IN THE SUPREME COURT OF MISSOURI

Appeal No. SC93502

KEN AND JANET ALLEN
AND
FRANKLIN QUICK CASH

Plaintiffs/Respondents,

v.

CONTINENTAL WESTERN INSURANCE COMPANY,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, STATE OF MISSOURI
THE HONORABLE JOHN B. BERKEMEYER, JUDGE PRESIDING

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On May 14, 2012, Judge Berkemeyer granted the Plaintiffs' Motion for Partial Summary Judgment and denied Continental Western's Cross-Motion for Summary Judgment, implicitly concluding that Continental Western was obligated to defend Franklin Quick Cash and Ken Allen in the action: Stephanie Whipple v. Franklin Quick Cash, LLC, a Missouri Limited Liability Company and Ken Allen. The Order was not accompanied by a written opinion explaining the trial court's reasoning. (Id.). On October 9, 2012, an amended final judgment was entered in favor of Franklin Quick Cash, LLC and Ken and Janet Allen by Judge Berkemeyer.

On October 15, 2012, Continental Western filed its notice of appeal. On April 30, 2013, the Eastern District of the Missouri Court of Appeals reversed Judge Berkemeyer's decision and remanded the case to the trial court with instructions to enter summary judgment in favor of Continental Western. Allen v. Continental Western Ins. Co., 2013 WL 1803476 (Mo. Ct. App. April 30, 2013). The Court of Appeals concluded that Continental Western had no duty to defend the insureds in Ms. Whipple's action because "[t]he alleged conversion of Whipple's car was an intentional act not falling within the meaning ascribed to the term 'occurrence' or 'accident.'" Id. The Court further concluded that "the factual allegations of Count II and IV (negligence), including those allegations incorporated by references, [were] premised upon intentional conduct (i.e., Amended Petition paragraph 8b, supra: 'defendants intended to exercise control over the said vehicle')." Id. The Court observed, however, that "assuming, *arguendo*, Whipple's allegations of negligence create potential or possible coverage, we find, nevertheless, that

the Insurance Policy excludes coverage." Id. According to the Court, the "Insureds consciously acted to repossess Whipple's Vehicle with both the intention and expectation that Whipple would not be able to use it." Id

This Court has appellate jurisdiction under Article V, Section 3 of the Missouri Constitution as amended in 1982. Pursuant to Section 477.050 R.S. Mo. (2012), this Court has territorial jurisdiction of appeals from decisions of the Circuit Court of Franklin County, 20th Judicial Circuit.

POINTS RELIED UPON

Point 1: The trial court erred in implicitly finding that Continental Western was obligated to defend the Underlying Action because Ms. Whipple did not allege any "property damage" as that term is defined in the policies in that there was no physical injury to or loss of use of Ms. Whipple's vehicle.

a. Federated Mut. Ins. Co. v. Madden Oil Co., Inc., 734 S.W.2d 258 (Mo. Ct. App. 1987).

b. Collins v. American Empire Ins. Co., 21 Cal. App. 4th 787 (Cal. App. Ct. 1994).

c. NWS Corp. v. Hartford Fire Ins. Co., 2013 WL 2325175 (D. Mass. April 25, 2013).

Point 2: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because the damages complained of were

not the result of an accident as required by the insuring agreement to the policies in that the insureds purposefully and intentionally seized Ms. Whipple's vehicle.

a. Angelina Casualty Co. v. Pattonville-Bridgeton Terrace Fire Protection Dist., 706 S.W.2d 483 (Mo. Ct. App. 1986).

b. Federated Mut. Ins. Co. v. Madden Oil Co., Inc., 734 S.W.2d 258 (Mo. Ct. App. 1987).

c. Landers Auto Group No. One, Inc. v. Continental Western Ins. Co., 621 F.3d 810 (8th Cir. 2010).

Point 3: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because coverage was excluded under the policies in that the insureds expected and intended the only damage complained of when they deprived Ms. Whipple of her vehicle.

a. Landers Auto Group No. One, Inc. v. Continental Western Ins. Co., 621 F.3d 810 (8th Cir. 2010).

b. Federated Mut. Ins. Co. v. Madden Oil Co., Inc., 734 S.W.2d 258 (Mo. Ct. App. 1987).

c. Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116, 1125 (7th Cir. 1998).

d. American Family Mutual Insurance Company v. Franz, 980 S.W.2d 56, 57-58 (Mo. Ct. App. 1998).

Point 4: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because the policies exclude coverage for

any "property damage" that may have been sustained while Ms. Whipple's vehicle was in the insureds' "care, custody or control" in that the only damage complained of happened while the vehicle was in the insureds' care, custody or control.

a. Valentine-Radford, Inc. v. American Motorists Ins. Co., 990 S.W.2d 47 (Mo. Ct. App. 1999).

b. Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co., 755 S.W.2d 300 (Mo. Ct. App. 1988).

c. Estrin Const. Co., Inc. v. Aetna Cas. and Sur. Co., 612 S.W.2d 413 (Mo. Ct. App. 1981).

d. Michigan Millers Mut. Ins. Co. v. DG&G Co., Inc., 2007 WL 3120048 (E.D. Mo. Oct. 23, 2007).

