ARIZONA COURT OF APPEALS

DIVISION TWO

MELISSA LAWSON, a single woman, TANNER LAWSON, a minor child, and JORDYN LAWSON, a minor child, Defendants-Appellants, vs. COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff-Appellee.	)	No. 2 CA-CV 2016-0154 Graham County Superior Court No. CV-2015-00004

PLAINTIFF-APPELLEE COUNTRY MUTUAL INSURANCE COMPANY'S ANSWERING BRIEF

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STATEMENT OF THE CASE

Country Mutual Insurance initiated the underlying declaratory judgment action in Graham County Superior Court, requesting the court's determination of whether Maria and Jason Koutses' homeowner's insurance policy provided coverage for a claim for personal injuries by Melissa Lawson, who was injured while participating in a fitness class instructed by Maria Kouts, on January 14, 2013. (ROA 1).

Country Mutual filed a Motion for Summary Judgment, arguing that Maria's activities at Local Edge fell within the policy's business exclusion. (ROA 7 ep 4-15). The trial court denied Country's Motion, ruling that there was a dispute of fact regarding the nature of her activities and whether they constituted business activities. (ROA 20 ep 1). The Koutses and the Lawsons subsequently moved for summary judgment, arguing that the policy language defining "business" is ambiguous and should be construed against Country to find coverage. (ROA 29 ep 5-7). The court denied the Motion, based on its prior ruling that a dispute of fact existed, and also ruled that the policy language was not ambiguous. (ROA 45 ep 2).

Following a two-day trial, the jury found that Maria was engaged in a business at Local Edge Fitness (ROA 84 ep 1; ROA 77 ep 1), and based on that factual determination by the jury, and on the applicable law, the trial court issued its ruling in Country Mutual's favor. (ROA 84).

The Koutses and Lawsons filed a Motion for a New Trial pursuant to Rule 59, ARCP, making a number of arguments related to rulings before and during the trial related to evidence and the instructions given to the jury. (ROA 89). They also renewed their Motion for Judgment as a Matter of Law, arguing that language in the policy is ambiguous and must be construed in favor of coverage. (ROA 90). Country responded to both post-trial Motions (ROA 97, ROA 98), and on June 29, 2016 the trial court issued rulings denying both Motions. (ROA 102, ROA 103). Country submitted an Application and Request for Attorneys' Fees (ROA 91) (clarifying it was not seeking a fee award against the Koutses, its insureds) as the prevailing party pursuant to A.R.S. § 12-341.01, and the Koutses / Lawsons filed an objection. (ROA 93). The trial court overruled the objection (ROA 104), and signed the Judgment including an award of Country's fees against the Lawsons only, on June 30, 2016. (ROA 105).

On July 29, 2016, the Lawsons filed a Notice of Appeal. (ROA 106). The Notice of Appeal states the Lawsons appeal the Declaratory Judgment dated May 9, 2016, and also appeal the "two judgments entered on 29th Day of June, 2016, regarding the Lawsons' R. 50 and R. 59 motions." (ROA 106 ep 1).

STATEMENT OF FACTS

In June 2011, Maria Kouts agreed to be a substitute instructor for a Zumba fitness class at Local Edge Fitness in Safford, for which she was paid $10.00 per class.

(Country's SOF attached to Motion to Expand Record, CSOF, 11/18/16 ep 5, ¶¶5-6). After subsequently becoming a certified Zumba instructor effective August 11, 2011, Maria began teaching her own class at Local Edge five days per week, for which she was also paid $10.00 per class. (CSOF, 11/18/16 ep 5, ¶¶7-8). (Maria testified in October 2014 that she was paid $10.00 per class (*Id.*); she testified at trial that she was paid in "Zumba gear, or clothing.") (RT, 05/06/16 ep 72)

After injuring her knee in December 2011 while teaching at Local Edge, Maria did not teach for approximately 7 months. (CSOF, 11/18/16 ep 6, ¶10). She did still visit Local Edge on a regular basis during that time period. (RT 05/06/16 ep 74) When she resumed instructing classes, she taught two days per week beginning in August 2012. (CSOF, 11/18/16 ep 6, ¶10).

