ARIZONA COURT OF APPEALS

DIVISION TWO

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| MELISSA LAWSON, a single woman; TANNER LAWSON, a minor child; JORDYN LAWSON, a minor child,<br><br>Defendants/Appellants,<br><br>v.<br><br>COUNTRY MUTUAL INSURANCE COMPANY, an Illinois corporation,<br><br>Plaintiff/Appellee. | No. 2 CA-CV 2016-0154<br><br>Graham County Superior Court<br>No. CV 2015-00004 |

**AMENDED OPENING BRIEF OF DEFENDANTS/APPELLANTS**

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## I. Statement of the Case

This is an insurance coverage case. The main issue for this Court is the interpretation of the definition of 'business' in a homeowner's insurance policy. Country Mutual's complaint against the Kouts and the Lawsons was tried to a jury on May 5-6, 2016. (ROA 1) (ROA 84). The trial court asked the jury to answer three special interrogatories. (ROA 77). The trial court then entered judgment in favor of Country Mutual Insurance, ruling that there was no insurance coverage for the January 14, 2013 occurrence involving Ms. Lawson. (ROA 84).

The Lawsons filed a timely motion for a new trial and a motion for judgment as a matter of law on May 24, 2016. (ROA 90) (ROA 95). The trial court denied the Lawsons' post judgment motions in a formal written order entered on June 29, 2016. (ROA 102) (ROA 103).

The Lawsons filed a timely Notice of Appeal from both the judgment and the order denying their motions for a new trial and for judgment as a matter of law on July 21, 2016. (ROA 110).

This Court has jurisdiction over the Lawsons' appeal from the Graham County Superior Court judgment of no coverage and denial of their post judgment motions pursuant to A.R.S. § 12-2101(A)(1).

## II. Statement of Facts

### A. Maria Kouts' history of exercise and relationship with Cami Warren

From 2008 to 2010, Maria Kouts exercised almost every day at Curves. (Jury Trial Transcript, "Trial RT" 05/06/16 ep 64-65). In 2011, Maria Kouts began regularly attending fitness classes at Local Edge Fitness. (Trial RT, 05/06/16 ep 65). Shortly thereafter, Maria Kouts developed a close friendship with the owner of Local Edge Fitness Cami Warren. (Trial RT, 05/06/16 ep 67). Maria Kouts and Cami Warren became best friends. (Trial RT, 05/06/16 ep 68). In June of 2011, Maria Kouts substitute-taught a Zumba dance exercise class for an instructor who was out of town. (Trial RT, 05/06/16 ep 71-72). After the instructor did not return, Maria Kouts took over the Zumba class and taught the class three days per week. (Trial RT, 05/06/16 ep 71-72). In exchange for teaching three classes per week, Maria Kouts received approximately $30 in Zumba clothes and accessories. (Trial RT, 05/06/16 ep 72). In December of 2011, Maria Kouts injured her knee and did not teach any Zumba classes for approximately seven months. (Trial RT, 05/06/16 ep 74-75). During her seven-month recovery period, Maria Kouts "was still down there with the girls. (Because) I had become close with my entire class, and, of course, close with Cami. So I was still down there (at Local Edge Fitness) whooping and a hollering, hanging out,

you know." (Trial RT, 05/06/16 ep 74). In July of 2012 (approximately six months before the occurrence), Maria Kouts started teaching two fitness classes per week, but did not take a paycheck or any Zumba clothing. (Trial RT, 05/06/16 ep 75).[1]

**B.** Informal 'partnership' discussions with Cami Warren

In March or April of 2012, Cami Warren asked Maria Kouts to be her 'partner' at Local Edge Fitness. (Trial RT, 05/06/16 ep 110). Maria Kouts repeatedly told Maria Kouts that she was not interested in any business at all. (Trial RT, 05/06/16 ep 110). Maria Kouts told Cami Warren that she wasn't interested in any business because, "We own a business. My husband owns a business. And I was not interested in going into a business. I just wanted a hobby I wanted to do. And Zumba was my passion." (Trial RT, 05/06/16 ep 110). When Cami Warren moved to Utah, Maria Kouts agreed to be her partner and be the happy face of Local Edge. (Trial RT, 05/06/16 ep 111). Maria Kouts' understanding was that she would be the happy face of Local Edge Fitness for approximately 12 months and then she could go back to teaching two classes per week. (Trial RT, 05/06/16 ep 111). Maria Kouts' two motivations to get more involved with Local Edge Fitness were,

