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 REPLY BRIEF OF THE APPELLANT

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Preliminary Matter: All Points Are Preserved for Appeal

In the three points relied on in his opening brief, Appellant Jimmie Taylor explained how the trial court erred in granting Respondent The Bar Plan Mutual Insurance Company ("The Bar Plan") summary judgment on his equitable garnishment claim, requiring reversal of the judgment below and remand with instructions to enter judgment for him. That is, though the material facts are undisputed, The Bar Plan was not entitled to judgment as a matter of law that its professional liability policy with the Wirken Law Group, P.C. ("the Wirken Group") and James Wirken excluded coverage for the breach of fiduciary duty damages the underlying judgment awarded Mr. Taylor against those insureds.

Mr. Taylor's points explained three reasons why this was so. *First*, the terms "investor" and "investment" in the exclusionary language in § III(B)(4) of The Bar Plan's policy – the language on which the trial court relied in granting The Bar Plan summary judgment – are ambiguous and reasonably can be read not to include Mr. Taylor or his short-term loans to the Wirken Group or to Mr. Wirken's other client, Longview (Substitute Brief of the Appellant ("Aplt.Br.") 22-40). *Second*, as Mr. Taylor's claim against the insureds arose out of the concurrent proximate cause of Mr. Wirken's breach of his fiduciary duties as Mr. Taylor's attorney, which The Bar Plan's policy expressly covered, coverage lies regardless of any competing, excluded proximate cause (Aplt.Br. 41-52). *Finally*, the policy's use of the word "and" to join the multiple roles constituting the excluded "capacity" in § III(B) is ambiguous and renders that "capacity" exclusion inapplicable to Mr. Taylor's claim against the insureds (Aplt.Br. 53-58).

Several times in its brief, The Bar Plan states Mr. Taylor raises all three of these points "for the first time on appeal" (Substitute Brief of the Respondent ("Resp.Br.") 10-12, 57). Notably, though, The Bar Plan ascribes no consequence to this allegation, such as arguing that Mr. Taylor's three points relied on somehow are not preserved for appellate review. Nonetheless, because this Court always "must first determine, *sua sponte*, whether [an appellant]'s allegations of error are preserved for appellate review," *Crow v. Crow*, 300 S.W.3d 561, 564 (Mo. App. 2009), Mr. Taylor must assure the Court that, despite The Bar Plan's brief insinuations, his points properly are before the Court.

Mr. Taylor's three points *are* preserved for review, either by expressly having been raised below or, more importantly, by the mere nature of this Court's review of a grant of summary judgment on undisputed facts. The Bar Plan implicitly recognizes this by not actually arguing that any of Mr. Taylor's points somehow are not preserved. For, in Missouri, it is well-established that a summary judgment non-movant's legal argument why the movant is not entitled to judgment as a matter of law on undisputed facts cannot be waived and does not have to be raised earlier to be preserved for appeal.

A. Mr. Taylor expressly raised his second point relied on below.

First, The Bar Plan is wholly incorrect that Mr. Taylor did not raise his second point relied on below (Resp.Br. 11). Indeed, it was the crux of his response below to The Bar Plan invoking § III(B)(4) of its policy.

In his second point, Mr. Taylor explained that, even if § III(B) were unambiguous and Mr. Taylor and his loans to the Wirken Group and Longview had to qualify as an "investor" and "investments" excluded under § III(B)(4), coverage still must lie because

his claim was not solely "arising out of or based upon" Mr. Wirken's role as the "legal representative of investors" (Aplt.Br. 43-48). Rather, as the underlying judgment found, Mr. Taylor's damages independently and distinctly were caused by Mr. Wirken's breach of his fiduciary duties as his attorney, which *was* covered by The Bar Plan's policy, and his injury would not have resulted without that breach (Aplt.Br. 49-52). Accordingly, one concurrent proximate cause of Mr. Taylor's injury indisputably was covered by The Bar Plan's policy, and thus the law of Missouri is coverage must lie (Aplt.Br. 49-52).

