IN THE SUPREME COURT OF MISSOURI

KATINA PIATT,	)	
SALINA NELSON, and	)	
FREDERICK NUNLEY,	)	
	)	
Appellants,	)	
	)	
v.	)	**SC94364**
	)	
INDIANA LUMBERMENS MUTUAL	)	
INSURANCE COMPANY, and	)	
JUNIOR FLOWERS,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT
THE HONORABLE PATRICIA JOYCE, CIRCUIT JUDGE, DIVISION 4

APPELLANTS' SUBSTITUTE BRIEF

John Lake **#23472**
Tom Pirmantgen **#52384**
LAKE LAW FIRM, LLC
3401 West Truman Blvd.
Jefferson City MO 65109
Phone: 573-761-4790
Facsimile: 573-761-4220
E-Mail: tom@lakelawfirm.com
ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment entered by the trial court on cross-motions for summary judgment in favor of Respondent Indiana Lumbermens Mutual Insurance Company ("ILM") after briefing and argument. Appellants filed a breach of contract duty to defend and an equitable garnishment action seeking contract damages and coverage under ILM's commercial liability insurance policies for a wrongful death judgment entered in their favor and against ILM's insured in a previous action from the Circuit Court of Reynolds County, Missouri. The trial court concluded there was no breach of the duty to defend and also no coverage for that previous judgment based on two policy exclusions, and on a finding that the underlying wrongful death petition was amended to conform with evidence admitted in the wrongful death trial. This case requires this Court to construe and apply an insurance policy under Missouri law. This is an appeal by the parties aggrieved by a final judgment, thus this Court's jurisdiction is based on § 512.020.(5), RSMo (2000).

STATEMENT OF FACTS

I. The Underlying Wrongful Death Action

This is an equitable garnishment and breach of contract action seeking duty to defend damages and garnishment of the proceeds of a commercial general liability policy and umbrella policy issued by Indiana Lumbermens Mutual Insurance Company ("ILM") to several affiliated companies including Missouri Hardwood Charcoal, Inc. L.F. 12-18; 152. Flowers was the executive officer of Missouri Hardwood Charcoal. L.F. 80; 119; 123. The policies provide coverage for executive officers for their work-related duties. L.F. 142; 154. Flowers' work duties were to manage and control the corporation's property and business. L.F. 89.

Appellants' mother was killed while working at Missouri Hardwood Charcoal when a kiln door fell on her. L.F. 58; 123. Before this date Flowers was informed by an employee that the employee had previously seen a kiln door fall. L.F. 319 ¶ 20. On the date of the incident the wind was gusting up to 30 MPH. L.F. 317 ¶ 9. Appellants received the benefit available under Workers' Compensation Law from the employer Missouri Hardwood Charcoal, which was a $5,000.00 burial expense under § 287.240, RSMo. L.F. 447.

Appellants then commenced a wrongful death action against Flowers in Reynolds County, alleging he was negligent in ordering employees including their mother to lean the kiln door upright. L.F. 56-59; 447-48. Appellants did not yet know Flowers' specific capacity with the corporation so the petition alleged he had one or more capacities including "employee," "foreman," "supervisor," "site manager," and/or "agent." L.F. 57.

The petition alleged "[t]he practice of leaning the kiln doors against the buildings created hazards for the employees as the doors easily could fall or tip over on them." L.F. 57 ¶ 9. It also alleged Flowers himself as well as the corporation "were cited previously for violations of workplace safety laws and regulations regarding unsafe protection measures and practices." L.F. 58 ¶ 12. It further alleged Flowers "affirmatively and directly ordered the employees to place the doors upright despite [his] knowledge of the foregoing unsafe practices and conditions at the work site." L.F. 58 ¶ 13. The petition alleged Flowers' foregoing "affirmative acts of negligence breached the duty [he] owed to [appellants' decedent] and directly and proximately caused her death." L.F. 58 ¶ 18.

Flowers requested defense of the action from ILM. L.F. 60; 361. Three weeks later, without any investigation or talking to Flowers, ILM refused to defend. L.F. 61-69; 360-61. ILM determined a "co-employee" exclusion barred coverage based solely on the word "employee" in the petition. L.F. 63; 67; 76. ILM specifically wrote:

> The lawsuit alleges that Junior and Josh Flowers were acting in their capacity as employees of the insured when they instructed other employees to lean metal doors on the side of a building. . . . The CGL Policy states in Section II-2.a(1) that "employees" are not insureds for "bodily injury" to a co-"employee." Junior and Josh Flowers are not considered insureds. Therefore, under the CGL Policy, therefore there is no coverage for either defendant for the lawsuit.

L.F. 63.

So Flowers hired a lawyer to defend him in the negligence action and to deal with ILM on its declination. L.F. 70; 360. Flowers' lawyer gave information to ILM

establishing Flowers did not think of himself as an employee so the "co-employee" exclusion could not apply. L.F. 72. He specifically told ILM "Junior Flowers is not an employee of Missouri Hardwood Charcoal. . . ." L.F. 72. But ILM again refused to provide a defense, relying on the co-employee exclusion. L.F. 76. ILM contended "[a]s previously indicated . . . [t]he allegations in the lawsuit do not constitute a covered claim and therefore does not trigger ILM's duty to defend. . . . Our [previous] disclaimer correspondence . . . remains ILM's position." L.F. 76. The lawyer informing ILM that Flowers was not an employee did not stop it from relying on the employee exclusion. L.F. 76.

So Flowers' lawyer tried again with a different approach. L.F. 80. He obtained a copy of ILM's policy, and then clarified for ILM that not only was Flowers not an employee, he was the executive officer and manager of the corporation and was therefore potentially covered as such. L.F. 80. The lawyer directed ILM by page and section number to its language affording coverage for executive officers and managers. L.F. 80. He stated "I would direct your attention to Section II 2.A on page 9 of 16 of the commercial GL policy." L.F. 80. He said "[t]he language seems to clearly state that coverage is provided to executive officers and stockholders. Junior Flowers is both for Missouri Hardwood Charcoal." L.F. 81. He further explained the co-employee exclusion could not apply because "[i]t appears to me that suits by 'co-employees' are only disallowed if the defendant is defined as an employee or a volunteer worker. . . . I therefore think Junior Flowers has coverage as an executive officer, a stockholder and also as a manager of Missouri Hardwood Charcoal." L.F. 80.

This effort explaining the inapplicability of the co-employee exclusion and directing ILM to the very "executive officer" coverage provision at issue here ultimately failed too. L.F. 81; 92. In fact, once directed to the officer coverage, ILM made a deliberate decision to ignore it and not analyze the coverage despite the known facts that Flowers was the corporation's manager and executive officer. L.F. 92; Transfer App., p. 6 n.2.

ILM also dealt with Flowers as executive officer in the sales and underwriting of the policies, before any legal action. L.F. 360-61. ILM's internal documents, also pre-dating the lawsuit, state Flowers was president and manager of the parent company of Missouri Hardwood Charcoal. L.F. 73-75. ILM obtained Flowers' signature as "president" on its Coverage Acknowledgment Checklist. L.F. 75. The fact that Flowers was the executive officer of Missouri Hardwood Charcoal was also a matter of public record reflected in the required filing of an annual registration report with the Missouri Secretary of State's Office. L.F. 82.

Despite the fact that ILM knew Flowers was not a traditional employee of Missouri Hardwood Charcoal, Inc., and that he was instead the owner, president, executive officer, and manager who could potentially be subject to liability in those capacities, and despite the lawyer's citation of the section and page number providing coverage for executive officers in ILM's policy, ILM still did not provide a defense for Flowers, continuing to rely only on the co-employee exclusion with no analysis of the executive officer coverage. L.F. 76; 81, 92.

When Flowers' lawyer directed ILM by page and section number to its executive officer coverage, ILM's initial adjuster saw potential coverage so he sent the coverage question to the in-house counsel. L.F. 81. Upon being directed to the coverage he told Flowers' lawyer "[t]his matter is going to be handled by our in-house counsel, Ryan Gibson." L.F. 81. As far as the record reveals, however, the in-house counsel did not do a thing. L.F. 81; 363. He did not further clarify or attempt to justify the denial; he did not make a note to the file, or draft a letter. L.F. 81; 363; 92.

Neither the initial adjuster nor the in-house counsel mentioned, examined, or analyzed the "executive officer" coverage pointed out by Flowers' lawyer. L.F. 60-82; 363. The phrase "executive officer" does not appear anywhere in ILM's denial correspondence except where Flowers' lawyer used the phrase to show ILM its own coverage. L.F. 60-82; 363. After the in-house counsel got the file, ILM simply closed out Flowers' claim with no further explanation, leaving Flowers to fight the wrongful death case on his own at his own expense. L.F. 92. ILM's notice of claim closure states the claim status is "closed" and the total paid is ".00." L.F. 92.

While ILM still had Flowers' claim open, appellants submitted suggestions in opposition to Flowers' motion to dismiss based on the employers' workers' compensation immunity. L.F. 203-209. Appellants' suggestions were served on Flowers' attorney December 4, 2008. L.F. 207. Flowers' lawyer apparently talked to the in-house counsel about three weeks earlier on November 14, 2008. L.F. 363. ILM mulled things over for a few months, but did not defend and did not analyze officer coverage, closing the file several months later on May 14, 2009. L.F. 92.

Appellants' suggestions discussed Missouri law holding the term "co-employee" is simply a generic "umbrella" concept that includes a corporate officer like Flowers as well as a supervisor and a co-worker. L.F. 206. Appellants also discussed Missouri law holding that the co-employee liability rule is applied on a case-by-case basis depending on the specific facts in each individual case. L.F. 206. The suggestions also stated Flowers had a policy on the business premises requiring kiln doors to be set upright, which created a dangerous condition and was a breach of the duty owed appellants' decedent. L.F. 207. These assertions were reasonably ascertainable to ILM because its claim file was still open for a few months. L.F. 92.

After ILM refused to defend him, Flowers continued to pay his lawyer to litigate the case. L.F. 208-09; 214-17; 360. He initially obtained a judgment based on his motion to dismiss, with the Circuit Court concluding there was no jurisdiction for the claim because Flowers was entitled to the immunity from civil suits afforded the corporation under Chapter 287. L.F. 218. The Court of Appeals reversed that judgment and remanded, holding that whether Flowers could be entitled to the employer's immunity was merely an affirmative defense and not jurisdictional. L.F. 222-29.

At the hearing on Flowers' motion to dismiss in January, 2010 Appellants' counsel informed the Court "I tried to tackle the something more analysis and having thought about it I don't think that can apply any more under the [Chapter 287] strict construction analysis." L.F. 99-100. This was more than two years before the trial. L.F. 121. At this same hearing Flowers testified, like his counsel told ILM at the beginning of the lawsuit, that he was the owner of the corporation, and he did not consider himself a

co-employee of Appellants' decedent. L.F. 106. In his affidavit submitted to the wrongful death court at trial Flowers also set forth this same belief that he was not an employee but was the executive officer of the corporation. L.F. 119. This was the same information ILM had all along. L.F. 72, 80.

In their brief to the Court of Appeals after dismissal appellants also noted that strict construction under Chapter 287 had rendered "the 'something more' analysis inapplicable," so that "co-employees that negligently injure an employee/plaintiff are no longer protected from civil actions under Chapter 287, whether the negligence was garden variety or 'something more.'" L.F. 240.

Two months after remand ILM re-opened and reviewed the claim file yet again. L.F. 427. It reviewed the correspondence between Flowers' attorney and the claims examiner ("Letters"). L.F. 427. But ILM still did not provide a defense. L.F. 93-114. Until the action on appeal here, the sole reason ILM gave for refusing to defend Flowers was the word "employee" in the petition and the co-employee exclusion. L.F. 61-69; 76-79. ILM maintained this position despite knowing Flowers was not a traditional employee and that he was the corporation's manager and executive officer. Id.; 80; 92. ILM's denial correspondence does not analyze or mention "something more," nor "personal legal duty," nor "officer duty," nor any legal duty at all. L.F. 61-69. ILM also did not assert the workers' compensation or employer-employee exclusion as bases for declining a defense. L.F. 63; 67.

Soon after ILM reviewed the file after remand, appellants received the same correspondence and information ILM had from the beginning, establishing that Flowers

was not a traditional employee but was the manager and executive officer of Missouri Hardwood Charcoal, Inc., that the CGL provided coverage for executive officers, that Flowers' lawyer had directed ILM to its own officer coverage and all relevant facts, and that ILM had nonetheless repeatedly denied a defense without even analyzing officer coverage simply because of the term "co-employee" in the petition. L.F. 61-72; 76-81. Whereupon appellants and Flowers entered into an agreement under § 537.065, RSMo with appellants agreeing to execute on any judgment solely against ILM's insurance policies and Flowers agreeing to waive his right to a jury trial and to not object to appellants' evidence or put on his own evidence. L.F. 115-18.

Appellants and Flowers did not agree regarding liability or damages. L.F. 115-18. Flowers did not admit any liability. L.F. 120. All issues of liability and damages were submitted for determination by the Circuit Court of Reynolds County. L.F. 281-314. After a bench trial, the Honorable Kelly Wayne Parker stated "Well obviously I need to take this matter under advisement, read the exhibits, contemplate the evidence presented." L.F. 312.