[1]The trial court relied on inaccurate facts in its May 9, 2016 Declaratory Judgment on Insurance Coverage. Specifically regarding the amount of hours that Maria Kouts spent teaching classes in the twelve months before the occurrence. (ROA 95 ep 3-4).

1) Cami Warren was her best friend and 2) to keep Zumba in Safford because it was her passion. (Trial RT, 05/06/16 ep 114). From August of 2012 to January of 2013, Cami Warren would send a text message to Maria Kouts and ask her to write payroll checks to the Local Edge Fitness employees. (Trial RT, 05/06/16 ep 84).

**C.** Maria Kouts never signed a partnership agreement or received any compensation for being a 'partner'

Maria Kouts never signed a partnership agreement with Cami Warren. (Trial RT, 05/06/16 ep 113). Maria Kouts never received any money from being a partner at Local Edge Fitness. (Trial RT, 05/06/16 ep 115). Maria Kouts had minimal involvement with the finances of Local Edge Fitness and didn't even know how much money came into the club. (Trial RT, 05/06/16 ep 84).

**D.** The Kouts helped the Warrens get a loan and Jason Kouts made improvements to the Zumba room at Local Edge Fitness

The Kouts helped their friends the Warrens get a $40,000 loan by agreeing to put up a piece of land as collateral. (Trial RT, 05/06/16 ep 154-155). The Kouts did not charge any interest or fees for using their land as collateral. (Trial RT, 05/06/16 ep 113). The Kouts did not receive any equity in Local Edge Fitness in exchange for helping the Warrens get the loan. (Trial RT, 05/06/16 ep 113). Jason Kouts made some improvements

to the Zumba studio at Local Edge Fitness. (Trial RT, 05/06/16 ep 92-93). Jason Kouts made those improvements because his wife loves to dance and he supported her. (Trial RT, 05/06/16 ep 151-154).

**E.** The January 14, 2013 Occurrence with Defendant/Appellant Melissa Lawson and the subsequent litigation regarding coverage

On January 14, 2013, Melissa Lawson was injured during an exercise class that was instructed by Maria Kouts. (ROA 1 ep 2-3). On July 18, 2014, the Lawsons filed suit against the Kouts alleging negligence among other claims. (ROA 13 ep 23-32). When the Kouts submitted their claim to their homeowner's insurance company, Country Mutual denied coverage and sued the Kouts and the Lawsons for declaratory relief (ROA 1 ep 1-10). Country Mutual based their denial on the policy's business exclusion and definition of the term 'business.' (ROA 76 ep 1,4).

**F.** Maria Kouts and Cami Warren's relationship changes in March of 2013, after the Occurrence

In March of 2013 (approximately two months after the occurrence), Cami Warren fired two popular instructors and "all hell broke loose." (Trial RT, 05/06/16 ep 85-86). Sometime in late 2013, Cami Warren stopped communicating with anybody at Local Edge Fitness and essentially abandoned the business. (Trial RT, 05/06/16 ep 105). In March of 2013, Maria Kouts joined the Zumba Instructor Network on Zumba.com. (ROA

95 ep 8-11). Sometime in 2014, Country Mutual printed Maria Kouts' Zumba.com profile; and, sometime in 2014 at the time of printing, Maria Kouts had held herself out as the co-owner of Local Edge Fitness. (ROA 95 ep 8-11). Under oath, Maria Kouts admitted that she was never actually the legal owner of Local Edge Fitness. (Trial RT, 05/06/16 ep 115).