Point 5: The trial court erred to the extent it relied on the doctrine of reasonable expectations to interpret the Continental Western policies in that the policies are unambiguous.

a. Kertz v. State Farm Mut. Auto Ins. Co., 236 S.W.3d 39 (Mo. Ct. App. 2007).

b. Tactical Stop-Loss, LLC v. Travelers Cas. and Sur. Co. of America, 657 F.3d 757 (8th Cir. 2011) (applying Missouri law).

c. Raines v. Safeco Ins. Co. of America, 637 F.3d 872 (8th Cir. 2011)

d. Killian v. State Farm Fire & Cas. Co., 903 S.W.2d 215 (Mo. Ct. App. 1995)

STATEMENT OF FACTS

For the policy period June 2, 2004 to June 2, 2005, Continental Western Insurance Company ("Continental Western") provided "occurrence" or accident-based commercial general liability insurance coverage to Franklin Quick Cash, LLC through policy number CGL 2529681-21. (101-147). Franklin Quick Cash is in the business of making title loans and payday loans. (149, ¶ 5) The coverage was renewed for the June 2, 2005 to June 2, 2006 policy period. (193). The insureds' business is described in the 2004-2005 and 2005-2006 policies as an "office." (101; 193). The insureds were charged a $250 premium for policies that provided $2,000,000 in coverage during each annual period. (101; 193).

Franklin Quick Cash, LLC and Ken Allen (the "insureds") were sued in an action entitled: Stephanie Whipple v. Franklin Quick Cash, LLC, a Missouri Limited Liability Company and Ken Allen, case number 05AB-CC00265, in Franklin County, Missouri (the "Underlying Action"). (148-153). Ms. Whipple alleged that on March 8, 2005 the defendants took unauthorized possession of her 1998 Plymouth Voyager. (Id., ¶ 8). Ms. Whipple sought compensatory and punitive damages for Conversion. (Id.). The Petition alleged that:

- the Defendants had no legal right to assume ownership or possession of the vehicle;
- the Defendants acted intentionally in exercising control over the vehicle; and

- the Defendants intentionally deprived Ms. Whipple of the use of her vehicle.

(Id., ¶¶ 8.a.–8.g. and 19.a.–19.g). In the original Petition Ms. Whipple expressly alleged that the defendants' conduct was intentional, willful, wanton, and malicious. (Id., ¶¶ 11 and 22). The original Petition did not include an alternative count captioned negligence. (148-153).

Through a letter dated October 24, 2006, Continental Western advised Franklin Quick Cash, LLC and Ken Allen that counsel would not be retained to represent them in the Underlying Action because the damages sought were not covered by the policy. (154-157).

On August 1, 2008, Ms. Whipple filed an Amended Petition. (158-164). In the Amended Petition, Ms. Whipple claimed that on March 8, 2005 and July 17, 2005, the defendants unlawfully took possession of her vehicle and refused to return it. (Id., ¶¶ 8 and 22). Count I and Count II of the Amended Petition sought damages for Conversion and Negligence based on the March 8, 2005 incident. (158-164). Count III and Count IV sought damages for Conversion and Negligence based on the July 17, 2005 incident. (Id.).

The Amended Petition incorporated the same factual allegations as the original Petition. (Id., ¶¶ 8.a.–8.g. and 22.a.–22.g.). In support of the Conversion claims (Counts I and III), Ms. Whipple alleged that the defendants' conduct was intentional, willful, wanton, and malicious. (Id., ¶¶ 11, 25). In support of the negligence claims (Counts II and IV), Ms. Whipple restated, realleged and incorporated by reference the allegation that

"defendants *intended* to exercise control over the said vehicle." (158-164, ¶¶ 8b, 12, 22b, 26).

On November 18, 2008, counsel for Franklin Quick Cash was advised that the damages sought in Ms. Whipple's Amended Petition were not covered by the policy. (See 32, ¶¶ 9-10). On January 26, 2011, the insureds sued Continental Western. (1; 10-14).

The insuring agreement in the Continental Western policies that apply to the coverage provided for "bodily injury" and "property damage" states:

> **SECTION I - COVERAGES**
>
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1**. of Section **II** - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized

> "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

(113).

To fall within this insuring agreement, the following requirements must be met:

- there must be a claim or suit seeking to recover damages for "bodily injury" or "property damage";
- the "bodily injury" or "property damage" must be the result of an "occurrence"; and
- the "bodily injury" or "property damage" must happen during the policy period.

(Id.).

The term "bodily injury" is defined in the Continental Western policies as follows:

> **3.** "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

(125).

No damages were sought for "bodily injury" in the Underlying Action.

The term "property damage" is defined in the Continental Western policies as follows:

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

…

(127).

There was no allegation in the Petition or Amended Petition that there was any physical damage to the vehicle. (See generally 148-153; 158-164). Ms. Whipple did not allege that she sustained an economic loss because she was compelled to lease a substitute vehicle. (See id.).

The term "occurrence" is defined in the Continental Western policies as follows:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(126).

In the Underlying Action, Ms. Whipple alleged that she sustained damages because the insureds took her vehicle and refused to return it. (149-150, ¶¶ 8-9; 151-152, ¶¶ 19-20; 159, ¶¶ 8-9; 162, ¶¶ 22-23). The allegation that the insureds acted intentionally

was incorporated by reference into each count of the Petition and Amended Petition. (150, ¶ 11; 151, ¶ 22; 160, ¶ 11; 162, ¶ 25).

The Continental Western policies incorporate the following exclusion:

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

(114).

In the Underlying Action, it was alleged that the insureds intended to deprive Ms. Whipple of the vehicle and intended to exercise control over the vehicle. (149, ¶ 8b.; 150, ¶ 11; 151, ¶ 19b.; 152, ¶ 22; 159, ¶ 8b.; 160, ¶ 11; 162, ¶ 22b.; 162, ¶ 25).

The Continental Western policies also incorporated exclusion j.(4) which provides:

This insurance does not apply to:

j. Property damage to:

. . .

(4) Personal property in the care, custody or control of the insured;

. . .

(116) (emphasis added).

The Petition and Amended Petition alleged that the insureds unlawfully exercised physical dominion and control over the vehicle. (149-150, ¶ 8; 151-152, ¶ 19; 159, ¶ 8; 162, ¶ 22).

