. Co. v. Hargrave,* 34 S.W.3d at 91-2).

Karscig v. McConville, 303 S.W.3d 499 (Mo. banc 2010) is controlling for this case as it involved an identical American Family policy as the instant matter. In *Karscig*, the plaintiff was seriously injured when his motorcycle was struck by a vehicle driven by Jennifer McConville. *Id.* at 501. Jennifer admitted fault for causing the wreck. *Id.* Jennifer's parents owned the car she was driving and it was

being operated with their consent. *Id.* The car being driven was insured under an American Family Mutual Insurance Company policy that provided bodily injury liability coverage of $25,000 ("parents' policy"). *Id*. American Family paid the policy limit of $25,000 to plaintiff on the parents' policy because Jennifer was a member of her parents' household and was permissively operating the accident vehicle, the 1998 Pontiac. *Id.*

Jennifer also was insured with American Family under a separate policy ("Jennifer's policy") on which she paid the premium and was designated the policyholder. *Id*. That policy also provided liability coverage of $25,000. *Id.* The vehicle listed on Jennifer's policy was a 1990 Pontiac Grand Am, which her parents also owned. *Id*. The McConvilles did not maintain an "owner's policy" on this vehicle. *Id*. Coverage under Jennifer's policy was contested. *Id*.

Importantly, American Family relied upon the identical exclusion, Exclusion 9, in the *Karscig* case as they do in the instant case, to deny liability coverage. The Supreme Court in *Karscig* held that the exclusion, Exclusion 9, was invalid because it conflicted with the minimum coverage requirements of the MVFRL. *Id*. at 502. The Court held that Jennifer's policy had to provide coverage up the minimum limits as required by the MVFRL. *Id*.

The *Karscig* Court started its analysis by determining whether Jennifer was in fact covered under the policy, without regard to any exclusions. *Id*. The Court held that coverage was provided because Jennifer, as the policyholder named in

the declarations, was legally liable for plaintiff's injuries due to her use of a private passenger car. *Id.*

The insuring provisions in the American Family policy in *Karscig* are identical to the insuring provisions in the American Family Ford F-250 policy at issue in this matter. *Id.*; (LF 9). In the instant matter, nearly identical to the facts in *Karscig*, Ms. Hiles is covered under the Ford F-250 policy as she is the named insured, she is legally liable for plaintiff's injuries and she was using a private passenger car owned by her at the time of the accident. (LF 106, ¶3-4).

The Court in *Karscig* went on to discuss Exclusion 9, the identical exclusion as in the instant mater. The court in *Karscig* held that Jennifer's policy excludes coverage under Exclusion 9:

> "….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." (Emphasis added by the court). *Karscig*, at 502.

The term "your insured car" was defined, in relevant part, as "Any car described in the declarations." *Id.* The declarations in Jennifer's policy described only the 1990 Pontiac Grand Am. *Id.* She was not driving that vehicle at the time of the accident; rather, she was driving her parents' 1998 Pontiac Grand Am. *Id.* The Court went on to hold that the accident vehicle, therefore, fell within this

exclusion category because 1) it was owned by Jennifer's parents, 2) it was available for Jennifer's regular use, and 3) it was not described in the declarations in Jennifer's policy. *Id*. at 503. The Court held that the plain language of Jennifer's policy unambiguously excluded coverage for plaintiff's injuries. *Id*.

However, the *Karscig* Court held:

> Nevertheless, the exclusion does not apply to exclude coverage for [plaintiff's] injuries because it conflicts with the MVFRL's requirements for an "operator's policy." *Id*.

The *Karscig* Court went on to discuss the differences between an owner's policy and an operator's policy. The court held:

> Based on these definitions [used throughout the MVFRL], a policy issued to an owner is an "owner's policy" and must comply with the statutory mandates of § 303.190.2, while a policy issued to a non-owner is an "operator's policy" and must comply with the statutory mandates of § 303.190.3. *Id*.

The Court ultimately found that Jennifer's policy was an operator's policy and therefore under the mandate of the MVFRL it had to provide coverage up to the $25,000 minimum required. *Id*. at 504. The Court held that although the exclusion on its face seemed to exclude coverage, it conflicted with the mandate of §303.190.3. *Id*.