## III. Statement of Issues

**A.** The Country Mutual insurance contract includes an exclusion for business activity. There is an exception to the exclusion for business activity where the insured earned less than $2,000 in the 12 months preceding the occurrence. Maria Kouts earned less than $2,000 at Local Edge Fitness in the 12 months immediately preceding the occurrence. The question is whether Maria Kouts' activity at Local Edge Fitness is covered by the under-$2,000 exception.

**B.** The Country Mutual insurance contract includes a two-part definition of the term business. Part A defines business as a trade, profession or occupation engaged in on a full-time, part-time or occasional basis. Part B defines business as any other activity engaged in for financial compensation, other compensation or other professional purposes. Country Mutual elected to use a semicolon and the coordinating conjunction 'or' between the two parts of the definition instead of a period. The under-

$2,000 exception is a subsection below the two-part definition of business. The question is two-fold: (1) Whether the use of a semicolon and the conjunction 'or' instead of a period makes it so ambiguous about whether under-$2,000 except applies to the entire definition of business that the Court should construe the contract language against Country Mutual and in favor of coverage. Or, (2) whether Part B is so imprecise that it is unclear and ambiguous about what activity would fall under Part B but not part A and the Court should construe the contract language against Country Mutual and in favor of coverage.

**C.** Part A of the definition of business broadly defines business as a trade, profession or occupation engaged in on a full-time, part-time or occasional basis. Part B defines business as any other activity engaged in for financial compensation, other compensation or other professional purposes. If the Court finds that the under-$2,000 exception only applies to Part B, the question is whether Part A is so overly broad that it completely swallows Part B and eviscerates the coverage provided by the under-$2,000 exception so that the Court should interpret the plain language of the policy to provide coverage.

## IV. Argument

### A. There is insurance coverage, because Maria Kouts earned less than $2,000 at Local Edge Fitness in the 12 months before the occurrence

#### i. Standard of Review

In its May 9, 2016 Declaratory Judgment on Insurance Coverage, the trial court found in favor of Country Mutual and ruled that the insurance contract "provides no coverage for the claims made by Melissa Lawson against Jason and Maria Kouts." (ROA 84 ep 1-2). The standard of review for the interpretation of insurance contracts is *de novo*. *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, 187 P.3d 1107, 1110 (2008).

#### ii. The plain language of the insurance contract covers Maria Kouts' activity at Local Edge Fitness

To determine the parties' intent, we "look to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 259, 681 P.2d 390, 411 (Ct. App. 1983). In interpreting a contract, we do not construe one term in a way that renders another meaningless. *Aztar Corp. v. U.S. Fire Ins. Co.,* 223 Ariz. 463, 478, ¶ 56, 224 P.3d 960, 975 (Ct. App. 2010). As a corollary, each part of a contract must be read together, "to bring harmony, if possible, between all parts of the writing." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 291,

246 P.3d 938, 942 (Ct. App. 2010). Finally, because specific contract provisions express the parties' intent more precisely than general provisions, specific provisions qualify the meaning of general provisions. *Id.*

In the relevant homeowner's insurance policy, Country Mutual excludes business activity and defines 'business' as:

> "A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or Any other activity engaged in for financial compensation, other compensation or other professional purposes **except** the following: Activities for which no 'insured' receives more than $2,000 in total compensation for the 12 months before the 'occurrence…'" (ROA 76 ep 1,4).

The plain language of the policy provides coverage for business activity in which the insured earns less than $2,000 in the 12 months before the occurrence. Looking at the above policy language, the average, lay insurance consumer would read the definition of 'business' as one cohesive idea. There is no period between part A and part B of the definition. There is no language that limits the under-$2,000 exception to Part B. There is no policy language that requires the reader to stop at the end of Part A before analyzing whether one of the policy exceptions apply to the business activity in question.

A plain reading of the policy language provides a safe-harbor for business activity where the insured earned less than $2,000 in the previous

year. There is no need to find ambiguity. There is no need to go through a tortured algebraic breakdown of the policy language. There is no need to analyze Maria Kouts' involvement with Local Edge Fitness in the months and years after the occurrence involving Ms. Lawson.

