SC94250

IN THE SUPREME COURT OF MISSOURI

JIMMIE LEE TAYLOR,

Appellant,

vs.

THE BAR PLAN MUTUAL INSURANCE COMPANY,

Respondent.

On Appeal from the Circuit Court of Jackson County
Honorable Sandra C. Midkiff, Circuit Judge
No. 1016-CV38900

SUBSTITUTE BRIEF OF THE APPELLANT

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Preliminary Statement

Jimmie Taylor hired attorney James Wirken to represent him in the administration of his mother's trust. Around the time of her death, Mr. Wirken abused Mr. Taylor's confidence as his lawyer and advised Mr. Taylor to loan $250,000 to Mr. Wirken's law firm and $267,140 to another client of Mr. Wirken's. Mr. Wirken directed the transactions without advising Mr. Taylor to seek outside counsel. He concealed information, failed to ensure securities actually existed, and served only his own interests.

After the loans entered default, Mr. Taylor filed suit against Mr. Wirken for breach of his fiduciary duties. After a trial, the circuit court agreed and awarded Mr. Taylor $940,844.82. When The Bar Plan, Mr. Wirken's professional liability insurer, refused to cover the judgment, Mr. Taylor filed an equitable garnishment action against it.

The Bar Plan and Mr. Taylor each sought summary judgment. The trial court granted judgment for The Bar Plan, holding its policy did not cover the judgment due to an exclusion for claims arising out of an insured's capacity as "a legal representative of investors in regard to and resulting in an investment in an enterprise in which" the insured "owns an equity interest or for which" he "receives a fee or commission."

This was error. The exclusion is ambiguous, as the terms "investor" and "investment" reasonably can be read not to include Mr. Taylor or his loans, especially as he could not legally invest in Mr. Wirken's law firm. As well, Mr. Taylor obtained the underlying damages due to the concurrent cause of Mr. Wirken's breach of his fiduciary duties outside anything to do with the loans, mandating coverage nonetheless.

This Court should reverse and remand for judgment for Mr. Taylor.

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Jurisdictional Statement

This is an appeal from a judgment denying an injured plaintiff's equitable garnishment claim against the insurer of the party who injured him. The only issue on appeal is whether the insurer's policy excludes coverage for the plaintiff's damages as found in the underlying judgment.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. The appellant timely appealed to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals.

On April 29, 2014, the Court of Appeals issued an opinion reversing the trial court's judgment and remanding the case for further proceedings. The respondent filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. It then filed a timely application for transfer in this Court under Rule 83.04. On August 19, 2014, the Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

<u>Statement of Facts</u>

A. Mr. Taylor's Loans to Mr. Wirken and the Wirken Group

In September 2006, Appellant Jimmie Lee Taylor hired attorney James C. Wirken, a Missouri-licensed attorney and 100% shareholder of The Wirken Law Group, P.C. ("the Wirken Group"), to represent him, his wife, and his mother in claims against another person for mismanagement of his mother's trust (Legal File 295, 329-30, 422; Appendix A14-15).[1] Until the death of his mother in May 2007, Mr. Taylor was co-trustee of the trust; thereafter, he became the trust's sole trustee and beneficiary (L.F. 329; Appx. A14).

Mr. Wirken continue to represent Mr. Taylor in the period surrounding his mother's death in 2007 and 2008 "in matters related to estate planning for [Mr. Taylor]

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[1] Effective November 2, 2012, this Court ordered Mr. Wirken permanently disbarred for violation of Rules 4-1.8(a) and 4-1.15(c). *See* Order in *In re Wirken*, No. SC92856 (Mo. banc filed Nov. 2, 2012). This Court can take judicial notice of that case file, *In re Murphy*, 732 S.W.2d 895, 902 (Mo. banc 1987), and Mr. Taylor asks the Court to do so. As that case file shows, the disbarment stemmed primarily from the events underlying this case. *See also* Scott Lauck, "Former KCMBA president James Wirken accused of receiving loans from clients," *Mo. Lawyers Weekly* (July 30, 2012); Scott Lauck, "Former KCMBA president disbarred," *Mo. Lawyers Weekly* (Nov. 2, 2012).

and his wife and estate planning and administration of" Mr. Taylor's mother's estate after her death (L.F. 329-30; Appx. A14-15). An attorney-client relationship existed between Mr. Taylor and Mr. Wirken during all of 2007, in which Mr. Wirken provided Mr. Taylor legal services (L.F. 330, 152; Appx. A15, A22).

Through that relationship, Mr. Wirken gained a thorough knowledge of the assets available to Mr. Taylor in his mother's trust, and approached Mr. Taylor about Mr. Wirken obtaining loans from the trust (L.F. 31, 330; Appx. A15). Mr. Wirken told Mr. Taylor he had several contingent fee cases which already had settled or were going to be settled by the end of the year and promised to pay Mr. Taylor from those fees (L.F. 331; Appx. A16). In reality, however, at that time Mr. Wirken did not actually "know whether or not it was true that the cases had been settled or would settle" (L.F. 331; Appx. A16). But, as Mr. Wirken was Mr. Taylor's attorney and, thus, Mr. Taylor believed Mr. Wirken was acting in his best interests, Mr. Taylor relied on Mr. Wirken's representations and agreed to make the loans from the trust (L.F. 331; Appx. A16).

Accordingly, on three separate occasions during Mr. Wirken's representation of Mr. Taylor, April 5, 2007, May 21, 2007, and June 7, 2007, Mr. Wirken arranged with Mr. Taylor to borrow money from the trust (L.F. 330; Appx. A15). A separate promissory note, which Mr. Wirken drew up, memorialized each of the three loans (L.F. 330-31; Appx. A15-16). In drawing up the notes, Mr. Wirken was providing legal services to Mr. Taylor (L.F. 331; Appx. A16).

The Wirken Group made all three notes, which Mr. Wirken personally guaranteed, bore interest at 10% until default and 15% thereafter, and "provided that a reasonable attorney fee was due in the event the note was placed for collection" (L.F. 330-31; Appx. A15-16). The note for the April 5, 2007, loan was for $100,000 due April 5, 2008, and went into default on April 6, 2008 (L.F. 331; Appx. A16). The note for the May 21, 2007, loan was for $100,000 due December 31, 2007, and went into default on January 1, 2008 (L.F. 330-31; Appx. A15-16). The note for the June 7, 2007, loan was for $50,000 due September 5, 2007, and went into default on September 6, 2007 (L.F. 330; Appx. A15). No payments ever were made on the loans (L.F. 332; Appx. A17).

Although Mr. Wirken admitted an attorney-client relationship existed between him and Mr. Taylor and he owed Mr. Taylor a fiduciary duty, he did not act in Mr. Taylor's best interest either in advising Mr. Taylor to make the loans or in drawing up the notes for the loans (L.F. 332; Appx. A17). At no time did Mr. Wirken suggest to Mr. Taylor that he "should see another lawyer about the wisdom of entering into these transactions" with Mr. Wirken (L.F. 330; Appx. A15). Nor did Mr. Wirken "make a written disclosure regarding his ethical obligations under the Code of Professional Responsibility," specifically "Rule 4-1.8," "when engaging in a business transaction with a client" (L.F. 330; Appx. A15).

After the loans went into default, Mr. Wirken finally told Mr. Taylor the cases he previously had said would be settled were not settled and he was without resources to repay the loans (L.F. 332; Appx. A17). By April 21, 2010, "the total amount of principal and interest due on the three notes [was] $346,643.30" (L.F. 332; Appx. A17).

B. Mr. Taylor's Loans to Mr. Wirken's Other Client, Longview

Also in 2007, Mr. Wirken informed Mr. Taylor that Longview Village Development Company ("Longview"), another client of Mr. Wirken's, was looking for a short-term lender for its development projects (L.F. 332; Appx. A17). Mr. Wirken advised Mr. Taylor to make three loans to Longview and assured Mr. Taylor that all such loans would be secured by the personal guarantee of Jeffrey Montgomery, a former Kansas City Royals baseball player (L.F. 333; Appx. A18). Mr. Wirken implied he would review all paperwork from Longview to ensure that the guarantee was in place (L.F. 333; Appx. A18).

At the same time, however, Mr. Wirken did not tell Mr. Taylor that Longview was paying Mr. Wirken a commission for delivering a lender to it (L.F. 333; Appx. A18). He also did not tell Mr. Taylor that Longview owed him money (L.F. 333; Appx. A18). Mr. Wirken also did not advise Mr. Taylor to obtain other counsel regarding the prospect of making loans to Longview (L.F. 333; Appx. A18).

During this period, Mr. Wirken was Mr. Taylor's only lawyer (L.F. 333; Appx. A18). Relying on Mr. Wirken's advice as part of his existing attorney-client relationship with Mr. Wirken related to his mother's trust, Mr. Taylor agreed to make the three loans to Longview (L.F. 333-35; Appx. A18-20).

The first loan was on May 24, 2007, for $150,000, and was memorialized by a promissory note from Longview (L.F. 333; Appx. A18). The note bore 32% interest, was due August 24, 2007, and required the payment of a reasonable attorney fee in the event of default (L.F. 333; Appx. A18). Despite Mr. Wirken's previous assurance, the note did not bear the personal guarantee of Mr. Montgomery (L.F. 333; Appx. A18). Rather, it purported to be secured by a second mortgage on real estate in Johnson County, Kansas (L.F. 333; Appx. A18). As the note purported to pay 90 days of interest in advance, it required funds of $138,000, rather than the full $150,000 (L.F. 333; Appx. A18).

Enclosed with a letter to Mr. Taylor dated May 24, 2007, Mr. Wirken forwarded the documents Longview signed memorializing the transaction, including an executed promissory note and a second mortgage, which Mr. Wirken informed Mr. Taylor "will be recorded in Johnson County, Kansas" (L.F. 334; Appx. A19). Mr. Wirken instructed Mr. Taylor to fund the loan by a check for $138,000 payable to the Wirken Group's trust account (L.F. 334; Appx. A19). Mr. Taylor followed this instruction and delivered Mr. Wirken the check, which was deposited in the Wirken Group's trust account (L.F. 334; Appx. A19).

Unbeknownst to Mr. Taylor, the mortgagor of the property serving as collateral for the loan did not actually own the property, and thus the mortgage was never recorded (L.F. 334; Appx. A19). Mr. Wirken did not confirm ownership of the property or recording of the mortgage prior to funding the loan from the Wirken Group's trust account (L.F. 334; Appx. A19). The note went into default on August 24, 2007, and never was repaid (L.F. 334; Appx. A19).