In the April / May 2012 time frame, Cami Warren, Local Edge's owner and Maria's friend, asked Maria to be her partner in the business, because Ms. Warren was moving out of state. (CSOF, 11/18/16 ep 6, ¶11). Maria initially declined, but then agreed, because she did not want Local Edge to close. (CSOF, 11/18/16 ep 6, ¶¶12-14). Maria was to be "the face" of Local Edge, and would draw customers in, and Ms. Warren would take care of the "paperwork." (CSOF, 11/18/16 ep 6, ¶13). Part of the agreement was that neither Ms. Warren nor Maria would take a paycheck as partners. (CSOF, 11/18/16 ep 6, ¶14).

After Ms. Warren's departure in approximately August 2012, Maria taught

fitness classes two days per week. (CSOF, 11/18/16 ep 6, ¶16). She also would pay employees per Ms. Warren's instruction, and she was a signer on the Local Edge bank account. (RT 05/06/16 ep 84)(CSOF, 11/18/16 ep 34, at 41-42).

Also in August 2012, Maria's husband, Jason, agreed to obtain a $40,000.00 loan for new equipment and improvements to Local Edge. (RT 05/06/16 ep 91; CSOF, 11/18/16 ep 7, ¶23) Jason, who owns a contracting business, personally worked on the improvements, but was not paid for doing so. (RT 05/06/16 ep 92-94). Maria testified that Local Edge made repayments on the loan in the amount of $500.00 per month to the lender beginning August 2012. (CSOF, 11/18/16 ep 7, ¶24).

On January 14, 2013, Melissa Lawson was participating in a cross-fit class instructed by Maria, and allegedly suffered a stroke after swinging a "kettlebell." (CSOF, 11/18/16 ep 4-5, ¶¶1, 2). At this time, Maria was instructing classes two days per week and was present at Local Edge 5 days per week from 6:00 a.m. until noon. (CSOF, 11/18/16 ep 6, ¶17).

Maria had a web-page sponsored by Zumba, and on that web page (dated March 2013), she represented that she was "co-owner of Local Edge Fitness." (RT 05/06/16 ep 78-79). Approximately seven months after Lawson's injury, Maria contacted Ms. Warren via Facebook, and asked Ms. Warren if she would allow her be "sole owner of Local Edge." (RT 05/06/16 ep 103; 105-107). Maria did not take legal ownership, but was effectively running the business until she "got rid of it very quickly." (RT

05/06/16 ep 107-108).

In July 2014, Lawsons sued the Koutses and Local Edge, alleging, in part, that Maria's negligence caused her injury at Local Edge. (CSOF, 11/18/16 ep 4-5, ¶1). The Koutses requested coverage under their homeowner's policy with Country Mutual, and Country Mutual agreed to defend the Koutses pursuant to a reservation of rights. (CSOF, 11/18/16 ep 10-11, ¶¶36-37; ROA 30 ep 18-25). Country then initiated a declaratory judgment action to ascertain whether coverage was precluded by the policy's business exclusion. (ROA 1). In the course of the declaratory action, the Koutses and Lawsons had entered into a *Morris* agreement with a stipulated judgment and covenant not to execute. (ROA 30 ep 54-61).

The homeowner's insurance policy issued to the Koutses and in effect at the time of Lawson's accident, provided:

SECTION 1
Liability, Coverage A

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, "we" will:

1. Pay up to "our" limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and

2. Provide a defense at "our" expense by counsel of "our" choice, even if the suit is groundless, false or fraudulent. "We" may investigate or settle any claim or suit as "we" decide is appropriate. "Our" duty to settle or defend ends when "our" limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

Exclusions – SECTION 1

. . .

E. Liability, Coverage A and Medical Payments, Coverage B do not apply to the following:

2. Business

a. "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured", whether or not the "business" employs an "insured".

This exclusion E.2. applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business."

