

NO. SC94364

IN THE SUPREME COURT OF MISSOURI

KATINA PIATT, ET AL.

Appellants,

vs.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, ET AL.

Respondent.

Appeal from the Circuit Court of Cole County, State of Missouri
The Honorable Patricia Joyce, Circuit Judge
Case No. 12AC-CC000258

**SUBSTITUTE BRIEF OF RESPONDENT INDIANA LUMBERMENS
MUTUAL INSURANCE COMPANY**

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JURISDICTIONAL STATEMENT

Respondent Indiana Lumbermens Mutual Insurance Company (“ILM”) agrees with Appellants that this Court has jurisdiction under §512.020.(5), RSMo. (Cum. Supp. 2004) because this appeal arises from a final judgment entered by the circuit court. This Court, in an order entered September 30, 2014, granted the application of Respondent ILM to transfer this cause from the Missouri Court of Appeals, Western District.

STATEMENT OF FACTS

I. The Underlying Wrongful Death Action Through Dismissal

Following the death of their mother, Linda Nunley, while she was on the job at Missouri Hardwood Charcoal, Inc., Appellants filed a carefully-crafted “something more” negligence lawsuit in the Circuit Court of Reynolds County, Missouri, against Junior Flower and his son, Josh Flowers. L.F., 56. Appellants even affirmatively claimed in their wrongful death petition that the negligence claim against the Flowers defendants was a “something more” claim. L.F., 58 at ¶17. Appellants’ “something more” negligence claim against the Flowers defendants was based upon their having “affirmatively and directly ordered” the employees at Missouri Hardwood Charcoal, Inc. to place kiln doors upright, one of which fell and caused the death of Appellants’ mother. L.F., 58 at ¶13. Appellants did not allege in their Reynolds County action that either of the Flowers defendants was being sued in his capacity as an officer or director of Missouri Hardwood Charcoal, Inc., and did not mention officer or director status as relevant to their claims. L.F., 56-58. On the contrary, Appellants specifically alleged that the Flowers defendants’ actions and negligence was not tied to the employer’s (Missouri Hardwood Charcoal, Inc.’s) duty to provide a safe work environment. L.F., 58 at ¶17. Rather, the alleged negligence was based on the Flowers defendants allegedly “at all times” being the “foremen and supervisors” who were

each “engaged as an agent or employee” of Missouri Hardwood Charcoal, Inc. L.F., 57 at ¶¶6-7.

Junior Flowers sought a defense and indemnity¹ for the claim against him in the Reynolds County action under two policies issued by ILM to several affiliated companies, including Missouri Hardwood Charcoal, Inc. L.F., 60. One of the policies was a commercial general liability (CGL) policy and the other a commercial umbrella policy. L.F., 131, 150.² Flowers was neither a named insured nor an additional named insured under the policies. Rather, his insured status rested on whether he met the requirements of “Who is an Insured” under Section II of the CGL policy, L.F., 142, and the definition of “insured” under the commercial umbrella policy. L.F., 154.

¹ Josh Flowers never sought a defense or indemnity for the claim against him, and the claim against him was ultimately dismissed with prejudice as part of the \$537,065 agreement between Appellants and Junior Flowers. L.F., 282. Accordingly, the remainder of the facts focus on Junior Flowers only.

² Although the policies were issued to “Missouri Tie, Inc.” (see L.F., 131, 151) each policy contained a “Named Insured Endorsement” that extended named insured status to Missouri Hardwood Charcoal, Inc. Only the Named Insured Endorsement for the commercial umbrella policy is included in the legal file (see L.F., 152) but the CGL policy had an identical Named Insured Endorsement.

In denying Flowers a defense and indemnity for the claims against him in the Reynolds County petition, ILM noted, as to the claims in the petition:

It is alleged in the Lawsuit that Junior and Josh Flowers were acting as employees of the insured [and] directed other employees to stack large metal doors on the side of a building. On April 6, 2007 a large metal door fell on Linda Nunley resulting in her death.

L.F., 61, 66 (emphasis added).

In the letter denying Flowers a defense and indemnity, ILM advised Flowers that, under both the CGL policy and the commercial umbrella policy, Flowers was not an “insured” when acting as an employee for bodily injury to a co-employee. L.F., 62, 67. Flowers had personal counsel, Michael Hackworth, assist him in attempting to have ILM change its coverage position. In doing so, Hackworth, on behalf of Flowers, did not disagree with ILM that the allegation in the Reynolds County petition was that Flowers was acting as an “employee” of Missouri Hardwood Charcoal, Inc., and that he had “directed other employees” in stacking the kiln doors. L.F., 72. Rather, Hackworth argued that, despite what was actually alleged in the petition, Flowers was in fact “the owner” of the Corporation. L.F. 72. Hackworth argued that ILM should defend Flowers, despite the allegations in the petition, because he believed “that all liability insurance policies have a duty to defend and pay defense costs.” L.F., 72.

Relying again on what was actually alleged in the Reynolds County petition (i.e., that Flowers was a co-employee of the decedent who had caused the death of the decedent under a “something more” theory), ILM reiterated its denial of a defense and indemnity to Flowers. L.F., 76. After Flowers’ counsel, Hackworth, obtained a copy of ILM’s policies and analyzed them, he wrote to ILM suggesting that Flowers “has coverage as an executive officer, a stockholder and also as a manager of Missouri hardwood Charcoal.” L.F., 81. ILM referred the matter to its in-house counsel for review of Hackworth’s suggested analysis (and provided Hackworth with in-house counsel’s contact information). *Id.* ILM maintained its coverage position in light of the actual allegations in the Reynolds County petition.

After ILM declined to defend Flowers, his own personal counsel defended him in the Reynolds County action. In fact, Flowers initially was successful in having the Reynolds County action dismissed for lack of subject matter jurisdiction after arguing that “the workers compensation law is the exclusive remedy for the decedent and plaintiffs.” L.F., 208. In opposing Flowers’ motion to dismiss based on the exclusive remedy of the workers compensation law, Appellants argued that the exclusivity provisions of the workers compensation law “do not explicitly apply to co-employees” like Flowers. L.F., 211. As well, in trying to resolve the exclusive remedy issue in the Reynolds county action without court involvement, Appellants’ counsel even wrote to Flowers’ counsel “to see if there is a simple

mechanism” to resolve what he referenced as “the pending ‘something more’ case.” L.F., 259.

Instead, Flowers’ motion to dismiss the Reynolds County action was taken up for argument by the circuit court, during which the court asked counsel for Appellants: “Your clients have filed a petition alleging the wrongful death of the decedent because of the negligence of an employee, a co-employee, correct?” Appellant’s counsel responded, “Correct.” L.F., 100. The circuit court granted Flowers’ motion to dismiss for lack of jurisdiction based on the exclusive remedy of the workers compensation law. L.F., 245.

II. The Appeal of the Dismissal of the Wrongful Death Action

That dismissal was reversed by the Missouri Court of Appeals after an appeal by Appellants. See *Heirien v. Flowers*, 343 S.W. 3d 699 (Mo.App.S.D. 2011). In pursuing that appeal, however, it is noteworthy (and relevant to the issues on appeal here) as to Appellants’ representations to the Court of Appeals regarding the claims that were being made in their Reynolds County petition:

- Appellants represented to the appellate court in their Civil Case Information Form that an issue for the appeal was “whether co-employees that negligently injure an employee are protected from civil actions under Chapter 287 . . .” L.F., 220.

- Appellants represented to the appellate court in their brief:

This is an appeal from a Judgment entered by the trial court dismissing appellants' petition with prejudice. The petition alleges a wrongful death claim arising out of respondents' direction to place heavy doors from a charcoal kiln in an upright position, where the doors could fall. One of the doors fell, killing appellants' decedent. Respondents are alleged to be the foremen and supervisors of the workplace. L.F., 233.

- Later in the same brief, in setting forth what the "pleaded facts" of the petition were, Appellants advised the Missouri Court of Appeals:

Respondents Junior Flowers and Josh Flowers are individuals over the age of 18, and were foremen and supervisors employed by Missouri Hardwood Charcoal, Inc., which also employed decedent Linda Nunley. . . .
[R]espondents were the site managers engaged as an agent or employee of Missouri Hardwood Charcoal, Inc.

Appellants alleged [in the petition] that respondents' order to the employees to lean kiln doors upright in view of the several dangers known to them about the workplace was an affirmative negligent act, causing or increasing Linda Nunley's risk of injury, or constituting breach of the personal duty of care owed to Linda Nunley by respondents, and proximately causing her death. L.F., 234-35 (emphasis added).

- In describing to the appellate court in their prior appeal the nature of their claims, Appellants made no statement concerning even a possible breach of a duty owed by Flowers as an executive officer or director of Missouri Hardwood Charcoal, Inc. L.F., 234-35.

- In its written decision, the Court of Appeals referred expressly to the point relied on by Appellants in their prior appeal, as follows:

POINT RELIED ON

The circuit court erred in dismissing the petition with prejudice because *the respondents are individual employees* not entitled to the exclusivity protection of Mo. Rev. Stat. § 287.120.1 (2000) in that the exclusivity protection is given only to the employer by the express terms of the statute, and the respondents do not fall under the statutory definition of employer found in Mo. Rev. Stat. § 287.030.1(1), and the provision of Chapter 287 must be strictly construed per Mo. Rev. Stat. § 287.800. (Italics added).

L.F., 192; *Heirien v. Flowers*, 343 S.W.3d at 701. Accordingly, Appellants' own point relied on in their appeal of the Reynolds County dismissal described their claim against Flowers as one against an "individual employee" and not one against an officer or director of the corporation. *Id.*

III. The Wrongful Death Action After Remand

After the Court of Appeals reversed the Reynolds County dismissal and remanded, see 343 S.W.3d at 703, Flowers filed an answer to Appellants' Reynolds County petition. Flowers' answer did not raise any defense or affirmative based on Flowers' alleged capacity as an officer or director of the Corporation. L.F., 252-58. On January 9, 2012, pursuant to discovery requests by Appellants, Flowers' counsel provided to Appellants' counsel a copy of the ILM policies. L.F., 260. Less than a month later, counsel for Appellants provided to Flowers' counsel a proposed affidavit for Flowers to sign in conjunction with a proposed §537.065 agreement. L.F., 266.

Counsel for both parties continued to negotiate the proposed §537.065 agreement on February 10, 2012, and pursuant to the request by Flowers' counsel "to generally know what evidence you intend to introduce," discussed the evidence for trial. L.F., 261. As part of the negotiations between Appellants and Flowers, counsel for Flowers advised Appellants' counsel that, at any subsequent trial conducted pursuant to the proposed §537.065 agreement, Flowers would present documentary evidence (greeting cards) he had received from plaintiffs in which they stated they did not blame Flowers for Ms. Nunley's accident. L.F., 261.

On February 15, 2012, counsel for Appellants and for Flowers continued to negotiate the language that would be used in the affidavit for Flowers to sign in conjunction with the proposed §537.065 agreement. L.F., 275. Flowers approved

and executed the agreed affidavit prepared by counsel for the parties and, in conjunction with the §537.065 agreement, defendant Josh Flowers was dismissed from the Reynolds County action, with prejudice. L.F., 278-79. The finalized Flowers affidavit that was negotiated by Appellants and Flowers was executed by Flowers on February 17, 2012. L.F., 179.