The second loan was on June 6, 2007, for $90,000, and also was memorialized by a promissory note from Longview (L.F. 334; Appx. A19). The note bore 36% interest, was due July 6, 2007, and required the payment of a reasonable attorney fee in the event of default (L.F. 334; Appx. A19). This note also did not bear the personal guarantee of

Mr. Montgomery, but instead purported to be secured by the pledge of a Smith-Barney account (L.F. 335; Appx. A20).

Mr. Wirken instructed Mr. Taylor to fund the loan by check payable to the Wirken Group's trust account, which Mr. Taylor did (L.F. 334-35; Appx. A19-20). Unbeknownst to Mr. Taylor, in reality the Smith-Barney account supposed to secure the loan did not exist, nor did Mr. Wirken confirm that it existed prior to funding the loan from the Wirken Group's trust account (L.F. 335; Appx. A20). The loan never was repaid (L.F. 335; Appx. A20).

Mr. Taylor had no direct communication with Longview regarding either the May 2007 loan for $150,000 or the June 2007 loan for $90,000 (L.F. 334; Appx. A19). Rather, Mr. Wirken handled all communications with Longview (L.F. 334; Appx. A19).

The third and final loan was on June 22, 2007, for $27,140, and also was memorialized by a promissory note from Longview (L.F. 335; Appx. A20). The note bore 36% interest, was due July 22, 2007, and required the payment of a reasonable attorney fee in the event of default (L.F. 334; Appx. A19). Once again, on Mr. Wirken's instruction, Mr. Taylor funded the loan with a check payable to the Wirken Group's trust account (L.F. 335; Appx. A20). The loan never was repaid (L.F. 335; Appx. A20).

In all three loan transactions, Mr. Taylor "reasonably believed that [Mr. Wirken] was his lawyer and [was] handling the transactions so as to serve [Mr. Taylor's] interests" (L.F. 335; Appx. A20). Indeed, Mr. Wirken "did act as [Mr. Taylor's] lawyer during these transactions by receiving paperwork, advising what was being done to protect [Mr. Taylor's] interests, and receiving from [Mr. Taylor] and disbursing to [Longview] the funds loaned" (L.F. 335; Appx. A20).

At the same time, however, Mr. Taylor "did not know, prior to funding the loans, that [Mr. Wirken] would benefit if [he] loaned [Longview] the money" (L.F. 335; Appx. A20). Had Mr. Taylor known that Mr. Wirken would benefit or that Longview owed Mr. Wirken money, it would have "altered [Mr. Taylor]'s decision to loan money to" Longview (L.F. 335-36; Appx. A20-21). Mr. Wirken's "failure to reveal these facts to" Mr. Taylor was "an act or omission done or omitted in the course of performing legal services and as a consequence of carelessness and neglect" (L.F. 336; Appx. A21).

As of April 21, 2010, the total principal and interest due on all three notes from Longview was $479,060.94 (L.F. 336; Appx. A21). Mr. Montgomery later paid Mr. Taylor $50,000 to be released from any potential obligation (L.F. 336; Appx. A21).

During the course of advising Mr. Taylor to make the loans to Longview and instructing Mr. Taylor on doing so, Mr. Wirken owed Mr. Taylor a fiduciary duty (L.F. 337; Appx. A22). Mr. Wirken "was performing legal services in these [Longview] loan transactions for [Mr. Taylor] by passing documents from [Longview] to [Mr. Taylor] through his offices, by implying [he] would review the paperwork and the transaction details to see that [Mr. Taylor]'s interests were served, and by serving as the vehicle for funding the loans from [Mr. Taylor] to" Longview (L.F. 337; Appx. A22).

C. The Wirken Group's Policy with The Bar Plan

The Bar Plan Mutual Insurance Company ("The Bar Plan") is an insurance company doing business in Missouri (L.F. 59). Effective August 1, 2007, through

August 1, 2008, The Bar Plan issued the Wirken Group a "Lawyers Professional Liability Insurance Policy," number 0003049-2007 (L.F. 301, 351-67; Appx. A24-40).

The policy promised The Bar Plan:

> will pay on behalf of an Insured all sums, subject to the Limit(s) of Liability, Exclusions and terms and conditions contained in this Policy, which an Insured shall become legally obligated to pay as Damages as a result of CLAIMS … by reason of any act or omission by an Insured acting in a professional capacity providing Legal Services.

(L.F. 356; Appx. A29).

The policy defined "Legal Services" as meaning:

> Services performed by an Insured in an Insured's professional capacity as:
>
> 1. A lawyer;
> 2. A non-lawyer who is an employee, leased employee or independent contractor of the Policyholder and who works at the direction of and who is under the supervision of the Policyholder and for whose actions the Policyholder is legally responsible;
> 3. A notary public;
> 4. A mediator or arbitrator;
> 5. An administrator, conservator, executor, guardian, trustee, receiver or any similar fiduciary capacity; or
> 6. A title insurance agent, broker or producer, but only for title work performed as a partner, member, officer, director, stockholder,

Associate, or employee of the Policyholder for clients of the Policyholder. Title work performed as an agent, broker or producer of a title agency other than the Policyholder is NOT covered under this policy.

(L.F. 356; Appx. A29).

Four pages later, under § III, titled "Exclusions," the policy stated it did "not provide coverage for any claim based upon or arising out of" several things, including:

B. An Insured's capacity as:

1. A public official or employee of a governmental body, subdivision, or agency; provided, however, that if independent of that capacity, the Insured is also regularly engaged in the provision of Legal Services in return for financial remuneration, this exclusion shall not apply, but in that event, the insurance afforded by this Policy shall be excess over any other applicable, valid and collectible insurance or indemnity provided under law, rule, regulation or Policy applicable to such governmental body, subdivision or agency, notwithstanding any other language in this Policy;

2. A fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured under this Policy, is deemed to be a fiduciary solely by reason of rendering Legal Services in a professional capacity with respect to an employee benefit plan;

3. An investment advisor, securities broker or dealer, insurance agent or broker, real estate agent or broker or accountant [**("the investment advisor exclusion")**]; and

4. A legal representative of investors in regard to and resulting in an investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor [**("the legal representative of investors exclusion")**].

(L.F. 360; Appx. A33).

D. Mr. Taylor's Suit Against Mr. Wirken and the Wirken Group

On September 12, 2008, Mr. Taylor filed an action in the Circuit Court of Jackson County against Mr. Wirken, the Wirken Group, and another attorney, Christopher Wirken (L.F. 281-93). His second amended petition, filed in January 2010, stated claims for breach of Mr. Wirken's and the Wirken Group's fiduciary duties to him as his lawyer in representing him and causing him to make the three loans to Mr. Wirken and the three loans to Longview, amounting to $517,140 in damages (the face value of the loans), plus interest on the loans and attorney fees (L.F. 281-93).

The Bar Plan provided Mr. Wirken and the Wirken Group a defense against Mr. Taylor's suit, but it reserved its right to deny coverage if the court entered a judgment against either defendant for acts or omissions its policy did not cover (L.F. 302). Mr. Taylor offered to settle his claims for $1,000,000, the limit of Mr. Wirken's policy with The Bar Plan (L.F. 322, 325). The Bar Plan did not reply to the offer (L.F. 11).

Thereafter, Mr. Wirken requested The Bar Plan either to withdraw its reservation of rights or withdraw from the defense (L.F. 302). The Bar Plan elected to withdraw its defense, and Mr. Wirken and the Wirken Group obtained their own counsel (L.F. 302).

The parties waived their right to a jury trial, and the case proceeded to a bench trial on April 21, 2010 (L.F. 328; Appx. A13). Immediately before trial, Mr. Taylor dismissed his claims against Christopher Wirken (L.F. 328; Appx. A13). On November 9, 2010, the court issued its judgment, entering detailed findings of fact and conclusions of law (L.F. 328). The court found all the facts set forth in Section A of this Statement of Facts, *supra* (L.F. 328-36; Appx. A13-21).

Additionally, with respect to Mr. Taylor's loans to Mr. Wirken, the court found an attorney-client relationship existed between Mr. Taylor and Mr. Wirken during all of 2007, when the loans were made (L.F. 330; Appx. A15). It found that Mr. Wirken "drew the notes" memorializing those loans "and, in so doing was providing legal services to" Mr. Taylor (L.F. 331; Appx. A16). It also found that, to that end, Mr. Wirken "had a fiduciary duty to" Mr. Taylor (L.F. 331; Appx. A16). It found Mr. Wirken breached this fiduciary duty "[i]n advising [Mr. Taylor] to loan [him] money and advising that the loans would be repaid from resources that [he] did not know whether or not [he] would have," because in doing so Mr. Wirken "served [his] own interests rather than the interests of" Mr. Taylor (L.F. 331; Appx. A16).

Therefore, the court entered judgment for Mr. Taylor and against Mr. Wirken and the Wirken Group on Mr. Taylor's counts alleging breach of fiduciary duties related to the loans to Mr. Wirken (L.F. 332, 337; Appx. A17, A22). It awarded Mr. Taylor

$346,643.30 in principal and interest due on the three loans, plus a reasonable attorney fee of $69,328.66, for a total of $415,971.69 (L.F. 332, 337; Appx. A17, A22).

With respect to Mr. Taylor's loans to Longview, the court again found an attorney-client relationship existed in all of 2007 between Mr. Taylor and Mr. Wirken, "from which a fiduciary duty owed from [Mr. Wirken] to [Mr. Taylor] arose" (L.F. 337; Appx. A22). It found Mr. Wirken "was performing legal services in these [Longview] loan transactions for [Mr. Taylor] by passing documents from [Longview] to [Mr. Taylor] through his offices, by implying that [he] would review the paperwork and the transaction details to see that [Mr. Taylor]'s interests were served, and by serving as the vehicle for funding the loans from [Mr. Taylor] to [Longview]" (L.F. 337; Appx. A22).

The court then found Mr. Wirken "breached his fiduciary duty to [Mr. Taylor] by, in the course of providing those legal services to [Mr. Taylor], neglecting to tell [Mr. Taylor] that [he] would get a commission if [Mr. Taylor] loaned [Longview] money" (L.F. 337; Appx. A22). It found Mr. Wirken also "breached that fiduciary duty by, in the course of providing those legal services to [Mr. Taylor], neglecting to tell [Mr. Taylor] that [Longview] owed [Mr. Wirken] money" (L.F. 337; Appx. A22). It found that, "As a direct and proximate result of that breach of fiduciary duty, [Mr. Taylor] has been damaged in the amount of the principal, interest and collection terms provided by" the notes memorializing the Longview loans (L.F. 337; Appx. A22).