Definitions (Includes Limitations)

4. "Business" means:
   a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or
   b. Any other activity engaged in for financial compensation, other compensation, or other professional purposes, except the following:
      (1) Activities for which no "insured" receives more than $2,000 in total compensation for the 12 months before the "occurrence";
      (2) Providing home day care services for which no compensation is received, other than the mutual exchange of such services; or
      (3) The rendering of home day care services to a relative of an "insured".

(ROA 76; CSOF, 11/18/16 ep 9-10; 51-93, ¶35).

ISSUE PRESENTED

Did the trial court correctly rule in Country Mutual's favor on coverage, after a jury resolved a factual dispute and found that Maria was engaged in a business at Local Edge, and when the Country Mutual Homeowners Policy excluded from coverage

bodily injury arising out of or in connection with a business engaged in by an insured?

ARGUMENT

I. The Business Exclusion Applies.

A. Standard of review.

Interpretation of the Country Mutual policy is a question of law which this Court reviews de novo. *See Benevides v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 184 Ariz. 610, 613, 911 P.2d 616, 619 (App. 1995). To the extent this Court is confronted with fact questions, it is "bound by the trial court's findings unless they are clearly erroneous." *Ahwatukee Custom Estates Mgt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000).

B. Maria was Engaged in a Business at Local Edge Fitness.

The homeowner's policy excludes from coverage "'[b]odily injury' or 'property damage' arising out of or in connection with a 'business' conducted from an 'insured location' or engaged in by an 'insured', whether or not the 'business' employs an 'insured.'"

Per the clear language of the exclusion, it applies to bodily injury arising out of or connected with business engaged in by an insured – whether or not the business actually employs the insured.

On its face, based on the plain meaning of this exclusion applies to Maria's fitness instruction and other activities at Local Edge – even assuming Local Edge did

not "employ" her. There is nothing in the exclusion limiting its application based on the amount of monetary compensation an insured earned while engaged in a business. On the contrary, it specifies that the insured need not be employed by the business for the exclusion to apply.

Lawsons do not take issue with the language of the exclusion, but instead argue that the policy's general definition of the term "business" operates to exempt Maria's activities at Local Edge, from the exclusion. They are incorrect. The policy defines business as follows:

> "Business" means:
>
> a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or
>
> b. Any other activity engaged in for financial compensation, other compensation, or other professional purposes, except the following:
>
> (1) Activities for which no "insured" receives more than $2,000 in total compensation for the 12 months before the "occurrence";
>
> (2) Providing home day care services for which no compensation is received, other than the mutual exchange of such services; or
>
> (3) The rendering of home day care services to a relative of an "insured".

Section (a) of the definition applies to Maria's activities at Local Edge. She was engaged−at the very least−in an 'occupation' when she taught fitness classes at Local Edge beginning in 2011, for which she had been trained and certified, and for which

she had previously testified she was compensated. (CSOF, 11/18/16 ep 5-6, ¶¶5-10; ROA 76). And, prior to the accident in January 2013, she had agreed to be Ms. Warren's partner and agreed to be "the face of the club," given Ms. Warren's relocation. (CSOF, 11/18/16 ep 6, ¶¶11-13). As of January 2013, Maria was present at Local Edge five days a week, and taught two classes per week; she was not paid. (CSOF, 11/18/16 ep 8, ¶30). Maria was an authorized signer on the business bank account (CSOF, 11/18/16 ep 34, at 42); she completed payroll (*Id*.); she made rent and utility payments (*Id*.); and when the accident involving Melissa Lawson occurred, she was instructing a fitness class. (CSOF, 11/18/16 ep 4-5, ¶1).

C. Maria's Activities at Local Edge Were Continuous, and Her Expectation to Maintain and Grow the Business, was Profit Motive.

Lawsons argue that the policy exclusion does not apply, because Maria "was not in it for the money," she did not receive a paycheck after agreeing to be a partner, and her activities at Local Edge otherwise do not meet the definition of business under the policy.

Industrial Indem. Co. v. Goettl, 138 Ariz. 315, 674 P.2d 869 (App. 1983) is the leading Arizona Case regarding the so-called "business pursuits" exclusion, which is included in some form in most homeowner's insurance policies. While the policy provision at issue in *Goettl* was different from the Country Mutual provisions, the case is instructive generally on what constitutes a business pursuit under Arizona law.

