# In the Missouri Court of Appeals
# Eastern District

**DIVISION TWO**

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| NOOTER CORPORATION, | ) | No. ED103835 |
| | ) | |
| Respondent/Cross-Appellant, | ) | |
| | ) | Appeal from the Circuit Court |
| | ) | of the City of St. Louis |
| vs. | ) | Cause No. 1022-CC01145-01 |
| | ) | |
| ALLIANZ UNDERWRITERS INS. CO., APPALACHIAN INS. CO., EVANSTON INS. CO., NATIONAL UNION FIRE INS. CO. OF PITTSBURG, PA., NORTH STAR REINSURANCE CORP., ONEBEACON AMERICA INS. CO. | ) | Honorable Steven R. Ohmer |
| | ) | |
| Appellants, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CERTAIN UNDERWRITERS LLOYD'S LONDON & LONDON MARKET INS., MUNICH REINSURANCE AMERICA, INC., | ) | |
| | ) | |
| | ) | |
| Appellants/Cross-Respondents, | ) | |
| | ) | |
| and | ) | |
| | ) | Filed: October 3, 2017 |
| CONTINENTAL CASUALTY CO. | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## OPINION

The appeal before us involves a dispute between Nooter Corporation ("Nooter") and eight different excess insurance companies: Evanston Insurance Company ("Evanston"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), Allianz Underwriters Insurance Company ("Allianz"), Certain Underwriters at Lloyd's, London and Certain London Market Insurance companies ("London"), Appalachian Insurance Company ("Appalachian"), Munich Reinsurance America, Inc. ("Munich"), North Star Reinsurance Company ("North Star"), and OneBeacon America Insurance Company ("OneBeacon").[1] Collectively, we will refer to all eight appellants as "Excess Insurers." Aside from London and National Union, which have submitted a brief together, each appellant has submitted its own brief, resulting in seven appellant and reply briefs. Additionally, Nooter has filed a cross-appellant's brief, as well as a reply brief.

Nooter has been in the business of designing, installing, and distributing pressure vessels for refineries and chemical plants for over 100 years. Some of Nooter's sites allegedly contained asbestos. Consequently, claimants began filing lawsuits against Nooter for asbestos-related bodily injuries in the late 1990's. In turn, Nooter began seeking help to defend and/or reimburse Nooter for expenses related to these suits pursuant to various insurance policies. This sparked several disagreements between Nooter and Excess Insurers, eventually resulting in litigation. This appeal primarily involves the trial court's rulings on motions for summary judgment and declaratory judgment actions that concern the Excess Insurers' rights and obligations to indemnify and/or defend Nooter in asbestos lawsuits. Additionally, Evanston appeals the adverse judgments against it based on Nooter's claims of breach of contract and vexatious refusal to pay,

[1] OneBeacon America Insurance Company was the name of the entity at the time Nooter's OneBeacon insurance policy was active. The company now goes by the name Lamorak Insurance Company.

for which a jury trial was conducted. We affirm in part and reverse in part. Additionally, we grant, in part, Nooter's motion on appeal for reasonable attorney's fees, but we remand the case to the trial court to hold a hearing and determine the reasonableness of the attorney's fees requested and to enter judgment accordingly.

## I. BACKGROUND

### A. Factual Background

This appeal concerns numerous insurance policies providing coverage for Nooter from 1949 through 1985. Although only "excess" insurance policies are directly at issue on appeal, we must also examine several "primary" general liability insurance policies that were active during the period. The primary policies serve as the first layer of insurance protection for Nooter. Additionally, some of the excess insurance policies are "second-level" excess policies, which can only attach after the applicable primary policies and "first-level" excess policies have been exhausted. Accordingly, the hierarchy amongst the three policies types is (1) primary policies, (2) first-level excess policies, and (3) second-level excess policies.

After claimants began filing asbestos suits against Nooter, Nooter claims it first sought funds from its primary insurance policies, and then, "[a]s individual primary policies were becoming exhausted by the payment of asbestos claims," it sought coverage from Excess Insurers. In sum, more than 20,000 individuals have brought lawsuits against Nooter for bodily injuries resulting from exposure to asbestos. Although the suits involve similar allegations (i.e., personal injury caused by exposure to asbestos at Nooter sites), each claim involves different exposures based on each claimant's work history and/or unique circumstances that allegedly exposed the claimants to asbestos.

Further complicating matters, most of the suits are "long-tail" claims. Long-tail claims involve allegations of continuous or escalating damages over a range of time, sometimes spanning several years, or even decades; this is often the case for asbestos claims. Unlike most tort actions, where the causal event and resulting injury occur almost instantaneously (e.g., an automobile accident), identifying the timing of the causal event(s) is often difficult or impossible in long-tail claims. For example, it takes years between the affected individual's initial inhalation of asbestos and the manifestation of symptoms.[2] Moreover, the injury is cumulative—many separate exposures contribute to the affliction. Consequently, it can be difficult to identify which policies cover the periods of asbestos exposure that form the basis of a particular lawsuit.[3] Such is the case in the appeal before us.

**B. Procedural Background**

Due to the number of parties (8) and points on appeal or cross-appeal (29), we will adduce additional facts as necessary under the relevant portions on appeal.[4] Nooter initiated the lawsuit against Excess Insurers on March 10, 2010, and filed its First Amended Petition (the "Petition") on January 31, 2013, asserting claims for Vexatious Refusal to Pay (pursuant to §§

[2] None of the parties on appeal have raised the issue of when a policy is "triggered." Accordingly, this opinion does not analyze the specific events that must occur under the policies to trigger an insurer's policy obligations. We point this out since jurisdictions have adopted several different approaches to determining when coverage is triggered in continuous injury claims. *See Owens-Illinois, Inc. v. United Ins. Co*., 138 N.J. 437, 449, 650 A.2d 974, 980 (1994) ("[T]he answer to the trigger-of-coverage question varies by jurisdiction. The most frequently offered theories for the trigger of coverage are (1) the exposure theory, (2) the manifestation theory, and (3) the continuous-trigger theory.").

[3] *See In re Viking Pump, Inc*., 52 N.E.3d 1144, 1149, 27 N.Y.3d 244, 255 (N.Y. 2016) ("Courts across the country have grappled with so-called 'long-tail' claims—such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations—in the insurance context. These types of claims present unique complications because they often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage.").

[4] The appeal originally involved six separate appeals. However, upon our Court's own motion on January 12, 2016, those six appeals were consolidated into the present appeal.

375.420 & 375.296),[5] Breach of Contract, and Declaratory Judgment (pursuant to the Missouri Declaratory Judgment Act, § 527.010 et al.).[6,7,8]

Before the trial, Nooter agreed to dismiss its breach-of-contract claims against Appalachian, Allianz, Munich, North Star, and OneBeacon without prejudice. On April 28, 2014, Nooter proceeded to trial against three of the Excess Insurers (Evanston, London, and National Union), where only six counts were left for the jury to resolve—claims against all three defendants for both breach of contract and vexatious refusal to pay. On May 9, the jury returned verdicts in favor of National Union and London on both counts, however, it returned verdicts against Evanston on both counts.

On April 2, 2015, the trial court issued an order and judgment based on the "Motions for Summary Judgment that declared certain rights to the parties," the jury verdicts, and "Motions for Declaratory Judgment."[9] Finally, on September 16, 2015, the trial court entered its final order and judgment in accordance with (1) the May 9, 2014 jury verdicts and (2) the April 2, 2015 order and judgment.

In addition to the Excess Insurers' points on appeal, Nooter has raised three points on cross-appeal. All three points concern the trial court's entry of summary judgment in favor of

[5] All statutory citations are to RSMo 2000 as updated through the most recent cumulative supplement, unless otherwise indicated.
[6] Nooter named four defendants in its vexatious refusal to pay claim: Appalachian, London, Evanston, and National Union Fire.
[7] Nooter named all eight Excess Insurers as defendants in its breach of contract claim.
[8] Nooter sought declaratory judgment to establish "the parties' rights, duties, and obligations under umbrella and excess general liability insurance policies that Nooter purchased from [all eight Excess Insurers]."
[9] The Motions for Summary Judgment declaring certain rights of the parties were entered in orders on February 24, March 13, March 14, and April 23, 2014. The jury trial was conducted from April 28, 2014 to May 9, 2014; the jury also returned its verdicts on May 9, 2014. Subsequently, the parties filed Motions for Declaratory Judgment, presented arguments in support of their motions, and filed proposed Findings of Fact and Conclusions of Law on February 23, 2015. The Motions for Declaratory Judgment were addressed in the April 2, 2015 order and judgment.

London regarding its defense cost obligations under its 1949–1961 policies. Accordingly, London is the only cross-respondent on appeal.[10]

### C. Relevant Insurance Companies and Policies

All of the relevant policies' terms and conditions are necessary to resolve multiple points on appeal. This section is meant to provide a background on the relevant companies and policies.

#### i. Primary Insurance Companies

There are five "primary" insurance companies relevant to this appeal: Continental Insurance Company ("Continental"), Transamerica Insurance Company ("TIG"), Aetna/Travelers Casualty and Surety Company ("Aetna"), Insurance Company of North America ("INA"), and Home Indemnity Company ("Home"). Relevant information about the primary insurers and their policies will be provided as needed.

#### ii. Excess Insurance Policies

Eight different excess insurers are parties to this appeal:

***Evanston***

Evanston issued "four consecutive commercial umbrella liability policies" to Nooter from June 1981 until June 1985. These four policies are broken down further into two subtypes:

UM Policies: The first two annual policies were issued on July 1, 1981 (Policy No. "UM 199286") and July 1, 1982 (Policy No. "UM 100296") (collectively herein, the "Evanston UM Policies").

[10] Munich considers itself a cross-respondent; however, as Nooter has not made a cross-appeal on any ruling as it regards Munich, this appeal will leave the trial court's ruling on Munich's defense costs undisturbed.

CN Policies: The last two Evanston policies were issued on July 1, 1983 (Policy No. "CN 503824) and July 1, 1984 (Policy No. "CN 504032") (collectively herein, the "Evanston CN Policies").

The Evanston CN Policies contain ***two separate levels*** of coverage: (1) Coverage A ("occurrence-based" coverage) and (2) Coverage B ("claims-made" coverage). Nooter and Evanston dispute which type of coverage applies to asbestos claims under the Evanston CN Policies. After reviewing the language of the Evanston CN policies and the relevant endorsement, we have determined any relevant asbestos claims would fall under Coverage A. For further discussion, *see infra* Sec. III(G).

***National Union***

National Union issued a one-year "umbrella liability policy" to Nooter with effective dates from July 1, 1980, to July 1, 1981 (Policy No. "BE 1331118")[11] (the "National Union Policy"). Because London and National Union have jointly filed a brief, any reference to London's arguments in support of its Point I or Point II will also reflect National Union's position unless otherwise stated.

***London***

London and Nooter grouped the relevant policies before us on appeal into two separate groups.

London Policies from September 13, 1949 to May 17, 1961

London and Nooter entered into numerous policy agreements during this span. As relevant to this appeal, Nooter purchased annual excess policies from London from September

[11] This is the policy number listed in the "Declarations Umbrella Liability" section of the National Union Policy, however, the cover page is stamped "BE 133118."

13, 1949 to May 17, 1961.[12] London's annual excess policies from this period included the same relevant language.

London Policies from May 17, 1961 to July 1, 1965 and July 1, 1975 to July 1, 1980

During "various periods from May 17, 1961 to July 1, 1965, and from July 1, 1975 to July 1, 1980," London provided Nooter with umbrella coverage through numerous policies with identical relevant language.

***Appalachian***

Nooter purchased only one relevant insurance policy from Appalachian, which covered three years (July 1, 1972 through July 1, 1975)—Policy No. 71174 (the "Appalachian Policy").

***Allianz***

Allianz issued only one policy to Nooter (Policy No. AUX5201679). This policy (the "Allianz Policy") began on July 1, 1983, and ran until July 1, 1985.[13] The Allianz Policy is a "second-level" excess insurance policy, attaching to Evanston's two annual CN policies (first-level excess policies), which covered the same policy period. The Allianz Policy also contains "broad as primary" language under its MAINTENANCE OF UNDERLYING UMBRELLA INSURANCE provision, which states the Allianz Policy "is subject to the same terms, definitions, exclusions and conditions [of Evanston Umbrella Policy No. CN 503824] (except as regards [to] the premium, the amount and limits of liability and except as otherwise provided [in the Allianz Policy])."

[12] The September 13, 1949 date comes from the trial court's order and judgment regarding London's Motion for Partial Summary Judgment Regarding Defense Costs from February 24, 2014. Neither party identifies the specific date the relevant policies were issued. The last annual London policy from this time frame (Policy No. 513670) was scheduled to begin on September 1, 1960, and end on September 1, 1961, but the policy was canceled as of May 17, 1961.

[13] Although there was only one policy issued, the Allianz Policy was an annual policy, which originally was set to expire on July 1, 1984. However, Nooter renewed the policy, thereby extending it for an additional year.

### *Munich*

Munich issued two separate three-year policies to Nooter: (1) Policy No. M 7811 0001, which covered July 1, 1965 through July 1, 1968; and (2) Policy No. M 0085094, which covered July 1, 1968 through July 1, 1971. Only the 1968–1971 policy is at issue on appeal ("the Munich Policy").

### *North Star*

Nooter and North Star entered into a three-year policy agreement (Policy No. NSX-9590) beginning on July 1, 1971, and terminating on July 1, 1974 (the "North Star Policy").

### *OneBeacon*

OneBeacon issued one excess umbrella policy (No. EW-8500-566), which was effective from July 1, 1971 until December 31, 1973 (the "OneBeacon Policy"). However, the OneBeacon Policy's terms were changed after the first year of coverage; accordingly, the OneBeacon Policy has two periods with different terms and conditions.

The OneBeacon Policy's Terms and Conditions from July 1, 1971 through June 30, 1972

The OneBeacon Policy was primarily subject to the same terms and conditions as an Aetna policy (No. 51 XS 570 SCA) (the "Aetna Policy"). The terms and conditions were substantially similar because the OneBeacon Policy included a "broad as primary" endorsement. This endorsement expanded the scope of the OneBeacon policy to incorporate most of the coverage provided by the Aetna policy, which was broader than the OneBeacon Policy would otherwise provide.

The OneBeacon Policy's Terms and Conditions from July 1, 1972 through December 31, 1973

The OneBeacon Policy was primarily subject to the same terms and conditions contained in Appalachian Policy No. 71174 (the "Appalachian Policy").

## II. STANDARDS OF REVIEW

The majority of the issues before us are based on petitions for declaratory judgment and motions for summary judgment. The heart of these rulings concerned issues of insurance policy interpretation. Additionally, Evanston has presented several independent issues concerning the trial and the jury verdicts.

### A. Standard of Review for Interpretation of Insurance Policies

The proper interpretation of an insurance policy is a question of law that appellate courts review *de novo*; this includes determinations of whether provisions are "ambiguous." *Owners Ins. Co. v. Craig*, 514 S.W.3d 614, 616–18 (Mo. banc. 2017); *Taylor v. Bar Plan Mut. Ins. Co*., 457 S.W.3d 340, 344 (Mo. banc 2015). "[T]he trial court receives no deference where resolution of the controversy is a question of law." *State Farm Mut. Auto. Ins. Co. v. Stockley*, 168 S.W.3d 598, 600 (Mo. App. E.D. 2005). Further, where there are no factual issues left to resolve, any application of facts to the insurance policies is also a matter of law. *Id*.

### B. Standard of Review for Declaratory Judgments

> Generally, we review court-tried cases under the standards set forth in *Murphy v. Carron* and will affirm the judgment unless it is against the weight of the evidence, it is not supported by substantial evidence, or it erroneously declares or applies the law. 536 S.W.2d 30 (Mo. banc 1976). In a court-tried declaratory judgment action, however, interpretation of an insurance policy is a question of law, and the trial court receives no deference where resolution of the controversy is a question of law. Only if an ambiguity within the policy necessitates a factual determination will the standards set forth in *Murphy* govern.

*Id.* (citing *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)).

### C. Standard of Review for Summary Judgment

"A trial court's decision to grant summary judgment is an issue of law, which this Court reviews *de novo*; we will affirm such a decision if it is proper under any legal theory supported by the record." *Fruendly Auto Source, Inc. v. Chrostowski*, 514 S.W.3d 646, 650 (Mo. App. E.D.

2017) (citing *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010)). Summary judgment is only appropriate when the moving party has established (1) there is no genuine dispute of material fact, and (2) it is entitled to judgment as a matter of law. *Binkley v. Am. Equity Mortg., Inc*., 447 S.W.3d 194, 196 (Mo. banc 2014); Rule 74.04(c). The trial court's grant of summary judgment is reviewed in the light most favorable to the party against whom summary judgment was entered. *Id*.