ARGUMENT

A. Legal standard applicable to all Points Relied On.

This Court reviews a trial court's decision to grant a summary judgment motion *de novo*. Columbia Cas. Co. v. HIAR Holding, L.L.C., -- S.W.3d --, 2013 WL 4080770 at *3 (Mo. banc Aug. 13, 2013) (citing ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993)). The record is viewed in the light most favorable to the party against whom judgment was entered. Id.

The interpretation and meaning of an insurance policy is a question of law. Mendenhall v. Property and Cas. Ins. Co. of Hartford, 375 S.W.3d 90, 92 (Mo. 2012). Where no ambiguity exists in the contract, the court enforces the policy as written. Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300, 302 (Mo. banc 1993).

General liability policies "insure among other things, certain property damage caused by accident to the property of others." Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 77 (Mo. 1998). The intent of the policies "is to protect against the unpredictable, potentially unlimited liability that can be caused by accidentally causing injury to other persons or their property." Id. (citing Weedo v. Stone–E–Brick, Inc., 405 A.2d 788, 791-92 (N.J. 1979)).

A commercial general liability policy is not intended to protect business owners against every risk of operating a business. Schauf, 967 S.W.2d at 77 (citations omitted).

Some risks, termed "business risks," are considered the responsibility of the business owner, rather than the insurer; consequently, they are excluded from coverage. Id. Business risks are those risks that are the "normal, frequent, or predictable consequences of doing business, and which business management can and should control and manage." Id. Excluding such risks from coverage lowers insurance rates and provides an incentive for business owners to manage their businesses more effectively. Id. (citations omitted).

The commercial general liability policies issued by Continental Western did not insure against the business risk that a pay day loan company would be sued for exercising its right to repossess personal property used to secure a loan. No damages could have been awarded in the Underlying Action for "property damage" that resulted from an "accident" and Continental Western had no obligation to defend.

Ordinarily, an insurer's duty to defend is determined from the provisions of the policy and the allegations of the petition charging liability of the insured. Zipkin v. Freeman, 436 S.W.2d 753, 754 (Mo. banc 1968); Angelina Casualty Co. v. Pattonville–Bridgeton Terrace Fire Protection Dist., 706 S.W.2d 483, 484 (Mo. Ct. App. 1986); Travelers Insurance Co. v. Cole, 631 S.W.2d 661, 665 (Mo. Ct. App. 1982). If the petition against the insured alleges facts not within the coverage of the insurance policy, no duty devolves upon the insurer to defend. Cole, 631 S.W.2d at 665; Hawkeye–Security Insurance Co. v. Iowa National Mutual Insurance Co., 567 S.W.2d 719, 721 (Mo. Ct. App. 1978).

Under Missouri law, the insured "must bring itself within the terms of the policy and must carry the burden of offering substantial evidence that the underlying claim is

covered by the policy." Trans World Airlines, Inc. v. Associated Aviation Underwriters, 58 S.W.3d 609, 618-19 (Mo. Ct. App. 2001); see also Southeast Bakery Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635, 638 (Mo. Ct. App. 1998) ("Under Missouri law the insured has the burden of showing by substantial evidence that its claim falls within the coverage provided by the insurance contract"); Auto-Owners Ins. Co. v. McGaugh, 617 S.W.2d 436, 444 (Mo. Ct. App. 1981) ("the burden of proving coverage is upon the person seeking coverage.").

Ms. Whipple incorporated the allegation that the defendants intended to and did take possession of her vehicle in support of her conversion and negligence claims. (158-164, ¶¶ 8b, 12, 22b, 26) (emphasis added). To prevail on their Motion for Summary Judgment, the insureds had the burden of proving that depriving Ms. Whipple of the possession of her vehicle constituted "property damage" caused by an "accident." See Valentine-Radford, Inc. v. American Motorists Ins. Co., 990 S.W.2d 47, 51 (Mo. Ct. App. 1999) (citing Millers Mut. Ins. Ass'n v. Shell Oil Co., 959 S.W.2d 864, 869 (Mo. Ct. App. 1997)).

As held by the Court of Appeals, Continental Western had no duty to defend the insureds in the Underlying Action because "[t]he alleged conversion of Whipple's car was an intentional act not falling within the meaning ascribed to the term 'occurrence' or 'accident.'" Allen v. Continental Western Ins. Co., 2013 WL 1803476 (Mo. Ct. App. April 30, 2013). In reaching this conclusion, the Court of Appeals observed that the factual allegations in support of the negligence counts were premised upon the insureds' intentional conduct. Id. (citing Ms. Whipple's Amended Petition, 158-164, ¶ 8b,

"defendants intended to exercise control over the said vehicle"). The only damages sustained by Ms. Whipple were the expected and intended result of the insureds' intentional act of exercising dominion and control over the vehicle and were not the result of an "accident."

B. Point 1: The trial court erred in implicitly finding that Continental Western was obligated to defend the Underlying Action because Ms. Whipple did not allege any "property damage" as that term is defined in the policies in that there was no physical injury to or loss of use of Ms. Whipple's vehicle.

To meet its burden of proving that the damages sought in the Underlying Action were arguably covered by the insuring agreement to the Continental Western policies, the insureds were required to prove that Ms. Whipple sought compensation for "bodily injury", "property damage", "advertising injury" or "personal injury." (113). The insureds do not contend that damages were sought for "bodily injury", "advertising injury" or "personal injury." The insureds contend that damages were sought for "property damage," a term defined to include physical damage to tangible property and the loss of use of tangible property. (19). There were no allegations in the Underlying Action that the vehicle had been physically damaged. (148-153; 158-164). There were no allegations in the Underlying Action that Ms. Whipple sought damage for "loss of use." There was no evidence that Ms. Whipple was required to lease another vehicle because of the insureds' exercise of control over the vehicle. (Id.).