The burden of showing that an exclusion to coverage applies is on the

insurer. *Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. banc 2013)(*citing Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010) ("Missouri also *strictly* construes exclusionary clauses against the drafter, who also bears the burden of showing the exclusion applies") (emphasis in original). *Id*. In the instant matter, as in *Karscig*, it appears on its face as though Exclusion 9 would prohibit coverage. However, per *Karscig*, this exclusion violates the mandate of the MVFRL and the minimum coverage must be applied.

The *Karscig* Court then continued on to hold that even though there was anti-stacking language in the policy, this anti-stacking language also violated the mandate of the MVFRL and coverage up to the $25,000 must be provided. *Id*. at 504. This anti-stacking language is discussed below.

The *Karscig* Court reiterated the holding in *American Standard Insurance Company v. Hargrave*, 34 S.W.3d 88 (Mo. 2000) by stating:

> The MVFRL requires each owner's and operator's policy issued in Missouri to provide minimum liability coverage of $25,000. (internal citation omitted) It also does not restrict the minimum liability payments to a single insurance policy if coverage is provided under multiple policies. *Hargrave*, at 91-92.

In sum, the Missouri Supreme Court has held that every owner's or operator's policy issued in Missouri must provide liability coverage up to the

minimum limits of the MVFRL of $25,000. This Court has ruled upon the identical policy language and exclusion that is involved in the instant case and the Court has mandated coverage for both owner's and operator's policies. Any attempt to restrict or exclude coverage up to this limit is held to be a violation of the MVFRL and will be prohibited. The *Karscig* case dealt with an operator's policy and the instant matter involves an owner's policy, however, the Court in *Karscig*, pursuant to the MVFRL, treats both types of policies equally in terms of minimum coverages.

b. Ford F-250 policy coverage provisions are triggered

In the instant matter, Ms. Hiles had an owner's policy on the Ford F-250, which was valid at the time of the accident. (LF 106, ¶4). Ms. Hiles was covered under this policy as she was the named insured and Ms. Hiles is legally liable for the damages to Appellant. (LF 106, ¶3-4).

As stated, the American Family policies in *Karscig* and the instant case are the same. The relevant insuring provisions for the Ford F-250 policy are as follows:

* * *

PART I – LIABILITY COVERAGE

… **We** will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer**.

* * *

ADDITIONAL DEFINITION USED IN THIS PART ONLY

Insured Person or **Insured Persons** means:

1. You or a relative.

* * *

DEFINITIONS USED THRGOUHOUT THIS POLICY

3. **Car** means **your insured car**, a **private passenger car**, and a **utility car.**

5. **Private passenger car** means a four-wheel car of the private passenger type.

9. **Use** means ownership, maintenance, or use.

12. **We**, **us** and **our** mean the company providing this insurance.

14. Your **insured car** means:

    a. Any **car** described in the declarations and any **private passenger car** or utility trailer you replace with it…

(LF 5-17, 25-36).

In reviewing the insuring liability coverage provisions in the Ford F-250 policy -- "We" is American Family, the company to pay compensatory damages. (LF 106, ¶4). The insured person is Ms. Hiles -- she is the named insured. (LF 107, ¶5). Appellant suffered bodily injury in the accident and Ms. Hiles is legally liable for the damages to Appellant. (LF 105-6, ¶1-3). "Use" of a car includes

"ownership" and "use" – Ms. Hiles owned the 2007 Nissan and was using the 2007 Nissan at the time of the accident. (LF 9; LF 106, ¶4). The accident was due to the "use" (ownership and use) of a "car" (the 2007 Nissan). (LF 106, ¶4).

The definition of "car" includes not only the named insured vehicle, but it includes a "private passenger car" and a "utility car". (LF 9). A "private passenger car" includes a four wheel car of the private passenger type. (LF 9). The 2007 Nissan Maxima is a four wheel private passenger car. Pursuant to the plain language of the Ford F-250 policy, the vehicle does not have to be the vehicle listed on the declarations page to for the policy to provide coverage, there must simply be legal liability due to the "use" (ownership or use) of a "private passenger car". (LF 9).