## III. DISCUSSION

### A. Opinion Roadmap

There is great overlap amongst many of the issues before us, most of which center around questions of insurance policy interpretation. Certain Excess Insurers have asked our Court to determine (1) when a policy or policies underlying Excess Insurers' policies become "exhausted"; (2) the appropriate method(s) for allocating losses among Excess Insurers; (3) the extent of certain Excess Insurers' obligations to defend and/or indemnify Nooter; (4) how payment of defense costs impacts certain Excess Insurers' policies' limits; (5) whether Evanston's CN Policies require coverage on an "occurrence-basis" or a "claims-made basis"; (6) Munich's policy limits; (7) whether Evanston's CN Policies were excess over INA policies for certain claims; and (8) whether the trial court erred in making certain rulings during Evanston's trial. We will address these issues in that order.

### B. General Rules and Principles of Insurance Policy Interpretation

Issues of insurance policy interpretation are at the center of nearly every point on appeal. Thus, before delving into the specific points on appeal, we will discuss several rules and principles guiding our interpretation of the insurance policies.

"In interpreting an insurance contract, we must keep in mind that insurance policies are contracts; thus, the rules of contract construction apply." *Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 474 (Mo. App. E.D. 2013). The cardinal rule of contract interpretation "is that courts seek to determine the parties' intent and give effect to it." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013). When a contract is unambiguous on its face, we ascertain the intent of the parties based on the contract language alone. *Id*. at 226–27. Thus, we will only resort to canons of construction if the policy language is ambiguous. *Id*. at 227. However, clear and unambiguous language will be enforced as written. *Taylor*, 457 S.W.3d at 344. Accordingly, determining whether a policy is "ambiguous" is paramount. *Maritz Holdings, Inc. v. Fed. Ins. Co.*, 298 S.W.3d 92, 99 (Mo. App. E.D. 2009).

"It is black-letter law that: An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Burns*, 303 S.W.3d at 509. We assess whether an insurance policy is ambiguous by reading the agreement as a whole. *Owners Ins. Co.*, 514 S.W.3d at 617. We do not view provisions in isolation. *Id*. Unless a word or phrase is clearly intended to be used as a term of art, we assign a plain and ordinary meaning to the policy's words in a manner consistent with the parties' reasonable expectations and objectives. *Doe Run*, 400 S.W.3d at 474. Additionally, we aim to give a reasonable meaning to every provision and to avoid an interpretation that renders some provisions trivial or superfluous. *Id*.

## C. Allocation (Allianz Point VI, OneBeacon Point I, London Point I, Evanston Point III, and North Star Point III)

### i. Introduction to the Issue of Allocation

Effectively, "allocation" determines how losses are divided amongst the insured and its insurers. As is the case with exhaustion, the issue of allocation is more complex in long-tail claims:

> Traditional claims are limited in time, place, and space. In the context of long-tail claims (*e.g.*, pollution, mass product, or toxic tort exposures), however, damage or injury may take place over time, and often there is a latency period between the date on which the polluting activity or injurious process begins and the date on which the resulting bodily injury or property damage is discovered. In other words, long-tail claims may span several years or even decades. In some instances, the damage is progressive. In others, it is merely continuous.

Scott M. Seaman & Jason R. Schulze., *Allocation of Losses in Complex Insurance Coverage Claims* § 2:2 (2016). Accordingly, "the courts are left with the nettlesome problem of how to allocate damages among the policies," a problem to which there is no universal approach. *Boston Gas Co. v. Century Indem. Co*., 910 N.E.2d 290, 301, 454 Mass. 337, 351, (2009) (quoting 15 Couch on Ins. § 220:25 (3d ed. 2005)). However, two leading methods of allocation have emerged to address this issue: the "all sums" approach and the "pro-rata" approach.[14] *In re Viking Pump, Inc*., 52 N.E.3d 1144, 1150, 27 N.Y.3d 244, 256–57 (2016).

The "all sums" approach allows the policyholder to select a policy among the range of years triggered by the "occurrence" at issue. Conversely, "[u]nder the pro rata approach, damages are spread proportionately across the entire period during which the property damage takes place." *Doe Run*, 400 S.W.3d at 474. Under the "all sums" approach, the insurer may be

[14] The pro-rata allocation method has several different variations. For the sake of simplicity, our discussion of the pro-rata method will refer to its most basic form where liability is apportioned based on dividing the aggregate policy limits by the portion of the occurrence covered by the policy period. *See* 4 Philip L. Bruner and Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law, § 11:376 (2016).

able to recoup some or all of these funds from other insurers. *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co*., 679 F.3d 456, 460 (6th Cir. 2012) (explaining that the "all sums" approach allows the targeted insurer to "seek contribution from the other insurers for any amounts for which they are potentially responsible").[15] Accordingly, "[t]his method places the onus on the targeted insurer, rather than on the policyholder." *Id*.

Courts often determine the proper approach based on policy language, but some courts weigh other considerations more heavily, such as public policy concerns. *See In re Viking Pump, Inc*., 52 N.E.3d at 1150. Consistent with Missouri's long-standing principles for contract and insurance policy interpretation, our analysis will focus on the language of the Excess Insurers' policies.[16]

In sum, six of the Excess Insurers have appealed the trial court's grant of Nooter's motion for summary judgment regarding allocation, holding that an "all sums" allocation method applies to relevant asbestos claims under all of the policies addressed in this section (Sec. III(C)).[17]

[15] Said another way, "Under the 'all sums' method of allocation, each triggered insurer is liable for the insured's entire loss, even though the injury giving rise to liability may have begun before, and continued after, the insurer's policy period. One insurer pays the entire loss and then may seek contribution from other triggered insurers under the common-law doctrine of contribution or pursuant to each policy's 'other insurance' clause." *Arco Industries Corp. v. American Motorists Ins. Co*., 584 N.W.2d 61, 68 (1988).

[16] We are aware that some states may focus on public policy concerns when addressing allocation issues. Until otherwise directed by the legislature or the Supreme Court of Missouri, the intentions of the parties will control our resolution of this issue. *Viking Pump, Inc. v. Century Indem. Co*., 2 A.3d 76, 107–08 (Del. Ch. 2009) ("Although the case law addressing [questions of allocation] is laden with policy discussions, the task before me, as I shall explain, is to determine, using New York principles of contract interpretation, which approach is embraced by [the policies]…As will be seen, the State of New York has not adopted a rule of common law that imposes either approach on all insurance contracts; rather, New York precedent requires that the court apply traditional principles of insurance contract interpretation to the policies at issue and then apply the approach that results from that interpretative exercise."). Similar to the courts of New York, we will address questions of allocation on a case-by-case basis by examining the intentions of the contracting parties. *See id*. This case-by-case approach will be used to resolve the exhaustion issues as well.

[17] The six parties include London, National Union, OneBeacon, Evanston, Allianz, and North Star.

### ii. Allocation Analysis

Although the relevant policies have different variations, the arguments, as Evanston noted, are "substantially similar." Moreover, as several of these appellants have chosen to adopt and incorporate by reference some of the other appellants' allocation arguments, these arguments are intricately intertwined. The arguments advanced under London's Point I have been adopted by OneBeacon, Evanston, North Star, and Allianz. Unless specifically stated otherwise, any reference to London's allocation argument will subsume arguments made by the other four appellants.[18, 19]

We must view contracts as a whole; we will not consider contract language in isolation. *Owners Ins. Co.*, 514 S.W.3d at 617. That being said, two categories of language play the most prominent roles in addressing the allocation issue. All of the relevant policies have (1) some type of "all sums" language ("all sums," "the sum," "the sums," or "the total sum") and (2) language limiting losses or occurrences to a particular policy period ("during the [policy] period," "while this policy is in force," "occurring during the policy period," "coming within the terms and limits of this [policy]," etc.).[20] As aforementioned, even when interpreting insurance policies with great similarity, courts have reached different results on the issue of allocation. For example, some jurisdictions have concluded an "all sums" method applies "usually [by] relying

[18] OneBeacon has chosen to adopt London's argument, but it has also made some additions to said argument. Evanston has adopted both London's and OneBeacon's allocation arguments, and it relies almost exclusively on these two positions. North Star "joins and adopts" arguments supporting London's Point I without presenting additional arguments. Allianz has adopted and incorporated by reference the allocation arguments of London, OneBeacon, and Evanston without making any additions.

[19] Allianz stated in its appellant's brief that it incorporates "Point II" of London's brief and "Point II" of OneBeacon's brief. We assume this was a clerical error by Allianz, because Point II in both briefs address the issue of "exhaustion," not "allocation." Accordingly, we assume Allianz is adopting Point I of both briefs, as Allianz's Point VI concerns allocation and also advocates for a pro-rata approach to apportioning losses.

[20] These groupings are for conceptual simplicity. It is not a determination that the phrases are synonymous.

on language in policies obligating an insurer to pay 'all sums' for which an insured becomes liable." *In re Viking Pump, Inc.*, 52 N.E.3d at 1150. When courts rely on policy language to determine that a pro-rata allocation scheme should apply, they often do so by emphasizing language limiting losses to a particular policy period. *Id*. (explaining some jurisdictions have "utilized the pro rata method, emphasizing language in the insurance policies that may be interpreted as limiting the 'all sums' owed to those resulting from an occurrence 'during the policy period'").

In Missouri's most instructive case on this issue (*Doe Run*, 400 S.W.3d at 474), our Court found the "all sums" language was not limited by the "during the policy" language. In that case, the "pertinent part" of a policy at issue read:

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter sanctioned, to indemnify the insured for ***all sums*** which the Assured shall be obliged to pay by reason of the liability…for damages…caused by or arising out of each occurrence happening during the policy period."

*Id.* at 475 (emphasis in the original). In that policy, an "occurrence" was defined as "one happening or series of happenings, arising out of, or due to one event taking place during the term of this policy." *Id*. Our Court determined "[t]his definition does ***not*** limit the policies' promise to pay ***all sums*** of the policy holder's liability ***solely to damage during the policy period***," therefore, we found "the express language of the applicable insurance policies requires the adoption of the all sums allocation scheme[.]" *Id.* (emphasis added).

London attempts to distinguish *Doe Run* by advancing several similar arguments. For example, in the instance of the National Union Policy, London maintains that the policy provides "exactly what was deemed missing in [*Doe Run*]" by limiting occurrences to events "which result in Personal Injury or Property Damage ***during the policy period***…" (emphasis added). However, we find this to be a distinction without a difference. The policy discussed in *Doe Run*

also limits coverage to occurrences "***during the policy period***." *Id*. (emphasis added). The policies at issue here operate in a very similar manner to the language analyzed in *Doe Run*. *See id*. Moreover, after reading all of the language in the policies, we have found nothing elsewhere to affect the provisions which use permutations of "all sums" and "during the policy limit" language. In the context of the policies before us in this section (Sec. III(C)), we find the two categories of language—permutations of (1) "all sums" language and (2) "during the policy period" language—to operate in a substantially similar manner. Accordingly, we affirm the trial court's grant of summary judgment in favor of Nooter regarding allocation, and we deny Allianz Point VI, OneBeacon Point I, London Point I, Evanston Point III, and North Star Point III.

### D. Method of Exhaustion (Points on Appeal: London Point II, OneBeacon Point II, Evanston Point I, North Star Point IV)

#### i. Introduction to the Exhaustion Issue

Certain Excess Insurers appeal the trial court's grant of "Summary Judgment Regarding Exhaustion." Defining what constitutes "exhaustion" is necessary for assessing the Excess Insurers' obligations and potential liability; typically, exhaustion is a condition precedent to triggering an excess insurer's duties.[21] In this case, it is undisputed that exhaustion of the Excess Insurers' underlying policies is required. The definition of exhaustion as it pertains to certain policies is the sticking point. First, we look to the policy language to define when underlying insurance policies are "exhausted." *See Schmitz v. Great Am. Assur. Co*., 337 S.W.3d 700, 706 (Mo. banc 2011) ("It has been long recognized that parties to an insurance contract are free to define when an underlying insurance policy is exhausted so that the excess carrier's obligation to

[21] "[T]raditional excess insurance coverage generally is subject to an exhaustion requirement." *Nationwide Ins. Co. v. Schneider*, 960 A.2d 442, 449, 599 Pa. 131, 144 (2008). "Excess insurance is secondary insurance coverage that attaches only after a predetermined amount of primary insurance or self-insured retentions have been exhausted." Scott M. Seaman & Jason R. Schulze., *Allocation of Losses in Complex Insurance Coverage Claims* § 10:4 (2016).

pay is triggered."). The definition of exhaustion is not precisely defined in any of the Excess Insurers' policies. This is a common problem that courts have been grappling with nationwide.[22] *See Mayor & City Council of Baltimore v. Utica Mut. Ins. Co*., 145 Md. App. 256, 314–15 (Md. 2002).

Two primary methods of exhaustion have been used by courts: horizontal exhaustion and vertical exhaustion. *Id*. It is important to understand where these two approaches differ. Vertical exhaustion is a principle of insurance priority that allows the attachment of an excess policy once all of the policies immediately below it (as identified in the policy agreement) have been exhausted. Horizontal exhaustion requires every triggered lower-level policy to become exhausted before implicating an excess policy.

We will use the Allianz Policy as an example. This is a two-year policy covering July 1, 1983 through July 1, 1985. Allianz is a second-level excess insurer, with Evanston's CN policies (first-level excess policies) directly underlying the Allianz Policy.

If a claimant alleging injury from asbestos inhalation worked for Nooter from January 1, 1970 through December 31, 1985, Nooter would need to exhaust ***any and all*** primary and first-level excess insurance policies triggered during that sixteen-year span before any of Allianz's obligations were triggered under horizontal exhaustion. This means Nooter must exhaust policies covering periods in which the Allianz Policy was not in effect. For example, Nooter would be required to exhaust every Home policy (which covered Nooter from July 1, 1972 through July 1, 1985), the Appalachian Policy (which covered Nooter from July 1, 1972 through July 1, 1975),

[22] "One of the most hotly contested issues in continuous loss cases, often referred to by insurers as 'long-tail claims,' is whether an insured is obligated to exhaust its liability coverage 'vertically' or 'horizontally.' This issue arises when several primary policies or lower level excess policies are triggered, and a court must determine whether the limits of the underlying policies for one year (vertical exhaustion) or all years (horizontal exhaustion) must be exhausted before a particular excess policy must pay." *Mayor & City Council of Baltimore*, 145 Md. App. at 314–15 (quoting Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 DENV. L.REV. 29, 77 (2000)).

and most of the other policies discussed in this opinion before Allianz would owe any obligations to Nooter. On the other hand, vertical exhaustion only requires exhaustion of policies limits that directly underlie the Allianz Policy, in this case Evanston's CN policies and any of their underlying primary policies. Thus, exhaustion of the Appalachian Policy and any Home Policy providing coverage before July 1, 1983, is immaterial if vertical exhaustion applies.

**ii. Nooter's Judicial Admission Argument**

First, we will address Nooter's argument that the trial court did not err in applying vertical exhaustion to the policies of Evanston, National Union, and London because these excess insurers "withdrew their 'reservations of rights" and judicially admitted their obligations…that [they] would indemnify Nooter without reservation." If Nooter is correct in its assertion, there is no need to address the language of the relevant policies.

Nooter asserts that the judicial admissions of Evanston, National Union, and London bind them on the issue of exhaustion. Nooter contends that these three Excess Insurers told the jury Nooter had properly exhausted the primary coverage under their policies. Nooter directs us to portions of the transcript that support the opposite conclusion. The transcript primarily concerned the trial court's "all sums" ruling, but it also provides strong support that the three appellants did not "admit" the relevant policies were exhausted. For example, Evanston's counsel states: "There's no testimony about the '81–'82 policies, the UM policies. I'll just talk about them. No testimony about them. No evidence of exhaustion," Evanston's counsel made a similar statement about the 1983–1984 CN policy ("no testimony about it, no evidence of exhaustion."). Additionally, Evanston's counsel contested the 1984–1985 policy: "the simple fact is in this case Home kept paying money under that policy. ***The policy wasn't exhausted***..." (emphasis added).

Nooter also uses a quote from London's opening statement to advance their argument: "Give us the bill, give us the specific amount and the information and we'll pay for it." However,

London prefaced the statement by saying this would be done "[w]hen the primary is gone and when the policyholder gives the insurance company the information." London emphasized that exhaustion must first occur ("the money has to be gone"). When the quote is read in context, it is apparent that London did not make the representation Nooter argues it made. The references by the three Excess Insurers to payments that they paid or will pay to Nooter was predicated on the parties' acknowledgement of various trial court rulings. These alleged "admissions" were effectively reiterations of issues previously determined by the trial court. We do not find Nooter's judicial admission argument to be persuasive. Accordingly, we will examine the merits of all of the exhaustion arguments raised by the Excess Insurers.