The Petition and Amended Petition sought damages attributable to Ms. Whipple's loss of the vehicle due to the insureds' intentional assumption of control over the vehicle.

(Id.). Without regard to the label, a claim based on the unauthorized assumption of the right of ownership over the personal property of another is a claim that can only be described as conversion. See Ward v. West County Motor Co., Inc., -- S.W.3d --, 2013 WL 1420997 (Mo. April 9, 2013) (Conversion is the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights).

In Federated Mut. Ins. Co. v. Madden Oil Co., Inc., 734 S.W.2d 258, 263 (Mo. Ct. App. 1987), the underlying action involved a dispute over the insured's right to possession of a transport trailer that was subject to a security agreement at the time it had been purchased. In the underlying replevin action, the holder of the security interest sought to recover the vehicle and $31,000 representing damages for Madden's "wrongful detention." Id. at 259. Following entry of a judgment, Madden settled with the holder of the security interest for $20,000. Id. Madden sued Federal seeking to recover the amount paid in the settlement and the $7,500 spent in defending the replevin action. Id. Madden claimed that the action sought to recover damages for "property damage," a term defined as (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period. Id. The Missouri Court of Appeals found that "conversion did not constitute 'property damage'" under a liability policy. Id. at 263 (citing B & L Furniture Co. v. Transamerica Insurance Co., 257 Or. 548, 480 P.2d 711 (Or. 1971) (acts of conversion by furniture company which

repossessed various items of furniture sold under conditional sales contract did not constitute "property damage caused by an occurrence" under liability policy and insurer was not obligated to defend action for conversion brought against insured.)).

In Harry Winston, Inc. v. Travelers Indem. Co., 366 F. Supp. 988 (E.D. Mo. 1973), the United States District Court for the Eastern District of Missouri was asked to consider whether the plaintiff could recover for the value of jewelry that was allegedly lost in the mail. Id. at 989. The policy provided coverage for damages awarded as a result of "injury to or destruction of property, including loss of use thereof." Id. at 989-90. The court found that there was no "property damage." Id. See also Criticom Intern. Corp. v. Scottsdale Ins. Co., 228 Fed. Appx. 677 (9th Cir. 2007) (alarm systems retailers' complaints alleging that insured improperly sold their equipment did not claim damages for "loss of use" of equipment, within coverage of general commercial liability (GCL) policy; rather, their claim was for conversion.); Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 430 F. Supp. 2d 989 (N.D. Cal. 2006) (none of the damages claimed were for "loss of use" of defective disk drives); F & H Construction v. ITT Hartford Insurance Company of the Midwest, 118 Cal. App. 4th 364 (Cal. App. Ct. 2004) (damage claim for "loss of use" must be based on lost rental value or its equivalent; costs of modifying and repairing defective caps and for loss of early completion bonus not "loss of use" damages); Advanced Network, Inc. v. Peerless Ins. Co., 119 Cal. Rptr. 3d 17 (Cal. App. Ct. 2010) (suit against the insured seeking to recover damages for the loss use of cash stolen by an employee was not covered. Suit was not an action for damages for the "loss

of use" of property within the meaning of the policy.); Maryland Casualty Co. v. Texas Commerce Bancshares, Inc., 878 F. Supp. 939 (N.D. Tex. 1995).

In Collins v. American Empire Ins. Co., 21 Cal. App. 4th 787 (Cal. App. Ct. 1994), the court similarly found that a claim based on the conversion of property is not a claim for "property damage." Id. at 818-19. In Collins, the court found that the "loss" of property must be distinguished from the "loss of use" of property. Id. at 818. The court illustrated the distinction in the following passage:

> "Loss of use" of property is different from "loss" of property. To take a simple example, assume that an automobile is stolen from its owner. The value of the "loss of use" of the car is the rental value of a substitute vehicle; the value of the "loss" of the car is its replacement cost.

Id. While the court noted that the plaintiff in the underlying action had been deprived of the use of the property, no damages were sought for the loss of use. Id. at 818-19. The court found that the policy did not insure against the "loss of property." Id. See also NWS Corp. v. Hartford Fire Ins. Co., 2013 WL 2325175 at *5 (D. Mass. April 25, 2013) (claim for conversion was based on economic damages which fall outside the "loss of use" category of "property damage" under the insurance policy. In addition, conversion is an intentional tort and is excluded by the terms of the policy.); St. Paul Fire & Marine Ins. Co. v. Vadnais Corp., 2012 WL 761664 at *11-12 (E.D. Cal. March 6, 2012) (because the complaint sought damages for conversion based on the replacement of lost water, not damages based on the loss of use of the water, there was no "property damage." "Had the parties contemplated coverage for 'loss of property,' that provision

would have been written into each policy."); General Ins. Co. of America v. Palmetto Bank, 268 S.C. 355, 360, 233 S.E.2d 699, 701 (S.C. 1977) ("conversion" claim is not "property damage" caused by an "occurrence" under a general liability policy); Inland Const. Corp. v. Continental Cas. Co., 258 N.W.2d 881, 884 (Minn. 1977) (same); B & L Furniture Co., supra (same).

Ms. Whipple did not seek to recover damages for "property damage."

C. Point 2: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because the damages complained of were not the result of an accident as required by the insuring agreement to the policies in that the insureds purposefully and intentionally seized Ms. Whipple's vehicle.

Even if the insureds could meet the burden of proving that Ms. Whipple sought compensation for "property damage," they cannot meet the burden of proving that the "property damage" was the result of an "occurrence," a term defined in the Continental Western policies as "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions." (126) (emphasis added).