The MVFRL requires, under § 303.190.2, that any owner's policy "Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;…" The language "motor vehicles" is plural, evidencing the fact that more than a single vehicle could be designated. The Ford F-250 policy designates by explicit description the Ford F-250 (on the declarations page) and designates by reference in the insuring provisions which vehicles it will cover. It will cover not only the insured vehicle (the vehicle listed on the declarations page), as stated above, but it will also cover a "private passenger car". The 2007 Nissan is a private passenger car as stated and

is therefore designated by reference in the F-250 policy per the requirements of the MVFRL.

More simply put, the Ford F-250 policy is triggered and provides coverage and will pay compensatory damages because Ms. Hiles is legally liable for bodily injuries to Appellant due to the use of a private passenger car. The trial court in this matter did not find that coverage was not triggered under the policy, it merely found that the MVFRL does not mandate coverage on an owner's policy which specifically lists an automobile not involved in an accident and that the anti-stacking language applied to prohibit coverage. (LF 153; App. A1).

The Ford F-250 policy provides liability coverage for Ms. Hiles for this accident. Even though Exclusion 9 and the anti-stacking provisions on their face may appear to exclude coverage for Ms. Hiles under the Ford F-250 policy, per *Karscig*, this is a violation of the mandate of the MVFRL and coverage up to $25,000 must be provided.

c. *American Standard Ins. Co. v. Hargrave*

The Supreme Court in *Karscig* court relied upon *American Standard Insurance Company v. Hargrave*, 34 S.W.3d 88 (Mo. 2000). In *Hargrave*, a mother, Mrs. Hargrave and her minor children were injured in a car accident. *Id.* at 89. The children's father, Mr. Hargrave, sought payment for injuries sustained by one of the minors. *Id.* Mrs. Hargrave was driving a car insured under a State Farm owner's policy which was held by the minor child's grandfather. *Id.* Mrs.

Hargrave also had an owner's liability policy through her own American Standard Insurance Company policy. *Id.* State Farm paid the $25,000 as required by the MVFRL. *Id*. American Standard denied any coverage contending its household exclusion clause was fully enforceable against the minor child because State Farm had provided the minimum liability payment required by the MVFRL on the accident vehicle. *Id.*

The Supreme Court in *Hargrave* said the issue to be decided in the case was the application of R.S.Mo. § 303.190, the MVFRL, where an insured is covered by multiple owner's liability policies. *Id*. at 89-90. The Court noted that the purpose of the MVFRL is to ensure that persons injured on Missouri's highways, whether they be owners, operators, occupants of the insured's vehicle, or pedestrians, may collect at least minimal damage awards against negligent motor vehicle operators. *Id*. at 90. The Court noted that R.S.Mo. § 303.025.1 requires owners of registered motor vehicles to maintain financial responsibility conforming to Missouri law. *Id*. The Court stated that the plain language of this statute requires vehicle owners and operators to maintain financial responsibility not only for the vehicles they own, but for any vehicle they operate. *Id*. The Court quoted 303.025.1 which reads:

> No owner of a motor vehicle registered in this state…shall *operate* register or maintain registration of a motor vehicle,…unless the owner maintains the financial

> responsibility which conforms to the requirements of the laws of this state. *Id.* (emphasis in original).

The Supreme Court in *Hargrave* went on to hold that as there were two owner's policies at issue, R.S.Mo. § 303.190.2 was applicable. The Court held:

> There is no language in section 303.190 that would restrict the minimum liability payments to a single insurance policy. There are no words anywhere in the statutory scheme of the MVFRL that provide that an insured party is to receive only one statutory limit of $25,000 in compensation if they are insured under multiple polices. The plain language of the section 303.190.2 indicates that every owner's policy issued in this state must provide the minimum liability coverage to comply with Missouri law, and this Court's decision in *Halpin*[2] holds *all* household exclusion clauses invalid up to those minimum limits of coverage. The Hargraves correctly point out that had the state legislature intended the result argued for by American Standard, it could have easily included language restricting the minimum liability protection

[2] *Halpin v. American Family Mutual Ins. Co.*, 823 S.W.2d 479, 480 (Mo. banc 1992) determined that 303.190 "effects a partial invalidity" of household exclusions to the extent of the minimum coverage required by the MVFRL.

> to only one policy or only one statutorily required minimum payment. *Id*. at 91(emphasis in original).

