Preliminary Statement

ABC Specialty, Inc., is an automobile towing business which law enforcement authorities employ to impound vehicles. Wallace Hopkins was one of its employees. Prior to his employment by ABC, Mr. Hopkins had been arrested for multiple counts of larceny and tampering with vehicles.

In the summer of 2004, ABC towed a Honda Civic car to its impound lot in Lee's Summit, Missouri. After holding it for a sufficient time, ABC obtained a title to the car. While the Honda was in ABC's lot, it was in running condition. ABC allowed the Honda's keys to remain in its ignition. The Honda was not used by ABC in its towing business.

ABC's security measures at its lot included a fence, surveillance cameras, and a locked gate. On August 28, 2004, the Honda, driven by Shannon Norton and with Mr. Hopkins as a passenger, crossed the center line of a highway into oncoming traffic and collided head-on with a vehicle driven by Karri Kinnaman-Carson. (It is unclear whether ABC still employed Mr. Hopkins at that time.) ABC later reported the Honda as having been stolen. Ms. Norton had prior arrests for both possession of drug paraphernalia and traffic violations, including careless driving in November 2003. At some time prior to August 28, 2004, Ms. Norton's driving privileges were revoked. They remained revoked through the date of the accident.

Both Mr. Hopkins and Ms. Norton were killed at the scene. Mrs. Kinnaman-Carson suffered extensive injuries as a result of the collision.

Mrs. Kinnaman-Carson and her husband, Randy Carson, sued ABC. The first count of their petition stated a claim of negligence against Ms. Norton. The second count stated a claim of negligence against ABC. The third stated a claim of negligent supervision, hiring, and training against ABC, as well as a claim that ABC negligently failed to secure its premises properly. The fourth and final count stated a claim of loss of consortium on behalf of Mr. Carson against both Ms. Norton and ABC.

ABC had automobile and commercial liability insurance policies with the Westport Insurance Company. ABC gave Westport notice of the suit. At first, Westport declined to defend, claiming there was no coverage under either its automobile insurance policy or its commercial liability insurance policy.

The Kinnaman-Carsons then filed a First Amended Petition. ABC promptly notified Westport of this. Shortly thereafter, the Kinnaman-Carsons and ABC entered into an agreement under § 537.065, R.S.Mo. Westport then offered to defend ABC under a reservation of rights. ABC promptly rejected this offer.

The Circuit Court of Jackson County held a bench trial in the case, after which it granted the Kinnaman-Carsons a judgment against ABC for $1,374,128.00, finding ABC liable for negligent hiring, supervision, and training

of its employees, as well as negligently failing to secure its premises properly. Subsequently, after judgment was entered but before it became final, Westport withdrew its reservation of rights and elected to defend and indemnify ABC in full. Neither any post-trial motions nor a Notice of Appeal was filed, and the judgment became final.

Subsequently, Westport refused to pay on the judgment. The Kinnaman-Carsons brought an equitable garnishment action against Westport. Westport moved for summary judgment, claiming that Exclusion G in its commercial liability insurance with ABC, which excluded coverage for "'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any … 'auto' … owned or operated by or rented or loaned to any insured," excluded coverage for the Kinnaman-Carsons' injuries. The trial court granted summary judgment to Westport without analysis or comment.

Exclusion G did not exclude coverage for either ABC's negligence in failing to secure its premises or failing to hire, supervise, and train its employees properly, or arising out of the use of the Honda by an unauthorized party. Moreover, because Westport withdrew its reservation of rights and elected to defend and indemnify ABC in full, it cannot subsequently deny coverage altogether.

This Court should reverse the trial court's judgment and remand this case with instructions to enter judgment in favor of the Kinnaman-Carsons.

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Jurisdictional Statement

This is an appeal from a summary judgment entered in the Circuit Court of Jackson County, Missouri, denying an equitable garnishment.

This case does not fall within the exclusive jurisdiction of this Court, pursuant to Article V, § 3, of the Constitution of Missouri. As such, the appellants filed a timely notice of appeal to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Pursuant to § 477.070, R.S.Mo., venue lay within that district of the Missouri Court of Appeals. The case was designated as Case No. WD68761.

On September 9, 2008, the Missouri Court of Appeals, Western District, issued its opinion in this case, affirming the Judgment below. The appellants filed a Motion for Rehearing and an Application for Transfer, both of which the Court of Appeals denied on October 28, 2008. Thereafter, the appellants filed a timely Application for Transfer in this Court pursuant to Supreme Court Rule 83.04. On December 16, 2008, this Court sustained the application and transferred the case.

Therefore, pursuant to Article V, § 10, of the Constitution of Missouri, which provides this Court with authority to transfer a case from the Missouri Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," jurisdiction lies in this Court.

Statement of Facts

This is an appeal from a summary judgment entered in favor of an insurance company in an equitable garnishment action.

Appellant Karri Kinnaman-Carson was badly injured in an automobile accident (Legal File 244). A car owned by Respondent ABC Specialty, Inc., hit her car (L.F. 243). Apparently, Mr. Wallace Hopkins, an employee or former employee of ABC, had removed a Honda owned by ABC from its lot (L.F. 243). Mrs. Kinnaman-Carson and her husband, Mr. Randy Carson, sued ABC (L.F. 1).

I. The Plaintiffs' Injuries

On August 28, 2004, Mrs. Kinnaman-Carson was driving southbound on Missouri Highway 7, near the intersection of Missouri Highway FF (Truman Road), in Blue Springs, Missouri (L.F. 243). Ms. Shannon K. Norton was driving the Honda northbound on Highway 7 (L.F. 243). Mr. Hopkins had taken the Honda and had given it to Ms. Norton (L.F. 243).

With Mr. Hopkins as her passenger, Ms. Norton was driving the Honda while intoxicated (her blood alcohol content was well above the legal limit) (L.F. 243-44). She was speeding and driving recklessly (L.F. 244). She drove the Honda across the center line of traffic on Highway 7 (L.F. 244).

When she saw the Honda cross the center line, Mrs. Kinnaman-Carson took evasive action, immediately slowing down and pulling onto the highway's

shoulder (L.F. 244). But there was nothing she could have done to prevent an accident (L.F. 244). The Honda struck Mrs. Kinnaman-Carson's car head-on (L.F. 244).

Mrs. Kinnaman-Carson was trapped in her vehicle for more than twenty minutes immediately following the crash (L.F. 244). She was forced to watch as emergency personnel rendered aid to the bloody and mangled bodies of Mr. Hopkins and Ms. Norton (L.F. 244). Mr. Hopkins was half-ejected through the Honda's windshield, coming to rest on its hood, only a few feet directly in front of Mrs. Kinnaman-Carson (L.F. 244). He suffered massive trauma to his head, neck, and torso and was bleeding profusely (L.F. 244). He died at the scene (L.F. 244). Emergency personnel laid his dead body on the roadside under a white sheet (L.F. 244). Ms. Norton's head was impaled on the Honda's steering wheel (L.F. 244). She also died at the scene, and her dead body similarly was laid on the roadside, covered with a white sheet (L.F. 244).

After the crash, Mrs. Kinnaman-Carson was transported by ambulance to Liberty Hospital, where she required a great deal of medical care (L.F. 2, 182). She suffered an injury to her right ankle and subsequently underwent open reduction internal fixation surgery on that ankle (L.F. 2, 182). She now has hardware in her ankle which will remain there for the rest of her life (L.F. 2, 182). She also suffered injuries to her jaw (L.F. 2, 182). At the time of trial, Mrs.

Kinnaman-Carson had incurred medical expenses in excess of $40,000.00 (L.F. 247). The court in the underlying lawsuit determined that her reasonably anticipated future medical expenses were no less than an additional $42,000.00.

At the time of the accident, ABC was insured under a general liability insurance policy issued by Respondent Westport Insurance Corporation, Policy Number WCP102000430500, effective from October 17, 2003, to October 17, 2004 (L.F. 3, 186).

