Supreme Court Case No. SC87418

IN THE SUPREME COURT OF MISSOURI

ALBERT J. STONE and TAMMY STONE, in Their Capacity as Assignees of Arlene M. Bateman

Appellants/Cross-Respondents,

vs.

FARM BUREAU TOWN & COUNTRY INSURANCE COMPANY

Respondent/Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
31ST JUDICIAL CIRCUIT
The Honorable J. Miles Sweeney

RESPONDENT/CROSS-APPELLANT'S

SUBSTITUTE REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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REPLY TO STATEMENT OF FACTS

In this appeal, although the brief filed by the Stones is designated a "Reply Brief," it is actually both a: (1) "Reply Brief" in response to Farm Bureau's brief submitted in response to the Stones' appeal; and (2) a "Respondents' Brief" in response to the appeal filed by Farm Bureau. This "Respondent/Cross-Appellant's Substitute Reply Brief" will only reply to the Stones' response to Points I, II and III of its brief as permitted by Supreme Court Rule 84.04 (j).

Additional facts on proof of mailing: The issue of the sufficiency of mailing is raised for the first time in this Court. The issue of mailing was not raised in the briefs filed by the Stones in the Missouri Court of Appeals, Southern District. See Appellant's Brief and Appellants/Cross-Respondents' Reply Brief.

In response to the Stones' motion for partial summary judgment, Farm Bureau filed with the trial court the Affidavit of Claudia Goodin. (LF 83-159) As set forth in her affidavit, Ms. Goodin has been employed with Farm Bureau in the position of accounts receivable clerk since 1992 and has personal knowledge of Farm Bureau's practices and procedures for mailing invoices and notices to its insureds. These practices and procedures are used by Farm Bureau in the regular and systematic transaction of business. (LF 83, 84)

Although Arlene Bateman denied receiving the notice of cancellation from Farm Bureau dated October 10, 2002 (LF 157, 158, 184), she did not deny receiving other notices sent to the same address, pertaining to the 1995 GMC involved in the accident

dated June 13, 2002, August 26, 2002 and September 20, 2002. (LF 148, 149, 153, 154, 155, 182, 183)

Ms. Bateman also did not deny receiving the numerous other invoices and cancellation notices shown below, all sent to the same address, for other policies she had with Farm Bureau. By way of explanation, policy No. APV0038995 insured the 1995 GMC involved in the accident; policy No. APV0270977 (reissued after cancellation of prior policy) again insured the 1995 GMC; policy No. PRO0014050 insured the Bateman home; and policy No. APV007911 insured a 1988 Toyota. During Arlene Bateman's deposition, all of these documents were referred to using the bates number found in the lower right corner of each document.

Date	**Document description**	**Legal File**
12-26-99	Invoice sent on APV0038995 and PRO0014050	88, 170
1-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	89, 90, 170
2-24-00	Invoice sent on APV007911, APV0038995 and PRO0014050	91, 92, 170
3-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	93, 94, 171
4-25-00	Invoice sent on APV007911, APV0038995 and PRO0014050	95, 96, 171
5-26-00	Invoice sent on APV007911, APV0038995 and	97, 98,

	PRO0014050	171
6-20-00	Other cancellation notice sent on APV007911, APV0038995 and PRO0014050	99, 171, 172
6-28-00	Invoice sent on APV007911 and PRO0014050	100, 172
6-30-00	Invoice sent on APV0038995	101, 172, 173
7-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	102, 103, 172, 173
8-21-00	Other cancellation notice sent on APV0038995, PRO0014050	104, 173
8-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	105, 106, 174
9-25-00	Invoice sent on APV007911, APV0038995 and PRO0014050	107, 108, 174
10-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	109, 110, 174
11-25-00	Invoice sent on APV007911, APV0038995 and PRO0014050	111, 112, 174
12-26-00	Invoice sent on APV007911, APV0038995 and PRO0014050	113, 114, 174
2-23-01	Invoice sent on APV007911, APV0038995 and	115, 116,

	PRO0014050	174
3-26-01	Invoice sent on APV007911, APV0038995 and PRO0014050	117, 118, 174
4-20-01	Other cancellation notice sent on APV007911 and PRO0014050	119, 174
4-25-01	Invoice sent on APV007911, APV0038995 and PRO0014050	120, 121, 175
5-21-01	Other cancellation notice sent on APV007911, APV0038995 and PRO0014050	122, 175
6-29-01	Invoice sent on APV0038995	125, 178
7-26-01	Invoice sent on APV007911, APV0038995 and PRO0014050	126, 178
8-26-01	Invoice sent on APV007911, APV0038995 and PRO0014050	128, 178
9-20-01	Other cancellation notice sent on APV007911 and PRO0014050	129, 178, 179, 180
10-26-01	Invoice sent on APV007911, APV0038995 and PRO0014050	131, 181
11-20-01	Other cancellation notice sent on APV007911 and PRO0014050	132, 181
1-26-02	Invoice sent on APV007911, APV0038995 and	135, 181