The *Hargrave* Court continued to emphasize the point by holding, contrary to American Standard's argument that their owner's liability policy was excess over the policy on the vehicle:

> While it is correct that excess insurance coverage is not subject to the minimum financial requirements of section 303.190, each owner's policy must still provide the minimum requirements outlined in section 303.190.2. It is only any additional coverage contained in each individual policy that is not subject to section 303.190.2's requirements. Neither the MVFRL, nor the *Halpin* decision, require liability coverage exceeding the amounts specified in section 303.190. What the MVFRL requires is that each valid owner's or operator's policy provide the minimum liability limits specified, $25,000 for bodily injury to or death of one person in any one accident …. *Id*. at 92.

The *Hargrave* Court concluded by holding that because Mrs. Hargrave was covered by two valid owner's policies at the time of the accident, both policies would be required to pay the minimum $25,000 as required by the MVFRL. *Id*.

Hargrave specifically addressed the issue whether the MVFRL requirement of $25,000 per owner's or operator's policy can be satisfied by the payment of one policy where multiple policies are applicable. *Hargrave* held that the MVFRL requirement of $25,000 per policy coverage was not satisfied by the payment of one policy when there were other policies that provide coverage. *Id*. at 91-2.

As the *Hargrave* and *Karscig* Courts recognized, the public policy rationale in this instance is simple -- the legislature requires liability coverage, and the insurance company cannot, in any way, diminish that coverage unless expressly allowed by the statute.

The *Hargrave* case is on point and controlling. As in *Hargrave*, in the instant case, there are two valid owner's liability policies. (LF 106, ¶4). American Family paid the policy limit of $25,000 on the 2007 Nissan owner's policy but is attempting to restrict and deny coverage on the valid Ford F-250 owner's liability policy. (LF 108-9, ¶10-12). This circumvents the mandate of the MVFRL as determined by the Missouri Supreme Court. The American Family Ford F-250 policy must provide coverage in the amount of $25,000.

3. *Karscig* holds anti-stacking language invalid

As stated, the *Karscig* Court held that even though there was anti-stacking language in the policy, this anti-stacking language also violated the mandate of the MVFRL and coverage up to the $25,000 must be provided. *Id*. at 504. The anti-stacking language in *Karscig* is identical to the case at hand as the policies are

identical American Family policies.

The Court in *Karscig* first considered the following anti-stacking language, identical to the case at hand:

> 3. 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. *Id.*; (LF 13).

The *Karscig* Court held that since Jennifer McConville was the named insured on only one policy this language did not apply. However, even if this language had applied to the case, as will be shown, the Court would have held that the anti-stacking clause was invalid up to the minimum limits of the MVFRL.

The *Karscig* Court then considered the other anti-stacking provision in the policy, the identical language as in the case at hand. That provision is as follows:

> LIMITS OF LIABILITY
>
> 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.
>
> *Id.*; (LF 10).

The *Karscig* Court noted that two policies were involved, the owner's policy under which the limits had been paid and Jennifer's operator's policy, the policy at issue. *Id.* The Court held noted that:

> [T]his "anti-stacking" provision attempts to restrict the total compensation to $25,000 even though the two policies issued by American Family *each* provide $25,000 in coverage. *Id.* (emphasis in original).

The *Karscig* Ccourt held that this anti-stacking language violates the requirements of the MVFRL and that the MVFRL requires each owner's and operator's policy to provide the minimum coverage of $25,000. *Id.* at 504-05.

In the instant case there are two valid owner's policies. Any attempt to restrict the coverage to less than what is mandated by the MVFRL by way of "anti-stacking" language or by exlusion is invalid. The Ford F-250 policy must provide coverage in the amount of $25,000.

4. Recent decisions reiterate *Karscig* and *Hargrave* principles

Recent decisions from the Missouri Court of Appeals rely upon the reasoning and conclusions of *Karscig* and *Hargrave* in holding that the MVFRL requires that every owner's and operator's policy issued in Missouri must provide minimum liability coverage of $25,000. Those cases are discussed here briefly.