This court has repeatedly recognized that the term accident must be interpreted in accordance with its common meaning as "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 672 (Mo. Ct. App. 2007) (quotation omitted). "The determinative inquiry into whether there was an 'occurrence' or 'accident' is whether the

insured foresaw or expected the injury or damage." D.R. Sherry Const., Ltd. v. American Family Mut. Ins. Co., 316 S.W.3d 899, 905 (Mo. 2010).

The harm complained of by Ms. Whipple did not result from an "accident" but resulted from the insureds' intentional repossession of the vehicle. It cannot be disputed that the insureds foresaw and expected that the act of repossession would result in Ms. Whipple's loss of the vehicle, the only injury complained of. The insureds' belief that they were legally entitled to exercise of dominion and control over the vehicle may have been legally justified does not transform their intentional and deliberate act into an accident. See American Family Mut. Ins. Co. v. Mission Medical Group, Chtd., 72 F.3d 645, 646-48 (8th Cir. 1995) (applying Missouri law) (the insured's mistaken belief was "of no consequence" where he intended to and did burn down building).

In Madden Oil Co., Inc., supra, the insured argued that the "accident" requirement was met because it believed that it had a legal right to possession of the trailer. 734 S.W.2d at 260. In rejecting this argument, the court found that the loss complained of was caused by the insured's intentional conduct without regard to whether or not the conduct was ultimately determined to be legal. Id. at 263-64.

In reaching this result, the Missouri Court of Appeals relied on a number of decisions from other jurisdictions recognizing that the insured's belief that it was acting within its legal rights did not transform an intentional act into an accident. Id. at 260-64 (citing Georgia Farm Bureau Mut. Ins. v. Meriwether, 169 Ga. App. 363, 312 S.E.2d 823 (Ga. Ct. App. 1983); Foxley & Co. v. U.S. Fid. & Guar. Co., 203 Neb. 165, 277 N.W.2d

686 (Neb. 1979); General Ins. Co. of America v. Palmetto Bank, 268 S.C. 355, 233 S.E.2d 699 (S.C. 1977); and B & L Furniture Co. , supra).

In Landers Auto Group No. One, Inc. v. Continental Western Ins. Co., 621 F.3d 810 (8th Cir. 2010), the Eighth Circuit held that the intentional act of repossessing a vehicle was not an "accident" as required by the insuring agreement to the Continental Western policy. In Landers Auto, the insured sold a car to Latwanna Clark. Id. at 811. The car was financed by Toyota Motor Corporation and Landers guaranteed the loan. Id. Clark alleged that Toyota Motor Corporation failed to credit several of her payments and erroneously listed her as delinquent on the loan. Id. When Toyota Motor Corporation contacted Landers as guarantor, Landers paid the loan in full and repossessed the car. Id. Clark sued Landers and Toyota Motor Corporation, alleging wrongful repossession and conversion and violations of the Arkansas Deceptive Trade Practices Act for failing to credit payments on an open account and for repossessing and selling the car when Clark was not in default. Id. at 811-12.

The Eighth Circuit found that the damages sought were not the result of "property damage" caused by an "occurrence," a term defined as an "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id. at 815. The court determined that Landers' repossession of the car was an intentional act "that would not fit the ordinary definition of an accident." Id.

In Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co., 915 F.2d 306, 311 (7th Cir. 1990), the insured financed the sale of four trucks to a lessee, then later repossessed the trucks based on its mistaken belief that the lessee was in default.

Hartford denied coverage on the grounds that the repossession was not an accident. Id. at 308. After a thorough examination of cases from other jurisdictions, the court agreed, finding that the conversion, even though based upon the erroneous belief that the repossession was lawful, was a volitional act and not an accident. Id. at 310-12. The court went on to explain:

> A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by a deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point. The former injury may be an accident. However, the latter injury, because it is intended and the negligence is attenuated from the volitional act, is not an accident.

Id. at 311–12 (citations and footnotes omitted). See also American Cas. Co. of Reading, Pennsylvania v. AmSouth Bank, 2002 WL 1397263 at *4 (W.D. Tenn. March 11, 2002) (repossession of truck was intentional and not an "accident").

The Amended Petition's introduction of "negligence" counts based on the insureds' intentional act of taking Ms. Whipple's vehicle does not affect the analysis. See Ervin v. Coleman, 454 S.W.2d 289, 291 (Mo. Ct. App. 1970) (an act may be negligent or it may be willful and malicious misconduct but it cannot be both "at one and the same time because the ultimate 'proof of negligence necessarily disproves willfulness and vice

versa.'") (overruled on other grounds by Sharp v. Robberson, 495 S.W.2d 394 (Mo. 1973)).

In Chochorowski v. Home Depot U.S.A, 2013 WL 3894944 at *9-10 (Mo. July 30, 2013), this Court analogized the "accidental damage" requirement in the waiver of damage provision to a liability policy and observed: "[t]he key question in such cases is 'whether the insured foresaw or expected the injury or damages.'" Id. (citing D.R. Sherry, 316 S.W.3d at 905). This Court restated the proposition that "[a]n accident does not include expected or foreseeable damages" and noted that this proposition had been "applied consistently by this Court and other authority." Id. at *10.

It cannot be disputed that the injury sustained by Ms. Whipple – the loss of her vehicle – was precisely the injury expected and intended by the insureds. The damages complained of in the Underlying Action were both expected and foreseeable. Under established Missouri law, the damages did not result from an "accident." See Todd v. Missouri United School Ins. Council, 223 S.W.3d 156 (Mo. 2007) (the intentional act of using physical force was not an "accident" and the injuries caused by this act were expected and intended).

