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REPLY TO STATEMENT OF FACTS SUBMITTED BY FARM BUREAU TOWN & COUNTRY INSURANCE COMPANY OF MISSOURI

Albert J. Stone and Tammy Stone, Appellants and Cross-Respondents adopt their prior statement of facts set forth within Appellants= Substitute Brief filed with the Missouri Supreme Court on or about March 16, 2006.

In addition, and by way of a response to the Statement of Facts set forth within the Substitute Brief of Respondent Farm Bureau, the following additional facts as documented by the record before the Court are provided.

On page 9 of Farm Bureau's Substitute Brief filed with the Missouri Supreme Court, Farm Bureau correctly states that the policy of liability insurance in question in this case, as renewed on August 2nd, 2002, for the policy period of August 2nd, through February 2nd, 2003, is documented by a Declaration Sheet at page 201 of the Legal File. The Declaration Sheet (L.F. 201) provides for a policy period of six months and total premium charges in the amount of $364.78. Payments were due monthly as indicated by the first invoice submitted by Farm Bureau after renewal of the policy on August 2, 2002 (L.F. p.343) which confirmed receipt of a payment from the insured in the amount of $140.26. Simple mathematics would indicate that monthly premiums sufficient to provide payment of $364.78 due for this six month policy period, would require a monthly payment of $60.80. (364.78 ÷ 6 = 60.7966) Simple mathematical calculation

also reveals that the premium Farm Bureau admits receiving by its invoice of August 26, 2002 (L.F. 343) in the amount of $140.26 was sufficient to provide coverage for a period of time equal to 2.3069 months. (140.26 ÷ 60.80 = 2.3069) Further, calculation indicates that the per diem due for the liability insurance in question, calculated on a 30 day basis, required $2.0266 in premium per day. (60.80 ÷ 30 = 2.0266)

The first month of the six month policy term was from August 2nd, 2002 through September 2nd, 2002. The second month of the policy term was from September 3rd, 2002 through October 2nd, 2002. When measured by the documents that Farm Bureau has admitted and are indeed in the record before the Court (L.F. 201 and L.F. 343), after October 2nd, 2002, Bateman had on deposit with Farm Bureau the sum of $18.66 in prepaid premium (140.26 - 121.60 [which equals two months of premium at $60.80 per month] = $18.66). Eighteen dollars and sixty-six cents divided by the per diem rate charged for the liability insurance in the amount of $2.0266 per day reflects that Farm Bureau had premium from Bateman, sufficient to provide insurance coverage for an additional 9.2 days beyond October 2, 2002, i.e., until at least October 11, 2002. ($18.66 divided by 2.0266 per diem = 9.2075) Calculated on the basis of 30 days, the 2.3069 months of coverage paid by Arlene Bateman, acknowledged by Farm Bureau in the amount of $140.26 would have provided coverage for two full months plus .3069 months. This translates, under this method of calculation to additional coverage from October 2nd in the amount of an additional 9.207 days. (30 days x .3069 = 9.207 days) This also indicates by this method of calculation that Farm Bureau had premium in its hands from Arlene Bateman sufficient to provide coverage through October 11, 2002.

The applicable Declaration Sheet (L.F. 201) also provided, without explanation in the record, a surcharge of $28.43 for "No Insurance". The record does not reflect that there was "No Insurance" warranting or justifying any such surcharge, and it remains without explanation in the record.

Farm Bureau's statement or invoice issued on August 26, 2002 claimed premium was due in the amount of $58.05. (L.F. 243). A claim for the same amount was asserted in a reminder notice issued on September 20, 2002 (L.F. 245). Farm Bureau's cancellation notice issued on October 10, 2002, purporting to effect cancellation on October 9, 2002 (L.F. 247) asserts a claim for premium due in the amount of $9.45. The record before the Court does not reflect where, how, why or when the surcharge or premium differential in payment was justified, or applied.

Farm Bureau submitted diverse and confusing invoices to Arlene Bateman, from time to time, billing in one invoice for premiums claimed on a policy providing property insurance and a policy providing auto liability insurance on different vehicles, including the 1995 GMC involved in the accident on December 23, 2002. (L.F. 278-347). On occasion, the property insurance policy and insurance on a separate 1988 Toyota were billed separately from insurance on the 1995 GMC. (L.F. 325). Also, premium claimed to be due on the property insurance policy and insurance on the 1995 GMC were billed separately from the Toyota. (L.F. 327, 329, 332 and 336).

In the year 2002, Farm Bureau submitted statements for insurance premiums claimed to be due on various policies, sometimes, just days apart. A reminder notice of premium due on the property insurance policy and the 1995 GMC involved in the auto

accident in question, were billed together on one invoice on March 20, 2002 (L.F. 327) claiming total premium due in the amount of $83.27. This invoice was followed by one issued by Farm Bureau some 21 days later, i.e., April 10, 2002 reflecting a different premium charge claimed to be due by Farm Bureau on the 1995 GMC and on the property insurance. (L.F. 329). Six days later, on April 16, 2002, Farm Bureau submitted a cancellation notice claiming premium due on the 1988 Toyota in the amount $6.20. The cancellation notice purported to effect cancellation two days prior to its issuance, i.e., April 14th, 2002. (L.F. 331). Six days following the April 16th, 2002 notice, on April 22, 2002, Farm Bureau submitted a reminder notice of premium due on the 1995 GMC Jimmy and on the property insurance policy in the amount of $100.73. (L.F. p.332). Eleven days later, on June 30, 2002, Farm Bureau issued a new invoice claiming premium due only on the 1995 GMC in the amount of $70.13. (L.F. 336). Ten days later Farm Bureau issued a notice on June 13, 2002 for both the property insurance, and insurance on the 1995 GMC claiming premium due in the amount of $100.74. (L.F. 338). Thirteen days later, (June 26, 2002) Farm Bureau issued what appears to be a cancellation notice, claiming that there was $12.13 in premium due on the policy providing insurance coverage for the 1995 GMC Jimmy and purporting to effect cancellation of insurance one day prior to the date of the notice, i.e., June 25th, 2002. (L.F. 340) Twelve days later, Farm Bureau issued a separate notice of cancellation on the property insurance policy on July 8, 2002 claiming premium remaining due in the amount of $14.37. (L.F. 342). The property insurance cancellation notice issued on July 8, 2002 (L.F. 342) also purports to effect a cancellation of insurance four days prior to the issuance of the cancellation

notice, i.e., on July 4, 2002. On August 26, 2002, Farm Bureau submitted an invoice for insurance premium only on the 1995 GMC Jimmy (L.F. p. 343). On September 30, 2002, Farm Bureau submitted a separate invoice for property insurance only, claiming premium due in the amount of $83.29. (L.F. 346). Farm Bureau purportedly issued a cancellation notice to effect cancellation of the property insurance on November 25, 2002, claiming premium due on that policy in the amount of $17.02. (L.F. 349). The property insurance policy notice of November 25, 2002 purported to effect cancellation two days prior to the time it was issued, i.e., November 23, 2002. (L.F. 349).

Not one of the cancellation notices presented in the record before the trial court by Farm Bureau, appear, on their face, to provide ten days notice of cancellation as required by the policy as shown by the following:

Legal File Page No.	Date Notice Issued	Purported Cancellation Date	Notice Days Provided
313	**6-12-01**	**6-9-01**	**-3**
314	**6-15-01**	**6-14-01**	**-1**
317	**8-7-01**	**8-4-01**	**-3**
320	**10-3-01**	**10-2-01**	**-1**
324	**12-25-01**	**12-21-01**	**-4**
331	**4-16-02**	**4-14-02**	**-2**
334	**5-25-02**	**5-24-02**	**-1**
340	**6-24-02**	**6-25-02**	**-1**
342	**7-8-02**	**7-4-02**	**-4**

Each and everyone of the cancellation notices which Farm Bureau claims to have issued in this case, as referenced above, reflect a claim by Farm Bureau to a right to transfer any unpaid balance to another policy by virtue of the following sentence found in each notice: "Any unpaid balance may be transferred to another policy."

Farm Bureau delegated responsibility for mailing invoices and notices to Arlene Bateman to an independent mailing service known as Triple A. (L.F. 83-87). Farm Bureau submitted an affidavit of Claudia Goodin (L.F. 83-87) which in fact substantiates a lack of any personal knowledge as to when, how, why or where the independent mailing service ever effects proper mailing. (L.F. 83-87). Arlene Bateman denied receiving the cancellation notice that Farm Bureau claims to have issued on October 10, 2002 which purported to effect cancellation of the automobile liability policy in question in this case on October 9, 2002. (L.F. 184, Deposition of Arlene Bateman at p. 161 referencing the subject October 10, 2002 notice at L.F. p. 157-158).

Aside from the notice of suits against Arlene Bateman provided by her attorney, Eric Hutson, on September 15, 2005 as conceded by Farm Bureau at page 12 of its brief, there was a prior notice of suits provided to Farm Bureau by letter of August 18, 2003 which included a demand for settlement of the lawsuits for the lesser of or the combined sum of $900,000.00. The letter was received by Farm Bureau on August 22, 2003. (L.F. p.26 and p.75 ¶'s 4 and 5).

RESPONSE TO POINTS OF ERROR ASSERTED

BY CROSS-APPELLANT FARM BUREAU

POINTS RELIED ON

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DETERMINING, AS A MATTER OF LAW, THAT FARM BUREAU=S POLICY PROVIDED COVERAGE FOR THE ACCIDENT THAT OCCURRED ON DECEMBER 23, 2002 IN THAT: (A) FARM BUREAU=S POLICY WAS NOT CANCELED PRIOR TO THE DATE OF THE ACCIDENT AND THE ATTEMPT TO CANCEL BY FARM BUREAU WAS WHOLLY INEFFECTUAL AS A MATTER OF LAW; AND (B) A WHOLLY INEFFECTUAL EFFORT AT CANCELLATION IS NO CANCELLATION LEAVING THE POLICY IN EFFECT THROUGH THE END OF ITS TERM, FEBRUARY 2, 2003. FURTHER, FARM BUREAU FAILED TO SUBSTANTIATE OR DOCUMENT BEFORE THE TRIAL COURT THAT IT HAD COMPLIED WITH THE POLICY PROVISIONS FOR CANCELLATION DUE TO NON-PAYMENT OF PREMIUM BY PROPERLY MAILING A PROPER NOTICE OF CANCELLATION, WHICH WAS A FACT ISSUE UPON WHICH IT BORE THE BURDEN OF PROOF.