Mr. Taylor equally stated this below. In opposing The Bar Plan's invocation of § III(B)(4), Mr. Taylor recounted the law of Missouri that, regardless of whether *a* cause of his damages in the underlying judgment was Mr. "Wirken's failure to pay money he had borrowed," an equal and independent cause was "the failure of [Mr.] Wirken to meet his fiduciary duty to do those things a non-negligent lawyer would do when doing business with a client," and, therefore, "the loss was caused or ***contributed to be caused*** … by [Mr.] Wirken providing 'Legal Services' while breaching his fiduciary duty, bringing the conduct within the insuring agreements" (Legal File 453) (emphasis in the original).

For this reason, Mr. Taylor argued The Bar Plan's "reliance on the … exclusion" in § III(B)(4) was "tenuous" because, "even accepting *arguendo*" that the exclusion applied, "the conduct of [Mr.] Wirken that ***was*** covered ***contributed to cause*** [Mr.] Taylor's loss," and, thus, "Any failure of the policy to segregate the excluded conduct from the non-excluded conduct … must be ignored in favor of enforcing the provisions which do provide coverage" (L.F. 457) (emphasis in the original).

Mr. Taylor then explored the issue of "[t]he cause of [his]'s loss:"

> The ultimate target is provided by the language from the policy which says that Defendant will pay Damages the Insured is legally obligated to pay "…by reason of any act or omission by an Insured acting in a professional capacity providing Legal Services." The uncontroverted facts establish that [Mr.] Wirken was providing legal services. The uncontroverted facts establish that [Mr. Taylor] suffered damages. The uncontroverted facts establish that the injury to [Mr.] Taylor was, ***at least in part***, "…by reason of [an]…omission" of [The Bar Plan]'s insured. The policy does not require that the act or omission identified be the ***sole cause*** of harm.

(L.F. 457-58) (emphasis in the original).

While Mr. Taylor did not name the "concurrent cause rule" below, that is not the same thing as failing to raise his argument that, even if, *arguendo*, one cause of his damages was excluded, another nonetheless was covered, and thus coverage still lies. Plainly, he raised that argument below, only labeling it "The cause of Plaintiff's loss," rather than "Application of the Concurrent Cause Rule."

But the law of Missouri is the label Mr. Taylor gave his argument is irrelevant, as it is the argument's substance that counts. *See, e.g., Galati v. New Amsterdam Cas. Co.*, 381 S.W.2d 5, 9 (Mo. App. 1964) (insurer's argument that insured lacked insurable interest was preserved, where, though insurer had not used the term "insurable interest" below, it made the substance of that argument). That Mr. Taylor's argument below as to the concurrent proximate cause rule may not have been as detailed or eloquent as in his opening brief does not matter. The law of Missouri is he raised it below.

B. All three of Mr. Taylor's points also are preserved because all of a summary judgment non-movant's legal arguments in opposition to the movant's proffered right to judgment as a matter of law on undisputed facts are non-waivable on appeal, even if no opposition is filed.

More importantly, due to the manner of this Court's review of a grant of summary judgment, the law of Missouri is all of Mr. Taylor's three points explaining why The Bar Plan is not entitled to judgment as a matter of law on the undisputed facts of this case are properly before the Court, regardless of whether they were argued below.

As they continue to do on appeal, the parties agreed below that there was no genuine dispute as to any material fact (L.F. 421-31, 450, 462-69). Indeed, in both his opposition to The Bar Plan's motion for summary judgment and his own motion for summary judgment, Mr. Taylor expressly agreed the material facts were uncontroverted; he even largely adopted The Bar Plan's statement of uncontroverted facts (L.F. 450, 460). One of The Bar Plan's admitted facts was that the copy of its policy it attached to its statement was its true and accurate policy with the Wirken Group, including all the terms at issue both below and now, on appeal (L.F. 429-31).

Accordingly, the only dispute between the parties was as to which one had the right to judgment as a matter of law on these undisputed, admitted facts (L.F. 450, 460-61). The trial court granted summary judgment to The Bar Plan (L.F. 496-507).