In *Rutledge v. Bough*, 399 S.W.3d 884 (Mo.App.S.D. 2013), the tortfeasor was test-driving a vehicle owned by his employer and caused the death of plaintiffs' family member. The tortfeasor had a personal owner's insurance policy with limits of $50,000 which covered the tortfeasor's operation of the vehicle and that limit was paid. *Id*. at 885. The owner of the vehicle that was involved in the accident also had an owner's policy which listed the accident vehicle but coverage was denied based upon the fact that the tortfeasor's personal owner's policy had already paid out its $50,000 policy limits in coverage and therefore the MVFRL had been satisfied by this payment. *Id*. at 887. This is similar to the "one policy in place" argument previously argued by Respondent American Family in this matter. The court denied this argument and held that pursuant to the MVFRL, *Karscig* and *Hargrave*, this owner's policy must provide the $25,000 minimum coverage as required by the MVFRL. *Id*. at 887-88.

In *O'Neal v. Argonaut Midwest Insurance*, 415 S.W.3d 720 (Mo.App.S.D. 2013), the tortfeasor was driving a leased vehicle and caused an accident and injury to her brother. *Id*. at 722. After a $25,000 minimum payment by a policy which covered the tortfeasor, the owner of the leased vehicle denied coverage under an owner's policy for the accident arguing mainly the policy was a contingent policy and its coverage was not triggered under the facts. *Id*. at 724. The court held that the policy provisions were triggered and held that pursuant to

the MVFRL, *Karscig* and *Hargrave*, this owner's policy must provide the $25,000 minimum coverage as required by the MVFRL. *Id*. at 725-26.

In *Affirmative Insurance Company v. Broeker*, 412 S.W.3d 314, FN11 (Mo.App. E.D. 2013), although the court held in the case that the policy at issue was true excess insurance and not subject to the minimum requirements of the MVFRL, the court cited *Hargrave* in noting in FN11 that an insured party may receive more than one statutory limit of $25,000 in minimum coverage if there is coverage under more than one policy. The court also noted in FN11 that in the case, the plaintiffs had received two mandatory minimum coverage payments from two separate insurance policies. *Id*.

The *O'Rourke v. Esurance Ins. Co.*, 325 S.W.3d 395 (Mo. App. E.D. 2010) case reiterates the same principles and law pronounced in the *Karscig* and *Hargrave* -- that the MVFRL requires every owner's and operator's policy issued in Missouri to provide minimum liability coverage. *Id.* at 398. *O'Rourke* held that the plaintiff could not stack coverage for multiple vehicles listed on one single policy and distinguished its holding from *Karscig* by stating that:

> However, this fact pattern is clearly distinguishable from *Karscig*. Where in *Karscig* two policies covered one automobile, here one policy covers two automobiles, only one of which was involved in the accident. *Id*.

O'Rourke is also distinguishable from the case at hand in that there was only one policy at issue. *See also*, *Allstate Property and Casualty Ins. Co. v. Davis ex rel. Davis*, 403 S.W.3d 714 (Mo.App.W.D. 2013)(relying upon the reasoning and holdings in *Hargrave* and *Karscig* but denying coverage under a multi-vehicle policy as opposed to separate policies). The inference of the *O'Rourke* and *Allstate* courts clearly indicates given the same facts as this case, they would be bound by *Hargrave* and *Karscig*, and the MVFRL minimum coverage would be required for the Ford F-250 policy in the case at hand.

5. "One Policy in Place Rule" argued by American Family has been abandoned

American Family has argued previously in this case that because there was one policy in place to cover the injuries from the accident, the MVFRL has been satisfied and the Ford F-250 policy does not have to cover the accident. For this proposition, American Family has relied mainly upon S*isk v. American Family Mutual Insurance Company*, 860 S.W. 2d 34 (Mo. App. 1993), a case decided by the Missouri Appeals Court for the Eastern District, many years before the Missouri Supreme Court decided *Hargrave* and *Karscig*.

In *Sisk*, the appeals court held that because one liability policy was already in place to cover the injuries sustained, the MVFRL was satisfied and other policies would not be required to provide coverage. *Id*. at 36.

This "rule" has been abandoned, most recently by the Missouri Supreme Court in *Karscig*. The Court in *Karscig* held that even though there was one owner's policy and one operator's policy at issue, both were required to cover the injuries from the accident. *Karscig* at 500-01. This holding in *Karscig* explicitly abandons the "one policy in place" rule that American Family relies upon. If the "one policy in place rule" were applicable, the operator's policy in *Karscig* would not have been required to cover the accident as there had already been one policy in place to cover the accident – the owner's policy that upon which American Family had already paid its policy limits.