In *Goettl*, the insured was an officer and stockholder in International Metal Products Co., which had constructed a warehouse. *Id*. at 317, 674 P.2d at 871. The insured subsequently sold his interest in the company, and also sold the warehouse. *Id*. Sixteen years later, an employee of the subsequent purchaser fell through the roof of the warehouse and sustained catastrophic injuries. *Id.* The employee sued the insured for negligent construction of the roof and for failing to disclose the dangerous condition of the roof to the purchaser when the warehouse was sold. *Id.*

The homeowners' policy at issue in *Goettl* provided that coverage did not apply to "bodily injury or property damage arising out of business pursuits of any Insured except activities therein which are ordinarily incident to non-business pursuits" *Id*. at 318, 674 P.2d at 872. The insured argued that the exclusion did not apply, because it only excluded from coverage business pursuits engaged in during the policy term, and that he had sold his interest in the International Metal long before the occurrence at issue. *Id*. at 318-19, 674 P.2d at 872-73. He also argued that his role as an officer and stockholder in the company was not a business pursuit. *Id.*

The Court rejected both arguments, finding that there was no time limitation on the exclusionary clause, and although the term "business pursuits" was not defined in the policy, "[a]ppellants' restriction of business pursuits to a 'trade, profession, or occupation' is too narrow." *Id*. at 318, 674 P.2d at 872. It reasoned that business pursuits "denotes 'a continued or regular activity for the purpose of earning a

livelihood such as a trade, profession, or occupation, or a commercial activity.'" *Id.* at 318-319, 674 P.2d at 872-873. The Court held:

> "'To constitute a business pursuit, there must be two elements: first, continuity, and secondly, the profit motive; as to the first, there must be a customary engagement or a stated occupation; and, as to the latter, there must be shown to be such activity as a means of earning a living, procuring subsistence or profit, commercial transactions or engagements.'"

Id. at 319, 674 P.2d at 873, quoting *Krings v. Safeco Ins. Co*., 6 Kan.App.2d 391, 393, 628 P.2d 1071, 1074 (1981).

The Court further held that the insured's activities as a part owner of the business and of the warehouse at issue, fell within the exclusion. *Id*. ("Clearly, Goettl's involvement in International Metal, which used the building, and in Adgus Properties, which sold the building . . . was the kind of commercial activity which is described in the policy as 'business pursuits.'") *Id.*

Goettl instructs that even when an insured had ceased the alleged business pursuit years prior to the occurrence at issue, the exclusion still applied. *Id*. at 318, 674 P.2d at 872. The same should be true in this case, since Maria's involvement with Local Edge occurred both before and after the occurrence at issue.

Goettl does not hold that the so-called "profit motive" factor for a business pursuit must be an insured's personal motivation. If that were the definitive test for a business pursuit, then virtually any business owner who also carries homeowner's

coverage, could invoke coverage under his or her homeowner's policy by stating that they do not take a salary, and otherwise are "not in it for money."

Here, Maria testified that the reason she agreed to become a partner and take on more responsibility after the owner moved out of state, was to keep Local Edge open for business. (CSOF, 11/18/16 ep 6-7, ¶¶11, 14, 22). She also testified that he had an expectation that she would be treated as a 50/50 partner and eventually receive compensation for the work she was doing to operate the business on a day to day basis. (CSOF, 11/18/16 ep 36-37, at 52-53) She and her husband loaned $40,000.00 to Local Edge for business improvements (CSOF, 11/18/16 ep 7, ¶¶21, 22), and Maria testified that the goal was for Local Edge to be "the biggest gym in Safford." (CSOF, 11/18/16 ep 41, at 71).

Accordingly, there is no question that the "profit motive" element of *Goettl* is met here.

II. The "Exemption" From The Definition Of Business Does Not Apply.

A. Standard of Review.

The standard set forth in section I applies to this Court's interpretation of the policy definition of "business."

B. Because Maria's Activities at Local Edge Were a "Trade, Profession or Occupation," the "Other Activity" Exception Does Not Apply.