The decision in HIAR Holding, L.L.C., 2013 WL 4080770, does not affect the on-going vitality of the proposition that an accident does not include expected or foreseeable damages. This Court's decision in Columbia Casualty was premised on an initial determination that damages could be awarded under the TCPA even if the insured did not foresee or expect to cause the damage. Id. at *8 (citing Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc., 401 F.3d 876, 882-83 (8th Cir. 2005)).

In contrast, here, the insured unquestionably intended the only harm for which Ms. Whipple could have recovered damages. The duty to defend arises only if the Complaint alleges facts that could result in an award of covered damages. See First Southern Ins. Co. v. Jim Lynch Enterprises, Inc., 932 F.2d 717, 719 (8th Cir. 1991) (applying Missouri law) ("duty to defend is determined by the nature of the factual assertions in a complaint, and not the label used by the plaintiff"). Ms. Whipple's Petition and Amended Petition only alleged facts that could not result in an award of covered damages and Continental Western had no duty to defend. See Spicer Motors Inc. v. Federated Mutual Ins. Co., 758 S.W. 2d 191 (Mo. Ct. App. 1998) (if the petition against the insured alleges facts not within the coverage of the insurance policy, no duty evolves upon the insurer to defend) (emphasis added).[1]

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[1] See also Health Care Industry Liability Ins. Program v. Momence Meadows Nursing Center, Inc., 566 F.3d 689, 696 (7th Cir. 2009) (the factual allegations in the complaint, and not the legal labels a plaintiff uses, control an insurer's duty to defend); American Modern Home Ins. Co. v. Corra, 2009 WL 3424226 at *4 (S.D. W. Va. Oct. 22, 2009) ("[A] claimant may not 'trigger insurance coverage by characterizing allegations of [intentional] tortious conduct under the guise of 'negligent' activity.'"); Pekin Ins. Co. v. Wilson, 909 N.E.2d 379, 386 (Ill. Ct. App. 2009) ("the factual allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend."); In re Russell, 285 B.R. 877, 887-88 (Bkrtcy.

Continental Western is mindful of its obligation to take into account facts known to it which could result in an award of covered damages. See Trainwreck West Inc. v. Burlington Ins. Co., 235 S.W.3d 33 (Mo. Ct. App. 2007). The insured's defense that it had a legal right to assert control over the collateral is not a fact that could affect the duty to defend. If the insureds prevail on their defense, no damages will be awarded against them. In the insuring agreement to the policies, Continental Western only undertook to defend suits seeking damages that were covered. (113). The insuring agreement also incorporates the following statement: "However, we will have no duty to defend the

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M.D.N.C. 2001) (even though the some of the underlying claims were characterized under a "negligence" heading, "it is clear that such claims are not truly based on unintentional, negligent conduct. The "negligence" claims incorporated by reference "all of the prior allegations concerning intentional acts." The court therefore rejected claimants' attempt to recast their allegations of intentional conduct under a heading of "negligence" as not alleging an "occurrence" within the meaning of the policies issued by Cincinnati.); Dairy Road Partners v. Island Ins. Co., 882 P.2d 93, 112 (Haw. 2000) (when the facts alleged in the underlying complaint unambiguously exclude the possibility of coverage, conclusory assertions regarding the legal significance of those facts (such as the facts) demonstrate "negligent" rather than "intentional conduct" are insufficient to trigger the insurer's duty to defend).

insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." (Id.).

The claims for conversion and negligence are based on the insureds' intentional act of repossessing and depriving Ms. Whipple of her vehicle. The insureds' intentional acts resulting in the very injury intended do not constitute an "accident" under Missouri law. There was no suit seeking damages that would be covered by the policies. Continental Western had no duty to defend.

D. Point 3: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because coverage was excluded under the policies in that the insureds expected and intended the only damage complained of when they deprived Ms. Whipple of her vehicle.

The insureds did not and cannot meet their burden of proving that the Underlying Action sought to recover damages for "property damage" that was the result of an "accident." However, even if this burden were met, Continental Western was relieved of its obligation to defend the insureds in the Underlying Action by Exclusion a. Exclusion a. provides:

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

(114).

Where a policy exclusion precludes coverage, an insurer has no duty to defend the Underlying Action. See, e.g., Trainwreck West Inc., 235 S.W.3d at 43-44 (insurer had no duty to defend Underlying Action because claims were precluded from coverage by policy exclusion); Custom Hardware Engineering & Consulting, Inc. v. Assurance Co. of America, 295 S.W.3d 557, 561 (Mo. Ct. App. 2009) (insurer may "extricate itself from a duty to defend" if it demonstrates that a policy exclusion applies). Here, any "property damage" resulting from the insureds' repossession of Ms. Whipple's vehicle is excluded by the "expected or intended injury" exclusion.

The Petition and Amended Petition alleged only intentional and deliberate acts on the part of the insureds in taking and retaining the vehicle. (149, ¶ 8b.; 150, ¶ 11; 151, ¶ 19b.; 152, ¶ 22; 159, ¶ 8b.; 160, ¶ 11; 162, ¶ 22b.; 162, ¶ 25). The loss of the vehicle was the intended and inevitable result of the insureds' intentional and deliberate acts. The damage Ms. Whipple sustained as the result of the taking and exercise of the insureds' conduct was both expected and intended. See Landers, supra, 621 F.3d at 815 (the insured's repossession of the vehicle was excluded from coverage under Continental Western's policy because the insured "expected" the loss of the vehicle would occur when it took the action of repossessing the car); R.J.S. Sec., Inc. v. Command Sec. Services, Inc., 101 S.W.3d 1, 15 (Mo. Ct. App. 2003) ("Conversion requires an intentional exercise of dominion or control over property that so seriously interferes with the owner's right of control that the interferer may justly be required to pay the owner the full value of the property.") (citation omitted). Without regard to Ms. Whipple's characterization of her