Cases

Blair by Snyder v. Perry County Mutual, 118 S.W.3d 605 (Mo. 2003)

MFA Mutual Ins. Co. v. Southwest Baptist College, Inc.,

381 S.W.2d 797 (Mo. 1964)

Cain v. Robinson Lumber Co., 295 S.W. 2d 388 (Mo. 1956)

Dyche v. Bostian, 229 S.W.2d 25 (Mo.App. 1950)

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE (1) FARM BUREAU=S POLICY PROVIDED COVERAGE TO ARLENE BATEMAN ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002 AND (2) THE STONE=S HAD STANDING TO MAINTAIN THE ACTION AGAINST FARM BUREAU BY VIRTUE OF A VALID ASSIGNMENT OF CLAIMS AND CAUSES OF ACTION MADE BY ARLENE BATEMAN TO THE STONES. A DETERMINATION OF DAMAGES DUE ON A CLAIM FOR BREACH OF CONTRACT, IN EXCESS OF THE POLICY LIMIT, IS APPROPRIATE AS A PROPER MEASURE OF THE LOSS SUFFERED BY THE INSURED AND THE AMOUNT NECESSARY, IN THE FORM OF DAMAGES, TO PLACE THE INSURED IN AS GOOD A POSITION AS SHE WOULD HAVE OCCUPIED HAD FARM BUREAU PERFORMED ITS CONTRACTUAL OBLIGATIONS.

Cases

Boten v. Brecklein, 452 S.W.2d 86 (Mo. 1970)

Whitehead v. Lakeside Hospital Association,

844 S.W.2d 475 (Mo.App. W.D. 1992)

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

Fuller v. Lloyd, 714 S.W. 2d 698 (Mo.App. 1986)

POINT III

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR BREACH OF CONTRACT BECAUSE THE STONES HELD A VALID ASSIGNMENT OF ALL CLAIMS WHICH ARLENE BATEMAN HAD AVAILABLE TO HER AGAINST FARM BUREAU AND FARM BUREAU HAD NO STANDING TO CHALLENGE THE VALIDITY OF THE ASSIGNMENT AS IT WAS NOT A PARTY TO THE ASSIGNMENT AND THE ASSIGNMENT ITSELF REFLECTS ADEQUATE CONSIDERATION. FURTHER, THE LAW IN MISSOURI ALLOWS FOR AN ASSIGNMENT OF CLAIMS SOUNDING IN TORT, OTHER THAN THOSE SEEKING DAMAGES FOR BODILY INJURY, AND THE CLAIMS ASSIGNED IN THIS CASE AROSE FROM BREACH OF CONTRACT OBLIGATIONS, NOT DAMAGES ATTRIBUTABLE TO PERSONAL BODILY INJURY, BUT WHICH OBLIGATIONS WERE OWED UNDER A CONTRACT BECAUSE OF PERSONAL BODILY INJURY CLAIMS.

Cases

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

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DETERMINING, AS A MATTER OF LAW, THAT FARM BUREAU=S POLICY PROVIDED COVERAGE FOR THE ACCIDENT THAT OCCURRED ON DECEMBER 23, 2002 IN THAT: (A) FARM BUREAU=S POLICY WAS NOT CANCELED PRIOR TO THE DATE OF THE ACCIDENT AND THE ATTEMPT TO CANCEL BY FARM BUREAU WAS WHOLLY INEFFECTUAL AS A MATTER OF LAW; AND (B) A WHOLLY INEFFECTUAL EFFORT AT CANCELLATION IS NO CANCELLATION LEAVING THE POLICY IN EFFECT THROUGH THE END OF ITS TERM, FEBRUARY 2, 2003. FURTHER, FARM BUREAU FAILED TO SUBSTANTIATE OR DOCUMENT BEFORE THE TRIAL COURT THAT IT HAD COMPLIED WITH THE POLICY PROVISIONS FOR CANCELLATION DUE TO NON-PAYMENT OF PREMIUM BY PROPERLY MAILING A PROPER NOTICE OF CANCELLATION, WHICH WAS A FACT ISSUE UPON WHICH IT BORE THE BURDEN OF PROOF.

Argument

Farm Bureau continues to assert the liability insurance policy in this case was canceled in October, 2002. It relies upon its cancellation notice issued on October 10, 2002, purporting to provide a cancellation date on the previous day, October 9, 2002. As

noted by Farm Bureau, the policy required 10 days notice. It is nonsensical to assert that a notice issued on October 10, 2002 is effective to provide 10 days notice of cancellation which Farm Bureau urges took effect on the previous day, October 9, 2002.

Farm Bureau also claims that is should be given the benefit of its deficient efforts to cancel the policy. It relies on prior notices of premium due that were sent to its insured, prior to the defective cancellation notice issued on October 10, 2002.

The argument of Farm Bureau is disposed of by analysis of Blair by Snyder v. Perry Co. Mutual, 118 S.W.3d 605 (Mo. 2003) and the long outstanding Missouri Supreme Court case authority discussed and approved by the Missouri Supreme Court in the Blair decision. Additionally, it should be noted that the contingent cancellation notice which Farm Bureau seeks to have the court rely upon, i.e., issued on September 20, 2002 (A-3 of Farm Bureau's Appellant's-Respondent's Substitute Brief, L.F. p. 155) indicated that it was a Afriendly reminder@ that a premium payment was due, although it purported to set forth a proposed cancellation date. The total amount of the premium due in the September 20, 2002 notice relied upon by Farm Bureau was in the sum of $58.05. By the time Farm Bureau got around to issuing what it claims as an unequivocal cancellation notice on October 10, 2002 (Appendix to Stones Appellants' Substitute Brief p. A-5; Appendix to Farm Bureau's Substitute Respondent's Brief p. A-4 and L.F. p. 157), the amount of premium claimed to be due by Farm Bureau, as indicated in the notice, was $9.45.

The Missouri Supreme Court decision in Blair cited and relied upon long standing case authority in Missouri, which the Blair decision did not overrule, and did not purport

to change or modify. The Missouri Supreme Court in Blair specifically held that a cancellation of an insurance policy can occur only by strict compliance with policy conditions and an unmistakable and unequivocal act of cancellation, not dependant upon a future event. A mere intention to effect a cancellation will not suffice. To be effective, a notice of cancellation must comply with the terms of the policy (which Farm Bureau=s did not) and constitute a present cancellation, as distinguished from an intention to cancel at some future time. For cancellation to be based upon nonpayment of premium, the nonpayment of premium must have occurred. The facts in this case clearly show that Farm Bureau was in the possession of premium dollars sufficient to provide coverage to Arlene Bateman at the time it issued its notice on the 20th day of September, 2002. Indeed, the facts indicate that Farm Bureau was in possession of premium dollars from Arlene Bateman sufficient to provide coverage through October 11, 2002.

A review of the Blair decision and the statements of law set forth within the Blair decision are instructive by way of response to Farm Bureau=s assertion that its policy issued to Arlene Bateman was canceled. The following statements of law or legal rulings are found in Blair:

1. The more probable and reasonable of two available constructions (in an insurance policy) should be utilized to the exclusion of one which provides a redundant, illusory, absurd, and therefore unreasonable result. Blair at page 606.

2. A unilateral cancellation of a policy must strictly comply with the policy. There must be an unequivocal, unmistakable act of cancellation, not dependant upon

some future event and a mere intent to cancel will not suffice to effect a cancellation under policy provisions. Blair at page 607.

3. A conditional notice of cancellation provided at any time, if at least 10 days before cancellation is not a proper cancellation as A . . . such anticipatory notice could be weeks, months, or even years before nonpayment.@ Such interpretation A . . . would render the policy provision illusory, absurd, and unreasonable.@ Blair at page 607.

The Missouri Supreme Court in the Blair case cited as supporting authority its prior decision in MFA Mutual Insurance Company v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964) holding that cancellation of a policy cannot be accomplished except upon strict compliance with the conditions provided within the policy for cancellation, and a mere intention to cancel, but improper effort, will not suffice to effect cancellation. The Missouri Supreme Court, in Blair, also relied upon its decision in Cain v. Robinson Lumber Co., 295 S.W.2d 388 (Mo. 1956) holding that an insurer could not cancel a policy unless and until all conditions precedent have been met, and, as reported in Cain, when the conditions precedent have not been met, the attempt at cancellation is abortive and wholly ineffectual.

It should be noted that the Missouri Supreme Court in Cain v. Robinson Lumber was dealing with policy language exactly of the type relied upon by Farm Bureau as argued in its brief, i.e., the particular language stating: Athe effective date of cancellation stated in the notice will become the end of the policy period@. The Missouri Supreme Court in Cain v. Robinson Lumber held that the cancellation notice was Awholly ineffectual@ and that cancellation had not been accomplished.

It should further be noted that the Missouri Supreme Court in Blair did not overrule or endeavor to distinguish prior decisions by the Court of Appeals in Missouri that have been rendered consistent with the position asserted by the Stones in this action. Particularly, O=Connor v. State Farm Mutual Auto Insurance, 831 S.W.2d 748 (Mo.App. S.D. 1992) holding that the failure to mail a cancellation notice by certified mail, as required by the policy, did not accomplish cancellation of the policy even though the insured admitted receiving the notice. In Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo.App. E.D. 1992) the Court held that a cancellation notice mailed to an individual maintaining the same address of the insured corporation, did not constitute a proper cancellation notice and was therefore ineffectual. In Blanks v. Farmer=s Ins. Co., Inc., 97 S.W.3d 1, (Mo.App. E.D. 2002) the Court held that an insured who tried to cancel his policy but did not strictly comply with the terms of the policy regarding cancellation, did not accomplish cancellation as there had not been strict compliance with the provisions of the policy. It should be noted that the decision of the Court of Appeals in Safeco Inc. Co. of America v. Stone & Sons, Inc. was more recently relied upon by the Southern District of the Missouri Court of Appeals in Stickler v. Foremost Signature Ins. Co., 150 S.W.3d 314 (Mo.App. S.D. 2004), holding that a cancellation procedure is binding upon the parties and must be strictly complied with, even when the provisions for cancellation are unreasonable.