Appellants argue that Maria's activities at Local Edge are exempt from the

business exclusion, because she earned less than $2,000.00 in the 12 months preceding the accident involving Lawson. This argument ignores the plain meaning of section (a), and ignores the word "or" that immediately precedes section (b).

An insurer has the burden of showing that a policy exclusion applies, but the insured has the burden of showing that an exception to an exclusion applies. *Nationwide Mutual Fire Ins. Co. v. Jones*, 695 F.Supp.2d 978, 982 (D. Ariz. 2010), citing *Hudnell v. Allstate Ins. Co.*, 190 Ariz. 52, 54, 945 P.2d 363, 365 (App. 1997).

First, there is nothing ambiguous about section (a), which defines business as a "trade, profession or occupation engaged in on a full-time, part-time or occasional basis." Maria was a fitness instructor, then partner, and eventually represented herself as a co-owner of Local Edge; she taught classes there regularly and was present at Local Edge performing other administrative tasks including paying rent, utilities, processing payroll, and otherwise being "the face of the club" per her agreement with Ms. Warren. (RT 05/06/16 ep 85-86). Prior to injuring her knee in December 2011, she was teaching classes five days per week and, per her testimony, was paid $10.00 per class. (CSOF, 11/18/16 ep 5, ¶8). Lawsons incorrectly assert that as of the date of the underlying accident, Maria's only activity at Local Edge was teaching fitness classes two days per week. She testified that as of January 2013, she was taught two days a week and also completed payroll, and did other administrative tasks like paying rent and utilities. (RT 05/06/16 ep 85-86; CSOF, 11/18/16 ep 6, 8, ¶¶15-16; 30). She and

her husband had also made the $40,000.00 loan to the business. (CSOF, 11/18/16 ep 7, ¶23).

Since, by the plain language of the definition, Maria's activities are a "trade, profession, or occupation," then section (b) and the exemptions for "other activities," does not apply.

Appellants argue that the $2,000.00 provision applies nonetheless, because they believe the exception applies equally to section (a) and section (b). But, the policy uses both a semicolon and the word "or" to separate sections (a) and (b) – not the word "and." Both a semicolon and the word "or" separates sections (a) from section (b). As such, the term "business" means either a "trade, profession or occupation engaged in on a full-time, part-time or occasional basis," or "[a]ny other activity engaged in for financial compensation, other compensation or other professional purpose, except the following…." The three exceptions are listed directly under section (b), and therefore apply as exceptions to that section. If an insured is engaged in a trade, profession or occupation, the exceptions do not apply.

The policy definition on its face does not exempt from the business exclusion, all activities for which an insured does not earn more than $2,000.00 during the year prior to the occurrence. It only exempts activities that do *not* fall within the definition of business in subsection (a), and that are "other activities" besides a trade, profession or occupation, for which the insured earned no more than $2,000.00 in the 12 months

before the occurrence.

Under Lawsons' strained interpretation, an insured cannot be said to have been engaged in a business if the insured earned less than $2,000.00 in the twelve months before the occurrence. That is not a reasonable interpretation, nor does it make sense in the context of a homeowner's insurance policy, as opposed to a commercial policy.

C. The Definition of Business Can be Discerned Without Finding Ambiguity.

The rule that an ambiguity in an insurance policy will be construed against the insurer only applies when a provision is "actually ambiguous." *Thomas v. Liberty Mut. Ins. Co.*, 173 Ariz. 322, 325, 842 P.2d 1335, 1338 (App. 1992).

In determining whether policy language is ambiguous, it should be examined from the viewpoint of one not trained in law or insurance. *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982). In construing policy terms, the Court will "give words their ordinary, common sense meaning." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 220 Ariz. 202, 209, ¶ 23, 204 P.3d 1051, 1058 (App. 2008). The mere fact that the parties disagree about the meaning of policy language, does not create ambiguity. *Giovanelli v. First Federal Savings and Loan Ass'n*, 120 Ariz. 577, 587 P.2d 763 (App. 1978). "If a clause may be susceptible to different constructions, rather than simply finding ambiguity . . . [courts] will first attempt to discern the meaning of the clause by 'examining he

purpose of the exclusion in question, the public policy considerations involved and the transaction as a whole.'" *Keggi v. Northbrook Property and Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶11, 13 P.3d 785, 788 (App. 2000), *quoting Ohio Cas. Ins. Co v. Henderson*, 189 Ariz. 184, 186, 939 P.2d 1337, 1339 (1997).