The Reynolds County action against Flowers proceeded to trial to the court on March 19, 2012. L.F., 281. The Proposed Findings of Fact and Conclusions of Law, and the Judgment ultimately entered by the Reynolds County court, were based on the forms prepared by Appellants, containing the claims and evidence they would present at trial. L.F., 310. In fact, the Proposed Findings of Fact and Conclusions of Law that Appellants filed with the Reynolds County court on the day of the trial were the same Proposed Findings of Fact and Conclusions of Law ultimately entered by the court. L.F., 315, 324.

For the first time in the Reynolds County action, Appellants asserted at the trial that Flowers was negligent in causing the death of Nunley in his “capacities” as “president and executive officer and director” of the Missouri Hardwood Charcoal, Inc. L.F., 285-86, 291, 311. Whereas Appellants’ Reynolds County petition alleged Flowers was a foreman and supervisor of Nunley employed by Missouri Hardwood Charcoal, Inc. “at all relevant times,” L.F., 57, at the trial Appellants affirmatively alleged Flowers was not an employee of the Corporation

and was, instead, president, executive officer and director “at all relevant times.” L.F., 125.

For the first time in the Reynolds County action, Appellants asserted at the trial that Flowers was negligent in causing Ms. Nunley’s death while “acting in the scope and course of his authority and duties as a president, executive officer and director of the Corporation.” L.F., 126. In addition to the evidence presented, Appellants presented these facts to the Reynolds County court within proposed findings of fact and conclusions of law in conjunction with their claims at the trial. L.F., 310. The court ultimately entered the Appellants’ “Proposed Findings of Fact and Conclusions of Law,” and they were incorporated into the court’s judgment. L.F., 121-128.

Consistent with the claim asserted by Appellants at the Reynolds County trial, the Findings of Fact and Conclusions of Law entered by the Court found Flowers was negligent in causing the death of Nunley while “acting under his duties as president, executive officer, and director” of the Corporation. L.F., 127. At the trial, Appellants claimed that it was Flowers’ duty, as president, executive officer and director of the Corporation, to furnish a safe workplace for Nunley. L.F., 126. The Reynolds County petition, in contrast, had alleged that the Corporation, not Flowers, owed a duty to furnish a safe workplace for Nunley. L.F., 58.

In the equitable garnishment action below, ILM presented expert opinion testimony of Robert Russell, Esq., as part of the summary judgment briefing. He opined that Appellants' claim at the Reynolds County trial that Flowers was negligent in causing the death of Ms. Nunley in his capacity as president, executive officer, and director of the Corporation was an amendment to Appellants' petition that had been filed August 22, 2008. L.F., 331-33. Russell further opined that Appellants' claim at the Reynolds County trial that Flowers breached a duty he had as president, executive officer, and director of the Corporation to provide Ms. Nunley with a safe work environment was also an amendment to the petition that had been filed August 22, 2008. *Id.*

Both the CGL and the commercial umbrella policy required an insured to notify and provide written notice to ILM "as soon as practicable" of a claim and to "immediately send" to ILM any legal papers received in connection with the claim. L.F., 144, 159. ILM received no notice whatsoever – from either Appellants or Flowers – of the amended claims asserted at the trial in the underlying action. See L.F., 39 (Deposition of Junior Flowers, 107:20-108:5); L.F. 363-91.

Other pertinent facts as may be necessary for resolution of the issues on appeal will be set forth within the argument, below.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT ANY POTENTIAL COVERAGE FOR THE REYNOLDS COUNTY JUDGMENT WAS PRECLUDED BECAUSE OF APPELLANTS' AMENDMENT OF THEIR REYNOLDS COUNTY CLAIM WITHOUT NOTICE TO ILM [POINTS VII AND VIII]

In Points VII and VIII of their brief, Appellants contend the circuit court below in the equitable garnishment action erred in finding that Appellants had amended their Reynolds County claim against Flowers without notice to ILM, thus prejudicing ILM and precluding any potential coverage under the policies for the judgment against Flowers. ILM's defense in the equitable garnishment action below was certainly properly raised, and Appellants do not suggest otherwise. "The rights of the injured person bringing an action against the insurer for equitable garnishment are derivative and can rise no higher than those of the insured, so that the insurer may set up in the garnishment proceeding the defense of non-cooperation of the insured." *Hayes v. United Fire & Cas. Co.*, 3 S.W.3d 853, 857 (Mo.App.E.D. 1999).

The issue is whether the circuit court correctly ruled in favor of ILM on this affirmative defense. ILM addresses these issues pertaining to the amendment of

the claim first because, if this Court agrees with the circuit court, then there is no further need to address the other coverage issues raised by Appellants.

Standard of Review

The standard of review on this issue is *de novo*. The circuit court ruled that there had been an amendment to the Reynolds County claim without notice to ILM based on the evidence before the circuit court in the parties' cross-motions for summary judgment. Where the trial court's judgment "is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Nonetheless, this Court will see from the undisputed evidence that the circuit court's ruling was correct and should be affirmed.

Analysis

A. The Original Claim in the Reynolds County Action

Linda Nunley died while working on the job at Missouri Hardwood Charcoal, Inc. (hereafter, the "Corporation"). Appellants admit on appeal that they recovered to the fullest extent allowed under Missouri's workers compensation statutes for surviving adult children of a deceased worker. See Appellants' Subst. Brf., 11. Appellants then filed their Reynolds County petition against Flowers. Appellants' petition made no allegation that Flowers was negligent in performing

any duty as the Corporation's executive officer in causing Ms. Nunley's death.³ Instead, Appellants alleged a very specific "something more" claim against Flowers in an effort to avoid the exclusive remedy of workers compensation law. In fact, Appellants expressly claimed that Flowers' actions "went beyond and were thus 'something more' than a breach of the duty of care owed by the Corporation to provide a safe work place to all of its employees." L.F., 58.

In asserting a "something more" claim Appellants were, by definition, asserting a claim against Flowers outside of any corporate duty he might have owed to Nunley, on behalf of the Corporation, to provide a safe work environment. As stated by the Missouri Supreme Court with regard to a "something more" claim:

The rationale for the imposition of co-employee liability "for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe workplace"—sometimes called the "something more" test—can be traced to the seminal case of *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982). In that case, Judge Satz wrote that,

³ Again, Flowers was an "insured" under ILM's policies as an executive officer "but only with respect to [his] duties as your [the Corporation's] office[r]" L.F., 142; see also L.F., 154 (regarding the commercial umbrella policy).

... a corporate officer or supervisory employee performs in a dual capacity. He has immunity under the workmen’s compensation law where his negligence is based upon a general non-delegable duty of the employer; he does not have immunity where he does an affirmative act causing or increasing the risk of injury. Something “extra” is required beyond a breach of his duty of general supervision and safety, for that duty is owed to the employer, not the employee.

(citations omitted)

Id. at 179. Judge Satz concluded that,

[c]harging the employee chosen to implement the employer’s duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence. Something more must be charged. The extent and nature of the additional charge can only be determined and sorted out on a case-by-case basis.

Burns v. Smith, 214 S.W.3d 335, 338 (Mo. 2007) (emphasis added).

In other words, by asserting in their Reynolds County petition that their negligence claim against Flowers was a “something more” claim, Appellants were concomitantly stating that the claim against him was not one involving his duties as an officer of the Corporation. That is the very nature of a “something more” claim – that the individual defendant did something beyond his corporate duties

and violated a personal duty owed to the plaintiff. Beyond the implications of their “something more” claim, the fact that the Appellants made no allegation against Flowers in his capacity as an executive officer of the Corporation in their petition, based on Missouri’s fact pleading rules, made clear that Appellants were not asserting a claim against Flowers as to his duties as an officer of the Corporation. Therefore, Flowers could not meet the definition of “Who Is An Insured” under section II.1.d. of the policy as to the claim in the underlying petition because it alleged nothing against him with regard to his duties as an officer or director (or stockholder) of the Corporation. See L.F., 142.

There really is no question that the Reynolds County petition alleged a “something more” claim. The petition itself states this, expressly. See L.F., 58. And, if there had been any room for doubt as to the nature of the claim asserted, Appellants made it abundantly clear in their filings and briefing to the Court of Appeals in their appeal of the dismissal of the Reynolds County action. While the terms “executive officer” and “director” are never mentioned once by Appellants in their prior appellate filings in describing their claims, time and again Appellants represented to the Court of Appeals that Flowers had been sued as a co-employee, a “foreman” and “supervisor” of Nunley whose “order to the employees to lean kiln doors upright in view of the several dangers known to them about the workplace was an affirmative negligent act, causing or increasing Linda Nunley’s

risk of injury, or constituting a breach of the personal duty of care owed to Linda Nunley” by Flowers. L.F, 234-35 (emphasis added).

Because the Reynolds County petition alleged no claim against Flowers in his capacity as an executive officer of the Corporation (and could not have alleged a claim against him in that capacity given it was a “something more” claim), ILM, in assessing Flowers’ tender of the defense of the suit, did not analyze the claim as one against an executive officer. Rather, as was plain on the face of the Reynolds County petition, ILM analyzed the claim as one against a co-employee for breach of a personal duty of care owed to Nunley. L.F., 63. Even Flowers himself viewed Appellants’ Reynolds County petition as alleging only co-employee liability for breach of a personal duty, and not any claim against him in his capacity as an executive officer of the Corporation. Indeed, when ILM corresponded with Flowers’ counsel regarding the coverage denial based on the allegations of co-employee liability, Flowers’ counsel took no issue with ILM’s statement that the petition only claimed such co-employee liability, not executive officer liability. See L.F., 61, 66 (ILM stating, “It is alleged in the Lawsuit that Junior and Josh Flowers were acting as employees of the insured [and] directed other employees to stack large metal doors on the side of a building.”), and 72 (Flowers’ counsel’s response to the denial of coverage, not disputing the claim being asserted in the petition as understood by ILM).

In short, prior to remand following the appeal of the Reynolds County action, no one – not Appellants, not Flowers, and not ILM – viewed the Reynolds County petition as alleging a breach of a duty by an officer of the Corporation. Rather, the claim against Flowers was for negligence as a “co-employee” under a “something more” theory for the alleged breach of a personal duty. Accordingly, ILM denied coverage to Flowers under its policies issued to the Corporation for the alleged breach by Flowers of these personal duties of care to Ms. Nunley because the policies did not afford “insured” status to Flowers outside of his capacity as an officer and director for bodily injury “to a co-‘employee’ while in the course of his or her employment or performing duties related to the conduct of your business” L.F., 142; see also L.F., 62 (coverage denial).

B. The Change in the Claim Against Flowers at the Reynolds County

Trial

After the Reynolds County action was remanded by the Court of Appeals for further proceedings, Appellants obtained a copy of ILM’s policies from Flowers in discovery. L.F., 260. Less than a month later, Appellants and Flowers entered into their \$537,065 agreement in the Reynolds County action. L.F., 270. Appellants then crafted an entirely different claim against Flowers for the trial against him. Specifically, in proceeding to trial, rather than putting on evidence that Flowers was a co-employee of Nunley (as alleged in the petition), Appellants instead made

the claim that Flowers affirmatively was not a co-employee of Nunley. L.F., 124. Rather than putting on evidence that Flowers had committed an affirmative act of negligence as Nunley’s foreman or supervisor in breach of a personal duty of care owed (i.e., a “something more” claim as alleged in the petition), Appellants instead made the claim that Flowers was negligent in his capacity as an executive officer of the Corporation in failing to “furnish a place of employment that was reasonably free from recognized hazards that were causing or likely to cause death or serious physical harm to employees including Ms. Nunley. L.F., 126. The claim at the wrongful death trial was amended to allege that Flowers, in his capacity as an executive officer, failed to adopt an appropriate “practice or policy” regarding workplace safety; failed to draft and implement safe policies and procedures; and failed to conduct a hazard assessment of the kiln area where Ms. Nunley was killed. L.F., 126. All of these new claims against Flowers, rather than dealing with a breach of a personal duty, as alleged in the original petition, alleged workplace injury attributable to the employer’s breach of the nondelegable duty to provide a safe workplace. See *Leeper v. Asmus*, 440 S.W.3d 478, 488-89 (Mo.App. 2014).