"Appellate review of the grant of summary judgment is *de novo*." *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 764 (Mo. banc 2009). "Summary judgment will be upheld on appeal if: (1) there is no genuine dispute of material fact, and

(2) the movant is entitled to judgment as a matter of law." *Id.* at 765. "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* at 764 (citation omitted). Translated to the insurance context, if an insurer a obtains summary judgment that its policy excludes coverage, on the non-movant's appeal the burden remains "on the insure[r] to prove" so. *Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. banc 2013).

Therefore, as the summary judgment movant, The Bar Plan bore (and thus continues to bear) "the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." *Kinnaman-Carson*, 283 S.W.3d at 764 (citation omitted). As a result, "The trial court [was] prohibited from granting summary judgment, *even if no responsive pleading [was] filed in opposition to [the] summary judgment motion*, unless the facts and the law support[ted] the grant of summary judgment." *Id.* (emphasis added).

Because of this posture, the law of Missouri is a non-movant does not need to make a specific counterargument before the trial court as to the movant's right to judgment as a matter of law on admitted facts in order to preserve it for appeal. *Id.* (citing *Landstar Inv. II, Inc. v. Spears*, 257 S.W.3d 630, 632 (Mo. App. 2008)). For the movant "to be entitled to judgment as a matter of law, the admitted facts must establish its right to judgment as a matter of law." *Id.*

As such, "While [it may be] true that [non-movant appellants] did not raise [a specific issue] in their opposition to [the movant respondent's] summary judgment

motion itself," as long as the issue goes to whether the movant was entitled to judgment as a matter of law under the admitted facts, "they did not need to do so" in order to preserve it for appeal. *Id.* at 765-66. Rather, this Court reviews the *movant*'s proffered right to judgment *de novo*. *Id.*

In *Kinnaman-Carson*, it was undisputed that an insurer had agreed to defend and indemnify its insured without a reservation of rights. *Id.* at 766. Later, in an equitable garnishment action by the injured parties to recover on their judgment against the insured, the insurer obtained a summary judgment that its policy excluded coverage. *Id.* at 764. In their appeal, *but not before the trial court*, the injured parties argued the insurer had waived its coverage defense by defending without a reservation of rights. *Id.* at 764 n.5. The insurer objected that, because the injured parties had not expressly included this argument in their summary judgment opposition, it was not preserved. *Id.* at 765-66.

Initially, the Missouri Court of Appeals agreed with the insurer and denied the point. *Kinnaman-Carson v. Westport Ins. Corp.*, 2008 WL 4128057 at *7 (Mo. App. Sept. 9, 2008), *transferred to Mo. banc*, Dec. 16, 2008. It held that, "Because the [injured parties] failed to raise this argument in opposition to [the insurer]'s motion for summary judgment, … the issue [was] waived" on appeal. *Id.*

On transfer, however, this Court disagreed – and, ultimately, held for the injured parties. As the summary judgment movant, the insurer had the burden to prove its right to judgment as a matter of law. *Kinnaman-Carson*, 283 S.W.2d at 765. "While it is true that the [injured parties] did not raise the reservation of rights issue in their opposition to [the insurer's] summary judgment motion itself, they did not need to do so because" it

was undisputed that the insurer "had agreed to defend without a reservation of rights …." *Id.* at 765-66. Thus, the question on appeal was whether the admitted facts established the insurer's right to judgment as a matter of law, which automatically was preserved for *de novo* review. *Id.* at 766.

Here, Mr. Taylor's three points equally are preserved, even if not specifically raised below. Just as in *Kinnaman-Carson*, his arguments are that, on the undisputed facts, The Bar Plan did not have a right to judgment as a matter of law. In its summary judgment motion, The Bar Plan admitted the copy of its policy at issue, including all the language at issue, was true and accurate, "and nothing in [its] summary judgment motion countered that admission." *Id.* at 765. Even if Mr. Taylor had not filed *any* response, The Bar Plan still would have had to prove its right to judgment as a matter of law, both below and on appeal, such that any purely legal counterargument is preserved. *Id.*

As in *Kinnaman-Carson*, Mr. Taylor's point is that the admitted material fact of the terms of The Bar Plan's policy, "not countered in [The Bar Plan's] summary judgment motion, establish[es] that [it] is not entitled to" judgment as a matter of law, The Bar Plan thus did not and cannot meet its continuing summary judgment burden, and the trial court therefore erred in granting it summary judgment. *Id.*

Given the procedural posture of this case, all of Mr. Taylor's reasons why The Bar Plan was not entitled to judgment as a matter of law plainly are preserved. *Id.* This Court will review *de novo* whether, under the admitted facts, The Bar Plan had the right to judgment as a matter of law.