At trial, appellants adduced the same information ILM knew all along about Flowers' capacity as "executive officer," thereby bringing specificity to the petition's "shotgun approach" where he was called an "individual," "foreman," "supervisor," "site manager," "agent," or "employee." L.F. 119-20; 286. He was an "agent" or "employee" as alleged, specifically an executive officer as ILM knew from the outset. L.F. 119-20. After taking the matter under advisement, the court entered Judgment in appellants' favor in the amount of $7,000,000.00. L.F. 121.

The wrongful death court first noted the case was called "[f]or bench trial before this Court . . . for adjudication of the Plaintiffs' Petition for Wrongful Death[] and the Defendant's Answer and Affirmative Defenses thereto. . . ." L.F. 122. After adjudication of the petition and the affirmative defenses, the wrongful death court concluded that appellants' petition was valid and that Flowers' defenses and affirmative defenses were invalid. L.F. 127. Flowers' key affirmative defense was the one remanded for adjudication, involving whether he was effectively the "employer" entitled to the corporation's workers' compensation immunity from civil suit. L.F. 222-29; 254-255. Flowers' attorney specifically stated that appellants "cause of action is barred by the case of *Murry v. Mercantile Bank, N.A.*, 334 S.W.3d 193 (Mo. App. E.D. 2000)." L.F. 255, ¶ 19. He also alleged appellants' petition failed to state a claim upon which relief could be granted. L.F. 255 ¶ 20. The trial court concluded these defenses failed. L.F. 127.

While ILM still had its file open in December, 2008 Appellants specifically alleged in their suggestions in opposition to Flowers' motion to dismiss that Flowers:

> *personally implemented and enforced a policy on [his] business premises requiring the kiln doors to be set up leaning on walls. This practice created a very dangerous condition, beyond merely the ordinary safety of the workplace, and was a breach of the personal duty owed decedent.*

L.F. 207. Analogously, the Judgment concluded as a matter of law that Flowers:

> *[a]cting under his duties as president, executive officer, and director of Missouri Hardwood Charcoal, Inc. was negligent in permitting and not changing the policy*

of leaning kiln doors upright, and in authorizing and requiring such policy to be followed.

L.F. 127. No appeal was taken from the wrongful death judgment.

II. Coverage Under the CGL and Umbrella Policies

Under the CGL ILM agrees "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'. . ." L.F. 134 (Section I, Coverage A, part 1.a). The bodily injury must be caused by an "occurrence." L.F. 134. Bodily injury includes death. L.F. 135. Occurrence means an accident. L.F. 148. The Umbrella Policy too provides coverage for an occurrence and incorporates all of the coverage provisions of the CGL. L.F. 153.

The CGL provides "If you are designated in the Declarations as . . . [a]n organization other than a partnership, joint venture or limited liability company, you are an insured." L.F. 142 (Section II.1.d). Further, "[y]our 'executive officers' and directors are insureds, but only with respect to their duties as your officers or directors." L.F. 142. The trial court's judgment does not question that Flowers was the executive officer, or that his order to lean the kiln doors upright was within his duties. L.F. 446-56.

With respect to coverage for executive officers, the CGL also states:

> Each of the following is also an insured: Your 'volunteer workers' . . . or your 'employees,' *other than . . . your 'executive officers'* . . . However, none of *these* 'employees' or 'volunteer workers' are insureds for . . . 'Bodily injury' . . . to a co-'employee'. . . .

L.F. 142 (emphasis added).

The CGL also states:

Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the First Named Insured, this insurance applies:

As if each Named Insured were the only Named Insured; and Separately to each insured against whom claim is made or 'suit' is brought.

L.F. 145-46. The Umbrella policy too has a separation of insureds provision. L.F. 159.

The CGL also obligates ILM to pay interest on the full amount of any judgment after entry of the judgment up to when it is paid, notwithstanding the limits of the policy. L.F. 141. The CGL provides a "per occurrence" limit of $1,000,000.00. L.F. 132. The Umbrella policy provides a "per occurrence" limit of $5,000,000.00. L.F. 150.

"Employee" is defined in part: "' Employee' includes a 'leased worker'[.]" L.F. 146. "'Leased worker' means a person leased to **you** by a labor leasing firm under an agreement between **you** and the labor leasing firm, to perform duties related to **your business**.[]" L.F. 147 (emphasis added).

The policy states "[t]hroughout this policy the words '**you'** and '**your' refer to the Named Insured** shown in the declarations and any other person or organization qualifying as a **Named Insured** under this policy." L.F. 134 (emphasis added). The Named Insured was the corporation Missouri Hardwood Charcoal and other corporations only. L.F. 152. Flowers is not a named insured under the CGL or the umbrella policy; he qualified as an insured only by operation of the "Who is an Insured" provision under Section II. L.F. 134; 142.

III. Relevant Exclusions

With respect to the garnishment count, the trial court concluded there are two exclusions barring coverage for the wrongful death judgment; the "workers' compensation" and "employer's liability" exclusions. L.F. 450-53. The workers' compensation exclusion excludes coverage for *"[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law* or any *similar law.*" L.F. 135.

The employer's liability exclusion 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.

L.F. 135. Similar exclusions appear in the Umbrella policy, except there the workers' compensation exclusion adds language excluding obligations of the insured under the Longshoremen's and Harbor Workers' Compensation Act, and the Federal Employers' Liability Acts or Jones Act. L.F. 156; 158.

IV. The Breach of Contract and Equitable Garnishment Action

Appellants sought payment of the wrongful death judgment under equitable garnishment and also sought breach of contract duty-to-defend damages, as Flowers' assignees and standing in his shoes against ILM in the Circuit Court of Cole County.

L.F. 12-18. After cross-motions for summary judgment, the court entered judgment in favor of ILM on the garnishment count based on the two above-referenced exclusions. L.F. 446-56.

With respect to the garnishment count, the trial court also concluded that the petition in the wrongful death action was amended by evidence admitted at trial. L.F. 453-54. The trial court concluded "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." L.F. 448-49. Most of the evidence presented in the wrongful death action regarding Flowers' liability is not part of the record here. L.F. 129-30.

With respect to the duty to defend count, the trial court concluded "[t]here was no duty by ILM to defend Flowers against the 'something more' claim against him in the underlying petition because it was based on alleged co-employee liability of Flowers[.]" L.F. 454-55. The trial court provides no legal authority, fact analysis, or policy analysis for this conclusion. L.F. 454-55.

After the trial court's entry of judgment in favor of ILM, appellants timely submitted their notice of appeal and this appeal followed. L.F. 435-56.

POINTS RELIED ON

I. The trial court erred in granting ILM's motion for summary judgment and in denying appellants' motion for summary judgment on the duty to defend count because it erroneously concluded that ILM did not breach its insurance contract with Flowers in that ILM had a duty to defend Flowers in the wrongful death action because there was potential for coverage based on the allegations that Flowers was the corporation's employee, site-manager, foreman, supervisor or agent, which concepts include executive officer, and that he was negligent in those capacities for his work-related conduct, and based on the facts actually known to ILM that Flowers was the corporation's manager and executive officer, and based on the initial adjuster's recognition of potential coverage after Flowers' lawyer directed him by page and section number to ILM's executive officer coverage for work-related conduct, and based on Missouri law holding executive officer coverage is ambiguous, at best, and covers co-employee liability cases as well as managerial liability cases;

Columbia Cas. Co. v. HIAR Holding, LLC, 411 S.W.3d 258 (Mo. banc 2013)

Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506 (Mo. banc 1999)

Fostill Lake Builders, LLC v. Tudor Ins. Co., 338 S.W.3d 336 (Mo. App. 2011)

Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo. App. 2005)

II. The trial court erred in denying appellants' motion for summary judgment and in granting ILM's motion for summary judgment on the equitable garnishment count because Flowers is insured under the policies for the wrongful

death judgment in that he was the corporation's executive officer carrying out his duties as such and the policies provide coverage for executive officers when their negligence causes bodily injury, and ILM is precluded from now trying to use its contract to avoid the duty to indemnify where it previously ignored its contract to wrongfully avoid the duty to defend;

Columbia Cas. Co. v. HIAR Holding, LLC, 411 S.W.3d 258 (Mo. banc 2013)

Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700 (Mo. banc 2011)

Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506 (Mo. banc 1999)

III. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that Flowers was in effect appellants' decedent's employer such that the workers' compensation and employer liability exclusions apply in that the policies' "severability provision" require the policies to be applied separately to each insured seeking coverage, so that Flowers the executive officer is not treated as the named insured corporation for coverage purposes, and the named insured corporation was the actual employer;

Baker v. DePew, 860 S.W.2d 318 (Mo. banc 1993)

Bituminous Cas. Corp. v. Aetna Life and Cas. Co., 599 S.W.2d 516 (Mo. App. 1980)

Barnette v. Hartford Ins. Group, 653 P.2d 1375 (Wy. 1982)

Zenti v. Home Ins. Co., 262 N.W.2d 588 (Ia. 1978)

IV. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously

concluded that Flowers was in effect appellants' decedent's employer such that the workers' compensation and employer liability exclusions apply in 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 were concluded against Flowers, and those conclusions were necessary to Judge Parker's liability finding so they cannot be re-litigated or collaterally attacked here;

Columbia Cas. Co. v. HIAR Holding, LLC, 411 S.W.3d 258 (Mo. banc 2013)

Assurance Co. of Am. V. Secura Ins. Co., 384 S.W.3d 224 (Mo. App. 2012)

Fostill Lake Builders, LLC v. Tudor Ins. Co., 338 S.W.3d 336 (Mo. App. 2011)

Gaunt v. State Farm Mut. Auto. Ins. Co., 24 S.W.3d 130 (Mo. App. 2000)

V. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that under Chapter 287 Flowers was in effect appellants' decedent's employer such that the employer based exclusions apply in that Flowers as executive officer is an employee under Chapter 287 and therefore under the policies for construing exclusionary and coverage provisions;

Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363 (Mo. banc 1973)

State ex rel. Mann v. Conklin, 181 S.W.3d 224 (Mo. App. 2005)

Am. Fam. Mut. Ins. Co. v. Tickle, 99 S.W.3d 25 (Mo. App. 2003)

§ 287.020.1, RSMo (2000)

VI. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it improperly

applied a piercing the corporate veil analysis to conclude that Flowers was appellants' decedent's employer such that the CGL's employer liability exclusion applied in that it only applied one prong of the test, the "complete control" prong, and there are no facts in the record to support the other prongs requiring improper purpose, fraud, or disregard of corporate formalities;

Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363 (Mo. banc 1973)

K.C. Roofing Center v. On Top Roofing, Inc., 807 S.W.2d 545 (Mo. App. 1991)

VII. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that the petition in the underlying action was amended such that lack of notice to ILM bars coverage under the CGL in that ILM could not be substantially prejudiced where the only amendment was to specify Flowers' "co-employee" capacity as executive officer, which capacity ILM knew yet refused to defend him, and which capacity is covered under the CGL for all forms of work-related negligence;

Columbia Cas. Co. v. HIAR Holding, LLC, 411 S.W.3d 258 (Mo. banc 2013)

Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700 (Mo. banc 2011)

Stark Liquidation Co. v. Florist's Mut. Ins. Co., 243 S.W.3d 385 (Mo. App. 2007)

Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo. App. 2005)

VIII. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that the petition in the underlying wrongful death action was amended by

the evidence admitted in that to determine an amendment of a pleading to conform with the evidence, the actual evidence admitted should be examined, to see whether it was relevant to issues already pleaded, but most of the liability evidence from the wrongful death action is not part of the record here;

Lester v. Sayles, 850 S.W.2d 858 (Mo banc 1993)

ARGUMENT

I. The trial court erred in granting ILM's motion for summary judgment and in denying appellants' motion for summary judgment on the duty to defend count because it erroneously concluded that ILM did not breach its insurance contract with Flowers in that ILM had a duty to defend Flowers in the wrongful death action because there was potential for coverage based on the allegations that Flowers was the corporation's employee, site-manager, foreman, supervisor or agent, which concepts include executive officer, and that he was negligent in those capacities for his work-related conduct, and based on the facts actually known to ILM that Flowers was the corporation's manager and executive officer, and based on the initial adjuster's recognition of potential coverage after Flowers' lawyer directed him by page and section number to ILM's executive officer coverage for work-related conduct, and based on Missouri law holding executive officer coverage is ambiguous, at best, and covers co-employee liability cases as well as managerial liability cases.

Standard of Review

The trial court decided the case on cross-motions for summary judgment on all counts between appellants and ILM. L.F. 446. "'The propriety of summary judgment is purely an issue of law, so [the appellate court] will conduct an 'essentially de novo' review of the trial court's summary judgment." Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64, 79 (Mo. App. 2005) (quoting ITT Comm. Fin. Corp. v. Mid-Am. Marine Supp. Corp., 854 S.W.2d 371, 376 (Mo. banc 1993)). "Summary judgment is

particularly appropriate if the issue to be decided is the construction of a contract that is unambiguous on its face." Parmark Corp. v. Liberty Mut. Ins. Co., 943 S.W.2d 256, 259 (Mo. App. 1997). "Disputes arising from interpretation and application of insurance contracts are matters of law for the court where there are no underlying facts in dispute." Id.