Farm Bureau also asserts that the decision of the Missouri Supreme Court in Blair supports its assertion that even though its October 10th notice of cancellation was improper, it is nevertheless an effective cancellation prior to the time of the accident in

this case on December 23, 2002. The essence of Farm Bureau's argument is that a defective cancellation notice should be treated as valid and effectual on a prospective basis. The Missouri Supreme Court in Blair did not overrule prior holdings to the effect that an improper cancellation is Awholly ineffectual@. Indeed, it reiterated prior decisions by the Missouri Supreme Court which set forth the general legal principle that an improper cancellation notice is wholly ineffectual.

The claim asserted by Farm Bureau is premised upon language within the Blair decision where the Court, after determining that the cancellation notice in Blair was improper stated its agreement with Heather Blair=s assertions that the earliest date that the cancellation could have taken effect was 10 days after the time the notice was actually sent. The Court did not hold that the notice was effectual. The Missouri Supreme Court did not hold in Blair that a cancellation notice, not in strict compliance with the policy terms, may be given effect at some future point in time. The Missouri Supreme Court did not hold in Blair that a liability insurer may receive prospective benefit of a misleading and inaccurate cancellation notice which does not strictly comply with the policy.

The opinion of the Missouri Supreme Court in Blair reflects, on page 606, that Heather Blair asserted that the cancellation in question could not take effect " . . . until at least 10 days after the October 14 notice – after her injuries." It is respectfully submitted that the statement by the Supreme Court indicating its agreement with Blair's argument was not a new legal ruling, or a departure from the long standing rule of law in Missouri to the effect that strict compliance with all policy provisions on cancellation is required.

The Missouri Supreme Court in the Blair case relied upon its prior ruling in MFA Mutual Ins. v. Southwest Baptist College, Inc. The Supreme Court in MFA Mutual v. Southwest Baptist in turn relied upon Dyche v. Bostian, 229 S.W.2d 25 (Mo.App. 1950) which stated, at page 28, the following:

> AThe law is firmly settled that, where a policy contains a specific provision for cancellation by either party, it is binding upon the parties and must be strictly complied with in order to terminate the policy. In Home Insurance Company v. Hamilton, 143 Mo.App. 237, 128 S.W. 273, 274, this court said: >A contract covering a certain period of time, but containing a conditional provision that it might be terminated before that time, will remain effective the full term, unless the condition of termination is fully complied with. And this is especially applicable to an insurance policy containing a provision allowing a cancellation prior to the end of the term of insurance.= Chrisman & Sawyer Banking Co. v. Hartford Insurance Co., 75 Mo.App. 310,@ (additional supporting citations omitted) (emphasis added)

The end of the term of the insurance contract in this case, as shown by Exhibit AA@ attached to the Stones= Amended Petition, (L.F. 25) was February 2, 2003, well after the accident of December 23, 2002.

The opinion of the Missouri Court of Appeals in this case implies that the Missouri Supreme Court, by its decision in Blair was authorizing a departure from the long standing legal rule previously evident by a long line of prior decisions relied upon by the

Missouri Supreme Court in Blair. The Court of Appeals opinion in this case, at page 18 of its Opinion states: " . . . Blair instructs us that a notice of cancellation which purports to be immediately effective, in violation of the terms of the policy, is not a nullity; rather, the notice becomes effective after the lapse of the time period prescribed by the policy." The Court of Appeals interpretation of the Blair decision is based on inference, and indeed, by legal interpretation, obviation of the very authorities relied upon by the Missouri Supreme Court in the Blair decision.

The Court of Appeals cited as persuasive authority a 1964 article, i.e., Effect of Attempt to Terminate Insurance or Fidelity Contract upon Notice Allowing a Shorter Period than that Stipulated in Contract, 96 ALR 2d 286 § 3 (1964). In fact, the ALR article quoted at page 19 in the Court of Appeals' opinion in this case, clearly indicates that there is a contrary view, which obtains in some jurisdictions. Missouri has consistently been one such jurisdiction.

Likewise, other treatises relied upon by the Missouri Court of Appeals in its opinion in this case substantiate and support the so called "contrary view" referenced within the 1964 ALR article relied upon by the Missouri Court of Appeals. By way of example, 2 Couch On Insurance 3d § 30: 17 (Clark Boardman Callaghan 1995) provides as follows:

> "In order to effect cancellation of a policy in the absence of mutual assent, strict compliance by insurer with the policy's cancellation provision is necessary, and no additional requirements may be imposed upon cancellation other than those set forth in the contract of insurance. In other

words, to defeat an action upon a policy on the ground that it had been cancelled, it must be shown either that there was strict compliance with the policy conditions which allowed the insurer to cancel, or that the insured, knowing all the facts, waived such compliance.

The necessity of strict compliance with the cancellation provisions has been stated in absolute terms, to the effect that such compliance is necessary regardless of the reasonableness of the conditions provided in a policy for its cancellation. For example, the requirement is given recognition to the extent of holding ordinary mail insufficient when registered mail is specified.

An insurer is held to strict compliance with the cancellation provision of a public liability policy, a workmen's compensation policy, an automobile liability policy, and a renewal fire policy."

Similarly, provisions supporting the long standing Missouri rule can also be found in 45 CJS Insurance and 43 Am Jur 2d Insurance which had specific sections relied upon the Missouri Court of Appeals in its opinion at page 19. More particularly, 45 CJS Insurance, § 498 provides, in pertinent part, as follows: " It has however, also been held that an attempted cancellation which does not give the required notice is ineffective." 43 Am Jur 2d Insurance § 410 (2003) provides the following pertinent general rule: "Insurance contract provisions for cancellation are valid, unless in conflict with the terms of an applicable statute, and are binding

between the parties. If an insurance policy has specific cancellation requirements, strict and literal compliance with those contractual requirements must be met."

The foregoing illustrates that the treatises relied upon by the Missouri Court of Appeals, also clearly recognize what has long been the rule of law in Missouri. The Court of Appeals referenced selected portions of treatises to illustrate a view in some jurisdictions that is in fact contrary to long standing Missouri case precedent.

There is simply no legal provision or rule allowing for coming close, or almost canceling. A notice of cancellation is proper and effects a cancellation or it accomplishes nothing. The decision in Blair does not hold that an insurance company will be given the benefit of its inadequate effort under any set of circumstances. The argument by Farm Bureau that it should be given the benefit of cancellation based upon its improper notice is, in effect, arguing to the court that its improper cancellation should be given some prospective effect at some point in time. Neither Blair or any of the outstanding precedent in Missouri case law, cited as authority and relied upon in Blair, have so held.

The burden of proving cancellation is on the party asserting it. In this case, Farm Bureau bore the burden of proving strict compliance with the policy provisions allowing its claimed cancellation. Farrar v. Mayabb, 326 S.W.2d 337 (Mo.App. 1959); O'Connor v. State Farm Mut. Auto. Ins., 831 S.W.2d 748 (Mo.App. S.D. 1992); Blanks v. Farmers Ins. Co., 97 S.W.3d 1 (Mo.App. E.D. 2002).

Examination of the record before the trial court substantiates that Farm Bureau did not meet its burden of proving that it had properly canceled the policy in question, via strict compliance with the policy provisions. Farm Bureau in fact did not substantiate that it even mailed its notice of cancellation dated October 10, 2002, upon which it ultimately relies. A review of the record before the trial court substantiates that all Farm Bureau had to document its mailing of its October 10, 2002 notice of cancellation was an affidavit from Claudia Goodin (L.F. 83-87) which clearly indicates that Farm Bureau delegated the responsibility for the actual mailing of any notice or invoice to an independent commercial mailing service in Jefferson City, Missouri. The affidavit substantiates that this was true as to the October 10, 2002 cancellation notice (L.F. 86) which purported to effect cancellation the previous day, on October 9, 2002. The affidavit clearly indicates that Claudia Goodin has no personal knowledge as to when, how, where or under what circumstances the independent mailing service would ordinarily arrange to get out invoices and cancellation notices, if ever. Although a presumption of mailing may arise if evidence can be presented substantiating compliance with settled custom and usage of a sender in the regular and systematic transaction of its business, such evidence must be based upon some personal knowledge. Clearly, Claudia Goodin, Farm Bureau's affiant, has no personal knowledge of the independent contractor, Triple A Mailing Service in Jefferson City, Missouri.

Arlene Bateman denied ever receiving the October 10, 2002 cancellation notice. (L.F. p.184). The evidence in this case did not substantiate that Farm

Bureau was entitled to the presumption that the notice was properly mailed. In Insurance Placements, Inc. v. Utica Mut. Ins. Co., 917 S.W.2d 592 (Mo.App. E.D. 1996) the Court held that a presumption that a mailing was effected by compliance with usual and systematic procedures is indeed rebuttable by evidence, that in fact, the matter alledgedly mailed was in fact not received. The Court held in the Insurance Placements case that when a conflict in the facts is presented the presumption of mailing is rebutted thereby requiring the determination of mailing, or not, to be left to a jury under all of the facts and circumstances. This rule was reiterated in Clear v. Coordinating Bd. For Higher Educ., 23 S.W.3d 896 (Mo.App. E.D. 2000).

In the context of evidence supporting a presumption of mailing by compliance with ordinary and systematic procedures, Farm Bureau presented the affidavit of Claudia Goodin which on its face manifests a lack of personal knowledge as to when any mailing is effected. Farm Bureau had no affidavit before the trial court from the commercial mailing service in Jefferson City used by Farm Bureau to mail its invoices and notices. Even assuming the presumption arose by reason of the defective affidavit, it was rebutted by virtue of Arlene Bateman having denied ever receiving the notice in question.