In short the changes in Appellants’ claim against Flowers, from their petition to their claim at trial, included:

Appellants’ Reynolds Co. Petition

Alleged Flowers was a “co-employee”

Appellants’ Trial Evidence

Alleged Flowers was not

of Nunley (L.F., 100)

a “co-employee” of Nunley
(L.F., 317)

Did not allege Flowers was
negligent in his in his capacity as officer
of the Corporation (L.F., 58)

Alleged Flowers was negligent
in his capacity as officer of the
Corporation (L.F., 291, 329)

Alleged the Corporation (not Flowers)
owed a duty to Nunley to provide a safe
work environment (L.F., 58)

Alleged Flowers owed a duty to
Nunley to provide a safe work
environment (L.F., 311, 319)

This is what one would call a “180-degree turn” in the claim against Flowers. In the garnishment action below, the Cole County circuit court recognized this, stating:

In going to trial on their claim against Flowers, however, Plaintiffs changed their allegation from one against Flowers for alleged co-employee liability on a “something more” theory to a claim of alleged executive officer liability for failure to maintain a safe work environment for the decedent, Ms. Nunley. Prior to the trial Plaintiffs prepared proposed findings of fact and conclusions of law setting forth the new theory, and then proceeded to put on their evidence in accordance with the new theory. Because the evidence came in at trial without any objection by Flowers, this

Court finds there was, as a matter of fact and law, an amendment to the pleadings in the underlying action to assert the new claim against Flowers in his capacity as an executive officer of the company for failing to maintain a safe work environment.

L.F., 448-49.

C. Lack of Coverage for Failure to Give Notice of Amended Claim

Appellants devote two of their nine points on appeal (Points VII and VIII) to the trial court's ruling that Appellants had asserted a new theory at the Reynolds County trial without notice to ILM, thus prejudicing ILM and defeating any potential coverage. If this Court affirms the trial court's judgment regarding the amendment of the wrongful death claim without notice to ILM then the remaining coverage issues become moot. Thus, ILM addresses this issue before the remaining coverage issues.

1. Appellants' argument that there was no amendment

Appellants first argue (in Point VII) that the trial court erred in concluding there was an amendment to Appellants' wrongful death claim in the Reynolds County action. In other words, Appellants' first argue there was no amendment whatsoever between the claim in their original Reynolds County petition and their claim at trial in that action. See Appellants' Subst. Brf., 74-76.

It is difficult to imagine that Appellants make this argument with a straight face. ILM has already shown immediately above that Appellants' original claim against Flowers was for breach of a personal duty while their claim at trial was that Flowers breached the Corporation's duty to provide a safe work environment. Appellants spend little space or energy arguing this point, and the Court should have little difficulty in denying it straight away.

2. Appellants' argument that there was no "substantial prejudice"

Appellants next argue (in Point VII) that the trial court erred in concluding that any amendment to their Reynolds County petition resulted in substantial prejudice to ILM. Appellants' specific contention is that the amendment could not have substantially prejudiced ILM when ILM was aware of Flowers' capacity as an executive officer of the Corporation. Appellants' Subst. Brf., 76-77. In a similar vein, Appellants go on to argue that there was no new theory of liability in the case as a result of the amendment such that there could not have been substantial prejudice to ILM. Appellants' Subst. Brf., 77-85. Appellants misapply both the law and the facts relating to this issue and, accordingly, Appellants' Point VII must be denied.

Appellants' argument is that the changes made between their petition and their claim at trial in the underlying case did not advance "a new theory of

liability” in the sense that, both in the petition and at trial, the claim against Flowers was a wrongful death negligence claim. See Appellants’ Subst. Brf., 77 (quoting *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 272 (Mo. banc 2013)). The question, then, is whether the trial court was correct in ruling that Appellants did, indeed, advance “a new theory of liability” at the Reynolds County trial.

In *HIAR Holding*, a class action suit was brought against HIAR Holding under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. HIAR Holding sought a defense of the class action suit and indemnity coverage from Columbia Casualty Company, who denied the tender. After the class action plaintiffs settled with HIAR Holding, the plaintiffs filed a garnishment action against Columbia, who in turn asserted a declaratory judgment action on the issues relating to its duty to defend and indemnify in the underlying class action. One of the arguments raised by Columbia for non-coverage was HIAR Holdings’ purported failure to notify the insurer, during the class action suit and after the insurer had denied the tender, of an amended petition that merely added another defendant that was related to HIAR Holding. 41 S.W.3d at 272. This Court reaffirmed in *HIAR Holding* the basic principle that “[p]rejudice from a failure of notice of an amended petition can be shown where the new petition alleges a new theory of liability that the insurer was not aware of previously.” *Id.*

This Court rejected Columbia's argument of prejudice, however, reasoning:

In this case, Columbia was not prejudiced when it was not informed about the amended petition, as the amended petition *did not alter* the theory on which the class sought damages. The class's litigation at all times presented TCPA claims that Columbia has refused since 2002 to defend or indemnify. Columbia's initial refusal to defend or provide coverage for the class's TCPA claims was the point at which it wrongly refused to defend HIAR in this litigation. Even though the initial petition invoked Columbia's coverage, Columbia sought to be wholly unconnected from the proceedings and now argues that its disconnectiveness barred coverage. Under these circumstances, the trial court did not err in refusing to entertain Columbia's assertions that its coverage was inapplicable because HIAR failed to cooperate or provide notice of the amended petition.

Id. (emphases added).

Here, however, Appellants did "alter" their theory at trial in the Reynolds County action. Even Appellants acknowledged (when they appealed the earlier dismissal of that action) that they were initially asserting a co-employee "something more" claim, not a claim against a non-employee executive officer for breach of a non-delegable duty. In fact, Flowers' own counsel – although arguing to ILM that Flowers was in fact an "owner" and officer of the Corporation – never

suggested that the Reynolds County petition itself ever alleged any such claim against him in that capacity. L.F., 80. As well, Flowers himself, when asked to review the plain language of the Reynolds County petition against him during discovery in the equitable garnishment action below, saw no allegations against him in his capacity as officer or director. L.F., 347 (Deposition, 60:4-18).

Moreover, as a matter of law, based on the undisputed facts, it is clear that Appellants' asserted in the original petition a "something more" claim based on Flowers' alleged breach of a personal duty, yet at trial changed that claim to one against him for breach of a duty in his capacity as officer of the Corporation for breach of the non-delegable duty to provide a safe workplace. This change was made clear when Appellants' counsel argued in closing to the Reynolds County court after putting on evidence:

The exercise of due care at a business by the president and director of the Company would require at the least putting the kiln door down, exactly the policy that was adopted the very next business day after Ms. Nunley's death. It should have been adopted years before. In terms of liability we think that Ms. Nunley's death was directly caused by Mr. Flowers acting in his capacity as president and director of the company [because] that policy was under his control at all times, as were all the business policies. L.F., 311 (emphasis added).

Such is not a “something more” claim. Such is not a claim for breach of a personal duty owed to a fellow employee. The duty to enact and implement safety policies has been deemed by Missouri courts to be among the nondelegable duties of an employer, and not a personal duty owed to a fellow employee, for some 80 years. See *Leeper v. Asmus*, 440 S.W.3d at 484 (citing *Kelso v. W.A. Ross Constr. Co.*, 337 Mo. 202, 85 S.W.2d 527, 534 (1935)). Appellants did “alter the theory” of liability against Flowers at trial in the wrongful death action. And Flowers himself knew that the claim against him would be altered at trial because he worked with Appellants’ counsel in preparing an affidavit for Appellants to use in conjunction with the altered claim. L.F., 277-79. Moreover, without question Appellants themselves had planned to alter the claim at trial because they came to trial with the proposed Findings of Fact and Conclusions of Law that the court would ultimately adopt. L.F., 310. In short, because the amendment to the claim did alter the theory of liability against Flowers, and was knowingly done by Appellants and Flowers without any notice to ILM, longstanding Missouri case law states that prejudice to ILM is presumed and any potential coverage under the policies is defeated. See, e.g., *Inman v. St. Paul Fire & Marine Ins. Co.*, 347 S.W.3d 569, 580 (Mo.App. 2011).

In *Inman*, the court held that failure to notify a liability insurer of the claims against its insured in an amended pleading prejudices the insurer, “reliev[ing] the

insurer of liability under the policy.” *Id.* at 580. In that case, as here, the insurer denied that its policy covered the claims asserted by the claimants against its insured, and denied the insured a defense on the claims. In that case, as here, the claimants then entered a § 537.065 agreement with the insured. *Id.* at 573. In that case, as here, after the § 537.065 agreement was entered, but before trial, the insured became aware that the claimants were likely to amend their claims at trial but failed to notify the insurer of the claimants’ new theories. *Id.* The circuit court granted summary judgment to the insurer, and the issue on appeal was “whether St. Paul showed the injury alleged by the Inmans was not covered under the policy because of the City’s failure to provide notice of the first amended petition.” *Id.* at 578.

In affirming the equitable garnishment court’s denial of coverage, the *Inman* court’s extensive analysis is worth repeating:

First, summary judgment was appropriate because the Inmans failed to provide St. Paul adequate notice that the claims were changed in the first amended petition, which prejudiced St. Paul.

In comparing the original petition with the first amended petition, it is obvious the amended petition added new factual allegations, changed other facts, and added a new surprise theory of recovery.

The cooperation provisions in the policy required the City to provide notice and copies of “all legal documents” “as soon as possible” and required cooperation and assistance in securing and giving evidence, attending hearings and trials, and obtaining the attendance of witnesses. Despite the fact that St. Paul had declined to defend the original petition, St. Paul was still entitled to determine if recovery upon the new allegations would be covered and to have the opportunity to defend upon that theory. See *Rocha v. Metro Prop. & Cas. Ins. Co.*, 14 S.W.3d 242, 246 (Mo.App.W.D. 2000) (coverage voided due to insured’s failure to notify insurer of amended petition and entry into a section 537 agreement).

Where an insured is served with an amended petition setting out a new cause of action, the insurer has the right to determine whether the new count is within its coverage and to reexamine its decision on whether to actively participate in a defense against that new claim. The insured’s violation of a cooperation clause relieves the insurer of liability to the insured.

Id. at 246-47. Furthermore, “[t]he law is clear that an insurer must be given notice of an amended pleading which would impose a duty to defend, and a failure to give notice will relieve the insurer of liability under the policy....”

Id. at 246 (quoting *Dickman Aviation Services, Inc. v. U.S. Fire Ins. Co.*, 809 S.W.2d 149, 153 (Mo.App.S.D. 1991)).

It is undisputed the City knew about the amended petition prior to trial, but did not ensure St. Paul received notice or a copy of the amended petition until after the trial was complete. “In an action to recover on an insurance policy, an insured must prove either that he complied with the policy provisions that require performance on his part or that he has an acceptable excuse for non-performance.” *Rocha*, 14 S.W.3d at 246. The City offers no indication of any excuse in this case for the failure to notify St. Paul of the first amended petition.