### iii. Certain Excess Insurers' Points on Appeal Regarding Vertical and Horizontal Exhaustion (London Point II, OneBeacon Point II, Evanston Point I, and North Star Point IV)

London has raised two main arguments relating to exhaustion. First, London argues that horizontal exhaustion of primary insurance is required before triggering coverage, and the trial court erred in determining vertical exhaustion applied. Second, London argues the trial court erred in finding the record supported summary judgment in favor of Nooter and consequently granting Nooter's motion for summary judgment on the exhaustion issue, because Nooter failed to provide sufficient evidence that the limits of Continental's or TIG's primary policies had been exhausted. London also filed a cross-motion for summary judgment to establish those primary policies had not been exhausted, which the trial court denied.

OneBeacon adopts the arguments made by London in its Point II(B) of its appellate brief, also advocating for horizontal exhaustion of all triggered primary policies. North Star also "joins in and adopts the Argument of London…on the issue of exhaustion set forth in Point II of [London's brief]." Further, Evanston notes that its "position regarding horizontal primary exhaustion is substantially aligned with that set forth in [London's Appellant's Brief]" and it

"adopts and incorporates by reference" London's statement of facts and arguments on the matter. Additionally, Evanston has advanced several arguments independent of London.

London has several substantially similar insurance policies, which we separate into two groups: (1) London's policies from September 1, 1955 through May 17, 1961 (the "Older London Policies"); and (2) London's policies from May 17, 1961 through July 1, 1965 and London's policies from July 1, 1975 to July 1, 1980 (the "Newer London Policies").

**a. Horizontal Exhaustion Arguments**

**1. "Other Insurance" Provisions**

For several policies, "Other Insurance" provisions lie at the forefront of our exhaustion analysis. Regarding these types of provisions, the Supreme Court of South Carolina made an apt observation that encapsulates our viewpoint:

> When judges first set about the task of interpreting insurance policies, we looked confidently to tried and true principles of contract law. After all, lawyers are taught in their earliest classes that the common law rules of contract are the bedrock of all Anglo-American jurisprudence, thus judges clearly had at hand the perfect tools for crafting fair and lucid interpretations of insurance agreements. We failed utterly to anticipate the linguistic excesses to which the insurance industry would resort in order to avoid paying claims when 'other insurance' may be available. This is an area in which hair splitting and nit picking has been elevated to an art form. 'Other insurance' clauses have been variously described as: 'the catacombs of insurance policy English, a dimly lit underworld where many have lost their way,' a circular riddle, and 'policies which cross one's eyes and boggle one's mind.'

*South Carolina Ins. Co. v. Fidelity and Guar. Ins. Underwriters, Inc*., 489 S.E.2d 200, 201–02 (S.C. 1997) (internal quotations omitted).

The relevant "other insurance" provisions are substantially similar to each other. There are five permutations of "other insurances" language relevant to the issue of exhaustion:

**The Newer London Policies (from May 17, 1961 through July 1, 1965 and July 1, 1975 through July 1, 1980):**

OTHER INSURANCE

> If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this Policy, other than insurance that is in excess of the Insurance afforded by this Policy, the Insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance…

**The National Union Policy:**

> Other Insurance. If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder, this insurance shall be excess of, and shall not contribute with such other insurance…

**All Four Evanston Policies:**

> **Other Insurance**: The insurance afforded by this policy shall be excess insurance over any other valid and collectible insurance available to the Insured and applicable to any part of ultimate net loss or excess net loss, whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise, unless such other insurance applies specifically as excess insurance over the limits of liability provided by this policy...

**The OneBeacon Policy (from July 1, 1971 through June 30, 1972, following the form of the Aetna Policy)**

> Other Insurance. The Insurance afforded by this policy shall be excess Insurance over any other valid and collectible Insurance available to the insured and applicable to any part of ultimate net loss, whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise…

**The OneBeacon Policy (from July 1, 1972 through December 31, 1973, following the form of the Appalachian Policy)**

> **OTHER INSURANCE**
> If other collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the Retained Limit and the limit of liability hereunder), the Insurance hereunder shall be in excess of, and not contribute with such other insurance…

The relevant excess insurers argue that the "other insurance" clauses plainly require Nooter to exhaust all "other valid and collectible insurance" before the excess policy attaches, as the policy is "in excess of" such other insurance. Nooter, however, argues that it is "well-established Missouri law that 'other insurance language' addresses concurrent, not successive,

coverage and the rights among insurers; 'other insurance' language does not limit the insurers' obligations to the policyholder." Respondent's Brief p. 44–45 (citing *Heartland Payment Sys., L.L.C. v. Utica Mut. Ins. Co.*, 185 S.W.3d 225, 232 (Mo. App. E.D. 2006)).

Policy language is ambiguous when it is reasonably open to different interpretations. *Burns*, 303 S.W.3d at 509. Concerning the issue of exhaustion, we find both parties offer reasonable interpretations. Looking solely at the "other insurance" language ***in isolation***, the relevant excess insurers' explanation is arguably more persuasive. However, Missouri and other jurisdictions have interpreted "other insurance" provisions to only apply to "concurrent" policies covering the same policy period. *See Heartland Payment Sys., L.L.C.*, 185 S.W.3d at 232; [23] *see also In re Viking Pump, Inc*., 52 N.E.3d at 1157 (finding "'other insurance' clauses apply when two or more policies provide coverage during the ***same*** period, and they serve to prevent multiple recoveries from such policies, and that such clauses have nothing to do with whether any coverage potentially exists at all among certain high-level policies that were in force during ***successive years***.") (emphasis in original); *see also Benjamin Moore & Co. v. Aetna Cas. & Sur. Co*., 179 N.J. 87, 98, 843 A.2d 1094, 1101 (N.J. 2004) ("'[O]ther insurance' clauses...are provisions typically designed to preclude a double recovery when multiple, concurrent policies provide coverage for a loss. We determined that such clauses were not generally applicable in the continuous-trigger context where successive rather than concurrent policies were at issue."); *see also Arco Indus. Corp. v. Am. Motorists Ins. Co*., 232 Mich. App. 146, 165, 594 N.W.2d 61, 70 (Mich. Ct. App. 1998) (citing *Continental Casualty Co. v. Medical Protective Co*., 859 S.W.2d 789, 791 (Mo. App. E.D. 1993)), aff'd, 462 Mich. 896, 617 N.W.2d 330 (2000) (explaining

[23] The dispute in *Heartland* dealt with two primary insurance companies. Nonetheless, that case notes "Other Insurance clauses" are used to "vary or limit an insurer's liability when additional, ***concurrent*** insurance exists…" which includes "excess clauses that make the policy excess or payable after other policies," as is the case here. *See Heartland*, 185 S.W.3d at 231 n.11.

"Other Insurance" clauses "relate to the effect of concurrent coverages of a single occurrence. They are individual contractual agreements between the insured and the insurer, designed to prevent the insured from recovering multiple times for an injury that occurs at one point in time"). The fact that jurisdictions dispute the function of "other insurance" provisions in excess policies in similar situations supports a finding of ambiguity. *See Harrison v. Tomes*, 956 S.W.2d 268, 270 (noting that "divergent conclusions reached by [other] jurisdictions is further evidence of [an] ambiguity" and resolving the ambiguity in favor of the insured).

Furthermore, although "exhaustion" was not at issue in the case, our Court's analysis of policy language in *Doe Run* provides further support for Nooter's position.[24] As addressed in the previous section, our application of *Doe Run* to similar language in the policies currently at issue called for an "all sums" allocation. Although we do not conflate the issues of exhaustion and allocation,[25] courts typically pair either (1) "all sums" allocation with vertical exhaustion or (2) "pro-rata" allocation with horizontal exhaustion, finding the grouped methodologies conceptually consistent. *See In re Viking Pump, Inc*., 52 N.E.3d at 1156 ("[V]ertical exhaustion is conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year."); *see also Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 351, 910 n.24 N.E.2d 290, 301 (Mass. 2009) (using "all sums" allocation and "vertical exhaustion" synonymously); *Westport Ins. Corp. v. Appleton Papers Inc*., Wis. 2d 120, 167, 787 N.W.2d 894, 918 (2010) (stating that horizontal exhaustion "is another name for pro rata allocation"); *see also* Restatement of the Law of Liability Insurance

[24] Nooter contends that requiring vertical exhaustion to apply is "mandated by this Court's 'all sums' ruling in Doe Run." We find this to be an overstatement. *Doe Run* never addressed exhaustion.

[25] The issues of allocation and exhaustion cannot be conflated. *See John Crane, Inc. v. Admiral Ins. Co*., 2013 IL App (1st) 991 N.E.2d 474, 491 (2013) (finding an "all sums" allocation method and a horizontal exhaustion scheme applied to the triggered excess insurance agreements). "Exhaustion" helps determine if and when a policy is triggered. "Allocation" deals with how costs are apportioned between insurers if their policies are triggered.

§ 44 cmt. j (tentative draft) (2016) ("Under the all-sums approach…insureds exhaust the coverage available in one year using a 'vertical-exhaustion' approach before accessing the coverage available in another year[.]").

An ambiguity exists when language is reasonably open to different constructions. *Owners Ins. Co.*, 514 S.W.3d at 617. "In determining whether language in the policy is ambiguous, the words will be tested in light of the meaning which would normally be understood by the average layperson." *Maher Bros., Inc. v. Quinn Pork, LLC*, 512 S.W.3d 851, 856 (Mo. App. E.D. 2017). A person of ordinary intelligence could reasonably conclude that the "other insurance" provisions either call for horizontal exhaustion or are wholly inapplicable to the exhaustion determination. Indeed, when other courts have been confronted with nearly identical language to the policies before us, they have reached opposite conclusions. Further, compared to an average person with "ordinary intelligence," courts have greater experience in reading and interpreting contracts and legalese, yet they still reach different conclusions, which supports a finding that the language is reasonably open to different constructions and thereby ambiguous. We find the policies containing "other insurance" provisions to be ambiguous on the issue of exhaustion. Consequently, we resolve the ambiguities in favor of the insured, Nooter, and we conclude vertical exhaustion shall apply to the aforementioned excess policies. Although Evanston does not rely exclusively on the "Other Insurance" provision to make its case, for the reasons addressed in the next subsection, Evanston's policies also call for vertical exhaustion.

### 2. Remaining Horizontal Exhaustion Arguments

Some of the Excess Insurers have directed us to language outside of "other insurance" clauses to support their horizontal exhaustion arguments.

**The Older London Policies**

The Older London Policies do not include "other insurance" provisions. These policies obligate London to indemnify Nooter for Nooter's "ultimate net loss," which is defined below:

> ULTIMATE NET LOSS. The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which [Nooter] is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."

We find other language in the policies relevant for determining exhaustion. For example, the Older London Policies state that "it is expressly agreed that liability shall attach to [London] only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability…" Similarly, the Older London Policies include a condition determining when liability attaches:

> ATTACHMENT OF LIABILITY. Liability under this Policy shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until [Nooter] has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits."

Under these policies, "Primary Insurer(s)" is a term of art specifically referring to Continental ("…in the underlying policy/ies specified in the Schedule herein and issued by…CONTINENTAL CASUALTY COMPANY hereinafter called the "Primary Insurers."). Thus, London's policy is triggered after the exhaustion of the underlying Continental policies as defined under ATTACHMENT OF LIABILITY. This is vertical exhaustion. Nonetheless, the practical effect on Nooter's ability to recover from London is limited by the definition of "Ultimate Net Loss." The definition of Ultimate Net Loss serves as a means for calculating London's liability; it does not dictate when the London policies are triggered.[26] Per the plain language of the policy, London is only required to

[26] For example, had London included a duty to defend in these policies, that duty would be triggered upon the exhaustion of policies included in the schedule of underlying insurance or otherwise explicitly referred to as a policy that directly underlies the London policy. Exhaustion of "other insurance" policies (i.e., any insurance policy that

pay Nooter the amount of damages remaining after subtracting the relevant amounts of "recoveries, salvages and other insurances…whether recoverable or not…"[27] We agree with the trial court that vertical exhaustion applies to these London policies. However, to the extent the trial court's order is inconsistent with the conclusion we reach today, we reverse the trial court's judgment.[28]

**The North Star Policy**

Like the other excess insurers appealing the trial court's exhaustion ruling, North Star argues Nooter has not exhausted its underlying insurance because horizontal exhaustion applies. Additionally, North Star argues that Nooter has failed to meet its burden in establishing that the Continental and TIG policies are exhausted. North Star has opted to join and adopt "the Argument of London Market Insurers and National Union, as North Star joins in the brief of London Market Insurers and National Union on the issue of exhaustion[.]"

Regarding the method of exhaustion argument, the North Star Policy is substantially similar to the London policies from 1955 through May 17, 1961; it includes a similar definition of "ULTIMATE NET LOSS," and the policy does not include an

covers the same risk but is not expressly listed as an underlying insurance policy) would be irrelevant to London's duty to defend.

[27] The "other insurance" language in the excess policies likely mainly applies to primary insurance companies. Most insurance policies include similar "other insurance" language. Generally, the other insurance language of excess insurers residing on the same level will be disregarded under the doctrine of mutual repugnancy to prevent an insured from total forfeiture of coverage. *Wentzville Park Assocs., L.P. v. Am. Cas. Ins. Co. of Reading, PA*, 263 S.W.3d 736, 740 (Mo. App. E.D. 2008).

[28] In the trial court's February 24, 2014 order and judgment, it determined that "[London's] excess policies 'attach' or ***must start paying*** after either Nooter or Nooter's underlying insurers pay the amount of the underlying limits in any one policy year." (emphasis added). We agree with the trial court's conclusions that London's excess policies "attach" after the underlying insurance policy becomes exhausted. However, we find London "***must start paying***" Nooter only if Nooter's covered loss exceeds "recoveries, salvages and [any] other insurance…whether recoverable or not…" Overall, we largely agree with the trial court's determination, but we distinguish between the attachment point (i.e., after vertical exhaustion) and the point in which London's obligation to pay the ultimate net loss is triggered (i.e., after vertical exhaustion ***and*** the loss exceeds recoveries, salvages, and the limits of any other insurance policies that cover the same risk).

"other insurance" provision.[29] However, the North Star Policy does not include language expressly defining when the policy is triggered, such as London's ATTACHMENT OF LIABILITY provision. London's use of such provision essentially confirms what is implied by the schedule of underlying insurance: the policy limits of the underlying insurance must be exhausted before an excess policy attaches. Thus, because there is nothing else in the North Star Policy to alter the implied exhaustion requirements, Nooter need only exhaust the specifically listed underlying insurance policies before the North Star Policy attaches (i.e., vertical exhaustion). As aforementioned in the London exhaustion analysis, the ULTIMATE NET LOSS provision establishes the formula for calculating North Star's indemnity obligations. Thus, the existence of other primary insurance policies covering the same occurrence is highly relevant to determining the amount of North Star's damages to Nooter, but the exhaustion of other insurance policies is irrelevant to determining when the North Star Policy attaches based on the policy's language. Thus, we affirm the trial court's judgment ruling that vertical exhaustion applies to the policies, however, to the extent the trial court's order is inconsistent with the conclusion we reach today, we reverse the court's judgment.[30]

**The Evanston Policies**

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[29] The relevant provision in the North Star Policy reads: "ULTIMATE NET LOSS, as used herein, shall be understood to mean the sums paid in settlement of losses for which the Reinsured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the underlying insurance, policies of coinsurance, or policies specifically in excess hereof), whether recoverable or not, and shall exclude all 'Costs[.]'"

[30] In the trial court's February 24, 2014 order and judgment, it determined that "[London's] excess policies 'attach' or ***must start paying*** after either Nooter or Nooter's underlying insurers pay the amount of the underlying limits in any one policy year." (emphasis added). We agree with the trial court's conclusions that London's excess policies "attach" after the underlying insurance policy becomes exhausted. However, we find North Star "must start paying" Nooter only if Nooter's covered loss exceeds "all recoveries, salvages and other insurances (other than recoveries under the underlying insurance, policies of coinsurance, or policies specifically in excess hereof), whether recoverable or not." Overall, we largely agree with the trial court's determination, but we distinguish between the attachment point (i.e., after vertical exhaustion) and the point in which North Star's obligation to pay the ultimate net loss is triggered (i.e., after vertical exhaustion ***and*** the loss exceeds recoveries, salvages, and the limits of any other insurance policies that cover the same risk).