Farm Bureau bore the burden of proof of mailing of the cancellation notice. The issue was not proven by virtue of Farm Bureau's summary judgment, the Stones' response to the same, or the Stones' Motion For Partial Summary Judgment or Farm Bureau's response. Farm Bureau asserted within its statement

of uncontroverted facts submitted in support of its motion for summary judgment (L.F. p. 271, p. 274 and p. 275, ¶ 12) that documents representing the October 10, 2002 cancellation notice were mailed to Bateman on October 10, 2002. The affidavit relied upon by Farm Bureau, its legal efficacy, and the assertion that the October 10, 2002 notice of cancellation was mailed, was denied by the Stones in their objection and response to Farm Bureau's motion for summary judgment (L.F. p.44) particularly, at (L.F. p.486 ¶ 10 thru p.487 ¶ 11).

Farm Bureau simply did not present evidence before the trial court which would give rise to a presumption that it had, indeed, mailed the notice of cancellation dated October 10, 2002 as required by the policy.

Farm Bureau=s claim that the trial court=s ruling effectively forced Farm Bureau to continue providing liability insurance to Arlene Bateman without premium is of no consequence. An ineffective cancellation is wholly ineffective. Prior rulings of the appellate courts in Missouri have held that an insurer must remain obligated on its policy that is otherwise unexpired, if its cancellation notice is ineffective. In the case of Cain v. Robinson Lumber Co., 295 S.W.2d 388 (Mo. 1956), the insurer remained on the policy a period of 49 days after its improper efforts to effect cancellation, to the date of the covered incident. In O=Connor v. State Farm Mutual Auto Insurance, 831 S.W.2d 748 (Mo.App. S.D. 1992), there was a 91 day lapse from the date of ineffective cancellation efforts to the date of the covered incident. In Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo.App. E.D.1992), there was a 54 day lapse of time from ineffective cancellation efforts to date of covered incident. In Fuller v. Lloyd, 714

S.W.2d 698 (Mo.App. W.D. 1986), there was approximately 116 days lapse of time from ineffective cancellation efforts to date of covered incident. In Farrar v. Mayabb, 326 S.W.2d 337 (Mo.App. S.D. 1959), there was a 52 day lapse of time from ineffective cancellation efforts to date of covered incident. In this case, the accident or covered incident occurred 74 days after the October 10, 2002 defective notice.

Farm Bureau=s complaint that the trial court decision requires it to continue on a policy of liability insurance after it had stopped receiving premium payments should garner no sympathy. The continued coverage due from Farm Bureau to Arlene Bateman is a consequence of its own failure to abide by law, which has been outstanding and unmodified for approximately forty years. MFA Mutual Insurance Company v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964). Regardless of what other jurisdictions have held in allowing insurers benefit of improper cancellation efforts, Missouri case law has been clear, even though it may be in that group of a minority of jurisdictions that require strict compliance and hold a notice of cancellation that does not strictly comply with the policy is wholly ineffective.

The rational for the rule is distinctly stated in Blanks v. Farmer's Ins. Co., Inc., 97 S.W.3d 1 (Mo.App. E.D. 2002), at page 4 as follows: "Requiring strict compliance enhances certainty in insurance matters, benefiting both insurers and insureds." To allow deviation from the long standing rule in Missouri would in essence inject into every ordinary automobile liability insurance policy an open question as to when cancellation has been properly effected. Deviation from the long standing rule in the State of Missouri, would result in the injection of doubt in all policies supposedly cancelled due to

non-payment of premium as an insurer or an insured may never completely know if a policy has been cancelled. No sound and predictable legal rule would exist. Deviation from the strict compliance standard, long upheld in the State of Missouri, will necessarily result in an unwarranted confusion regarding ordinary contract rights that are best resolved by virtue of a legal rule requiring strict and literal compliance with unequivocal contract obligations.

As a practical matter, most citizens of the State of Missouri are absolutely required to obtain and maintain automobile liability insurance in order to function on any productive basis. They must purchase a product, which our legislature has insisted that they purchase, thereby mandating a market for liability insurers, as a matter of law. It is not unreasonable, and indeed, it is respectfully submitted, completely necessary, that parties with a legislatively mandated market continue to comply with the longstanding rule requiring strict compliance with policy provisions before cancellation of insurance may be effected, and holding that inadequate or incomplete efforts in this regard are to be deemed wholly ineffective. Otherwise, we will have cast upon the ordinary citizens of this state a routine obligation to know that which no lawyer or judge can easily determine for them, while at the same time insisting that they buy the product which may give rise to the question.

In the opinion issued by the Missouri Court of Appeals, it endeavored to interpret what it held to be an unambiguous contract in view of the practical interpretation placed upon it by the parties, Arlene Bateman and Farm Bureau. Presumably, the Court of Appeals may have undertaken such efforts in order to provide additional justification

from what is perceived to be its departure from the long standing rule in the State of Missouri on cancellation due to non-payment of premium. It is submitted that the reasoning by the Court of Appeals in endeavoring to adopt practical interpretation that it discerned from the parties conduct was improper. Such interpretive efforts are contrary to law when a contract is unambiguous. An unambiguous contract is to be interpreted from the four corners of the contract, without resort to construction. Eisenberg v. Redd, 38 S.W.3d 409 (Mo. 2001); Dunn Indus. Group v. City of Sugar Creek, 112 S.W.3d 421 (Mo. 2003); Blackburn v. Habitat Development Co., 57 S.W.3d 378 (Mo.App. S.D. 2001).

In view of the fact that the Court of Appeals determined in its opinion that the policy language in issue was not ambiguous, it was improper for the Court to engage in contract interpretation premised upon the performance of the parties as such "practical interpretation" is irrelevant to resolution of the dispute in view of the long outstanding law in the State of Missouri.

Assuming arguendo that some "practical interpretation" of the policy language were proper under the circumstances, the Court of Appeals overlooked the facts supporting reasonable and practical interpretation under the circumstances in this case. Farm Bureau essentially waived its right to effect any cancellation under the terms of the policy as it had consistently, over a long period of time, provided deficient notices of cancellation, only to effect subsequent reinstatement. It would have been just as reasonable for Arlene Bateman to assume that Farm Bureau's cancellation notices issued at various times on both automobile liability insurance policies and on property insurance

policies, were in essence meaningless.

The detailed history of the relationship between Bateman and Farm Bureau as recited by the Missouri Court of Appeals in its opinion, reflecting the poor customer performance of Arlene Bateman, is equally matched or countered by the obvious willingness of Farm Bureau to continue to insure Arlene Bateman and its continued desire to extract from her premium payments, regardless of her poor payment history.

The trial court did not err in determining by its judgment that Farm Bureau did not properly cancel the policy prior to the date of the accident in question, December 23, 2002.

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE (1) FARM BUREAU=S POLICY PROVIDED COVERAGE TO ARLENE BATEMAN ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002 AND (2) THE STONE=S HAD STANDING TO MAINTAIN THE ACTION AGAINST FARM BUREAU BY VIRTUE OF A VALID ASSIGNMENT OF CLAIMS AND CAUSES OF ACTION MADE BY ARLENE BATEMAN TO THE STONES. A DETERMINATION OF DAMAGES DUE ON A CLAIM FOR BREACH OF CONTRACT, IN EXCESS OF THE POLICY COVERAGE LIMIT, IS APPROPRIATE AS A PROPER MEASURE OF THE LOSS SUFFERED BY THE INSURED AND THE AMOUNT

NECESSARY, IN THE FORM OF DAMAGES, TO PLACE THE INSURED IN AS GOOD A POSITION AS SHE WOULD HAVE OCCUPIED HAD FARM BUREAU PERFORMED ITS CONTRACTUAL OBLIGATIONS.

Argument

Farm Bureau has asserted that the sum of the judgments obtained against Arlene Bateman do not reflect a proper measure of damages on the claim asserted in Count I for Breach of Contract. Farm Bureau claims that even though it had breached its contract, it cannot be held liable for any amounts in excess of its policy limits. It is respectively submitted that it is a novel argument that an insurance company, unlike any other business, commercial entity, or individual, may not be held liable for compensatory damages which would not have arisen but for the breach of contract duties.

It should be remembered that Farm Bureau was informed of the two lawsuits against Arlene Bateman by letter of August 18, 2003. (L.F. 26) Farm Bureau was advised that the value on the wrongful death suit was assessed at the sum of $450,000.00. Settlement value of the personal injury suit was also assessed at $450,000.00. Demand was made for these sums or the policy limits, whichever was less. Farm Bureau did nothing. Judgments were rendered in each suit for a combined total of $906,000.00

Provided the Court finds that the cancellation was not effective, it necessarily follows that Farm Bureau breached its insurance contract in failing to defend and in failing to settle when it had an opportunity to do so for the policy limits. The breach of the duties to defend and settle must also allow for the assertion of tort claims as the duties

involved in each instance were fiduciary in nature. However, at a minimum, it is suggested that the conduct amounted to a breach of contract.

The damages resulting from a breach of a contract are to be measured or stated as Athe amount which will compensate that injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed . . . Compensation is the value of the performance of the contract . . . ." Boten v. Brecklein, 452 S.W. 2d 86, 93 (Mo. 1970). A person who has been injured or suffered damage by reason of a breach of contract is, as far as it is possible to do so by a monetary award, to be placed in the position he or she would have been in had the contract been performed. Had Farm Bureau accepted the settlement demand submitted in the August 18, 2003 letter, it would have been required to pay its policy limit of $250,000.00 and there would be no outstanding judgments against Arlene Bateman for a combined total of $906, 000.00 plus interest.

The Missouri rule on measurement on damages for breach of contract as set forth in the Boten v. Brecklein case follows basic legal treatises on the subject. See for example, Corbin On Contracts, Vol. IV ' 992 providing, in pertinent part as follows:

> AOne who commits a breach of contract must make compensation therefore to the injured party. In determining the amount of this compensation as the >damages= to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised.@

Williston On Contracts, Vol. III, 3rd Ed., ' 1338 provides, at page 198, the following:

> AIn fixing the amount of these damages the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.@

Calamari and Perillo, The Law of Contracts, 3rd Ed., 1987 at ' 13-4, page 591, provides as follows:

> AFor breach of contract, the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed.@

In this case, in order to place the aggrieved party in as good a position as she would have occupied had the contract been performed, the judgments against Arlene Bateman must be satisfied. Therefore, the actual damages are measured by the judgments obtained against her with interest accruing. This is true whether the recovery in this case is measured by a breach of contract claim or the tort claim of bad faith. Whether the plaintiffs in this action recover for breach of contract, or recover from Farm Bureau on a tort theory, the actual damages sustained are the same, as a general measurement of actual damages for conduct asserted as breach of contract, or as a tort, are the same. See for example Restatement of the Law 2d Torts, Vol. IV, ' 903 which provides under comment (a), dealing with compensatory damages, in pertinent part, the following:

> A(a) When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to

> place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.@

See also United States Supreme Court ruling on the measurement of tort damages set forth in East River Steamship Corp. v. Trans America Delaval Inc., 476 U.S. 858, 90 L. Ed 2d 865, 106 S. Ct. 2295 (1986), holding that generally, tort damages are designed to compensate a plaintiff for loss and return him to a position he occupied before any injury.