	PRO0014050	
2-20-02	Other cancellation notice sent on APV007911	136, 181
3-20-02	Other cancellation notice sent on APV0270977 and PRO0014050	137, 138, 181, 182
4-10-02	Invoice sent on APV0270977 and PRO0014050	139, 140, 182
4-22-02	Other cancellation notice sent on APV0270977 and PRO0014050	142, 143, 182
6-3-02	Invoice sent on APV0270977	146, 147, 182
9-30-02	Invoice sent on PRO0014050	156, 184

Calculation of premium payments: In the Stones' statement of facts, counsel provides a recitation of "facts" which is claimed to be based on "simple math". The conclusion stated by counsel after doing this "simple math" was that Arlene Bateman's premiums were "paid up" at the time of the accident. Reference to the Stones' Motion for Summary Judgment and Suggestions in Support reflect that no claim has previously been made that the premiums were "paid up". (LF 58-73) The only issue raised in the Stones' motion was the effect of the cancellation notices. The Suggestions in Support of the Stones' motion stated:

> Plaintiffs' motion for summary judgment seeks a judicial determination that the notice of cancellation sent by Farm Bureau was ineffective and the policy therefore remained in effect from the date of the automobile accident. (LF 65)

The argument regarding "simple math" was not asserted as a basis of the Stones' claim in the Court of Appeals. See Stones' Appellants' Brief and Appellants'/Cross-Respondents' Reply Brief filed in the Missouri Court of Appeals, Southern District.

There is no evidence in the record to document the Stones' "simple math". There is no evidence in the record reflecting the financial terms of a monthly payment of premium, including arrangements as to finance charges, or other terms of a monthly payment plan.

The Stones' statement of fact also includes various pieces of information regarding another automobile policy on a Toyota motor vehicle and a property policy. The cancellation of those policies is not at issue here and there is no evidence regarding the terms and conditions of the contracts of insurance relating thereto.

POINTS RELIED ON

POINT I

(REPLYING TO POINT I OF THE STONES' RESPONSE)

The trial court erred in granting the Stone's motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because: (a) Missouri law requires the court to construe contractual provisions of an insurance policy to determine if an insurer properly canceled a policy for non-payment of premium and Farm Bureau effectively canceled the policy and complied with the contractual requirements of its policy when it canceled the Bateman's policy effective October 9, 2002, for non-payment of premium; (b) the holding of Blair v. Perry County Mut. Ins. Co. is relevant to this appeal only to the extent that it demonstrates that the latest date cancellation could have taken effect was October 20, 2002; (c) the issue of mailing the notice of cancellation was not a basis of the Stones' claim in the Court of Appeals and cannot be the basis of a claim in this Court; and (d) the issue of payment of premiums was not a basis of the Stones' claim in the Court of Appeals and cannot be the basis in this Court.

Blair v. Perry County Mutual Ins. Co., 118 S.W. 3d 605 (Mo. banc. 2003)

Supreme Court Rule 83.08(b)

O'Connor v. State Farm Mut. Auto. Ins. Co., 831 S.W.2d 748 (Mo. App. 1992)

Shelter Mut. Ins. Co. v. Flint, 837 S.W.2d 524 (Mo. App. 1992)

POINT II

(REPLYING TO POINT II OF THE STONES' RESPONSE)

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I in the amount of $1,004,295 because even if: (1) Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002 (which it does not); and (2) the Stones have standing to maintain this action against Farm Bureau (which they do not), the judgment against Farm Bureau cannot exceed $250,000 in that Farm Bureau's policy limit for liability coverage was $250,000 and Farm Bureau cannot be liable for more than its policy limit where the only claim is for breach of contract.

Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950)

Landie v. Century Indem. Co., 390 S.W.2d 558 (Mo. App. 1965)

Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 557 (Mo. App. 1990)

Whitehead v. Lakeside Hospital Ass'n., 844 S.W.2d 475 (Mo. App. 1992)

POINT III

(REPLYING TO POINT III OF THE STONES' RESPONSE)

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because: (1) the "Assignment" on which the Stones rely is void and unenforceable in that it lacks consideration; and (2) Farm Bureau has standing to attack the "Assignment" as it will be prejudiced by it if this Court determines that Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002.