Lawsons argue that under the rationale stated in *Keggi v. Northbrook Property and Cas. Ins. Co.*, *supra*, this Court should find the Country Mutual definition of business ambiguous, construe it against Country Mutual, and find coverage. Their argument is misplaced, because *Keggi* is wholly distinguishable on its facts.

First, *Keggi* involved a completely different policy exclusion, different language, and a different type of insurance coverage. The exclusion at issue there was a pollution exclusion in a commercial liability policy, not a business exclusion in a homeowner's policy. There is no similarity between *Keggi* and this case with respect to the factual questions or the ambiguity found in the policy at issue in *Keggi,* which was whether bacteria was a pollutant and therefore excluded from coverage.

Country Mutual agrees that the legal principles set forth in *Keggi* are instructive, including the Court's examination of the purpose behind the pollution exclusion, and interpreting the policy definition of "pollutant" in harmony with that purpose, which is to "exclude coverage for causes of action arising from traditional environmental pollution." *Id*. at 49, ¶ 23, 13 P.3d at 791. The Court determined there was coverage for a claim involving fecal coliform bacteria contaminated water that had been

consumed by a professional golfer via the water system for a development in Scottsdale, because the alleged bacterial contamination was not "traditional environmental pollution." *Id*. at 50, ¶ 30, 13 P.3d at 792. It reached this result by concluding that the policy exclusion at issue did not include bacteria, or alternatively, that based on the exclusion's purpose, public policy, and the transaction as a whole, that the bacterial contamination had not stemmed from "traditional environmental pollution." *Id*.

Lawsons argue that the Court's reasoning in *Keggi* applies here, because Country Mutual's business exclusion is overly broad, similar to the definition of pollutant in *Keggi*, and the exclusion should therefore be deemed ambiguous. But Defendants cite no legal authority or policy rationale for the proposition that a business exclusion in a homeowner's policy may not be "broad." And given the purpose of the exclusion here, the policy considerations behind it, and the transaction as a whole, the exclusion applies to Maria's business activities at Local Edge.

D. The Business Exclusion Comports With Public Policy.

Country's homeowner's policy excludes business activities from coverage. This is not an unexpected exclusion, since homeowner's policies generally include business exclusions. This is because the risks associated with home ownership and personal liability stemming from home ownership and incident risks, are distinct from those associated with business activities, which are generally insured by commercial liability

policies.

Certain risks are excluded from homeowners' policies "because they are not embraced within the course of a homeowner's normal activities." *Kepner v. Western Fire Ins. Co*., 109 Ariz. 329, 330, 509 P.2d 222, 223 (1973). Business activities are generally excluded because they "present additional risks over and beyond the ordinary and usual hazards to be found in the operation and maintenance of a home." *Id*. The exclusion of business liability, particularly in personal liability policies, removes coverage which is not essential to the purchasers of the policy and which would normally require specialized underwriting and rating, and thus help keep premium rates at a reasonable level. *Fimbres v. Fireman's Fund Ins. Co.,* 147 Ariz. 75, 708 P.2d 756 (App. 1985). As the Court noted in *Industrial Indem. Co. v. Goettl*, 138 Ariz. 315, 321, 647 P.2d 869, 875 (1983), "'Business activities can be insured by other types of policies. Their exclusion from personal liability policies avoids areas requiring specialized underwriting, prevents unnecessary coverage overlaps, and helps keep premiums low.'" *Id*., quoting Frazier, "The Business-Pursuits Exclusion Revisited," 649 *Ins. L.J.* 88, 88-89 (1977).

Lawsons contend that the definition of business and the $2000.00 exception, serves the purpose of creating a "safe harbor" for homeowners like Maria, who engage in activities related to business, but do not earn a regular salary. Again, this argument ignores that the so-called "safe harbor" does not apply to an insured who is otherwise

engaged in a trade, profession or occupation – which Maria clearly was.