Evanston's exhaustion issue has additional implications. The other points addressed in this section (Sec. III(D)) solely concern the trial court's summary judgment ruling on exhaustion in favor of Nooter. In addition to that ruling, Evanston seeks reversal of two jury verdicts entered in favor of Nooter: a breach of contract claim and a vexatious refusal to pay claim. Exhaustion was a prerequisite for establishing Evanston's liability on either claim. If the underlying policies were not exhausted, Evanston had no obligation to Nooter; thus, any refusal to pay Nooter could not be deemed "vexatious" or constitute a "breach" of any insurance policy. *See Progressive Preferred Ins. Co. v. Reece*, 498 S.W.3d 498, 506 (Mo. App. W.D. 2016) ("[W]here an insurer had no duty to pay under the insurance policy, there cannot be a claim for vexatious refusal to pay."); *see also Standard Artificial Limb, Inc. v. Allianz Ins. Co.*, 895 S.W.2d 205, 210 (Mo. App. E.D. 1995) (explaining that "[s]ince [the insurer] had no duty to defend or indemnify, its refusal to do so was not vexatious").

Alternatively, Evanston seeks reversal of the jury verdicts based on several assertions unrelated to exhaustion. Those arguments are addressed in Sec. III(J). Evanston adopts and joins London's argument supporting its Point II. Nonetheless, Evanston has advanced several other arguments to support its Point I.

Under all four Evanston policies, the Coverage section provides that "The Company will pay on behalf of the Insured the ***ultimate net loss*** in excess of the ***applicable underlying limit***…" (emphasis added). Per the Evanston Policies:

> Applicable Underlying limit means
>
> (a) the amount of the limits of liability of the applicable underlying insurance as stated in the Schedule of Underlying Insurance, ***or***
>
> (b) Any other available insurance, ***or***

(c) the amount stated in the Declarations as the retained limit, if any policy of underlying insurance is applicable to the occurrence,

***whichever is greatest***…

(emphasis added). Evanston contends that "'[a]ny other available insurance' clearly is not limited to the insurance in the Schedule of Underlying Insurance; if it were, part (b) of the definition of 'applicable underlying limit' would be rendered meaningless," thus, "[t]he 'applicable underlying limit' ***includes*** 'any other available insurance.'" (emphasis added).

Even if we were to accept the premise that the "applicable underlying limit" dictates the policies' exhaustion requirements, the contention that it calls for horizontal exhaustion necessarily fails. (1) "[T]he amount of the limits of liability of the applicable underlying insurance as stated in the Schedule of Underlying Insurance" (i.e., the policy limits of policies directly underlying the Evanston policies) and (2) "any other available insurance" cannot be added together to define the "applicable underlying limit." The use of the disjunctive "or" in the definition implies mutual exclusivity. *See TAP Pharm. Prod. Inc. v. State Bd. of Pharmacy*, 238 S.W.3d 140, 144 (Mo. banc 2007) ("The use of the term 'or' generally refers to alternative possibilities and is akin to use of the word 'either.'"). This is bolstered by the language following the three options in the applicable underlying limit definition: "***whichever is greatest***…" (emphasis added). If the definition of "applicable underlying limit" determined the method of exhaustion, it would be possible for the policy to only require the exhaustion of any applicable insurance ***not*** mentioned in the schedule of underlying insurance. We find this to be an unreasonable construction. "An interpretation of a contract or agreement which evolves unreasonable results, when a probable and reasonable construction can be adopted, will be rejected." *Belton Chopper 58, LLC v. N. Cass Dev., LLC*, 496 S.W.3d 529, 532 (Mo. App. W.D. 2016); *see also CB Commercial Real Estate Group, Inc. v. Equity Partnerships Corp*., 917

S.W.2d 641, 647 (Mo. App. W.D. 1996) ("In determining the intention of the parties, the courts should look for a reasonable and natural construction of their agreement.").

We find the "applicable underlying limit" definition in the Evanston policies—in conjunction with the definition of "ultimate net loss"—to serve a similar function as London's definition of "ultimate net loss" in their 1955–61 policies; these definitions serve as a means for calculating Evanston's liability, not defining when the policy attaches. We find this to be a more "probable and reasonable" construction that reflects the intent of the parties. After looking at the Evanston policies' "other insurance" provision and definitions of "ultimate net loss" and "applicable underlying limit," we do not find it unambiguously calls for horizontal exhaustion for Nooter's long-tail asbestos claims. Thus, we conclude Evanston's policies require vertical exhaustion of the relevant primary policies.

**b. Exhaustion of TIG and Continental Policies**

In general, the insured bears the burden of proving coverage under an insurance policy when it seeks to recover under said policy. *Am. Family Mut. Ins. v. Coke*, 413 S.W.3d 362, 368 (Mo. App. E.D. 2013). Nooter bore the burden of proving exhaustion, as exhaustion of relevant primary policies were necessary to trigger excess policies. London contends "Nooter could not produce admissible evidence showing that an issue of fact existed as to this issue [of exhaustion of the Continental and TIG policies]." If true, Nooter would fail to establish that vertical exhaustion has occurred for certain affected policies.

Because we have decided vertical exhaustion applies to London's policies and North Star's policies, the exhaustion of TIG or Continental policies are only relevant if such policies directly underlie an excess policy.

The trial court ruled on two motions concerning Continental's exhaustion at the same time: (1) Continental's Motion for Summary Judgment Regarding Exhaustion [of its policies] and (2) Nooter's Motion for Summary Judgment Regarding Exhaustion. Excess Insurers have not appealed the ruling on Continental's motion for summary judgment, however, the trial court noted that its decisions to grant both motions were "for the same reasons and rationale." Only Nooter's Motion for Summary Judgment is before us on appeal.

**Evidence of TIG Exhaustion**

TIG issued one policy to Nooter: a 1964–65 policy with $300,000 limit of liability. London concedes that "Nooter also settled its coverage claim with TIG in 2006," where "TIG paid Nooter a lump sum of $550,000." Nonetheless, London states the terms of the TIG settlement "have not been shared with Excess Insurers," and therefore, Nooter has not identified if the payment was pursuant to asbestos claims.

The summary judgment record contains only sparse evidence to prove the TIG policy was exhausted. Essentially, Nooter relies on its own statements that TIG has paid $550,000 toward settlements of Nooter's asbestos liabilities under the TIG policy No. 3CGB617300 (the "TIG Policy"), which exceeds its $300,000 limits of liability. These statements were made in Nooter's statement of uncontroverted material facts to support its motion and in Nooter's Rule 57 Responses. Further, Nooter did not submit an affidavit to authenticate the documents it included as exhibits to support its Statement of Uncontroverted Material Facts. Courts may only look at evidence that would be admissible at trial when assessing summary judgment. *Weltmer v. Signature Health Services Inc.*, 417 S.W.3d 856, 862 (Mo. App. E.D. 2014). This means that documents

must meet certain foundational requirements, such as relevancy, authentication, and hearsay. *Id*. at 863.

Additionally, Nooter failed to produce a copy of the TIG Policy. Moreover, even accepting the $300,000 and $550,000 figures as accurate, Nooter fails to identify what the $550,000 in settlement money went towards. For example, when referencing the payments made by Continental and Aetna in the same paragraphs, Nooter specifically divides payments in two groups: (1) indemnity, which would reduce policy limits under those policies; and (2) defense costs, which may or may not reduce policy limits depending on the policy's language. Nooter simply notes "TIG paid $550,000" or "[TIG] has paid $550,000 toward settlements of Nooter's asbestos liabilities."

The record on summary judgment reveals nothing about TIG's policies aside from the policy's duration (1964–1965) and its limits of liability ($300,000), as far as we can tell. Nooter has not directed us to other relevant supporting evidence either. Instead, Nooter cites the deposition testimony of Nooter's former president Michael Bytnar support the exhaustion of the TIG Policy's limits.[31] The cited deposition testimony reads:

> **Q**: Now, looking down at the bottom of page nine there's a discussion about TIG Insurance Company; do you see that?
> **A**: Yes.
> **Q**: It references that TIG has paid $550,000 toward settlements of Nooter's asbestos liabilities under a particular TIG policy for the 1964 to 1965 period. And it references those policy limits which it states is 300,000; do you see that?
> **A**: Yes.

Mr. Bytnar provides no testimony to support Nooter's claim there; he simply confirms what he is reading in some unknown discussion. Shortly after that exchange, Mr. Bytnar was asked if he knew whether "any of the $550,000 was allocated towards

[31] Mr. Bytnar served as the president of Nooter from 2002–2008.

defense costs versus settlement indemnity payments," Mr. Bytnar responded "I don't know." Mr. Bytnar made the same response when asked if he knew whether the $550,000 payment was made in a lump sum or "allocated [to] specific claims." We have not been directed towards, nor independently discovered any other evidence to support that the TIG Policy has been exhausted.

We reverse the judgment of the trial court finding that the TIG policy was exhausted, as we find Nooter has failed to cite sufficient evidence in the record to establish there is no genuine issue of material fact as to whether the policy was exhausted.[32,33]

**Evidence of Continental Exhaustion**

In Continental's response to London's first set of interrogatories, Continental stated, "all nine primary Continental Policies issued to Nooter between September 1, 1955 and September 1, 1964…have been exhausted because at least $300,000 in indemnity has been paid under each of those nine policies," and "Continental has paid defense costs of approximately $4 million and indemnity amounts totaling $2,903,563.99, an amount which totals in excess of the sum of the aggregate limits of liability for the policies…" Further, Continental provided a chart showing its payments based on date, name of claimant, and the amount paid for each claim.

The interrogatories were further supported by the affidavit of John Kotte, who was the "Account Manager for the Direct Claims Division of Resolute Management,

[32] In North Star's Point IV, it "joins and adopts" London's Point II and expressly mentions "Nooter failed to meet its burden of establishing exhaustion of the Continental and TIG Policies." However, Aetna is the only carrier of underlying insurance identified in the North Star Policy, and we concluded vertical exhaustion applies to the policy. The fact that we found there was insufficient evidence to establish exhaustion of the TIG Policy has no impact on our analysis of North Star's Point IV. Thus, we deny North Star's Point IV.

[33] Certain Excess Insurers also seek reversal of the trial court's denial of its "Motion for Partial Summary Judgment Regarding Lack of Exhaustion." We affirm the trial court's judgment entered on this motion in full.

Inc….which manages and administers certain claims for [Continental], including any asbestos claims that may be submitted to Continental by [Nooter].” Mr. Kotte stated that he “had primary responsibility, on behalf of Continental, for the day-to-day handling and oversight of Nooter Asbestos Claims” since 2004. Mr. Kotte stated that as of March 2010, Continental had paid a total of $1,833,853.49 in settlements (i.e., indemnity). He also noted that “[o]n June 10, 2011, Continental made its final indemnity payment to Nooter for Asbestos Claims,” and “[a]s of June 10, 2011, Continental had paid a total of $2,903,563.99 in indemnity for 83 Nooter Asbestos Claims[.]”Mr. Kotte also stated that at least $300,000 in indemnity payments were applied to the applicable products aggregate limit of all nine Continental policies, thereby exhausting every relevant Continental policy.

Based on the evidence adduced, there was sufficient evidence to find that the Continental policies had been exhausted.

**c. Exhaustion of INA Policies**

Allianz and Evanston both argue that Nooter has not exhausted INA policies, which is required for the Allianz Policy or the Evanston CN policies to attach. It is undisputed that the INA policies have not been exhausted; the disagreement is over whether the INA policies have been implicated at all. The relevance of the INA policies is discussed *infra* in Sec. III(I).

**d. Conclusion on Exhaustion**

After reviewing the relevant policies and rulings regarding exhaustion, we affirm the trial court’s judgment except for its ruling on Nooter’s Motion for Summary Judgment Regarding Exhaustion as it pertains to exhaustion of the TIG Policy.

On the issue of exhaustion, we affirm the trial court's summary judgment in favor of Nooter in part and reverse in part. We agree with the trial court's determination that "vertical exhaustion" applies to all of the policies addressed in this section (Sec. III(D)). We also agree with the court's determination that the evidence cited by both Nooter and Continental in their summary judgment pleadings established that Continental's policies have been exhausted. Therefore, we affirm the trial court's judgment in favor of Nooter that Continental's policies have been exhausted. However, we reverse the judgment of the trial court determining that London (under its 1961–1965 and 1975–1980 policies) and North Star must start paying Nooter its ultimate net loss as defined by the policies, as the plain language of the policies require that London and North Star must start paying after exhaustion ***and*** Nooter's loss exceed recoveries, salvages, and the limits of any other insurance policies which cover the same risk. Finally, we reverse the trial court's ruling that Nooter has proven the TIG Policy has been exhausted.

### E. Certain Excess Insurers' Obligations to Defend Nooter (Appalachian Point I, OneBeacon Point III, Allianz Point IV, and North Star Points I & II)

Most of the insurance policies impose a duty or duties on the Excess Insurers to support Nooter in defending applicable asbestos claims. The two most common obligations are (1) the duty to defend and (2) the duty to pay (or "indemnify") defense costs. *See Allen v. Cont'l W. Ins. Co*., 436 S.W.3d 548, 552 (Mo. banc 2014). The distinction is an important one. "The insurer's duty to defend, though broader than its duty to indemnify, arises only when there is a potential or possible liability to pay based on the facts at the outset of the case." *Id.* (internal quotations omitted).

In this appeal, three of the Excess Insurers—Allianz, Appalachian, and OneBeacon—challenge the trial court's ruling on their duty to defend. In OneBeacon's Point III on appeal, it "adopts and joins" the arguments made by Appalachian in its Point I on appeal. Additionally,

North Star appeals the trial court's ruling that it is obligated to pay Nooter's defense costs under the North Star Policy; the "duty to defend" is not at issue in North Star's points on appeal.

**i. Allianz's Duty to Defend (Allianz Point IV)**

Allianz's Point IV stems from a declaratory judgment in which the trial court declared the Allianz Policy includes "a duty to defend and to pay defense costs in addition to policy limits." Allianz contends the trial court misconstrued its policy (Policy No. AUX5201679) and erroneously concluded that Allianz must provide coverage as broad as the underlying Home primary policies from 1983–1985, which include a duty to defend.[34]

We agree with Allianz based on the plain language of the "broad as primary provision," which reads:

> EXCEPT WITH RESPECT TO THE EXCLUSIONS CONTAINED IN THE ATTACHED UMBRELLA FORM AND ANY OTHER EXCLUSION SPECIFICALLY OR PHYSICALLY ATTACHED OR ADDED TO THIS POLICY BY ENDORSEMENT, IT IS UNDERSTOOD AND AGREED THAT, NONWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, WHERE UNDERLYING INSURANCE IS WRITTEN UNDER TERMS AND CONDITIONS PROVIDING GREATER PROTECTION OR INDEMNITY TO THE INSURED THAN THE TERMS AND CONDITIONS OF THIS POLICY, THEN ***THIS POLICY WILL INDEMNIFY*** THE INSURED UPON THE SAME TERMS, CONDITIONS AND LIMITATIONS AS THE APPLICABLE UNDERLYING INSURANCE.

(emphasis added). Allianz's policy expressly limits its obligations to reimbursing or indemnifying Nooter for defense costs based on any underlying insurance policies covered by the "broad as primary" endorsement. Although many "broad as primary" endorsements obligate excess insurers to assume the underlying policies' duty to defend,

[34] Allianz states that the trial court erroneously concluded the Home policies underlie Policy No. AUX 5201679, and the Evanston CN policies constitute the actual underlying insurance. That issue, however, is immaterial to resolving the question before us. The "broad as primary" language in Allianz's policy limits its obligation to "indemnifying" Nooter, regardless of the underlying insurance.

this is not a categorical rule.[35] We must enforce the policy as written. *Taylor*, 457 S.W.3d at 344. In the present case, the endorsement states "…THIS POLICY WILL ***INDEMNIFY*** THE INSURED UPON THE SAME TERMS, CONDITIONS AND LIMITATIONS AS THE APPLICABLE UNDERLYING INSURANCE." (emphasis added). The plain meaning of "indemnify" limits Allianz's obligations to pay defense costs to the extent of the policies underlying Allianz's.[36]

However, Nooter also argues that Allianz owes a duty to defend Nooter per the "standard follow form provision", which incorporates Evanston's CN policies. Nooter fails to cite the "standard follow form provision" to which it alludes. Presumably, it is referencing the Maintenance Condition provision:

> 2. MAINTENANCE OF UNDERLYING UMBRELLA INSURANCE.
>
> This Policy is subject to the same terms, definitions, exclusions and conditions (***except as regards the premium, the amount and limits of liability and except as otherwise provided herein***) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 3 of the Declaration prior to the happening of an occurrence for which claim is made hereunder.

(emphasis added). The plain and unambiguous language clearly does not incorporate all of the obligations provided in Evanston's CN policies.

[35] This comports with our appellate courts' approach in interpreting "umbrella" policies; "[w]e specifically do not assume all 'umbrella' policies provide broader coverage than the underlying policies. Rather, we look to the specific provisions of an excess policy to determine whether and to what extent its terms and conditions vary from the primary policy." *Selimanovic v. Finney*, 337 S.W.3d 30, 40 (Mo. App. E.D. 2011). We will assess any "broad as primary" endorsements in the same manner.

