SUPREME COURT OF MISSOURI
en banc

RICKY GRIFFITTS, Appellant, v. OLD REPUBLIC INSURANCE COMPANY, BNSF RAILWAY COMPANY, and JAMES M. CAMPBELL, Respondents.	)	***Opinion issued July 3, 2018*** No. SC96740

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
The Honorable Jason Brown, Judge

Appellant Ricky Lee Griffitts ("Griffitts") was rear-ended by James Campbell ("Campbell"), an employee of BNSF Railway Company ("BNSF"), in Springfield, Missouri. Campbell was driving a BNSF company vehicle and was intoxicated at the time of the collision. Numerous lawsuits ensued, including the instant equitable garnishment action that Griffitts filed against BNSF and its insurer, Old Republic (collectively, Respondents), to collect on the unsatisfied $1.475 million judgment entered against Campbell in an earlier action. Griffitts filed this equitable garnishment suit claiming Campbell was a permissive user under the omnibus clause of the insurance

policy Old Republic issued to BNSF. This Court has jurisdiction under article V, section 10, of the Missouri Constitution. The judgment of the circuit court is vacated, and the case is remanded to the circuit court for further proceedings.

Background

While employed with BNSF, Campbell was a foreman on a tie gang (a group of workers who travel the region and replace railroad ties) for BNSF. Campbell's position required him to travel to and stay at out-of-town job sites sometimes for up to a week or more in a multistate region. This region included Tennessee and Missouri. In January 2009, BNSF gave Campbell a BNSF-owned vehicle ("company vehicle") to use for work purposes.[1] While at home in Tennessee, however, Campbell was only permitted to use the company vehicle for work and did not have permission to use it for personal use.

Then, in March 2009, Campbell's supervisor gave him permission to use the company vehicle to commute between his home in Tennessee and a job site in Springfield, Missouri. BNSF had no express policy or rule detailing what a BNSF employee could (or could not) use a company vehicle for while traveling to, staying near, and working at an out-of-town job site.[2] Campbell regularly used the company vehicle to get meals, go to job sites, and do other necessary errands. Campbell was never told he

[1] On March 14, 2009, Campbell took the original vehicle assigned to him to a repair shop due to problems with that vehicle's electrical system. A 2008 Chevrolet Silverado pick-up truck was provided to Campbell as a replacement vehicle. Because the Silverado – like the original vehicle provided to Campbell – belonged to BNSF, the fact Campbell was driving the Silverado and not the original vehicle at the time of the collision has no bearing on the outcome of this case.

[2] Additionally, there was no rule requiring BNSF employees to be on the clock or in the course or scope of their employment to drive a company vehicle while traveling to, staying near, and working at an out-of-town job site.

could not use the company vehicle in this way, nor was he disciplined for doing so. Other BNSF employees corroborated Campbell's use of the company vehicle in this manner, as they testified they also used company vehicles for the same purposes. In fact, one BNSF employee testified that, when he was traveling to, staying near, and working at an out-of-town job site, he used the company vehicle for any purpose for which he would use his own vehicle. Further, while Campbell was working at the job site in Springfield, BNSF was aware the company vehicle was his only means of transportation.

Despite BNSF's lack of an express rule regarding when an employee could (or could not) use a company vehicle while traveling to, staying near, and working at an out-of-town job site, BNSF had rules and polices for other matters. Of particular significance are BNSF's policy on the Use of Alcohol and Drugs, section 3.1 of which prohibits the use or possession of alcohol "while on BNSF property, on duty, or operating BNSF work equipment or vehicles," and BNSF's Maintenance of Way Rule, section 1.5 of which prohibits "the use or possession of alcoholic beverages while on duty or on company property" (collectively, the Company Rules).

On the day of the collision, Campbell traveled from his home in Tennessee to a motel in Springfield, where he would be staying while working at the BNSF job site nearby. After arriving at the motel around 5:00 p.m., Campbell joined other BNSF employees to eat barbecue, play video games, and drink alcohol. After a time, a few of Campbell's coworkers walked him back to his room, where he fell asleep for a few hours. Around 8:30 p.m., Campbell woke up and left the hotel in the company vehicle.