"'Generally, an order denying a party's motion for summary judgment is not a final judgment and is therefore not subject to appellate review.'" Sauvain v. Acceptance Indem. Ins. Co., 339 S.W.3d 555, 568 (Mo. App. 2011) (quoting Schroeder v. Duenke, 265 S.W.3d 843, 850 (Mo. App. 2008)). "'However, the denial of a motion for summary judgment may be reviewable when, as in this case, the merits of the motion for summary judgment are intertwined with the propriety of an appealable order granting summary judgment to another party.'" Id.

Appellants, as non-movants under the trial court's judgment, are entitled to all reasonable inferences drawn in their favor from the undisputed facts in the record. ITT Comm. Fin. Corp., *supra*, 854 S.W.2d at 382.

Analysis

The trial court entered summary judgment in favor of ILM and against appellants on their count for breach of the duty to defend. L.F. 454-55. Under the § 537.065 Agreement, Flowers assigned all of his causes of action against ILM and all of his contractual rights under ILM's policies to appellants. L.F. 115-18. Also, in this breach of contract and equitable garnishment proceeding appellants stand in Flowers' shoes on this contract claim. See Rodgers-Ward v. American Std. Ins. Co., 182 S.W.3d 589, 592

(Mo. App. 2005) (explaining "[i]n an equitable garnishment proceeding, an injured person 'stands in the shoes' of the insured") (citation omitted). Because of the assignment by Flowers, and because appellants stand in Flowers' shoes, appellants are authorized to pursue the breach of contract duty to defend claim. ILM's CGL provides that ILM has a duty to defend Flowers. L.F. 134. This was count II of appellants' petition. L.F. 15-16.

In denying appellant's duty to defend claim, the trial court summarily concluded "[t]here was no duty by ILM to defend Flowers against the 'something more' claim against him in the underlying petition because it was based on alleged co-employee liability of Flowers[.]" L.F. 454-55. The judgment provides no legal authority for the conclusion that the CGL's executive officer coverage does not cover "co-employee liability" as opposed to "managerial liability" claims (as explained below, it covers both).

The judgment also does not provide any analysis of the facts in the petition alleging Flowers' corporate capacity inclusively as employee, site-manager, foreman, supervisor or agent of the corporation, L.F. 57; nor does the judgment analyze the facts known to ILM about Flowers' actual capacity as the owner, manager and executive officer of the corporation, L.F. 72, 80; nor does it analyze the facts alleged about Flowers' work-related conduct of having a policy on the business premises requiring kiln doors to be set upright, which created a dangerous condition and was negligent. L.F. 207 (which characterization of Flowers' liability never changed; see the underlying judgment at L.F. 127; see also, Points VII-VIII, *infra*).

The facts known to ILM are important because "[a]n insurer cannot determine its duty to defend solely on the facts alleged in the petition. Rather it must also consider the petition in light of facts it knew or could have reasonably ascertained." Truck Ins. Exch., *supra*, 162 S.W.3d at 83. "[T]o invoke the duty to defend, the allegations, combined with the ascertainable facts, need only establish *potential* or *possible* coverage under the policy." Id. (emphasis in original).

In fact, "'[e]ven though the pleadings do not show coverage, where known or reasonably ascertainable facts become available that show coverage[,] the duty to defend devolves upon the insurer.'" Id. (quoting John Alan Appleman, 7C Insurance Law and Practice § 4684.01 (Walter F. Berdal ed. 1979)). "[E]ven if [the insurer] were correct that its . . . exclusion was sufficient to prevent its having to [pay] . . . it does not necessarily follow that [the insurer] had no duty to defend. . . ." Fostill Lake Builders, LLC v. Tudor Ins. Co., 338 S.W.3d 336, 349 (Mo. App. 2011). "[E]ven if the plaintiff bringing a claim against the insured initially pleads the 'wrong' cause of action, or one that is likely to be subject to a motion to dismiss . . ." the insurer still must defend if there is any possibility, based on reasonably discoverable facts, that the claim could be within coverage. Id. at 347.

"'To suggest that the insured must prove the insurer's obligation to pay before the insurer is required to provide a defense would make [the duty to defend] provision a hollow promise.'" McCormack Baron Management Serv., Inc. v. American Guar. & Liability Ins. Co., 989 S.W.2d 168, 170 (Mo. App. 1999) (quoting 13 Appleman, Ins. Law and Pract., section 4684 (rev. vol. 1976)).

"The presence of some potentially insured claims in complaint gives rise to a duty to defend, even though claims beyond coverage may also be present." Superior Equip. Co. v. Maryland Cas. Co., 986 S.W.2d 477, 482 (Mo. App. 1999). "The facts known or ascertainable control the obligation to defend." Standard Artificial Limb, Inc. v. Allianz Ins. Co., 895 S.W.2d 205, 210 (Mo. App. 1995). "'The insurer cannot ignore . . . actual facts known to it or which could be known to it or which could be known from reasonable investigation.'" Brand v. Kansas City Gastro. & Hepatology, LLC, 414 S.W.3d 546, 553 (Mo. App. 2013) (quoting Trainwreck West Inc. v. Burlington Ins. Co., 235 S.W.3d 33, 42 (Mo. App. 2007)).

In addition to not citing *any* authority for the proposition that an executive officer is not covered for a co-employee negligence case, and not analyzing the relevant facts about Flowers' corporate capacity and job-related conduct, the trial court also failed to mention this well-settled body of Missouri law governing the duty to defend. L.F. 454-55. Under these legal principles, the key question in determining whether ILM breached its duty to defend is whether there was *any possibility* of coverage based on the allegations in the petition, the facts known to ILM, and the facts that could have been known from reasonable investigation. The trial court did not even ask this question.

The petition broadly and inclusively alleged Flowers' corporate capacity as employee, foreman, supervisor, site-manager, or agent. L.F. 57. Flowers' lawyer told ILM in 2008 Flowers was "not an employee of Missouri Hardwood Charcoal[.]" L.F. 72 (same at trial in 2012; L.F. 119 ¶ 2; 124 ¶ 12) (same at motion to dismiss hearing January, 2010; L.F. 106). He also told ILM Flowers' corporate capacity was executive

officer and manager. L.F. 80 (same at trial; L.F. 119 ¶ 1; 123 ¶ 3). ILM also dealt with Flowers as executive officer in the sales and underwriting of the policies, before any legal action. L.F. 360-61 (same at trial; L.F. 119 ¶ 1; 123 ¶ 3). ILM's internal documents, also pre-dating the lawsuit, state Flowers was president and manager of the parent company of Missouri Hardwood Charcoal. L.F. 73-75 (same at trial; L.F. 119 ¶ 1; 123 ¶ 3). ILM obtained Flowers' signature as "president" on its Coverage Acknowledgment Checklist. L.F. 75 (same at trial; L.F. 119 ¶ 1; 123 ¶ 3). These facts alone indicate possible or potential executive officer coverage for the wrongful death negligence action involving his workplace conduct.

As can be seen, Flowers always *factually* thought of himself as a "non-employee" and told ILM that from day one. L.F. 72 (September 26, 2008). So that same factual position based on Flowers' perception was presented in court. L.F. 105:23-106:6 (January 5, 2010 motion hearing), 119 (2012 trial affidavit); 124 (2012 judgment). But as explained immediately below *contractually* under the policies he is a covered employee, L.F. 142; and *legally* under Missouri law he is also an employee in the service of the corporation, § 287.020.1. Further, as explained herein, ILM willfully ignored *all* of these realities, factually, contractually, and legally. ILM simply refused to consider the known facts, the applicable policy language, and the controlling Missouri law when it declined a defense.

Other reasonably ascertainable facts while ILM had the file open include appellants' legal suggestions explaining the generic phrase "co-employee" includes a corporate officer, supervisor, and co-worker in Missouri. L.F. 206. The term "co-

employee" *alone* would include Flowers as officer. See Gunnett v. Girardier Bldg. And Realty Co.,70 S.W.3d 632, 637 n.5 (Mo. App. 2002) (explaining "[w]e consider the term co-employee to include a corporate officer, a supervisor, as well as a co-worker"); see also, § 287.020.1 ("[t]he word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer . . . including executive officers of corporations"). The trial court's unsupported conclusion to the contrary is erroneous.

While ILM had the claim file open, appellants also explained that the liability case against Flowers depended on close reference to the particular facts on a case-by-case basis. L.F. 206. Appellants also characterized the liability case thus: "Here, [Flowers] personally implemented and enforced a policy on [his] business premises requiring the kiln doors to be set up leaning on walls. This practice created a very dangerous condition, beyond merely the ordinary safety of the workplace, and was a breach of the personal duty owed to decedent." L.F. 207 (same as the wrongful death judgment at L.F. 127 ¶ 5; and same as the petition at L.F. 57 ¶11, 58 ¶¶ 13, 16). ILM had the opportunity to review all of these reasonably ascertainable facts but instead closed out its file soon thereafter. L.F. 92. The bottom line is ILM *ignored* the truth in assessing its duty, whereas appellants *used* the truth at trial.

With respect to Flowers' insured status under ILM's policy, the controlling language states "WHO IS AN INSURED . . . Your 'executive officers' and directors are insureds, but only with respect to their duties as your officers or directors." L.F. 142 (Section II.1.d). The policies do not define the phrase "duties as your officers." The policy defines executive officer as "[a] person holding any of the officer positions created

by your charter, constitution, by-laws, or any other similar governing document." L.F. 146. Flowers was the corporation's executive officer. L.F. 80; 119; 123. The corporation's by-laws state "[t]he offices of the corporation shall consist of President and Secretary. . . ." L.F. 88. Flowers was the president and secretary. L.F. 119. The by-laws then say "[t]he President shall be the principal executive officer of the corporation and shall be in general control and manage the property and business of the corporation." L.F. 89. Under ILM's Umbrella Policy, the definition of insured includes executive officers, and there is no exception for co-employee claims. L.F. 154.

When Flowers' lawyer directed ILM's initial adjuster to its executive officer coverage, and analyzed it in relation to the co-employee exclusion, explaining "I therefore think Junior Flowers has coverage as an executive officer[]", the adjuster saw the potential for coverage, but instead of defending he passed the buck to the in-house counsel. L.F. 81 (in effect telling Flowers' lawyer, I see what you mean so "[t]his matter is going to be handled by our in-house counsel"). The adjuster was correct that under Missouri law there is executive officer coverage under ILM's policies for Flowers in performing any work-related conduct. See Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506 (Mo. banc 1999).

In addition to not analyzing the relevant facts and duty-to-defend law, the trial court's judgment also does not mention the Martin case. L.F. 446-56. That failure is an error because Martin is the controlling law. In Martin the CGL provided coverage for executive officers with respect to their "duties" as such, just like ILM's CGL does. Id. at 508; L.F. 142. Same as ILM's ISO form policies, the standard ISO form policy in Martin

did not define the phrase "duties as your officers." This Court explained that the term officer "duties" is "[a]mbiguous, at best, and the Court is bound to construe it against the insurer and in favor of coverage." Id. at 510. The Court then found the chief operator of a city's waste water plant was engaged in executive officer "duties" when he merely installed a pipe assembly that later exploded injuring a co-employee so he was covered under the CGL. Id.

Like ILM, the insurer in Martin mistakenly thought its executive officer coverage only applied to "managerial" cases not "co-employee" cases. Id. This Court rejected that contention thus:

> USF&G argues that 'duties as officers' include only those portions of an officer's position that are managerial in character. Mr. Martin argues that all job responsibilities performed by executive officers are included in their duties as officers, whether or not the character of the particular act at issue was managerial. Again, the insurance policy on this point is ambiguous, at best, and the Court is bound to construe it against the insurer and in favor of coverage.

Martin, 996 S.W.2d at 510. Manifestly, ILM's refusal to defend Flowers knowing he was the executive officer sued for workplace negligence, and in light of its "ambiguous at best coverage," was wrong under Missouri law.

Like Flowers' lawyer helpfully did for ILM (L.F. 80), the Martin Court also analyzed the CGL's co-employee exclusion as it relates to executive officer coverage. Id. at 508. The exclusion in Martin stated:

> Each of the following is also an insured: . . . Your employees *other than your executive officers*, but only for acts within scope of their employment by you. However, none of *these* employee is an insured for . . . 'bodily injury' or 'personal injury' to you or to a co-employee. . . ."

Martin, 996 S.W.2d at 508 (emphasis added). Almost identical to the exclusion in Martin the exclusion here states:

> "Each of the following is also an insured: Your 'volunteer workers' . . . or your 'employees,' *other than . . . your 'executive officers'* . . . However, none of *these* 'employees' or 'volunteer workers' are insureds for . . . 'Bodily injury' . . . to a co-'employee'. . . ."