II. The Underlying Lawsuit

Mrs. Kinnaman-Carson and her husband filed a lawsuit, *Kinnaman-Carson v. ABC Specialty, Inc.*, Case No. 0516-CV29901, in the Circuit Court of Jackson County (L.F. 1). Respondent Westport Insurance Corporation, which initially handled ABC's defense, requested consent from the plaintiffs' counsel to an extension of time to answer the plaintiffs' petition (L.F. 156). The plaintiffs' counsel agreed to an extension of time for ABC to file its answer on or before February 20, 2006 (L.F. 156). On February 20, through Claims Management Services, Inc., Westport sent a fax to ABC's counsel stating that Westport would deny coverage to ABC (L.F. 156). It also stated that the extension was granted through only that day, and thus ABC either needed to file an answer or seek another extension immediately (L.F. 156).

On February 28, 2006, in a letter to ABC's counsel, Westport declined coverage under its policy with ABC (L.F. 168-70). The plaintiffs subsequently filed an amended petition, on June 12, 2006 (L.F. 3-4, 186, 156, 157-67).

Westport reviewed the plaintiffs' amended petition (L.F. 171). On August 15, 2006, some 65 days after Westport received the amended petition, Westport sent a letter to ABC's counsel offering to defend ABC under a reservation of rights (L.F. 4, 171-172). ABC's counsel responded the following day, refusing Westport's offer to defend ABC under a reservation of rights (L.F. 4, 172).

On September 22, 2006, 37 days later, Westport informed ABC's counsel that it now had agreed to withdraw its reservation of rights (L.F. 4, 173).

The plaintiffs agreed to proceed to trial before the court on the amended petition under § 537.065, R.S.Mo. (L.F. 5, 174-77). After a bench trial, the court entered judgment in favor of Mrs. Kinnaman-Carson in the amount of $1,074,128.00, plus interest from the date of judgment until paid (L.F. 5, 183). The court also entered judgment for Mr. Carson in the amount of $300,000.00, plus interest from the date of judgment until paid (L.F. 5, 183). This judgment remains unpaid (L.F. 5).

ABC hires, trains, and supervises employees and contractors to drive tow trucks, to tow vehicles, and to store vehicles in its tow lot (L.F. 244). The circuit court found that ABC had a duty to maintain proper safeguards when hiring,

training, and supervising its employees and contractors so as to ensure the safety of others (L.F. 244-45). This duty included screening potential employees to ensure that they are proper candidates for work in the towing industry (L.F. 245). The duty also included training its employees and contractors in the proper storage of towed vehicles and their keys so that they will not be stolen (L.F. 245). Additionally, the duty included supervision of its employees, its contractors, and its premises (L.F. 245).

The trial court found that ABC had a fence around its tow lot and a video surveillance camera on the premises (L.F. 245). It found that the Honda was taken from ABC's lot prior to the accident and that the tow lot fence was not broken, nor were the locks on the gates to the lot tampered with or damaged (L.F. 245). The court found that no video from the surveillance camera was offered showing the theft of the Honda from the impound lot (L.F. 245). The court found that it had been reported to the Lee's Summit Police Department that ABC had left the Honda's keys in its ignition while the Honda was stored in the impound lot (L.F. 245).

As a result, the court held that ABC had breached its duty to screen employees properly when it hired Mr. Hopkins (L.F. 245). Upon seeing Mr. Hopkins at the roadside at the scene of the accident, a witness had blurted out, "Oh my God, that's Wally. He works for ABC Tow" (L.F. 245). Evidence established

that Mr. Hopkins had been arrested on multiple counts of larceny and tampering with vehicles prior to his employment at ABC (L.F. 245). The plaintiffs' expert testimony established that proper screening of potential employees is important to ensure the safety of customers and the public at large (L.F. 245). The court held that ABC's failure to properly screen its employees set into motion a course of events which had led to Mr. Hopkins gaining access to the Honda and subsequently providing it to Ms. Norton (L.F. 245).

The court also held that ABC had failed to train its employees on the proper method to safeguard vehicles in the tow lot (L.F. 245). ABC had admitted to the Lee's Summit Police Department that its practice was to leave an impounded vehicle's keys inside the vehicle (L.F. 245). The plaintiffs' expert testimony established that this practice deviates from the standard practice of the towing industry (L.F. 245). The standard is to remove the keys from an impounded vehicle and store them in a lockbox in the office (L.F. 245).

Thus, the court held that ABC had failed to safeguard the Honda properly and further had failed to safeguard the Honda's keys properly by leaving them in an unsecured location (L.F. 246). The court found that it was foreseeable that unauthorized third persons would attempt to remove vehicles which had been impounded in the tow lot (L.F. 246). The court found that ABC was aware of this, because it has a fence around its lot, as well as a security camera (L.F. 246). It also

was foreseeable that when a drivable vehicle is removed from a tow lot, unauthorized third persons would use it (L.F. 246). The court further found that there was a substantial likelihood that a unauthorized third person's driving of an impounded vehicle would lead to an accident, causing injuries (L.F. 246).

Before announcing these findings, the trial court was faced with the question of Mr. Hopkins's employment status on the date of the accident (L.F. 246). After careful review, the court found that ABC was liable whether Mr. Hopkins was a current or former employee of ABC on that day (L.F. 246). If, on the date of the accident, Mr. Hopkins was an employee of ABC, he was clearly not acting in the course and scope of his employment (L.F. 246). It was not reasonable to believe that an employee would provide a car belonging to his employer to an intoxicated, unlicensed driver at the behest of the employer (L.F. 246). This was especially true in light of the fact that Ms. Norton had prior arrests for traffic violations, including careless driving in November 2003, and possession of drug paraphernalia (L.F. 246). Furthermore, there was no evidence that either Mr. Hopkins's use of the Honda or his subsequent delivery of it to Ms. Norton was with ABC's permission (L.F. 246).

Therefore, if Mr. Hopkins was acting as an employee, he was acting outside the scope of his employment when he allowed Ms. Norton to drive the Honda (L.F. 246). Alternatively, if Mr. Hopkins was a former employee, then ABC's failure to

safeguard the Honda had led to Mr. Hopkins's use of it (L.F. 246). Either way, ABC's breach was in failing to prevent an unauthorized third party from obtaining the Honda and using it to injure the plaintiffs (L.F. 246).

The court held that this result necessarily followed, as there was no evidence that ABC used the Honda in the towing business (L.F. 246). In fact, the report from the Lee's Summit Police Department indicated quite the opposite (L.F. 246). It established that ABC kept the car in storage from its acquisition until Mr. Hopkins took it (L.F. 246).

The trial court judgment is included in the Appendix of this Brief.

III. The Equitable Garnishment Action and Appeal

Under the terms of the general liability insurance policy which Westport issued to ABC, Westport covered ABC for plaintiffs' claims (L.F. 5, 173). The proceeds from that insurance policy, as well as any interest thereon, should have been paid in satisfaction of the underlying Judgment (L.F. 5, 173).

When Westport refused to cover the Judgment, Mrs. Kinnaman-Carson and Mr. Carson sought an equitable garnishment of Westport under § 379.200, R.S.Mo. (L.F. 6-9). They asked the Circuit Court of Jackson County to declare that the terms of Westport's policy covered ABC's negligence, that the coverage extends to the entire Judgment plus interest, and that the entire Judgment must be paid by

Westport (L.F. 6-9). If not, then Westport had made a fraudulent misrepresentation (L.F. 6-9, 173).

Westport moved for summary judgment, arguing that the following exclusionary clause in its general liability policy with ABC, "Exclusion G," precluded coverage:

> 2. Exclusions
>
> This insurance does not apply to:
>
> g. Aircraft, Auto Or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

(L.F. 59, 409).

The trial court entered summary judgment in Westport's favor, without announcing its analysis (L.F. 474-75).

The plaintiffs appealed the trial court's judgment to the Missouri Court of Appeals, Western District (L.F. 470-77). The Court of Appeals issued an opinion affirming the trial court's Judgment. A copy of that opinion is in the Appendix to this brief.

On December 16, 2008, this Court sustained the plaintiffs' Application for Transfer.