legal claims, the act of repossession and the refusal to return the vehicle were indisputably intentional acts that were both expected and intended to deprive her of the vehicle's use. See Madden Oil, 734 S.W.2d at 261 (the fact that the insured possessed and used the trailer demonstrates beyond doubt that it expected and intended that the claimant suffer the loss of use of the trailer). "When an intentional act results in injuries which are the natural and probable consequence of the act, the injuries as well as the act are intentional." Truck Ins. Exchange v. Pickering, 642 S.W.2d 113, 116 (Mo. Ct. App. 1982). See also K.G. v. R.T.R., 918 S.W.2d 795, 800 (Mo. Banc 1996) (the specific factual allegations contradict any possibility that the defendant's conduct was mere negligence). Ms. Whipple expressly alleged that the insureds intentionally committed specific acts that they must have known would result in the injury complained of – Ms. Whipple's loss of the vehicle.

The only injury complained of in the Underlying Action was the intended, foreseeable, logical and inevitable consequences of the insureds' act of repossession. The exclusion for expected or intended injury applies if it is shown that the insured intended the acts that are alleged to have caused the injury and the injury was the expected consequence of the acts. American Family Mutual Insurance Company v. Franz, 980 S.W.2d 56, 57-58 (Mo. Ct. App. 1998).

In Landers, the court concluded that Clark's claims arising out of the repossession of a vehicle were excluded from coverage under the CGL policy "because the loss of use was a loss Landers 'expected' would occur when it took the action of repossessing the car." 621 F.3d at 815. See also Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc.,

136 F.3d 1116, 1125 (7th Cir. 1998) (exclusion applied where the insured consciously acted to repossess the automobile with both the intention and expectation that the claimant would not be able to use it).

The insureds here intended to repossess Ms. Whipple's vehicle and intended to deprive her of the vehicle. Continental Western has no duty to defend the insureds for any damage resulting from their acts that resulted in an injury that was both expected and intended.

E. Point 4: The trial court erred in finding that Continental Western was obligated to defend the Underlying Action because the policies exclude coverage for any "property damage" that may have been sustained while Ms. Whipple's vehicle was in the insureds' "care, custody or control" in that the only damage complained of happened while the vehicle was in the insureds' care, custody or control.

It is undisputed that Ms. Whipple's vehicle sustained no physical injury. To the extent it were determined that the Underlying Action sought damages for "property damage" in the form of "loss of use of tangible property," exclusion j.(4) would apply. The exclusion provides:

This insurance does not apply to:

j. Property damage to:

. . .

(4) Personal property in the care, custody or control of the insured;

. . .

(116) (emphasis added).

Missouri courts have determined that the "care, custody and control" exclusion is clear and unambiguous and should be enforced in accordance with its plain and ordinary meaning. Estrin Const. Co., Inc. v. Aetna Cas. and Sur. Co., 612 S.W.2d 413, 422 (Mo. Ct. App. 1981) (Missouri courts have consistently found the care, custody or control exclusion to be unambiguous); Michigan Millers Mut. Ins. Co. v. DG&G Co., Inc., 2007 WL 3120048 at *4 (E.D. Mo. Oct. 23, 2007) (same).

In Valentine-Radford, Inc., 990 S.W.2d at 49, the insured was sued by a former employee based, in part, on the refusal to return his personal property. As here, the Amended Petition added a negligence count in which it was claimed in the alternative that the insured's retention and subsequent destruction of the personal property was the result of negligence. Id.

American Motorists denied coverage. Id. In the coverage litigation, the trial court found in favor of the insureds. Id. at 50. The Missouri Court of Appeals reversed, finding that without regard to whether or not the Underlying Action sought to recover damages for a covered "occurrence" or whether the "intentional act" exclusion applied, both the conversion and negligence claims were excluded by a "care, custody or control" exclusion that is identical to the exclusion found in the Continental Western policies. Id. at 53-54.

To the extent it were determined that damages were sought in the Underlying Action for "loss of use" of the vehicle, the care, custody and control exclusion would

apply because any "loss of use" happened while the vehicle was in the insureds' care, custody and control. See Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co., 755 S.W.2d 300, 302 (Mo. Ct. App. 1988).

F. Point 5: The trial court erred to the extent it relied on the doctrine of reasonable expectations to interpret the Continental Western policies in that the policies are unambiguous.

It is not possible to determine how the trial court analyzed the applicable policy provisions to reach the conclusion that Continental Western was obligated to defend the insureds. The trial court provided no interpretation of the relevant policy provisions. Accordingly, it must be assumed that the trial court accepted insureds' position that the plain language should not be considered because they reasonably expected to be insured for wrongful repossession claims.

It would have been manifest error for the trial court to rely on the "reasonable expectations" doctrine to interpret policy provisions that the Missouri courts have repeatedly found to be unambiguous. Under Missouri law, the doctrine of reasonable expectations cannot be applied unless it is first determined that the controlling policy language is ambiguous and that the expectations of the insured are objectively reasonable. See Niswonger v. Farm Bureau Town & Country Ins. Co., 992 S.W.2d 308, 320 (Mo. Ct. App. 1999). Here, the trial court did not make the threshold determination that any of the limitations relied upon by Continental Western to deny coverage were ambiguous. Absent a determination of ambiguity, the doctrine has no application. See Kertz v. State Farm Mut. Auto Ins. Co., 236 S.W.3d 39, 42-43 (Mo. Ct. App. 2007)

(because the State Farm policy was unambiguous, the reasonable expectation doctrine was inapplicable); Tactical Stop-Loss, LLC v. Travelers Cas. and Sur. Co. of America, 657 F.3d 757, 761 (8th Cir. 2011) (applying Missouri law).