The average, lay consumer would read the entire definition of business and apply the entire definition including the exceptions to the business activity in question. Reading the two parts of the definition and the exceptions together – in harmony – provides coverage for Maria Kouts' activity at Local Edge Fitness.

To summarize, there is coverage because Maria Kouts earned less than $2,000 in the 12 months before the occurrence and because teaching two unpaid fitness classes per week is not ordinarily described as a trade, profession or occupation. When the entire definition is read in harmony, there is coverage for the January 14, 2013 occurrence involving Ms. Lawson.

**iii.** Teaching two unpaid fitness classes per week was not Maria Kouts' trade, profession or occupation

Alternatively, even if the Court finds that one must stop at the end of Part A before analyzing whether one of the policy exceptions apply to the business activity in question, there is still coverage because Maria Kouts' activity at Local Edge Fitness was not her trade, profession or occupation.

Looking at the plain, ordinary meaning of 'trade,' 'profession' and 'occupation,' Maria Kouts' activity (teaching two unpaid fitness classes per week and being the happy face of the club) does not fit best within part A of the definition.

The word 'trade' is ordinarily used to describe people who work as plumbers, electricians, carpenters or masons.

The word 'profession' ordinarily describes jobs that require specialized educational training and legal qualifications. For example, lawyers, doctors, accountants, clergy and professors are typically considered 'professionals.'

The word 'occupation' ordinarily describes a permanent, normally full time job that provides financially for oneself or her family. Mowing lawns, flipping hamburgers, babysitting and other less formal and infrequent or irregular jobs would not ordinarily be called occupations (if worked on a part-time basis for relatively little money). The word 'occupation' is the least precise of the three terms; however, because it is grouped with the terms 'profession' and 'trade,' we can assume that it is meant to describe occupations like a banker, insurance agent, or secretary.

Teaching two fitness classes per week and being the happy face of Local Edge Fitness was not Maria Kouts' trade, profession or occupation.

Teaching two unpaid fitness classes and being the happy face of Local Edge Fitness was Maria Kouts' passion, hobby and primary social activity.

Maria Kouts' activity at Local Edge Fitness fits much better into Part B of the definition of 'business,' rather than Part A. For most of 2012, Maria Kouts was not very involved at Local Edge Fitness. From August to December of 2012, Maria Kouts spent several hours, most days at Local Edge Fitness, but she had no formal responsibilities.

After her close friend Cami Warren moved to Utah, Maria Kouts would help out by occasionally signing checks, but she never took a paycheck herself and she had no access to Local Edge Fitness's accounts or financial records. Maria and Jason Kouts helped the Warrens secure a loan for new equipment at the Warren's gym, but the Kouts did not benefit financially from the loan, did not receive equity in the business, or earn interest on the loan. Maria Kouts and Cami Warren informally discussed becoming 'partners,' but they never signed a partnership agreement, exchanged money or even discussed finances. Maria Kouts' activity was motivated by her friendship with Cami Warren and her love of fitness.

As such, Maria Kouts' activity at Local Edge Fitness was not her trade, profession or occupation but is much better described as 'any other business activity' engaged in for 'other purposes.' Because Maria Kouts'

activity fits much better into Part B of the definition of business, and because she earned less than $2,000 in the 12 months before the occurrence, the Country Mutual insurance policy provides coverage for the January 14, 2013 occurrence involving Ms. Lawson.

### B. Country Mutual's use of a semicolon and the conjunction 'or' instead of a period creates ambiguity about the application of the under-$2,000 exception

#### i. Standard of Review

On May 24, 2016 the Lawsons filed their post judgment Ariz. R. Civ. P. 50 motion for judgment as a matter of law. (ROA 90). In their R. 50 motion, the Lawsons argued that the Country Mutual insurance contract language was so ambiguous that it should be construed against Country Mutual and in favor of coverage. (ROA 90 ep 1-2). The trial court denied the Lawsons' motion and entered judgment on June 29, 2016. (ROA 103). The standard of review for a trial court's ruling on a motion for judgment as a matter of law is *de novo*. *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 492, 200 P.3d 977, 989 (Ct. App. 2008). The standard of review for the interpretation of insurance contracts is *de novo*. *First Am. Title Ins. Co.,* 218 Ariz. at 397, 187 P.3d at 1110.