Points Relied On

I. The trial court erred in granting summary judgment in favor of the Westport Insurance Corporation *because* exclusions in insurance contracts are strictly construed against the insurer *in that* the general commercial liability insurance policy Westport issued to ABC Specialty, Inc., which excluded "bodily injury" or "property damage" arising out of the ownership, maintenance, use (including operation and "loading or unloading") or entrustment to others of any aircraft, "auto," or watercraft owned or operated or rented or loaned to any insured, did not exclude coverage for the damages in the underlying case caused by the independent negligence of ABC resulting in an unauthorized person using ABC's car for unauthorized purposes, such as its negligent failure to have proper security, to screen employees properly, or to supervise and train employees properly.

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

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

Columbia Mut. Ins. Co. v. Neal, 992 S.W.2d 204 (Mo. App. 1998)

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

II. The trial court erred in granting summary judgment to Westport Insurance Corporation *because* the law of Missouri is that an insurance company is estopped from later declining coverage when it has elected to defend and indemnify its insured without a reservation of rights *in that* Westport had withdrawn its one and only reservation of rights and had elected to defend and indemnify its insured, ABC Specialties, Inc., without reservation, thereby waiving the defense that its policy did not cover this claim, and Westport's subsequent denial of that coverage was a breach of its duty of good faith and fair dealing.

Truck Ins. Exchange v. Prairie Framing, 162 S.W.3d 64 (Mo. App. 2005)

Mistele v. Ogle, 293 S.W.2d 330 (Mo. 1956)

Nat. Battery Co. v. Standard Acc. Ins. Co., 226 Mo. App. 351,
41 S.W.2d 599 (1931)

Transamerica Ins. Group v. Chubb & Son, Inc., 16 Wash.App. 247,
554 P.2d 1080 (1976)

Argument

I. The trial court erred in granting summary judgment in favor of the Westport Insurance Corporation *because* exclusions in insurance contracts are strictly construed against the insurer *in that* the general commercial liability insurance policy Westport issued to ABC Specialty, Inc., which excluded "bodily injury" or "property damage" arising out of the ownership, maintenance, use (including operation and "loading or unloading") or entrustment to others of any aircraft, "auto," or watercraft owned or operated or rented or loaned to any insured, did not exclude coverage for the damages in the underlying case caused by the independent negligence of ABC resulting in an unauthorized person using ABC's car for unauthorized purposes, such as its negligent failure to have proper security, to screen employees properly, or to supervise and train employees properly.

Standard of Review

In an appeal from a grant or denial of summary judgment, this Court reviews the record "in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT Commercial Fin. Cop. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court accords "the non-

movant the benefit of all reasonable inferences from the record." *Id.* The "propriety of summary judgment is purely an issue of law" and the standard of review "is essentially *de novo*." *Id.*

In Missouri, "an insurance policy is a contract to afford protection to an insured and will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citations omitted). The interpretation of a contract is a question of law which this Court reviews *de novo*. *Netco, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006). In interpreting a contract, a court "first looks to the plain language of the agreement … to determine the intent of the parties." *TAP Pharm. Prods. v. State Bd. of Pharm.*, 238 S.W.3d 140, 143 (Mo. banc 2007). If the language is unclear, the Court will consider the context of the entire contract, including "the relationship of the parties, the subject matter of the contract . . . the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties." *Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991). Exclusionary clauses in insurance policies "must be strictly construed against the insurer." *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210-11 (Mo. banc 1992).

* * *

The law of Missouri is that exceptions in insurance policies are to be strictly construed against the insurer. ABC Specialty, Inc., was found liable for damages in the amount of $1,374,128.00 to Mrs. Kinnaman-Carson and her husband which were caused by ABC's negligence in securing its premises and screening, supervising, and training its employees, which foreseeably resulted in an unauthorized person stealing a car from ABC's tow lot and providing it to an unlicensed and intoxicated driver, who hit Mrs. Kinnaman-Carson's car head-on. An exclusionary clause in Westport Insurance Corporation's general commercial liability policy with ABC excluded coverage for "any 'bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any … 'auto' … owned or operated by or rented or loaned to any insured." Westport refused to extend coverage to Mrs. Kinnaman-Carson's injuries, claiming that this clause excluded such coverage. The trial court granted summary judgment in favor of Westport. Was this error?

A. Missouri's overarching public policy regarding insurance contracts is that they must be strictly construed against the insurer and in favor of coverage.

The longstanding law of Missouri is that "insurance is designed to furnish protection to the insured, not defeat it." *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992) (citing *Weathers v. Royal Indem. Co.*, 577

S.W.2d 623, 626 (Mo. banc 1979)); *see also Brugioni v. Maryland Cas. Co.*, 382 S.W.2d 707, 710-11 (Mo. 1964). As such, an insurance policy "will be interpreted, if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citations omitted).

Where an insurance policy contains "[a]mbiguous provisions … designed to cut down, restrict, or limit insurance coverage already granted, or introducing exceptions or exemptions," the law of Missouri is that they "must be strictly construed against the insurer." *Krombach*, 827 S.W.2d at 210-11 (citing *Meyer Jewelry Co. v. General Ins. Co. of Am.*, 422 S.W.2d 617, 623 (Mo. 1968); *Brugioni*, 382 S.W.2d at 710-11). This is because, "as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract." *Id.* As Judge Learned Hand observed,

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

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

As such, this Court follows "a construction favorable to the insured wherever the language of a policy is susceptible of two meanings, one favorable to the insured, the other to the insurer." *Meyer Jewelry Co.*, 422 S.W.2d at 623.

A provision in an insurance policy is ambiguous when there is "duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Rodriguez v. Gen. Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991). As in any contract, when the language of a provision is ambiguous, the Court considers the context of the *entire* contract, including "the relationship of the parties, the subject matter of the contract . . . the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties." *Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991). These principles are applied broadly, so that if an insurance company knows or could ascertain from a reasonable investigation that a claim is *potentially* within the scope of its policy's coverage, then its refusal to extend coverage is wrongful. *Truck Ins. Exch. v. Prairie Framing*, 162 S.W.3d 64, 79 (Mo. App. 2005).

B. The exclusion at issue in this case cannot reasonably be read to exclude coverage for the Kinnaman-Carsons' injuries.

This case concerns the interpretation of "Exclusion G" in the general liability insurance policy which Westport issued to ABC, the tortfeasor in the underlying case. This provision states:

> 2. Exclusions
>
> This insurance does not apply to:
>
> g. Aircraft, Auto Or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

(L.F. 59, 409).

Westport maintains that this provision excludes coverage for the negligence for which ABC was found liable and which caused Mrs. Kinnaman-Carson's damages due to the simple fact that an automobile was involved in the events leading to her injuries. "[J]ust because an auto is somehow involved in a loss does not automatically mean the auto exclusion applies. The plain meaning of the exclusion still governs the coverage issue. An insured purchases coverage for protection, and the policy will be interpreted to grant coverage rather than defeat it." *Truck Ins. Exch.*, 162 S.W.3d at 86.

In this case, the plain language of Exclusion G shows that it was not intended to apply to either other, independent forms of negligence not mentioned anywhere in the exclusion, or the use or operation of a vehicle without permission or authorization of the insured.

i. Exclusion G cannot reasonably be read to exclude either coverage for ABC's independent negligence in this case which did not arise out of the ownership, maintenance, use, or entrustment to others of its automobile, or coverage for an unauthorized person using ABC's automobile in an unauthorized manner.

Exclusion G's exclusion of injuries "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured" does not exclude Westport

Insurance's coverage of the negligence in this case. Foreseeably due to ABC's negligent failure to secure its premises, its Honda was removed from its lot without its permission and was used to cause the injuries to Mrs. Kinnaman-Carson. Her injuries did not "arise out of the ownership, maintenance, use or entrustment" of the Honda to the person who took it. Ms. Norton, the driver of the Honda, was not "an insured." She was not using the Honda for any business purposes of ABC.