Missouri courts have held consistently that an insurance company that fails and refuses to defend and improperly fails to settle a suit against its insured is liable for all of the resultant damages. In both Whitehead v. Lakeside Hospital Association, 844 S.W.2d 475 (Mo.App. W.D. 1992) and the older case of Landie v. Century Indemnity Company, 390 S.W.2d 558 (Mo.App 1965) our courts have held that an insurer is liable to its insured for all resultant damages from a breach of contract, even if it makes an honest mistake in denying coverage and thereafter refuses to defend. More specifically, in the Whitehead case, at page 481, the Missouri Court of Appeals stated in pertinent part, as follows:

> AWhere 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. Independence, 418 S.W.2d at 425 [Mo. 1974]. Even if the refusal of the insurer to defend on the ground that the claim is outside the policy is an honest

> mistake, the insurers position still constitutes an unjustified refusal and renders the insurer liable to the insured for all resultant damages from the breach of contract.@

See also Fuller v. Lloyd, 714 S.W.2d 698 (Mo.App. 1986) holding an insurance company liable for a judgment rendered against its insured even though the judgment was in excess of the policy limits.

Based upon the law in the State of Missouri as set forth above, the Stones submit that in addition to finding coverage and that there has been a breach of contract, it was appropriate for the trial court to determine that the actual damages on the claim for breach of contract before the court and indeed, the tort claims if successful at trial, is equal to the full amount of the outstanding judgments against Arlene Bateman.

Both Farm Bureau and the Stones have referenced the case of Landie v. Century Indemnity Co., 390 S.W.2d 558 (Mo.App. 1965). What Farm Bureau overlooks is the fundamental damage principles set forth within the Landie decision which are applicable to the breach of contract claim. The court in Landie stated at page 565 the following:

> ASince it has now been conclusively determined that there was in fact coverage under the policy in the present case the defendant company breached such contract by failure to defend. Such breach cannot put the company in a better position than if it had properly performed the obligations of its contract. Such breach cannot relieve the company of any of its obligations and such breach cannot take away from the insured any of his rights. Under such circumstances the insured must be placed in a

position which is equally as good as that which he would have occupied if the company had performed its contract.@ (emphasis added)

Farm Bureau was given an opportunity to protect Arlene Bateman by settlement of the suits against her for its policy limits. (See demand letter of August 18, 2003, L.F. 26-27). Farm Bureau chose to ignore the demand letter of August 18, 2003.

The Stones, as assignees of Arlene Bateman are entitled to collect the same damages as Arlene Bateman would have been entitled to recover had she not assigned her claims against Farm Bureau to the Stones in this suit. Arlene Bateman has outstanding final judgments against her. She has not been released from those judgments. The judgments undoubtedly have an adverse impact upon her credit standing. She will not be released from those judgments until they are satisfied. They will be satisfied only when the judgments have been paid in full.

In Fuller v. Lloyd, 714 S.W.2d 698 (Mo.App. W.D. 1986) the Missouri Court of Appeals upheld that portion of a judgment rendered against an insurance company, which required it to pay the full amount of the judgment against its insured and other damages claimed. The court cited the language from Landie, which reflects that when an insurance company refuses to defend an insured, the company becomes liable for damages, which flow from the refusal to defend.

The damages, which are apparent from the judgments, may not be controverted. The judgments have been obtained against Arlene Bateman by reason of the failure on the part of Farm Bureau to fulfill its contractual obligations. Damages resulting from the

contract breach are in an amount, which can be, and indeed must be, measured by the amount of the judgments obtained against Arlene Bateman.

POINT III

THE TRIAL COURT DID NOT ERR IN GRANTING THE STONE=S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR BREACH OF CONTRACT BECAUSE THE STONES HELD A VALID ASSIGNMENT OF ALL CLAIMS WHICH ARLENE BATEMAN HAD AVAILABLE TO HER AGAINST FARM BUREAU AND FARM BUREAU HAD NO STANDING TO CHALLENGE THE VALIDITY OF THE ASSIGNMENT AS IT WAS NOT A PARTY TO THE ASSIGNMENT AND THE ASSIGNMENT ITSELF REFLECTS ADEQUATE CONSIDERATION. FURTHER, THE LAW IN MISSOURI ALLOWS FOR AN ASSIGNMENT OF CLAIMS SOUNDING IN TORT, OTHER THAN THOSE SEEKING DAMAGES FOR BODILY INJURY, AND THE CLAIMS ASSIGNED IN THIS CASE AROSE FROM BREACH OF CONTRACT OBLIGATIONS, NOT DAMAGES ATTRIBUTABLE TO PERSONAL BODILY INJURY, BUT WHICH OBLIGATIONS WERE OWED UNDER A CONTRACT BECAUSE OF PERSONAL BODILY INJURY CLAIMS.

Argument

Farm Bureau also claims that the Stones in this case have no standing to assert claims against Farm Bureau premised upon the AAssignment@ made by Arlene Bateman

of any claims Arlene Bateman may have against Farm Bureau. The AAssignment@ is before the court, attached to the Amended Petition, as Exhibit AH@. (L.F. 36)

Farm Bureau=s argument is without support in law or in fact.

First, the facts.

The AAssignment@ attached to the Stones= Amended Petition (L.F. 36), states the consideration, commencing on the last paragraph of the first page. In addition, the prior agreement executed pursuant to the authority of ' 537.065 RSMo., (L.F. 186-188) provides on the last page in paragraph number two:

> A2. In order to effect collection activity limited to the foregoing assets, Arlene Bateman hereby covenants and agrees that <u>in the event a judgment or judgments are obtained against her</u> in either one or both of the aforementioned suits, that she will execute an appropriate assignment or assignment of proceeds of chose in action, in order to allow and facilitate collection activities on claims which she may have available to her against Farm Bureau. . . .@ (emphasis added)

Arlene Bateman admitted that she executed the Assignment in her deposition at page 56. (L.F. 169, 189, 359 and 380) Farm Bureau placed this sworn testimony twice before the trial court. First, as an exhibit to its response to the Stones Statement of Uncontroverted Material Facts, (L.F. 74, 169 and 189) and secondly, as an exhibit in support of Farm Bureau's Motion for Summary Judgment. (L.F. 271, 359 and 380) The facts clearly indicate consideration supporting both the AAssignment@ and the

' 537.065 agreement.

Second, the law.

Farm Bureau does not have the right to challenge the AAssignment@ as it is a stranger to it. The courts attention is directed to Barker v. Danner, 903 S.W.2d 950 (Mo.App. W.D. 1995) wherein the basic legal principle indicating lack of standing on the part of a party who is a stranger to an assignment to challenge the assignment. In Barker v. Danner, the court stated in pertinent part at page 755, the following:

> ADefendants also asserted in the trial court that the assignment was invalid for lack of consideration. Barker and Clark contend defendants lack standing to raise the issue. Consideration between the assignee and the assignor is necessary to support an assignment, but a non-party to the assignment may not claim lack of consideration. >As between the assignee and the debtor, or the obligor in the chose assigned, the rule is sometimes broadly stated to be that the subject of consideration, or want thereof, is not open to the latter, his obligation being to pay, and it being immaterial to him whether or not the party to whom he is compelled to pay gave value for the obligation, the only interest of the obligor being that he shall be required to pay his debt to but one person.= 6A C.J.S. Assignments ' 60 (1975), page 687. Defendants do not have standing to raise the defense of lack of consideration for the assignment since they were not parties to the assignment and were not prejudiced by the assignment. The general rule of law on this issue is clear.@

The challenge to the Assignment by Farm Bureau is without merit.

Although Farm Bureau did not assert in its Respondent's Brief that bad faith claims cannot be assigned in Missouri, it did make such argument in prior motions to dismiss, as well as in its memorandum in support of its Motion for Summary Judgment submitted to the trial court (L.F. p. 464, 471-472). It is believed to be appropriate to address the issue in case the Missouri Supreme Court should determine to address Farm Bureau's prior arguments, sua sponte.

Farm Bureau has previously asserted that claims for bad faith may not be assigned in Missouri, relying upon a federal court decision in Quick v. National Auto Credit, 65 F.3d 741 (8th Cir. 1995). The Eighth Circuit Court of Appeals in the Quick case held that a jury verdict against a self-insuring auto rental company, and in favor of an assignee of the insured could not be sustained, holding that the bad faith claim was not assignable under Missouri law.

The decision by the Eighth Circuit in the Quick case is not remotely in accord with Missouri law, or prior binding en banc decision of the Eighth Circuit rendered in 1973, Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1973).

The Quick decision equated the assignment of a claim for bad faith on the part of a liability insurer in failing to settle or defend a tort liability claim against its insured as the same type of a personal bodily injury claim which Missouri courts have consistently held could not be assigned, directly, or by subrogation to an insurance company. The Eighth Circuit panel decision in the Quick case relied on Forsthove v. Hardware Dealers Mutual Fire Ins. Co., 416 S.W.2d 208 (Mo.App. 1967). The Forsthove case reiterated the

longstanding rule that a claim for personal bodily injuries could not be assigned in Missouri as a matter of public policy and further held that it could not be assigned by subrogation to an insurer. The Forsthove case did not hold that a claim for bad faith, which arises out of an insurance contract, and is not a claim for personal bodily injury, is not assignable. The Forsthove case did not even address a claim for bad faith, or even mention the concept. The Missouri Court of Appeals in Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554 (Mo.App. S.D. 1990) specifically held that a claim for bad faith asserted against an insurance company is in fact assignable. Missouri courts have long recognized that a claim for fraud is also assignable. Houston v. Wilhite, 27 S.W.2d 772 (Mo.App. 1930).