Reply as to Point I

In his first point, Mr. Taylor recounted the overarching public policy of Missouri that insurance contracts must "be interpreted, if reasonably possible, to provide coverage" and 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" (Aplt.Br. 26-28) (quoting *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997); *Meyer Jewelry Co. v. Gen. Ins. Co. of Am.*, 422 S.W.2d 617, 623 (Mo. 1968)).

Following this rule, Mr. Taylor then explained the undefined term "investment" in § III(B)(4) of The Bar Plan's policy reasonably can be read not to include his loans to Mr. Wirken or Longview, because that term is susceptible of several ordinary meanings, at least one of which would not encompass mere short-term loans to a business as "investments" in that business (Aplt.Br. 28-38). He also explained this was doubly true as to his loans to Mr. Wirken, for, as Mr. Taylor was not an attorney and the Wirken Group was a professional corporation whose investors were statutorily limited to attorneys, his loans to Mr. Wirken could not be "investments" in the Wirken Group and he could not be an "investor" in the Wirken Group (Aplt.Br. 38-40).

In response, The Bar Plan cites other dictionaries' definitions of "investment" it argues *would* encompass Mr. Taylor's loans (Resp.Br. 19, 22-23). It wonders aloud why Mr. Taylor "mentions neither of" those "dictionaries," but instead cites only another dictionary (Resp.Br. 19). At length, it criticizes the definition Mr. Taylor cited and puffs up its own chosen definitions (Resp.Br. 19-24).

Mr. Taylor admitted, of course, that *some* ordinary (though more technical) meanings of "investment" *could* feasibly include short-term loans such as his to Mr. Wirken and Longview (Aplt.Br. 31). His point, however, is that *other* common definitions, such as the one on which he relied involving the *purchase* of an item with the expectation of benefit from it (such as, most commonly, an equity interest), as compounded by the common parlance of attorneys and other businesspeople alike, would not include his loans (Aplt.Br. 30-33). The Bar Plan's use of dictionary definitions in its favor and criticism of another *not* in its favor only amplifies that the law of Missouri is the term "investment" in § III(B)(4) is ambiguous.

For, at the very least, The Bar Plan is forced tacitly to admit the term "investment" in its exclusion is susceptible of more than one meaning, one favorable to coverage in this case and one unfavorable to coverage. This is fundamentally what an "ambiguity" is: when "language in the policy at issue [is] reasonably susceptible of two interpretations," as would "would be attached by an ordinary [attorney purchasing insurance] of average understanding" (Aplt.Br. 29, 31) (quoting *Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 101 (Mo. App. 1995); *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009)). An ordinary purchaser of The Bar Plan's professional liability policy – an attorney operating a small firm – thinks of "investing" in his firm as another attorney buying an equity interest in it, not giving its principal member a short-term loan (Aplt.Br. 32-33, 36-38).

Essentially, the question in Mr. Taylor's first point comes down to this: is it *reasonably possible* that an attorney managing a small firm would not consider a short-

term loan to him to be an "investment" in his firm? The obvious answer is "yes." The Bar Plan simply cannot get around this. But it sure tries: it spends 24 pages in its brief attempting to bypass this bedrock question and, instead, argue the Court should apply another possible meaning of "investment" that *does not* favor coverage (Resp.Br. 18-42).

But that is not the inquiry in this case. Rather, as it *is* reasonably possible to construe The Bar Plan's exclusionary language in favor of coverage in this case, the Court must do so (Aplt.Br. 26-28). It plainly *is* reasonably possible that an attorney purchasing The Bar Plan's policy would not consider "investments" to include Mr. Taylor's loans, and the Court must apply that meaning (Aplt.Br. 26-28).