Moreover, Mrs. Kinnaman-Carson's main allegations of negligence against ABC are wholly independent of the ownership, maintenance, operation, or use of the Honda. Even a cursory review of her allegations – which the trial court accepted – indicates that it was ABC's negligence in failing to secure the vehicle properly and in failing to screen, hire, train, and supervise employees properly which caused Mrs. Kinnaman-Carson's injuries. She and her husband alleged a variety of independent forms of negligence for which the trial court found ABC liable:

(a) ABC failed to comply with set procedures and regulations for safeguarding vehicles that it owned and stored;

(b) ABC failed to follow set procedures and regulations regarding the control and storage of a vehicle;

(c) ABC failed to comply with the set procedures and regulations relating to the storage of vehicles it owns, and the keys to the same, to prevent third persons from driving the same;

(d) ABC failed to have in place adequate rules and regulations regarding the proper storage of vehicles and the keys to the same in a fashion to prevent third persons from driving the vehicles;

(e) ABC failed to have in place rules and regulations regarding the proper storage, use or safeguarding of vehicles it owns;

(f) ABC failed to have in place adequate and proper hiring practices for its employees and/or contractors regarding the proper use, storage and safeguarding of vehicles it owns;

(g) ABC failed to have in place adequate and proper training policies for its employees and/or contractors regarding the proper use, storage and safeguarding of vehicles it owns;

(h) ABC failed to have in place adequate and proper supervision policies for its employees and/or contractors regarding the proper use, storage and safeguarding of vehicles it owns;

(i) ABC failed to properly hire, train or supervise its employees and/or contractors regarding the proper use, storage, and safeguarding of vehicles it owns; and

(j) ABC's employees and/or contractors failed to maintain the vehicle in a safe, secure location such that it was available for a third person to drive, utilizing the keys to the same.

(L.F. 163-64). These allegations are far different than an allegation which the plain language of Exclusion G intends to exclude, such as that ABC or one of its employees negligently operated one of its motor vehicles.

The phrase "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured" reasonably can be interpreted to refer only to the authorized or permissive use or operation of a vehicle. Certainly, the exclusion would exclude coverage for claims that a person had been injured by the authorized or permissive use or operation of one of ABC's vehicles. But under Missouri's longstanding policy of construing exclusions in insurance policies against the insurer so as to presume coverage, Exclusion G cannot encompass the use or operation which occurs without permission or authorization of the insured, due to the insured's independent negligence.

In *Centermark Props., Inc. v. Home Indem. Co.*, 897 S.W.2d 98 (Mo. App. 1995), the Missouri Court of Appeals, Eastern District, came to this same conclusion about a nearly identical insurance policy exclusion in a case with facts analogous to those in this case. In *Centermark*, the plaintiff, Timothy Marti, an officer of the St. Peters Police Department, alleged that he was injured due to Centermark's negligence when his vehicle was struck by a vehicle which was owned by Centermark and driven by unauthorized "third party" Eric Scales. 897 S.W.2d at 99. Officer Marti sued Centermark and one of its security officers for his damages. *Id.* In his petition, Officer Marti alleged that his damages were caused by Centermark's negligence and carelessness in the following respects:

> (a) That Defendant failed to comply with set procedures for subduing and controlling third parties;
>
> (b) That Defendant failed to follow set procedures and regulations regarding the control of one's own security vehicle;
>
> (c) That Defendant failed to comply with the set procedures and regulations relating to the apprehension of persons suspected of criminal activity within the property patrolled by said Defendant security company;
>
> (d) That Defendants failed to have adequate rules and regulations to govern subduing and controlling third parties;

(e) That Defendants failed to have adequate rules and regulations to govern the control of one's own security vehicle;

(f) That Defendants failed to have adequate rules and regulations to govern the apprehension of persons suspected of criminal activity within the property patrolled by said Defendant security company;

(g) That Defendant failed to have proper and adequate hiring practices for security officers;

(h) That Defendant failed to have proper and adequate training policies and programs for its security officers;

(i) That Defendant knew or by the exercise of the proper degree of care should have known that Defendant's actions would pose a threat to third persons in or about the area.

Id.

At the time of the collision, Centermark had two liability insurance policies in place. *Id.* One of the two was a commercial general liability coverage policy issued by Home Indemnity. *Id.* Centermark requested Home Indemnity to provide a defense and protect it against any liability it might face in Officer Marti's lawsuit, up to its policy limits. *Id.* Home Indemnity refused, citing an exclusion which is nearly identical to that at issue in this case:

Exclusions

This insurance does not apply: …

(b) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any automobile or aircraft owned or operated by or rented or loaned to any insured …

Id. at 100.

Centermark then filed a declaratory judgment action against Home Indemnity requesting the court to declare that the policy Home Indemnity issued to it provided coverage for Officer Marti's claims. *Id.* at 99-100. The trial court sustained Centermark's motion for summary judgment, determining that the policy covered Officer Marti's claims. *Id.* at 100. Home Indemnity appealed, raising one point: that the automobile exclusion relieved it from any obligation to provide coverage. *Id.*

After reviewing the history of Missouri's law and public policy regarding insurance contracts, the Missouri Court of Appeals, Eastern District, held that the exclusion in Home Indemnity's policy could not be construed to exclude Officer Marti's claims. The court particularly noted its previous holding in *Braxton v. United States Fire Ins. Co.*, 651 S.W.2d 616 (Mo. App. 1983), that "Because the language in the policy at issue was reasonably susceptible of two interpretations, the court was required to apply the construction most favorable to the insured and

this is especially true when the clause in question attempts to limit or exclude coverage under the policy." *Centermark*, 897 S.W.2d at 101 (quoting *Braxton*, 651 S.W.2d at 619).

The court held that this was especially true "where an insured risk and an excluded risk constitute concurrent proximate causes of an accident," because in such circumstances "a liability insurer is liable so long as one of the causes is covered by the policy." *Id.* (quoting *Braxton*, 651 S.W.2d at 619). For over seventy years, this Court has maintained that concurrent proximate causes are "causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either." *Byars v. St. Louis Pub. Serv. Co.*, 334 Mo. 278, 66 S.W.2d 894, 900 (1933).

As a result, the identical cause at issue in *Centermark* did not exclude every kind of negligence which Officer Marti alleged, despite the fact that an automobile was involved in the loss:

> [W]e need not reach the issue of whether the wording of the exclusionary clause was meant to apply to the use or operation of a vehicle without permission or authorization of the insured. Instead, we find coverage based on the fact that there are allegations of negligence that appear independent of ownership, maintenance, operation, or use of an automobile -- that is, that Centermark failed to

> comply with set procedures for apprehending, subduing, and controlling third parties and persons suspected of criminal activity and it failed to have proper and adequate hiring practices and training policies and programs for its security officers.

Centermark, 897 S.W.2d at 101.

The court held that its result was consistent with the law of Missouri, "because while one proximate cause of the damage may have been the use of an automobile owned by Centermark, which was clearly excluded from coverage, a concurrent cause may have been Centermark's negligence in supervising and training employees, a covered risk." *Id.* Due to the basic principle in Missouri that "Exclusion clauses in insurance policies are strictly construed against the insurer," the Court of Appeals, Eastern District, later followed the same reasoning and declined to apply other nearly identical automobile exclusion clauses to claims of an insured's independent negligence in *Columbia Mut. Ins. Co. v. Neal*, 992 S.W.2d 204, 207-09 (Mo. App. 1998) (citing *Centermark*), and *Bowan v. Gen. Sec. Indem. Co. of Ariz.*, 174 S.W.3d 1, 5-7 (Mo. App. 2005) (citing *Centermark*). In both cases, the court noted that this result had to be reached because "It is broadly accepted that where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable as long as one of the

causes is covered by the policy." *Bowan*, 174 S.W.3d at 5; *Columbia Mut.*, 992 S.W.2d at 208.

The same holds true here. ABC was found liable for many separate allegations of negligence which were independent of the ownership, maintenance, operation, or use of the Honda. ABC's negligence in failing to have proper security in place and in failing to hire, train, and supervise employees properly regarding the security of its vehicles was a proximate cause of the Kinnaman-Carsons' loss. While one proximate cause of their damages may have been the use of ABC's automobile, which clearly was excluded from coverage under Exclusion G, a concurrent cause was ABC's independent negligence, which was not excluded. The law of Missouri is that because the policy plainly does not exclude a concurrent cause of the Kinnaman-Carsons' damages, the fact that an automobile owned by ABC was involved in the events which caused their loss is of no consequence. The policy still covers ABC's independent breach of its duties which was a proximate cause of the Kinnaman-Carsons' damages.