Nevertheless, an insured, or one standing in the shoes of an insured, will not be barred from recovery based on the breach of these conditions unless the insurer can show that it has been prejudiced by the insured’s non-compliance with such policy provisions. *Johnston v. Sweany*, 68 S.W.3d 398, 402 (Mo. banc 2002). Here, St. Paul was prejudiced because the City’s failure to notify St. Paul of the first amended petition denied St. Paul the opportunity to protect its interests. Specifically, it denied St. Paul the opportunity to investigate the new allegations and claims, to defend against liability at trial, and to dispute the amount of damages. The City failed to give St. Paul the opportunity to defend the new cause of action by failing to

notify it of the amended petition. “Because the failure to notify [St. Paul] was unexcused, it gives rise to the presumption that [St. Paul] was prejudiced.” *Rocha*, 14 S.W.3d at 248. In such a case, “the insurer will generally be disadvantaged in its capacity to compromise and settle the claim. Such a disadvantage is difficult to prove, and it would be unjust to force the insurer to demonstrate prejudice in such a case.” *Id.*

Id. at 579-80.

Here, Flowers was aware of the evidence that Appellants intended to put on at the Reynolds County trial. L.F., 261-80. Indeed, for over a month before trial counsel for the two sides conferred as to trial evidence and even agreed upon the language in the affidavit of Flowers that would be submitted for the trial. *Id.* Flowers not only was well aware of the new claim but assisted in the preparation of the new claim. Regardless, because Appellants stepped into the shoes of Flowers for purposes of the garnishment proceeding, and because Appellants themselves certainly knew the amendments to the petition that would take place at trial, knowledge of the amendments to the pleadings is not an issue.⁴

⁴ To their credit, Appellants make no argument in their brief that *Inman* and similar cases are distinguishable because they involve the filing of an actual motion for leave to amend a petition, as opposed to trying the new claims by consent as

Appellants cite *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64 (Mo.App. W.D. 2005), another case that supports ILM on the issue of what constitutes “a new theory of liability.” See Appellants’ Subst. Brf., 78. In *Truck Ins. Exchange*, the plaintiffs intended to assert a negligent supervision claim in their petition – and even identified one of their legal theories as a claim against the defendant for negligent supervision – yet failed to allege the claim in a manner that would normally survive a motion to dismiss. *Id.* at 82-83. *Truck Ins. Exchange* was a case in which the plaintiffs intended to assert a particular claim for relief but did not plead the claim in as “artfully” as they could have. *Id.* at 83. The present case is not a case of “inartful drafting” by Appellants. It is a case in which Appellants asserted a particular claim in their original petition – a “something more” claim against an alleged fellow employee alleging breach of a personal duty – and made no attempt to assert a claim against Flowers in his capacity as an officer of the Corporation for breach of a non-delegable duty.

The difference in legal theories between the breach of a personal duty and the breach of an employer’s non-delegable duty has been emphasized in dozens of Missouri reported cases. The legal distinction matters. Just last year the court of appeals addressed this critical difference in *Carman v. Wieland*, 406 S.W.3d 70

Appellants and Flowers did here. See *Inman*, 347 S.W.3d at 574. Under Rule 55.33, this is a distinction without a difference.

(Mo.App.E.D. 2013), where the court took up the “nature” of these two different types of claims. *Id.* at 72.⁵ The distinction between the two types of claims, the court said, “is vital.” *Id.* at 76. So, in making a claim against Flowers in their Reynolds County petition under a “something more” theory, Appellants were, as a matter of law, asserting a claim against Flowers for breach of a personal duty. *Id.* at 76 (emphasis added). Moreover, “a co-employee’s personal duties to fellow employees do not include a legal duty to perform the non-delegable duties belonging to the employer under the common law.” *Id.* (emphasis added). That is why ILM did not provide a defense to Flowers as an executive officer: because the Reynolds County petition alleged he breached a personal duty of care owed to Appellants’ decedent, not an officer duty. And because Flowers was not an insured under ILM’s policies for bodily injury to a co-employee (the claim that

⁵ Like *Leeper*, *Carman* also makes clear the “nearly eighty year” rule of law in Missouri that a claim against a defendant for the alleged breach of an employer’s non-delegable duty does not state an actionable civil claim. That is why Appellants avoided this claim in their original Reynolds County petition and, instead, alleged a “something more” common law negligence claim, which claim is by definition one against “a co-employee” for breach of his or her “personal duties.” 406 S.W.3d at 76.

was asserted) he was not entitled to a defense and coverage either. See the arguments in Section III, *infra*.

Notably, in the circuit court below Appellants offered no facts or circumstances that would excuse the failure to notify ILM of the amendment. Because the failure to notify ILM of the amendment was unexcused, there is a presumption of prejudice. See *Inman*, 347 S.W.3d at 580. Not only is prejudice presumed, but prejudice is actual and substantial in this case. Here, had Appellants and Flowers duly notified ILM of the change in the legal theory against Flowers, ILM could have, and would have, provided a defense to Flowers for the very purpose of having the new claim dismissed with prejudice because such a claim against Flowers for breach of a non-delegable duty does not even state an actionable claim of negligence. See *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo.App.E.D. 1982) (“charging the employee chosen to implement the employer’s duty to provide a reasonably safe place to work merely with the general failure to fulfill that duty charges no actionable negligence”); *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W. 3d 293, 303 (Mo.App.E.D. 2013). ILM never had that opportunity to have the new claim against Flowers dismissed. Instead, Appellants took a claim that had no value (because it failed to state an actionable claim) and turned it into a \$7 million dollar judgment by withholding notice of the claim from ILM. That is demonstrable, substantial prejudice on its face.

Appellants also make the untenable argument that the amendment of their claim was from one against a “co-employee” executive officer to one against a “non-employee” executive officer (and, therefore, Appellants suggest there could be no substantial prejudice to ILM by the amendment). Appellants’ Subst. Brf., 79. This argument fails on multiple grounds as demonstrated above. First, there simply is no allegation in the Reynolds County petition against Flowers in his capacity as an executive officer. Second, Appellants themselves made clear after filing the petition that it had nothing to do with executive officer liability. Plaintiffs essentially admitted this through their own description of their claim to the Reynolds County Circuit Court and in their prior appeal. Third, the “something more” claim, by definition, alleged only a breach by Flowers of a personal duty, not a duty owed in his capacity as an officer of the Corporation.

Yet Appellants persist in attempting to rewrite the Reynolds County petition and argue “the wrongful death negligence action alleging Flowers ordered people to do a dangerous thing remained the same from when ILM denied a defense through trial.” Appellants’ Subst. Brf., 81. That is simply untrue. In the Reynolds County petition, it was alleged that Flowers “affirmatively and directly” ordered another employee to place kiln doors upright and breached a personal duty of care owed that was separate from the duty to provide a safe workplace. L.F., 58. At trial, it was alleged that Flowers, in his capacity as an executive officer, was

negligent “in permitting and not changing the policy” such that he “did not furnish a place of employment that was reasonably free from recognized hazards” L.F., 126-27. Fact pleading matters in Missouri jurisprudence.

Appellants further argue that, because their Reynolds County petition used the word “negligence” and the judgment against Flowers was for “negligence” that there could not have been a material change in the claim to ILM’s prejudice. Simply using the word “negligence” in the petition does not in itself trigger a duty to defend. *Brand v. Kansas City Gastroenterology & Hepatology, LLC*, 414 S.W.3d 546, 553 (Mo.App.W.D. 2013). Even a negligence claim creates no duty to defend where the claim is not covered under the policy. *Shelter Mut. Ins. Co. v. Ballew*, 203 S.W.3d 789, 791-92 (Mo.App.W.D. 2006). Moreover, the threshold question under any policy – whether or not the allegation is one of “negligence” – is whether the person seeking a defense and indemnity under the policy is even an insured. Here, because the policy was not issued to Flowers as a named insured, he was not an “insured” under the policy for each and every act of negligence he might commit. And, while he was an “insured” in his capacity as an executive officer, this only applied with respect to his “duties” as an officer. L.F., 142.

Finally, Appellants argue that ILM was not entitled to Flowers’ cooperation in forwarding information pertaining to the amended claim because ILM somehow “failed to exercise due diligence to secure Flowers’ cooperation.” Appellants’

Subst. Brf., 79. Appellants’ argument ignores Missouri law and the relevant facts. The fact is that, in its denial of coverage letters issued well before the amendment, ILM expressly set forth the cooperation clauses in the policies to which Flowers was bound. L.F., 63, 68. ILM, therefore, specifically reiterated to Flowers his duty of cooperation with regard to any claim made against him, and thereby exercised reasonable diligence under the circumstances to secure Flowers’ cooperation. Indeed, Missouri courts have found “reasonable diligence” to secure an insured’s cooperation based solely on the terms of the insurance policy, without any need for the insurer to reiterate to the insured its duties, as ILM did here. See *Smith v. Progressive Cas. Ins. Co.*, 61 S.W.3d 280, 283 (Mo.App. 2001).

The Court must reject all of Appellants’ arguments that there was no substantial prejudice to ILM as a result of the amendment of the claim without notice to ILM.

3. Appellants’ argument that there was insufficient evidence for the trial court to find an amendment to the pleadings

In Point VIII, Appellants argue the circuit court erred in finding that their Reynolds County claim had been amended to conform to the evidence at trial because there was insufficient evidence before the circuit court below to make that determination.

First, this argument should be summarily denied because it is being raised for the first time on appeal. At no time in the summary judgment briefing, when ILM was asserting its facts and argument concerning the amendment of the Reynolds County claim, did Appellants ever suggest there was an inadequate record to make that determination. “Issues raised for the first time on appeal are not preserved for review.” *City of Kansas City v. Chung Hoe Ku*, 282 S.W.3d 23, 28 (Mo.App.W.D. 2009) (internal citation omitted).

Second, the circuit court below reviewed, among other evidence, the transcript of the Reynolds County trial, in which counsel for Appellants described into the record each and every exhibit that was introduced into evidence. See L.F., 286-92. As well, Appellants’ Proposed Findings of Fact and Conclusions of Law, prepared before the trial, and given to the court at the end of the evidence, not only describes the evidence that was introduced at trial but identifies the exhibits upon which the evidence is based. L.F., 315-21. The circuit court below had ample evidence to conclude that there had been an amendment of the claim through the evidence introduced at the Reynolds County trial.⁶ Point VII fails.

⁶ Appellants’ citation to *Lester v. Sayles*, 850 S.W.2d 858 (Mo. banc 1993), is puzzling. See Appellants’ Subst. Brf., 87. *Lester* simply repeats longstanding Missouri law that evidence introduced at trial will not give rise to an amendment of the pleadings by implied consent where the evidence is relevant to some issue

4. Appellants' argument that they were relieved of the duty to cooperate

To avoid the result of lack of coverage, Appellants argue they were relieved of the duty to cooperate because of ILM's alleged breach of the duty to defend Flowers under the original Reynolds County petition. See Appellants' Subst. Brf., 50-51. This argument fails because ILM did not breach a duty to defend the original petition (see Section III, *infra*). Moreover, however, even assuming, *arguendo*, that ILM breached a duty to defend the original Reynolds County petition, ILM was still entitled to notice of the amended claim against Flowers. This result can be seen by this Court's recent decision in *Hiar Holding*.