The Bar Plan also argues the "only court to interpret [§] III(B)(4) held that it is unambiguous" (Resp.Br. 29) (citing *Vaughn v. Guarino-Sanders*, 478 Fed.Appx. 310 (6th Cir. 2012)). While *Vaughn* did concern § III(B)(4) of The Bar Plan's policy, the Sixth Circuit was not asked to decide whether the term "investment" in the exclusion was ambiguous as to a short-term loan. 478 Fed.Appx. at 310-12. Indeed, the injured party in *Vaughn* rightly *accepted* the transaction at issue – the purchase of "membership in limited-liability companies as vehicles to buy Florida real estate" – *was* an investment. *Id.* at 310. Rather, in *Vaughn*, on appeal from a grant of summary judgment in The Bar Plan's favor, the injured party "fail[ed] to point out any ambiguity in the language of the" exclusion, but instead "contend[ed] that genuine issues of material fact preclude[d] summary judgment …." *Id.* at 311. The Sixth Circuit did not analyze whether a short-term loan had to constitute an "investment," because that was not at issue. *Id.* at 310-12.

Here, though, that *is* the issue: *must* the term "investment" encompass a short-term loan to a business from a person legally incapable of purchasing an equity interest – "investing" – in the business? Or, is it *reasonably possible* to read "investment" as not including such a loan? The answer is it is reasonably possible not to read it as including a short-term loan (Aplt.Br. 28-38).

Mr. Taylor agrees the purchase of an equity interest in an enterprise, as in *Vaughn*, unambiguously would be an "investment" in it (Aplt.Br. 28-38). Of course, and as The Bar Plan concedes, the law of Missouri prohibited Mr. Taylor from making such an investment in the Wirken Group (Aplt.Br. 38-40; Resp.Br. 24). Indeed, as in *Vaughn*, that obviously is what § III(B)(4) was designed for: alleviating the insurer of liability when the insured represents someone purchasing a bad equity interest in the insured's enterprise (Aplt.Br. 28-38). As The Bar Plan tacitly concedes, though, the term "investment" is readily capable of multiple meanings, including one that does not encompass mere short-term loans. Thus, this Court must apply *that* meaning.

The Bar Plan also argues its use of the term "investment" "is deliberately broad and was intended as such, so [§ III(B)(4)] would apply … to any of the ever expanding array of financial transactions … that a lawyer could have a client commit funds to" – that it "facially covers all financial transactions … that are undertaken for profit" and includes all "expending money to make a profit" (Resp.Br. 29-30). While, in limited circumstances, obviously broad language in insurance policies can be unambiguous, *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs.*, 407 S.W.3d 621, 629 (Mo. App. 2013) (term "related" in multiple claims provision making "a series of related acts or

omissions" constitute one "claim" in case involving same claims over a long period of time), The Bar Plan's reading of "investment" is incredibly, unreasonably broad, and would be used in the future to exclude practically any malpractice claim.

For, if an "investment" in an attorney's firm is any "expending money" by a client to the firm that the client "undertakes for profit," what is to stop it from encompassing even attorney fees a client pays to the firm in an effort to make a profit on a matter? Clients routinely hire attorneys to make a profit in a matter – starting businesses, drafting contracts and other business documents, managing collections, handling litigation, etc. By paying fees to the attorney for the attorney's work that facilitates the profit-making, the client is engaging in a "financial transaction undertaken for profit," and is "expending money to make a profit."

Thus, if this Court were to approve of that "broad" understanding, The Bar Plan could invoke § III(B)(4) to avoid coverage for virtually any malpractice judgment against one of its insureds in the future. It would "impose upon [a] wor[d] of common speech an esoteric significance intelligible only to [The Bar Plan's] craft," *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) (Hand, J.), so as to excise practically any claim from The Bar Plan having to cover it.

But "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) (citation omitted). The Bar Plan's broad reading of "investment" as necessarily including any expenditure for profit by a client to a lawyer's firm would violate not only common sense, but also the longstanding public policy of Missouri holding insurers to their duty.