As such, the loss in this case does not arise out of the "ownership, maintenance, use, or entrustment to others of any … 'auto.'" The loss in this case arose from ABC's negligent failure to have proper security in place so as to prevent unauthorized third persons like Mr. Hopkins and Ms. Norton from gaining access to its property. As in *Centermark*, *Bowan*, and *Columbia*, Westport's policy

covers ABC's negligence in this manner, as the negligence is independent of the ownership, maintenance, operation, or use of an automobile.

The construal of coverage in those three cases does, however, seem to conflict with the opinion of the Court of Appeals, Western District, in *Hartford Cas. Ins. Co. v. Budget Rent-a-Car of Mo., Inc.*, 864 S.W.2d 5 (Mo. App. 1993). In that case, an insurer sought a declaratory judgment that its similar exclusionary clause excluded coverage for a motorist's claims resulting from a collision between the motorist and the insured's stolen shuttle bus. 864 S.W.2d at 6. The Court of Appeals affirmed the trial court's ruling that there was no coverage, because "liability on the part of [the insured] can *only* be founded on the ownership and use of the shuttle bus. It is these elements, ownership and use of the shuttle bus, which are specifically excluded by the exclusionary clause." *Id.* at 7 (emphasis added).

As a panel of the Eastern District of the Court of Appeals noted in *Columbia Mut.*, however, cases like this one which involve claims for an insured's independent negligence, such as negligent supervision or negligent failure to have proper security measures in place, are "distinct" from what the Western District decided in *Budget*. 992 S.W.2d at 209. This is because, in cases where negligence independent of the ownership or use of an automobile are at issue,

> the obligation and ability to supervise and control … are the decisive factors in the claim. The liability of [the insured] in this case will not

> be founded on the ownership and use of the vehicle that [cause the claimant's injury], but rather will focus on the aforementioned decisive factors.

Id.

Last year, the Southern District of the Court of Appeals entered this fray when it decided the case of *Estate of Murley v. Shelter Mut. Ins. Co.*, 250 S.W.3d 393 (Mo. App. 2008). In that case, a claimant was injured when a shower unit blew out of the bed of an insured's pickup truck while being transported on a highway and struck the claimant's truck. 250 S.W.3d at 395. The claimant obtained a judgment against the insured for the insured's negligent failure to secure the shower unit in its pickup truck. *Id.* The insurer denied coverage, citing a nearly identical automobile exclusion to the one at issue in this case. *Id.* at 397. The claimant filed an equitable garnishment action, in which the trial court entered judgment against the insurer. *Id.* On appeal, the Court of Appeals reversed the trial court's judgment, holding that "the act of negligently failing to secure the [vehicle] is dependent upon, not independent of, the use of the [vehicle]," and thus the concurrent causation doctrine was inapplicable. *Id.* at 401.

As with the Western District's decision in *Hartford*, however, this case is highly distinguishable from *Murley*. First, the court in *Murley* made no mention of Missouri's longstanding doctrine that an insurance policy exclusion which is

subject to two competing meanings, one excluding coverage and one in favor of coverage, must be construed in favor of coverage. More importantly, however, in *Murley*, there was *no question* that the insured was the one operating the pickup truck when the injury was caused. Plainly, as the Court of Appeals observed in that case, the claimant's injury arose out of the insured's ownership, operation, or use of the pickup truck.

Conversely, in this case, as in *Centermark*, *Columbia*, and *Bowan*, it is the negligence of ABC wholly independent of the ownership, operation, or use of its Honda which caused Mrs. Kinnaman-Carson's injuries. The trial court held in the underlying case that it was ABC's negligent failure to have proper security procedures in place which constituted a proximate cause of her injuries.

While ABC's ownership of the Honda may have been a concurrent proximate cause, ABC's negligent failure to secure its premises acted contemporaneously with the ownership, use, or operation of the automobile, and together caused Mrs. Kinnaman-Carson's injuries, which would not have resulted in the absence of either. As such, Missouri's concurrent cause doctrine acts so as not to exclude Mrs. Kinnaman-Carson's claims from ABC's insurance policy with Westport. Exclusion G must be construed strictly against Westport so as to provide coverage for ABC's independent negligence. Every applicable case in Missouri has held exactly this.

ii. Even given the second paragraph of Exclusion G, which seemingly seeks to broaden its terms, the exclusion is ambiguous as applied to this case and must be construed strictly against Westport and in favor of coverage.

Exclusion G includes a second paragraph after the actual exclusion which states the following:

> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

(L.F. 59, 409).

This paragraph, however, is wholly ambiguous as to what it purports to exclude. Moreover, it does not even mention a negligent failure to have proper security in place, which was the main thrust of the Kinnaman-Carsons' claims. It begins with the phrase "This exclusion applies even if…" To what, though, does "this exclusion" refer? One might interpret it as giving effect to the first paragraph of Exclusion G even if divisible or independent negligence such as some of that

alleged in this case exists. That is, even if the entrustment or use of the automobile involved negligent supervision, under that interpretation the exclusion stated flatly in the first paragraph still would be in effect.

But because the first paragraph does not exclude divisible or independent negligence – including negligent supervision or training – a competing interpretation is that there is no exclusion of these claims. One reader may choose to interpret "this exclusion" broadly as setting out additional exclusions encompassing claims for ABC's negligence in supervising or training its employees if an automobile caused the injuries.

As noted above, however, where there are two reasonable, competing interpretations of an ambiguous insurance policy exclusion, one excluding coverage and one construing coverage, the exclusion must be construed in favor of coverage. *Meyer Jewelry Co.*, 422 S.W.2d at 623. A provision in an insurance policy is ambiguous when there is "duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Rodriguez*, 808 S.W.2d at 382. The second paragraph of Exclusion G fits this definition to the letter.

If Westport intended this second paragraph to exclude *any* damages caused by negligent supervision or negligent hiring or training, it could have stated it clearly by drafting more like this:

> This Exclusion G applies to exclude any claims or suits against any insured involving "bodily injury" or "property damage" even if those claims rely on an underlying claim of negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by the insured, or in the insured's failure to secure its premises, if the "occurrence" which caused the claimed "bodily injury" or "property damage" concurrently and/or in any way involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

Plainly, sufficient language was available to Westport to state an additional exclusion clearly and unambiguously. But it did not craft the exclusion in this way. It failed to use clear and unambiguous language. The phrase "this exclusion applies even if…" itself is subject to inherent ambiguities and reasonably can be interpreted to refer to the exclusion stated in the first paragraph, which does not eliminate *all* coverage for independent negligence such as negligent supervision or training. As well, even this second paragraph makes no mention of negligence in securing the insured's premises. It cannot reasonably be interpreted to exclude the claims for which the Kinnaman-Carsons obtained their judgment against ABC.

a. "Claims" versus "suits"

Westport's policy with ABC provides that it covers "suits" seeking damages. The policy states, "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" (L.F. 56) (emphasis added). The policy defines "suit" as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged" (L.F. 70).

The second paragraph of Exclusion G, however, does not refer to excluding "suits," but rather "claims" – "claims against any insured." The policy does not define the word "claims." The exclusion could have stated "*claims* or *suits* against any insured…" It did not. "Claim" is not synonymous with "suit." The policy otherwise repeatedly refers to "claims or suits."

In Missouri, words in contracts must be interpreted as "understood by the average layperson," and "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. App. 1993). Because Exclusion G reasonably can be interpreted as *not* excluding "suits against the insured," by its

own terms the exclusion must be construed strictly against Westport as not applying to a suit.

b. "Negligence and other wrongdoing"

Even if "claims" somehow should be construed broadly to include "suits," Exclusion G contains other inherent, material ambiguities. The second paragraph refers to "negligence or other wrongdoing in the supervision…" In *Centermark*, the Court of Appeals held that the use of the vehicle was not used in furtherance of Centermark's business, and thus the exclusion could not apply. 897 S.W.2d at 101. Here, the actual exclusionary paragraph was identical to the one at issue in *Centermark*. The use of the Honda also was not either by any insured or in furtherance of the insured's business. ABC's underlying failure properly to secure its premises is not excluded – even under any reading of the second paragraph – nor was the failure to hire, train, and supervise employees with regard to safeguarding the Honda and its keys.