Accordingly, the court entered judgment for Mr. Taylor and against Mr. Wirken and the Wirken Group on Mr. Taylor's counts alleging breach of fiduciary duty related to the loans to Longview (L.F. 336, 338; Appx. A21, A23). It awarded Mr. Taylor

$479,060.94 in principal and interest due on the three loans, plus a reasonable attorney fee of $95,812.19, minus the $50,000 Mr. Montgomery already paid, for a total of $524,873.13 (L.F. 336, 338; Appx. A21, A23).

E. Proceedings Below

On December 23, 2010, Mr. Taylor filed a Petition in Equitable Garnishment against The Bar Plan in the Circuit Court of Jackson County under § 379.200, R.S.Mo. (L.F. 9-13).[2] He alleged The Bar Plan had issued professional liability insurance policies to Mr. Wirken and the Wirken Group that provided coverage for his judgment against Mr. Wirken and the Wirken Group, under which he was "entitled to recover the amount of those judgments … to the same extent as" Mr. Wirken and the Wirken Group (L.F. 10-12). He requested the trial court to enter a judgment "equitably garnishing" The Bar Plan's policies at issue "to the extent necessary to satisfy the judgments" he "obtained against" Mr. Wirken and the Wirken Group, "for interest at the highest legal rate," and for costs and attorney fees (L.F. 13).

In its answer, The Bar Plan admitted it had issued the policies to Mr. Wirken and the Wirken Group (L.F. 59). It alleged, however, that it had no duty to indemnify Mr.

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[2] Mr. Taylor also initially named both Mr. Wirken and the Wirken Law Group, P.C., as defendants (L.F. 10, 12). During the course of the litigation, those defendants filed a cross-claim against The Bar Plan for bad faith, which they later dismissed (L.F. 59, 220). Ultimately, Mr. Taylor dismissed his claims against those defendants (L.F. 483).

Wirken or the Wirken Group under those policies for Mr. Taylor's judgment, because the acts or omissions Mr. Taylor had alleged of those defendants "did not constitute Legal Services" within the meaning of its policy (L.F. 62-63). It also alleged the defendants' acts or omissions alleged were excluded under the "investment advisor" and "legal representative of investors" exclusions to its policy (L.F. 63).

On December 18, 2012, The Bar Plan moved for summary judgment (L.F. 105). Once again, it argued coverage did not lie because Mr. Wirken's and the Wirken Law Group's "wrongdoing did not" constitute "the provision of Legal Services" within the meaning of its policy (L.F. 105, 393-97). It also argued coverage did not lie because it was excluded under the "investment advisor" and "legal representative of investors" exclusions (L.F. 105, 397-404).

Mr. Taylor opposed The Bar Plan's summary judgment motion, explaining Mr. Wirken's preexisting representation, as well as his actions in drawing up the notes and advising the loans, were legal services, as the underlying judgment already had held, and within the meaning of The Bar Plan's policy (L.F. 453-55). He also explained the exclusions must be construed against The Bar Plan, the policy contained no definition of "investment advisor," and, as the underlying judgment already found, Mr. Wirken did far more than merely act as an "investment advisor" or a legal representative of an investor (L.F. 455-58). Rather, he argued, it was Mr. Wirken's general provision of legal services that also caused his loss (L.F. 455-58). On December 26, 2012, Mr. Taylor cross-moved for summary judgment based on these arguments (L.F. 421, 460).

On March 27, 2013, the trial court entered judgment granting The Bar Plan summary judgment and denying Mr. Taylor summary judgment (L.F. 496-507; Appx. A1-12). It found there were no disputed material facts and there were two questions of law: (1) "Whether the issued policy provides coverage, in the first place, for the injurious actions of the insured;" and (2) "Whether any unambiguous coverage exclusions apply and preclude coverage under the policy" (L.F. 504, 506; Appx. A9, A11).

As to the first question, the court found The Bar Plan's policy provided coverage for Mr. Wirken's injurious actions because the actions constituted an "act or omission by an Insured acting in a professional capacity providing Legal Services" (L.F. 505; Appx. A10). The court noted that to hold otherwise would require "an unduly myopic view of the law practice of transactional attorneys" (L.F. 505; Appx. A10). It observed the underlying judgment expressly had held Mr. Wirken was providing legal services to Mr. Taylor (L.F. 505; Appx. A10). "The drafting of loan documents, the structuring of loan repayment and drafting of personal guaranties of a loan all are within the coverage of The Bar Plan policy" (L.F. 505; Appx. A10). "Similarly, the loan transactions between [Mr. Taylor] and Longview … fall within the basic policy coverage of The Bar Plan policy" (L.F. 505; Appx. A10).

As to the second question, the court "overrul[ed] and reject[ed] The Bar Plan's argument that coverage of these loan transactions is excluded under the" "investment advisor" exclusion (L.F. 507; Appx. A12). "The record lacks clarity as to any 'investment advice' given by [Mr.] Wirken that [Mr.] Taylor should invest in The Wirken Law Group" (L.F. 507; Appx. A12). It found "further analysis of his 'investment advice' relating to the Longview loans is unnecessary," given the rest of its holdings (L.F. 507; Appx. A12).

Then, however, the court found held coverage was excluded under the "legal representative of investors" exclusion (L.F. 506-07; Appx. A11-12). It held the three Wirken loans fell within that exclusion because Mr. Wirken acted as a legal representative for Mr. Taylor "in regard to and resulting in investment in an enterprise in which an Insured owns an equity interest" (L.F. 506; Appx. A11). It held this was because "it is undisputed that Mr. Wirken had a 100% equity ownership in Wirken Law Group" (L.F. 506; Appx. A11). It held the Longview loans also fell within this exclusion because, as Mr. Wirken alleged he received a commission of five percent on those loans from Longview, the loans "were thus investments 'for which the Insured receives a fee or commission from an Entity other than the investor'" (L.F. 507; Appx. A12).

The court entered judgment for The Bar Plan and against Mr. Taylor (L.F. 507; Appx. A12). Mr. Taylor timely appealed to the Missouri Court of Appeals, Western District (L.F. 508). On April 29, 2014, the Court of Appeals issued an opinion reversing the trial court's judgment and remanding the case for further proceedings. On August 19, 2014, this Court sustained The Bar Plan's application for transfer and transferred this case.

Points Relied On

I. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* ambiguous exclusions in insurance contracts are strictly construed against the insurer *in that* the undefined terms "investor" and "investment" in The Bar Plan's exclusion of claims "based upon or arising out of" an insured's "capacity" as "a legal representative of investors in regard to and resulting in an investment in an enterprise in which" the insured "owns an equity interest or for which" he "receives a fee or commission" are ambiguous and reasonably can be read not to encompass Mr. Taylor or his loans.

Krombach v. Mayflower Ins. Co., 827 S.W.2d 208 (Mo. banc 1992)

Meyer Jewelry Co. v. Gen. Ins. Co. of Am., 422 S.W.2d 617 (Mo. 1968)

Reves v. Ernst & Young, 494 U.S. 56 (1990)

Minn. Lawyers Mut. Ins. Co. v. Ahrens, 432 Fed.Appx. 143 (3d Cir. 2011)

§ 356.111, R.S.Mo.

II. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* a non-excluded concurrent proximate cause of an injury must result in coverage even if another cause is excluded *in that* The Bar Plan's exclusion of claims "based upon or arising out of" an insured's "capacity" as "a legal representative of investors" did not exclude coverage for the damages in the underlying case that concurrently were caused by Mr. Wirken's breach of his fiduciary duties to Mr. Taylor in representing Mr. Taylor in the administration of his mother's trust, which were not "based upon or arising out of" Mr. Wirken's "capacity" as "a legal representative of investors."

Centermark Props., Inc. v. Home Indem. Co., 897 S.W.2d 98 (Mo. App. 1995)

Braxton v. U.S. Fire Ins. Co., 651 S.W.2d 616 (Mo. App. 1983)

Intermed Ins. Co. v. Hill, 367 S.W.3d 84 (Mo. App. 2012)

Bowan ex rel. Bowan v. Gen. Sec. Indem. Co. of Ariz., 174 S.W.3d 1 (Mo. App. 2005)

III. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* ambiguous exclusions in insurance contracts are strictly construed against the insurer *in that* The Bar Plan's exclusion in § III(B) of its policy for claims arising out of an insured's certain "capacity" is not limited to the insured's role as "a legal representative of investors," but states the "capacity" is the insured's role as a public official, and ERISA fiduciary, an investment advisor, "and" a legal representative of investors – not "or" a legal representative of investors – and The Bar Plan did not and cannot meet its burden to prove Mr. Wirken acted in all of these roles so as to activate the "capacity" exclusion in § III(B).

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

Manner v. Schiermeier, 393 S.W.3d 58 (Mo. banc 2013)

Argument

Standard of Review for All Points

The standard of review of all three of Mr. Taylor's Points Relied On is *de novo*.

This is an appeal from a grant of summary judgment. This Court "reviews the grant of summary judgment *de novo*." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452 (Mo. banc 2011). "In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper;" that is, that "there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law." *Id.* at 453.

Where, "the only issue" as to the propriety of summary judgment "is whether the trial court's judgment was correct as a matter of law," *A & L Holding Co. v. S. Pac. Bank*, 34 S.W.3d 415, 417 (Mo. App. 2000), if it was incorrect as a matter of law, this Court will reverse it and remand the case with instructions to enter judgment for the non-movant. *Levinson v. City of Kan. City*, 43 S.W.3d 312, 323 (Mo. App. 2001); *Dalton Invs., Inc. v. Nooney Co.*, 10 S.W.3d 590, 594 (Mo. App. 2000).

All three Points Relied On concern the interpretation of an insurance policy, which also is reviewed *de novo*. "[A]n insurance policy is a contract to afford protection to an insured and will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citations omitted). The interpretation of a contract is a question of law reviewed *de novo*. *Netco, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006).

I. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* ambiguous exclusions in insurance contracts are strictly construed against the insurer *in that* the undefined terms "investor" and "investment" in The Bar Plan's exclusion of claims "based upon or arising out of" an insured's "capacity" as "a legal representative of investors in regard to and resulting in an investment in an enterprise in which" the insured "owns an equity interest or for which" he "receives a fee or commission" are ambiguous and reasonably can be read not to encompass Mr. Taylor or his loans.