[36] Webster's Dictionary defines "indemnify" as "to secure or protect against hurt or loss or damage," or "to make compensation to for incurred hurt or loss or damage"; further, it lists "pay" as a synonym. *Indemnify, Webster's Third New International Dictionary* 1147 (2002); *see also AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 132 (Mo. banc 2014) (describing "*Webster's Third New International Dictionary*" as "the institutional dictionary of choice").

Accordingly, we reverse the trial court's ruling declaring that Allianz's umbrella policy imposes a duty to defend, and we hold that Allianz's obligation is limited to paying defense costs or indemnifying Nooter.

**ii. Appalachian's and OneBeacon's Duty to Defend (Appalachian Point I and OneBeacon Point III)**

For simplicity, under this subsection (Appalachian's and OneBeacon's Duty to Defend), any reference to Appalachian's Point I on appeal will also encompass OneBeacon's Point III unless specifically stated otherwise.

Before examining Appalachian's arguments, we turn to Nooter's assertion that Appalachian has "already admitted its duty to defend" and "withdrew its reservation of rights" because Appalachian assured Nooter that it is "available to defend and indemnify Nooter." Nooter cites to Appalachian's joinder to "National Union's Opposition to Nooter's Motion Regarding Control of Defense." For Nooter's argument to succeed, it has the burden of showing Appalachian "clearly and unequivocally" intended to relinquish a contractual right. *Roller v. Am. Modern Home Ins. Co*., 484 S.W.3d 110, 115 (Mo. App. W.D. 2015). Further, "[w]aiver may not be used to create coverage where it does not already exist." *Id*. The alleged "admissions" by Appalachian came after the trial court had previously determined Appalachian had a duty to defend. Appalachian's compliance with a court order does not demonstrate that Appalachian intended to relinquish a contractual right. We find that Appalachian has not waived its right to appeal the trial court's ruling on Appalachian's duty to defend.

Appalachian contends its policy creates a duty to *indemnify* Nooter for defense costs, but it does not create a duty to defend. These two duties are separate and distinct. *See Allen,* 436 S.W.3d at 552. The duty to defend is broader than the duty to indemnify. *Id*. Appalachian advances two arguments for reversing the trial court's ruling and holding it only has a duty to

indemnify Nooter: (1) the plain language of the Appalachian Policy itself does not provide a duty to defend; and (2) a duty to defend is not incorporated by the "broad as primary" endorsement, which expands the scope of the Appalachian Policy's coverage beyond its original policy language.

Both the Appalachian Policy and the OneBeacon Policy include "broad as primary" endorsements. Generally, parties utilize "broad as primary" endorsements to expand the scope of coverage in an excess insurance policy to include that of the primary liability policy, while preventing any exclusions in the primary liability policy from applying to the excess policy. *See* 4 Philip L. Bruner and Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law, § 11:48 (2016). Essentially, "broad as primary" provisions usually expand an excess policy so that its coverage of occurrences (i.e., the types of harms covered by the policy) is at least as broad as the primary policy. Nonetheless, the precise effect of the provision hinges on the specific endorsement agreed upon by the parties. The "broad as primary" endorsement in this case references the underlying policy of Home Policy No. GA 4315500.

The endorsement reads:

It is agreed:

> Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that where underlying insurance is written under terms and conditions providing greater protection or indemnity to the insured than the terms and conditions of this Policy, this insurance ***shall Pay*** on behalf of the insured upon the same terms, conditions and limitations of the applicable underlying insurance…

(emphasis added). We find the endorsement in the Appalachian Policy to be substantially similar to the "broad as primary" endorsement in the Allianz Policy, which states "…WHERE UNDERLYING INSURANCE IS WRITTEN UNDER TERMS AND CONDITIONS PROVIDING GREATER PROTECTION OR INDEMNITY TO THE

INSURED THAN THE TERMS AND CONDITIONS OF THIS POLICY, THEN ***THIS POLICY WILL INDEMNIFY*** THE INSURED..." (emphasis added). Whereas the Allianz Policy expressly limits Allianz's obligations to "indemnifying," here, the Appalachian Policy limits Appalachian's obligation to "paying" on behalf of the insured. Consequently, we resolve Appalachian's point on appeal in the same manner, finding the "broad as primary" endorsement does not create an obligation for Appalachian to defend Nooter.

Alternatively, Nooter argues that the Appalachian Policy itself creates a duty to defend, regardless of the "broad as primary" endorsement. The relevant language in the Appalachian Policy provides:

> II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS:
>
> With respect to ***any occurrence not covered*** by the underlying policies listed in Schedule A hereof or any other underlying insurance collectible by the insured, but covered by the terms and conditions of this Policy except for the amount of Retained Limited specified in the declarations, ***the company shall***:
>
> (a) ***defend*** any suit against the insured alleging such injury or destruction and seeking damages on account therefore, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient[.]

(emphasis added). The interpretation of the phrase "any occurrence not covered" controls the outcome here. Our Court was presented with the same issue involving a nearly identical provision in *U.S. Fire Ins. Co. v. Coleman*, 754 S.W.2d 941, 945 (Mo. App. E.D. 1988). The provision in *U.S. Fire*—labeled "Section II, DEFENSE SETTLEMENT— read:

> With respect to ***any occurrence not covered***, as warranted, by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance collectible by the insured, but covered by the terms and conditions of this policy except for the amount of retained limit specified in Item 4(c) of the declarations, ***the company shall***:

> (a) ***defend*** any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient[.]

*Id*. (emphasis added). Our Court concluded "any occurrence not covered" referred to occurrences covered ***per the terms*** of the policy agreement, regardless of whether coverage was actually available. *Id*. The insureds argued that the occurrences were "not covered," because "the insurer [was] insolvent and cannot provide 'actual' coverage." *Id*. This Court rejected the insured's argument, finding that interpretation would require it to insert the word "actually" into the policy language. *Id*. Although there is a colorable argument that "not covered" is ambiguous (and effectively requires the insertion of "per the terms of the underlying agreement"), we are bound by this Court's holding in *U.S. Fire*.[37]

"An interpretation that inserts language into a contract is forbidden. In interpreting the contract we must be guided by the well-established rules that we cannot make contracts for the parties or insert provisions by judicial interpretation*." The Renco Grp., Inc. v. Certain Underwriters at Lloyd's, London*, 362 S.W.3d 472, 479 (Mo. App. E.D. 2012). Accordingly, we find that the language of the Appalachian Policy and the OneBeacon Policy obligates these excess insurers to defend Nooter only if the terms of these excess policies cover an occurrence and the terms of the underlying insurance does not. Based on the foregoing, we reverse the judgment of the trial court. Appalachian Point I and OneBeacon Point III are granted.

### iii. North Star's Obligations to Pay Defense Costs (North Star Points I & II)

The trial court granted London's motion for summary judgment concluding that London's 1949–1961 policy language was "clear and unambiguous" and imposes "no obligation to provide

[37] We are mindful of the doctrine of stare decisis. *See Rothwell v. Dir. of Revenue*, 419 S.W.3d 200, 206 (Mo. App. W.D. 2013) (explaining "a court's decision has stare decisis effect upon a court of the same rank," and a decision should not be overruled when the opinion "is not clearly erroneous and manifestly wrong").

coverage for Nooter's asbestos-related defense costs." However, the court reached the opposite conclusion after reading North Star's policy language. London, Nooter, and this Court all agree the North Star Policy's language is effectively equivalent to London's.[38] Although Nooter and North Star agree the policies' substantially similar language should produce consistent results, the parties differ on which result should be reached.

Both of North Star's points on appeal concern its Motion for Declaration Regarding Defense Costs. In Point I, North Star argues the plain language of the policy imposes no such liability, primarily due to language specifying that North Star's "consent" is required for Nooter to obtain any defense costs. In North Star's Point II, it contends the trial court erred in declaring North Star may not unreasonably withhold its consent to incur defense costs, because, as established in Point I, North Star has full discretion over if and when it will pay defense costs. North Star argues the trial court erred in entering its April 2, 2015 order and judgment declaring North Star is responsible for reimbursing defense costs for Nooter's future asbestos claims because the unambiguous policy language excludes such coverage. We agree; North Star's policy language clearly and unambiguously confers ***an option*** to North Star to pay defense costs, not ***an obligation***.

The "Ultimate Net Loss" provision in the North Star Policy clearly states the definition "shall exclude all 'Costs.'" Immediately below the definition, the policy defines the word "costs," providing that "the word 'costs' should be understood to mean interest on judgments, investigation, adjustment and ***legal expenses***…" Nooter counters this by pointing out, in the following subsection titled "COSTS INCURRED BY THE REINSURED," that "[t]he North Star policy states North Star 'shall contribute to the costs incurred by [Nooter].'" However, Nooter

[38] North Star characterizes the policies' language as "nearly identical," and Nooter calls the North Star language "functionally equivalent" to the London policies.

has omitted the policy language preceding that quoted language, which requires North Star's consent before triggering an obligation to pay legal expenses: "***if [North Star] approves [a] settlement or consents to the proceedings continuing***, [***then*** North Star] shall contribute to the Costs incurred by [Nooter]." (emphasis added). A party's "request for a truncated consideration of portions of the policy is unavailing." *Owners Ins. Co.*, 514 S.W.3d at 617. We must read the insurance policy as a whole, not in isolation. *Id*.

We find nothing else in the policy to contradict or call into question the plain language of the "COSTS INCURRED BY THE REINSURED" section. The North Star Policy clearly excludes an obligation for it to pay defense costs. Accordingly, the trial court erred in declaring North Star is responsible in the future for paying defense costs for relevant Nooter asbestos claims. The trial court further held North Star could not unreasonably withhold its consent to incurring defense costs absent a showing of prejudice. We also disagree with this determination. The policy language creates an ***option*** for North Star, it does not impose an ***obligation***.

Moreover, to the extent the trial court relied on invalidating the relevant "consent" language to interpret the contract based on public policy, we disagree with the conclusion and must read the policy as written. The trial court order does not say whether the "consent" language altered its interpretation; it simply states "North Star further may not unreasonably withhold its consent to the incurring of such defense costs." The trial court cites *Mazzocchio v. Pohlman* 861 S.W.2d 208 (Mo. App. E.D. 1993) and *Tegtmeyer v. Snellen*, 791 S.W.2d 737, 739 (Mo. App. W.D. 1990) to support its conclusion.

In *Mazzocchio* and *Tegtmeyer*, the courts noted that "right to consent" clauses will generally be upheld "unless consent is unreasonably withheld" and results in "prejudice" to the insured. *Mazzocchio*, 861 S.W.2d at 211; *Tegtmeyer*, 791 S.W.2d at 740. However, the right to

consent in those cases concerned an insurance company's "right to consent" before an insured could reach a settlement with a tortfeasor, the logic being the insured's settlement may otherwise "impair the insurer's right to subrogation[.]"*Mazzocchio,* 861 S.W.2d at 211; *Tegtmeyer,* 791 S.W.2d at 740.

This case is much more akin to *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co. of N. Carolina,* 716 S.W.2d 348 (Mo. App. W.D. 1986). *Crown* stands for the proposition that withholding payments for defense costs cannot be deemed "unreasonable" when there is no obligation to make such payments. *Id.* at 356–57. It distinguished itself from earlier right to consent cases where the policy itself required the insurer to reimburse the insured's defense costs "on the precondition that the insured first obtain the insurer's approval of the insured's choice of counsel." *Id.* at 356. Unlike the earlier cases, in the policy at issue in *Crown,* the insurer's obligation to pay defense costs was "neither fixed nor absolute." *Id.* at 357. Under the policy in *Crown*, "the entire obligation [was] conditioned on the consent of [the insurer] and not simply the procedure by which the obligation is carried out." *Id.* Such is the case at bar. Part of the agreed upon bargain between Nooter and North Star provided North Star with ***an option*** to pay defense costs.

This finding is consistent with the trial court's analysis of the ***functionally equivalent language*** in the certain London policies. *See* Sec. III(K)(i)). In the London order, the trial court relied on *Crown*, noting "[u]nder Missouri law, the language of the London [i]ndemnity only policy imposes no obligation to provide coverage for Nooter's asbestos-related defense costs," further adding, "'consent' language in the policy does not constitute an obligation to reimburse a policyholder for defense costs." Based upon this rationale, the trial court granted London's motion for partial summary judgment regarding defense costs, stating that "London has no

obligation to reimburse Nooter for defense costs…***unless they expressly consent to do so***." (emphasis added). We agree with the trial court's reasoning and holding on London's motion regarding defense costs; North Star "has no obligation to reimburse Nooter for defense costs…unless they expressly consent to do so."

Thus, we reverse the judgment of the trial court on North Star's Points I and II.

### F. Points Concerning How Payment of Defense Costs Impact Policy Limits (Appalachian Point II, OneBeacon Point IV, and Allianz Point V)

At the heart of these three points on appeal is the issue of whether an excess insurer's payment for defense costs is made "in addition to" policy limits or erodes policy limits.

#### i. Erosion of Policy Limits Under Appalachian Policy No. 71174 (Appalachian Point II and OneBeacon Point IV)

As noted in Sec. III(E), from July 1, 1972 through December 31, 1973, the OneBeacon Policy follows the form of Appalachian Policy No. 71174, and is "subject to all the terms and conditions" of said policy. *See* Sec. I(C)(ii). Moreover, OneBeacon and Appalachian advance substantially similar arguments, as OneBeacon has adopted and joined "Argument Section II of the Brief of Appellant Appalachian." For simplicity, under this subsection ("Erosion of Policy Limits Under Appalachian Policy No. 71174"), any reference to Appalachian's Point II on appeal will also encompass OneBeacon's Point IV unless specifically stated otherwise. Appalachian contends that any payments for Nooter's defense expenses erode the Appalachian Policy's limits because such expenses are part of the "ultimate net loss" defined by the policy, which unambiguously states any "ultimate net loss" payment depletes the policy limit. Moreover, Appalachian further contends the "broad as primary" endorsement—referencing the underlying policy (Home Policy No. GA 4315500)—does not change how these payments erode the policy limit.

As discussed in Sec. III(E)(ii), typically, "broad as primary" endorsements expand the ***scope*** of coverage (i.e., types of risk insured), but they do not create additional obligations for excess insurers or alter the limits of liability defined in the excess policy. *See Haering v. Topa Ins. Co*., 244 Cal. App. 4th 725, 735, 198 Cal. Rptr. 3d 291, 296 (2016) ("A broad as primary endorsement enlarges the scope of coverage to include a loss that is within the scope of the underlying primary policy, even though that loss otherwise would have been excluded under the terms of the excess policy."); *see also Bondex Int'l, Inc. v. Hartford Acc. & Indem. Co*., 667 F.3d 669, 682 (6th Cir. 2011) ("[C]ourts have narrowly construed 'broad as primary' provisions appearing in excess insurance policies, finding that such provisions only refer to the scope of coverage and, thus, only incorporate the underlying policy's covered risks.").

Missouri courts eschew unreasonable constructions of contracts. Adopting Nooter's interpretation of the "broad as primary" endorsement would lead to an "unreasonable construction." Nooter contends the "broad as primary" endorsement expands the Appalachian Policy to the extent it provides "greater protection or indemnity," which "necessarily includes the broad defense coverage that the Home Policy provides pursuant to the duty to defend." Although not explicitly stated by Nooter, this interpretation would double Appalachian's policy limits from $1,000,000 (per the terms of the Appalachian Policy) to $2,000,000 (per the terms of Home Policy No. GA 4315500), as the latter provides "greater protection." Further, several definitions in the Appalachian policy, including "ultimate net loss," "Limit of Liability," and "Coverage" would become virtually meaningless.[39]

[39] "Ultimate net loss" as defined in the Appalachian Policy includes "all expenses incurred …" Ultimate net loss is used to determine Appalachian's "coverage" and "limit of liability." In contrast, Home's policy separates reimbursement of defense costs (which does not deplete the policy limit) from reimbursement of damages (which does deplete the policy limit).

"An interpretation of a contract or agreement which evolves unreasonable results, when a probable and reasonable construction can be adopted, will be rejected." *Belton Chopper 58, LLC v. N. Cass Dev., LLC*, 496 S.W.3d 529, 532 (Mo. App. W.D. 2016); *see also CB Commercial Real Estate Group, Inc. v. Equity Partnerships Corp*., 917 S.W.2d 641, 647 (Mo. App. W.D. 1996) ("In determining the intention of the parties, the courts should look for a reasonable and natural construction of their agreement."). Giving the policy a reasonable construction, we find the "broad as primary" endorsement only expands the scope of coverage (i.e., the types of harms covered). Based on the foregoing, we find the language of the Appalachian Policy, not the language in the "broad as primary" endorsement, dictates how policy limits are depleted.