Moments later, Campbell ran the company vehicle into the back of Griffitts's vehicle, which had been stopped at a traffic light. Griffitts sustained serious injuries from the collision. Campbell's vehicle ultimately came to rest in the parking lot of a Ruby Tuesday's restaurant.[3] The police arrived at the scene shortly thereafter. Campbell admitted to the responding officers he had been drinking and felt intoxicated. Campbell was arrested. Subsequent testing revealed his blood alcohol content was more than twice the legal limit.[4] Campbell's conduct prompted an internal investigation by BNSF and, in April 2009, Campbell was fired for violating the Company Rules.

Campbell's collision has sparked a great deal of litigation. Of particular significance is Griffitts's third negligence lawsuit against Campbell,[5] in which the circuit court entered a $1.475 million judgment for Griffitts and against Campbell. That judgment went unsatisfied for 30 days, after which Griffitts filed the instant equitable

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[3] The circuit court found, "at the time of the crash, … Campbell was on his way either to Ruby Tuesday's to drink more alcohol, or to a liquor store to purchase more alcohol." The circuit court indicated it was "unpersuaded" Campbell was in search of more food. Of course, "[c]onflicts in the evidence [are] for the trial court to resolve." *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). Accordingly, this Court is bound by the factual findings of the circuit court. This has no bearing on the outcome of this case, however, because Campbell's permission to use the company vehicle was not limited to going to get food. Rather, Campbell had broad, general permission to use the company vehicle. As a result, the circuit court's finding on this point will not be addressed further.

[4] Campbell ultimately pleaded guilty to felony counts of leaving the scene of an accident and second-degree assault. His sentence included an order to pay Griffitts $45,000 in restitution.

[5] Griffitts first sued Campbell and BNSF for negligence in Greene County circuit court, Case No. 0931-CV04244. BNSF removed that case to the U.S. District Court for the Western District of Missouri, which ultimately found Campbell was not acting within the course and scope of his employment at the time of the collision and, therefore, entered summary judgment in favor of BNSF on Griffitts's *respondeat superior* claim. Griffitts then filed a second negligence suit, this time against Campbell alone, in Greene County circuit court, Case No. 1131-CV03896. BNSF and Old Republic filed a motion to intervene, but, prior to any rulings by the circuit court, Griffitts voluntarily dismissed that case.

garnishment action against Respondents on the ground Campbell was a permissive user under the omnibus clause of the insurance policy issued by Old Republic to BNSF.

The only issue considered by the circuit court was whether Campbell, at the time of the collision, had permission to use the company vehicle under the omnibus clause of BNSF's insurance policy. The circuit court reasoned the Company Rules were rules of authorization or permission. Because Campbell was in violation of the Company Rules at the time of the accident, the circuit court concluded Campbell did not have permission to use the company vehicle at that time and, therefore, was not a permissive user under the omnibus clause of BNSF's policy. As a result, the circuit court entered judgment for Respondents.

Standard of Review

Appellate review of an equitable garnishment action is governed by Rule 73.01. *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 705 (Mo. banc 2011). "The judgment will be affirmed unless there is no substantial evidence to support it or unless it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law." *Id.* As with any other contract, the "interpretation of an insurance policy is a question of law that this Court determines *de novo*." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). "In construing the terms of an insurance policy, this Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance ...." *Id.* (quotation marks omitted). "Absent an ambiguity, an insurance policy must be enforced according to its terms." *Id.* Notably, "[w]here the policy language has already been judicially defined," no ambiguity exists,

and "the judicial definition[] assigned to [a] policy term [is] controlling." *Walden v. Smith*, 427 S.W.3d 269, 274 (Mo. App. 2014). However, the "credibility of witnesses and the weight to be given their testimony is a matter for the circuit court, which is free to believe none, part, or all of their testimony." *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988).

Analysis

Point I of Griffitts's substitute brief fails to comply with Rule 84.04.[6] In its discretion, however, this Court elects to review only the first of the two claims in Griffitts's multifarious Point I, i.e., whether the circuit court erroneously declared the law regarding what constitutes permissive use (as distinct from operation) of a vehicle under the omnibus clause of an insurance policy. *See Spence v. BNSF Ry. Co.*, __ S.W.3d. __, Slip Op. at 14 n.12 (Mo. banc 2018) (No. SC96195, decided May 22, 2018, and modified on the Court's own motion June 12, 2018) (electing to review only the first of multiple claims in a multifarious point relied on). Resolution of this point is sufficient to decide the appeal.