* * *

The law of Missouri is that, where language in an insurance policy exclusion, read as an ordinary person purchasing the insurance, is reasonably susceptible of two interpretations, one favorable to coverage and one not, the construction favorable to coverage must be applied. Here, the insured is liable for damages caused by his breach of his fiduciary duties that resulted in the plaintiff loaning money. A clause in the insurer's policy purports to exclude coverage for "any claim based upon or arising out of … [a]n Insured's capacity as … [a] legal representative of investors in regard to and resulting in an investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor." Is it reasonably possible for the undefined term "investor" to be read as not encompassing a short-term simple lender to a law firm and the undefined term "investment" not to encompass that short-term simple lender's loans?

A. Introduction

Appellant Jimmie Lee Taylor ("Mr. Taylor") obtained a judgment against his former attorney, James C. Wirken, and Mr. Wirken's law firm, the Wirken Law Group, P.C. ("the Wirken Group"), for damages from Mr. Wirken's breach of his fiduciary duties as Mr. Taylor's lawyer. In that judgment, the court found Mr. Taylor had hired Mr. Wirken to represent him in matters related to the administration of his mother's trust, not as any financial or investment advisor. It held that, in the course of providing Mr. Taylor those legal services, Mr. Wirken breached his fiduciary duties resulting in him conning loans from Mr. Taylor loans both to Mr. Wirken's firm and to another client of Mr. Wirken's, Longview Village Development Company ("Longview").

When Mr. Wirken's and the Wirken Group's professional liability insurer, The Bar Plan Mutual Insurance Company ("The Bar Plan"), refused to cover that judgment, Mr. Taylor filed an equitable garnishment action against the insurer. The insurer sought summary judgment, claiming: (1) Mr. Wirken's actions did not constitute the provision of "legal services" within its policy's coverage language; (2) an exclusion in its policy for claims arising out of an insured's capacity as an "investment advisor" excluded coverage; and (3) an exclusion in its policy for claims arising out of an insured's capacity as a "legal representative of investors in regard to and resulting in an investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor" similarly excluded coverage.

The trial court rejected the first and second of The Bar Plan's arguments, holding Mr. Wirken's actions were coverable "legal services," and that the "investment advisor" exclusion did not apply.[3]

Then, however, the court granted summary judgment to The Bar Plan on the third argument, holding the "legal representative of investors" exclusion excluded coverage for Mr. Taylor's claim. It held the loans to Mr. Wirken fell within the exclusion because Mr. Wirken acted as a legal representative for Mr. Taylor "in regard to and resulting in investment in an enterprise in which an Insured owns an equity interest," as "Mr. Wirken had a 100% equity ownership in Wirken Law Group." It held the Longview loans also fell within the exclusion because, as Mr. Wirken received a commission on the loans,

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[3] As The Bar Plan did not cross-appeal from the trial court's judgment, it is barred from re-litigating these holdings adverse to it now. *Goldberg v. State Tax Comm'n*, 618 S.W.2d 635, 642 n.6 (Mo. banc 1981). "[I]n the absence of a cross-appeal, the reviewing court is concerned only with the complaint of the party appealing[;] … the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Id.* Moreover, that question necessarily was conclusively determined in Mr. Taylor's underlying lawsuit for recovery on a theory of breach of fiduciary duty in the provision of legal services, as opposed to, say, a theory of breach of contract on the notes themselves. Because the trial court in the underlying lawsuit determined Mr. Wirken and his firm had provided legal services to Mr. Taylor including in connection with the loans, The Bar Plan was estopped from challenging this determination in the equitable garnishment proceeding, even on appeal. *Assurance Co. of Am. v. Secura Ins. Co.*, 384 S.W.3d 224, 232 (Mo. App. 2012).

they "were thus investments 'for which the Insured receives a fee or commission from an Entity other than the investor.'"

This was error. The law of Missouri is that an exclusion from coverage in an insurance policy must be construed strictly and narrowly against the drafter and must be read in favor of coverage if at all reasonably possible. In this case, it is more than reasonably possible to read The Bar Plan's "legal representative of investors" exclusion as not excluding coverage for Mr. Taylor's claim.

Specifically, the undefined terms "investor" and "investment" in the exclusion are ambiguous, susceptible of several meanings, and reasonably can be read as not including Mr. Taylor or his loans to Mr. Wirken or Longview. This is even more glaringly true as to Mr. Taylor's loans to Mr. Wirken, as those loans could not be "investments" in the Wirken Group and Mr. Taylor could not be an "investor" in the Wirken Group, because that entity was a Missouri professional corporation for attorneys in which non-lawyers are legally barred from investing, and Mr. Taylor was and is not an attorney.

The trial court should not have held that the "legal representative of investors" exclusion excluded coverage for Mr. Taylor's judgment in the underlying case. The Bar Plan's professional liability insurance policy with the Wirken Group obligated it to provide coverage for Mr. Taylor's underlying judgment against Mr. Wirken and the Wirken Group. The Bar Plan was not entitled to judgment as a matter of law.

This Court should reverse the trial court's summary judgment in favor of The Bar Plan and should remand this case with instructions to enter judgment for Mr. Taylor.

B. Missouri's overarching public policy for insurance contracts is that they must be strictly construed against the insurer and in favor of coverage; exclusions must be read in favor of coverage if at all reasonably possible.

The longstanding law of Missouri is "insurance is designed to furnish protection to the insured, not defeat it." *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992) (quoting *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623, 626 (Mo. banc 1979)). As such, an insurance policy "will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citations omitted).

This is especially true of coverage exclusions in insurance policies. "Exclusion clauses in insurance policies are strictly construed against the insurer." *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204, 207-09 (Mo. App. 1998) (quoting *Walters v. State Farm Mut. Auto. Ins.*, 793 S.W.2d 217, 219 (Mo. App. 1990)). Thus, when an insurance policy contains "[a]mbiguous provisions … designed to cut down, restrict, or limit insurance coverage already granted, or introducing exceptions or exemptions," the law of Missouri is that they "must be strictly construed against the insurer." *Krombach*, 827 S.W.2d at 210-11 (citing *Meyer Jewelry Co. v. Gen. Ins. Co. of Am.*, 422 S.W.2d 617, 623 (Mo. 1968); *Brugioni v. Md. Cas. Co.*, 382 S.W.2d 707, 710-11 (Mo. 1964)).

This is because, "as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract." *Id.* As Judge Learned Hand once observed,

> The canon *contra proferentem* is more rigorously applied in insurance than in other contracts, in recognition of the difference between the parties in their acquaintance with the subject matter … Insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion.

Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947).

"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). This is so even in the context of an appeal from a summary judgment in the insurer's favor holding that such an exclusion applies: the "burden [is] on the insurers to prove" so. *Id*. at 60.

Under these principles, this Court follows "a construction favorable to the insured wherever the language of a policy is susceptible of two meanings, one favorable to the insured, the other to the insurer." *Meyer Jewelry Co.*, 422 S.W.2d at 623. This is because such duplicity is an ambiguity: a provision in an insurance policy is ambiguous when there is "duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Rodriguez v. Gen. Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991).

Thus, where "language in the policy at issue [is] reasonably susceptible of two interpretations, [a] court [is] required to apply the construction most favorable to the insured and *this is especially true when the clause in question attempts to limit or exclude coverage under the policy*." *Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 101 (Mo. App. 1995) (quoting *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 169

(Mo. App. 1983)) (emphasis added). "This rule is especially applicable where insurance is first 'granted' and is then followed by provisions limiting or avoiding liability." *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009).

In determining whether the language in an insurance policy is ambiguous, the language is considered in the light in which it would normally be understood by the person who bought and paid for the policy. *Blumer v. Auto. Club Inter-Ins. Exch.*, 340 S.W.3d 214, 218 (Mo. App. 2011). That is, what would an average *insured* believe the policy language means? *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009); *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. banc 1982); *Shiddell v. The Bar Plan Mut. Ins. Co.*, 385 S.W.3d 478, 485 (Mo. App. 2012). While the review of an insurance policy normally is based on the understanding of a reasonable layperson, the only possible purchasers of an attorney professional liability policy would be attorneys, because only attorneys purchase legal malpractice insurance.

Therefore, the proper lens for review of a legal malpractice insurance policy would be through the eyes of a reasonable attorney purchasing such insurance.

C. The exclusion at issue in this case reasonably can be read *not* to exclude coverage for Mr. Taylor's damages in the underlying case, because the terms "investor" and "investment" in the exclusion are ambiguous and an attorney purchasing the insurance reasonably could read them as not encompassing Mr. Taylor or his loans.

The language that the trial court held excluded coverage in this case, § III(B)(4) of The Bar Plan's policy, states the following:

THIS POLICY DOES NOT PROVIDE COVERAGE FOR ANY CLAIM BASED UPON OR ARISING OUT OF: …

B. An Insured's capacity as: …

4. A legal representative of investors in regard to and resulting in an investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor.

(Legal File 360; Appendix A33).

Under the above principles, it is more than reasonably possible for an ordinary attorney purchasing insurance to read The Bar Plan's "legal advisor of investors" exclusion as *not* excluding coverage for Mr. Taylor's underlying breach of fiduciary duties judgment. Specifically, the terms "investor" and "investment" in the exclusion are ambiguous for being susceptible of multiple meanings, several of which would not include Mr. Taylor or his loans to Mr. Wirken or Longview. This is particularly true with regard to the Wirken loans, considering Mr. Taylor *legally could not* invest in the Wirken Group, a professional corporation whose investors are limited to licensed attorneys, and Mr. Taylor was and is not an attorney.

The trial court held Mr. Taylor's claim was excluded under the "legal advisor of investors" exclusion as to both Mr. Taylor's three loans to Mr. Wirken and his three loans to Longview. The court held the three Wirken loans were excluded because Mr. Wirken acted as a legal representative for Mr. Taylor "in regard to and resulting in investment in an enterprise in which an Insured owns an equity interest," because "it is undisputed that

Mr. Wirken had a 100% equity ownership in Wirken Law Group" (L.F. 506; Appx. A11). It held the Longview loans also were excluded because, as Mr. Wirken alleged he received from Longview a five percent commission of on those loans, the loans "were thus investments 'for which the Insured receives a fee or commission from an Entity other than the investor'" (L.F. 507; Appx. A12).