Additionally, *Hargrave* also specifically addressed the issue whether the MVFRL requirement of $25,000 per owner's or operator's policy can be satisfied by the payment of one policy where multiple owner's policies are applicable. *Hargrave* held that the MVFRL requirement of $25,000 per policy coverage was not satisfied by the payment of one policy when there were other owner's policies that provide coverage. *Hargrave* at 91-2. If the "one policy in place" rule were applicable, then the second owner's policy in *Hargrave* would not have been required to provide coverage. The policy situation in *Hargrave* is nearly identical to the case at hand. In the case at hand there are two valid owner's policies that should cover the accident and the damages suffered by Appellant.

6. Conclusion

The Missouri Supreme Court's rulings in *Karscig* and *Hargrave* require insurance liability "stacking" up to state minimums of $25,000 per policy on owner's policies where multiple policies apply to a covered incident. Ms. Hiles was covered by two valid owner's policy for the May 25, 2009 accident which injured Appellant. American Family has paid the $25,000 limits of coverage for the 2007 Nissan policy, however, refuses to pay the $25,000 policy limits and minimum coverage limits as mandated by the MVFRL on the Ford F-250 policy.

The Ford F-250 policy provides liability coverage for Ms. Hiles as she is the named insured and she is legally liable for Appellant's damages due to her use of a private passenger car. Any exclusions or limitations on this coverage are invalid up to the minimum limit of $25,000. Coverage must be provided on Ms. Hiles' American Family Ford F-250 policy in the amount of $25,000.

II. The trial court erred in entering judgment in favor of Respondent American Family Mutual Insurance Company because the "Other Insurance" clause in the Ford F-250 policy is ambiguous in that it conflicts with other anti-stacking language in the policy and it contains a broad grant of coverage with no limitations or qualifying language and this ambiguity should be decided in favor of coverage.

A. Standard of Review

There is no dispute as to the material facts. This case involves the interpretation of an insurance policy, which is a question of law that the court reviews *de novo*. *Karscig v. McConville*, 303 S.W.3d 499, 502 (Mo. banc 2010)(*citing McCormack Baron Management Services, Inc. v. American Guarantee and Liability Ins. Co.*, 989 S.W.2d 168, 171 (Mo. banc 1999)). Additionally, whether an insurance policy is ambiguous is a question of law that the court reviews *de novo*. *Durbin v. Deitrick*, 323 S.W.3d 122, 125 (Mo.App.W.D. 2010).

B. The "Other Insurance" clause in the Ford F-250 policy is ambiguous in that it conflicts with other anti-stacking language in the policy and it contains a broad grant of coverage with no limitations or qualifying language

The "Other Insurance" clause in the Ford F-250 policy is ambiguous in that it conflicts with other anti-stacking language in the policy and it contains a broad

grant of coverage with no limitations or qualifying language. The resulting ambiguity must be decided in favor of coverage. The "Other Insurance" clause in the instant policy reads as follows:

> 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. (LF 13).

There is "other auto liability insurance" in the instant case so the Other Insurance clause is applicable. There was the other owner's liability insurance policy for the 2007 Nissan issued by American Family under which the policy limits have been paid. (LF 108-9, ¶10). The second sentence does not apply as the 2007 Nissan Ms. Hiles was driving was owned by her. (LF 106, ¶4).

The case of *Durbin v. Deitrick*, 323 S.W.3d 122 (Mo.App.W.D. 2010) is on point. *Durbin* involved an American Family policy with an Other Insurance clause identical to the clause in the instant matter. In *Durbin* the defendant was driving a non-owned vehicle and severely injured the plaintiff. *Id*. at 123. The insurance policy which covered the vehicle defendant was driving paid its policy limits to plaintiff. *Id*. However, defendant had four other liability policies on other cars he owned issued by American Family. *Id*. American Family paid the policy limits for one of the four policies but refused to tender the remaining policy

limits citing anti-stacking language in its policies. *Id*. at 123-24. The court ultimately held that the Other Insurance clause, when read in conjunction with the policies' other anti-stacking clauses, rendered the policy ambiguous and therefore stacked coverage was available under the remaining three American Family policies. *Id*. at 127.