The policy's references to "negligence" and "other wrongdoing" imply that recklessness, accidents, or omissions are not excluded by Exclusion G. The inclusion of the terms "negligence" and "other wrongdoing" means that violations of the law, recklessness, accidents, or omissions simply are not excluded. *Expressio unius est exclusio alterius*: "to express or include of one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 602

(7th ed. 1999). Because Mrs. Carson's injuries were the result of (1) ABC's failure to secure its premises, which is not mentioned anywhere in Exclusion G, as well as its failure to secure the Honda, and (2) the operation of the automobile by someone other than the insured, the reference to "negligence" and "other wrongdoing" cannot be construed to include what it does not.

Moreover, Exclusion G does not define "negligence." Its usage is unclear. "Other wrongdoing" also is undefined and inherently vague. These terms might refer only to actions, not a failure to act. They might mean only actions in the discharge of duties to or on behalf of ABC.

In this case, however, the Honda was used by someone other than the insured without the insured's authorization. One might construe "wrongdoing" narrowly as conduct short of a crime, as otherwise the plain, understandable words "crime" or "unlawful acts" would have been used. Alternatively, if criminal behavior is included, "wrongdoing" might be construed to mean only misdemeanors, and not felonies. Either way, this language is unmistakably vague.

c. "Supervision" and "hiring"

The terms "supervision," "hiring," "employment," "training," and "monitoring of others" also are inherently ambiguous. It may be that these terms state legal terms of art. This, however, is unclear. Legal terms of art may not be readily understood by a layperson.

That is, it may be that the reference to "negligence" or "wrongdoing" in the "supervision" is a reference to the legal cause of action in Missouri known as "negligent supervision." If so, however, the language relies on legal terms of art without providing *any* definition of those terms in the policy or by referring either to statute sections or commonly accepted legal treatises for their meaning.

Construed narrowly and against Westport, however, as the law mandates this Court must, the terms "negligence in the supervision" cannot be the legal equivalent of a cause of action for negligent supervision under the law of Missouri. This exclusion cannot apply.

d. Other "if" conditions

The second paragraph of Exclusion G contains additionally vague terms. It states that it excludes the aforementioned items

> if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

(L.F. 59, 409).

But this provision is both duplicitous and highly uncertain. It recites the bulk of Exclusion G's first paragraph's language nearly verbatim, albeit with one exception: the first paragraph refers to "claims *arising out of* the ownership,

maintenance …," while this condition states, "*involved* the ownership, maintenance …" So, which is it? Given this language, the opening statement of the second paragraph, "this exclusion applies…", makes no sense. With such a blatant ambiguity, it manifestly was error for the trial court to grant summary judgment for Westport – especially without comment.

It is difficult to make sense out of precisely what the second paragraph means. Read along with the first paragraph, to which it expressly refers, the terms of the second paragraph are indistinct and inarticulate. Its meaning is uncertain.

C. Result

The one thing that *is* certain about Exclusion G is that the language which Westport cited to the trial court to exclude the Kinnaman-Carsons' claims in the underlying lawsuit is highly ambiguous and susceptible to two competing meanings, one excluding coverage and one construing coverage. The language is fatally "dulled by ambiguity." *Aetna Cas. & Sur. Co. v. Haas*, 422 S.W.2d 316, 321 n.5 (Mo. banc 1968). The trial court's conclusion otherwise was error. Westport did not have a right to judgment as a matter of law.

As the Court of Appeals did in *Centermark*, *Columbia*, and *Bowan* under nearly identical circumstances with nearly identical insurance policy exclusions at issue, this Court should construe Exclusion G strictly against Westport. This Court should hold that the exclusion does not exclude coverage for ABC's negligence in

failing to secure its premises and failing to hire, supervise, and train its employees consistent with standard industry policy, which was wholly independent of any ownership, use, maintenance, or entrustment to others of its automobile, especially when the automobile was not used by any insured and was not used in the furtherance of ABC's business.

The Court should reverse the judgment below and remand the case with instructions to enter judgment in the appellants' favor.

II. The trial court erred in granting summary judgment to Westport Insurance Corporation *because* the law of Missouri is that an insurance company is estopped from later declining coverage when it has elected to defend and indemnify its insured without a reservation of rights *in that* Westport had withdrawn its one and only reservation of rights and had elected to defend and indemnify its insured, ABC Specialties, Inc., without reservation, thereby waiving the defense that its policy did not cover this claim, and Westport's subsequent denial of that coverage was a breach of its duty of good faith and fair dealing.

Standard of Review

In an appeal from a grant or denial of summary judgment, this Court reviews the record "in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT Commercial Fin. Cop. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court accords "the non-movant the benefit of all reasonable inferences from the record." *Id.* The "propriety of summary judgment is purely an issue of law" and the standard of review "is essentially *de novo*." *Id.*

* * *

The law of Missouri is that an insurance company has several options when notified of a claim alleged to be within the terms of its policy with an insured. It can (1) deny coverage, (2) offer to defend with a reservation of rights, or (3) defend and indemnify the insured. A "reservation of rights" means that the insurance carrier will defend the insured, but will deny indemnification if its policyholder is found liable. As with any other company with a fiduciary relationship with another, an insurance company has a duty of good faith and fair dealing with its insured. When an insurance company agrees to defend without a reservation of rights, it has agreed to indemnify its insured if the insured is found liable. In this case, Westport stalled in its decision as to coverage, then denied coverage at the last moment, then reconsidered and offered to defend ABC with a reservation of rights (which ABC rejected), and then reconsidered again and offered to defend ABC without a reservation of rights. When the injured party sought to garnish Westport, the insurance company denied coverage altogether. The trial court granted summary judgment in Westport's favor. Was this error?

The sequence of events in the underlying case of the Kinnaman-Carsons against ABC as it relates to the issue of Westport's coverage of ABC was this:

Date	Event
August 28, 2004	Crash (L.F. 243).

August 27, 2005	The Kinnaman-Carsons file the underlying suit against ABC (L.F. 1).
January 20, 2006	Westport requests a 30-day extension of time to file an Answer; the Kinnaman-Carsons consent; Westport makes no mention of coverage issue (L.F. 156).
February 20, 2006	One-page facsimile letter sent from Westport's third-party administrator, Claims Management, to ABC's attorney, Mr. Garten, stating that a no-coverage letter would be sent to ABC later in the week, and reminding ABC that the extension to file an answer expired that day, so ABC must answer or seek another continuance (L.F. 156).
February 28, 2006	Letter from Westport to ABC stating that Westport was denying coverage (L.F. 4, 168-70).
June 12, 2006	The Kinnaman-Carsons file their First Amended Petition (L.F. 3-4, 156, 157-67).
August 15, 2006	Letter from Westport to ABC's attorney, Mr. Garten, stating, "We have reviewed the amended complaint and have made the decision to defend the insured under a Reservation of Rights. A copy of this letter will be sent to you. I am assigning Bradley Nielson of Franke & Schultz to

	defend ABC" (L.F. 171-72).
August 16, 2006	Letter from Mr. Garten to Westport, stating, "Your letter is dated some 65 days after the Amended Petition was mailed to your company. Please be advised that we would respectfully reject your company's belated offer of defense under reservation of rights" (L.F. 4, 172).
August 29, 2006	Bench trial (L.F. 178).
August 31, 2006	Trial court grants Judgment to the Kinnaman-Carsons (L.F. 178-84).
September 22, 2006	Letter from Franke & Schultz to Mr. Garten, stating, "Susan Todd of Claims Management has advised me that our client's insurance company has dropped its reservation of rights. They have agreed to defend ABC Specialty, Inc. without reservation of rights in the lawsuit brought by Karri Kinnaman-Carson and Randy Carson. I look forward to working with you on this case on behalf of ABC Specialty, Inc" (L.F. 4, 173).
September 30, 2006	Trial court's judgment in underlying case becomes final. ABC and Westport take no action; they file no Motion for New Trial, Motion to Amend, or other post-trial motion of

	any kind.
October 10, 2006	Time to file Notice of Appeal expires; ABC and Westport file no Notice of Appeal to the Missouri Court of Appeals, Western District.