Barker v. Danner, 903 S.W.2d 950 (Mo. App. 1995)

ARGUMENT

POINT I

(REPLYING TO POINT I OF THE STONES' RESPONSE)

The trial court erred in granting the Stone's motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because: (a) Missouri law requires the court to construe contractual provisions of an insurance policy to determine if an insurer properly canceled a policy for non-payment of premium and Farm Bureau effectively canceled the policy and complied with the contractual requirements of its policy when it canceled the Bateman's policy effective October 9, 2002, for non-payment of premium; (b) the holding of Blair v. Perry County Mut. Ins. Co. is relevant to this appeal only to the extent that it demonstrates that the latest date cancellation could have taken effect was October 20, 2002; (c) the issue of mailing the notice of cancellation was not a basis of the Stones' claim in the Court of Appeals and cannot be the basis of a claim in this Court; and (d) the issue of payment of premiums was not a basis of the Stones' claim in the Court of Appeals and cannot be the basis in this Court.

The Stones New Claim That Bateman Had Actually Paid Her Premiums

In the first part of their brief, the Stones appear to make an issue out of the fact that two of Farm Bureau's notices reflected a different amount of premium due. The Stones correctly point out that the notice of September 20, 2002, reflected a premium due

of $58.05 and that the notice of October 10, 2002, reflected a premium due of $9.45. The fact that premiums were due under both notices is not relevant to this appeal. The Stones claim that a mathematical calculation forms a basis for their claim that the policy was not cancelled because Arlene Bateman was "paid up" is raised by the Stones for the **first time** in this Court. A careful review of the briefs filed by the Stones in the Southern District reveal no mention of any claim that somehow Arlene Bateman had actually paid for insurance on the vehicle in question. Supreme Court Rule 83.08(b) prohibits a party from filing a Substitute Brief in this Court which alters the basis of a claim that was raised in the Court of Appeals brief. As such, the Stones' new found basis for claiming the policy was in force cannot be considered. See Blackstock v. Kohn, 994 S.W. 2d 947 (Mo. banc 1999) and Dupree v. Zenith Goldline Pharmaceuticals, 63 S.W.3d 220 (Mo. banc 2002).

Even if one examines the Stones' claims regarding premium calculation, there still is no foundation for the claim that Arlene Bateman was "paid up" at the time of the accident.

In this appeal, the following facts are not disputed and have never been contested:

(1) the Stones **never** made any premium payments in response to the notices sent on August 26th, September 20th and October 10th. (LF 83, 86, 87);

(2) Farm Bureau never received from the Batemans the premium payment of $58.50 called for in Farm Bureau's invoice of August 26, 2002 and set forth in the notice of September 20, 2002; (LF 86) and

(3) the only reason the Bateman's policy was canceled effective October 9, 2002, was because of non-payment of the past-due premium. (LF 87)

The fact that Farm Bureau's notices reflected different premium due amounts has nothing to do with this appeal and is easily explained but is outside the record here[1]. For the same reasons, the arguments on page 21 of the Stones' Reply Brief ("…Farm Bureau was in possession of premium dollars from Arlene Bateman sufficient to provide coverage through October 11, 2002") are not supported by the facts, are outside the record and are not germane to the disposition of this appeal.

The Cancellation Notices and the Stones' Claim that Non-Payment Must Occur Before Cancellation

The Stones characterize Farm Bureau's notice of September 20, 2002 (LF 155) as merely a notice of premium due and a "contingent" cancellation notice (Stones' Reply Brief, p. 20). However, the notice was not merely a notice of premium due as Farm Bureau had previously sent its August 26, 2002 notice (LF 154) to the Batemans informing them of the installment premium payment due to continue the policy in force. Rather, the September 20, 2002 notice advised the Batemans that the premium due September 10, 2002 had not been received, was past due, and that payment of the past

[1] For example, the notice of October 10, 2002 (LF 157) indicated that the premium due of $9.45 was the premium due for coverage provided to the date of cancellation, October 9, 2002. However, such amount due did not represent the past-due premium amount necessary to continue the policy in force beyond October 9, 2002.

due premium must be received or the policy would, in fact, cancel as of the date shown. Such notice was dated 19 days before the date of cancellation, but after the premium was past due. The notice was an unequivocal notice that the policy would cancel if the past due premium was not received and was issued: (1) **after** non-payment had occurred; and (2) more than 10 days before cancellation was to occur. Thus, even if those elements of cancellation must occur in that order under the contract provisions, Farm Bureau provided proof that the "requirements" were satisfied.

The Stones spend a considerable amount of time in their brief discussing the case of Blair v. Perry County Mut. Ins. Co., 118 S.W. 3d 605 (Mo. banc. 2003). The Stones advocate that under Blair (and "the long outstanding Missouri Supreme Court case authority discussed and approved" by it) for cancellation to be based upon non-payment of premium, the non-payment of premium must have occurred before a notice of cancellation can be sent. (See Stones' Reply Brief, p. 21) This statement, however, does not accurately reflect the holding of Blair or other Missouri case law; rather, it merely reflects a portion of the Court's holding in the Blair decision that was based upon **the policy** before the court. In this regard, the Blair Court held:

> Here, the September 14 notice did not strictly comply with **the policy provisions**. The policy may be cancelled if notice is given: "Not less than 10 days before the cancellation is to take effect when the cancellation is based upon . . . non-payment of premium . . . ." For cancellation to be "based" upon non-payment, non-payment must have occurred. . . .