L.F. 142 (emphasis added). This Court explained the effect of this language thus:

> Under the commercial general liability policy at issue here, an 'executive officer' is an insured while acting in the scope of his duties as an officer, *while 'employees other than executive officers' are not insureds for injuries caused to co-workers.*

Id. at 508 (emphasis added). So under Martin an executive officer, like Flowers, is insured by the CGL for his negligence even assuming he injured a co-employee. Id. at 510. Thus ILM's repeated rejection of a defense for Flowers based on the co-employee exclusion was wrong under Missouri law. L.F. 76; 81; 92.

Although it did not take such a position in its declination letters or emails with Flowers' lawyer (L.F. 60-81), ILM now contends that its officer coverage does not cover "something more" type co-employee cases. See Transfer App., p. 6 n.2. But in Missouri such cases were the *only* ones permitted by a co-employee against an executive officer or

any other co-employee.[1] Indeed, the very reason the executive officer is carved out of the co-employee exclusion is solely to cover *this* type of case. So ILM's position is that the *only* viable claim by a co-employee against an officer in Missouri is *not* covered, thereby rendering the 'carving out' of the officer from the co-employee exclusion and the officer coverage itself illusory. This Court should reject ILM's recently fabricated position. ILM's policies cover an executive officer for both "something more" and "managerial liability" cases. L.F. 142 (CGL), L.F. 154 (umbrella). Martin, supra, 996 S.W.2d at 510. The coverage is based on *job* duties not *legal* theories or duties.

It is also worth noting that like appellants here, the injured person in Martin recovered benefits in a separate workers' compensation case. Id. at 507 ($125,000.00). So a workers' compensation recovery is not an impediment to recovery under the policies. Also like Flowers did in the wrongful death action, L.F. 208-09; 254-55, the defendant in Martin filed a motion to dismiss alleging immunity from a civil action based on Chapter 287. Id. This also was not a bar to recovery and coverage.

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[1] Recent case law has clarified that the "something more" concept is no longer relevant for actions arising between August 28, 2005 and August 28, 2012 and co-employee lawsuits for injuries occurring during that time frame are permitted based on common law negligence principles. See Leeper v. Asmus, __S.W.3d__; 2014 WL2190966 (Mo. App. May 27, 2014) (application for transfer denied September 30, 2014).

Also analogous to this case the underlying action in Martin would have been a "something more" personal duty case, because as mentioned above that was the type of co-employee liability action permitted at the time. See Lyon v. McLaughlin, 960 S.W.2d 522, 526 (Mo. App. 1998) (explaining "[a] petition must charge 'something more' beyond a breach of general supervision and safety for the co-employee to be liable"). Alternatively, Martin could also accurately be characterized as an "unsafe workplace" case because the conduct at issue was merely installing a pipe that at some point exploded, which is not an "affirmative act" directed at a co-worker. Martin, 996 S.W.2d at 507. Either way, whether the underlying lawsuit is characterized as a "something more" co-employee case or as a "managerial" case (a distinction Martin does not mention because it is irrelevant), ILM breached its duty to defend because its "ambiguous at best" officer coverage was triggered by the petition and the known facts. It bears repeating, coverage is based on *officer conduct* not *legal theories*.

The same exclusionary language at issue in Martin and also under ILM's policies, whereby only employees *other than* executive officers are not insured for co-employee suits, was recently construed by another state's Supreme Court in Tri-S Corp. and Rapoza v. Western World Ins. Co., 135 P.3d 82 (Ha. 2006). The Tri-S Corp. Court concluded "[t]he definition of employee for purposes of the phrase 'no employee' does not include executive officers." Id. at 100. The Tri-S Corp. court went on to explain that the insured officer was claiming "[i]nsured status under Section II.1.c, which governs insured status for officers and directors, while the bodily injury exception is located in Section II.2.a, a completely different subsection pertaining to non-executive corporate employees." Id.

Likewise here, Flowers was insured as executive officer under Section II.1 of the CGL, pertaining to manager and officer liability, whereas the co-employee exclusion appears in Section II.2, pertaining to volunteer worker and non-executive employee liability. L.F. 142. ILM was wrong to rely on the co-employee exclusion where the executive officer was sued.

Other courts, too, agree with this Court's holding in Martin that all of the executive officer's job conduct is covered whether menial or managerial. See Middlesex Mut. Assur. Co. v. Fish, 738 F.Supp.2d 124, 134-35 (D. Maine 2010) ("'[a]bsent a narrower definition of 'duties of office,' when a policy extends coverage to executive officers acting 'with respect to their duties as officers,' the coverage should be construed to include **all work-related activities** performed by executive officers—whether menial or managerial. . .'") (quoting Holderness v. State Farm Fire & Cas. Co., 24 P.3d 1235, 1243 (Alaska 2001)) (emphasis added).

In another recent case the insurer argued it did not have to defend an executive officer because the negligent act was not a "[b]road-based executive decision[] involving the design of corporate policy[.]" Deters v. USF Ins. Co., 797 N.W.2d 621 at *12 (Ia. App. 2011). The court rejected that position, and explained "[t]he existing law and treatises . . . reveal no jurisdiction or treatise supporting" denial of a defense based on the co-employee exclusion. Id. The Deters court permitted a $1 million punitive damages award because the insurer, like ILM here, "stubbornly refused to research, reconsider, investigate, and reevaluate its duty to indemnify and defend" once it knew the defendant

was the executive officer. Id. at *15. Deters cited this Court's Martin decision and explained the same policy language was at issue. Id. at *8 n. 2.

As Deters mentioned, there is no jurisdiction or treatise supporting ILM's denial of a defense for an executive officer based on the inapplicable co-employee exclusion (or any other exclusion; see Points IV-VI, *infra*). See also Zenti v. Home Ins. Co., 262 N.W.2d 588, 592 (Iowa 1978) (holding "[t]he employee exclusion was inapplicable here and thus Home Insurance is obligated to defend Zentis as 'executive officers' against a suit for damages brought by [the employee]"). Zenti also references a case out of Maryland that concluded "[a]n executive vice-president of a construction company was entitled to coverage in a suit brought by an injured iron worker." Id. at 590 (citing Penn. Nat'l Mut. Ins. Co. v. Bierman, 292 A.2d 674, 678 (Md. App. 1972)). *Any way* a work-place negligence case 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. There is not one case to the contrary.

ILM takes the curious position that although it did not even mention or analyze the executive officer coverage it somehow was able to conclude the coverage was inapplicable under the known facts that Flowers was the executive officer sued for his workplace negligence. See Transfer App., p. 6 n.2. That is not a reasonable approach in determining a duty to defend; the insurer must at least analyze coverage in light of the facts. See Brand, *supra* 414 S.W.3d at 553 (explaining "'[t]he insurer cannot ignore . . . actual facts known to it or which could be known to it or which could be known from reasonable investigation'") (citation omitted). Indeed, if ILM *had* analyzed its

ambiguous coverage, instead of stubbornly ignoring it, it would have defended its insured and avoided this entire breach of contract and garnishment case; ILM has only itself to blame. See Deters, *supra*, 797 N.W.2d 621 at *13) (noting "many of [the insurer's] positions . . . were never even discussed at the time the coverage determining facts were considered, and that specifically refers to . . . the executive officer analysis") (awarding $1 million in punitive damages).

ILM also takes the curious position that its executive officer coverage is for "breach of a non-delegable duty of the corporation" cases. Transfer App., p. 11 (middle paragraph). That type of case is not even viable in Missouri so ILM's construction of its policies renders the officer coverage a nullity because there would never be a judgment to pay. See Hansen v. Ritter, 375 S.W.3d 201, 213 (Mo. Ap. 2012) (explaining "[t]he employer's non-delegable duties are not duties owed by co-employees to fellow employees[]"). ILM failed to defend because it does not understand its own coverage.

Not only did ILM fail to analyze the officer coverage after Flowers' lawyer walked the adjuster through the facts and helped him see how the coverage applied, L.F. 80 (the phrase 'executive officer' never appears in ILM's declination letters or emails), but from that day forward ILM chose to completely ignore Flowers. L.F. 363. The *only* thing ILM did after learning all the facts and seeing the potential for coverage was close out Flowers' claim file. L.F. 92. ILM made a conscious and deliberate decision to disregard a known officer insured, who paid $120,000 in premiums for this treatment, L.F. 76, and paid a lawyer to walk ILM through its own coverage, L.F. 80, abandoning

him in a potentially covered wrongful death negligence action, and ILM thereby breached its duty to defend.

ILM's breach of its duty to defend leads to monetary damages under the law. This Court recently explained "[t]he insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend." Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258, 265 (Mo. banc 2013) (citing Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 708-09 (Mo. banc 2011)). Therefore, simply because of its breach of its duty to defend Flowers and the damages he incurred therefrom, ILM is liable for contract damages as measured by the full amount of the wrongful death judgment of $7,000,000.00. L.F. 121. This Court need not even reach the garnishment count indemnification issues discussed in Points II-VIII *infra* to reverse the trial court.

In the Columbia Casualty case the insurer only had $2,000,000.00 in limits. Id. at 273. Yet this Court ordered it to pay the judgment in full plus interest totaling $8,400,000.00. Id. at n.7. The insurer argued only a bad faith claim could support such an award of "extra-contractual" damages and there was no bad faith claim pleaded. Id. at 273. This Court rejected that argument, quoting with favor the trial court's conclusion that "limits 'do not matter,'" and explaining the insurer's "[w]rongful refusal to defend [its insured] put it in a position to indemnify [its insured] for all damages flowing from its breach of the duty to defend." Id. at 273. This Court's approach to duty to defend damages is the trend. The Supreme Court of Montana was the most recent high court to recognize this rule on August 1, 2014. Tidyman's Mgmt. Serv., Inc. v. Davis, 330 P.3d

1139, 1150 (Mont. 2014) (holding "[a]n insurer who breaches the duty to defend is liable for the full amount of the judgment, including amounts in excess of policy limits").

ILM owes the entire amount of the underlying judgment plus interest at the § 408.020, RSMo statutory rate of 9% on the full amount of the judgment from the date the breach of duty to defend damages became liquidated March 23, 2012. L.F. 121; 141. Accordingly, this Court should reverse the trial court's judgment, enter judgment for appellants on Count II of their petition for breach of the duty to defend, and remand this case for calculation of interest.

II. The trial court erred in denying appellants' motion for summary judgment and in granting ILM's motion for summary judgment on the equitable garnishment count because Flowers is insured under the policies for the wrongful death judgment in that he was the corporation's executive officer carrying out his duties as such and the policies provide coverage for executive officers when their negligence causes bodily injury, and ILM is precluded from now trying to use its contract to avoid the duty to indemnify where it previously ignored its contract to wrongfully avoid the duty to defend.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

Appellants are entitled to recover under Count I of their petition for equitable garnishment under § 379.200 in the amount of the underlying judgment. This "equitable garnishment" statute provides:

> Upon the recovery of a final judgment against any person . . . on account of bodily injury or death . . . if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company . . .and the defendant, applied to the satisfaction of the judgment[.]

Section 379.200, RSMo.

With respect to this equitable garnishment count, the trial court denied appellants' motion for summary judgment concluding that the underlying wrongful death judgment is not covered under the CGL. L.F. 446-56. The trial court's denial of appellants' motion for summary judgment is reviewable because the coverage issues are intertwined with ILM's motion for summary judgment. See Sauvain, *supra*, 339 S.W.3d at 568.

As a threshold matter, an insurance policy should "[b]e given a reasonable construction and interpreted so as to afford coverage rather than defeat coverage." Univ. Underwriters Ins. Co. v. Dean Johnson Ford, Inc., 905 S.W.2d 529, 533 (Mo. App. 1995). This is because the purpose of an insurance policy is "'[t]o afford protection to an insured and will be interpreted . . . to provide coverage.'" Harrison v. Tomes, 956 S.W.2d 268,

270 (Mo. banc 1997) (quoting Gibbs v. Nat'l Gen. Ins. Co., 938 S.W.2d 600, 605 (Mo. App. 1997)).

On the garnishment count, the core inquiry for the trial court should have been whether the CGL and Umbrella policies afford coverage to Flowers as executive officer of the named insured corporation for the wrongful death judgment. See McNeal v. Manchester Ins. & Indem. Co., 540 S.W.2d 113, 119 (Mo. App. 1976) (after judgment against the insured plaintiffs may "[p]roceed by garnishment of funds in the hands of the insurance company to collect the claim"). "To establish an equitable garnishment claim, the plaintiff must prove that he obtained a judgment in his favor against the insurance company's insured, the policy was in effect when the incident occurred and that the injury is covered by the insurance policy." Kotini v. Century Surety Co., 411 S.W.3d 374, 377 (Mo. App. 2013). The existence of a final judgment and a policy in effect are not in dispute.

ILM agrees Flowers is insured for the judgment, admitting it does "[n]ot dispute that Flowers qualified as an insured under the policy in his capacity as an executive officer as to the Reynolds County judgment." Transfer App., p. 6. In seeking coverage under the policies here, appellants stand in the shoes of Flowers the insured. Rodgers-Ward v. American Std. Ins. Co., 182 S.W.3d 589, 592 (Mo. App. 2005) (explaining "[i]n an equitable garnishment proceeding, an injured person 'stands in the shoes' of the insured") (citation omitted).