This chart is more than merely a recitation of the communications by and between ABC and Westport. Rather, it plainly demonstrates Westport's absolute lack of concern for ABC's interests. At no time did Westport have ABC's best interests in mind. Indeed, the very first communication in this case shows as much.

On February 20, 2006, the very last day for ABC to file an Answer in the underlying lawsuit, Westport sent a one-page facsimile to ABC's attorney stating that the insurance company would not extend coverage. Apparently, each communication was pumped out of Westport's office without any investigation or thoughtful analysis. After the Kinnaman-Carsons amended their petition to allege that ABC was negligent in failing to secure its premises and failing to hire, train, and supervise its employees, all claims for which the trial court found ABC liable in the underlying case, Westport changed its mind and agreed to defend ABC with a reservation of rights. When ABC rejected the reservation of rights, Westport changed its mind again and, on September 22, 2006, after trial and judgment in the

Kinnaman-Carsons' favor, Westport, through counsel, expressly withdrew its reservation of rights, and agreed to defend ABC and indemnify it in full.

A. By affirmatively electing to defend ABC without a reservation of rights, Westport waived any subsequent argument that its policy excluded the Kinnaman-Carsons' claims.

The law of Missouri is that Westport's withdrawal of its reservation of rights was an admission that coverage lies for ABC's negligence, as well as an absolute waiver of its right to rely upon any alleged exclusions in its policy with ABC so as to deny coverage. In *Truck Ins. Exchange v. Prairie Framing*, 162 S.W.3d 64 (Mo. App. 2005), the Court of Appeals outlined an insurance company's duty to defend its insured:

> An insurance company has a duty to defend an insured when the insured is exposed to potential liability to pay based on the facts known at the outset of the case, no matter how unlikely it is that the insured will be found liable and whether or not the insured is ultimately found liable. To extricate itself from a duty to defend the insured, the insurance company must prove that there is no possibility of coverage. Coverage is principally determined by comparing the language of the insurance policy with the allegations in the pleadings. 'However, even though the pleadings do not show coverage, where

known or reasonably ascertainable facts become available that show coverage[,] the duty to defend devolves upon the insurer.'

162 S.W.3d at 80 (citations omitted).

In this case, Westport has left ABC entirely on its own, despite affirmatively agreeing to defend and indemnify ABC in full, without a reservation of rights.

A "reservation of rights" is a contract between an insurance company and its insured "in which the insured acknowledges that the insurer's investigation or defense of a claim against the insured does not waive the insurer's right to contest coverage later." BLACK'S LAW DICTIONARY 1082 (7th ed. 1999) (defining "reservation of rights" as alternative term to "nonwaiver agreement"). It is a means by which, prior to determination of the insured's liability, the insurer seeks by agreement to suspend the operation of the doctrines of waiver and estoppel so as to reserve the right later to disclaim coverage. *Safeco Ins. Co. of Am. v. Rogers*, 968 S.W.2d 256, 258 (Mo. App. 1998).

In *Truck Ins. Exchange*, the Court of Appeals also thoroughly discussed the options an insurer has in the situation which Westport faced in this case:

Upon proper notice to the insured, Missouri law permits an insurer to defend its insured but reserve the right to later disclaim coverage. The insured then has the option of either accepting the insurer's defense under a reservation of rights or refusing such defense. If the fully-

> notified insured accepts, the insurer's defense under a reservation of rights will not be considered a denial of coverage. But, the decision is the insured's, and "insurers cannot force insureds to accept a reservation of rights defense." Should the insured reject the defense, the insurer then has one of three options: "(1) [it] may represent the insured without a reservation of rights defense; (2) [it] may withdraw from representing the insured altogether; or (3) [it] may file a declaratory judgment action to determine the scope of [the] policy's coverage." If the insurer chooses (1), i.e. to defend without reservation, it "'has the opportunity to control the litigation.'" … "'*If its decision concerning coverage is wrong [the insurer] should be bound by the decision it has made*.'"

162 S.W.3d at 88 (citations omitted) (emphasis added).

The purpose of this rule of law is to ensure that an insured is well-informed by its insurer, so that it can be well-equipped to take whatever steps are necessary to protect its interests. The insured is entitled to rely on the representations which its insurer makes regarding coverage. If the insurance company sends conflicting messages or behaves in such a way that the insured relies on a representation of its insurer to its detriment, the insurer has violated its duty of good faith and fair dealing and has breached its contract with the insurer. *Id.* at 89.

In this case, Westport chose the first option which the court in *Truck Ins. Exchange* discussed: it agreed to defend and indemnify ABC without a reservation of rights. The effect of this was that Westport admitted that its policy issued to ABC provided coverage for the claim the Kinnaman-Carsons made against ABC in their first petition. *Id.* at 88. If Westport was wrong, it still must be bound by its decision. *Id.*

The Judgment in the underlying action was entered on August 31, 2006. Westport withdrew its reservation of rights on September 22, 2006. As the Judgment did not become final until September 30, 2006, Westport had eight days within which to file timely post-trial motions, in fulfillment of its promise to defend ABC without a reservation of rights. It similarly could have filed a Notice of Appeal, which it did not.

Westport sent three inconsistent letters during the pendency of the underlying litigation. The first denied coverage. The second, sent days before trial, purported to offer a defense under a reservation of rights. The third, sent after judgment already had been entered, completely withdrew the reservation of rights.

Although courts in Missouri "are inclined to grasp any circumstances which indicate an election" by an insurance company to waive coverage of its insured, "the intention to waive must plainly appear, or else the acts or conduct relied upon

as constituting waiver must involve some element of estoppel." *Quirk v. Columbian Nat. Life. Ins. Co.*, 207 S.W.2d 551, 557 (Mo. App. 1948).

If an insurer with knowledge of a defense on its policy defends to a conclusion an action against its insured without a reservation of rights, it has waived the right subsequently to assert that defense. *Truck Ins. Exch.*, 162 S.W.3d at 88; *Mistele v. Ogle*, 293 S.W.2d 330, 334 (Mo. 1956); *Nat. Battery Co. v. Standard Acc. Ins. Co.*, 226 Mo. App. 351, 41 S.W.2d 599, 604 (1931). This is true even if the basis for the action was not within the coverage of the policy. *Mistele*, 293 S.W.2d at 334. Only where an insurer suddenly learns of a right to disclaim liability and promptly withdraws will the insurer not be estopped from disclaiming and withdrawing. *State Farm Mut. Auto. Ins. Co. v. MFA Mut. Ins. Co.*, 485 S.W.2d 397, 402 (Mo. banc 1972).

The letters in this case must be read together. The law of Missouri is that, at this point, Westport is estopped from denying coverage. Changing this longstanding rule so as to permit insurance companies to make untimely offers to defend with a reservation of rights, then make a new offer to defend without reservation of rights after the judgment against its insured is entered, and *then* deny coverage altogether after the judgment has become final, would defeat the insurance company's duty of good faith and fair dealing with its insured. Indeed, it would result in an insurance company being able to have its cake and eat it, too.

The unmistakable reasoning behind Missouri's public policy otherwise is that an insured who is owed fiduciary duties by its insurer should not be faced with a moving target of ever-changing positions during litigation. It is unfair to induce an insured to proceed forward on the belief that coverage exists because no reservation of rights letter has been tendered, or that the previous reservation of rights has been withdrawn.

When the attempted reservation of rights is ambiguous, the provisions of the purported reservation must be construed strictly against the insurer and liberally in favor of coverage. 7C APPLEMAN, INSURANCE LAW & PRACTICE § 4892 (1979). In this case, by its own actions, Westport irrevocably fixed the course of events by denying coverage, then offering to defend with a reservation of rights, then deciding to defend and indemnify without a reservation of rights. Its actions must be construed in favor of coverage.