Nor would finding it reasonably possible that "investor" and "investment" do not encompass Mr. Taylor or his loans require The Bar Plan to make its "policies byzantine labyrinths of exclusion" (Resp.Br. 30). If The Bar Plan wanted § III(B)(4) necessarily to exclude coverage for attorneys who represent clients in making short-term loans to the attorney's firm, it easily could have defined "investor" and "investment" to include these. Alternatively, it could have worded the exclusion to state precisely what it argues here: "This policy does not provide coverage for any claim based upon or arising out of an Insured's capacity as a legal representative of any person or Entity engaging in a financial transaction with the Insured for the person or Entity's profit or expending money to the Insured to make a profit."

But The Bar Plan's policy *does not* say this. Section III(B)(4) says "[a] legal representative of *investors* in regard to and resulting in *investment* in an enterprise in which an Insured owns an equity interest" (L.F. 360). It is reasonably possible to read this language – the actual language in The Bar Plan's policy – as *not* encompassing Mr. Taylor or the loans Mr. Wirken conned out of him.

As a result, the law of Missouri is Mr. Taylor's short-term loans to Mr. Wirken were not "investments" in The Wirken Group, and his short-term loans to Longview were not "investments" in that entity (the fee for which he had no idea Mr. Wirken was receiving) (Aplt.Br. 28-38). While there may be meanings of "investment" that could encompass those transactions, it also is reasonably possible to construe the term otherwise.

Reply as to Point II

In his second point relied on, Mr. Taylor explained that, even if § III(B) were unambiguous and the term "investment" in § III(B)(4) had to encompass his short-term loans to the Wirken Group and Longview, coverage still lies because Mr. Taylor's injury was not solely "arising out of or based upon" Mr. Wirken's role as the "legal representative of investors" (Aplt.Br. 41-52). Rather, as the underlying judgment expressly found, Mr. Taylor's damages independently and distinctly were caused by Mr. Wirken's breach of his fiduciary duties, which *was* covered by The Bar Plan's policy, and without which his injury would not have occurred. Therefore, the law of Missouri is coverage must lie because The Bar Plan's policy indisputably covered and did not exclude one concurrent proximate cause of his injury, regardless of whether another (Mr. Wirken's failure to pay back the loans) was excluded (Aplt.Br. 43-52).

As Mr. Taylor explained (Aplt.Br. 43-48), this is the "concurrent proximate cause rule," which requires coverage where "an insured risk and an excluded risk constitute concurrent proximate causes" of a loss. *Braxton v. U.S. Fire Ins. Co.*, 651 S.W.2d 616, 619 (Mo. App. 1983). The Bar Plan acknowledges the Court of Appeals has applied this rule to require coverage in five decisions between 1983 and 2012 (Resp.Br. 45). But it suggests the rule somehow is void because *this* Court has not yet applied it (Resp.Br. 43).

The Bar Plan is correct that this Court apparently never has considered the concurrent proximate cause rule in one of its decisions. Notably, this is because, for over 30 years, it has *denied* transfer from each Court of Appeals decision applying the rule. *See Braxton*, 651 S.W.2d at 616, *transfer denied*, June 30, 1983; *Centermark*, 897

S.W.2d at, *transfer denied*, May 30, 1995; *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204 (Mo. App. 1999), *transfer denied*, June 29, 1999; *Bowan ex rel. Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1 (Mo. App. 2005), *transfer denied*, Sept. 22, 2005; *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84 (Mo. App. 2012), *transfer denied*, May 29, 2012. Additionally, Chief Justice Russell concurred in the rule's application in *Columbia* while a judge of the Court of Appeals. 992 S.W.2d at 211.

Certainly, transfer to this Court is "extraordinary," Rule 83.04, and denial of that discretionary review does not officially express an opinion on a decision's merits, *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999). But if the concurrent proximate cause rule truly "wholly misperceive[s] the structure of insurance policies" and "is a drastic and unworkable over-reach," as The Bar Plan urges (Resp.Br. 44), surely at some point between 1983 and today this Court would have transferred a decision applying it and overruled it. As a result, the concurrent proximate cause rule now is well-ingrained in Missouri insurance law.