"In interpreting whether the language used in the policy is ambiguous, the words will be tested in light of the meaning which would normally be understood by the average layperson, the layperson's definition will be applied unless it plainly appears that the technical meaning is intended." Chase Resorts, Inc. v. Safety Mut. Cas. Corp., 869 S.W.2d 145, 150 (Mo. Ct. App. 1993). The policy provisions the trial court was required to consider to determine the outcome of this insurance coverage dispute are standard in the industry and have been repeatedly interpreted and applied by the Missouri courts without resort to extrinsic evidence, including the insureds' purported reasonable expectations. Courts have repeatedly found that the policy provisions Continental Western relied upon to support its coverage denial are unambiguous. See Raines v. Safeco Ins. Co. of America, 637 F.3d 872, 876 (8th Cir. 2011) (the language unambiguously limits the duty to defend and indemnify to cases where the insured is exposed to liability for property damage caused by an accident); Essex Ins. Co. v. Paric Corp., 2010 WL 2696709 at *3-7 (E.D. Mo. July 6, 2010) (policy language providing coverage for "bodily injury" or "property damage" caused by an "occurrence" "is clear and unambiguous, so the Court is required to enforce the terms of the Policy, as written."); Estrin Construction Co., 612 S.W. 2d at 422 fn. 8 (the care, custody or control provisions has been consistently found to be unambiguous by the courts of this state).

Because there could have been no threshold finding of ambiguity, the trial court was obligated to give effect to the plain language of the policies. See Killian v. State Farm Fire & Cas. Co., 903 S.W.2d 215, 218 (Mo. Ct. App. 1995) (when interpreting an insurance policy, Missouri courts do not have the authority to alter or rewrite the policy and cannot create an ambiguity where none exists) (citing Southern General Insurance Company v. WEB Associates/Electronics, Inc., 879 S.W.2d 780, 782 (Mo. Ct. App. 1994)); American Motorists Ins. Co. v. Moore, 970 S.W.2d 876, 878 (Mo. Ct. App. 1998) (Missouri courts will not "distort unambiguous policy language to create an ambiguity.").

In light of the unambiguous nature of the controlling policy language, the nature of the insureds' business enterprise and purported representations made by the insureds' agent could have no bearing on the interpretation. The fact that claims for wrongful repossession are a known risk for "quick cash" lenders does not make the insureds' purported expectation that this risk was insured by a general liability policy purchased for $250 objectively reasonable. Malpractice claims are a known risk for lawyers and physicians but they do not reasonably expect that the risk of being sued for malpractice will be covered by a standard general liability policy. Similarly, representations allegedly made by an agent relating to the coverage provided are irrelevant. Harris v. Shelter Mut. Ins. Co., 141 S.W.3d 56, 60-61 (Mo. Ct. App. 2004) (where policy was unambiguous, insured could not create ambiguity based on the representations made by his insurance agent and the insurer's informational brochure).

The commercial general liability policies issued by Continental Western do not provide coverage for claims for wrongful repossession and the insureds have not

identified a case from any jurisdiction where coverage for this exposure was found under a policy like the ones issued by Continental Western. "[A] general liability policy does not insure against all risks, and the Missouri Supreme Court has cautioned against an expansive reading of coverage." United Fire & Cas. Co. v. Fuhr Intern., LLC, 2006 WL 3691256 at *2 (W.D. Mo. Dec. 12, 2006) (citing Schauf, 967 S.W.2d at 77).

The trial court erred by refusing to enforce the contract as written. See Killian, 903 S.W.2d at 218 (when interpreting an insurance policy, Missouri courts do not have the authority to alter or rewrite the policy and cannot create an ambiguity where none exists) (citing Southern General, 879 S.W.2d at 782)); Moore, 970 S.W.2d at 878 (Missouri courts will not "distort unambiguous policy language to create an ambiguity.").

CONCLUSION

More than a decade ago, this Court recognized the social and economic consequences of extending the coverage afforded by a commercial general liability policy to business risks. See Schauf, 967 S.W.2d at 77. The risk of litigation for wrongful repossession of collateral is endemic to the pay day loan business.

The Continental Western policies incorporated provisions designed to ensure that only fortuitous events resulting in an accident or injury would be covered. Individually and collectively, these provisions preclude coverage for the damages sought in the Underlying Action. Continental Western has no duty to defend because:

- No damages were sought for physical damage to or the loss of use of tangible property.
- The only damage complained of was not the result of an "accident."

- The only damage complained of was expected and intended by the insureds.
- The only damage complained of was the direct result of the insureds' assertion of control and taking custody over the vehicle.

Continental Western has no obligation to provide a defense to Franklin Quick Cash, LLC or Mr. Allen in the Underlying Action. The trial court offered no explanation for the departure from established law and his decision should be reversed and judgment rendered in favor of Continental Western.

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Dated: September 3, 2013

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CERTIFICATE OF COMPLIANCE

As required by Rule 84.06(c), the undersigned certifies that this brief complies with the word or line limits of Rule 84.06(b) and the information that is required by Rule 55.03. The word count of this brief is 10,392 words. The undersigned relied on the word count feature on his firm's word processing system to arrive at that number.

/s/ Yvette Boutaugh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Substitute Brief and Appendix was served via the e-filing system on the 3rd day of September 2013, to: Frederick H. Schwetye (#23498) and Bradley Lockenvitz (#27150), FREDERICK H. SCHWETYE LAW OFFICES, 8 South Church Street, Union, MO 63084, O: (636) 583-3800, F: (636) 583-3808, Attorneys for Appellee.

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