In *Hiar Holding*, the insurer refused to defend its insured in a class action suit under the Telephone Consumer Protection Act. 411 S.W.3d at 262. This Court held that the insurer breached its duty to defend the insured in that suit. *Id.* at 265. This Court then determined that there was coverage under the policy for the judgment entered against the insured in the suit. *Id.* at 270. The insurer then argued that coverage under the policy was “vitiating” as a result of the insured's failure to already in the case. Here, the negligence of Flowers in his capacity as executive officer for breach of the duty to provide a safe workplace was not already in the case. Indeed, Appellants had expressly alleged in their original petition that this issue was not in the case. See L.F., 58.

notify the insurer of an amended petition in the suit (amounting to a breach of the policy's cooperation clause). *Id.* at 271.

In resolving the non-cooperation issue, this Court did not do what Appellants here ask the Court to do. Namely, this Court did not resolve the non-cooperation issue by summarily finding that, because there had a been a breach of the duty to defend, the insured had no duty to notify the insurer of the amended petition. Rather, this Court examined whether the insurer had suffered substantial prejudice as a result of not being notified of the amended petition. *Id.* at 272. Indeed, although Appellants here assert that *Rocha v. Metropolitan Property & Casualty Insurance Co.*, *supra*, somehow compels the conclusion that an insurer's breach of the duty to defend an original petition automatically relieves the insured of notifying the insurer of an amended petition, this Court never even hinted at such a principle despite directly considering the application of *Rocha* in *Hiar Holding*. See 411 S.W.3d at 271-72. Appellants' argument that a breach of the duty to defend the original Reynolds County petition would have "relieved" Flowers "of the duty to forward" the amended claim to ILM, see Appellants' Subst. Brf., 50, an argument based entirely on *Rocha*, is completely meritless. The question, as this Court analyzed in *Hiar Holding*, is whether the failure to notify ILM of the

amended claim against Flowers substantially prejudiced ILM. It did, as previously shown.⁷

II. THE CIRCUIT COURT DID NOT ERR IN RULING THE REYNOLDS COUNTY JUDGMENT WAS NOT COVERED UNDER ILM'S POLICIES [POINTS II-VI]

In Points II-VI of Appellants' brief, Appellants address issues relating to ILM's alleged duty to indemnify for the Reynolds County judgment entered against Flowers under Appellants' equitable garnishment claim. As stated above, the Court need reach these coverage issues only in the event it reverses the circuit court's judgment concerning the amendment of the claim without notice to ILM.⁸

⁷ Moreover, it makes no sense that an insured would be relieved of the duty to cooperate on a claim that has never been presented to the insurer (or, stated from the insurer's perspective, that an insurer could have breached the duty to defend a claim that has never been presented to the insurer).

⁸ ILM will address Appellants' Point I in the final portion of this brief. Appellants' Point I argues that ILM breached a duty to defend Flowers under the original Reynolds County wrongful death petition. See Appellants' Subst. Brf., 29-44. However, the original wrongful death claim was abandoned when the claim was amended.

Standard of Review

ILM agrees generally with regard to Appellants' stated standard of review by this Court of the Cole County's Circuit Court's judgment, and that the standard of reviewing the circuit court's summary judgment in favor of ILM is essentially *de novo*. Based on the undisputed facts this Court should find, as did the circuit court, that ILM's policies do not provide coverage for the underlying judgment.

Analysis

A. Whether or Not the Policies Provide Coverage for the Judgment Without Regard for the Applicable Exclusions [Point II]

In Point II of their brief, Appellants take up the issue of whether or not the ILM policies provide coverage for the Reynolds County judgment without regard for the workers compensation and employer liability exclusions relied upon by the circuit court. Appellants bear the initial burden of proving coverage under ILM's policies. *Penn-Star Ins. Co. v. Griffey*, 306 S.W.3d 591, 596 (Mo.App.W.D. 2010).

As a starting point, ILM agrees that Flowers would be an "insured" under the policies in his capacities as an executive officer and director of the Corporation when acting within the scope of his duties as an executive officer and/or director. See CGL policy (L.F., 142) and commercial umbrella policy (L.F., 154). And, ILM recognizes that the judgment entered against Flowers was for his negligence in "acting under his duties as president, executive officer, and director" of the

Corporation “in permitting and not changing the policy” regarding kiln door placement. L.F., 127. That is what makes the secret amendment of the claim against Flowers so egregious, as shown in section I of ILM’s brief herein. ILM was denied its right to assess coverage for the new claim against Flowers in this capacity for alleged negligence involving the Corporation’s nondelegable duty to provide a safe work environment.

1. The trial court’s ruling

The trial court analyzed the equitable garnishment claim by Appellants by concluding that, even aside from the improper amendment of the claim by Appellants without notice to ILM, there was no coverage for the wrongful death judgment because of two policy exclusions – the workers compensation and employer liability exclusions. See Appendix at A-5 (“Here, the Court finds that, even on the face of [sic] the underlying judgment, the judgment is not covered under ILM’s policies because the workers compensation and employer liability exclusions both apply to exclude any potential coverage.”). The trial court did not expressly analyze whether or not Appellants had met their initial burden of proving coverage in the first instance but went straight to the applicable policy exclusions. ILM will address those exclusions in Section II., B, below.

2. Procedural argument made by Appellants regarding the exclusions

Before addressing the merits of the policy exclusions, Appellants raise an argument, made now for the first time on appeal (in Point II of their brief), that the trial court erred “because it permitted ILM to rely on the workers’ compensation and employer exclusions, L.F. 446-56, which were not even used by ILM at the time of declination, L.F. 61-81” Appellants’ Subst. Brf., 48. This argument fails both procedurally and on the merits.

This argument fails procedurally because it was never preserved or raised by Appellants before the trial court. First, this argument was never preserved because, in denying the equitable garnishment claim in its answer, ILM expressly alleged as affirmative defenses that the workers compensation and employer liability exclusions applied. L.F., 23. ILM likewise raised these policy exclusions in its counterclaim on the issue of coverage. L.F., 30. Yet Appellants, in responding to ILM’s answer and counterclaim, raised no allegation or issue that ILM was somehow “precluded” from raising these policy defenses, as it now argues. See L.F., 33-34. By failing to raise this defense in the pleadings Appellants failed to preserve this issue for review. See *Zundel v. Bommarito*, 778 S.W.2d 954, 957 (Mo.App. 1989). Moreover, as a prerequisite to raising this “preclusion” argument on appeal Appellants bear the burden of showing that they at least raised this argument before the trial court as a part of the parties’ cross-motions for summary judgment. See, e.g., *Kamerick v. Doman*, 907 S.W.2d 264, 266 (Mo.App. 1995)

("[O]ne may not rely on an argument he failed to raise in the court below."). This new argument advanced by Appellants, that ILM is somehow precluded from relying upon the workers compensation and employer liability exclusions, see Appellants' Subst. Brf., 48-49, is procedurally fatally defective.

Moreover, even looking at the merits of the argument, it is inconceivable that Appellants now want to judge the language of ILM's coverage denial letters issued in September 2008 as to a claim that was later asserted against Flowers in March 2012. At the time of the coverage denial ILM had not been made aware of any claim against Flowers for negligence in breaching the employer's nondelegable duty. The first opportunity ILM had to raise exclusions related to the new claim against Flowers was in its answer to the equitable garnishment petition.

Because ILM never refused to defend Flowers on the claim that was actually presented against him in the wrongful death trial, Appellants' citations to *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700 (Mo. banc 2011) and *Hiar Holding* are, accordingly, misplaced. See Appellants' Subst. Brf., 48-49. In *Schmitz* this Court held that an insurer is bound by the result of litigation against its insured where the insurer "unjustifiably refuses to defend and to provide coverage." 337 S.W.3d at 710. Yet here ILM was never even asked to defend or cover the claim against Flowers for which a judgment was taken against him, so ILM could not have

“unjustifiably refused” to defend or cover that claim. *Hiar Holding* is no different because it also involved a “wrongful refusal to defend,” see 411 S.W.3d at 272-73, whereas here ILM was not even given notice of the claim at issue. Contrary to Appellants’ suggestion, neither *Schmitz* nor *Hiar Holding*, nor any other Missouri case, stands for the proposition that there can be a “wrongful refusal to defend” on a claim of which the insurer was not even aware.

B. The Circuit Court Correctly Ruled that the Workers Compensation and Employer’s Liability Exclusions Preclude Coverage [Points III-V]

The circuit court found that, on the face of the underlying Reynolds County judgment, “the judgment is not covered under ILM’s policies because the workers compensation and employer liability exclusions both apply to exclude any potential coverage.” L.F., 450. The circuit court correctly applied these exclusions.

1. Workers Compensation Exclusion

In Points III, IV and V, Appellants assert various arguments as to why they believe the circuit court erred in finding the workers compensation exclusion in the policies applied to exclude any potential coverage.⁹

⁹ Appellants flip-flop back and forth in Points III, IV and V in discussing the workers compensation and employer’s liability exclusions. Because the exclusions are separate, and to avoid confusing the two, ILM addresses them separately.

With regard to the CGL policy, exclusion 2.d. provides that “[t]his insurance does not apply to: . . . Any obligation of the insured under a workers compensation . . . law.” L.F., 135. Similarly, the commercial umbrella policy, at exclusion B., provides that “[t]his insurance does not apply to: Any obligation for which the insured or any carrier as his insurer may be held liable under any Workers’ Compensation . . . law.” L.F., 156.

Appellants first argue that the workers compensation exclusion could only apply to a civil claim against “the entity that could be subject to liability” under the workers compensation act, i.e., the Corporation. Appellant’s Subst. Brf., 59. Yet Appellants cite no legal authority whatsoever for this self-serving analysis. Indeed, not only do Appellants fail to cite a single case for their analysis that the workers compensation exclusion can only apply to the Corporation, Appellants give almost no attention to the case expressly relied upon by the circuit court with regard to this exclusion, *Gear Automotive, L.L.C. v. Acceptance Indem. Ins. Co.*, 2012 WL 1833892 (W.D.Mo. May 18, 2012). See A-6; L.F., 451.

The court in *Gear Automotive*, in turn, cited to and quoted from *United Fire & Casualty Co. v. Lipps*, 2009 WL 2143766 (E.D.Mo. 2009) (which was also quoted by the circuit court below – see Judgment at A-6 – yet is also a case not mentioned by Appellants). In *Lipps*, decedent Donald Ray Seabaugh was an employee of Jerry Lipps, Inc., and died while in the course and scope of his

employment. *Id.* at *2. Seabaugh’s surviving wife pursued a claim under the Workers Compensation Act, and settled and compromised that claim. The survivors of decedent Seabaugh then filed a civil action against two defendants (one a corporation, the other an individual), and obtained a judgment for \$2.7 million. The Seabaugh survivors then attempted to collect on the judgment under a policy issued to Lipps.

The *Lipps* court held that the judgment that had been entered against the defendants in the underlying civil action involved a claim for breach of the general duty to provide a safe workplace, not a “something more” claim, such that the exclusivity provision of the Workers Compensation Act applied. *Id.* at *7. The *Lipps* court further held that the workers compensation exclusion in the policy (which exclusion is closely similar to ILM’s) applies to preclude a tort action where the workers compensation law applies to the injury. *Id.* at *6-7.