"It is the public policy of this state to assure financial remuneration for damages sustained through the negligent operation of motor vehicles on the public highways of

[6] Griffitts's Point I argues the circuit court erroneously declared and applied the law. These are separate and distinct claims. Griffitts's Point I violates Rule 84.04, therefore, because "it groups together multiple, independent claims rather than a single claim of error." *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017). "Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review." *Id.*

this state not only by the owners of such automobiles but also by all persons using such vehicles with the owner's permission, express or implied." *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21, 22-23 (Mo. App. 1982) (citing *Winterton v. VanZandt,* 351 S.W.2d 696, 701 (Mo. 1961)). This public policy is made law in section 303.190.2(2) of the Motor Vehicle Financial Responsibility Law, which requires any insurance policy issued in the state to have an omnibus clause. *Ragsdale v. Armstrong*, 916 S.W.2d 783, 785 (Mo. banc 1996). An omnibus insurance clause requires coverage for "the person named therein and any other person … using any such motor vehicle or motor vehicles with the express or implied permission of such named insured." § 303.190.2(2). "Omnibus coverage provisions are intended to extend, not restrict, coverage afforded and such intention is salutary." *Weathers v. Royal Indem. Co*., 577 S.W.2d 623, 626 (Mo. banc 1979) (citation omitted). "Such extension is accomplished by enlarging the number and variety of insured classes." *Id.*

In 1979, this Court construed the policy language at issue in this case, and that "judicial definition[] … [is] controlling." *Walden*, 427 S.W.3d at 274. Therefore, by failing to employ prior judicial constructions of the relevant policy language concerning permissive use, the circuit court erroneously declared the law. In *Weathers*, this Court held the phrase "permissive use" as used in an omnibus insurance clause protects any person using the vehicle with the permission (express or implied) of the named insured whether or not the actual operation of the vehicle is within the framework of that permission. *Weathers*, 577 S.W.2d at 628. The Court explained, "[u]se is said to involve

its employment for some purpose or object of the user,"[7] whereas "[o]peration of the vehicle … is said to involve the driver's direction and control of its mechanism for the purpose of propelling it as a vehicle." *Id.* at 627. As such, in the context of an omnibus insurance clause, the term "use" is much broader in scope and application than the term "operate."

In *Weathers*, this Court addressed whether the driver of a rented vehicle was a permissive user under the omnibus clause of the rental car company's insurance policy. *Id.* at 624. Ultimately, this Court found the renter's permission to use the rental vehicle was "broad, almost unfettered," whereas the renter's operation was limited by restrictions in the rental agreement. *Id.* at 626-27. Although the driver of the rented vehicle was not permitted to drive the vehicle pursuant to the rental agreement, the Court found he was covered under the omnibus insurance clause because the forbidden act (i.e., a non-permitted driver driving the rental vehicle) related to the operation, and not the use, of the vehicle. *Id.* at 628. The Court explained, when a "use ha[s] been permitted, it is immaterial how the vehicle was operated." *Id.*

Both this Court and the court of appeals have dutifully applied the holding in *Weathers* on many occasions.[8] Of particular significance here is *United Fire & Casualty Co. v. Tharp*, 46 S.W.3d 99 (Mo. App. 2001), which is factually similar to the present

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[7] *See also Farm Bureau Mut. Ins. Co. v. Broadie*, 558 S.W.2d 751, 754 (Mo. App. 1977) (finding use is the purpose "actually contemplated at the time of the original bailment").

[8] *See, e.g.*, *Royal Indem. Co. v. Shull*, 665 S.W.2d 345 (Mo. banc 1984); *Broadie*, 558 S.W.2d 751.

case.[9] In *Tharp*, the court of appeals found the omnibus clause of the employer's insurance policy extended coverage to the employee. *Id.* at 100-01. The employee had permission to use the company vehicle to get meals after work hours, which is what he was doing at the time of the accident giving rise to the lawsuit. *Id.* at 102. And although the employee violated his employer's company rules against hauling non-employee passengers and consuming alcohol, the court of appeals properly found such conduct related to the operation, and not the use, of the vehicle. *Id.* at 105.[10]

Here, the omnibus clause of BNSF's insurance policy provides coverage for "anyone else while using with your permission a covered 'auto' you own, hire or borrow." As with the cases above, the issue is whether Campbell's use (as distinct from operation) of the vehicle was within the scope of permission given by BNSF and, therefore, covered under the omnibus insurance clause. This Court holds it was.