The Bar Plan recounts the five previous decisions applying this rule, *supra* (Resp.Br. 46-53), all of which Mr. Taylor discussed at length in his opening brief (Aplt.Br. 44-48). It correctly recites that all five involved one concurrent cause of failure to supervise (or a like circumstance) and another concurrent, excluded cause, which were found to be concurrent proximate causes such that coverage lay (Resp.Br. 45). Citing no authority, however, it suggests the rule *only ever* could be applied where the concurrent, covered cause was failure to supervise (Resp.Br. 45-46, 53-55).

That makes no sense. As The Bar Plan "exhaustively" (Resp.Br. 45) points out, the fulcrum of whether the rule applies is whether, if the covered cause had not occurred, the excluded cause would not have occurred (Resp.Br. 46-53). That is not dependent on supervision or non-supervision. Instead, here, as in all the five cases both parties recount, and as the underlying judgment expressly found, the (arguably) excluded cause of Mr. Wirken obtaining the loans from Mr. Taylor would not have occurred without Mr. Wirken first breaching his fiduciary duties to Mr. Taylor while providing legal services to him, which *was* a covered cause (Aplt.Br. 49-52).

Had Mr. Wirken *not* breached his fiduciary duties by, *inter alia*, "serv[ing] [his] own interests rather than the interests of Mr. Taylor" and withholding material information from Mr. Taylor, damaging Mr. Taylor "[a]s a direct and proximate result of th[ose] breach[es] of fiduciary duty," the arguably excluded loans would not have been procured (Aplt.Br. 49-52) (quoting L.F. 331, 335-37). The precise nature of the covered concurrent proximate cause makes no difference. Mr. Wirken's breach of his fiduciary duties plainly was an independent, distinct, and concurrent proximate cause of Mr. Taylor's damages not inextricably intertwined with any other proximate cause.

The Bar Plan also suggests the concurrent proximate cause rule could not apply here because § III(B)(4) "precludes coverage for losses that an insured causes when acting in a certain capacity," rather than "the particular manner by which the insured caused damage" to his client (Resp.Br. 53). Essentially, it argues that, because an attorney always will be providing legal services before the exclusion can be activated, the rule has no application.

That misses the mark. Certainly, before any insurance policy exclusion can apply, coverage must be activated by the policy's insuring language. Here, that would be providing "legal services" (L.F. 356). But it is easily possible to imagine a situation where: (1) an attorney insured is providing legal services to a client who is investing in an enterprise the attorney owns; (2) the attorney gives full disclosure, serves only the client's interests, and breaches no fiduciary duties (such as by adhering to the procedure in Rule 4-1.8(a) to avoid such a breach); (3) the investment fails; and (4) the client sues the lawyer on the failed investment – e.g., for breach of contract, a declaratory judgment, or the like, and *not* for the tort of breach of fiduciary duties.

In that case, if the client recovered, there would be the provision of legal services, but coverage would be excluded because of the "investment" exclusion, and there would be no concurrent proximate cause that, unlike here, is covered and not excluded. Essentially, those are the facts of *Vaughn*, 478 Fed.Appx. at 310, on which The Bar Plan relied in its response to Mr. Taylor's first point (Resp.Br. 29).

But that is not this case. Here, Mr. Wirken injured Mr. Taylor by breaching his fiduciary duties, which, as The Bar Plan admits, was covered by its policy (Resp.Br. 44). The underlying judgment expressly found Mr. Taylor was damaged "[a]s a direct and proximate result of th[ose] breach[es] of fiduciary duty" (L.F. 335-37). The Bar Plan's policy thus must "be construed to provide coverage," because Mr. Taylor's "injury was proximately caused by two events," "independent and distinct," one of which is covered and *not* excluded. *Intermed*, 367 S.W.3d at 88.