Before getting to whether Mr. Wirken's undisputed 100% equity interest in the Wirken Group or his commission from Longview activated the exclusion, however, under the plain language of the exclusion it first had to be determined that Mr. Taylor was an "investor" and his loans were "investments." For, the language about equity ownership or receiving fees and commissions only can apply if the insured was acting as "a legal representative of *investors in regard to and resulting in an investment*" (L.F. 360; Appx. A33) (emphasis added). So, regardless of Mr. Wirken's equity interest in the Wirken Group or his commissions from Longview, if it is reasonably possible for an ordinary attorney purchasing professional liability not to view Mr. Taylor as an "investor" in the Wirken Group or Longview or his loans as "investments" in the Wirken Group or Longview, then the exclusion does not apply *ab initio*.

As noted above, this Court follows "a construction favorable to the insured wherever the language of a policy is susceptible of two meanings, one favorable to the insured, the other to the insurer." *Meyer Jewelry Co.*, 422 S.W.2d at 623. Such duplicity is an ambiguity. *Id.* A provision in an insurance policy is ambiguous when there is "duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Rodriguez*, 808 S.W.2d at 382. Where "language in the policy at issue [is] reasonably susceptible of two interpretations, [a] court [is] required to apply the construction most favorable to the insured and this is especially true when the clause in question attempts to limit or exclude coverage under the policy." *Centermark*, 897 S.W.2d at 101 (quoting *Braxton*, 651 S.W.2d at 169).

In this case, the terms "investor" and "investment" are reasonably susceptible of multiple meanings read in the light of an ordinary attorney, several of which would not include Mr. Taylor as an "investor" in either the Wirken Group or Longview and would not include his loans as "investments" in those entities. Unlike numerous terms in The Bar Plan's policy, as stated in its § I (L.F. 355-56 Appx. A28-29), the policy does not define either the term "investor" or the term "investment."

A standard dictionary entry for "invest," the root of both "investor" and "investment," includes multiple different definitions. *See, e.g.*, AM. HERITAGE DICT. 922 (5th ed. 2011). Many have nothing to do with a transaction involving money, such as "To endow with authority or power: *The Constitution invests Congress with the power to make laws*." *Id.* (emphasis in the original). Two competing meanings, though, do involve money: "To commit (money or capital) in order to gain a financial return: *invested their savings in stocks and bonds*." *Id.* (emphasis in the original). Also, "To purchase with the expectation of benefit: *We decided to invest in a new car*." *Id.* (emphasis in the original). As such, an "investor" might be a person who merely commits money to gain a financial return, or, conversely, might be a person who *purchases* something, obtaining ownership of it, expecting a future benefit from that newly-owned thing.

Here, The Bar Plan might point to the first definition and argue that, as Mr. Taylor committed money from his mother's trust to the loan transactions Mr. Wirken advised of him, expecting the financial return of the interest due, they were "investments" under that definition. Even then, though, the common use of that meaning to which the dictionary above points, including by attorneys running firms, is to commit money to buy something that will gain in value in the future: "to invest in stocks and bonds."

Simple interest due on a short-term loan is not the same thing. There, a creditor gives money to a debtor for a short period of time, with the resulting interest amount merely compensating the creditor for the economic cost of the money not being in his or her possession for that amount of time, regardless of the debtor's finances. This is simply not the same as "investing in stocks and bonds," the dictionary's example of the first definition of "invest."

To this end, "In construing the terms of an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance …." *Ritchie*, 307 S.W.3d at 135. Doubtless, an ordinary attorney operating a law firm would not consider a simple loan of money to his firm for interest due to be an "investment" in his firm.

In this respect, an ordinary attorney purchasing legal malpractice insurance for the firm is acting as an ordinary businessperson. If asked by, say, a potential liability insurer to list the firm's "investors," he or she would not list the bank that extended the firm a small business loan or line of credit, the mortgage company that issued the mortgage for the firm's building, American Express for the firm's charge card, a fellow attorney who lent some money for a short period when times were tough, etc. Rather, he would list those partners, members, shareholders, etc., who hold an equity interest in the firm – those who have purchased an active or passive interest in the firm whose potential return is contingent on the firm's success, and who face the acknowledged possibility of losing money on their investment if the firm has financial difficulties.

To read the term "investor" otherwise would make all forms of financing, debt or equity, into "investments" – in all respects, period. But an ordinary small businessperson does not construe the term "investor" or "investment" that way. Certainly, and under the standard at issue here, it is *reasonably possible* that an ordinary small businessperson *would not* construe it that way.

For, the distinction between financing a business or enterprise through equity versus debt runs throughout the law. An attorney purchasing a policy through The Bar Plan may understand a financing that provides an equity or ownership interest to be "resulting in investment in an enterprise" with capital investments, various stocks, securities, shares, and other partnership or membership interests at stake. The return on these investments is typically tied to the performance of the enterprise.

But *all* financing does not necessarily constitute an "investment in an enterprise." Loans like Mr. Taylor's do not confer equity or ownership interests. Instead, they constitute a business's debt. As numerous courts have noted, loans often are not deemed to be "investments." *See, e.g., In re Keisker's Estate*, 168 S.W.2d 96 (Mo. 1943) (noting that the terms "loan" and "invest" often are incorrectly used interchangeably; statute used "invest" to denote the idea of purchase, as in the first dictionary definition above, and "loan" to denote idea of making a loan *rather than* a purchase of an investment interest); *In re Terry Mfg. Co., Inc.*, No. 03-32063, 2007 WL 274319, at *8 (Bankr. M.D. Ala. Jan. 25, 2007) (noting that the "term investment is ambiguous, as it can mean either debt or equity"); *Engelking v. Inv. Bd.*, 458 P.2d 213, 219 (Idaho 1969) (distinguishing the terms "loan" and "investment"); *In re Owen's Estate*, 36 N.Y.S.2d 60, 62 (Sur. 1942) (holding that "[t]he word 'investment' is a vague term and no general rule can be laid down as to its meaning"); *Reves v. Ernst & Young*, 494 U.S. 56, 62 (1990) (holding that notes are "used in a variety of settings, not all of which involve investments").

A variety of other legal contexts bear this ambiguous difference out further. For example, in federal tax law, courts use an involved set of tests "[i]n determining whether a loan is an investment," such as from a shareholder of a Subchapter S corporation to that corporation, so that loans often are found not to be investments. *Oren v. Comm'r of Internal Revenue*, 357 F.3d 854, 858 (8th Cir. 2004). In other contexts, some courts have held "a loan is an investment made for the purposes of securing interest income." *Sutro Bros. & Co. v. Indem. Ins. Co. of N. Am.*, 264 F.Supp. 273, 289 (D.C.N.Y. 1967). Still other courts have held that a loan and an investment (such as the purchase of commodities futures) can be different in the professional liability insurance context. *Minn. Lawyers Mut. Ins. Co. v. Ahrens*, 432 Fed.Appx. 143, 148, 148 n. 2 (3d Cir. 2011) (loans are not necessarily "investments").

Federal securities law provides further examples. In the Investment Company Act of 1940, "investment company" is defined in part as an entity engaging in the business of investing or reinvesting or trading in securities. 15 U.S.C. § 80a-3. Similarly, under the

Securities Exchange Act of 1934, in determining whether a contract, transaction, or scheme is an "investment contract," one element is that there will be the expectation that profits will be derived from the entrepreneurial or managerial efforts of others. *Sec. & Exch. Comm'n v. W.J. Howey & Co.*, 328 U.S. 293, 298-99 (1946); *Reves*, 494 U.S. at 64; *Long v. Shultz Cattle Co.*, 881 F.2d 129, 132 (5th Cir. 1989) (citing 15 U.S.C. §§ 77b(1) and 78c(a)(10)). Along that same line, multiple provisions of Missouri law require "investment advisors" to register with the U.S. Securities and Exchange Commission. *See, e.g.*, §§ 103.032 and 166.415.5, R.S.Mo. Conversely, simple lending is not considered "investing" and does not face these requirements.

Indeed, the U.S. Supreme Court has fashioned a multi-part test for determining whether a note constitutes a security under the Securities Exchange Act. *Reves*, 494 U.S. at 65-69. This is because,

> If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, *to correct for the seller's cash-flow difficulties*, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security."

Id. at 66 (emphasis added). Another factor in the *Reves* Court's determination that notes at issue in that case were securities was there was "common trading" of the notes and they were offered and sold to a broad segment of the public. *Id.* at 68.

Even outside the "reasonable attorney running a firm" viewpoint, this marked difference as to an "investment" between debt and equity is consistent with what any ordinary layperson thinks of as "investing." A friend loaning money for a period to another friend is not an "investor" in that other friend, and his loan is not an "investment." A credit card company extending credit to a consumer is not an "investor" in that consumer and its revolving loan is not an "investment." A bank giving a mortgage to a couple to purchase a home is not an "investor" in the couple; the couple may be investing in the home, but the bank's mortgage is not an "investment." Rather, ordinary people think of "investments" as constituting the *purchase* of an item that will increase in value in the future – stocks, bonds, mutual funds, real estate, commodities futures, collectibles, etc. – and "investors" as the persons who purchase those items.

That ordinary meaning is the second dictionary definition quoted above: "To purchase with an expectation of benefit." It is undisputed that Mr. Taylor did not purchase anything from Mr. Wirken, such as shares of the Wirken Group (which he legally could not, *infra* at 38-40), or from Longview, such as an equity interest in Longview's development operations. Indeed, even the trial court held the record did not show Mr. Wirken had advised Mr. Taylor to "invest in The Wirken Law Group" (L.F. 507; Appx. A12). Rather, Mr. Taylor's six loans were simple, unsecured loans that charged interest according to the terms of the promissory notes.

Under the second, ordinary definition of "invest," Mr. Taylor was not an "investor," and his loans in no way evidenced a transaction "resulting in investment in an enterprise." The loans did not confer on Mr. Taylor any property or ownership interest in the Wirken Group or Longview. They did not give him the right to share in the profits of either business. They only gave him the right to be repaid on time with interest.

As the terms "investor" and "investment" are susceptible of multiple meanings, in reviewing their meanings under The Bar Plan's policy this Court must apply the "construction favorable to the insured" and in favor of coverage if at all reasonably possible. *Meyer Jewelry Co.*, 422 S.W.2d at 623; *Centermark*, 897 S.W.2d at 101; *Braxton*, 651 S.W.2d at 169.

In this case, it plainly is reasonably possible to read the terms "investor" and "investment" in the exclusion at issue as *not* including Mr. Taylor or his loans to the Wirken Group or to Longview. Therefore, as the key, ambiguous terms in The Bar Plan's "legal representative of investors" exclusion reasonably can be read in favor of coverage, this Court must do so.