> The provision here requires non-payment, notice, and the passage of 10 days--in that order--before cancellation takes effect. Non-payment occurred on October 3, 1998. Notice of cancellation was sent on October 14th. **By the terms of the policy**, October 24th is the earliest date that cancellation can take effect. Id. at 607. (emphasis added) [2]

As previously stated in Respondent's brief, the language in Farm Bureau's policy is **completely different** from the policy construed by the court in Blair. Farm Bureau's policy does **not** state "[t]he notice must be given not less than 10 days before the cancellation is to take effect when the cancellation is based upon" non-payment of premium. In addition, unlike the policy in Blair, Farm Bureau's policy provides that "[t]he effective date of cancellation stated in the notice will become the end of the policy period." Farm Bureau complied with the 10 day notice requirement in its policy and even provided the Batemans with 24 additional days notice.

The Stones have cited several additional cases in an attempt to support their argument that for cancellation based on non-payment of premium, the non-payment must have occurred first. The cases cited by the Stones do not so hold and are only relevant to confirm Farm Bureau's position that the coverage issues in this appeal are contractual issues. For example, in MFA Mut. Ins. Co. v. Southwest Baptist College, Inc. 381 S.W.2d 797 (Mo. 1964), at issue was whether there was an effective cancellation under

[2] It should be noted that the dissent in Blair found that the Perry County policy, in fact, did not require notice before cancellation. Blair at 608-609, Limbaugh, dissenting.

the doctrine of "cancellation by substitution and replacement," a concept where the insured's action of buying new insurance with the intention that it replace existing insurance constitutes a valid, voluntary cancellation of an existing policy. That case did **not** involve cancellation for non-payment. This case is simply not relevant to the instant case as Farm Bureau is not claiming "cancellation by substitution and replacement."

Similarly, the Stones cite the case of Cain v. Robinson Lumber Co., 295 S.W.2d 388 (Mo. 1956), a case involving a worker's compensation policy where it was claimed that the endorsement rendered the policy ambiguous. In Cain, the policy did contain language similar to the Farm Bureau policy that "the effective date of cancellation shall be the end of the policy period." This language, however, was not construed by the court and was not the basis of the court's decision. The Cain court simply held there had been no event justifying cancellation. It did **not** construe the sufficiency of a purported cancellation notice. Cain has no application to this appeal and merely stands for the proposition that when there is a conflict between the language in the policy and the language in the endorsement, the language in the endorsement will prevail. Id. at 391.

The other cases cited by the Stones in support of their proposition that non-payment must occur before cancellation are O'Connor v. State Farm Mut. Auto. Ins. Co., 831 S.W.2d 748 (Mo. App. 1992), Fuller v. Lloyd, 714 S.W.2d 698 (Mo. App. 1986), Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo. App. 1992), Stickler v. Foremost Signature Ins. Co., 150 S.W.3d 314 (Mo. App. 2004) and Farrar v. Mayabb, 326 S.W.2d 337 (Mo. App. 1959). These cases are likewise not relevant to this appeal in that they involved situations where the notice was admittedly mailed to the

wrong address (Farrar), or wrong person (Safeco), or not sent by certified mail (O'Connor), or sent by the wrong insurance company (Stickler), or sent to only one of two insureds (Fuller).

In Stickler, supra, the court simply held that strict compliance with policy term is required. It does not stand for the proposition that non-payment is required before cancellation or that the policy term extends indefinitely. In fact, the author of the opinion from the Southern District in this case, Judge Bates, concurred in the opinion in Stickler.

The court in all of these cases held that the coverage issues were contractual issues and that strict compliance with the policy requirements was a pre-requisite to cancellation. None of these cases held that non-payment must occur **before** a policy could be canceled due to non-payment of premium. In fact, the O'Connor court cited with approval McCoy v. Guarantee Trust Life Ins. Co., 240 S.W.2d 172 (Mo. App. 1951) where the court upheld a cancellation notice sent 15 days **after** the policy was canceled.

The two remaining cases cited by the Stones both involve situations where there was a dispute as to whether the **insured**, not the insurer, had voluntarily canceled an insurance policy. Blanks v. Farmers Ins. Co., Inc., 97 S.W.3d 1 (Mo. App. 2002) involved a situation where the insurer canceled a policy because the insurer was of the belief that the insured wanted the policy canceled. The insured, who spoke English poorly, allegedly indicated he wanted his policy canceled. The insured was later killed in an automobile accident with the plaintiff and it was disputed whether the insured had actually given his agent authority to cancel the policy. Blanks did not involve a situation where the insured's policy was canceled for non-payment of premium and has no

application to any of the legal issues in this appeal. Likewise, Dyche v. Bostian, 229 S.W.2d 25 (Mo. App. 1950) is not relevant as it involved a worker's compensation policy where there was a dispute as to whether the employer's conduct operated to effectively cancel the policy.