When the Appalachian Policy covers an occurrence also covered by Home Policy No. GA 4315500 or other collectible insurance, the Appalachian Policy requires depletion of the policy limit when the insurer pays defense costs, as "all expenses incurred in the investigation, negotiation, settlement and defense of a claim or suit seeking…damages" are included in the policy's definition of "ultimate net loss." Accordingly, we grant Appalachian's Point II and OneBeacon's Point IV, with a caveat for payments made pursuant to Section II of the Appalachian Policy: to the extent an occurrence is "not covered by [Home Policy No. GA 4315500] or any other underlying insurance collectible by the insured," Section II "DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS" controls how defense costs affect the policy's limits. The unambiguous language in Section II states that "[w]ith respect to any occurrence not covered by the underlying policies listed in Schedule A hereof or any other underlying insurance collectible by the insured, but covered by the terms and conditions of this Policy…the company shall…defend any suit against the insured…" and "the amounts so incurred" shall be paid by Appalachian "***in addition*** to the applicable limit of liability of this

Policy." (emphasis added). Accordingly, when Appalachian or OneBeacon makes payments to Nooter pursuant to Section II of the Appalachian Policy, those payments (which include defense costs), will not erode the insurers' policy limits.

Thus, the trial court's ruling on how payment of defense costs impacts policy limits under the Appalachian Policy is reversed, except for payments made pursuant to Section II of the Appalachian Policy, which provides an exception to how the policy generally operates.

**ii. Erosion of Policy Limits Under the Allianz Policy (Allianz Point V)**

On September 2, 2015, the trial court declared that Allianz was responsible to "pay defense costs ***in addition to*** any policy limits for Nooter and any future claims against Nooter covered by their policy." (emphasis added). The rationale from our Appalachian and OneBeacon analysis of this same issue applies to Allianz's argument in Point V; adopting Nooter's position would lead to an "unreasonable construction" of the "broad as primary" endorsement. Nooter's interpretation would increase Allianz's policy limit and alter the coverage the parties bargained for: "[Allianz] hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, ***to indemnify*** the Insured for all sums..." For these reasons, and the reasons laid out in the previous subsection, we find the "broad as primary" endorsement only expands the scope of coverage (i.e., the types of harms covered).

Further, Nooter has also pointed to the MAINTENANCE OF UNDERLYING UMBRELLA INSURANCE provision and contends the Allianz Policy follows form to Evanston's excess policies, which incorporate an additional duty to defend. However, the maintenance provision expressly prevents the incorporation of anything that changes Allianz's limits of liability under the policy ("[The Allianz Policy] is subject to the same terms, definitions, exclusions and conditions (***except as regards the premium, the amount and limits of***

***liability*** and except as otherwise provided herein) as are contained in…[the underlying Evanston policy]"). (emphasis added). Accordingly, we find that Allianz's payment of defense costs depletes its limits of liability under the Allianz Policy, and we reverse the judgment of the trial court.

### G. Points Concerning Evanston's CN Policies' Coverage A and B (Evanston Point V and Allianz Points I & II)

The trial court entered a declaratory judgment regarding the Evanston CN Policies and the Allianz Policy, declaring that "both the Evanston CN [P]olicies and the Allianz [P]olicy provide occurrence-based 'products and completed operation' coverage[.]" Evanston's CN policies provided two types of coverage: Coverage A, which was "umbrella liability insurance excluding the products hazard and completed operations hazard" that provides occurrence-based coverage; and Coverage B, which provided "Excess Liability Insurance for Products and Completed Operations" on a claims-made basis. Additionally, at the inception of the insurance policies, the parties amended coverage through Endorsement No. 1, which redefined the scope of Coverage A and Coverage B.

Both Evanston and Allianz argue that Evanston's CN policies only provide coverage for "Products or Completed Operations Hazards" on a claims-made basis due to the plain language of the policy; the Allianz Policy incorporates the terms and conditions of Evanston Policy No. CN503824 and Endorsement No. 1. Nooter agrees the language of the *policy itself* calls for claims-made coverage for the asbestos claims. However, Nooter argues the policy was amended through "Endorsement No. 1" of the Evanston CN policies, which transferred coverage of the personal injury asbestos claims from Coverage B (claims-made coverage) to Coverage A (occurrence-based coverage).

Whether the asbestos claims liability falls under Coverage A or B is significant. If Coverage B only provided coverage on a claims-made basis, the claims the policies cover would need to be filed during the effective coverage period. Because the claimants did not begin filing their personal injury claims against Nooter until the late 1990's, neither Evanston nor Allianz would be liable to Nooter for claims covered under Coverage B. The trial court agreed with Nooter's position, holding that the endorsement amended the Evanston CN policies' original language and provided for occurrence-based coverage in Coverage B.

Evanston and Allianz contend that the plain language of the Evanston CN policies demonstrates that Coverage B provides claims-made coverage, and the endorsement does not affect Coverage B because it is "silent as to products/completed coverage" and "nothing in Endorsement No. 1 changed the policy language stating that coverage for Nooter's products and completed operations is provided on a claims-made basis." We disagree.

Endorsement No. 1 reads:

> 1. Coverage A: Umbrella Liability Insurance excluding the Architects & Engineers Professional Liability Hazard:
>
>    The Company will pay on behalf of [Nooter] the ultimate net loss in excess of the applicable underlying limit which [Nooter] shall become legally obligated to pay as damages for ***personal injury***, property damage or advertising liability to which this policy applies occurring during the policy period anywhere in the world.

(emphasis added). The plain language of Endorsement No. 1 provides for coverage of Nooter's asbestos claims under Coverage A. Coverage A obligates Evanston and Allianz to pay damages for personal injury liability on an occurrence-basis. The asbestos claims clearly constitute "personal injury" liability. Nonetheless, Evanston and Allianz have advanced another argument for claims-based coverage.

Evanston and Allianz also argue that the personal injury claims are precluded from coverage per Exclusion (k), which disallows "personal injury or property damage arising out of the products hazard or the completed operations hazard" from Coverage A. Once again, the issue is whether the original policy language was affected by Endorsement No. 1. Evanston and Allianz contend that Endorsement No. 1 "speaks only to the added Architects and Engineers Professional Liability coverage [and] Exclusion (k) does not apply to preclude products and completed operations." The trial court held that Endorsement No. 1 prevented Exclusion (k) from applying, and therefore, both excess insurers provided Nooter with occurrence-based coverage for the personal injury asbestos claims. We agree with the trial court. Evanston's and Allianz's argument is unavailing. They focus on the "products hazard or the completed operations hazard" language. It is true that Endorsement No. 1 is silent on that matter. Nonetheless, Endorsement No. 1 clearly moves coverage for "personal injury" or "property damage" liability to Coverage A. The plain language of the endorsement trumps the original policy language, thus superseding Exclusion (k). Accordingly, we affirm the judgment of the trial court concerning the Evanston CN policies' occurrence-based coverage.

**H. <u>Munich's Policy Limits</u> (Munich Points I and II)**

Both of Munich's points on appeal concern a determination of its own policy limits for Policy No. M 0085094, which was a three-year policy in effect from 1968–1971. The trial court granted Nooter's motion for declaratory judgment that the $3,000,000 aggregate policy limits were "annual" limits, allowing for $3,000,000 in coverage in each of the three years. Munich asserts the $3,000,000 aggregate limit spanned the full three years of the policy and the trial court's ruling exposes Munich to an additional $6,000,000 in liability (a total of $9,000,000) beyond what the contract provided. The trial court's ruling was largely based on an endorsement,

which provides "3,000,000 ***annual*** aggregate from inception." (emphasis added). The plain language of the endorsement is clear and unambiguous. The question before us is whether the endorsement was part of Policy No. M 0085094.

The parties dispute the appropriate standard of review for Munich's points on appeal. Munich contends that "[i]n this case, where all facts were derived from pleadings, a stipulation, exhibits, and deposition testimony, the rule of deference is inapplicable" and there should be "no deference…given to the trial court's judgment."[40] Relying on a 2009 opinion from the Supreme Court of Missouri, Nooter maintains appellate courts should give deference to the trial court as "the finder of fact in determinations as to whether there is substantial evidence to support the judgment." We agree with Nooter's position. The Missouri Supreme Court articulated the appropriate standard of review when the evidence is of a "documentary nature":

> Despite the documentary nature of the evidence, this Court—though it need not defer to credibility determinations made by the trial court—'defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions.' *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). In other words, even though this Court has the same opportunity to review the evidence as does the circuit court, the law allocates the function of fact-finder to the circuit court.

*MSEJ, LLC v. Transit Cas. Co.*, 280 S.W.3d 621, 623 (Mo. banc 2009). Thus, although we need not defer to the trial court's credibility determinations based on deposition testimony, we will defer to the trial court "as the finder of fact in determinations as to whether there is substantial evidence to support the judgment," even though the facts were derived from evidence we are similarly well-positioned to assess. *See id*. Nonetheless, pure questions of law are reviewed *de novo*. *Stevens v. Markirk Constr., Inc*., 454 S.W.3d 875, 880 (Mo. banc 2015).

[40] Munich cites *MFA Mut. Ins. Co. v. Home Mut. Ins. Co*., 629 S.W.2d 447, 449 (Mo. App. W.D. 1981) and *Case v. Universal Underwriters Ins. Co*., 534 S.W.2d 635 (Mo. App. S.D. 1976).

In Munich's first point on appeal, it claims the trial court erred in granting Nooter's motion for declaratory judgment regarding the 1968–1971 Munich policy's limits because "the only evidence before the trial court was the undisputed testimony of Thomas O'Kane that the endorsement was not part of the insurance policy." Similarly, Munich argues Mr. O'Kane's testimony "confirmed" that the Stipulation was "accurate and complete," and thereby the endorsement was not part of the policy.

The stipulation stated that "[t]he parties have conducted a diligent and thorough search for insurance policies, or secondary evidence of the insurance policies," and "[t]he parties [were] not aware of any further policy pages for the policies attached." Although the stipulation reflected the parties' belief that no other relevant policy pages existed, it did not bar the addition of other evidence ("This Stipulation is based upon the parties' best efforts, and without prejudice to any later-discovered evidence, including any future production of documents regarding the insurance policies at issue in this litigation by any part or entity."). This notion is further supported later in the Stipulation, providing: "The Parties reserve the right to modify this Stipulation and to timely seek leave of Court, upon good cause shown, to modify or supplement this Stipulation." We reject Munich's assertion that "the only evidence before the trial court was the undisputed testimony of Thomas O'Kane that the endorsement was not part of the insurance policy." The court also considered a separate binder agreement signed by Munich which provided "3,000,000 annual aggregate" limits, underwriting notes, the endorsement, *inter alia* (emphasis in original). Additionally, Nooter presented evidence of an endorsement between itself and Munich, which expressly states that the relevant portion of Munich Policy No. M 0085094 "is amended to read $3,000,000 ***annual*** aggregate from inception." (emphasis added).

Accordingly, the trial court had sufficient evidence to conclude the Munich Policy provided $3,000,000 annual aggregate limits. Point I is denied.[41]

In Munich's second point on appeal, it asserts that "Nooter stipulated that the endorsement was not a part of the policy, and stipulations are controlling and conclusive under Missouri Law." It is true that stipulations are generally binding, but stipulations "should be interpreted in view of the result [that] the parties were attempting to accomplish." *Bock v. Broadway Ford Truck Sales, Inc*., 55 S.W.3d 427, 436 (Mo. App. E.D. 2001). We find that consideration of the endorsement is consistent with the stipulation agreed upon by the parties. The stipulation did not preclude either party from introducing "later-discovered evidence." Munich also contends Nooter made a "judicial admission" by referencing the stipulation in Nooter's Statement of Uncontroverted Material Facts relating to certain summary judgment motions. However, the motions referenced do not concern the completeness of the policy, and the language in the endorsement (which simply states that the $3,000,000 policy limit is an annual aggregate limit) had no bearing on the outcome of the motions.

Similarly, Munich argues "Nooter was estopped from altering the Stipulation after summary judgment, since Nooter itself relied on the Stipulation as an undisputed material fact…" First, we note that the trial court never permitted Nooter to "amend" the stipulation. The ruling at issue is Nooter's motion for declaratory judgment on the 1968–1971 Munich policy's limits. Still, we will address Munich's argument on the merits and presume this was a clerical mistake. "Judicial estoppel will lie to prevent litigants from taking a position, under oath, in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a

[41] We note that, even assuming arguendo that Munich's suggested standard of review applied, we would reach the same result. The endorsement, which came after the inception of the 1968–1971 policy, expressly reads that said policy is to be "amended" to read that the limits are "annual aggregate from inception." The endorsement controls the outcome here.

second proceeding, taking a contrary position in order to obtain benefits at that time." *State Bd. of Accountancy v. Integrated Fin. Sols., L.L.C.*, 256 S.W.3d 48, 54 (Mo. banc 2008). Once again, the endorsement would have no impact on the outcome of these previous motions. Munich argues Nooter played "fast and loose" by relying on the stipulation for summary judgment, "but later arguing that the [s]tipulation was incomplete because it perceived a strategic advantage of potentially tripling the total amount of potential coverage under the policy." Of course Nooter "perceived a strategic advantage of potentially tripling the total amount of potential coverage under the policy," however, no such "strategic advantage" was gained by the absence of the endorsement in the Statement of Uncontroverted Material Facts. Nothing on the record suggests Nooter was gaming the judicial system. ("The doctrine [of judicial estoppel] is designed to preserve the dignity of the court and ensure order in judicial proceedings."). *Loth v. Union Pac. R. Co.*, 354 S.W.3d 635, 638 (Mo. App. E.D. 2011). Based on the foregoing, Point II is denied.

We affirm the judgment of the trial court as to the policy limits of Munich Policy No. M 0085094.

**I. <u>Shell Wood River Refinery and INA Policies</u> (Evanston Point VI and Allianz Point III)**

Evanston, joined by Allianz, sought a declaratory judgment that the Evanston CN policies were excess of the INA policies applicable to Nooter's liability for asbestos exposure claims from the Shell Wood River facility. The Evanston CN Policies are relevant to both Evanston and Allianz; the Evanston CN Policies directly underlie the Allianz Policy, and any acceleration to exhausting the limits of Evanston's CN policies would expedite the attachment of the Allianz Policy. The trial court found the only relevant Evanston CN policy was the 1983–1984 policy "for the final three months," but "solely with respect to the Insured's work at Shell Oil's Wood

River Refinery."[42] The court further found "[t]he evidence demonstrated that all the asbestos claims against Nooter relating to Shell Wood River Refinery involved years or decades of alleged exposure, and involved exposure to asbestos at multiple sites," implying exposure did not occur "solely" at the Shell Oil's Wood River Refinery (herein the "Refinery"). Nooter, Evanston, and Allianz agree that the INA policies have not been exhausted; the point of contention is whether the INA policies are applicable to any of the claims, as the evidence shows that no claimant's alleged asbestos exposure occurred "solely" at the Refinery.

The original Schedule of Underlying Insurance for Evanston's 1983–1984 CN policy (Policy No. CN 503824) did not include any INA policies, but INA policies were later added through an endorsement. Endorsement 4 of Evanston's 1983–84 CN policy (effective March 12, 1984) provides an "Amendment of Schedule of Underlying Insurance," which reads: "Add, solely with respect to Insured's work at [the Refinery] under 'Owner's Controlled Insurance Program'…INA #GLP-G0-351960-0," which covers "General Liability Bodily Injury & Property Damage[.]" Essentially, the question before us is whether the INA policies cover (1) claims which arose "solely" based on work at the Refinery (i.e., the only cause of the alleged injury was asbestos exposure at the Refinery), which is Nooter's position; or (2) "solely" claims which "occurred," at least in part, at the Refinery (i.e., at least some of the alleged asbestos exposure at the Refinery contributed to the injury complained of), which is Evanston's position.

"It is black-letter law that: An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Burns*, 303 S.W.3d at 509. Unless a word or phrase

[42] The Evanston CN policy from 1984–85 (Evanston Policy No. CN 504032) also covered Nooter, but the Schedule of Underlying Insurance expressly states, "[t]his policy shall ***not*** apply excess of the above policies [which includes the INA bodily injury policy.]" (emphasis added).

is clearly intended to be used as a term of art, we assign a plain and ordinary meaning to the policy's words in a manner consistent with the parties' reasonable expectations and objectives. *Doe Run*, 400 S.W.3d at 474. We have reviewed the "solely" language in conjunction with the policies' language and other endorsements, but no clarity has been gained from this exercise. The interpretations offered by Evanston and Allianz are reasonable. Likewise, we find the interpretation offered by the trial court and Nooter to be reasonable as well. We resolve ambiguities in favor of the insured. *Burns*, 303 S.W.3d at 509. "This rule, often referred to as the doctrine of 'contra proferentem,' is applied more rigorously in insurance contracts than in other contracts in Missouri." *Id*. Thus, we resolve this ambiguity in favor of Nooter and adopt its interpretation that "solely" means all of the asbestos exposure providing the basis for the cause of action must have occurred at the Refinery.