The Missouri Supreme Court in State ex. rel. Park Nat'l. Bank v. Globe Indemnity Co., 61 S.W.2d 733 (Mo. 1933) held that the test of assignability of a cause of action is whether it survives to a personal representative. In the course of its opinion in the Globe Indemnity Co. case, the Missouri Supreme Court stated at page 736, the following in regard to assignability of choses in action:

> "The matter is summed up as follows . . . . 'Although at common law no action ex delicto in which the appropriate plea was not guilty survived, the early statue of 4 Edw. III, c. 7 gave a remedy to executors for a trespass to the personal estate of their testators, which remedies by equitable construction was extended to administrators, and ultimately gave rise to the principle that choses in action for torts may be assigned, provided they arise from wrongs caused from injury to real or personal property, or from

> frauds, deceits or other torts by which an estate, real or personal, has been injured, diminished or damaged. This class of assignable choses in action for torts includes rights of action to recover for the wrongful taking and conversion of personal property. The assignability of things in action is now the rule and non-assignability the exception. Practically the only classes of choses in action which are not assignable are those for torts for personal injuries, and for wrongs done to the person, the reputation, or the feelings of the injured party, and those based on contracts of a purely personal nature, such as promises of marriage.'"

It has been recognized by the Missouri courts that a claim for punitive damages is assignable. The Missouri Supreme so held in State ex rel. Smith v. Greene, 494 S.W.2d 55 (Mo. 1973). In the Greene case, the court held at page 60 that Missouri's policy is such that punitive damages are not compensatory, but are imposed for the purpose of punishment and deterrence to prevent the wrongdoer or other from engaging in the same type of action. In holding that a punitive damage claim is assignable, the Court found that the policy supporting punitive damages would not be supported if a right to assert a claim for punitive damages were not assignable along with the underlying claim. More recently, the Missouri Court of Appeals has held in Eastern Atlantic Transportation v. Dingman, 727 S.W.2d 418 (Mo.App. W.D. 1987) that a claim for punitive damages is assignable.

The reasoning by the Eighth Circuit Court of Appeals in the Quick case is flawed. It relies upon authority precluding assignment of claims for personal bodily injury. The

claims in Quick were ones asserted for recovery of damages arising from the breach of insurance contract duties owed. It was a bad faith case arising from failure to settle and failure to defend a claim for personal bodily injuries. It was not an assignment of a bodily injury claim. The decision in the Quick case purporting to hold that claims for bad faith against insurance companies, or for that matter, other tort claims (excluding bodily injury claims) are not assignable, is clearly contrary to longstanding Missouri case law precedent.

Missouri now allows assignment of commercial tort claims to secure commercial transactions governed by the uniform commercial code. Section 400.9-102 (13), 400.9-108 (e), 400.9-109 (d)(12) RSMo.

Although the claims assigned by Arlene Bateman to the Stones in this case may not qualify as "commercial tort claim" as defined by the Missouri version of the UCC, they do in fact represent tort claims which have been widely recognized as being assignable in longstanding Missouri case precedent. The claims are not for personal bodily injury. The claims assigned are in fact all claims or causes arising out of breach of obligations owed under a contract.

The challenge to the assignment by Farm Bureau is without merit.

REPLY OF ALBERT J. STONE AND TAMMY STONE TO SUBSTITUTE BRIEF OF FARM BUREAU SUBMITTED IN RESPONSE TO POINTS OF ERROR ASSERTED BY ALBERT J. STONE AND TAMMY STONE

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) BECAUSE, AS A MATTER OF LAW, FARM BUREAU=S POLICY WAS IN EFFECT AND PROVIDED LIABILITY INSURANCE COVERAGE FOR ARLENE BATEMAN ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002, IN THAT (A) FARM BUREAU=S EFFORTS TO CANCEL THE POLICY WERE WHOLLY INEFFECTIVE AND NOT IN COMPLIANCE WITH CONTRACTUAL REQUIREMENTS OF ITS POLICY AS ITS CANCELLATION NOTICE OF OCTOBER 9, 2002 WAS MAILED ON OCTOBER 10, 2002 AND DID NOT PROVIDE TEN DAYS NOTICE, AND ALL PRIOR NOTICES WERE NOT IN FACT LAWFUL CANCELLATION NOTICES OR IN COMPLIANCE WITH THE CONTRACT PROVISIONS OF THE POLICY OR THE LAW IN THE STATE OF MISSOURI AND (B) FARM BUREAU WAS NOT ENTITLED TO CLAIM CANCELLATION DUE TO A WHOLLY INEFFECTIVE EFFORT AT CANCELLATION AS THE LAW DOES NOT ALLOW FOR AN INSURANCE COMPANY SEEKING TO CANCEL ITS LIABILITY INSURANCE POLICY TO OBTAIN PROSPECTIVE BENEFIT OF

IMPROPER CANCELLATION EFFORTS AND THE POLICY REMAINED IN EFFECT UNTIL ITS EXPIRATION DATE OF FEBRUARY 2, 2003.

POINT II

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) OF THE AMENDED PETITION AS THERE WAS NO WAIVER OF THOSE CLAIMS BY THE STONES IN THAT (A) THE STONES SOUGHT ONLY PARTIAL SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIM AND ASSERTED WITHIN THEIR MOTION THAT ITS OTHER CLAIMS FOR RELIEF SET FORTH WITHIN COUNTS II THROUGH VI, INCLUSIVE, SHOULD REMAIN PENDING AFTER THE COURT GRANTED PARTIAL SUMMARY JUDGMENT ON COUNT I AND IN SEEKING SUCH RELIEF, WHICH THE STONES WERE ENTITLED TO UNDER RULE 74.04, THERE WAS NO WAIVER OF THE OTHER CLAIMS BEFORE THE COURT IN THE AMENDED PETITION AND (B) THE STONES SOUGHT ONLY AN INTERLOCUTORY JUDGMENT, AND NOT A FINAL JUDGMENT, BY THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE GRANTING OF PARTIAL SUMMARY JUDGMENT ON THEIR COUNT I, BREACH OF CONTRACT CLAIM, DID NOT PRECLUDE THEM FROM SEEKING RECOVERY OF DAMAGES AND POSSIBLY PUNITIVE DAMAGES ON THE OTHER CLAIMS ASSERTED WITHIN THE AMENDED

PETITION. THE ADJUSTMENT OF SUCH DAMAGES IN THE EVENT OF AN OVERLAP OR DUPLICATION WAS FOR THE COURT TO DIRECT AT THE TIME OF FINAL JUDGMENT.

Cases

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. 2005)

Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999)

State ex rel. Farmers Insurance Co. v. Murphy, 518 S.W.2d 655 (Mo. 1975)

Trimble v. Pracna, 167 S.W.3d 706 (Mo. 2005)

POINT III

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) OF THE AMENDED PETITION BECAUSE THE STONES IN FACT HAD STANDING TO ASSERT THE CLAIMS IN THE AMENDED PETITION BY VIRTUE OF A VALID ASSIGNMENT RECEIVED FROM ARLENE BATEMAN, FARM BUREAU=S INSURED, IN THAT: (A) THERE WAS NO PROOF PRESENTED THAT THE ASSIGNMENT ATTACHED TO THE AMENDED PETITION WAS INVALID AND FARM BUREAU LACKED STANDING TO CHALLENGE THE VALIDITY OF THE ASSIGNMENT AS IT WAS NOT A PARTY TO IT; AND (B) THE ASSIGNMENT ON ITS FACE WAS ENFORCEABLE AND SUPPORTED BY CONSIDERATION.

POINT IV

THE TRIAL COURT ERRED IN DISMISSING COUNT VI (CLAIM FOR PUNITIVE DAMAGES) BECAUSE RECOVERY BY THE STONES ON ANY OF THE OTHER TORT THEORIES ASSERTED WITHIN THEIR AMENDED PETITION, THE SAME BEING COUNTS II THROUGH V WOULD HAVE ENTITLED THE STONES TO HAVE THE COURT CONSIDER, UNDER APPROPRIATE CIRCUMSTANCES, THE SUBMISSION OF A PUNITIVE DAMAGE COUNT TO A TRIER OF FACT AND THE GRANT OF PARTIAL SUMMARY JUDGMENT WHICH THE STONES SOUGHT FROM THE COURT DID NOT PRECLUDE THEM AS A MATTER OF LAW IN PROCEEDING TO OBTAIN RECOVERY ON THEIR TORT THEORIES ASSERTED WITHIN THE AMENDED PETITION.

Cases

Shervin v. Huntleigh Securities Corp., 85 S.W.3d 737 (Mo.App. E.D. 2002)

Schimmer v. H.W. Freeman Const. Co., 607 S.W. 2d 767 (Mo.App. E.D. 1980)

Williams v. Finance Plaza, Inc., 78 S.W.3d 175 (Mo.App. W.D. 2002)

POINT V

THE TRIAL COURT ERRED IN DISMISSING COUNTS II AND III OF THE AMENDED PETITION AS THE LAW IN THE STATE OF MISSOURI CLEARLY IMPOSES A FIDUCIARY DUTY ON THE PART OF A LIABILITY INSURER TO PROVIDE DEFENSE AND RESOLVE CLAIMS AGAINST ITS INSURER ONCE THE LIABILITY INSURER HAS BEEN INFORMED OF A LIABILITY CLAIM AGAINST ITS INSURED AND EXISTENCE OF THE TORT OF BAD FAITH IN THE STATE OF MISSOURI DOES NOT PRECLUDE THE ASSERTION OF A CLAIM FOR THE TORT OF BREACH OF FIDUCIARY DUTY, EVEN THOUGH THEY ARE RELATED.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) BECAUSE, AS A MATTER OF LAW, FARM BUREAU=S POLICY WAS IN EFFECT AND PROVIDED LIABILITY INSURANCE COVERAGE FOR ARLENE BATEMAN ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002, IN THAT (A) FARM BUREAU=S EFFORTS TO CANCEL THE POLICY WERE WHOLLY INEFFECTIVE AND NOT IN COMPLIANCE WITH CONTRACTUAL REQUIREMENTS OF ITS POLICY AS ITS CANCELLATION NOTICE OF OCTOBER 9, 2002 WAS MAILED ON OCTOBER 10, 2002 AND DID NOT PROVIDE TEN DAYS NOTICE, AND ALL PRIOR NOTICES WERE NOT IN FACT LAWFUL CANCELLATION NOTICES OR IN COMPLIANCE WITH THE CONTRACT PROVISIONS OF THE POLICY OR THE LAW IN THE STATE OF MISSOURI AND (B) FARM BUREAU WAS NOT ENTITLED TO CLAIM CANCELLATION DUE TO A WHOLLY INEFFECTIVE EFFORT AT CANCELLATION AS THE LAW DOES NOT ALLOW FOR AN INSURANCE COMPANY SEEKING TO CANCEL ITS LIABILITY INSURANCE POLICY TO OBTAIN PROSPECTIVE BENEFIT OF

IMPROPER CANCELLATION EFFORTS AND THE POLICY REMAINED IN EFFECT UNTIL ITS EXPIRATION DATE OF FEBRUARY 2, 2003.