The court in *Durbin* cited longstanding case law that holds that when one provision of an insurance policy conflicts with another provision and an ambiguity in the policy is created, coverage will be decided in favor of the insured and against the insurance company. *Id*. at 125. "If an insurance policy is not ambiguous, we enforce the policy according to its terms; if a policy is ambiguous, we construe the language of the policy against the insurer." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). "In construing the terms of an insurance policy, we apply 'the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.'" *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009) (*quoting Seeck*, 212 S.W.3d at 132). "An ambiguity arises when there is duplicity, indistinctness, or uncertainty in the meaning of words used in the contract." *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. banc 1992). We do not interpret insurance policy provisions in isolation but rather evaluate the policy in terms of a whole. *Ritchie*, 307 S.W.3d at 135.

"Where an insurance policy promises the insured something at one point

but then takes it away at another, there is an ambiguity." *Chamness v. Am. Family Mut. Ins. Co.*, 226 S.W.3d 199, 204 (Mo.App. E.D 2007). "Specifically, if 'an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured.'" *Id.* (*quoting Seeck*, 212 S.W.3d at 134). Thus, if policy language is ambiguous as to whether stacking is permitted, we construe the language of the policy against the insurer and in favor of stacking. *Ritchie*, 307 S.W.3d at 135.

In the instant matter, the Ford F-250 policy provides, in the Other Insurance clause, that when there is other liability insurance, American Family will pay its share of the loss. (LF 13). This clause has no limitations or restrictions. This would appear to the average layperson to be applicable in this situation and would appear to cover this claim. The proportion would be that the Policy would pay in full because Appellant's damages equal or exceed $50,000 and American Family has only paid $25,000. (LF 106, ¶3; 108-9, ¶10).

This Other Insurance clause conflicts with the anti-stacking language in the Ford F-250 policy. The Limits of Liability section states reads as follows:

> LIMITS OF LIABILITY
>
> 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. (LF 13).

And in the General Provisions section of the policy, there is language as follows:

> 3. 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. (LF 13).

When the Other Insurance clause is read and interpreted by a reasonable insured it is clear that the Ford F-250 policy will pay its share – its policy limit of $25,000. However, the Limits of Liability section and No. 3 in the General Provisions sections seem to conflict in that they prohibit this type of coverage (even though, as discussed above, these clauses are invalid per case law and the MVFRL). This creates a conflict in the policy and pursuant to Missouri case law the resulting ambiguity is to be resolved in favor of coverage.

Additionally, the Other Insurance clause has no restrictions or limitations on coverage. (LF 13). A layperson would reasonably read this clause as a broad grant of coverage as there appear to be no limitations on this coverage. American

Family could have limited this broad grant of coverage by stating, "subject to the limitations or exclusion contained in this policy" or similar language, but failed to do so.

Lynch v. Shelter Mutual Insurance Company, 325 S.W.3d 531 (Mo.App.S.D. 2010), is an example of where limiting language can be unambiguously used to limit a broad grant of coverage in certain situations. In *Lynch*, the policy in question granted coverage then had a limiting phrase "subject to the limit of our liability…" *Id*. at 536. Such is not the case here. American Family has offered a broad grant of coverage with no limitation. This conflicts with the other provisions of the Ford F-250 policy and makes the policy as a whole ambiguous.

"If a contract promises something at one point and takes it away at another, there is an ambiguity." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo. banc 2007)(*quoting Lutsky v. Blue Cross Hosp. Serv., Inc.*, 695 S.W.2d 870, 875 (Mo. banc 1985)). Specifically, if "an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured." *Seeck*, 212 S.W.3d at 134.

This case law is on point in the instant matter. The Ford F-250 policy gives coverage in the Other Insurance clause, then attempts to take it away in the exclusion and limits of liability. This creates an ambiguity that must be construed

in favor of coverage. Therefore, liability coverage of $25,000 should be provided on Ms. Hiles' Ford F-250 American Family policy.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the trial court and remand this cause to the trial court with instructions for entry of judgment in favor of Appellant in the amount of $25,000.00.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Rule 84.06(c), that the foregoing brief complies with the limitations contained in Rule 84.06(b), that this brief contains 9,090 words (all inclusive) and that counsel relied on the word count of the word-processing system used to prepare the brief (Microsoft Word). Counsel further certifies that the electronic copies of this brief have been scanned for viruses and are virus free.

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