The Stones Claim That The Policy Term Continues Indefinitely

Finally, the Stones contend that the Blair opinion where the court held "by the terms of the policy, October 24th is the earliest date the cancellation can take effect" (Blair at 607) is irrelevant to this appeal. Contrary to the Stones' argument, in this portion of the opinion, this Court was articulating the earliest date the policy would terminate for non-payment of premium. The October 24th date in Blair was 10 days after the carrier sent its notice of cancellation to its insured. The Stones acknowledge that in this portion of the opinion, the Court **agrees** that the earliest date that cancellation could have taken effect was 10 days after the time the notice was actually sent. Nowhere in the Blair decision does the Court indicate or suggest that an insurer has an obligation to provide coverage indefinitely or until some other future date that has no relationship to any of the terms in the policy relating to cancellation. To so hold would require an insurer to in essence provide free insurance to its insured. Public policy in Missouri does not and should not require free insurance. Thus, even under the most liberal interpretation of Farm Bureau's policy, coverage would be deemed terminated on October 20, 2002, 10 days following the date of Farm Bureau's *alleged* ineffective cancellation, well before the Stones' accident.

The logic of extending the cancellation date to October 20, 2002, not only follows Blair, it also follows the rule adopted by the overwhelming majority of jurisdictions in the United States. Those authorities are set forth on pages 33 – 45 of Farm Bureau's brief and will not be repeated here. The Stones have also cited O'Connor, Safeco, Fuller, Cain and Farrar claiming that the court in these cases held "that an insurer must remain obligated on its policy that is otherwise unexpired." See Stone Reply Brief page 31. None of these cases so hold. More importantly, none of these cases involved any discussion pertaining to the timing of the notice of cancellation sent by the insurer as it related to the effective date of cancellation. The only claimed defect in the notice in the case at bar is that it did not give adequate notice of the **time** which was to elapse before cancellation would occur. Under Blair and the majority of cases in the United States, once the time lapsed cancellation would occur. See *Effect of Attempt to Terminate Insurance or Fidelity Contract Upon Notice Allowing a Shorter Period Than That Stipulated in Contract*, 96 ALR2d 286, Section 3 (1964). This is an entirely different situation than that which was involved in the cases cited by the Stones. In all of those cases, the defect in the notice had nothing to do with timing. The defect in the notices could not be cured by the lapse of time since the defects were the failure to send the notice by certified mail, the failure to send the notices to the right person, and similar defects. The lapse of time had no effect on these claimed defects. Conversely, the lapse of time did operate to create an adequate notice period to the Stones in this case.

The Stones claim that Missouri is one of the few jurisdictions that has adopted the minority contrary view. The fact of the matter is that there is no Missouri case that

indicates or even suggests this is so. The rationale for extending the date of cancellation is that it accomplishes the purposes of having a notice period--providing notice to the insured so that they will have an opportunity to obtain insurance with another company before the time their existing coverage is terminated, something the Batemans did not do for over 2 months after receiving this notice. See e.g. Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981).

The Stones New Claim That Farm Bureau Provided Inadequate Proof of Mailing

For the first time, the Stones now claim that Farm Bureau did not meet its burden of proving that it had properly canceled the policy because it "did not substantiate that it even mailed its notice of cancellation dated October 10, 2002, upon which it ultimately relies." (Stone Reply Brief page 29) The law and the facts, however, do not support this argument.

Supreme Court Rule 83.08(b) does not permit a party to file a substitute brief in this Court which alters the basis of claims raised in the Court of Appeals. No claim whatsoever regarding the sufficiency of Farm Bureau's affidavit on mailing of the notice was raised in the Southern District. See "Appellants' Brief and Appellants/Cross-Respondents' Reply Brief," filed in the Southern District on August 11, 2005. Similarly, the exhaustive opinion issued by the Southern District does not even **mention** any issue regarding mailing—because none was raised. The claim regarding the mailing of the notice cannot be reviewed. Blackstock v. Kohn, 994 S.W.2d 947 (Mo. banc 1999).