Argument

Farm Bureau contends in its first point submitted in response to the claims of error asserted by the Stones in their Appellants= Brief that part of the trial court judgment was incorrect as there was no coverage under the policy due to its cancellation.

The efforts undertaken by Farm Bureau to effect a cancellation of its policy are fully briefed in the Stones= initial Appellants= Brief, and in the points submitted heretofore in this brief and will not be repeated.

In summary, Farm Bureau=s efforts to effect a cancellation of the policy prior to its expiration date were wholly ineffectual. As such, the policy remained in effect through the date of the accident, December 23, 2002. The Stones had valid tort theory claims before the trial court which they were entitled to have heard and they did not waive those claims by virtue of seeking partial summary judgment in the case on their breach of contract claim.

POINT II

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) OF THE AMENDED PETITION AS THERE WAS NO

WAIVER OF THOSE CLAIMS BY THE STONES IN THAT (A) THE STONES SOUGHT ONLY PARTIAL SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIM AND ASSERTED WITHIN THEIR MOTION THAT ITS OTHER CLAIMS FOR RELIEF SET FORTH WITHIN COUNTS II THROUGH VI, INCLUSIVE, SHOULD REMAIN PENDING AFTER THE COURT GRANTED PARTIAL SUMMARY JUDGMENT ON COUNT I AND IN SEEKING SUCH RELIEF, WHICH THE STONES WERE ENTITLED TO UNDER RULE 74.04, THERE WAS NO WAIVER OF THE OTHER CLAIMS BEFORE THE COURT IN THE AMENDED PETITION AND (B) THE STONES SOUGHT ONLY AN INTERLOCUTORY JUDGMENT, AND NOT A FINAL JUDGMENT, BY THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE GRANTING OF PARTIAL SUMMARY JUDGMENT ON THEIR COUNT I, BREACH OF CONTRACT CLAIM, DID NOT PRECLUDE THEM FROM SEEKING RECOVERY OF DAMAGES AND POSSIBLY PUNITIVE DAMAGES ON THE OTHER CLAIMS ASSERTED WITHIN THE AMENDED PETITION. THE ADJUSTMENT OF SUCH DAMAGES IN THE EVENT OF AN OVERLAP OR DUPLICATION WAS FOR THE COURT TO DIRECT AT THE TIME OF FINAL JUDGMENT.

Argument

Farm Bureau asserts that the Stones waived their tort claims by seeking an interlocutory order granting partial summary judgment on Count I, the breach of contract

claim. First, waiver involves the intentional relinquishment of a known right. It may be express or it may be implied by conduct that clearly and unequivocally shows a purpose to relinquish a right. Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999). In order for a waiver to be found, there must be a clear, unequivocal and decisive act by a party showing such purpose, and so consistent with the intention to waive that no other reasonable explanation is possible. Bartleman v. Humphrey, 441 S.W.2d 335 (Mo. 1969). In view of this standard, it can be seen that the Stones never sought to waive their tort theories of recovery asserted against Farm Bureau. The Stones submitted what was titled "Plaintiffs' Motion For Partial Summary Judgment" (L.F. p. 58) and wherein they requested the following relief:

> "WHEREFORE, plaintiffs request the court to enter its order granting partial summary judgment and enter its interlocutory judgment as follows: . . ." (emphasis added)

Additionally, the Stones submitted in their reply memorandum of law the following:

> "Upon the court's consideration of all of these matters, it is respectfully suggested that the plaintiffs' motion for partial summary judgment should be granted in all respects."
>
> (Appendix to Appellants' Substitute Brief A-17, A-32).

The Stones clearly never sought to have their claims prosecuted to a "final" judgment unlike the parties in the cases against whom a waiver was found and cited by

Farm Bureau in its brief, which reflect in each instance, that a final judgment was sought on all claims.

Rule 74.04(a) authorizes a claimant, with our without supporting affidavits, to seek a A. . . summary judgment upon all or any part of the pending issues@ additionally, 74.04(c)(4) provides, in part, the following:

> AA summary judgment interlocutory in character, may be entered on any issue, including the issue of liability alone, although there is a genuine issue as to the amount of the damages@.

Rule 55.06 allows a party to join independent or alternative claims, whether legal or equitable, in any suit against an opposing party.

This factual background, in view of the rules and legal authorities, establishes that there was no intentional relinquishment of a known right to proceed on the theories asserted, in tort, by the Stones. They never sought a final judgment from the court. It is suggested that the trial court entered a final judgment only after erroneously sustaining Farm Bureau=s motion for summary judgment on the other counts. The Stones never elected to proceed solely on their breach of contract theory although the actual damages, which the Stones may have been entitled to recover on their tort theories would have been overlapping. Duplication of recovery, which a waiver seeks to prevent, could have been and properly would have been corrected by the trial court in entry of final judgment declaring that one single recovery or payment of actual damages could be had. Additionally, prevailing on any of the tort theories would have allowed the Stones, as the

plaintiffs in the suit, to proceed with efforts to have additional damages assessed against Farm Bureau in the form of exemplary or punitive damages. The contract theory did not allow such recovery. It would only have been after proceeding through trial on the tort theories in an appropriate fashion before the Stones could have ever had an opportunity to submit their exemplary or punitive damage claim to the court and jury for consideration. They should have been allowed to do so. It is not improper to join contract and tort theories of recovery in a single suit. State ex rel. Farmers Insurance Company v. Murphy, 518 S.W.2d 655 (Mo. 1975).

The cases relied upon by Farm Bureau as authority for its assertion that a waiver was made by the Stones in this case are not applicable. The facts in Perez v. Boatmen's National Bank of St. Louis, 788 S.W.2d 296 (Mo.App. E.D. 1990), relied upon by Farm Bureau are clearly distinguishable. Unlike the Perez case, the Stones never sought a final summary judgment order. They only sought an interlocutory order on a motion for partial summary judgment. They did not choose to proceed to a final judgment and no waiver can be implied. Likewise, the case of Premium Financing Specialists v. Hullin, 90 S.W.3d 110 (Mo.App. W.D. 2002), relied upon by Farm Bureau, does not support its contention and position taken in its brief that there was a waiver by the Stones. Indeed, in the Premium Financing case the court held that no waiver had occurred. No efforts had been made by the plaintiff in Premium Financing to prosecute its claims to a final judgment on a contract claim.

Farm Bureau's reliance on Meco Systems v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794 (Mo.App. S.D. 2001), is also misplaced. In Meco, a party had prosecuted a

suit through trial and judgment on a claim for breach of contract and sought, in addition, judgment for unjust enrichment. Meco had sought to go to final judgment in the case. The Stones, under the facts of this case, did not seek, by their motion, a final judgment on all of their claims. In addition, recovery by Meco would not have afforded an opportunity for the assessment of an additional element of damages in the form of exemplary or punitive damages by virtue of effecting recovery on an additional claim with overlapping damages. Such is not the background in this case.

Had the Stones been properly allowed to proceed on their tort theories of recovery, they would have been entitled to submit the same for determination to a fact finder under proper instructions calling for packaging as required by Missouri approved instruction forms. Once a jury had determined that recovery upon one or more of the tort theories was proper, the Stones would have been entitled to have the court, under appropriate circumstances instruct the jury on the possible assessment of exemplary or punitive damages in the case. The court, in its final judgment on any jury verdicts rendered on the various claims could have easily addressed any duplication of damages, finding one actual damage award available under all of the theories seeking recovery of actual damages and enter final judgment.

The claims of Farm Bureau regarding waiver of tort claims or election of remedies has been clearly determined to be improper by more recent pronouncements of the law regarding these theories by the Missouri Supreme Court in Trimble v. Pracna, 167 S.W.3d 706 (Mo. 2005) and Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. 2005). This case clearly did not pose an election of remedies or waiver situation which

the trial court was entitled to address. In accord with prior Supreme Court rulings on these matters, the Stones were entitled to proceed with presentation of their tort claims before a trier of fact, even though they sought partial summary judgment on their breach of contract claim. There was no inconsistent theory asserted. There was no election of remedy made.

There was clearly no waiver of the tort claims in this case by the Stones.

POINT III

THE TRIAL COURT ERRED IN DISMISSING COUNT II (BREACH OF FIDUCIARY DUTY TO DEFEND), COUNT III (BREACH OF FIDUCIARY DUTY TO SETTLE), COUNT IV (BAD FAITH FAILURE TO DEFEND), COUNT V (BAD FAITH FAILURE AND REFUSAL TO SETTLE) AND COUNT VI (PUNITIVE DAMAGES) OF THE AMENDED PETITION BECAUSE THE STONES IN FACT HAD STANDING TO ASSERT THE CLAIMS IN THE AMENDED PETITION BY VIRTUE OF A VALID ASSIGNMENT RECEIVED FROM ARLENE BATEMAN, FARM BUREAU=S INSURED, IN THAT: (A) THERE WAS NO PROOF PRESENTED THAT THE ASSIGNMENT ATTACHED TO THE AMENDED PETITION WAS INVALID AND FARM BUREAU LACKED STANDING TO CHALLENGE THE VALIDITY OF THE ASSIGNMENT AS IT WAS NOT A PARTY TO IT; AND (B) THE ASSIGNMENT ON ITS FACE WAS ENFORCEABLE AND SUPPORTED BY CONSIDERATION.