Allianz, in the alternative, argues that Nooter was contractually bound to maintain the INA policies per the maintenance clause in its policy, and Nooter "failed its burden to prove that such coverage was exhausted or maintained during the Evanston CN Policies' terms[.]" However, as we have found the INA policies are inapplicable to the relevant asbestos claims at issue, we need not address the argument any further.

Because evidence showed none of the claimants' asbestos exposure occurred solely at the Refinery, we find the application of the INA policies inapplicable and affirm the trial court. Evanston Point VI and Allianz Point III are hereby denied.

### J. Evanston's Remaining Points Concerning the Jury Verdicts on Vexatious Refusal to Pay and Breach of Contract (Evanston Points I, II, and IV)

In regards to the jury trial, only Evanston raises arguments on appeal. In opposition to Evanston's unfavorable verdicts on both vexatious refusal to pay and breach of contract, Evanston asserts the trial court erred for several reasons. Evanston advances the following

arguments seeking a reversal of the trial court's judgments for breach of contract and vexatious refusal to pay and/or a new trial for damages:

Point I - the trial court erred in "entering the judgment against Evanston on Nooter's claims for breach of contract and vexatious refusal" because the court's granting of Nooter's motion for summary judgment on exhaustion was erroneous, as it misinterpreted the Evanston policies and Nooter failed to present sufficient evidence of exhaustion.

Point II - "[t]he trial court erred in denying Evanston's motion for directed verdict and judgment notwithstanding the verdict on Nooter's vexatious refusal claim because Nooter failed to present substantial evidence that Evanston's refusal to pay Asbestos Claims was without reasonable cause or excuse."

Point III - the trial court erred in entering judgment in favor of Nooter on Nooter's motion for summary judgment on the issue of allocation, which requires a new trial for damages.

Point IV - the trial court abused its discretion in admitting a summary exhibit to establish defense costs.

Point V - the jury verdict on Nooter's breach of contract claim improperly included defense costs which were not covered by the Evanston policies because Evanston's CN policies are "claims-made coverage," not occurrence-based, which requires a new trial on damages.

Point VI – the trial court erred in holding that the Evanston CN Policies were not excess over INA policies for claims arising from asbestos exposure at the Refinery.

Points III, V, and VI were addressed in full previously in this opinion. We denied all three of these points and find none of those arguments impact the judgments entered against Evanston for breach of contract or vexatious refusal. This section will focus on Evanston Points I, II, and IV, even though Point I was addressed substantially in Sec. III(D).

### i. Standards of Review

#### a. Standard of Review for Judgment Notwithstanding the Verdict and Directed Verdict

In reviewing a request for judgment notwithstanding the verdict, appellate courts apply "essentially the same standard" as *de novo* review. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014). When reviewing a circuit court's denial of a judgment notwithstanding the verdict, the reviewing court must decide whether the plaintiff made a submissible case by offering sufficient evidence to support every element required for liability. *Id*. We view the evidence in the light most favorable to the plaintiff when reviewing whether she has made a submissible case. *Smith v. Brown & Williamson Tobacco Corp*., 410 S.W.3d 623, 630 (Mo. banc 2013). We will not reverse a jury verdict unless "there is a complete absence of probative fact to support the jury's conclusion." *Id*. (quoting *Dhyne v. State Farm Fire & Cas. Co*., 188 S.W.3d 454, 457 (Mo. banc 2006)). "A judgment notwithstanding the verdict is a drastic action that can only be granted if reasonable persons cannot differ on the disposition of the case." *Delacroix v. Doncasters*, Inc., 407 S.W.3d 13, 39 (Mo. App. E.D. 2013). "In reviewing a denial of a motion for judgment notwithstanding the verdict, review is essentially the same as for review of a denial of a motion for directed verdict—we review the record to determine whether the plaintiff made a submissible case." *McBryde v. Ritenour Sch. Dist*., 207 S.W.3d 162, 173 (Mo. App. E.D. 2006). "If a party makes a case under any theory submitted to the jury, the motion for directed verdict and motion for judgment notwithstanding the verdict are properly denied." *Id*.

#### b. Standard of Review for Admissibility of Summary Exhibits

"A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Cox v. Kansas City Chiefs Football Club, Inc*., 473 S.W.3d 107, 114 (Mo. banc 2015). An abuse of discretion

occurs when a ruling is "clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id.* A summary of voluminous records is admissible if (1) the competency of the underlying records is established, and (2) such records have been made available to the opposing party for purposes of cross-examination. *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. banc 2006); *see also Sigrist by and Through Sigrist v. Clarke*, 935 S.W.2d 350, 356 (Mo. App. S.D. 1996) ("Generally, a summary of records is admissible where the records upon which the summary is based are voluminous, are admissible and are available to the opposing party for inspection.").

**ii. Exhaustion (Evanston's Point I)**

Evanston contends that the trial court erred in entering judgment against Evanston on jury verdicts for breach of contract and vexatious refusal to pay because (1) the trial court misinterpreted Evanston's policies, which require horizontal exhaustion, and (2) Nooter failed to present sufficient evidence to show that certain underlying policies were in fact exhausted (the TIG Policy, as well as certain Aetna, Home, and Continental policies). Evanston requests this Court to reverse the trial court's judgments on both claims and remand the causes for entry of judgment in its favor if we find Nooter cannot establish exhaustion.

As discussed in Sec. D, we reject both arguments. Although we found there was insufficient evidence to demonstrate the TIG Policy was exhausted, the TIG Policy would only be relevant to Evanston if horizontal exhaustion applied; the TIG Policy is not directly underlying any Evanston policy. Evanston relies on horizontal exhaustion arguments in seeking reversal of the jury verdict on the breach of contract claim. Due to our finding that vertical exhaustion applies to the Evanston policies, these arguments are unpersuasive. Accordingly, we

affirm the jury's finding that Evanston breached its insurance policies; however, Evanston also disputes the amount of damages to which Nooter was entitled, which we will address later.

### iii. Evanston's Motion for Directed Verdict and Judgment Notwithstanding the Verdict on Nooter's Vexatious Refusal Claim (Evanston Point II)

Evanston moved for a directed verdict and judgment notwithstanding the verdict in favor of Nooter on Nooter's vexatious refusal claim, arguing that Nooter had failed to prove exhaustion and that exhaustion was required to establish a breach of contract, stating "there can be no vexatious claim without a breach of contract." Because we determined Nooter has sufficiently established exhaustion as it pertains to the 1984–1985 Evanston CN policy, Evanston must support Point II on other grounds.[43]

Evanston claims that even if we determine it had an obligation to pay Nooter, its refusal to pay Nooter was based on its good-faith belief that its policies were never triggered. For example, Evanston states that "[f]rom the first time Nooter provided notice to Evanston of the Asbestos Claims, Evanston timely responded that it had no duty to provide defense or indemnity under its Excess Policies until, as a condition precedent, proper exhaustion [i.e., horizontal exhaustion]…was shown by Nooter." Evanston supports its position by stating it was undisputed that horizontal exhaustion had not (and still has not) occurred. Evanston further explains that the "exhaustion" issue in long-tail claims has not been addressed by Missouri courts, and "other states had interpreted even more restrictive language than in Evanston's Excess Policies to require horizontal exhaustion[.]"

[43] It is undisputed that the 1984–1985 Home policy directly underlying the 1984–1985 Evanston CN policy was exhausted. However, the trial court concluded, upon some excess insurers' motion for reconsideration, that "Home's remaining policies are not all exhausted."

### a. Breach of Contract

In Missouri, "[a] breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. banc 2010). Only the third element—whether Evanston breached its contract with Nooter—is at issue.

Evanston's breach of contract argument relies on this Court finding the underlying primary policies were not exhausted; if there was no exhaustion, Evanston's policy would not have attached, its obligations to Nooter would have never been triggered, and thus no breach would have occurred. However, because we found that Evanston's policies call for vertical exhaustion and Nooter provided sufficient evidence to establish exhaustion of the relevant primary policies, we affirm the jury's verdict on Nooter's breach of contract claim.

Additionally, to the extent Evanston's Point III seeks a reduction of damages for the trial court improperly applying an "all sums" allocation, we reject that contention as well, finding *supra* in Sec. III(D) that an "all sums" scheme was proper under Evanston's policies' language.

### b. Vexatious Refusal to Pay

Nooter also brought a claim of vexatious refusal to pay against Evanston, pursuant to §§ 375.420 and 375.297.[44] "Sections 375.296 and 375.420 allow penalties to be assessed against an insurer when it refuses to make payment, upon demand and in accordance with the policy, vexatiously, willfully and without reasonable cause." *Drury Co. v. Missouri United Sch. Ins. Counsel*, 455 S.W.3d 30, 38 (Mo. App. E.D. 2014).

[44] §375.420 permits a vexatious refusal to pay claim to be brought against an insurance company, and §375.296 allows for additional damages.

Section 375.420 RSMo provides:

> In any action against any insurance company to recover the amount of any loss under a policy of indemnity ... if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages…

Under § 375.420, a vexatious refusal to pay claim may be established by a plaintiff showing that the insurance company's refusal to pay a loss was willful and without reasonable cause, as the facts would have appeared to a reasonable person at the time. *Merseal v. Farm Bureau Town & Country Ins. Co. of Missouri*, 396 S.W.3d 467, 473 (Mo. App. E.D. 2013). "The test for a vexatious refusal claim is not the final resolution of the coverage issues but how willful and unreasonable the insurer's refusal was as the facts appeared to a reasonable and prudent person at the time the insurer was asked for coverage." *Drury Co.*, 455 S.W.3d at 38 (quoting *Legg v. Certain Underwriters at Lloyd's of London,* 18 S.W.3d 379, 387 (Mo. App. W.D. 1999)). In part, resolution of this issue turns on whether there was sufficient evidence for a jury to conclude Evanston refused to pay Nooter "without reasonable cause or excuse." *See* § 375.420. However, even if an insurer has a reasonable basis to deny coverage, "that would not necessarily preclude a penalty for vexatious delay if there was evidence that the insurer's attitude was vexatious and recalcitrant." *Doe Run Res. Corp.*, 400 S.W.3d at 472.

"Whether [an insurer] acted reasonably is an inherently factual inquiry left to the province of the jury. As a general rule, questions of reasonableness are questions of fact, not law." *Id.* at 471; *see also Drury Co.*, 455 S.W.3d at 38. We defer to the jury's determinations on credibility and findings of fact. *Doe Run Res. Corp.*, 400 S.W.3d at 471. The plaintiff is not required to show direct and specific evidence to receive a favorable judgment on its vexatious refusal claim. *Merseal*, 396 S.W.3d at 473. Rather, the jury may find the refusal "vexatious"

after performing a "general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case." *Id*.

In this case, we find the jury had sufficient evidence to find in favor of Nooter on its vexatious refusal to pay claim.

Evidence Presented on Vexatious Refusal to Pay

*Expert Testimony of James Marshall, Jr.*

Nooter presented expert testimony by James Marshall, Jr. Mr. Marshall obtained his J.D. in 1977 and had worked in the insurance industry for nearly 50 years at the time of his testimony. Mr. Marshall was asked about the customs and practices of Evanston, and he opined that Evanston failed to meet the standard of "good faith and fair dealing" on occasion. For example, Mr. Marshall testified that one element of "good faith and fair dealing" is that the insurer should "provide an accurate description of what the facts are and whatever the policy provisions are so that the policyholder is adequately advised of what the issues are." Mr. Marshall testified that he believed Evanston fell short of the customs and practices of the insurance industry, because initially, Evanston "sent reservation of rights letters that said nothing about Exclusion K…[and] all of a sudden in 2011 was the first time they raised Exclusion K."[45] Evanston asserted that Exclusion (k) applied and thus any personal injuries would fall under "Coverage B" (claims-based coverage), not "Coverage A" (occurrence-based coverage). The distinction is relevant because none of Nooter's claims were filed during a period of Evanston coverage, but there were "occurrences" that took place during the policy periods, thereby potentially triggering Evanston's policies.

[45] The Exclusion (k) argument is the discussed in more depth in Sec. III(G).

Mr. Marshall noted that Evanston's prior "reservation of rights would indicate that they believe the coverage was under Coverage A, which was the occurrence coverage. And they never raised [the Exclusion K argument] until 2011 even though…they knew about it." Effectively, Mr. Marshall testified that Evanston shifted its position to deny Nooter coverage, explaining that Evanston had never expressed an opinion that Nooter's asbestos claims were only covered under a claims-made basis before 2011. However, Mr. Marshall pointed out the first reservation of rights letter from Evanston regarding the asbestos claims was sent in 2002. Mr. Marshall confirmed that the 2011 letter stated, "Accordingly, Evanston hereby denies that defense and indemnity under 1984 CN policy for any and all claims falling within the scope of Exclusion (k)."

*Letters from Evanston and Nooter*

Mr. Marshall's testimony is supported by other evidence in the record as well. The record also establishes that Evanston's Exclusion (k) argument, which came to light in 2011, is inconsistent with Evanston's position over the preceding eight-plus years. In a letter from July of 2002, Evanston explains that its 1983–1984 and 1984–1985 policies (the "Evanston CN Policies") are covered under Coverage A, and it noted "Coverage A is occurrence-based and not claims-made." Evanston further stated that an "occurrence" included "bodily injury," and it asked Nooter for more information on the claims, stating "[t]he limited and general allegations in the suits are insufficient to determine whether 'bodily injury' took place within the Evanston policy period." In 2011, however, Evanston sent another letter to Nooter, which stated "Exclusion (k) of the 1984 CN Policy provides that Coverage A does not apply 'to personal injury or property damage arising out of the products hazard or the completed operations hazard.'"

Essentially, Evanston sought to limit occurrence-based coverage for "personal injuries" to injuries which "occur[] away from the premises owned by or rented to [Nooter]."[46, 47] This interpretation would prevent Nooter's asbestos claims from triggering the policy. Even though many "occurrences" took place during the Evanston CN Policies' policy periods, no "claims" were made as a result of the occurrences until 1998, years after the policy periods ended (July 1, 1985).

*Testimony of Joseph Weyhrich*

Joseph Weyhrich was Nooter's "lead corporate outside counsel" who was heavily involved in communicating with Evanston about Nooter's asbestos claims. Mr. Weyhrich testified that the purpose of corresponding with Evanston was "[n]otifying them of new claims, new lawsuits…[in] an attempt to get coverage," and he did not believe he had to do anything else to obtain coverage from Evanston. Mr. Weyhrich testified that Nooter consistently updated and added plaintiffs in letters it sent to Evanston, but Evanston's letters were very repetitive (which is reflected in the letters on record). He also noted Evanston made "[n]o offers to pay," even as Nooter consistently notified Evanston of its growing number of asbestos suits. As of January 2010, Mr. Weyhrich could not recall ever being contacted by Evanston, aside from receiving the fairly repetitive letters. Mr. Weyhrich also confirmed that "Evanston had never taken [the Exclusion (k)] position before the date of [the January 28, 2011] letter," despite sending 20 letters to Nooter previously.

[46] In the Evanston policies, "products hazard" is defined as "personal injury or property damage arising out of the Named Insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the personal injury or property damage occurs away from the premises owned by or rented to the Named Insured…"

[47] In the Evanston policies, "completed operations hazard" is defined as "personal injury and property arising out of operations…but only if the personal injury or property damage occurs after such operations have been completed or abandoned and occurs away from the premises owned by or rented to the Insured…"

Conclusion on Vexatious Refusal to Pay

We "will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion" *Dhyne*, 188 S.W.3d at 457–58 (Mo. banc 2006). After a "general survey and a consideration of the whole testimony and the facts and circumstances connected with the case," we do not find there was a "complete absence of probative fact" to support the jury verdict on vexatious refusal to pay. *See id*; *see also Merseal*, 396 S.W.3d at 467. Viewing the evidence in the light most favorable to the verdict, we believe a reasonable jury could conclude Evanston was recalcitrant in their communication with Nooter and its denial of coverage. Accordingly, we affirm the jury verdict and the trial court's denial of Evanston's JNOV and motion for directed verdict. Point denied.

**iv. Admissibility of Exhibit 667 (Evanston Point IV)**

Evanston argues that the trial court abused its discretion in admitting Plaintiff's Exhibit 667, a 33-page exhibit summarizing approximately 20 boxes of invoices Nooter has paid in defending claims potentially covered by Evanston. Evanston alleges that Exhibit 667 "was not competent evidence of defense costs incurred by Nooter in defending asbestos claims, was not a proper summary exhibit, and included defense costs for claims for which coverage had not been triggered[.]"