In the present case, it is undisputed that the Workers Compensation Act did apply to Ms. Nunley’s injury and death – indeed, Appellants recovered a benefit under the Act as a result of her injury and death. The duty of Flowers to provide a safe work environment to Nunley was an “obligation of the insured [Flowers] under a workers compensation [law]” and, therefore, the workers compensation exclusion applies. And while Appellants may well believe that the benefit

conferred to the surviving adult children of a worker who dies on the job is insufficient, that is a matter for the Missouri legislature to address.

This Court in *Burns v. Smith* expressly held that a corporate officer or supervisory employee “has immunity under the workmen’s compensation law where his negligence is based upon a general non-delegable duty of the employer.” 214 S.W.3d at 338. The negligence for which Flowers was found liable in the judgment was based upon a general non-delegable duty of Missouri Hardwood Charcoal – the duty to provide a safe work environment. L.F., 126-27. Even if one assumes that Flowers met the definition of an “insured” as an executive officer exercising officer duties, the judgment against Flowers was for an “obligation” that could only be imposed under Missouri’s Workers Compensation Act (against the Corporation) because Flowers himself has personal immunity for the injury to Nunley. As such, the judgment is subject to the workers compensation law exclusion.

As the circuit court noted, Appellants’ entire case is an attempt to negate the “sharp line” between insurance coverage for injuries to employees as opposed to members of the general public, see Judgment, A-5; L.F., 450 (quoting *American Family Mut. Ins. Co. v. Tickle*, 99 S.W.3d 25, 29 (Mo.App. 2003)), and to force fit liability insurance coverage onto an on-the-job injury arising from breach of an employer’s nondelegable duties. This is exactly what the workers compensation

exclusion is designed to prevent – coverage under a liability insurance policy for an injury that arises from an obligation (a safe workplace) owed under workers compensation law. Other courts outside of Missouri have similarly held. See, e.g., *Morales v. Zenith Ins. Co.*, 2012 WL 124086 (M.D.Fla. 2012); *Johnson v. Marciniak*, 231 F.Supp.2d 958 (D.N.D. 2002); *Brown v. Indiana Ins. Co.*, 184 S.W.3d 528 (Ky. 2005). Appellants’ point fails.

2. Employer Liability Exclusion

Exclusion 2.e. of the CGL policy excludes coverage for “bodily injury” to:

- (1) An “employee” of the insured arising out of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured’s business; or
- (2) The spouse, child, parent, brother or sister of that “employee” as a consequence of paragraph (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity.

L.F., 135 (emphasis added). The commercial umbrella policy contains a similar exclusion. L.F., 158.

In Points III-V of their brief, Appellants raise several contentions arguing the circuit court erred in applying the employer’s liability exclusion. ILM will attempt to address these arguments in the order raised by Appellants.

a. Severability

First, in Point III, Appellants argue that the trial court “conflated” Flowers with the Corporation and misapplied the rules of policy construction that require exclusions to be read narrowly. Appellants’ Subst. Brf., 53. However, the plain language of the exclusion states that the insured does not have to be the “employer” of the injured employee for the exclusion to apply. The exclusion applies if the insured, Flowers, is liable “in any other capacity” for the employee’s injuries. Here, Flowers was found liable as an executive officer for breach of the Corporation’s nondelegable duty to provide a safe workplace. The exclusion is plain and unambiguous and applies to the present facts.

Next, in Point III, Appellants argue that the severability provision in the CGL and commercial umbrella policies required the policies to be applied separately to Flowers; and at the same time suggest Flowers – although determined by the trial court under the undisputed facts to be, in substance, Nunley’s employer (see A-7) – was not the “actual” employer of Nunley, such that the employer’s liability exclusions could not apply. Appellants’ Subst. Brf., 51.

Yet the severability clauses in the policies do not preclude application of the exclusions under the facts.

Appellants rely upon *Baker v. DePew*, 860 S.W.2d 318 (Mo. banc 1993), but that reliance is misplaced. To correctly understand Missouri law on this issue, the Court needs to first consider *Simpson v. American Auto. Ins. Co.*, 327 S.W.2d 519 (Mo.App. 1959).

In *Simpson*, a man named Ogle was injured by Simpson, a fellow employee. The appeal centered on whether a liability insurance policy covered Simpson for the injury. Under the facts, Ogle was an employee of the named insured corporation, not Simpson. Simpson was an “insured” under the policy by virtue of the additional insured provisions. The liability insurance policy at issue had a similar employer’s liability exclusion to the one in ILM’s policies. 327 S.W.2d at 522. The issue in the case was whether the exclusion was inapplicable because Ogle was not an employee of Simpson, the insured tortfeasor. The *Simpson* court specifically noted that there was a split in authority throughout the United States as to whether the exclusion applies so long as the injured person is an employee of the named insured (regardless of whether a co-employee was the actual tortfeasor), or whether the exclusion only applies to the named insured that actually employs the injured person. *Id.* at 526-27. Analyzing the two lines of authority, the *Simpson* court rejected the line of authority relied upon by Appellants here. Rather, the

Simpson court sided with the line of authority holding that the employer’s liability exclusion “is applicable in any case where the injured party [here, Nunley] is an employee of any person entitled to insurance protection under the policy [here, Missouri Hardwood Charcoal], notwithstanding the fact that the actual employer has not been charged with liability.” *Id.* at 527. The *Simpson* court reasoned that the additional insured

should have no more protection under the policy than the primary insureds.

The purpose of Exclusion clause (c) was to withdraw from coverage certain injuries, namely, ‘bodily injury to * * * any employee of the insured while engaged in the employment, * * * of the insured * * *.’ The injury forming the basis of this litigation was Ogle’s injury sustained while in the employ of the [named] insured, Aero.

Id. at 528.

Although *Simpson* did not involve a policy with a severability clause, the presence of severability clauses in the ILM policies does not change the result, as Appellants suggest. The severability clauses simply mean that the term “insured” in the exclusion refers only to Flowers, and not to the Corporation. *Shelter Mut. Ins. Co. v. Brooks*, 693 S.W.2d 810 (Mo. banc 1985). As already shown, however, when Flowers is inserted for the term “insured” in the exclusion, the exclusion applies on its face because Flowers was found liable for the death of Nunley

“arising out of [his] [p]erforming duties related to the conduct of the insured’s business.” L.F., 135. As the trial court found under the “undisputed facts,” Missouri Hardwood Charcoal “was Flowers’ business.” A-7.

Appellants’ citations to *Baker v. Depew* and *Bituminous Cas. Corp. v. Aetna Life and Cas. Co.*, 599 S.W.2d 516 (Mo.App. 1980), are offpoint. *Baker v. Depew* involved application of a “fellow employee” exclusion, and not an employer’s liability exclusion and, for that reason alone, is distinguishable. See 860 S.W.2d at 321. As well, the employer liability exclusion referenced in *Baker v. Depew* was differently worded than the one before the Court here which applies whether Flowers may be liable as an employer “or in any other capacity.” Compare 860 S.W.2d at 320 to L.F., 135.

Importantly, in contrast to the present case, neither *Baker* nor *Bituminous* involved a claim against a corporate officer for a non-delegable duty of the employer.

Moreover, Appellants quote *Bituminous* approvingly but apparently do not perceive that it deals a deathblow to their case. This Court in *Bituminous* (which was in turn quoting *General Aviation Supply Co. v. Insurance Co. of North America*, 181 F.Supp. 380, 384 (E.D.Mo. 1960)), stated:

The logical theory for the employee exclusion is to prevent employees of the tortfeasor from suing his employer for injuries received through his

employer's negligence. A reason for this is that employees are usually covered by workmen's compensation and can recover from the employer, with or without negligence. When negligence is committed by other than his employer, the logic for the exclusion disappears.

Bituminous, 599 S.W.2d at 520.

This is precisely the case here. Here, the judgment against Flowers was for breach of the employer's non-delegable duty to provide a safe workplace. Nunley received an injury through her employer's negligence. And, her injury was covered by workers compensation. While Appellants may have an issue with the legislature's minimal benefit conferred under workers compensation to the adult children of an employee who is killed on the job, that is a matter to be resolved by the legislature, not by rewriting the insurance contracts here.

In short, the severability clause in the CGL policy does not avoid application of the employer's liability exclusion in the policy. Viewing the coverage separately as to Flowers, the exclusion applies either because Ms. Nunley was an employee of Missouri Hardwood Charcoal (i.e., *Simpson*), or because Ms. Nunley was an employee of the insured, Flowers, for purposes of the exclusion whether Flowers was liable as her employer "or in any other capacity." Here, Flowers was liable for her workplace injury under the employer's non-delegable duty and, accordingly, the exclusion applies.

Other cases cited by Appellants under Point III are inapplicable. For instance, *Zenti v. Home Ins. Co.*, 262 N.W.2d 588 (Ia. 1978), was expressly rejected by the court in *Bituminous* in favor of the holding in *Simpson*. See *Bituminous*, 599 S.W.2d at 520, n. 2. The severability clause does not defeat the employer's liability exclusion under the present facts.

A final argument made by Appellants under Point III is that, because Flowers himself was not encompassed by the definition of "you" under the policy, the employer liability exclusion could not apply to him. Appellants' Subst. Brf., 60-61.

The short answer to this argument is that this entire argument is misplaced because the employer liability exclusion does not utilize or refer to "you" so there is no reason to discuss the definition of "you" in applying the exclusion.

Appellants try to draw the definition of "you" into the exclusion by turning to the definition of "employee" in the policy, but that definition simply says that "employee" includes a 'leased worker.' 'Employee does not include a temporary worker.'" L.F., 146 (emphasis added). Contrary to Appellants' suggestion, however, this definition plainly is not attempting to exhaustively define the entire universe of "employee" but, rather, merely clarifying that the universe of "employee" includes leased workers but not temporary workers. Contrary to Appellants' attempts to distort and rewrite the policy, Ms. Nunley could certainly

be an “employee of the insured [Flowers]” for purposes of the employer liability exclusion (i.e., for purposes of this liability contract) because Flowers was held liable under the wrongful death judgment for a nondelegable duty of the Corporation, and the exclusion applies whether Flowers is liable “as an employer or in any other capacity.” L.F., 135.

b. Collateral attack

In Point IV, Appellants argue that “whether Flowers was in effect the employer and whether the action was a ‘non-delegable duty unsafe workplace case’ were affirmative defenses in the wrongful death case,” and that the judgment in that case could not be “collaterally attacked” in the judgment below. Appellants’ Subst. Brf., 62. Appellants’ argument fails for multiple reasons.

First, the question of whether or not Nunley was an employee of Flowers for purposes of the Reynolds County case is a separate question from whether or not Nunley was an employee of Flowers under the terms of the policies. ILM had every right to litigate, in the circuit court below, the issue of whether Nunley was an “employee” of Flowers for purposes of the employer liability exclusions in the policies. Such an issue could not have been determined in the underlying Reynolds County action because it was not an action for coverage under the policies. ILM is in no way seeking to “collaterally attack” or to relitigate the issues tried in the Reynolds County action because it is not trying to avoid the judgment of liability

against Flowers. See *Assurance Co. of America v. Secura Ins. Co.*, 384 S.W.3d 224, 232 (Mo.App.E.D. 2012).