The trial court cited Selimanovic v. Finney, 337 S.W.3d 30 (Mo. App. E.D. 2011) for the proposition that the executive officer Flowers is not covered. L.F. 453. But

Selimanovic involved coverage questions for a non-executive employee who injured a co-employee and who was not carved out of the co-employee exclusion. Id. at 38. It did not address executive officer coverage, so the trial court erred by relying on that case. As discussed more fully in appellants' Point I, *supra*, which is incorporated herein by this reference, this Court long ago explained that there is executive officer coverage under these standard ISO business-liability policies for injuries to a co-employee and the co-employee exclusion is inapplicable. Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506 (Mo. banc 1999). The trial court erred as a matter of law by ignoring Martin. L.F. 446-56. See also authorities and argument set forth fully in Point I *supra*.

The wrongful death judgment concluded that Flowers was negligent in carrying out his duties as executive officer. L.F. 127. Flowers is covered as executive officer. L.F. 142; 154. Thus the predicates for indemnification under the CGL and Umbrella policies are met. See Penn-Star Ins. Co. v. Griffey, 306 S.W.3d 591, 601 (Mo. App. 2010) (explaining "'[t]he duty to indemnify is determined by the facts as they are established at trial. . . '") (quoting Penn-Am Ins. Co. v. The Bar, Inc., 201 S.W.3d 91, 98 (Mo. App. 2006)); Selimanovic, *supra*, 337 S.W.3d at 37 (explaining "[t]he damages recoverable in a statutory wrongful death action are precisely those defined by the policy as damages for 'bodily injury' in Section I.A.1.e. of the CGL policy") (this is the same section as the one in ILM's CGL at L.F. 135).

The trial court also erred on the garnishment count 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, and which ILM is precluded

from relying on for the reasons stated in Point I, *supra*. See Columbia Cas., *supra*, 411 S.W.3d at 265 (citing Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 708-09 (Mo. banc 2011)). Columbia Casualty and Schmitz seem to be saying that the duty to defend is so vital to protecting Missouri insureds that the insurer's "wrongful failure to defend . . . **precludes its complaints that it is not liable to indemnify**. . . ." Id. at 272 (emphasis added), and this Court may properly **"[r]efus[e] to entertain [ILM's] assertions that its coverage was inapplicable**[.]" Id. (emphasis added). As this Court explained, when an insurer "wrongfully refuse[s] to defend **[it] thereby is not permitted to contest liability**." Id. at 273 (emphasis added).

As this Court wrote, the insurer "[w]as bound to the trial court's judgment . . . because it had an opportunity to control and manage the trial but failed to seize it." Schmitz, 337 S.W.3d at 710. "The standard is whether the insurer had the *opportunity* to control and manage the litigation, not whether the insurer had the *duty* to control and manage the litigation." Id. at 709-10 (emphasis in original). Likewise, ILM is bound to the judgment because it had the opportunity to control and manage the litigation, and simply refused to do so.

ILM cannot willfully refuse to even analyze its "ambiguous at best" coverage, ignoring the known executive officer for months until closing out the file, effectively erasing the policies from his perspective to wrongfully hide from its duty to defend in 2008, and then suddenly try to revive its policies here to hide from the duty to indemnify. ILM is precluded from complaining about indemnification for the reasons set forth in Point I showing ILM breached the duty to defend.

In Kotini, the garnishor "[d]id not assert his current position that [the insurer] was precluded from litigating the issue of coverage due to its alleged breach of the duty to defend," and thus the garnishor waived that argument. Kotini, *supra*, 411 S.W.3d at 378. The corollary is if the garnishor *had* raised that argument like appellants do, the insurer *would* be precluded from litigating coverage just like ILM is here.

This Court's rule that an insurer that breaches the duty to defend is precluded from complaining about indemnification is consistent with the more general rule:

> The legal consequences to the insurer from the breach of contract for unjustified refusal to defend on the ground of noncoverage include the loss of its contractual right to demand that the insured comply with certain prohibitory as well as affirmative policy provisions.

Truck Ins. Exch., *supra*, 162 S.W.3d at 89 (quoting Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d 475, 481 (Mo. App. 1992)).

This preclusion rule also applies to the cooperation clause. As explained in Points VII-VIII, *infra*, there was no amendment to the petition, but even if there was Flowers was relieved of the duty to forward it because of ILM's breach of the duty to defend. See Rocha v. Metro. Prop. & Cas. Ins. Co., 14 S.W.3d 242, 247 (Mo. App. 2000). Rocha first explained "[i]n our review of the insured's failure to cooperate, we must first review the issue of whether there was a duty to defend under the original petition." Id. The reason the Court first asks whether the original petition was potentially covered is that if it *was*, the insured is "relieved of the duty to forward a copy of the amended petition to his insurer by reason of any default on the part of [the insurer]." Id.

In addition to payment of the underlying judgment under § 379.200, ILM owes interest on the full amount of the judgment because the policies provide for interest and ILM "*should have*" defended. See Miller v. Secura Ins. And Mut. Co., 53 S.W.3d 152, 156-57 (Mo. App. 2001). ILM's policy pays "All interest on the full amount of any judgment that accrues after entry of the judgment. . . ." L.F. 141. Accordingly, this Court should reverse the trial court's judgment on appellants' count I for equitable garnishment, conclude that there is indemnification for the wrongful death judgment, enter judgment in appellants' favor on count I of their petition and remand this action for calculation of interest.

III. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that Flowers was in effect appellants' decedent's employer such that the workers' compensation and employer liability exclusions apply in that the policies' "severability provision" require the policies to be applied separately to each insured seeking coverage, so that Flowers the executive officer is not treated as the named insured corporation for coverage purposes, and the named insured corporation was the actual employer.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to

all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

The trial court concluded that Flowers is not covered for the judgment because of the employer's liability and workers' compensation exclusions. L.F. 450-53. Although ILM knew or could have reasonably ascertained *all* the facts about Flowers' capacity as owner, "non-employee" (Flowers' factual belief), director, officer, and sole shareholder of the corporation, it did not rely on these facts or exclusions in its declination letters and emails, L.F. 61-81, thus it waived the exclusions. See Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 388 (Mo. banc 1989) (insurer may waive contract rights).

Further, no published opinion *anywhere* has ever held these exclusions exclude coverage for an executive officer in a workplace negligence case. So the trial court relied on two unpublished federal magistrate cases. L.F. 451. "Such decisions are neither binding nor persuasive precedent in Missouri courts." State v. Ellis, 355 S.W.3d 522, 524, n. 1 (Mo. App. 2011); Village at Deer Creek Homeowners Assoc., Inc., 432 S.W.3d 231, 245 (Mo. App. 2014) (explaining "[u]npublished federal district court 'decisions are neither binding nor persuasive precedent in Missouri courts'") (quoting Ellis).

Also, one of the unpublished federal orders involved an officer suing his own corporation for injuries; of course the workers' compensation exclusion applies when the employer corporation is sued. See L.F. 451 (citing Gear Automotive, L.L.C. v. Acceptance Indem. Ins. Co., 2012 WL 1833892 at *1 (W.D. Mo 2012) (explaining

"[R]obert Gear filed suit against his own company, Gear Automotive, seeking damages for personal injuries")).

Both of the exclusions exclude coverage for injury to "*the insured*'s" employees. L.F. 135. The employer's liability exclusion 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. . .*

L.F. 135 (emphasis added). Similarly, the workers' compensation exclusion excludes coverage for *"[a]ny obligation of* ***the insured*** *under a workers' compensation, disability benefits or unemployment compensation law or any similar law.*" L.F. 135 (emphasis added).

The trial court has summarily conflated "the insured" executive officer with "the insured" corporation. That violates the applicable rule of construction requiring that "[p]olicy provisions designed to cut down, restrict or limit insurance, or imposing exceptions or exemptions, will be strictly construed against the insurer." Universal Underwriters Ins. Co. v. Dean Johnson Ford, Inc., 905 S.W.2d 529, 533 (Mo. App. 1995); see also Century Fire Sprinklers, Inc. v. CNA/Transp. Ins. Co., 23 S.W.3d 874, 878 (Mo. App. 2000) (explaining "'[a] defense based on an exception or exclusion in a policy is an affirmative one, and burden is cast upon the insurer to establish it'") (quoting Rothstein v. Aetna Ins. Co., 268 A.2d 233, 235 (Pa. 1970)).

Conflating the officer with the corporation is an error in construing the policy, not only because it violates the rules of construction, but because these exclusions must be read in concert with the CGL's "severability provision," which states in relevant part: "Except with respect to the Limits of Insurance . . . this insurance applies . . . [a]s if each Named Insured were the only Named Insured; and . . . [s]eparately to each insured against whom claim is made or 'suit' is brought." L.F. 145-46. The Umbrella, too, has a severability provision. L.F. 159.

Not only did the trial court not mention this Court's controlling Martin opinion, instead relying on unpublished federal magistrate orders, it also did not try to explain the applicability of this severability clause, which is another error. See Mendota Ins. Co. v. Ware, 348 S.W.3d 68, 74 (Mo. App. 2011) (the court should "'[r]ead the policy as a whole giving every clause some meaning if it is reasonably able to do so'") (quoting Miller v. O'Brien, 168 S.W.3d 109, 116 (Mo. App. 2005)). Further, "'[a]n insured is entitled to a pro-coverage interpretation of an insurance policy.'" Id. at 71 (quoting Burns v. Smith, 303 S.W.3d 505, 512 (Mo. banc 2010)). In addition to the preclusion rule discussed in Point II, *supra*, which operates to bar ILM from using these exclusions after its breach of the duty to defend, the severability provision, too, negates the exclusions.

This Court has analyzed severability clauses thus:

> The severability clause provides that the term 'insured' refers to any person or organization who qualifies as an insured but that the policy is applied separately to each insured who is seeking coverage and against whom a claim for damages is

> brought. This has been construed to mean that when applying the coverage to any particular insured the term 'insured' is deemed to refer only to the insured who is claiming coverage under the policy with respect to the claim under consideration.

Baker v. DePew, 860 S.W.2d 318, 320 (Mo. banc 1993). In Baker, the action arose out of an accident involving a truck owned by the employer, which was driven by employee/foreman DePew with co-employee Baker riding in back. Id. at 319. In discussing the effect of the severability clause as it relates to the employer exclusion, this Court explained:

> The [employer/]employee exclusion clause requires that the injured party be an employee of the insured and that the injury arise out of and in the course of that employment. . . . Of course [the injured employee] is not an employee of [the foreman], so, on that basis, the employee exclusion clause would not be applicable.

Id. at 321. In short, "[b]ecause this policy contains a severability clause, [the employer] is not treated as an insured when applying the policy for the benefit of [the foreman], and, therefore, the [employer/]employee exclusion clause would not exclude coverage in this situation." Id.

This analysis applies full force here. Appellants' mother was not an employee of Flowers, she was an employee of Missouri Hardwood Charcoal, Inc. L.F. 119; 124. Thus she was not "*an employee of **the insured***" for purposes of these exclusions. (See Points IV-VI). The rule expressed in Baker--that the severability clause limits the effect of the employer/employee exclusion to cases where the injured employee is actually an

employee of the particular insured sued--has been the rule in Missouri for over three decades. See Bituminous Cas. Corp. v. Aetna Life and Cas. Co., 599 S.W.2d 516, 520 (Mo. App. 1980) (explaining "[t]he employee exclusion is limited in its operation by the severability clause to cases in which an insured employee seeks to impose liability upon his insured employer").

Bituminous first explained "[t]he employee exclusion standing alone would have the effect of excluding all coverage as to an injured employee. . . ." Bituminous Cas. Corp. v. Aetna Life and Cas. Co., 599 S.W.2d 516, 520 (Mo. App. 1980) (emphasis added). Bituminous then clarified the exclusion was not "standing alone" and that, "[t]he question of the effect of the severability clause, however, is of first impression in Missouri." Id. Bituminous concluded "[t]he employee exclusion is limited in its operation by the severability clause to cases in which an injured employee seeks to impose liability upon his employer." Id. (emphasis added). Without the predicate employer/employee relationship, the "[e]mployee exclusion is wholly extraneous and inapplicable." Id. The trial court erred by relying on these exclusions where the policies have a severability provision.

In deciding a CGL coverage dispute in a tort case against a corporation and its officers, the Texas Supreme Court reasoned that the severability clause operated so that the officer, director and shareholder of the corporation was a "separate legal entity" from the corporation for purposes of coverage. Chrysler Ins. Co. v. Greenspoint Dodge of Houston, 297 S.W.3d 248, 252-53 (Tx. 2009) (explaining "[t]he purpose of these

separation-of-insureds clauses is to provide each insured with separate coverage, as if each were separately insured with a distinct policy").

One of the seminal cases on the effect of the severability clause on coverage for the corporate employer's executive officer for an employee's tort claim is Barnette v. Hartford Ins. Group, 653 P.2d 1375 (Wy. 1982). There, the Supreme Court of Wyoming explained:

> [P]rior to the introduction of the severability-of-interest clause . . . the courts of the country were in rampant disarray with respect to whether coverage would extend to an additional insured seeking protection from the claim of a co-employee and who was not himself or herself the claimant's employer.