Argument

Farm Bureau asserts in Point III of that portion of its brief responding to the Appellants= Substitute Brief of the Stones that the Stones lack standing to pursue their tort claims. In lieu of repetition of argument, Farm Bureau requested the court to consider again its analysis for that point set forth in pages 39 through 42 of Farm Bureau=s Substitute Respondent's Brief. As such, the Stones also request the Supreme Court to review their response to that portion of Farm Bureau=s brief, rather than repeating the same arguments previously stated.

POINT IV

THE TRIAL COURT ERRED IN DISMISSING COUNT VI (CLAIM FOR PUNITIVE DAMAGES) BECAUSE RECOVERY BY THE STONES ON ANY OF THE OTHER TORT THEORIES ASSERTED WITHIN THEIR AMENDED PETITION, THE SAME BEING COUNTS II THROUGH V WOULD HAVE ENTITLED THE STONES TO HAVE THE COURT CONSIDER, UNDER APPROPRIATE CIRCUMSTANCES, THE SUBMISSION OF A PUNITIVE DAMAGE COUNT TO A TRIER OF FACT AND THE GRANT OF PARTIAL SUMMARY JUDGMENT WHICH THE STONES SOUGHT FROM THE COURT DID NOT PRECLUDE THEM AS A MATTER OF LAW IN PROCEEDING TO

OBTAIN RECOVERY ON THEIR TORT THEORIES ASSERTED WITHIN THE AMENDED PETITION.

Argument

Farm Bureau asserts in Point IV in response to the claims of error of the Stones that the trial court did not err in dismissing Count VI of the Stones= Amended Petition which sought recovery for exemplary or punitive damages. Farm Bureau asserts that no recovery of punitive damages could be had as the Stones did not seek punitive damages on Count I of their Amended Petition which asserted a claim for breach of contract. That is in fact true. Additionally, it is true that the Stones did not seek final judgment to be entered on their claim for breach of contract, only a interlocutory order to the effect that Farm Bureau had, at a minimum, breached its contract, and that it would be facing damages, at a minimum, in an amount equal to the two outstanding judgments.

The Stones in fact sought the assessment of exemplary or punitive damages in the event they obtained recovery on one or more of their tort theories asserted within Counts II through IV, i.e., the claims for breach of fiduciary duty and bad faith. More particularly, the Stones asserted within Count VI of their Amended Petition, & 54 (L.F. 21) that the conduct of Farm Bureau as set forth within the claims or causes asserted within Counts II, III, IV or V was A . . . in one or all events alleged or asserted in each and all of the aforementioned counts, intentional tortious conduct which was willful, wanton, and in reckless disregard of the rights of others.@

The Stones take no issue with Farm Bureau=s assertion that under the pleadings in this case, exemplary damages could not be awarded for any final judgment on the Stones breach of contract claim asserted within Count I. However, the Stones sought no final judgment for breach of contract.

Farm Bureau also asserted that a breach of a fiduciary duty does not allow for recovery of exemplary or punitive damages, citing Brown v. Mercantile Bank of Poplar Bluff, 820 S.W.2d 327 (Mo.App. S.D. 1991). What in fact the Court of Appeals held in Brown was that there was no fiduciary duty existing between the borrower and the lender in that case and therefore, punitive damages could not be assessed on the breach of contract claim. The Brown case simply did not involve a breach of a fiduciary duty.

A breach of a fiduciary duty is a species of fraud. Shervin v. Huntleigh Securities Corp., 85 S.W.3d 737 (Mo.App. E.D. 2002); Schimmer v. H.W. Freeman Const. Co., 607 S.W.2d 767 (Mo.App. E.D. 1980). As an intentional tort, and a species of fraud, punitive damages may be recoverable for a breach of fiduciary duty if proof is presented at time of trial of the willful, wanton, or reckless indifference to the rights of others as alleged in the Stones Amended Petition. Williams v. Finance Plaza, Inc., 78 S.W.3d 175 (Mo.App. W.D. 2002).

The Stones alleged in their Amended Petition, particularly Count VI thereof (L.F. 21) that the conduct of Farm Bureau in breaching its fiduciary duty constituted intentional tortious conduct, which was willful, wanton and in reckless disregard of the rights of others. Farm Bureau presented nothing to the trial court to indicate otherwise. The trial

court=s order granting summary judgment on the punitive damage claim, as well as the other counts within the Stones= Amended Petition were in error.

Farm Bureau=s asserted that the breach of fiduciary duty claims asserted as Counts II and III of the Amended Petition cannot be separately asserted from the bad faith claims asserted as Counts III and IV of the Amended Petition. Farm Bureau asserts that a separate claim for breach of fiduciary duty cannot be asserted under the circumstances. There is no Missouri case law supporting Farm Bureau=s assertion.

A claim for bad faith against an insurance company arises by virtue of the existence of a fiduciary duty. However, as pointed out in the Stones Appellants= Substitute Brief a claim for bad faith necessarily involves proving dishonest conduct. See Appellants= Substitute Brief pages 46 through 48. However, a claim for breach of fiduciary duty involves proving a special or confidential relationship, which arises by virtue of a trust being reposed, either as contracted for, or arising by virtue of the conduct of the parties. A breach of fiduciary duty arises whenever a party who is charged with the trust relationship fails and refuses to discharge it properly with damage resulting. As mentioned previously within Appellants= Substitute Brief at pages 30 through 36, Farm Bureau contracted for discharge of a fiduciary obligation by insisting that in the event a claim was made against its insured, Arlene Bateman, that it had the right to control defense of any such claim, and control settlement of any such claim. Its fiduciary obligations were triggered by virtue of being notified of the claims and suits against Arlene Bateman in this case. Farm Bureau completely failed and refused to discharge its

fiduciary obligations, which it insisted upon obtaining by virtue of its insurance policy language.

It is respectfully submitted that the distinction between a claim for breach of fiduciary duty asserted against a liability insurer and a claim for bad faith against a liability insurer is as follows: A claim for breach of fiduciary duty may be asserted by showing that an insurer has retained unto itself the right to control defense of any claims or suits, and right to control settlement of any such claims or suits, and fails to discharge such duties. Such is an independent tort. A claim for bad faith arises when indeed there are such fiduciary duties, and the failure and refusal on the part of the insurer to discharge its duties amounts to a lack of honest judgment in an effort to protect the insured, i.e., dishonest conduct.

In this case, claims for breach of fiduciary duty on the part of Farm Bureau were asserted in Counts II and III of the Amended Petition and claims for bad faith were asserted in Counts III and IV. (L.F. pgs. 14-20). Farm Bureau presented no evidence to justify the trial courts grant of its motion for summary judgment on those claims or the claims of the Stones for assessment of exemplary or punitive damages.

POINT V

THE TRIAL COURT ERRED IN DISMISSING COUNTS II AND III OF THE AMENDED PETITION AS THE LAW IN THE STATE OF MISSOURI CLEARLY IMPOSES A FIDUCIARY DUTY ON THE PART OF A LIABILITY

INSURER TO PROVIDE DEFENSE AND RESOLVE CLAIMS AGAINST ITS INSURER ONCE THE LIABILITY INSURER HAS BEEN INFORMED OF A LIABILITY CLAIM AGAINST ITS INSURED AND EXISTENCE OF THE TORT OF BAD FAITH IN THE STATE OF MISSOURI DOES NOT PRECLUDE THE ASSERTION OF A CLAIM FOR THE TORT OF BREACH OF FIDUCIARY DUTY, EVEN THOUGH THEY ARE RELATED.

Argument

The matters raised by Farm Bureau under its Point V of that portion of its brief submitted in response to the Stones Appellants' Substitute Brief are believed to be adequately addressed in the prior points of the Stones' Reply Brief. As such, their argument in reply will not be repeated here.

CONCLUSION

It is respectfully requested that the Missouri Supreme Court should issue its opinion and order as follows:

(A) Affirming that part of the judgment of the trial court granting Plaintiffs= Motion For Partial Summary Judgment, and declaring such motion sought an interlocutory order and not a final judgment on Count I on the Stones claim for breach of contract and:

(1) Did not constitute an election of remedies; and

(2) Did not constitute a waiver of other claims and theories of recovery asserted.

(B) Reversing that part of the trial court=s judgment entered in favor of Farm Bureau and against the Stones on Counts II, (Claim for Breach of Fiduciary Duty in Failure to Defend), Count III, (Claim for Breach of Fiduciary Duty in Failure to Settle), Count IV, (Claim for Bad Faith in Failure to Defend), Count V, (Claim for Bad Faith in Failure to Settle) and Count VI, (Claim for Exemplary or Punitive Damages) and hold:

(1) A claim for breach of fiduciary duty is an intentional tort for which punitive damages may be assessed and that there was no showing by Farm Bureau in regard to the claims for breach of fiduciary duty, (Counts II and III) entitling Farm Bureau to summary judgment.

(2) The claims asserted by the Stones for bad faith, although similar to claims of fiduciary duty, require in and of themselves, proof of dishonest conduct on the part of Farm Bureau in its failure to defend and its failure to settle.

(3) The Stones claim for exemplary or punitive damages in Count VI in the event recovery is obtained on either Counts II through IV should be submitted to a trier of fact upon determination by the court that there is sufficient evidence to indicate conduct on the part of Farm Bureau that was willful, wanton, and in reckless disregard of the rights of its insured.

(C) Remand of the case to the trial court for trial on Counts II through VI asserted in the Stones= Amended Petition.

_____
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Microsoft Word, by which it was prepared, contains 14,635 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing this Appellant=s brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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Certificate of Service

The undersigned hereby certifies that on the _____ day of June, 2006, one original and 10 true and correct copies of the foregoing brief to the brief and one diskette containing a copy of the brief were sent to the Missouri Supreme Court as required by Rule 84.06(f) and two copies of the brief and appendix and diskette containing a copy of the brief were forwarded to Mr. Joseph P. Winget, P.O. Box 4043, Springfield, Missouri, 65808-4043,via:

G	United States Mail	G	Facsimile transfer to counsel
G	Overnight Mail	G	Hand delivery to courthouse
G	Certified Mail	G	Hand delivery to counsel

_____
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