Second, the issue of whether or not Flowers was the employer of Ms. Nunley for purposes of the policy exclusion was not an issue joined for trial in the Reynolds County action. Certainly if this Court agrees with the trial court that there was an amendment of the Appellants' claim at trial then the facts show that Flowers never filed any answer, or asserted any defenses, to the amended claim. L.F., 282-31. Rather, Flowers essentially remained mute at the trial involving the amended claim. *Id.* Alternatively, if Flowers' previously filed answer in the Reynolds County action had any effect at the Reynolds County trial then a plain reading of Flowers' answer shows that whether or not Flowers was improperly sued for a nondelegable duty of the Corporation was not raised in his answer. See L.F., 255. Flowers' casual reference in his answer to *Murray v. Mercantile Bank*, 34 S.W.3d 193 (Mo.App. 2000), see L.F., 255, was at best a defense "that the workers' compensation law is the exclusive avenue for relief available to Plaintiffs" because Flowers was not Ms. Nunley's "supervisor." *Heirien v. Flowers*, 343 S.W.3d at 700. Flowers asserted no affirmative defense that he himself was Ms. Nunley's employer. L.F., 254-58. Appellants' contention that the circuit court below "re-litigated a question that was necessary to the wrongful

death court's liability and its rejection of Flowers' affirmative defenses" (Appellants' Subst. Brf., 66) is simply untrue.

Collateral estoppel requires proof that "the issue decided in prior litigation must be identical to the issue presented in the present action." *Adams v. Inman*, 892 S.W.2d 651, 654 (Mo.App. 1994). Appellants have failed to prove collateral estoppel applies.

Finally, this argument is yet another instance of Appellants raising a defense that was never preserved in the pleadings below. Collateral estoppel is an affirmative defense. *Ronollo v. Jacobs*, 775 S.W.2d 121, 124 (Mo. banc 1989). "Failure to plead an affirmative defense results in waiver of that defense." *Lake Wauwanoka, Inc. v. Anton*, 277 S.W.3d 298, 300 (Mo.App. E.D.2009). In responding to ILM's declaratory judgment counterclaim below, Appellants did not raise any defense of collateral estoppel. L.F., 33-34.

c. Appellants' argument that Flowers was an "employee"

Appellants argue in Point V that the circuit court erred in finding, based on the evidence in the Reynolds County action, that Flowers was "in substance" the "employer" of Ms. Nunley for purposes of the exclusion. A-8; L.F., 452.

First, before addressing Appellants' argument, it is important to note that Appellants do not in any way contest the factual finding of the circuit court in which the circuit court assessed the "undisputed evidence" proved by Appellants at

their Reynolds County trial regarding Flowers' position with and control of the Corporation. See A-7; L.F., 452 (trial court findings of fact) and Appellants' Subst. Brf., 68-70.

Second, in addressing this argument, it should not go without notice to the Court the manner in which Appellants have tried at every turn to manipulate the facts to wiggle into coverage under ILM's policies. Initially they filed a wrongful death petition under a "something more" theory asserting Flowers' was a co-employee of Ms. Nunley. Then they proceeded to go to trial against Flowers in Reynolds County by affirmatively putting on evidence that Flowers was "not a co-employee of Linda Nunley at any time." L.F., 124 (emphasis added). Now Appellants come before this Court asserting that their representations to the Reynolds County court apparently were meaningless and argue that Flowers "is most accurately characterized as an 'employee,' at least with respect to strictly construing the 'employer' liability exclusion" in ILM's policies. Appellants' Subst. Brf., 69.

As well, the Court should consider the fact that Appellants themselves "proved" at the Reynolds County trial that Flowers "was not an employee of Missouri Hardwood Charcoal, Inc. at any time" (L.F., 124) – and yet Flowers was found liable for breach of a non-delegable duty of the Corporation. It would seem

that Appellants themselves “proved” at the Reynolds County trial that Flowers was, in effect, Nunley’s employer.

But regardless of whether Flowers was Nunley’s “employer,” the employer liability exclusion in ILM’s policies applies “[w]hether the insured [Flowers] may be liable as an employer or in any other capacity.” L.F., 135 (emphasis added). Although proof of “employer” status would have been sufficient for application of the exclusion, it was not necessary for the circuit court below to find that Flowers was, in effect, the “employer” of Nunley. All that needed to be found was that Flowers had been held liable for Nunley’s injury and death arising out of her performing of duties related to the conduct of Flowers’ business. The circuit court below did not “re-litigate” what had been proved in Reynolds County but, rather, applied that same evidence.

Appellants assert that “Missouri courts turn to workers’ compensation law in construing whether a person is an ‘employee’ under liability policies.” Appellants’ Subst. Brf., 68. That is what the circuit court did. The court found that “Missouri workers’ compensation law recognizes an ‘employer’ as a ‘person . . . using the service of another for pay.’ RSMo. §287.030.1.” L.F., 453. And, “[b]ecause Flowers had absolute control over Missouri Hardwood Charcoal he was, in substance, using the services of Nunley.” *Id.*

Indeed, recently, in *Wyman v. Missouri Dept. of Mental Health*, 376 S.W.3d 16 (Mo.App.W.D. 2012), the Missouri Court of Appeals suggested that an individual could be deemed an “employer” of another under certain circumstances, although the facts in *Wyman* did not present those circumstances. While noting that “a fellow employee could not be an ‘employer’ under the Act,” citing *Robinson v. Hooker*, 323 S.W.3d 418 (Mo.App.W.D. 2010), the court suggested that an individual like Flowers could be an “employer” under the act if he used the services of another for pay and had five or more employees. 376 S.W.3d at 25. In the present case Appellants made clear in the underlying trial, and the Reynolds County court found in its judgment, that Flowers was not a fellow employee of Nunley’s. While “[a]n individual cannot be both an employer and an employee for purposes of the Workers’ Compensation Law,” *State ex rel. Mann v. Conklin*, 181 S.W.2d 224, 227 (Mo.App.S.D. 2005), here it is uncontroverted based on the facts proved by Appellants in the Reynolds County trial that Flowers was not an “employee” of the Corporation.

Finally, Appellants’ cite to *Lynn v. Lloyd A. Lynn, Inc.*, 493 S.W.2d 363 (Mo. banc 1973) for the proposition that Flowers, as an executive officer, was an “employee” of the Corporation for worker’s compensation purposes. See Appellants’ Subst. Brf., 69-70. The issue in *Lynn* was whether a corporate officer was an “employee” under §287.020, RSMo. (1969 Supp.) in relation to his own

injury on the job. Here, the question is not whether Flowers was an “employee” under the Workers Compensation Act for purposes of receiving benefits so *Lynn* is inapplicable.

d. Appellants’ “piercing the veil” argument

The judgment against Flowers was in his capacity “as president, executive officer, and director of Missouri Hardwood Charcoal, Inc.” L.F., 127. In his unique role in the Corporation as corporate officer, sole director, sole owner, and every other position of authority, Missouri Hardwood Charcoal, Inc. was Flowers’ business. The circuit court determined that, under the undisputed facts from the Reynolds County action, “Missouri Hardwood Charcoal was Flowers’ business. He owned it. He controlled it. He was the sole officer and director.” L.F., 452 (emphasis added). Accordingly, the court correctly concluded that, “[u]nder these facts, to the extent that Flowers was negligent in failing to provide a safe work environment to Nunley (as stated in the judgment) then Nunley was, in substance, “an ‘employee’ of the insured [Flowers]” for purposes of the employer liability exclusion, “and her injury and death arose out of Flowers’ ‘performing duties related to the conduct of the insured’s business.’” L.F., 452.

In Point VI, Appellants argue that the circuit court somehow misapplied a “piercing the corporate veil analysis” in finding that the employer’s liability exclusion in the policy applied to Flowers. Appellants’ Subst. Brf., 70-73. Yet the

circuit court did not attempt to apply such an analysis. Rather, the circuit court examined whether Flowers was liable for the death of Ms. Nunley “as an employer or in any other capacity” as set forth in the employer’s liability exclusion. L.F., 135. The policy does not require application of a “piercing the corporate veil” analysis to make this determination. Instead, the court merely was required to examine whether Ms. Nunley’s death arose of either “(a) Employment by the insured; or (b) Performing duties related to the conduct of the insured’s business.” L.F., 135, 451. Finding that, in the Reynolds County judgment, Flowers was liable for a nondelegable duty of the Corporation, the court had no hesitancy in finding that had been determined liable “as an employer or in any other capacity” such that the exclusion applied. Appellants’ piercing the corporate veil argument is entirely misplaced.

Finally, it should be noted that Appellants do not disagree with the factual findings by the trial court. Rather, Appellants argue that ILM should have been aware of these same facts and should have raised them in its declination of coverage letters. See Appellants’ Subst. Brf., 71. The problem with Appellants’ argument, as mentioned before, is that, at the time of the declination of coverage letters, Flowers had not yet been sued in his capacity as an executive officer of the Corporation for breaching an officer duty. That did not occur until the amendment

of the claim at the trial in Reynolds County. ILM cannot be deemed to have waived any coverage defense on a claim that had not yet been made.

III. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THERE HAD BEEN NO BREACH BY ILM OF A DUTY TO DEFEND FLOWERS UNDER THE ORIGINAL REYNOLDS COUNTY PETITION

In Point I of their brief, Appellants contend there was a breach by ILM of the duty to defend Flowers under the original Reynolds County petition. Appellants make several arguments under this point, which ILM will attempt to address each argument in turn.

Before addressing Appellants' arguments it is again important to point out to the Court that, if the Court agrees with the trial court that there was an amendment to Appellants' wrongful death claim without notice to ILM, then we are dealing with the question of whether there was a duty to defend an abandoned claim. ILM insists that there was no duty to defend the abandoned claim because there was no possibility of coverage under its policies for the claim (that's why Appellants amended their claim, in an attempt to try to invoke coverage). But, as will be further shown, even if there was a possibility of coverage such that there was a duty to defend the original petition, Appellants have not shown any damages from any such breach. It is conceivable that Flowers' cost of defending the abandoned

claim could potentially be actionable on such a claim but Appellants have never asserted any such costs as damages in in this garnishment case.

Moreover, as has been shown previously, after declining to defend the original petition (because Flowers was not an insured for causing injuries to co-employees), ILM was still entitled to assess coverage under the new claim that was made at trial. See, e.g., *Inman*, 347 S.W.3d at 580 (insurer who refused to defend original petition was entitled to reassess coverage position under amended petition). ILM could not have breached a duty to defend the amended claim because it was never made aware of it. So, the only issue before the Court is whether there was a breach of the duty to defend the abandoned claim.

A. The duty to defend is based on the claim actually made

Appellants filed a petition against Flowers in Reynolds County expressly alleging a “something more” claim against Flowers. L.F., 56-59. As the Missouri Court of Appeals explained in *Trainwreck West, Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33, 41-42 (Mo.App. 2007), the plaintiff is the “master” of the petition and the duty to defend is based on the claim actually made, not what the claim could potentially evolve or change into:

Initially, any analysis of a duty to defend begins with the plaintiff’s petition. See *Standard Artificial Limb, Inc. v. Allianz Ins. Co.*, 895 S.W.2d 205, 210 (Mo.App. E.D.1995). “The obligation of the insurer to defend

arises only as to claims and suits for damages covered by the terms of the policy.” *Benningfield v. Avemco Ins. Co.*, 561 S.W.2d 736, 737 (Mo.App.K.C.1978). The “plaintiff is the master of the [petition], and if [he or she] does not seek covered damages, there is no duty to defend even if these facts could support such damages.” William T. Barker, *When Can Extrinsic Evidence Defeat the Duty to Defend?* in *New Appleman on Insurance: Current Critical Issues in Insurance Law* III.C (April 2007). The “insurer’s duty to defend depends upon the pleaded theories upon which plaintiff announces ready for trial.” *Appleman on Insurance* § 4684. An insurer does not have a duty to defend a suit where the petition “upon its face alleges a state of facts which fail to bring the case within the coverage of the policy.” *Couch on Insurance* § 51:45. (Emphasis added).