**ii.** The rule of ambiguity applies to Country Mutual's policy language because the definition of business is actually ambiguous and social policy supports a finding of coverage

If a policy provision is subject to more than one reasonable interpretation, it is ambiguous and the ambiguity will be construed against the insurer. *Mid-Century Ins. Co. v. Samaniego*, 140 Ariz. 324, 326, 681 P.2d 476, 478 (Ct. App. 1984). If a policy is apparently ambiguous, a decision to require coverage follows after consideration of legislative goals, social policy, and examination of the transaction as a whole. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 258, 782 P.2d 727, 734 (1989). Only when the meaning of the contract remains uncertain after application of the primary standards of interpretation cited above may the court apply the rule of construction that ambiguity of language is to be construed against the drafter of the contract. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 258, 681 P.2d 390, 410 (Ct. App. 1983). An ambiguity exists when the language of the policy is unclear and can be reasonably construed in more than one sense. *Potter v. U.S. Specialty Ins. Co.*, 209 Ariz. 122, 124, 98 P.3d 557, 559 (Ct. App. 2004).

Here, the actual definition of 'business' is ambiguous in two separate but related ways:

**1.** Ambiguity No. 1 – Country Mutual used a semicolon and the coordinating conjunction 'or'

First, the policy language is ambiguous about whether the under-$2,000 exception applies to the entire definition of business. And, it is reasonable to construe the Country Mutual policy language so that the under-$2,000 exception applies to the entire definition of business.

In the relevant homeowner's policy, Country Mutual excludes business activity and defines 'business' as:

> "A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or Any other activity engaged in for financial compensation, other compensation or other professional purposes **except** the following: Activities for which no 'insured' receives more than $2,000 in total compensation for the 12 months before the 'occurrence…'"

Country Mutual chose to use a semicolon and the conjunction 'or' between Part A and Part B of its definition of 'business.' Country Mutual could have used a period to clearly separate Part A from Part B, but it did not.[2] Country Mutual could have explicitly limited the under-$2,000 exception to Part B only, but it did not. Country Mutual could have explicitly described the business activity that would fall under Part B of the definition of 'business,' but not part A, but it did not. Country Mutual could

[2] Country Mutual used a period at the end of the exceptions to the definition of 'business.'

have placed additional limitations on the under-$2,000 exception, but it did not.

In many other parts of the policy, Country Mutual includes clarifying or limiting language at the end of a definition or exclusion. For example, after the definition of 'cash value' and after the period, Country Mutual included the following language: "In determining depreciation we will consider wear and tear, deterioration, obsolescence, age, physical condition and reduced market value of the property."

The plain, ordinary use of a semicolon and the conjunction 'or' supports a finding of coverage because it indicates that the entire definition of 'business' should be read as one cohesive idea. Merriam-Webster's Dictionary (full definition) defines a semicolon as: "A punctuation mark; used chiefly in a coordinating function between major sentence elements." According to Oxford's Living English Dictionary, 'or' is a coordinating conjunction. (ROA 76 ep 1).

The word 'coordinating' conveys an important idea. Merriam-Webster's dictionary defines 'coordinate' as: "To put in the same order or rank" or "to bring into a common action, movement or condition." The two-part definition of 'business' should be read as one common action or movement.

Harmonizing is a useful synonym of coordinating for interpreting the policy language. The two parts of the definition of 'business' must be read within the context of the under-$2,000 exception to create harmony between the entire definition of 'business.' When reading the definition of 'business' as one common action or idea, it is clear that Maria Kouts' activity at Local Edge Fitness is covered by the under-$2,000 exception.

**2.** Ambiguity No. 2 – Country Mutual's policy language in Part B is imprecise and ambiguous

Alternatively, even if the Court finds that one must stop at the end of Part A before analyzing whether one of the policy exceptions apply to the business activity in question, there is still ambiguity. The policy language is imprecise and equally ambiguous about what activity would fall under Part B of the definition 'business,' but not Part A. Other than the under-$2,000 exception (and the other exceptions), Part B is very imprecise and ambiguous about what kind of business activity it is meant to describe.