Even if the Court were to consider the issue, the Stones' argument fails on the merits. In Shelter Mut. Ins. Co. v. Flint, 837 S.W.2d 524 (Mo. App. 1992), the court held there is a presumption of receipt with respect to correspondence sent by an insurer to its insured if certain requirements are satisfied. In Flint, the insurer brought a declaratory judgment action claiming there was no coverage for an accident because of non-payment of premium. On appeal, the insureds argued that the trial court erred in granting the insurer's summary judgment because there was a disputed factual issue as to whether the insurer had mailed a copy of the policy to them. Like plaintiffs here, the insureds claimed they never received a mailing from the company, but acknowledged that they received and paid two premium notices. The court held that the insured's claim that they did not receive the policy, **while acknowledging they received** and paid two other notices, was **insufficient** to rebut the presumption of receipt. In affirming the trial court's summary judgment in favor of the insurer, the court specifically held:

> A letter duly mailed is attended by the presumption of receipt by the addressee. [citation omitted]. A letter is duly mailed when it is placed in an envelope with the correct address of the recipient, stamped with sufficient postage, and deposited in the mail. [citation omitted] When the customary volume of mail is large, so that direct proof that a particular letter was mailed is not feasible, "**evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business is sufficient" to give rise to the presumption of receipt by the addressee.** *Id.* The Kunze affidavit recites that not only were all mailings

> of insurance policies in his charge, but also the premium notices. In such case, the settled custom of the sender in the regular transaction of its business suffices to establish the presumption of receipt. [citation omitted]. The regularity of the Shelter mailings was confirmed by the acknowledgments of the Flints that the two premium notices mailed to them were received and paid. **The response of the Flints, simply, that they did not receive the policy, to this evidence of mailing by Shelter on summary judgment did not dispel the presumption of receipt that attends that proof.** Id. at 528 (emphasis added)

The Affidavit of Claudia Goodin (LF 83-159) clearly satisfies the requirements needed for the presumption of receipt. She has personal knowledge of Farm Bureau's practices and procedures for mailing invoices and notices and stated in her affidavit that these practices and procedures are used by Farm Bureau in the "regular and systematic transaction of its business." (LF 83, 84) Her affidavit describes the process Farm Bureau used in mailing all correspondence, invoices and notices to Arlene Bateman. The affidavit indicates that all Farm Bureau invoices and notices were mailed to her in accordance with the these procedures. Although Arlene Bateman denied receiving the notice dated October 10, 2002, she did **not** deny receiving other correspondence relating to the 1995 GMC mailed to her at the same address, dated June 13, 2002, August 26, 2002 and September 20, 2002. (LF 148, 149, 153, 154, 155, 182 and 183) Moreover, Arlene Bateman did **not** deny receiving 34 other pieces of correspondence that included invoices and cancellation notices, all sent to the same address, for other policies she had

with Farm Bureau. (LF 88-122, 125, 126, 128, 129, 131,132, 135-143, 146, 147, 156, 170-175, 178-182, 184) As in Flint, the simple response of Arlene Bateman that she did not receive the notice dated October 10, 2002, while at the same time, not denying she received a total of 37 pieces of mail from Farm Bureau, **all sent to the same address**, does **not** dispel the presumption of receipt in this case. Even if Arlene Bateman **never received** the notices, the policy is nevertheless cancelled upon proof of mailing. O'Connor v. State Farm, 831 S.W.2d 748 (Mo. App. 1992) Farm Bureau has satisfied the requirements necessary for the presumption of receipt and the Stones cannot seriously contend otherwise.

The Stones' arguments should be rejected. Farm Bureau's policy does not provide coverage to Arlene Bateman and the trial court's decision must be reversed.

POINT II

(REPLYING TO POINT II OF THE STONES' RESPONSE)

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I in the amount of $1,004,295 because even if: (1) Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002 (which it does not); and (2) the Stones have standing to maintain this action against Farm Bureau (which they do not), the judgment against Farm Bureau cannot exceed $250,000 in that Farm Bureau's policy limit for liability coverage was $250,000 and Farm Bureau cannot be liable for more than its policy limit where the only claim is for breach of contract.

The Stones claim that the measure of damages in this appeal is the same regardless of whether they recover for breach of contract or on a tort theory. This claim, however, has no basis in Missouri law. Farm Bureau set forth in its Respondent's brief the unbroken line of Missouri cases that have consistently held that, in a breach of contract action, the insurer's liability is limited to its policy limits. See Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950); and Landie v. Century Indem. Co., 390 S.W.2d 558 (Mo. App. 1965). There is **no case** in Missouri that has held an insurer liable for a judgment amount in excess of its policy limits unless tort of bad faith has been proved. The Stones did not seek summary judgment on their bad faith claim. (LF 58-73) See Landie at 566 (where insurance company refused to accept offer to settle within limits, insurer was liable to the insured, **in tort**, for the damages resulting from such bad faith,

which may include that part of the judgment over and above the limit of the policy); and Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 557 (Mo. App. 1990) (on a **tort claim** for bad faith, an insurance company "may become liable in excess of its undertaking under the policy provisions if it fails to exercise good faith in considering offers to compromise the claim for an amount within the policy limits").