Had The Bar Plan's policy expressly defined "investment" to include loans, the resolution of whether Mr. Taylor's loans would be encompassed by that exclusion might differ. But as the drafter of the policy, The Bar Plan was in the better position to remove the ambiguity from the contract. The ambiguous language that The Bar Plan drafted instead creates indistinctness and uncertainty.

It is at least reasonably possible that an ordinary purchaser of The Bar Plan's policy would not understand that Mr. Taylor was an "investor investing in an enterprise."

Rather, it is reasonably possible that he or she reasonably would understand Mr. Taylor was providing simple loans, which such an attorney would not describe as an "investor" "investing." Therefore, most basically, and under common usage, Mr. Taylor's loans did not ***result in investment in an enterprise*** in which Mr. Wirken owned an equity interest or for which Mr. Wirken was receiving a fee or commission.

D. The ambiguity is further compounded as to Mr. Taylor's loans to the Wirken Group because Mr. Taylor could not be an "investor" in the Wirken Group, as the Wirken Group was a professional corporation whose investors are limited to attorneys, which Mr. Taylor was not.

As to Mr. Taylor's loans to the Wirken Group, his lack of "investor-ship" or "investments" under the ordinary understanding of the meaning of "investment" discussed above is even more glaring. The Wirken Group was a Missouri professional corporation engaging in business as a law firm (L.F. 309). As a result, the law of Missouri expressly *prohibited* Mr. Taylor, a non-lawyer, from investing in it. To allow The Bar Plan's construal of Mr. Taylor as having "invested" in the Wirken Group would run afoul of Missouri's Professional Corporation Law, Chapter 356, R.S.Mo.

The purpose of a professional corporation is "to render one or more types of professional service, and services ancillary thereto," in addition to general corporate purposes, "to the extent … expressly permitted by the licensing authorities that regulate … such professions." § 356.051, R.S.Mo. A "professional service" is a service that "lawfully may be rendered only by persons under the provisions of a licensing law of this state," expressly including an "attorney at law." § 356.021(5)(b)(c), R.S.Mo. A professional corporation may issue "shares, fractional shares, rights or options to purchase shares, *and other securities only to*" natural persons legally authorized to render the professional service at issue, general partnerships where all partners are so authorized, LLCs where all members are so authorized, and other professional corporations in the same profession. § 356.111.1, R.S.Mo. (emphasis added). Such shares and securities only can be transferred to these persons, too. *Id.* at .3. Any transaction in derogation of these provisions "shall be void." *Id.*

Thus, as the Wirken Group was a professional corporation for attorneys at law, it only could issue any portions of shares or *any other security* to attorneys, not laypeople. Mr. Taylor was not an attorney (L.F. 333; Appx. A18). As a result, the law of Missouri is he was prohibited from "investing" in the Wirken Group, and any such "investments" would be null and void. Indeed, Mr. Taylor never understood that he was investing in the Wirken Group. He believed he was merely loaning money to Mr. Wirken, which would be repaid later (L.F. 331-32; Appx. A16-17). Had Mr. Taylor "invested" in the Wirken Group, that investment would have been void. And Mr. Taylor did not do so: as the trial court held, the record did not show that Mr. Wirken was attempting to have Mr. Taylor "invest in The Wirken Law Group" (L.F. 507; Appx. A12).

Rather, the obvious *actual* intent of the "legal representative of investors" exclusion plainly is designed to prohibit coverage of precisely the sorts of investments that Chapter 356 contemplates. If Mr. Wirken negligently had sold shares of the Wirken Group to another lawyer and the firm then failed, The Bar Plan obviously was seeking not to be on the hook. As to Mr. Taylor, however, this provision reasonably has no application.

The base question is this: Would a reasonable attorney think that a non-lawyer can invest in his or her law firm? No. Would a reasonable attorney think that a non-lawyer can make a loan, profitable or not, to a law firm? Yes. Can a non-lawyer *invest* in a law firm? No. Thus, it is reasonably possible that an attorney purchasing The Bar Plan's policy would not read the exclusion to include a loan to an entity the lender cannot legally invest in.

Simply put, The Bar Plan's "legal representative of investors" exclusion reasonably can be read so as *not* to exclude coverage for Mr. Taylor's underlying judgment. Several of multiple ordinary meanings of the ambiguous terms "investor" and "investment" would not include Mr. Taylor's loans to the Wirken Group or to Longview. It is possible to read the policy, *qua* the exclusion, as covering Mr. Taylor's claim. As a result, this Court must do so.

Mr. Taylor should not suffer when Mr. Wirken's misdeeds were contemplated in The Bar Plan's policy and The Bar Plan cannot show that coverage for those misdeeds is excluded. The paying policy holder, despite his covered, undisputed malpractice, and the victim, should not suffer because of the insurer's careless drafting or its failure to define "investment" if the insurer indeed meant to exclude the transactions at issue.

The Court should reverse the judgment below and remand this case with instructions to enter judgment for Mr. Taylor.

II. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* a non-excluded concurrent proximate cause of an injury must result in coverage even if another cause is excluded *in that* The Bar Plan's exclusion of claims "based upon or arising out of" an insured's "capacity" as "a legal representative of investors" did not exclude coverage for the damages in the underlying case that concurrently were caused by Mr. Wirken's breach of his fiduciary duties to Mr. Taylor in representing Mr. Taylor in the administration of his mother's trust, which were not "based upon or arising out of" Mr. Wirken's "capacity" as "a legal representative of investors."

* * *

The law of Missouri is that, as exclusions in insurance policies must be strictly construed against the insurer and read in favor of coverage if at all reasonably possible, a covered concurrent proximate cause of an injury must result in coverage even if another cause is excluded. The underlying judgment found attorney James Wirken and his law firm liable for damages to Mr. Taylor that were caused by Mr. Wirken's breach of his fiduciary duties to Mr. Taylor while representing Mr. Taylor in matters related to the administration of his mother's trust in giving careless and neglectful legal advice and not acting in Mr. Taylor's interest, which The Bar Plan's policy covers. Does the policy's exclusion of claims "based upon or arising out of … [a]n Insured's capacity as … [a] legal representative of investors" exclude Mr. Taylor's damages for Mr. Wirken's breach of his fiduciary duties?

A. Introduction

In the underlying judgment, the trial court was careful to note that Mr. Taylor had hired Mr. Wirken to represent him in matters related to the administration of his mother's trust, not as any financial or investment advisor. It held Mr. Taylor's injury was caused by Mr. Wirken's breach of his fiduciary duties in that representation.

Inter alia, the court found these breaches included Mr. Wirken's serving his own interests, rather than Mr. Taylor's, advising Mr. Taylor to loan him money at all, failing to advise Mr. Taylor to obtain outside counsel to review the transactions, failing to ensure promised securities were there for the transactions, and failing to inform Mr. Taylor that Longview was a client of his who owed him money and from whom he would be receiving a referral fee.

The trial court in this subsequent equitable garnishment case erred in holding The Bar Plan's exclusion for claims "based upon or arising out of" an insured's "capacity" as a "legal representative of investors" excluded the breach of fiduciary duty damages in the underlying judgment. Regardless of the meaning of the undefined terms "investor" or "investment" in the exclusion, addressed *supra* at Point I, Mr. Taylor's claim was not solely "based upon or arising out of" Mr. Wirken's capacity as "a legal representative of investors." Rather, it independently was based upon the concurrent proximate cause of Mr. Wirken's breach of his general fiduciary duties to Mr. Taylor as his attorney in relation to the matter for with Mr. Taylor hired him – a plainly covered cause.

As a result, the trial court should not have held the "legal representative of investors" exclusion excluded coverage for the underlying judgment. As the underlying judgment found, Mr. Wirken breached his fiduciary duties to Mr. Taylor in the course of providing legal services to Mr. Taylor that were not "based upon or arising out of" Mr. Wirken's "capacity" as a "legal representative of investors," causing Mr. Taylor damage. The Bar Plan's professional liability policy with the Wirken Group obligated it to provide coverage for that injury. The Bar Plan was not entitled to judgment as a matter of law.

This Court should reverse the trial court's summary judgment in favor of The Bar Plan and should remand this case with instructions to enter judgment for Mr. Taylor.

B. When an insurance claim is "based upon or arises out of" several concurrent proximate causes, one covered and one excluded, coverage lies.

As discussed above, *supra* at 26-28, Missouri's overarching public policy for the interpretation of insurance policies is that they must be read in favor of coverage if at all reasonably possible, with coverage language being read broadly and exclusionary clauses being read narrowly. As a result of this, the law of Missouri is that, even if an exclusion in an insurance policy is unambiguous, if a claim arises out of several things, one excluded and one *not* excluded, then the policy cannot be read to exclude coverage.

That is, "where an insured risk and an excluded risk constitute concurrent proximate causes of" an injury giving rise to the claim, the "liability insurer is liable so long as one of the causes is covered by the policy." *Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 101 (Mo. App. 1995) (quoting *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 619 (Mo. App. 1983)). "Under this rule, an insurance policy will be construed to provide coverage where an injury was proximately caused by two events – even if one of those events was subject to an exclusion clause – if the differing allegations of causation are 'independent and distinct.'" *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84, 88 (Mo. App. 2012). Thus, "It is broadly accepted that where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable as long as one of the causes is covered by the policy." *Bowan ex rel. Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1, 5 (Mo. App. 2005).

Missouri courts have applied this rule in five previous cases to hold there was coverage for an injury that was "based upon or arose out of" a covered concurrent proximate cause of an injury even when another cause was excluded. *See Braxton*, 651 S.W.2d at 618-20; *Centermark*, 897 S.W.2d at 101-03; *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204, 207-09 (Mo. App. 1999); *Bowan*, 174 S.W.3d at 5-7; *Intermed*, 367 S.W.3d at 88-90.

While *Braxton* was the first time the concurrent proximate cause rule was applied in its modern form in Missouri, the Court of Appeals noted in *Braxton* that it is a longstanding and "widely accepted" doctrine in any jurisdiction that, like Missouri, requires exclusionary clauses in insurance policies with contested meanings to be construed strictly against the insurer. 651 S.W.2d at 618-19. For, if it were otherwise, the law could "be summed up as an uncomplicated syllogism: [the plaintiff] admits that his injury was caused by [X]; the policy excludes from coverage any … injury arising out of … [X]; therefore, [the plaintiff's] injury is not covered by the policy." 651 S.W.2d at 618.

The concurrent cause doctrine restated in *Braxton* and applied ever since, however, serves to invalidate this syllogism and to bring the law regarding concurrent causes into line with the requirement that courts construe insurance policy exclusions strictly against the insurer and in favor of coverage. Concurrent causation arises as a normal doctrine in American tort law when "two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result." PROSSER AND KEETON ON TORTS, § 41, at 266 (5th ed. 1984).