Id. at 1376. After analyzing numerous authorities holding that the severability clause operates to limit the scope of the employer/employee exclusion to cases where the insured sued is the plaintiff's employer, the Barnette Court explained:

> If . . . the insured in question is not an employer who seeks policy protection from the claims of employees, then the cross-employee exclusionary rule cannot interfere with the coverage of that insured—and why should it? Such an insured has no employer-employee relationship with which to be concerned. . . . [The executive officer] falls within this classification. He is not an employer seeking protection from claims arising out of an injury to his employee and is therefore not precluded by the cross-employee exclusionary clause from coverage. . . .

Id. at 1383.

It is not unusual for an insurance company to argue that a corporation's injured employee is an employee of the corporation's executive officer so that coverage should be excluded. See Zenti v. Home Ins. Co., 262 N.W.2d 588, 588-89 (Ia. 1978). But the argument fails. As the Zenti Court wrote "[t]he severability-of-interests clause was inserted into insurance contracts to make clear that the employee exclusion is applicable only when the person claiming coverage as insured is the employer." Id. at 592 (coverage for the executive officer not excluded).

Here, the employer liability and workers' compensation exclusions exclude coverage for injury to employees of "the insured." L.F. 135. Because of the severability provision the phrase "the insured" is applied to each insured individually as if each insured had purchased a distinct policy. L.F. 145-46. Thus "the insured" executive officer Flowers is a separate entity from "the insured" Missouri Hardwood Charcoal. That is important because appellants' decedent was employed by Missouri Hardwood Charcoal, not by its executive officer. L.F. 119; 124 (See Points VI-VI, *infra*).

To see that this rationale for the severability provision makes sense, this Court need only read the workers' compensation exclusion. Although the trial court mentions the exclusion, it does not confront the actual language. L.F. 450-51. The exclusion applies to "[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law." L.F. 135. The umbrella policy has a similar exclusion but adds the Longshoremen's and Harbor Workers' Compensation Act, the Federal Employers' Liability Acts and the Jones Act. L.F. 156.

Reading the actual language reveals that the exclusion applies to the entity that could be subject to liability arising under these various employment statutes. Under the trial court's approach, a corporation's officer/owners would be subject to such obligations, so that they would personally be liable for workers compensation claims, unemployment claims, disability law claims, and so on. Presumably they would also be subject to *respondeat superior* liability because as the trial court frames it they are apparently equated for all purposes with the "employer" merely for owning and running their own corporation.

But neither the facts, the law, nor the severability provision support the trial court's approach. The CGL was issued to the named insured corporation Missouri Hardwood Charcoal, Inc. L.F. 152. Flowers is not named as an insured under the CGL. L.F. 152. He is an insured because of his capacity with the corporation as "executive officer" and should be treated as distinct from the corporation. L.F. 142. There was in fact a workers' compensation claim concluded against Missouri Hardwood Charcoal, Inc. not against Flowers personally. L.F. 447.

As discussed in appellants' fifth point, *infra*, under Chapter 287 Flowers the executive officer is an employee not the employer, at least for purposes of construing and applying the CGL. Further, under § 287.030.1 to constitute the "employer" for purposes of workers' compensation liability the person or entity must have five or more employees. There are no facts in the record suggesting Flowers himself had five or more employees or how he could otherwise be subject to an obligation under Chapter 287 or any of the statutes delineated in the workers' compensation exclusion.

Further, based on the plain language in the policy alone Flowers could not possibly have had any employee. Only the "Named Insured" corporation could. "Employee" is defined in part: "' Employee' includes a 'leased worker'[.]" L.F. 146. "'Leased worker' means a person leased to **you** by a labor leasing firm under an agreement between **you** and the labor leasing firm, to perform duties related to **your business**.[]" L.F. 147 (emphasis added).

The only **you** or **your** under the policy, that could have an employee/leased worker and a business, is the Named Insured corporation. L.F. 134, 152. The relevant language says "[t]hroughout this policy the words '**you**' and '**your**' **refer to the Named Insured** shown in the declarations and any other person or organization qualifying as a **Named Insured** under this policy." L.F. 134 (emphasis added). The Named Insured was the corporation Missouri Hardwood Charcoal and other corporations only. L.F. 152.

Flowers qualified as an insured by operation of the "Who is An Insured" provision under Section II, L.F. 134, 142, not the Named Insured endorsement. L.F. 152. So when the policy uses "employee" in the exclusion, and defines "employee" referring to "you" and "your," it is necessarily referring only to "employees" of the Named Insured Missouri Hardwood Charcoal (the only "you" and "your" in the policy).

Plus an executive officer is always an "employee" under the policies even though he may not be one in the traditional "paycheck" sense (which is why Flowers believed he was not an "employee," L.F. 109:12-22; 124 ¶ 12). The CGL recognizes this by specifically carving the executive officer out of the co-employee exclusion. L.F. 142. In fact the coverage language and the co-employee exclusion refer to "Your" executive

officers, recognizing the officer is a distinct insured person separate from the insured corporation. L.F. 142 ("executive officer" under the policies is a person covered for all workplace negligence, not a "theory of liability" as ILM believes; Transfer App., p 3). ILM recognized this too when it continued invoking the co-employee exclusion to deny a defense after it *knew* that Flowers was not an employee in the traditional sense. L.F. 72 (Flowers' lawyer wrote ILM "Junior Flowers is not an employee . . . ."); L.F. 76 (ILM responded nonetheless "[o]ur [previous] disclaimer correspondence [based on the co-employee exclusion] . . . remains ILM's position").

To be sure, as the trial court recognizes, the CGL draws a "sharp line" between an employer's employees and members of the general public with respect to tort claims. L.F. 450. But for that sharp line distinction to arise the parties to the dispute must have an employer-employee relationship. Such a relationship simply did not exist between Flowers the executive officer and appellants' mother under the facts nor under the CGL.

The trial court erred in ignoring the severability clause and thereby conflating Flowers the officer with the corporation in applying the employer liability and workers' compensation exclusions. Accordingly, this Court should reverse the trial court's legal conclusion that the employer liability and workers' compensation exclusions exclude coverage for the wrongful death judgment, enter judgment in favor of appellants on Counts I and II of their petition, and remand this case for calculation of interest on each count.

IV. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously

concluded that Flowers was in effect appellants' decedent's employer such that the workers' compensation and employer liability exclusions apply in 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 were concluded against Flowers, and those conclusions were necessary to Judge Parker's liability finding so they cannot be re-litigated or collaterally attacked here.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

Throughout the wrongful death case Flowers argued that he was in substance appellants' decedent's employer and so should be immune from the suit under Chapter 287. L.F. 208-09; 214-17. In fact he initially won a judgment from the wrongful death court on that point. L.F. 218. On appeal from that judgment, the Southern District explained Flowers "went on to argue that [he was] not [a] coemployee[] of [appellants'] Decedent but [was] her employer[] as defined by the workers' compensation statutes, and as such [was] entitled to the exclusivity protection afforded by those statutes." Heirien v. Flowers, 343 S.W.3d 699, 701 (Mo. App. 2011).

Just like here, appellants argued that Flowers should not be classified as the "employer" and thus should not be immune from civil suit. Id. at 701-02 (explaining ("[t]he bulk of Plaintiffs' argument on this point focuses on the trial court's classification of Defendants as "employers" as defined by the statute"). The Southern District held that Flowers' motion to dismiss preserved the affirmative defense of the exclusivity provision in § 287.120 and that the wrongful death court had jurisdiction. Id. at 703. The case was reversed and remanded for further proceedings. Id.

A few months later the case was presented to the wrongful death court for trial on all issues of liability and damages. L.F. 281-314. The court took judicial notice of the entire file, which included the transcript from the motion to dismiss (L.F. 93-114), the petition and answer thereto with Flowers' affirmative defense under workers' compensation set forth (L.F. 56-59; 252-58), and the opinion from the Southern District (L.F. 222-29). L.F. 283. Flowers disclaimed any liability in the case. L.F. 116; 120.

Appellants did not "settle" the wrongful death action and could have lost the trial on any issue including Flowers' affirmative defenses. L.F. 115-18. This Court recently explained in similar circumstances that where a § 537.065 agreement does not admit liability or damages and those issues are presented at trial the insurer gets "[m]ore protection than a settlement that admitted liability and determined damages," because the plaintiffs still must prove their case and the trial court could find the defendant "[w]as not liable or that no damages were suffered." Schmitz v. Great Am. Assurance Co., 337 S.W.3d 700, 709 (Mo. banc 2011).

After the bench trial with evidence on all issues of liability and damages the court entered judgment in appellants' favor. L.F. 121. In entering judgment the court specifically concluded that Flowers' "Defenses and Affirmative Defenses are invalid." L.F. 127. The court also found appellants' decedent "[w]as not Mr. Flowers' employee, but instead she was an employee of the corporation Missouri Hardwood Charcoal, Inc." L.F. 124. Flowers' attorney pursued the employer immunity issue in a motion to dismiss based on Chapter 287 employer immunity, L.F. 208-09, and as an affirmative defense that the wrongful death court concluded was invalid. L.F. 127.

Flowers' attorney also contended appellants' petition "fails to state a claim upon which relief can be granted." L.F. 255. He specifically claimed "[t]his cause of action is barred by the case of Murry v. Mercantile Bank, N.A., 334 S.W.3d 193 (Mo. App. E.D. 2000)." L.F. 255. Murry involved a defense based on Chapter 287 immunity and "[t]he employer's non-delegable duty to provide a reasonably safe workplace. . . ." Murry, 34 S.W.3d at 196-97.

The wrongful death court noted the case was called "[f]or Bench Trial before this Court . . . for adjudication of the Plaintiff's Petition for Wrongful Death[] and the Defendant's Answer and Affirmative defenses thereto. . . ." L.F. 122. After trial, the court stated "Well obviously I need to take this matter under advisement, read the exhibits, contemplate the evidence presented." L.F. 312. So the wrongful death court adjudicated the petition and Flowers' Murry "non-delegable duty safe-workplace" defense, and his Chapter 287 immunity defense and concluded (based on evidence that

was not made part of the record here, see Point VIII, *infra*) "Defendant's defenses and affirmative defenses are invalid." L.F. 127.

The trial court's judgment on appeal here concluding Flowers is "in substance" the employer so that the employers' and workers' compensation exclusions apply is an impermissible collateral attack on the wrongful death court's judgment that Flowers is not the employer entitled to workers compensation immunity. L.F. 127; 452. See Fostill Lake Builders, LLC v. Tudor Ins. Co., 338 S.W.3d 336, 342 (Mo. App. 2011). The trial court erred by attacking the wrongful death court's conclusion that Flowers is not the employer. The trial court also erred by construing the judgment as imposing liability based on the employer's non-delegable duty to provide a safe workplace. L.F. 453-54. Flowers expressly raised and lost *that* specific affirmative defense. L.F. 255; 127.

"'As a general rule, the validity of a judgment may only be impeached in an action by a formal appeal, 'the sole object of which is to deny and disprove' the judgment.'" Gaunt v. State Farm Mut. Auto. Ins. Co., 24 S.W.3d 130, 139 (Mo. App. 2000) (quoting Travis v. Contico Int'l, Inc., 928 S.W.2d 367, 369 (Mo. App. 1996) (quoting Caby v. Caby, 825 S.W.2d 56, 59 (Mo. App. 1992)). There was no formal appeal taken from the wrongful death court's judgment.

Further, "'[e]rrors of law do not provide grounds for collaterally attacking a final judgment.'" Id. (quoting State ex rel. Robinson v. Crouch, 616 S.W.2d 587, 591 (Mo. App. 1981)); see also Wright v. Bartimus Frickleton Robertson & Gorny, PC, 364 S.W.3d 558, 565 (Mo. App. 2011) ("'[a] collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the express purpose of annulling the

judgment'" (quoting Vilsick v. Fireboard Corp., 861 S.W.2d 659, 662 (Mo. App. 1993)) (also explaining "[t]he existence of every fact essential for a court . . . to have rendered a valid judgment is presumed[]"). So even assuming the wrongful death court erred on its legal conclusion that Flowers lost on his "employer immunity" and "employer non-delegable duty" affirmative defenses, nonetheless that conclusion is not subject to attack; and the existence of every fact essential to a valid judgment is presumed. See also Rule 73.01(c) (fact issues are deemed to be "found in accordance with the result" that Flowers' affirmative defenses failed).

The trial court's judgment concluding Flowers is "in substance" the employer is not only an impermissible collateral attack, it also essentially re-litigated a question that was necessary to the wrongful death court's liability finding and its rejection of Flowers' affirmative defenses. L.F. 127; 452. That too is impermissible and ILM is "[b]ound by the issues and questions necessarily determined in the underlying judgment. . . ." Assurance Co. of Am. v. Secura Ins. Co., 384 S.W.3d 224, 233 (Mo. App. 2012).

