ARIZONA COURT OF APPEALS

DIVISION TWO

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

REPLY BRIEF OF DEFENDANTS/APPELLANTS MELISSA, TANNER AND JORDYN LAWSON

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ARGUMENT

I. Country Mutual's Policy Language Covers Some Business Activity

In its Answering Brief, Country Mutual frames the issue and argues that there is no insurance coverage for the January 14, 2013 occurrence because Maria Kouts was engaged in a business. (AB, 12/19/16 ep 11-12, 20).

The Lawsons agree that Maria Kouts was engaged in some kind of business activity. The Country Mutual policy language provides coverage for some business activity where "no insured receives more than $2,000 in total compensation for the 12 months before the occurrence." The Under-$2,000 exception is found within the Country Mutual definition of business.

Whether or not Maria Kouts was engaged in a business (or business activity) is not the issue.

A. The Goettl Elements of Profit Motive and Continuity are Irrelevant to the Main Issue of Coverage

In its Answering Brief, Country Mutual argues that because the *Goettl* elements of profit motive and continuity are met, then Maria Kouts' activity should be considered a "business pursuit" and therefore is not covered. *Industrial Indem. Co. v. Goettl*, 138 Ariz. 315, 674 P.2d 869 (App. 1983). (AB, 12/19/16 ep 14-15). Whether the *Goettl* elements are met is irrelevant.

Assuming the *Goettl* elements are met, there is still coverage. Maria Kouts' activity may be considered a business pursuit and still fall under the exception for business activity where no insured receives more than $2,000 in total compensation for the 12 months before the occurrence. Obviously earning up to $2,000 would normally require some profit motive.

Goettl is instructive for determining whether activity should even be considered a business pursuit. Goettl does not have any application on whether the Under-$2,000 exception applies to Maria Kouts' activity because the Under-$2,000 exception assumes the activity is some kind of business pursuit. Indeed, the Court in *Goettl* never discusses a similar exception to Country Mutual's Under-$2,000 exception.

B. Country Mutual Admits that the Policy Language Covers Teaching Fitness Classes Outside the Home

Country Mutual suggests that its policy language would cover teaching fitness classes from your home for nominal compensation or on a one-time basis as a volunteer (apparently at a gym, away from the home). (AB, 12/19/16 ep 24).

How is a layperson supposed to interpret Country Mutual's policy language and the Under-$2,000 exception? Apparently, if Maria Kouts had taught classes at her home and earned significantly more money than she did at Local Edge, but less than $2,000 in the previous 12 months, then there

would be coverage. And, if the occurrence had taken place during Maria Kouts' very first class, then there would also coverage. The problem for Country Mutual is that these time and space limitations are not included in the contract language. If Country Mutual wanted to include these time and space limitations, it is required to set them forth in the contract.

Country Mutual's interpretation of its own contract language is confusing and uncertain. Where is the line? What if a future insurance customer teaches three fitness classes on a volunteer basis, would there be coverage? What if a future insurance customer fills in and teaches one class, but is given some Zumba clothing in return, would there be coverage? What if Local Edge Fitness ceased to exist and Cammi Warren continued to provide fitness classes out of her home? This inherent ambiguity is fatal to Country Mutual's claim that there is no coverage here.

Rather than guessing, the contract language should speak for itself. Instead of adopting the opinions of Country Mutual's counsel about where an insurance customer is permitted to teach fitness classes and still have coverage, the law requires the Court to look at the plain language of the Under-$2,000 exception and enter judgment in favor of coverage for the January 14, 2013 occurrence.

II. Interpretation of the Country Mutual Insurance Contract is a Mixed Question of Fact and Law

The Court is not bound by the trial court's findings of fact, as argued by Country Mutual. The validity and enforceability of a contract clause is a mixed question of fact and law, subject to de novo review. *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 20, 316 P.3d 607, 609 (Ct. App. 2014).

In the jury trial, the trial court presented the jury with three special interrogatories (ROA 77). The jury did not answer whether the Under-$2,000 exception should apply to Maria Kouts' activity. (ROA 77). After reviewing the jury's responses to the special interrogatories, the trial court entered judgment in favor of Country Mutual, finding there was no coverage for the January 14, 2013 occurrence involving Ms. Lawson.[1] (ROA 84). Determining whether the Under-$2,000 exception applies to Maria Kouts' activity is a mixed question of fact and law and is subject to de novo review.

III. Country Mutual's Policy Language Looks Backward

Country Mutual relies on Maria Kouts' activity that took place months after the occurrence to justify denying coverage. The Country Mutual policy language looks backward at the 12 months immediately before the

[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).

occurrence. A party to a contract is not able to change their fate under that contract because of their subsequent behavior. The plain contract language looks to the 12 months before the occurrence, not several months after.

The issue of whether the Under-$2,000 exception applies is not complicated. Determining that issue does not require careful investigation into whether Maria Kouts had a profit motive based on some Facebook messages that took place almost a year after the occurrence.

Because the Under-$2,000 exception is found within the definition of business, the Court does not need to analyze whether Maria Kouts had a profit motive. The dispositive issue is whether the Under-$2,000 exception applies to Maria Kouts' activity on January 14, 2013.

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.*

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 entire definition of business together including the Under-$2,000 exception – in harmony – provides coverage for Maria Kouts' activity at Local Edge Fitness.

IV. Public Policy Favoring Business Exclusions is Distinguishable from Public Policy Favoring the Enforcement of the Under-$2,000 Exception

Country Mutual argues that its business exclusion is not unexpected and is supported by public policy. The Lawsons agree that public policy supports insurance companies including business exclusions in homeowner's policies.

However, the public policy generally supporting business exclusions is completely separate from the public policy favoring the enforcement of the Under-$2000 exception. And, the Under-$2,000 exception is much more pertinent to this case.

Nobody forced Country Mutual to include a safe harbor for some business activity where the insured earned less than $2,000 in the previous twelve months. If Country Mutual did not include the Under-$2,000 exception within its definition of business, Appellants would not have a very strong case for coverage.

Arizona public policy supports holding insurance companies to their contract language. If Country Mutual is allowed to escape its obligations to the Kouts family, then the Under-$2,000 exception is meaningless and illusory. Public policy supports a finding of coverage.

V. 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 5th Day of January, 2017

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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 1,758 words.

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

DATED this 5th Day of January, 2017

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CERTIFICATE OF SERVICE

I, Paul M. Benson certify that the foregoing Amended Opening Brief has been electronically filed on this 5th Day of January, 2017 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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