Reply as to Point III

In his third point relied on, Mr. Taylor explained that The Bar Plan's use of the word "and" to join the paragraphs in § III(B) describing the four roles to make up the single "capacity" excluded by that subsection is ambiguous and renders that described "capacity" inapplicable to his claim (Aplt.Br. 53-58). He analogized this case to *Burns v. Smith*, 303 S.W.3d 505, 509-13 (Mo. banc 2010), in which an insurer's use of "and" to join descriptions in an exclusionary definition was held to be ambiguous and coverage lay (Aplt.Br. 55-57). He explained that, under the meaning of "and" this Court approved of in *Burns* – "along with or together with," *id.* at 511-12 – for any part of § III(B)'s block "capacity" exclusion to apply in this case, Mr. Wirken would have had to be acting at the same time in multiple roles, several of which could not apply here (Aplt.Br. 57-58).

The Bar Plan characterizes Mr. Taylor's argument as being that "the entirety of Section III(B) is ambiguous" (Resp.Br. 55). This is not so. If The Bar Plan argued its right to judgment as a matter of law arose because Mr. Wirken engaged in *all four* roles joined by "and" to make the excluded "capacity" § III(B), there would be no ambiguity at issue. Rather, the ambiguity here exists, as it did in *Burns*, because of the use of "and" to join multiple clauses, only *one* of which is alleged to apply (Aplt.Br. 40-45).

The Bar Plan then argues, "[A]n ordinary person reading Subsection B would easily see that 1-4 are each separate exclusions" (Resp.Br. 57). But insurers *always* argue an "ordinary person" would read its policy as disfavoring coverage and using indelibly precise language. In *Burns*, this Court rejected that notion as to the word "and," holding, "while 'and' *can* mean 'or,' most commonly 'and' means 'and,'" as in "along with or

together with …." 303 S.W.3d at 511-12. Essentially, just as the insurer in *Burns* did, the Bar Plan argues its "and" *really* means "or:" an insured's capacity as (1), (2), (3), *or* (4). But The Bar Plan *did not* use the word "or," it used the word "and:" an insured's capacity as (1), (2), (3) *and* (4). Just as in *Burns*, this makes a great difference (Aplt.Br. 55-58).

Next, The Bar Plan argues the use of the accepted meaning of "and" discussed in *Burns* would create "internal inconsistencies" in the various paragraphs of § III(B), suggesting Mr. Taylor's reading is absurd (Resp.Br. 58). Again, as in *Burns*, however, "[T]hat is the policy [The Bar Plan] 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." 303 S.W.3d at 513. If The Bar Plan wanted its descriptions of the roles constituting the excluded "capacity" to be separately applicable, it should have separated them with "or." It did not. It joined them together with "and." Its suggestion that its "and" really means "or" so as to separate them and not join them certainly was not "grammatically correct" (Resp.Br. 59). *See Burns*, 303 S.W.3d at 511-12.

Finally, The Bar Plan suggests this Court in *Burns* actually *approved* of its reading of "and" as "or," because the Court's analysis in *Burns* dealt with only the first of the two "ands" in the policy language at issue, not the second (Resp.Br. 59-60). But that is only because the second "and," joining numbered paragraphs, was not before the Court in *Burns* (and did not need to be). 303 S.W.3d at 510. It was the insurer's burden to show an exclusion applied. *Manner*, 393 S.W.3d at 62. But neither party in *Burns* put the rest of the insurer's exclusionary language at issue; instead, the question was relegated to the

first "and." 303 S.W.3d at 510. That is not the same as this Court *approving* of the second "and." It merely was not addressed.

Conversely, here, that second "and" *is* at issue. The term's analysis in *Burns*, though, is the same (Aplt.Br. 55-58). The Bar Plan's suggestion that joining numbered subparagraphs of a subsection with "and" can mean "or," but "and" means "and" only when in the middle of a sentence makes no sense. "(1), (2), (3) *and* (4)" is different than "(1), (2), (3) *or* (4)." If The Bar Plan intended the paragraphs describing the roles constituting the "capacity" excluded in § III((B) to be separate and individually applicable, it should have separated them with "or." It did not.

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 6,378 words.

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Certificate of Service

I hereby certify that, on October 17, 2014, I filed a true and accurate Adobe PDF copy of this Substitute Reply Brief of the Appellant via the Court's electronic filing system, which notified the following of that filing:

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