This Court recently observed that the underlying court's liability finding is binding in the equitable garnishment action. See Columbia Cas., *supra*, 411 S.W.3d at 264 (insurer is "bound by the liability determination") (quoting Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700, 709-10 (Mo. banc 2011)). Here, ILM had the opportunity as well as the duty under Martin to defend and control the wrongful death action against its insured. It cannot now relitigate the wrongful death court's conclusion that Flowers is not entitled to the employer's immunity and that his affirmative defense based on the Murry "non-delegable duty" theory fail. L.F. 127. ILM should have pursued this

affirmative defense on behalf of its insured, indeed it had a duty to do so, but instead chose to desert a known officer without even analyzing officer coverage. L.F. 92 (see Point I, *supra*).

In order to find Flowers' affirmative defenses were invalid the underlying judgment necessarily found he was not the employer and that appellants were not pursuing liability based on the invalid employer's non-delegable duty to provide a safe workplace. For the trial court to now find otherwise is an impermissible collateral attack on a legal conclusion and a final judgment, as well as an attempt to relitigate and presume the invalidity of a final judgment, and an attempt to find facts not in accordance with the result reached that Flowers lost on his affirmative defenses. Accordingly, this Court should reverse the trial court's judgment.

V. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that under Chapter 287 Flowers was in effect appellants' decedent's employer such that the employer based exclusions apply in that Flowers as executive officer is an employee under Chapter 287 and therefore under the policies for construing exclusionary and coverage provisions.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to

all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

The trial court concluded the CGL's "employer liability" exclusion applies to exclude coverage for the wrongful death judgment. L.F. 453. To get to that conclusion the trial court reasoned that under Missouri Workers' Compensation Law:

> [F]lowers' relationship with [appellants' decedent] could only be one of employer-employee. Missouri workers' compensation law recognizes an "employer" as a "person . . . using the service of another for pay. RSMo § 287.030.1 Because Flowers had absolute control over Missouri Hardwood Charcoal, he was, in substance, using the services of [appellants' decedent].

L.F. 453.

It is true that "'[i]n Missouri, the courts consistently turn to the Workmens' Compensation Act in determining the meaning of the word 'employee' as used in exclusion clauses of liability insurance policies. . . .'" Am. Fam. Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 29 (Mo. App. 2003) (quoting Ward v. Curry, 341 S.W.2d 830, 837 (Mo. banc 1960)). So the trial court is correct in turning to Chapter 287 to determine whether Flowers is an "employer" or an "employee" under the CGL. It just erred in applying the statute.

The term "employee" has different meanings depending on context, so Flowers may not have been an "employee" in the traditional sense because he did not receive a

paycheck, L.F. 109, but he may be an "employee" as that term is used in the CGL. As this Court has explained:

> The word 'employee' may and frequently does have many different meanings in the multitude of varying connections in which it is used. 'It is not a word of art, but it takes color from its surroundings and frequently is carefully defined by the statute where it appears.' The question of who is an employer and who is an employee under workmens' compensation acts is determined upon the terms and definitions set forth in such acts.

Ward v. Curry, 341 S.W.2d 830 (Mo. banc 1960) (internal citations omitted).

Because Missouri courts turn to workers' compensation law in construing whether a person is an "employee" under liability policies, it is relevant that "[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.3d 224, 227 (Mo. App. 2005) (citing Bethel v. Sunlight Janitor Serv., 551 S.W.2d 616, 618 (Mo. banc 1977)).

Concomitantly, Flowers cannot be both an employee and an employer under the CGL policy, where he is most accurately characterized as an "employee," at least with respect to strictly construing the "employer" liability exclusion. Chapter 287 expressly provides "[t]he word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter . . . including executive officers of corporations." § 287.020.1, RSMo (2000) (emphasis added). This Court explained this language soon after its inclusion in Chapter 287:

> When the Legislature amended § 287.020(1) . . . by including executive officers of corporations under the definition of 'employee,' it is our conclusion that they intended to include executive officers of corporations irrespective of whether or not these officers rendered controllable services or exercised control over the service of others.

Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363, 366 (Mo. banc 1973).

Under the trial court's analysis, using Chapter 287 to turn Flowers the executive officer into the "employer" to exclude coverage, the officer coverage is effectively written out of the policy. See Am. Fam. Mut. Ins. Co. v. Moore, 912 S.W.2d 531, 533 (Mo. App. 1995) (explaining "[a]ll provisions of an insurance policy must be given their plain and reasonable meaning and, if possible, all parts should be harmonized and given effect[]").

For these reasons, the trial court erred in concluding Flowers the executive officer was the employer under Chapter 287 and in applying the employer liability exclusion to bar coverage. Accordingly, this Court should reverse the trial court's judgment.

VI. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it improperly applied a piercing the corporate veil analysis to conclude that Flowers was appellants' decedent's employer such that the CGL's employer liability exclusion applied in that it only applied one prong of the test, the "complete control" prong, and there are no facts in the record to support the other prongs requiring improper purpose, fraud, or disregard of corporate formalities.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

In addition to erroneously concluding that Flowers is the employer under Chapter 287, the trial court also concluded the CGL's employer exclusion applies because Flowers was the sole owner, director, and officer controlling the corporation. L.F. 452. ILM knew or could have reasonably ascertained *all* these exact same facts about Flowers' capacity as owner, "non-employee" (Flowers' factual belief), director, officer, and sole shareholder of the corporation from the beginning (L.F. 72; 73; 75; 80; 82; 105:23-106:6; 119-20), yet it did not rely on these facts or the employer exclusion in its declination letters and emails, L.F. 61-81, thus it waived the exclusion. See Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 388 (Mo. banc 1989) (insurer may waive contract rights).

Further, the trial court's approach is a misapplication of a piercing the corporate veil analysis. The insurance company before this Court in the Lynn case *supra* tried using a similar analysis to argue that the executive officer was the "employer." Lynn, 493 S.W.2d at 366-67. There, the insurer:

> [p]roved that the corporation never had a stockholder's meeting; the deceased [executive officer] never consulted anyone regarding any decisions he made with regard to the operation of the business; that no by-laws were adopted; and that no showing was ever made as to how the various officers acquired their titles.

Lynn, 493 S.W.2d at 366.

Based on these facts the insurer argued "[t]he corporation was a façade which was controlled and directed by deceased [executive officer]." Id. This Court rejected this argument explaining "[t]o hold that the decedent [officer] was not an employee at the time of his death because of the office he held and his stock ownership in the corporation is to disregard the separate and distinct legal identities of decedent and Lloyd A. Lynn, Inc." Id. at 366-67. This Court refused to pierce the corporate veil because the insurer "[f]ailed to show that the separate identities were used as a subterfuge to defeat public convenience, for the perpetration of a fraud, or as a means to justify a wrong." Id. at 367.

Likewise here there is no showing that Missouri Hardwood Charcoal, Inc. was used as a subterfuge to defeat public convenience, for the perpetration of a fraud, or as a means to justify a wrong so there is no reason to pierce the corporate veil and hold Flowers the known executive officer was "in substance" the corporation. The trial court erred in doing so.

The Court of Appeals explained the general rule for piercing the corporate veil years ago:

> Although courts will look through corporate organizations to individuals when necessary to prevent injustice, doing so is the exception rather than the rule, and,

> ordinarily, a corporation will be regarded as a separate legal entity even though there is but a single stockholder.

K.C. Roofing Center v. On Top Roofing, Inc., 807 S.W.2d 545, 549 (Mo. App. 1991) (citing Love v. Ben Hicks Chevrolet, Inc., 655 S.W.2d 574, 576 (Mo. App. 1983)).

The facts relied on by the trial court may establish the "control" prong of the test but there is not a single fact in the record suggesting Flowers exercised control of the corporation to commit a fraud or do anything wrong. Accordingly, this Court should reverse the trial court's erroneous legal conclusion that the employer liability exclusion excludes coverage.

VII. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that the petition in the underlying action was amended such that lack of notice to ILM bars coverage under the CGL in that ILM could not be substantially prejudiced where the only amendment was to specify Flowers' "co-employee" capacity as executive officer, which capacity ILM knew yet refused to defend him, and which capacity is covered under the CGL for all forms of work-related negligence.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to

all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

The trial court concluded that "[t]he underlying judgment is not covered under ILM's policies because . . . [appellants'] claims were amended in the underlying action without notice to ILM." L.F. 453. The specific amendment identified by the trial court is that the petition "alleged no claim against Flowers in his capacity as an officer . . . while the judgment, based on [appellants'] evidence at trial, was that Flowers was negligent in his capacity as officer. . . ." L.F. 453. As explained in Point I, officer "capacity" simply means all of the officer's work-related conduct whether menial or managerial; and the term "co-employee" by itself includes a corporate officer. Martin v. United States Fid. & Guar. Co., 996 S.W.2d 506, 510 (Mo. banc 1999) (officer coverage is ambiguous at best and covers job conduct); Gunnett v. Girardier Bldg. And Realty Co.,70 S.W.3d 632, 637 n.5 (Mo. App. 2002) (explaining "[w]e consider the term co-employee to include a corporate officer, a supervisor, as well as a co-worker"); see also, § 287.020.1 ("[t]he word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer . . . including executive officers of corporations"). .

The trial court further concluded "[Appellants] 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." L.F. 448. The trial court concluded that the petition was amended "[b]ecause the evidence came in at trial without any objection by Flowers[.]" L.F. 449. As explained in

Point IV, *supra*, the case was not submitted as a "non-delegable duty safe workplace" case, and in fact Flowers raised that very defense and it failed. The trial court is erroneously collaterally attacking, relitigating, and presuming the invalidity of a final judgment with its amendment analysis.

Also, years before trial appellants recognized the "something more" concept had lost legal significance, explaining at the hearing on Flowers' motion to dismiss in January, 2010, "I tried to tackle the something more analysis and having thought about it I don't think that can apply any more under the strict construction analysis [under Chapter 287]." L.F. 99-100. Eight months later the Court of Appeals agreed with that proposition in Robinson v. Hooker, 323 S.W.3d 418, 422-23 (Mo. App. 2010). Robinson explained "[c]o-employee immunity primarily arose from a judicial construct . . . that must be re-evaluated based on principles of strict construction." Id. at 424. Robinson went on to say "[t]he immunity applies only to those who qualify as an 'employer' under the Act. The employee retains a common law right of action against co-employees who do not fall squarely within the definition of 'employer.'" Id. at 425. Thus the defendant could be subject to civil liability when she merely "lost her grip on a high pressure hose," id. at 421, instead of doing "something more" like "an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Id. at 423.

In light of Robinson abrogating the "'something more' than a breach of the employer's duty to provide a safe workplace" judicial construct, id. at 423, on appeal to the Southern District appellants correctly argued that changes in the law had "render[ed] the 'something more' analysis inapplicable." L.F. 240. So appellants stopped referring

to "something more" years before trial, because that is what the law required not because appellants were changing their case. And they started calling Flowers executive officer because ILM's correspondence showed he was. L.F. 80. Plus in seeking dismissal Flowers himself testified (just eight months after ILM closed its file, L.F. 92) that he was not a co-employee and did not receive a paycheck, L.F. 124 ¶ 20, same as he told ILM from day one. L.F. 72. None of this was a "new" case presented at trial years later. This was a Robinson case based on negligence against a defendant that was not the employer, id. at 425 (explaining "[t]he employee retains a common law right of action against co-employees who do not fall squarely within the definition of 'employer'"), and based on the truth known to ILM from the beginning.

In order to avoid recovery based on breach of notice provisions in an insurance policy the insurer must show it was "[s]ubstantially prejudiced as a result of the insured's breach[.]" Columbia Cas. Co. v. HIAR Holding, L.L.C., 411 S.W.3d 258, 272 (Mo. banc 2013) (citing Kearns v. Interlex Ins. Co., 231 S.W.3d 325, 331 (Mo. App. 2007)). "An insured's failure to provide an amended petition does not automatically indicate that the insurer need not provide coverage." Id. "A failure to provide an insurer an amended petition supports a refusal to defend and provide coverage only if the insurer suffered substantial prejudice by the insured's failure of notice." Id. (citing Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64, 91-92 (Mo. App. 2005)).

The trial court did not explain how ILM could be substantially prejudiced by evidence showing Flowers was the named insured's executive officer when ILM knew he was from the outset and nonetheless deserted him. L.F. 453-54. Indeed, every relevant

fact about Flowers' "capacity" with the corporation as owner, "non-employee" (Flowers' factual belief), manager, director, officer, and shareholder of the corporation was known or available to ILM from the beginning (L.F. 72; 73; 75; 80; 82; 105:23-106:6; 119-20). Flowers' lawyer even directed ILM to its own coverage by section and page and explained how the officer is carved out of the exclusion. L.F. 80. ILM recognized as much, whereupon the initial adjuster passed the buck, stating "this matter is going to be handled by our in-house counsel." L.F. 82. After which ILM did nothing. L.F. 92. There is no prejudice in these circumstances.