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[9] Respondents' attempt to distinguish *Tharp* is unpersuasive. Respondents argue that, in *Tharp*, the court found the employee was covered under the omnibus insurance clause because his supervisor knew of and acquiesced to the violation of the employer's rules (i.e., driving a non-employee in the vehicle and driving under the influence of alcohol). But the court in *Tharp* did not hold the employee was not in violation of his employer's rules due to the presence and apparent acquiescence of his supervisor. Rather, the court found he was in violation of his employer's rules but, because those rules regarded only the operation, and not the use, of the vehicle, the employee's violation of the rules did not preclude coverage under the omnibus insurance clause.

[10] Similarly, *Allstate Insurance Co. v. Sullivan*, 643 S.W.2d at 23, also deals with coverage pursuant to an omnibus insurance clause and a prohibition against driving while intoxicated. In *Sullivan*, the court held that Sullivan's driving while intoxicated (in violation of the terms of the rental agreement) related to the operation of the vehicle, but "Sullivan's [permitted use] of the [rental] car was … broad[] [and] almost unfettered." *Id.* As a result, the court held "use (as distinct from the operation) by Sullivan of the vehicle was within the scope of permission given by Budget." *Id.*

It is undisputed Campbell had permission to drive to and from his Tennessee home to the BNSF job site in Springfield.[11] When Campbell was out of town for work, the company vehicle was his only means of transportation and he was permitted to use the vehicle to get meals and run personal errands. Campbell and other employees had previously (and routinely) used company vehicles for such purposes without any instruction to the contrary or discipline from BNSF. Accordingly, as in *Weathers*, Campbell had "broad, almost unfettered" permission to use the company vehicle while he was traveling to, staying near, and working at an out-of-town job site.

Because Campbell had broad, almost unfettered permission to use the company vehicle at the time of the accident, it does not matter, for purposes of insurance coverage under BNSF's omnibus clause, that Campbell was drunk because, once "use ha[s] been permitted, it is immaterial how the vehicle was operated." *Weathers*, 577 S.W.2d at 628. Like the rental agreement restrictions in *Weathers* and the employer's company rules in *Tharp*, Campbell's violation of the Company Rules were restrictions on operation, not use.[12]

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[11] Although, "[p]ermissive use is a question of fact[,]" *State Farm Fire & Cas. Co. v. Ricks*, 902 S.W.2d 323, 324 (Mo. App. 1995), and the circuit court found Campbell was not a permissive user of the company vehicle, the circuit court's judgment was based on an erroneous declaration of law and cannot stand. Despite this Court having clarified almost 40 years ago in *Weathers* the meaning of the relevant terms in omnibus clauses, the circuit court used an incorrect definition and, as a result, erroneously declared the law. *Walden*, 427 S.W. 3d at 274; *Schmitz*, 337 S.W.3d at 705.

[12] Respondents rely heavily on the fact that Campbell admitted to violating the Company Rules on the night of the collision. Campbell's admission, however, has no bearing on the outcome of this case. But because the Court holds the Company Rules are rules of operation and not use, Campbell's violation of those rules has no bearing on the issue of whether he was covered under the omnibus clause of BNSF's insurance policy as a permissive user.

Accordingly, this Court holds the circuit court erroneously declared the law when it concluded Campbell's violation of BNSF's rules regarding vehicle operation were sufficient to preclude coverage under the omnibus clause of BNSF's insurance policy.

Conclusion

For the reasons set forth above, the judgment of the circuit court is vacated and the case remanded to the circuit court for further proceedings.[13]

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Paul C. Wilson, Judge

All concur.

[13] The remainder of Griffitts's multifarious Point I argues the circuit court erroneously applied the law regarding the permissive user of a vehicle under an omnibus insurance clause. In Point II, Griffitts argues the circuit court did not have authority to proceed because it received this case as the result of an improper application for change of judge filed by Respondents. In Points III and IV, Griffitts asserts the circuit court erroneously applied the law in that the doctrines of judicial estoppel and collateral estoppel, respectively, required the circuit court to find that, at the time of the collision, Campbell was traveling to a restaurant to eat dinner. Because this Court grants Griffitts relief on the first argument in Point I, it neither reaches nor decides these other points.