The Stones advance the case of Whitehead v. Lakeside Hosp. Ass'n., 844 S.W.2d 475 (Mo. App. 1992) to support their position that in a breach of contract action where the insurer refuses to defend, the insured is liable for all resulting damages ("resulting damages" presumably including, under the Stones' theory, any amounts in excess of the policy limits). The court in Whitehead did **not** hold that an insurer is liable for an amount in excess of its policy limits where a claim had been made for breach of contract and the holding was limited to affirming a denial of an insurer's motion to intervene. In rendering its decision, the court in Whitehead, in dicta, did analyze prior Missouri decisions on the subject of breach of contract. As the Stones correctly point out, the Whitehead court held:

> Where the claim comes within the policy coverage, and so within the duty of the insurer to defend, the refusal of the insurer to do so is unjustified, and the insurer is guilty of a breach of contract. Butters v. City of Independence, 513 S.W.2d 425 [5-7]. That the refusal of the insurer to defend on the ground that the claim is outside the policy is an honest mistake, nevertheless constitutes an unjustified refusal and renders the insurer liable to the insured for all resultant damages from

that breach of contract. Kelso v. Kelso, 306 S.W.2d 534, 540 [7] (Mo. 1957). Id. at 481.

As noted above, the underpinnings of the Whitehead decision were the earlier cases of Butters v. City of Independence, 513 S.W.2d 525 and Kelso v. Kelso, 306 S.W.2d 534, 540 [7] (Mo. 1957). In both Butters and Kelso, however, the court held that the insurer's liability was **limited** to its policy limits. In Kelso, the court held that the insurer was liable only for the amount of its coverage. Kelso at 540. In Butters, the trial court entered a judgment against the insurer for $100,000, the amount of its coverage, but was later reversed because the Missouri Supreme Court determined the trial court erred in entering judgment without affording the insurer a trial on the coverage issues. Neither Whitehead nor any of the cases it relied upon support the Stones' position that Farm Bureau is liable for an amount in excess of its policy limits on a breach of contract theory.

The Stones have also advanced the case of Fuller v. Lloyd, 714 S.W.2d 698 (Mo. App. 1986). This case likewise does not support the Stones' position. In Fuller, the court never mentioned the amount of the policy limits so it cannot be determined whether the underlying judgment was in excess of those limits or not. The "other damages" in Fuller were for the damages associated with the insured losing his driver's license and amounted to $10,000. The "other damages" did **not** include any portion of a judgment that had been entered against the insured in excess of the policy limits. In the case at bar, the Stones have not made a claim for attorney fees or other damages. Fuller does not

support the Stones' position that, under a claim for breach of contract, an insurer is liable for an amount in excess of its policy limits.

Simply put, there is no case in Missouri which has ever held that an insurance company is liable for an underlying judgment in excess of its policy limits when plaintiff's theory is breach of contract. All cases hold that, under a breach of contract theory, damages are limited to the contract amount plus attorney fees for the defense of the underlying case. To hold otherwise would effectively eliminate the tort of bad faith and hold an insurer strictly liable in coverage cases. Under the Stones construct, every time an insurer honestly believes its policy has been canceled or provides no coverage for the claims asserted, it will be liable for whatever the amount of judgment its alleged insured and the claimant can agree on or get the trial court to enter in a fabricated "trial" in which neither damages or liability is contested. All Missouri courts have rejected this tortured view and have adhered to the basic truth that, for breach of contract, the damages are limited to the amount of the contractual coverage. To hold an insurer responsible for amounts in excess of its limits which it never agreed to pay anyone under any circumstances requires substantial proof beyond the mere fact that the company was incorrect in its coverage denial. This proof, under Missouri law, is proof of the tort of bad faith. The Stones **never sought** summary judgment on that count of their petition and do not now claim they have proved the tort.

The breach that the Stones' claim gives rise to the liability of Farm Bureau in excess of its limits is not the failure to **defend**, it is the failure to **settle**. The Stones misconstrue the "duty" to settle. The effect of the Stones' argument is to construe an

insurance company's policy rights regarding settlement to be an affirmative duty to, **in fact**, settle every case. An insurance company has no such duty. To the contrary, all Missouri cases hold that plaintiffs must prove the company acted in bad faith in rejecting settlement offers before the company will be liable for amounts in excess of policy limits--something the Stones did not do when they sought summary judgment on their breach of contract claim. If the Stones' theory is adopted, the tort of bad faith will be eliminated in coverage cases because all plaintiffs will have to prove is that there is coverage to recover amounts in excess of the coverage amount. This bad policy has never been adopted in Missouri and should not be adopted now.

The Stones' suggestion that Whitehead, Landie, Butters, and Fuller stand for the proposition that Farm Bureau is liable for the amount of the judgment in excess of its policy limits in a breach of contract case is misleading at best. None of these cases so hold. Landie specifically holds to the contrary.

The other cases cited by the Stones are contract cases not related to insurance policies and are not applicable. As set forth in Farm Bureau's original brief in this Court, the Stones have mistaken the contractual duty owed by Farm Bureau. The obligation of an insurance company is to give **good faith** consideration to settlement offers. It is not contractually required to settle every claim.