The timeline of the two causes does not matter. Concurrent proximate causes are "causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either." *Byars v. St. Louis Pub. Serv. Co.*, 66 S.W.2d 894, 900 (Mo. 1933). While one cause can precede the other, *see*, *e.g.*, *Centermark*, 897 S.W.2d at 101-03 (non-excluded proximate cause of injury of negligent failure to secure automobile occurred before excluded concurrent proximate cause of use of automobile), they equally can occur at the same time.

Indeed, the word "concurrent," meaning "occurring together," infers that the timing of the two causes is irrelevant. Even the classic "two fires" "law school example" of a concurrent proximate cause, *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 861 (Mo. banc 1993), involves two independent causes occurring at the same time. That is, where two fires are started at the same time on opposite sides of a mountain, "the fires burn toward the cabin on the top, and either is sufficient to destroy the cabin," they constitute concurrent proximate causes because they "involve[e] two independent torts, either of which is sufficient in and of itself to cause the injury …." *Id.* at 861-63. Rather, the only question involved in whether two proximate causes are concurrent is whether the injury "would not have resulted in the absence of" either. *Byars*, 66 S.W.2d at 900.

The five previous decisions in which the concurrent proximate cause doctrine was applied in favor of coverage bear this out. In *Braxton*, a drunken employee got into an altercation with a customer and shot him with the employee's personal gun. 651 S.W.2d at 617. The employer's liability policy contained an exclusion for "injury … arising out of the ownership or use of any firearm." *Id.* The plaintiff argued that, regardless of the employee's ownership and use of the gun, the employer's negligent supervision of the employee was a non-excluded concurrent proximate cause of the injury, requiring coverage. *Id.* at 618. The Court of Appeals agreed. *Id.* at 618-20. Notwithstanding the gun, the employer's "own negligence was a separate, concurrent and non-excluded cause of his liability. The policy … did, therefore, provide coverage for respondent's injuries." *Id.* at 620.

In *Centermark*, a vehicle was stolen and used to injure a police officer. 897 S.W.2d at 99. The officer alleged he was injured by the vehicle owner's negligent failure to have adequate security. *Id.* He sought coverage under the owner's commercial general liability policy, which contained an exclusion for injuries arising out of the ownership or use of an automobile. *Id.* at 100. He argued that, regardless of the use of the car, the owner's negligent security was a non-excluded concurrent proximate cause of his injuries, requiring coverage. *Id.* Again, the Court of Appeals agreed. *Id.* at 101-03. The owner's negligence was "independent of ownership, maintenance, operation, or use of an automobile …." *Id.* at 101. Thus, "because while one proximate cause of the damage may have been … excluded from coverage, a concurrent cause" was not, and coverage lay. *Id.*

In *Columbia*, a child was killed when a car his grandparents owned backed over him. 992 S.W.2d at 205. His mother alleged the child's death was due to the grandparents' negligent failure to supervise the child. *Id.* The grandparents' homeowners' insurance policy contained an exclusion for any injury "arising out of … the ownership, maintenance, [or] use … of motor vehicles …." *Id.* at 206. The mother argued that, regardless of the automobile, the grandparents' negligent failure to supervise the child was a non-excluded concurrent proximate cause of the child's death, and thus coverage lay. *Id.* at 207. The Court of Appeals agreed. *Id.* at 207-09. As the court had to "construe the exclusionary clause strictly against the insurer," the mother's non-excluded claim had to be "covered by the insurer." *Id.* at 209.

In *Bowan*, after a transporter of a mentally disabled person failed to secure the person's seatbelt, the transporter was involved in a crash with another car that paralyzed the person. 174 S.W.3d at 3. The transporter's commercial general liability insurance policy contained an exclusion for any injuries arising out of the use of an automobile. *Id.* at 5. The person argued that, regardless of the use of an automobile, the negligent failure to ensure she was secured was a non-excluded concurrent proximate cause of her injuries, requiring coverage. *Id.* The Court of Appeals agreed:

> [B]oth the failure to properly secure Bowan and the negligent operation of the vehicle were distinct causes of Bowan's injuries. Therefore, there existed an independent and distinct act of negligence (the failure to properly secure Bowan) that was a cause of Bowan's injuries and was not excluded under the policy. Where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable as

long as one of the causes is covered by the policy.

Id. at 7.

Finally, in *Intermed*, a physician's assistant molested the plaintiff in the course of purporting to provide medical care. 367 S.W.3d at 86. To avoid coverage for her injuries, the physician's professional liability insurer attempted to invoke a policy exclusion for claims arising from sexual relations, activity, acts, or conduct, etc. *Id.* at 87-88. The plaintiff, though, argued that, regardless of the sexual activity, the physician's negligent hiring, supervision, and retention of the assistant was a non-excluded concurrent proximate cause of her injuries, requiring coverage. *Id.* at 88. Once again, the Court of Appeals agreed. *Id.* at 88-90. "Because the Clinic's negligent supervision of [the assistant] constituted an independent, concurrent proximate cause of [the plaintiff's] injuries," the exclusion was irrelevant. *Id.* at 90.

The same is true here. Regardless of whether The Bar Plan's "legal representative of investors" exclusion applied to Mr. Taylor and his loans to Mr. Wirken, Mr. Taylor's claim against Mr. Wirken in the underlying case was not solely "based upon or arising out of" Mr. Wirken's capacity as "a legal representative of investors." Rather, as the underlying judgment expressly found, Mr. Taylor's damages independently were based on and arose out of Mr. Wirken's concurrent breach of his ordinary, preexisting attorney-client fiduciary duties to Mr. Taylor, which The Bar Plan's policy explicitly covered and did not exclude. As a result, the law of Missouri is, regardless of the "legal representative of investors" exclusion, coverage must lie for the non-excluded and plainly covered damages for Mr. Wirken's preexisting breach of his fiduciary duties.

C. The Bar Plan's "legal representative of investors" exclusion does not exclude coverage for the underlying judgment, as Mr. Taylor's claim independently arose out of the concurrent cause of Mr. Wirken's breach of his fiduciary duties as Mr. Taylor's attorney, which the policy expressly covered.

Even if The Bar Plan's "legal representative of investors" exclusion were unambiguous and Mr. Taylor and his loans to the Wirken Group and Longview had to qualify as an "investor" and "investments" under it, coverage still must lie because Mr. Taylor's claim was not solely "arising out of or based upon" Mr. Wirken's role as the "legal representative of investors." Rather, the underlying judgment independently and distinctly awarded Mr. Taylor damages for Mr. Wirken's breach of his fiduciary duties as Mr. Taylor's attorney hired to handle issues related to the administration of Mr. Taylor's mother's trust. Mr. Taylor's injury would not have resulted in the absence of this breach. Accordingly, as this covered concurrent proximate cause of Mr. Taylor's injury indisputably was not excluded, coverage must lie.

A plaintiff in an equitable garnishment action must establish two elements in order to obtain his requested relief: (1) that he has obtained a judgment in his favor against the insured for matters that occurred during the policy period, and (2) that there is coverage. § 379.200, R.S.Mo. It is a longstanding principle of Missouri law that the facts as found in the judgment against the insured in the underlying personal injury case are final and certain. The underlying judgment cannot be re-litigated in the equitable garnishment proceedings:

The general rule is that, [1] *where one is bound to protect another from liability, he is bound by the result of the litigation to which the other is a party, provided he had notice of the litigation, and an opportunity to control and manage it*, and [2] that the judgment rendered therein is conclusive in the subsequent action upon the indemnity contract as to all questions and issues necessarily determined therein.

Lodigensky v. Am. States Preferred Ins. Co., 898 S.W.2d 661, 665 n.4 (Mo. App. 1995) (Stith, J.) (citations omitted) (emphasis in the original).

It is undisputed that Mr. Taylor obtained a judgment in his favor against Mr. Wirken and the Wirken Group, The Bar Plan's insured, for matters that occurred during the coverage period (Legal File 328; Appendix A13). It is undisputed that The Bar Plan also had notice of the underlying litigation and the opportunity to control it, as it initially gave Mr. Wirken and the Wirken Group a defense under a reservation of rights (L.F. 302, 322, 325). Thus, The Bar Plan is "bound by the result of" the underlying judgment, including all its factual findings and legal conclusions. *Lodigensky*, 898 S.W.2d at 665.

The underlying judgment granted Mr. Taylor damages for Mr. Wirken's *numerous*, different breaches of his fiduciary duties he owed Mr. Taylor. As the court found, Mr. Taylor hired Mr. Wirken not as a "representative of investors," but as his attorney to represent him, his wife, and his mother in claims against another person for mismanagement of his mother's trust (L.F. 295, 329-30, 422; Appx. A14-15). Throughout 2007 and into 2008, Mr. Wirken continue to represent Mr. Taylor "in matters related to estate planning for [Mr. Taylor] and his wife and estate planning and administration of" Mr. Taylor's mother after her May 2007 death (L.F. 329-30; Appx. A14-15). This attorney-client relationship existed between Mr. Taylor and Mr. Wirken during all of 2007 (L.F. 330, 152; Appx. A15, A22).

When Mr. Wirken approached Mr. Taylor about the loans, he was acting as Mr. Taylor's attorney in the above matters, and Mr. Taylor believed Mr. Wirken was acting in his best interests in that regard (L.F. 331; Appx. A16). Essentially, around the time of Mr. Taylor's mother's death in May 2007 (L.F. 329; Appx. A14), when Mr. Taylor was most vulnerable, Mr. Wirken took advantage of his existing client's trust in him so as selfishly to serve his own interests (L.F. 331; Appx. A16).

Accordingly, the trial court in the underlying judgment found Mr. Wirken had breached his fiduciary duties to Mr. Taylor in multiple ways unrelated to the fact that the loans involved the transfer of money that might be called an "investment" or the transferor an "investor." Cardinally, it was because Mr. Wirken "served [his] own interests rather than the interests of" Mr. Taylor (L.F. 331; Appx. A16). Mr. Wirken did not "make a written disclosure regarding his ethical obligations under the Code of Professional Responsibility," in violation of his ethical duties as Mr. Taylor's existing lawyer (L.F. 330; Appx. A15). He withheld material information from Mr. Taylor, also in violation of his ethical responsibilities and constituting "an act or omission done or omitted in the course of performing legal services and as a consequence of carelessness and neglect" (L.F. 335-37; Appx. A20-22). The court held Mr. Taylor was damaged "[a]s a direct and proximate result of *th[ose] breach[es] of fiduciary duty*" (L.F. 337; Appx. A22) (emphasis added).