What the exemption recognizes, is that there are certain activities such as day care in the home, or activities that produce nominal income-like having a garage sale, or a lemonade stand, or a neighborhood bake sale-that are still inextricably tied to risks associated with the home. As such liability coverage may attach in those situations without otherwise eliminating the rationale for excluding business activities.

This is not case where Ms. Kouts had, for example, been teaching classes from her home for nominal compensation, or volunteering on a one-time basis as an instructor. On the contrary, the facts show not just her continuous and regular presence at Local Edge instructing classes and being the "face" of the business since August 2012, but also her agreement to share the responsibility of running the business with the stated goal of keeping the business running and viable, and with the ultimate goal of establishing the biggest gym in Safford.

E. The Transaction as a Whole Supports Applying the Business Exclusion.

The homeowner's policy issued by Country Mutual to the Koutses was a renewal of a policy first issued to them in 2008. (RT 05/06/16 ep 134) Vaughn Grant, the Koutses' local Country Mutual agent in Safford, testified that neither Jason nor Maria had asked him whether Maria would be covered under their homeowner's policy for outside business activity. (RT 05/06/16 ep 180-181). They had also renewed the

same policy with the same business exclusion, since initiation of the underlying litigation. (RT 05/06/16 ep 185). To add to the overall context of the transaction, Jason Kouts owns and operates a residential and commercial construction business and has four employees. (RT 05/06/16 ep 139-140). Maria is Vice President of the business. (RT 05/06/16 ep 141). As such, these insureds are experienced homeowners and business owners.

With respect to Maria's involvement with and activities at Local Edge Fitness before and after the incident giving rise to the claim, it also supports an interpretation of the policy that excludes from coverage those activities that fall within a layperson's understanding of what a "trade, profession, or occupation" means. On a regular basis beginning in 2012, Maria left her home, went to Local Edge Fitness, taught fitness classes there, and held herself out as the "face" of the business. She had agreed to be a partner in the business, with the expectation of keeping Local Edge up and running and with a goal of growing the business. She had invested her time and also her own money into that endeavor. By March 2013, she held herself out on the internet as a co-owner of the business.

Within this context, as well as within the general purpose behind the business exclusion, there is sufficient evidentiary support for both the jury's answer to the special interrogatory that Maria was engaged in a "trade, profession or occupation," and Judge Sanders' ruling that the policy excludes coverage.

INTENT TO CLAIM ATTORNEY'S FEES

Country Mutual gives notice that it intends to make a claim for attorney's fees on appeal, on grounds that the matter at issue arises out of a contract. A.R.S. § 12-341.01(A).

CONCLUSION

Country Mutual requests that this Court affirm the trial court's ruling in Country Mutual's favor and affirm the final Judgment entered June 30, 2016.

DATED this 19th day of December, 2016.

GOERING, ROBERTS, RUBIN, BROGNA,
ENOS & TREADWELL-RUBIN, P. C.

By: /s/ Kristin A. Green
Attorneys for Appellee Country Mutual Insurance Company

CERTIFICATE OF COMPLIANCE

By affixing her electronic signature below, the undersigned certifies upon her oath, pursuant to AR-CAP Rule 14(b), that the foregoing Brief is double-spaced and formatted in proportionately spaced 14-point Times New Roman font, and that the countable portion contains 4,997 words and does not exceed the 14,000 word limit.

DATED this 19th day of December, 2016.

GOERING, ROBERTS, RUBIN, BROGNA,
ENOS & TREADWELL-RUBIN, P. C.

By: /s/ Kristin A. Green
Attorneys for Appellee Country Mutual
Insurance Company

CERTIFICATE OF SERVICE

Furthermore, by signing below, the undersigned hereby certifies that the foregoing Answering Brief has been electronically filed on this day with the Arizona Court of Appeals, Division Two's e-filer system; and that a copy of the foregoing has been emailed to:

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DATED this 19th day of December, 2016.

GOERING, ROBERTS, RUBIN, BROGNA, ENOS & TREADWELL-RUBIN, P. C.

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