It is reasonable to construe the Country Mutual policy language so that earning less than $2,000 in the previous 12 months must categorize that business activity into Part B rather than Part A. The above proffered interpretation would not extend to obviously absurd examples like an attorney being sued on the first day that she becomes licensed to practice law. "We prefer to adopt a rule of common sense and have attempted to do

so on numerous occasions." *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. at 257, 782 P.2d at 733.

Here, it is reasonable to construe earning more than $2,000 in the previous 12 months as a necessary condition in order for business activity to be considered a trade, profession or occupation.[3]

Because, the policy language is actually ambiguous, the Court should look to legislative goals, the nature of the transaction and public policy to determine whether the rule of ambiguity should be applied to Country Mutual's business exclusion.

**iii.** Legislative Goals

The Arizona Legislature had been clear with its goals for contract construction. Contracts should not be dissected. "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended or modified by any rider, endorsement or application attached to and made a part of the policy." A.R.S. § 20-1119 (2016). Arizona's legislative goals regarding contract construction support a finding of coverage for Maria Kouts activity at Local Edge Fitness. Country Mutual's definition of business should not be

[3] It seems that Country Mutual tried to codify the profit motive requirement set forth in Industrial Indemnity v Goettl. *Indus. Indem. Co. v. Goettl*, 138 Ariz. 315, 319, 674 P.2d 869, 873 (Ct. App. 1983).

dissected but should be construed according to the entirety of its terms (including the under-$2,000 exception) and in favor of coverage.

**iv.** Nature of the transaction

The nature of the transaction also supports a finding that the under-$2,000 exception applies. The Kouts took the policy "as is" and did not negotiate any of the terms of the policy. Because Country Mutual drafted the terms of the policy, the nature of the transaction supports a finding of coverage.

**v.** Public Policy

Public policy supports a narrow interpretation of the exclusion so that it does not eviscerate coverage otherwise reasonably expected by the insured. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 50, 13 P.3d 785, 792 (Ct. App. 2000). The above public policy is important in the modern 'gig' economy. Insurance provisions similar to Country Mutual's under-$2,000 safe harbor are attractive to anyone who earns a little extra income apart from their profession, trade or occupation.

For example, the under-$2,000 safe harbor would be very valuable to an attorney who referees basketball on the side, but earns less than $2,000 per year. Or to a stay at home father who enjoys baking and occasionally sells his baked goods at the local farmers market. Or to an accountant who

enjoys making jewelry and sells a small amount of that jewelry on the Internet. Arizona public policy supports a narrow interpretation of Country Mutual's business exclusion so that insurance companies may not limit coverage otherwise reasonably relied upon by their customers.

Country Mutual's definition of business is actually ambiguous. Arizona's legislative goals, the nature of the transaction and public policy support a finding of coverage. As such, the Court should apply the rule of ambiguity and enter a judgment finding coverage for the January 14, 2013 occurrence involving Ms. Lawson.

### C. Country Mutual's Part A definition of business may be read so broadly that it eviscerates the coverage provided by the under-$2,000 exception

#### i. Standard of review

In its May 9, 2016 Declaratory Judgment on Insurance Coverage, the trial court found in favor of Country Mutual and ruled that the insurance contract "provides no coverage for the claims made by Melissa Lawson against Jason and Maria Kouts." (ROA 84 ep 1-2). The standard of review for the interpretation of insurance contracts is *de novo*. *First Am. Title Ins. Co.*, 218 Ariz. at 397, 187 P.3d at 1110.

**ii.** Country Mutual's business exclusion should be narrowly interpreted

Public policy supports a narrow interpretation of the exclusion so that it does not eviscerate coverage otherwise reasonably expected by the insured. *Keggi*, 199 Ariz. at 50, 13 P.3d at 792.