Plainly, *those* breaches, having nothing to do with Mr. Taylor's putative status as an "investor" or his loans as "investments," constituted "act[s] or omission[s] by" Mr. Wirken, an insured, "acting in a professional capacity providing Legal Services" to Mr. Taylor as the attorney for Mr. Taylor in relation to his mother's trust, which The Bar Plan's policy plainly covered (L.F. 356; Appx. A29). These breaches independently, distinctly, and concurrently proximately caused Mr. Taylor's injury (L.F. 337; Appx. A22). His injury "would not have resulted in the absence of" this independent proximate cause. *Byars*, 66 S.W.2d at 900.

As a result, as in all the cases discussed above, even if the "legal representative of investors" exclusion somehow were unambiguous and Mr. Taylor in some way had to constitute an "investor" under it and his loans "investments," The Bar Plan nonetheless must cover the underlying judgment. *Centermark*, 897 S.W.2d at 101. For, regardless, "an insured risk and an excluded risk constitute concurrent proximate causes of" Mr. Taylor's injury, and thus The Bar Plan "is liable" because "one of the causes is covered by the policy." *Id.* (quoting *Braxton*, 651 S.W.2d at 619). The Bar Plan's "insurance policy" must "be construed to provide coverage," because Mr. Taylor's "injury was proximately caused by two events," "independent and distinct," one of which would be excluded and one covered. *Intermed*, 367 S.W.3d at 88.

Thus, even if the terms "investor" and "investment" were unambiguous and somehow included Mr. Taylor and his loans, Mr. Wirken's independent breach of his fiduciary duties still would be covered. Either way, the trial court's judgment was error. The Court should reverse the judgment and remand for judgment in Mr. Taylor's favor.

III. The trial court erred in holding The Bar Plan's professional liability policy excluded coverage for Mr. Taylor's underlying judgment *because* ambiguous exclusions in insurance contracts are strictly construed against the insurer *in that* The Bar Plan's exclusion in § III(B) of its policy for claims arising out of an insured's certain "capacity" is not limited to the insured's role as "a legal representative of investors," but states the "capacity" is the insured's role as a public official, and ERISA fiduciary, an investment advisor, "and" a legal representative of investors – not "or" a legal representative of investors – and The Bar Plan did not and cannot meet its burden to prove Mr. Wirken acted in all of these roles so as to activate the "capacity" exclusion in § III(B).

* * *

The law of Missouri is that exclusions in insurance policies must be strictly construed against the insurer and read in favor of coverage if at all reasonably possible. The exclusionary language in § III(B) of The Bar Plan's professional liability policy for claims "based upon or arising out of" an insured's certain "capacity" lists multiple roles to constitute that capacity, all joined by the conjunction "and." That is, it states it excludes coverage for claims based upon or arising out of an insured's "capacity" as a public official, an ERISA fiduciary, an investment advisor, "***and***" a "legal representative of investors" – "*and*," not "*or*." Regardless of whether Mr. Wirken acted in the role as a "legal representative of investors," he did not act in the role of a public official, an ERISA fiduciary, or an investment advisor, let alone all three. Is it reasonably possible to read the exclusionary language in § III(B) as not excluding Mr. Taylor's damages?

Regardless of the "legal representative of investors" language in § III(B)(4) of The Bar Plan's policy, that language is entirely inapplicable to this case. This is because it is part of a broader exclusion in § III(B) that is collectively and expressly dependent on three other paragraphs that The Bar Plan does not allege apply, because it cannot.

The actual exclusionary language constituting the excluded "capacity" described in § III(B) is not limited to the "legal representative of investors" language alone. Rather, it states this in full:

> THIS POLICY DOES NOT PROVIDE COVERAGE FOR ANY CLAIM BASED UPON OR ARISING OUT OF: …
>
> B. An Insured's capacity as:
>
> 1. A public official or employee of a governmental body, subdivision, or agency; provided, however, that if independent of that capacity, the Insured is also regularly engaged in the provision of Legal Services in return for financial remuneration, this exclusion shall not apply, but in that event, the insurance afforded by this Policy shall be excess over any other applicable, valid and collectible insurance or indemnity provided under law, rule, regulation or Policy applicable to such governmental body, subdivision or agency, notwithstanding any other language in this Policy;
>
> 2. A fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured under this Policy, is deemed to be a

fiduciary solely by reason of rendering Legal Services in a professional capacity with respect to an employee benefit plan;

3. An investment advisor, securities broker or dealer, insurance agent or broker, real estate agent or broker or accountant; ***and***

4. A legal representative of investors in regard to and resulting in an investment in an enterprise in which an Insured owns an equity interest or for which the Insured receives a fee or commission from an Entity other than the investor.

(Legal File 360; Appendix A33) (emphasis added).

Section III(B) plainly joins the four paragraphs describing its singular "capacity" (not "capacities") with "and," not "or." As a result, the law of Missouri is that, to constitute the excluded "capacity," the insured must have been engaging at the same time in the roles of: (1) "[a] public official or employee of a governmental body;" (2) "a fiduciary under" ERISA; (3) an "investment advisor;" ***and*** (4) "a legal representative of investors …" It is reasonably possible for § III(B) to be read as excluding coverage only if the insured is acting in the capacity of *all* of these roles together.

It is The Bar Plan's burden to prove that an exclusion in its policy excludes coverage for Mr. Taylor's underlying judgment. *Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. banc 2013). "The burden of showing that an exclusion to coverage applies is on the insurer." *Id.* (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")). Thus, unless The Bar Plan can show Mr.

Wirken was engaging in each and every one of these roles, then, due to use of the word "and" to join them, rather than "or," the single "capacity" described in § III(B) does not apply to this case.

"And" versus "or" can mean a great difference in whether or not a policy exclusion excludes coverage. In *Burns*, the policy at issue excluded injuries from "business pursuits," defining "business" as "[a] trade, profession or occupation, excluding farming, ***and*** the use of any premises or portion of residence premises for any such purposes." 303 S.W.3d at 508 (emphasis in the original). The insurer in *Burns* sought to use the exclusion to exclude coverage, but faced the problem that the injury at issue did not occur at a residence at which a trade was being carried on. *Id.* at 510. But the clause could be "read to require both an injury arising out of a trade, occupation or business and the use of the insured's premises," such that "the exclusion by its own terms [would] not apply" to the injury at issue. *Id.*

In an attempt to get around this reading, the insurer argued the word "and" in the exclusion could mean "or," so as to exclude coverage – that it meant either that a "business" was "a trade, profession or occupation, excluding faming," *or* was "the use of any premises or portion of residence premises for any such purposes."

This Court rejected this outright: the exclusion "simply does not use the word 'or.' It uses the word 'and.'" *Id.* at 511. "Accordingly, the use of the conjunctive 'and' requires both the first portion of" the exclusion before the comma "**along with or together with** the second portion of" the exclusion after the comma. *Id.* (emphasis in the original). Thus, "[a]t best, accepting [the insurer's] argument would mean only that the use of the word 'and' can be ambiguous – for, while 'and' *can* mean 'or,' most commonly 'and' means simply 'and.'" *Id.* (emphasis in the original). Because "such ambiguity must be construed against the insurer," and construing "and" as "and" would favor coverage, the language had to be read that way. *Id.* at 511-12.

The insurer attempted to counter that this was an "absurd" result. *Id.* at 513. Once again, this Court disagreed: "[T]hat is the policy [the insurer] chose to sell to [the insured]. … Clearly [the insurer] did not find it absurd to offer such coverage and accept [the insured's] premiums for it." *Id.*

The same as in *Burns* is true here. It is reasonable to conclude that "and" in § III(B) means "and," not "or" (L.F. 360; Appx. A33). As a result, for any part of § III(B)'s description of an excluded "capacity" to apply in this case, Mr. Wirken would have had to be acting at the same time in the roles of: (1) "[a] public official or employee of a governmental body;" (2) "a fiduciary under" ERISA; (3) an "investment advisor;" ***and*** (4) "a legal representative of investors" (L.F. 360; Appx. A33).

Obviously, though The Bar Plan had the burden to prove that any exclusion applied, it did not (and could not) show that Mr. Wirken in any way was acting as a "public official or employee of a governmental body" and "a fiduciary under" ERISA, let alone both at the same time. And the trial court held he was not acting as an "investment advisor" (L.F. 507; Appx. A12).

Thus, under this reasonable reading, whether Mr. Wirken was acting in the role of a "legal representative of investors," standing alone, was irrelevant. He did not also act in all the other roles necessary to constitute the "capacity" described in § III(B) and thereby activate the overall "capacity" exclusion.

Just as in *Burns*, the use of the word "and" in § III(B) of The Bar Plan's policy precludes the single "capacity" described in that subsection from applying to this case. To join the paragraphs describing the four roles necessary to constitute that "capacity," § III(B) "simply does not use the word 'or.' It uses the word 'and.'" *Burns*, 303 S.W.3d at 511. "Accordingly, the use of the conjunctive 'and' requires" the first three of the roles described in § III(B) "**along with or together with** the" last role. *Id.* (emphasis in the original). Thus, "[a]t best," " the use of the word 'and' [could] be ambiguous …." *Id.*

Even then, though, "such ambiguity must be construed against" The Bar Plan. As construing "and" as "and," per its plain language, would favor coverage, the language must be read that way. *Id.* at 511-12. While The Bar Plan might feel this is an "absurd" result, "that is the policy [it] chose to sell to [the Wirken Group]. … Clearly [The Bar Plan] did not find it absurd to offer such coverage and accept [the Wirken Group's] premiums for it." *Id.* at 513.

The "legal representative of investors" language in The Bar Plan's policy did not exclude coverage for Mr. Taylor's underlying judgment against Mr. Wirken and the Wirken Group. Regardless of whether Mr. Wirken was acting in the role of a "legal representative of investors," he was not acting in *all* the roles necessary to invoke the "capacity" exclusion contained in § III(B). This Court should reverse the trial court's judgment and remand this case with instructions to enter judgment for Mr. Taylor.

Conclusion

The Court should reverse the trial court's summary judgment in favor of The Bar Plan. It should remand this case with instructions to enter judgment for Mr. Taylor.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that this brief contains 17,445 words.

/s/Jonathan Sternberg
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Certificate of Service

I hereby certify that, on September 8, 2014, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Appellant and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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