We find the summary of records was admissible because it was voluminous, Nooter sufficiently established the competency of the otherwise admissible underlying records, and the records were available for Evanston's inspection. Nooter provided testimony to establish the process for creating the Exhibit 667 summary, which helped establish the relevance and admissibility of the underlying evidence. Nooter also made the 20 boxes of invoices available for Evanston to inspect.

Evanston raises three main arguments on the admissibility of Exhibit 667:

(1) Exhibit 667 "did not contain….information necessary to determine whether the defense costs and expenses purportedly summarized…were incurred in defending a claim potentially covered by an Evanston policy[.]

(2) Exhibit 667 "did not identify the Asbestos Claims to which the defense costs allegedly related, the types of Asbestos Claims, or any claimant's date of first exposure to asbestos for which Nooter was responsible[.]"

(3) "Nooter failed to show that Exhibit 667 qualified as a summary document because Nooter failed to show that it had produced the underlying documents containing the information necessary to determine whether claims were potentially covered."

Exhibit 667 was relevant evidence to help establish that Evanston had breached its contract and vexatiously refused to pay Nooter. To lay the foundation and establish competency, Nooter called on its "lead corporate outside counsel," Mr. Weyhrich, to provide extensive testimony about his process for tracking lawsuits filed against Nooter and determining which suits were potentially covered by Evanston's policies. Specifically, Mr. Weyhrich testified that the 20 boxes of invoices all stemmed from asbestos exposure claims at a Nooter facilities during a period in which Evanston's policies provided coverage. When asked whether the bills summarized in Exhibit 667 were segregated by claim and included "all of the names that the jury has seen on these charts," Mr. Weyhrich replied "Yes…Maybe some early on ones were not, but I believe most of them are." He went on to state that there were invoices for every plaintiff and these invoices were identified on the chart by jurisdiction and date filed. They were not segregated by the date of first exposure for application to particular policies. However, the claims all involved exposure to asbestos during the Evanston policy period. The Exhibit showed a summary of unreimbursed bills for which Evanston was potentially responsible.

Evanston was granted the opportunity to examine Mr. Weyhrich and inspect the boxes of invoices, which Evanston acknowledges. Moreover, Evanston was unable to produce any

individual bills that were inappropriately included in the summary. Accordingly, we cannot find the trial court abused its discretion in admitting Exhibit 667.

Evanston asserts that "Nooter's only evidence of the amount of fees it paid [to attorneys to defend against the asbestos claims] was Exhibit 667, which was…not competent evidence of Nooter's damages and should have been excluded." Based on that premise, Evanston reasons our Court should "reverse and remand for a new trial on damages for Nooter's claim for breach of contract." However, because we find Exhibit 667 was properly admitted, we disagree with Evanston's contention. Based on the foregoing, the trial court did not abuse its discretion in admitting Exhibit 667, and we deny Evanston's Point IV.

#### v. Conclusion on Remaining Evanston Points

Based on our discussion in this section and in previous sections in this opinion, we deny all five of Evanston's points on appeal.

### K. Nooter's Cross-Appeals and Motion for Attorney's Fees (Nooter Points I, II, & III)

#### i. London's Duty to Pay Defense Costs on the Older London Policies (Nooter Point I & II)

The trial court found the London policies from 1949–1961 do not impose an obligation to reimburse defense costs, and in accordance, it granted summary judgment in favor of London. Nooter raises two main arguments on appeal: (1) the plain language of the policy requires indemnity for defense costs, and (2) even if the language of the policy itself excluded that obligation, the "consent" language must be invalidated under Missouri law, thus altering the language of the agreement and changing London's obligations. We disagree with both arguments.

For reasons similar to our reversal of the trial court's ruling on North Star's obligation to pay defense costs (discussed *supra* in Sec. III(E)(iii)), we affirm the court's ruling, which

explained London does not have an obligation to pay Nooter's defense costs. We agree the language in both the North Star Policy and the 1949–1961 London Policies are "functionally equivalent," however, we will briefly examine and discuss the language in the London policies independently.

Although we disagree with the trial court's reasoning for the North Star rulings, we find its rationale and conclusion for its ruling on London's defense costs obligation under the 1949–1961 policies to be on point. The trial court explained, "[t]he language of the 1949–1961 London Indemnity-only policy is clear and unambiguous and must, therefore, be applied as written." The 1949–1961 London policies operated similarly to North's Star's policy: (1) "Ultimate Net Loss" was defined and excluded "Costs" from its definition;[48] (2) "COSTS" was defined immediately under Ultimate Net Loss and included "legal expenses" within its scope;[49, 50] and (3) the PAYMENT OF COSTS provision (the functional equivalent of North Star's COSTS INCURRED BY THE REINSURED provision) requires "written consent" to trigger London's obligation to pay defense costs.[51] The trial court's order and judgment does not discuss invalidation of the consent language. Nonetheless, for the same reasons explained in our analysis of North Star's second point on appeal, we give the consent language its full effect. Nooter's Points I and II are denied.

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[48] "The words 'ultimate net loss' shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and ***shall exclude*** all expenses and 'Costs.'" (emphasis added).

[49] "Costs" means "interest on judgment, investigation, adjudgment and ***legal expenses*** (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured)."

[50] We note that "Costs" under the 1949–1961 London policies includes "legal expenses," but with a qualifier which excludes "all expenses for salaried employees and retained counsel of and all office expenses of [Nooter]" from the scope of "legal expenses."

[51] The relevant portion of the Payment of Costs provision states: "Costs incurred by the Assured personally ***with the written consent of [London]***, and for which the Assured is not covered by the said Primary Insurers…" (emphasis added).

### ii. London's Duty to Pay Defense Costs on the 1961–1965 London Policies (Nooter Point III)

Nooter's Point III arises from the same summary judgment order referenced in Nooter's Points I and II. Point III concerns the 1961–1965 London policies. The trial court found these policies "provide coverage for defense costs for [Nooter] ***in connection with claims for which indemnity is paid only*** and not for defense costs incurred with claims for which Nooter has no liability." (emphasis added). Nooter argues the 1961–1965 policies also require London's payment of defense costs for claims that Nooter "successfully defends without incurring a settlement or judgment."

The relevant language in these policies is a departure from the language analyzed in the 1949–1961 London policies. "The original point of embarkation upon the determination of insurance coverage questions must always be the insuring clause of the policy." *Cont'l Cas. Co. v. Med. Protective Co*., 859 S.W.2d 789, 791 (Mo. App. E.D. 1993). First, we turn to the insuring clause in London's policies (the "Coverage" section):

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability…for damages, direct or consequential and expenses, all more fully defined by the term "Ultimate Net Loss" on account of:
>
> (i). Personal Injuries…
>
> Caused by or arising out of each occurrence…

The plain language of this insuring clause provides coverage for "all sums which [Nooter] shall be obligated to pay by reason of the liability (a) imposed upon [Nooter] by law [i.e., damages from an adverse judgment against Nooter] or (b) assumed under contract or agreement by [Nooter]" (i.e., a settlement agreement). The event of Nooter successfully defending against an asbestos claim falls under neither of these categories. In a successful

defense at trial, Nooter does not become "obligated to pay by reason of the liability" from an adverse judgment or a settlement agreement. Accordingly, Nooter is not covered for "damages, direct or consequential and ***expenses***," such as litigation expenses.

Nooter focuses on the definition of "ultimate net loss" in its argument, which includes "law costs" and "expense[s] for…lawyers" and "litigation." However, the definition of "ultimate net loss" only becomes relevant if the insuring clause provides for coverage. Because we find that the insurance clause limits London's obligation to indemnify Nooter for defense costs to situations in which Nooter enters a settlement agreement or receives an adverse judgment at trial, the definition of "ultimate net loss" is immaterial to the resolution of this point.

Based on the foregoing, we find the 1961–1965 policies unambiguously require London to indemnify Nooter for costs incurred in defending asbestos claims only when Nooter settles or loses in litigation. Thus, we affirm the trial court and deny Nooter's Point III.

### iii. Nooter's Motion for Attorney's Fees

Nooter filed a motion for appellate attorney's fees with our Court, requesting that we award attorney's fees for Nooter's defense against Evanston's appeal, pursuant to Special Rule 400,[52] § 375.420, and Rule 84.19.[53] In particular, Nooter argues that it is entitled to attorney's fees in its defense of its vexatious refusal to pay claim under § 375.420 and/or that it is entitled to attorney's fees as damages under Rule 84.19 for Evanston's appeal because it was frivolous or non-meritorious.

[52] Rule 400 is to Missouri Eastern District Court of Appeals Special Rules 2017.
[53] Rule 84.14 is to Missouri Supreme Court Rules 2017.

### a. Attorney's Fees Pursuant to § 375.420

Pursuant to § 375.420, a court may award reasonable attorney's fees where a plaintiff prevails against an insurance company for vexatious refusal to pay under that statute. This Court has found that this applies to appeals involving claims of an insurance company's vexatious refusal to pay under § 375.420, specifically finding that "refusing to compensate an attorney for time reasonably spent on appellate work defending the judgment below would be inconsistent with the legislative intent to provide for recovery of said fees provided by that statute." *Merseal,* 396 S.W.3d at 475.

In this case, because we affirm the portion of the trial court's judgment ruling in favor of Nooter on its vexatious refusal to pay claim against Evanston, it is appropriate to award attorney's fees on that issue, as the trial court also did. *See id.* ("This Court has found that entitlement to attorney's fees on appeal stands upon the same ground as the trial court level."); *see also Green v. Plaza in Clayton Condo. Ass'n,* 410 S.W.3d 272, 285 (Mo. App. E.D. 2013) (quoting *Stark Liquidation Co. v. Florists' Mut. Ins. Co.,* 243 S.W.3d 385, 402 (Mo. App. E.D. 2007)) ("The entitlement to attorneys' fees on appeal stands upon the same ground as that at the trial court level."). Nooter has successfully defended its claim of vexatious refusal to pay on appeal. Accordingly, we grant Nooter's motion for appellate attorney's fees in defense of that claim pursuant to § 375.420. Although we are aware that our Court has the authority to "allow and fix the amount of attorney's fees on appeal," we exercise this power with caution, as we are aware the trial court is better equipped to hear evidence and argument on the issue and assess the reasonableness of fees. *See Stark Liquidation Co.,* 243 S.W.3d at 402. Accordingly, we grant Nooter's request for reasonable fees, but we remand the case to the trial court to hold a hearing

and determine the reasonableness of the requested appellate attorney's fees and to enter judgment accordingly.

**b. Attorney's Fees Pursuant to Rule 84.19**

Rule 84.19 permits an appellate court to award damages to a respondent, as the court deems just and proper, if it determines that an appeal is frivolous. "An appeal is frivolous if it presents no justiciable question and is so readily recognizable as devoid of merit on the face of the record that there is little prospect that it can ever succeed." *Snelling v. Kenny,* 491 S.W.3d 606, 616 (Mo. App. E.D. 2016) (citing *Johnson v. Aldi*, 971 S.W.2d 911, 912 (Mo. App. E.D. 1998)). "The issues presented on appeal must be at least fairly debatable in order to avoid assessment of damages for frivolous appeals." *Id*.

Here, we find that Evanston's appeal was not frivolous. As we have reversed on a number of the issues on appeal, there were clearly justiciable questions that had merit. Further, this was a high-stakes case for all parties, as the judgment of the trial court involved millions of dollars and implicated future asbestos-related injury claims against Nooter and how excess insurers would be required to contribute to the defense or settlement of those claims. Further, this area of Missouri law is largely unexplored. Accordingly, awarding damages to Nooter under Rule 84.19 would not be warranted.[54] Based on the foregoing, we deny Nooter's motion for attorney's fees under Rule 84.19.

[54] Although we find Evanston's decision to appeal reasonable, this conclusion is consistent with our decision to affirm the jury verdict against Evanston on the vexatious refusal claim. Even if an insurer has a reasonable basis for believing an insured is not entitled coverage, "that would not necessarily preclude a penalty for vexatious delay if there was evidence that the insurer's attitude was vexatious and recalcitrant." Further, "[a]s a general rule, questions of reasonableness are questions of fact, not law." *Doe Run Res. Corp*., 400 S.W.3d at 471.

## IV. CONCLUSION

On the issue of allocation, we affirm the trial court's summary judgment in favor of Nooter finding that an "all sums" allocation method applies to all of the policies addressed in Sec. III(C).

On the issue of exhaustion, we affirm the trial court's summary judgment in favor of Nooter in part and reverse in part. We agree with the trial court's determination that "vertical exhaustion" applies to all of the policies addressed in Sec. III(D), which includes: (1) the Older London Policies (covering from September 1, 1955 through May 17, 1961); (2) the Newer London Policies (covering from May 17, 1961 through July 1,1965 and July 1, 1975 through July 1, 1980); (3) the National Union Policy; (4) the four annual Evanston policies; and (5) the North Star Policy. We also agree with the court's determination that the evidence cited by both Nooter and Continental in their summary judgment pleadings established that Continental's policies have been exhausted. Therefore, we affirm the trial court's judgment in favor of Nooter that Continental's policies have been exhausted. However, we reverse the judgment of the trial court determining that London (under its 1961–1965 and 1975–1980 policies) and North Star must start paying Nooter its ultimate net loss as defined by the policies, as the plain language of the policy requires that London and North Star must start paying after vertical exhaustion ***and*** Nooter's loss exceed recoveries, salvages, and the limits of any other insurance policies that cover the same risk. Finally, we reverse the trial court's judgment that Nooter has proven the TIG Policy has been exhausted.

Concerning Allianz's, Appalachian's, and OneBeacon's duties to defend under the policies addressed in Sec. III(E) and (F), we reverse the trial court's judgment declaring (1) Allianz has a duty to defend and (2) "that Allianz [must] pay defense costs in addition to any

policy limits for Nooter and any future claims against Nooter covered by their policy." Additionally, we reverse the trial court's summary judgment in favor of Nooter that (1) the Appalachian Policy and the OneBeacon Policy include duties to defend, as we find these two policies limit the insurers' obligations to reimbursing for defense costs; and (2) payment of defense costs does not erode the two policies' limits, as we find payment of defense costs generally depletes the policies' limits (except as identified in Sec. III(F)(i)). We also reverse the trial court's declaratory judgment that (1) North Star has an obligation to pay defense costs, and (2) North Star cannot unreasonably withhold consent in paying defense costs to Nooter.

Regarding the points concerning Evanston's CN Policies, as discussed in Sec. III(G), we affirm the trial court's declaratory judgment, which declared that "both the Evanston CN [P]olicies and the Allianz [P]olicy provide occurrence-based 'products and completed operation' coverage[.]"

As it pertains to Munich's two points on appeal, we affirm the judgment of the trial court, finding the policy limits of Munich Policy No. M 0085094 to be "annual" limits.

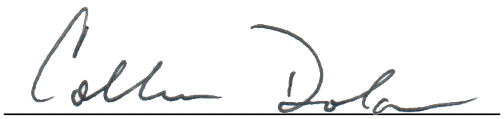
Concerning the declaratory judgment on the Shell Wood River Refinery and the INA policies, in accordance with our analysis in Sec. III(I), we affirm the trial court's judgment that the INA policies are inapplicable to asbestos claims unless the asbestos exposure occurred "solely" at the Shell Wood River Refinery, as we find the Amendment of Schedule of Underlying Insurance to be ambiguous and must construe the language in the insured's favor.

We affirm the trial court's judgment entered on the jury verdicts on Nooter's breach of contract and vexatious refusal to pay claims. We also find the trial court did not err in denying Evanston's motions for directed verdict and notwithstanding the verdict in favor of Nooter on Nooter's vexatious refusal claim, as Nooter made a submissible case by offering sufficient

evidence to support every element required for liability. Additionally, we find the trial court did not abuse its discretion in admitting Exhibit 667.

Turning to Nooter's cross-appeals and the trial court's entry of summary judgment in favor of London on defense costs, we affirm the trial court's judgment in full; the 1949–1961 London policies do not impose an obligation to reimburse defense costs, and the 1961–1965 London policies only obligate London to pay defense costs when Nooter either settles an asbestos claim or unsuccessfully defends against an asbestos claim at trial.

Finally, we grant Nooter's motion for appellate attorney's fees in part, and we deny it in part. We grant Nooter's motion for reasonable appellate attorney's fees pursuant to § 375.420, and we remand the case to the trial court and direct it to hold a hearing to determine the reasonableness of the requested appellate attorney's fees and enter judgment in accordance with that assessment. However, we deny Nooter's request for attorney's fees pursuant to Rule 84.19.



Colleen Dolan, Judge

Sherri B. Sullivan, P.J., concurs.
Roy L. Richter, J., concurs.