In *Keggi v Northbrook Insurance*, Keggi sued Desert Mountain Properties for injuries arising from drinking bacteria-contaminated water. *Keggi*, 199 Ariz. at 44, 13 P.3d at 786. Desert Mountain made a claim to its insurance carrier, Northbrook Insurance. *Id.* Northbrook Insurance denied coverage. *Id.* Desert Mountain sued Northbrook Insurance for declaratory relief. *Id.* Northbrook Insurance moved for summary judgment. *Id.* The trial court granted summary judgment in Northbrook Insurance's favor, holding that the pollution exclusion barred coverage for Keggi's injury. *Id.* The Arizona Court of Appeals reversed the trial court. *Id.* The Court of Appeals held that the trial court erred in granting summary judgment because the policy exclusion did not preclude coverage for Keggi's injuries. *Id.*

In *Keggi*, the trial court relied on the following definition of pollutant to deny coverage:

> "Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

*Id.* at 47, 789.

Northbrook Insurance argued that bacteria should be classified as an irritant or contaminant. *Id.* The Court of Appeals reasoned that the terms irritant and contaminant are "virtually boundless," for there is no substance or chemical in existence that would not irritate or damage some person or property. *Id.* Furthermore, the Court of Appeals held, "Clearly, this clause cannot be read literally as it would negate virtually all coverage." *Id.* The Court of Appeals noted that the Northbrook Insurance policy limits pollutants to irritants and contaminants that are solid liquid gaseous or thermal . . . and the water-borne bacteria do not fit neatly within that definition. *Id.*

Country Mutual argues that if Maria Kouts' activity could be considered a trade, profession or occupation, then the reader must stop at the semicolon and not even consider the rest of the definition of business.

When construing the definition of business according to the entirety of its terms and conditions, the under-$2,000 exception covers Maria Kouts' activity at Local Edge Fitness.

Like the Northbrook Insurance definition of pollutant, the Country Mutual policy terms trade, profession or occupation are very broad and if read literally, would negate virtually all coverage. Almost any business

activity could be described as a trade, profession or occupation. Part A of the definition of business would completely swallow Part B and eviscerate the coverage provided by the under-$2,000 exception.

In the same way that bacteria did not fit neatly into Northbrook Insurance's definition of pollutant, teaching two fitness classes per week and being the happy face of the club does not fit neatly as a trade, profession or occupation.

The Court should disregard Country Mutual's broad interpretation of the terms 'trade,' 'profession' or 'occupation;' and instead, should adopt a narrow interpretation of the Country Mutual business exclusion. Based on a plain reading of the policy language, the Court should construe Country Mutual's definition of 'business' according to the entirety of its terms and conditions and enter judgment in favor of coverage for the January 14, 2013 occurrence involving Ms. Lawson.

## V. Notice of intent to claim attorneys' fees per Rule 21(a)

Pursuant to ARCAP 21(a) and A.R.S. §§ 12-341 and 12-341.01, the Lawsons seek an award of their attorneys' fees and costs incurred arising out of this appeal and the underlying litigation arising out of the Country Mutual insurance contract.

## VI. Conclusion

For all of the above reasons, this Court should reverse the trial court's judgment that the Country Mutual insurance contract does not provide coverage for the January 14, 2013 occurrence involving Ms. Lawson. This Court should also find that the Country Mutual insurance contract provides coverage for the January 14, 2013 occurrence involving Ms. Lawson. Finally, this Court should find that Country Mutual is no longer entitled to a recovery of attorneys' fees and costs because it is no longer the prevailing party; and instead, should award Defendants/Appellants their attorneys' fees and costs.

**DATED** this 21st Day of November, 2016

**TORGENSON LAW**

By: /s/ Paul M. Benson
Paul M. Benson
*Attorney for Appellants*

## CERTIFICATE OF COMPLIANCE

1. This Certificate of Compliance concerns a brief and is submitted under Rule 14(a)(5).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced and contains 5,069 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

**DATED** this 21st Day of November, 2016

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By: /s/ Paul M. Benson
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## CERTIFICATE OF SERVICE

I, Paul M. Benson certify that the foregoing Amended Opening Brief has been electronically filed on this 21st day of November 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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