In Missouri, the “pleaded theories upon which plaintiff announces ready for trial” are no mystery because of Missouri’s fact pleading requirement. Under this requirement a petition must allege the “ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial.” *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo.App. 2003). So, while an insurer “cannot ignore safely actual facts known to it or which could be known to it or which could be known from reasonable investigation,” *Trainwreck*, 235 S.W.3d at 42, that principle relates to

additional facts to be considered as to the claim actually pleaded, not some other claim that could possibly be made.

Appellants’ original Reynolds County petition was a “something more” claim alleging that Flowers breached a personal duty of care owed to Ms. Nunley and Appellants. As ILM has shown previously (see sections I.A and B), the original claim against Flowers was not one against him in his capacity as an executive officer of the Corporation for breach of an executive officer duty but, rather, was a claim against him for breach of a personal duty of care, a “something more” claim. Appellants’ original Reynolds County petition makes no allegation that Flowers was being sued in his capacity as an executive officer of the Corporation. L.F., 56-59. As stated in *Gunnett v. Girardier Bldg. and Realty Co.*, 70 S.W.3d 632, 637 (Mo.App. 2002), “it is not simply the existence of a duty on the part of the co-employee, but the nature of the duty involved which is key in determining whether a co-employee may be held liable.”

B. ILM owed no duty to defend Flowers under the original petition for breach of an officer duty because no such breach was alleged

Section II.1.d. of ILM’s CGL policy insured Flowers as an “executive officer,” “but only with respect to [his] duties as [the Corporation’s] executive officer or director.” L.F., 142 (emphasis added); see L.F., 154 (commercial umbrella policy language). Yet, it is axiomatic that Appellants’ “something more”

claim sought to impose liability on Flowers not for actions taken on behalf of the Corporation but for breaching a personal duty of care owed to Ms. Nunley. Under Section II.1.d. of ILM's policy, Flowers was not an "insured" for breaches of personal duties of care.

Appellants' citation to *Martin v. United States Fid. & Guar. Co.*, 996 S.W.2d 506 (Mo. banc 1999) is, therefore, unavailing. *Martin* is inapplicable, and unhelpful, because the issue there was whether or not the defendant who injured a co-employee was an "executive officer" within the meaning of the insurer's policy and, therefore, covered under the policy in that capacity. *Martin* did not hold that "executive officers" automatically have coverage under a CGL policy "in performing any work-related conduct," as Appellants argue. Appellants' Subst. Brf., 36 (emphasis in original). After finding that the policy was ambiguous as to whether or not the employee was an "executive officer" the Court in *Martin* went on to hold that the policy was ambiguous as to whether or not the conduct of the employee fell within his duties as an officer. 996 S.W.2d at 510. *Martin* did not involve a "something more" claim or a purely personal duty of care, as is involved here. *Martin* has not been cited in any "something more" cases involving executive officers.

Tri-S Corp. v. Western World Ins. Co., 135 P.3d 82 (Ha. 2006), also cited by Appellants, is also distinguishable. See Appellants' Subst. Brf., 40. *Tri-S Corp.*

was a case in which the executive officer of the corporation was sued in his capacity as an executive officer for failing to provide a safe workplace to an employee who was killed. See 135 P.3d at 87 (“The suit alleged that Taft [the executive officer] had a duty to provide a safe workplace for Rapoza and willfully and wantonly breached that duty by failing to implement certain safety standards.”). In other words, *Tri S Corp.* involved the same time of claim as the amended claim asserted by Appellants against Flowers at trial in the Reynolds County action, not the claim made against Flowers in the original Reynolds County petition. *Tri-S Corp.*, therefore, is inapposite with regard to the duty to defend issue at hand.

C. Flowers was not an insured for injury to a co-employee

Beyond not meeting the definition of “Who Is An Insured” under section II.1.d of the CGL policy (for officers, directors, and stockholders, but only with respect to their duties as such), Flowers was not an “insured” under section II.2 of the CGL policy for co-employee liability. Section II.2 identifies as an “insured” the Corporation’s “employees” for any acts within the scope of their employment, or any acts related to the Corporation’s business, but not as to any bodily injury to a co-“employee” while in the course of her employment or performance of duties related to the Corporation’s business. See L.F., 142-43.

It is uncontroverted that Appellants’ original Reynolds County petition – although it alleged no duty breached by Flowers in his capacity as an officer or

director of the Corporation – did allege Flowers was negligent in his capacity as a co-employee of Nunley. L.F., 57. In addition, it is uncontroverted that the petition alleged that Flowers was acting within the scope of his employment or performance of duties for the Corporation. *Id.* It is also uncontroverted that the underlying petition alleged that Nunley was injured and killed while within the scope of her employment or performance of duties for the Corporation. *Id.* The petition, therefore, alleged a claim against Flowers for which he was not an insured under the policy pursuant to section II.2 of the policy.

Nearly identical language as section II.2 of the ILM policy was found to be clear and unambiguous, and precluded coverage for an alleged co-employee like Flowers, in *Selimanovic v. Finney*, 337 S.W.3d 30 (Mo.App.E.D. 2011), a case referenced by the trial court. See A-8; L.F., 453. In *Selimanovic* the policy language similarly provided:

SECTION II—WHO IS AN INSURED

* * *

2. Each of the following is also an insured:
 - a. Your “employees”, ... but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these “employees” is an insured for:
 - (1) “Bodily injury” or “personal injury”;

(a) To you, ... or to a co-“employee” while that co-“employee” is either in the course of his or her employment or performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-“employee” as a consequence of paragraph (1)(a) above;....

337 S.W.3d at 36.

The *Selimanovic* court then held: “In sum, the CGL policy clearly and unambiguously provides that a deceased employee’s co-employees are not insureds for wrongful death claims brought by the deceased employee’s survivors.” *Id.* at 38. The *Selimanovic* court even commented that “Plaintiffs do not point to any language in the CGL policy or any relevant case law that supports their argument that ‘something more’ cases against co-employees are covered by the CGL policy.” *Id.* Again, that is precisely what the original claim was against Flowers in the underlying petition – a “something more” claim against an alleged co-employee.

Appellants complain that the lack of coverage for Flowers under the CGL and umbrella policies for the on-the-job injury to Ms. Nunley somehow renders the policies “illusory.” Appellants’ Subst. Brf., 39. Yet, that is the whole point of the “sharp line” between workers compensation and employer liability policies:

Such exclusions developed alongside workers' compensation law to draw a "sharp line" between liability to employees and to the general public.

American Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 29 (Mo.App.2003).

Injured employees get workers' compensation, while CGL insures a company's liability to the public. *Id.* Employee policy exclusions protect employers who have provided workers' compensation benefits from being twice liable to a worker for the same incident. *Gavan v. Bituminous Cos.*

Corp., 242 S.W.3d 718, 721–22 (Mo. banc 2008).

Southerly v. United Fire & Casualty Company, __ S.W.3d __, 2014 WL 5439622,

* 1 (Mo.App.S.D. Oct. 27, 2014).

Here, again, Appellants, as adult heirs of the decedent, Ms. Nunley, have recovered the extent of the benefit available under the workers compensation system for Ms. Nunley's on-the-job injury. The lack of coverage for Flowers under ILM's policies is not illusory but consistent with the rule of law for on-the-job injuries.

D. If Appellants' breach of duty to defend claim does not fail as a matter of law, then at best Appellants are entitled to remand on questions of fact

If Appellants' breach of duty to defend claim does not fail as a matter of law, for the reasons expressed by ILM above, then at best Appellants would be

entitled to a remand solely for the finder of fact to determine whether or not the alleged negligent conduct of Flowers set forth in Appellants' original Reynold County petition came within his "duties as an executive officer" of the Corporation. Again, because the judgment is not covered under ILM's policies such that the trial court's judgment on the equitable garnishment claim must be affirmed, this would simply be to determine whether there was a breach of a duty to defend, and whether there were any damages attendant thereto.

Contrary to Appellants' argument, *Martin and Middlesex Mut. Assur. Co. v. Fish*, 738 F.Supp.2d 124 (D.Maine 2010), do not stand for the proposition that "all work-related activities performed by executive officers" are performed in fulfillment of an executive officers' duties to their corporations. See Appellants' Subst. Brf., 41. For instance, in *Middlesex*, the court looked to the facts relating to the insured's duties "in these circumstances" to determine the scope of the executive officer's duties. 738 F.Supp.2d at 134. See also *Holderness v. State Farm Fire & Cas. Co.*, 24 P.3d 1235, 1243 (Alaska 2001) (court should first look to "case-specific evidence" regarding the range of duties of the officer in that capacity).

Likewise, the following proposed statement of the law championed by Appellants is not found in any case (at least not in any case cited by Appellants, or of which ILM is aware):

Any way a workplace negligence claim is framed against the executive officer for job conduct (depending on whichever state’s negligence law is implicated), there is coverage under the standard ISO form policy.

Appellants’ Subst. Brf., 42 (emphasis in original).

Even the cases cited by Appellants do not suggest such a proposition but, instead, look to the facts of the case regarding the scope of the executive officer’s duties for the particular corporation. See *Middlesex*, 738 F.Supp.2d at 134; *Holderness*, 24 P.3d at 1243.

Here, the record shows that, as president of the Corporation, Flowers was required to “preside at all meetings of Shareholders and of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors from time to time.” L.F., 89. As president of the Corporation, Flowers could sign all conveyances and instruments executed in the names of the Corporation.” *Id.* At best for Appellants there are questions of fact as to whether the allegations in the original Reynolds County petition were part of Flowers’ executive officer duties.

E. There is no liability for the judgment

Finally, Appellants argue that a breach of the duty to defend Flowers under the abandoned Reynolds County petition would somehow make ILM liable for the Reynolds County judgment. See Appellants’ Subst. Brf., 44 (citing *Hiar Holding*, 411 S.W.3d at 265). Such certainly is not the case because the judgment – based on

a different claim against Flowers – did not “flow from” any conduct of ILM. See *Hiar Holding, Id.* at 265 (“The insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend.”). As previously shown in section I, above, ILM was not even made aware of the claim against Flowers that ultimately resulted in the judgment against him. Accordingly, the Reynolds County judgment did not flow from ILM’s refusal to defend the original, abandoned petition.

CONCLUSION

ILM submits, as shown throughout this brief, that the circuit court’s summary judgment should be affirmed. ILM disagrees with Appellants that, if for some reason this Court were to reverse the circuit court’s judgment, then this Court should enter judgment for Appellants. At worst, the case would be remanded to the circuit court for further proceedings to resolve any questions of fact that may have precluded summary judgment. See *Schroeder v. Duenke*, 265 A.W.3d 843, 850 (Mo.App.E.D. 2008).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), counsel for Respondent certifies that, to the best of his knowledge, information and belief, Respondent's Substitute Brief complies with the limitations contained Rule 84.04(b) and that the brief contains 18,349 words counted toward the applicable word limit as counted by Microsoft Word, and that this Brief is in 14 point Times New Roman font.

/s/John R. Weist _____

Date: November 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Respondent's Substitute Brief was served on Appellants' attorneys via the e-filing system on November 19, 2014 to: John Lake and Tom Pirmantgen, Lake Law Firm, LLC, 3401 West Truman Blvd., Jefferson, City, MO, 65109.

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