In *Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wash.App. 247, 554 P.2d 1080 (1976), the Washington Court of Appeals held that an insured establishes prejudice as a matter of law when its insurer changes positions on the issue of a reservation of rights during the litigation. 554 P.2d at 1083-84. In that case, the insurer controlled the insured's defense for ten months before issuing a reservation of rights. *Id.* at 1081. The court held that this was bad faith, because the "course cannot be rerun, no amount of evidence will prove what might have

occurred if a different route had been taken. By its own actions, [the insurer] irrevocably fixed the course of events concerning the law suit for the first 10 months. Of necessity, this establishes prejudice." *Id.* at 1083.

Westport's prejudice to ABC and – vicariously – the Kinnaman-Carsons, is of an even greater magnitude than in *Transamerica*. In this case, Westport's letter withdrawing its reservation of rights was sent *after* the judgment had been entered, but before it was final. Westport plainly knew the facts relative to the lawsuit. Its letter withdrawing its reservation of rights constituted a binding election to affirm coverage under its policy with ABC. It effected a waiver. Plainly, Westport's inconsistent and untimely letters which ultimately elected to defend ABC without a reservation of rights after judgment waived its denial of coverage; thereafter, Westport was estopped from denying coverage. *See* 44 AM.JUR.2D *Insurance* § 1423 (1982).

Westport's conduct in the underlying lawsuit exemplifies bad faith. It handled the insurance claim in a self-serving manner, with no regard to its fiduciary. Its letters were untimely. Its ultimate position that it would defend and indemnify ABC in full was an admission that there was coverage and that it waived the issue of whether there was coverage. Indeed, Westport plainly repudiated the terms of its previous letter that it only would defend under a reservation of rights. Westport is guilty of bad faith gamesmanship, which led

ABC to believe that insurance coverage was not at issue, and would not be contested by Westport.

B. The Kinnaman-Carsons raised and preserved this issue below.

"An appellant's failure to preserve an issue at the trial court waives the issue, and it is not reviewable on appeal." *Ryan v. Maddox*, 112 S.W.3d 476, 479 (Mo. App. 2003). At a lawsuit's outset, the plaintiff must plead the ultimate facts to state a claim. *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App. 2003). To do so, the plaintiff must make a short, concise statement of the material facts to establish the elements of each claim. *Id.*; Rule 55.05.

A party responding to a motion for summary judgment must make an appropriate response to the material facts offered in support of the motion. Rule 74.04(c)(2). The facts must be supported with specific references to the pleadings, discovery, and exhibits, or an affidavit which demonstrates the party's asserted factual position. Rule 74.04(c)(1).

The appellants in this case satisfied these requirements such that the issue of the effect of Westport's reservation of rights is preserved for appeal. In their equitable garnishment petition, the Kinnaman-Carsons concisely stated the applicable material facts:

> 14. Plaintiff initiated a Petition for Damages in the Circuit Court of Jackson County, Missouri under case number 0516-CV29901. A true

and accurate copy of the Petition is attached hereto and incorporated herein as Exhibit "B". Defendant was served on December 29, 2005 by serving owner Danny Moody. Westport, by and through its agent, requested from plaintiff's counsel an extension of time to answer the Petition. Said request was granted and the parties agreed that defendant would file an answer on or before February 20, 2006. However, on February 20, 2006, Westport, through its agent Claim Management Services, Inc, sent a one page facsimile transmission stating that coverage would be denied. Further, it stated that the extension was granted through today (Feb 20, 2006) and that an answer must be filed today or another extension sought. A true and accurate copy of the facsimile transmission is attached hereto and incorporated herein as Exhibit "C". An Amended Petition was filed on June 12, 2006. Said Amended Petition is attached hereto an incorporated herein as Exhibit "D".

15. On February 28, 2006, defendant Westport denied liability in a letter to Kendall R. Garten, Esq., attorney for Defendant ABC. A true and correct copy of the letter is attached hereto and incorporated herein as Exhibit "E".

16. Subsequently, Westport reviewed the Amended Petition, attached Exhibit "D". After reviewing the Amended Petition, and on August 15, 2006, Westport offered to defend ABC under a reservation of rights. A true and accurate copy of this letter is attached hereto and incorporated herein as Exhibit "F". This offer to defend under a reservation of rights was sent to Kendall R. Garten some sixty-five (65) days after the Amended Petition was sent to Westport.

17. On August 16, 2006, ABC refused the offer of Westport to defend ABC under a reservation of rights in a letter from Kendall R. Garten to Susan Todd. A true and accurate copy of this letter is attached hereto and incorporated herein as Exhibit "G".

18. On September 22, 2006, some thirty-seven (37) days after the rejection of the defense under the reservation of rights, Bradley Nielsen wrote a letter to Kendall Garten advising that Westport had agreed to withdraw its reservation of rights. A true and correct copy of this letter is attached hereto and incorporated herein as Exhibit "H".

(L.F. 3-4). Plainly, these are all the material facts necessary to address the issue of what effect Westport's election to defend and indemnify ABC in full had on its subsequent outright denial of coverage. The Petition and all of its incorporated attachments were before the trial court.

Moreover, in their response to Westport's motion for summary judgment, the Kinnaman-Carsons specifically discussed this effect by quoting from *State ex rel. Rimco v. Dowd*, 858 S.W.2d 307 (Mo. App. 1993), one of the cases on which *Truck Ins. Exch., supra*, relied in discussing the effect of a reservation of rights or non-reservation of rights. The Kinnaman-Carsons stated:

> It is essential that this Court not be drawn or lured into a re-examination of any aspect of the final Judgment as a result of Westport's re-characterization of the legal and factual basis for the Judgment. In *State ex rel. Rimco v. Dowd*, 858 S.W.3d 307, 309 (Mo. App. E.D. 1993), the Eastern District of Missouri Court of Appeals held:
>
> "The insurer has the opportunity to control the litigation by accepting the defense without reservation. If it elects some other course it forfeits its right to participate in the litigation and to control the lawsuit. *If its decision concerning coverage is wrong, it should be bound by the decision it has made.*"

(L.F. 450) (emphasis added). The Kinnaman-Carsons also discussed the effect of this reservation of rights issue in the previous two pages of their summary judgment response (L.F. 448-49).

On appeal, this Court accords "the non-movant the benefit of all reasonable inferences from the record." *ITT Commercial Fin. Cop. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The "propriety of summary judgment is purely an issue of law" and the standard of review "is essentially *de novo*." *Id.* Moreover, in summary judgment proceedings, where what is alleged to be a dispute of fact is really the differing opinions of the parties as to the effect of documents or actions determining their respective rights, the propriety of summary judgment is an issue of law to be reviewed purely *de novo*. *Baker v. State Farm Mut. Aut. Ins. Co.*, 806 S.W.2d 742, 743 (Mo. App. 1991).

Westport did not contest below that it withdrew its reservation of rights in the underlying case. That it did so was plainly before the trial court. The Kinnaman-Carsons placed the material facts necessary to establish their claim regarding the reservation of rights in their Petition, and they addressed the issue again in their summary judgment response. As such, the question of what effect that withdrawal had on Westport's subsequent denial of any coverage was before the trial court. It also was preserved for appeal.

C. Result.

By agreeing to withdraw its reservation of rights before the underlying Judgment became final, Westport agreed to defend and indemnify ABC in full if ABC were found liable. The law of Missouri is that it cannot subsequently deny

coverage outright so as to avoid paying on the underlying Judgment. That the trial court granted summary judgment otherwise was error.

The Court should reverse the judgment below and remand the case with instructions to enter judgment in the appellants' favor.

Conclusion

The trial court's interpretation of "Exclusion G" in Westport Insurance Corporation's policy issued to ABC Specialty, Inc., was unreasonable and contrary to the law of Missouri. The exclusion was ambiguous and duplicitous, and it did not exclude coverage for the independent negligence of ABC which resulted in the appellants' damages.

Additionally, Westport waived the defense that its policy did not cover the appellants' claims against ABC. Its subsequent denial of that coverage was a breach of its duty of good faith and fair dealing. The law of Missouri is that Westport is estopped from subsequently denying coverage.

This Court now should reverse the trial court's Judgment and remand this case with instructions to enter judgment for the appellants.