Under the Stones' breach of contract theory as set forth in Count I of their Amended Petition, it is clear that **even if** Farm Bureau is liable for breach of contract, its liability is not the amount of the underlying judgments, but rather is limited to $250,000, the amount of its policy.

POINT III

(REPLYING TO POINT III OF THE STONES' RESPONSE)

The trial court erred in granting the Stones' motion for partial summary judgment and entering final judgment on Count I (breach of contract) of the Stones' Amended Petition because: (1) the "Assignment" on which the Stones rely is void and unenforceable in that it lacks consideration; and (2) Farm Bureau has standing to attack the "Assignment" as it will be prejudiced by it if this Court determines that Farm Bureau's policy provides coverage to Arlene Bateman for the accident of December 23, 2002.

For the reasons set forth in its Respondent's brief, the "Assignment" entered into between Arlene Bateman and the Stones is void and unenforceable because it lacks consideration. Those arguments and authorities will not be repeated here. The cases cited by the Stones do not challenge this principle. Instead, the Stones make various arguments supporting their claim that a bad faith claim **can** be assigned. Even if such a claim can be assigned, the question here is "was it effectively assigned and supported by consideration." The Stones cases have not even addressed Farm Bureau's position that the "Assignment" was not supported by consideration.

The Stones now claim that Farm Bureau is not permitted to challenge the validity of the "Assignment" due to the fact that it is a "stranger" to it. For this proposition, the Stones cite the case of Barker v. Danner, 903 S.W.2d 950 (Mo. App. 1995). The Stones fail to mention, however, that a non-party to an assignment **may** challenge the validity of

an assignment if they are prejudiced by the assignment. Barker at 955. Accordingly, Farm Bureau is permitted to attack the validity of the "Assignment" because it will be prejudiced by it if this Court determines there is coverage for Arlene Bateman because: (1) Farm Bureau is subject to the Stones' claim that it is financially obligated to pay the judgments, or portions of the judgments, that have been entered against Arlene Bateman; (2) Farm Bureau may be forced to participate in future litigation with Arlene Bateman; and (3) Farm Bureau may be exposed to double liability.

In this appeal, if this Court determines that Farm Bureau's policy provides coverage, Farm Bureau will clearly suffer prejudice if it is not permitted to attack the "Assignment." The most obvious prejudice will be that Farm Bureau is subject to the Stones' claim that it is required to pay all or part of the judgments entered against Arlene Bateman. Moreover, if there is coverage under its policy, Farm Bureau could be forced to participate in future litigation with Arlene Bateman wherein she claims that Farm Bureau is liable to her, not the Stones, due to the fact that the "Assignment" is void. In this litigation, Arlene Bateman would claim that Farm Bureau is liable to her for the sum of the two judgments entered against her. In this situation, not only would Farm Bureau be forced to defend the action, but it would be potentially exposed to double liability if Bateman prevailed. Farm Bureau clearly will suffer prejudice if not permitted to challenge the void "Assignment" entered into between the Stones and Arlene Bateman and should not now be forced to sit on its hands. The "Assignment" is void for lack of consideration and Farm Bureau has standing to attack the "Assignment."

CONCLUSION

Farm Bureau's policy does not provide coverage to Arlene Bateman because it was effectively canceled for non-payment of premium. The Blair decision is only relevant to this appeal to the extent that it demonstrates (1) that contract law governs cancellation; and (2) that the latest date cancellation could have taken effect was on October 20, 2002, 64 days before the accident involving Arlene Bateman. The other cases cited by the Stones are not on point with regard to any of the coverage issues in this case and do not support the Stones' position that Farm Bureau's policy provides coverage.

Finally, the law is clear that even if there is coverage under its policy, Farm Bureau's liability cannot exceed $250,000 because the Stones' sole claim is for breach of contract. The cases cited by the Stones do not hold to the contrary. If the Stones' theory is adopted, the tort of bad faith will be eliminated in coverage cases because all plaintiffs will have to prove is that there is coverage to recover amounts in excess of the policy. Missouri law does not authorize the relief sought by the Stones and this Court should not change the law to allow it.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Come now Michael J. Patton and Joseph P. Winget and hereby certify, pursuant to Rule 84.06(b) as follows:

1. That this brief includes the information required by Rule 55.03.

2. That this brief complies with the limitations contained in Rule 84.06(b).

3. That there are 7657 words contained in this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of June, 2006, one original and 10 copies of the foregoing brief and a diskette containing a copy of the brief were hand-delivered to the court as required by Rule 84.06(f) and two copies of the brief and a diskette containing a copy of the brief was forwarded to Thomas W. Millington, 1736 East Sunshine, Suite 405, Springfield, Missouri 65804 by hand-delivery of same to counsel and the court.

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