In Columbia Casualty, the amended petition added a new defendant, which obviously could change the insurer's analysis under the policy's "Who is an Insured" section, and the related coverage and exclusionary provisions that may apply to each insured differently. Id. at 271. But the Court held that even adding a new defendant does not cause prejudice where the legal theory underlying the claim remains the same. Id. at 272. The Court explained there was no prejudice because "[t]he amended petition did not alter the theory on which the [plaintiff] sought damages. The [plaintiff's] litigation at all times presented [statutory] claims that Columbia has refused since 2002 to defend or indemnify." Id. Likewise here, appellants' litigation at all times presented a negligence wrongful death claim involving the known executive officer Flowers' work-related kiln door policy that ILM refused to defend. ILM was not prejudiced.

This Court explained "[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. But relying on the same statute to seek damages is not a

"new" theory of liability that could cause substantial prejudice, even when a new insured is added as a defendant. Id. Likewise, appellants' relying on the same wrongful death negligence theory is not a "new" theory. See Nesselrode v. Exec. Beechcraft, Inc., 707 S.W.2d 371, 373 (Mo. banc 1986) (identifying negligence as a "primary theor[y] of liability," even where three distinct sub-categories were pleaded for negligent design, negligent manufacture, and negligent failure to warn).

In order to determine whether ILM could have been prejudiced, this Court should look first to the allegations in the wrongful death petition and to the facts known by ILM, and then compare those allegations and known facts to the truth presented at trial to see if any "new" theory of liability was added to the case. See Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 83 (Mo. App. 2005). The petition in the underlying case commenced a civil action L.F. 56-59 (same at trial, L.F. 284), seeking money damages L.F. 59 (same at trial, L.F. 312), alleging a statutory wrongful death claim under §§ 537.080 and 537.090, L.F. 56; 59 (same at trial, L.F. 284; 311-12), based on negligence L.F. 58 (same at trial, L.F. 310-11), stating Flowers' conduct was negligent in ordering people to lean kiln doors upright L.F. 58 (same at trial, L.F. 127; 310-11).

With respect to his "capacity" with the corporation, the petition alleges he was an individual, foreman, supervisor, site manager, employee or agent of the corporation. L.F. 57. These allegations encompass "executive officer," especially when ILM *knew* Flowers was the executive officer (L.F. 73; 75; 80), but refused to consider the petition in light of the facts it knew. See Gunnett v. Girardier Bldg. And Realty Co.,70 S.W.3d 632, 637 n.5 (Mo. App. 2002) (explaining "[w]e consider the term co-employee to include a

corporate officer, a supervisor, as well as a co-worker"); see also, § 287.020.1 ("[t]he word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer . . . including executive officers of corporations").

The upshot is, assuming *arguendo* there was somehow a change to a covered "non-employee" officer negligence case at trial, as compared to the covered "co-employee" officer negligence case (both covered under Martin), ILM cannot be prejudiced. Under the petition and based on the information ILM had in its possession, Flowers the executive officer was potentially covered from the outset.

There is also no prejudice because ILM failed to exercise due diligence to secure Flowers' cooperation. See Columbia Casualty, *supra*, 411 S.W.3d at 272 (the insurer must show it "[e]xercised reasonable diligence to secure the insured's cooperation"). ILM did not investigate the claim or even talk to Flowers, L.F. 361, it just repeatedly denied a defense based on the inapplicable co-employee exclusion, L.F. 61-64, 76, refused to analyze its executive officer coverage for a known executive officer, L.F. 80, and then sent the file to the in-house counsel who did nothing except ignore Flowers, L.F. 81, 92, and then it closed out its file. L.F. 92.

In fact in its denial letters ILM did not even use any standard language requesting "notice of any new claim, facts, theory or petition," etc. L.F. 61-69. It just "reserve[d] the right to assert any new term, condition or exclusion . . . that at a later time may be determined to apply whether or not that term, condition or exclusion has been discussed[]." L.F. 64, 68. Then it told Flowers if he disagreed he could contact the Department of Insurance. L.F. 64, 68. That is not an attempt to secure Flowers'

cooperation, it is an attempt to save the chance to think of new reasons to deny him, and to re-direct him to an outside agency for complaints.

Of course there are cases holding an insurance company can be prejudiced by not receiving notice of an actual amendment. "But, each of [those] cases involved the insured's failure to forward an amended petition asserting a *new* theory of liability against the insured." Truck Ins. Exchange, 162 S.W.3d at 91 (emphasis in original). In the TIE case, "[t]he [plaintiff's] negligent supervision theory was present from the beginning. TIE had an opportunity to and chose not to defend the claim." Id. The plaintiffs added some facts, and dropped a respondeat superior theory, but "[i]f anything, the amendment simply conformed with the facts, which TIE was charged with knowing in initially determining its duty to defend." Id. at 92.

Likewise, here, if anything, appellants' use of the specific "executive officer" in place of the more general "manager" "agent" or "employee" simply conformed with the facts ILM knew in initially determining its duty to defend. L.F. 80. There was no "new theory" that ILM did not know about from the very beginning, this was always a wrongful death negligence case, and ILM is not prejudiced. See Hocker Oil Co. v. Barker-Phillips-Jackson, Inc., 997 S.W.2d 510, 520 (Mo. App. 1999) (holding where insurer knew the nature of the occurrence pre-suit and denied liability, the insurer was not entitled to tender of the petition once suit was filed, and must cover the loss because "tendering the petition . . . would have been useless. A party is not required to do a useless act").

An example of a case where there was an actual amendment, not just assertion of facts about the insured already known to the insurer, is Dickman Aviation Serv., Inc. v. United States Fire Ins. Co., 809 S.W.2d 149 (Mo. App. 1991). There, the plaintiff sued the insureds alleging breach of contract, express warranty, implied warranty, and misrepresentation. Id. at 150. The insurer rightfully declined to defend because no "occurrence" as defined by the policy was alleged. Id.

But then later, the plaintiff changed the petition adding a negligence count. Id. A negligence cause of action, of course, does constitute an "occurrence" under these policies so this was a real change. Stark Liquidation Co. v. Florist's Mut. Ins. Co., 243 S.W.3d 385, 393 (Mo. App. 2007) (explaining "when a 'liability policy defines occurrence as meaning accident Missouri courts consider this to mean injury caused by the negligence of the insured'") (quoting Wood v. Safeco Ins. Co. of Am., 980 S.W.2d 43, 49 (Mo. App. 1998)). Naturally the insurer was entitled to notice of the negligence count because that is a switch from a non-covered claim to a covered one. Dickman, 809 S.W.2d at 152.

Here, 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. L.F. 56-59; 284; 310-12. Appellants' position at trial that Flowers was an executive officer is not an amendment, it is merely a position conforming the case to the facts and to the truth ILM knew all along.

In the Inman case relied on by the trial court, L.F. 454, the plaintiff initially alleged the insured City entered property "for the purpose of converting a portion of the

[plaintiff's] Property into a drainage ditch for the public purpose of controlling storm water drainage." Inman v. St. Paul Fire & Marine Ins. Co., 347 S.W.3d 569, 579 (Mo. App. 2011) (emphasis added). "The first amended petition, however, changed the entire nature of the case by alleging a non-public-use taking." Id. (emphasis added).

Not only did the new petition in Inman change the case from a public use case, which was not covered, to a covered private benefit case, it added completely new legal claims based on the 1st, 4th, and 7th Amendments to the United States Constitution. Id. The petition also added new factual allegations. Id. And it changed other factual allegations. Id. Of course the insurer was entitled to notice of such radical changes in the underlying case. Id. at 579-80. Nothing like that happened here.

In analyzing whether ILM could be prejudiced in the circumstances, it helps to be mindful of what a CGL covers, which in a nutshell is negligence. "A 'liability policy is designed to protect the insured from fortuitous injury caused by his actions. If the injury occurs because of carelessness of the insured, he reasonably expects the injury to be covered.'" Wood v. Safeco Ins. Co of Am., 980 S.W.2d 43, 50 (Mo. App. 1998) (quoting Farm Bur. Town & Country Ins. Co. v. Turnbo, 740 S.W.2d 232, 236 (Mo. App. 1987)).

So in determining whether the injury was caused by an "occurrence" or "accident" covered by ILM's CGL the essential question is whether it was caused by the insured's negligence. "It is well-settled Missouri law that when a 'liability policy defines occurrence as meaning accident Missouri courts consider this to mean injury caused by the negligence of the insured.'" Stark Liquidation Co., *supra*, 243 S.W.3d at 393 (citation omitted).

So for coverage purposes under the CGL, the important distinction is not between the "co-employee executive officer" negligence action and the "non-employee executive officer" negligence action, which is what the trial court focused on, L.F. 453-54, but rather between negligence and intentional conduct or other non-covered conduct. See Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 672 (Mo. App. 2007) (explaining "[t]he focus of the definition [of accident] is the insured's foresight or expectation of the injury or damages"); Todd v. Missouri United Sch. Ins. Council, 223 S.W.3d 156, 162 (Mo. banc 2007) (intentional act of physical force not an accident, so not an occurrence under the policy).

All forms of "negligence" constitute an "accident" under the CGL. See Stark Liq. Co., *supra*, 243 S.W.3d at 393 (explaining "[n]egligent misrepresentation, like other forms of negligence, falls within the meaning of 'accident'"[]) (emphasis added). This includes negligence based on ordinary care or higher standards. "'When used without restriction in liability policies, 'accident' has been held not to exclude injuries resulting from ordinary, or even gross, negligence.'" Wood v. Safeco Ins. Co. of Am., 980 S.W.2d 43, 49 (Mo. App. 1998) (citing N.W. Elec. Power Coop, Inc., v. Am. Motorists Ins. Co., 451 S.W.2d 356, 364) (Mo. App. 1969).

Under these authorities the "co-employee executive officer" negligence case is equally as covered under the CGL as the "non-employee executive officer" negligence case. See Martin, *supra*, 996 S.W.2d at 508. So ILM could not have been prejudiced by an amendment from one covered negligence "accident" case to the other (again, assuming *arguendo* such an amendment occurred).

But instead of analyzing the question of whether the wrongful death action was a negligence action, thereby potentially triggering coverage as an "accident," the trial court attempted to sub-classify the negligence action as if one version of the same "accident" would be covered by the CGL but another would not. L.F. 453-54. The more accurate conclusion is that as long as the action alleges negligence, and therefore an accident, the CGL affords coverage in the first instance. See Selimanovic, *supra*, 337 S.W.2d at 37 (explaining "[t]he damages recoverable in a statutory wrongful death action are precisely those defined by the policy as damages for 'bodily injury'"); Martin, *supra* 996 S.W.2d at 510.

In Columbia Casualty, this Court cited with favor a federal case where the district court held the insurer was not prejudiced by the lack of notice of an amended petition in a negligence case. Columbia Casualty, *supra*, 2013 WL4080770 at *11 (citing Hudson Specialty Ins. Co. v. Brash Tygr, LLC, 870 F.Supp.2d 708, 725 (W.D. Mo. 2012)). The federal court explained the differences between the petitions:

> The most significant difference between the final petition and the earlier ones is that the Second Amended Petition . . . named as defendants only Brash Tyger, LLC, and George, Sharon, and Tyler Roush. Further, Count III, which is in the First Amended Petition and the proposed Second Amended Petition and sets forth a cause of action for negligent entrustment against Sharon Roush, only, was deleted from the Second Amended Petition. . . .

Hudson Specialty Ins. Co. v. Brash Tygr, LLC, 870 F.Supp.2d 708, 724 n.7 (W.D. Mo. 2012). Even these amendments deleting a cause of action and dismissing parties as defendants did not arise to the level of prejudice requiring notice to the insurer. Id at 725.

The *only* cases to find prejudice from an amended petition involve change from a *non-covered* case to a covered case. See Rocha v. Met. Prop. & Cas. Ins. Co., 14 S.W.3d 242, 245-46 (Mo. App. 2000) (from intentional conduct to negligence) (also explaining the insured may be "relieved of the duty to forward a copy of the amended petition to his insurer by reason of any default on the part of [the insurer]" at 247); Dickman Av. Serv., Inc. v. United States Fire Ins. Co., 809 S.W.2d 149, 150 (Mo. App. 1991) (from contract/warranty allegations to negligence); Inman v. St. Paul Fire & Marine Ins. Co., 347 S.W.3d 569, 579 (Mo. App. 2011) (from non-covered "public purpose" to covered private-property "taking"). This makes sense because there is no prejudice going from one covered negligence case to another involving the same negligent conduct.

ILM simply cannot be substantially prejudiced in these circumstances. This Court should reverse the trial court's legal conclusion that the wrongful death petition was amended to ILM's substantial prejudice.

VIII. The trial court erred in granting ILM's motion for summary judgment and denying appellants' motion for summary judgment because it erroneously concluded that the petition in the underlying wrongful death action was amended by the evidence admitted in that to determine an amendment of a pleading to conform with the evidence, the actual evidence admitted should be examined, to see whether

it was relevant to issues already pleaded, but most of the liability evidence from the wrongful death action is not part of the record here.

Standard of Review

Because all of appellants' points challenge the propriety of the trial court's legal conclusions in granting ILM's motion for summary judgment and in denying appellants' motion, the same standard of review applicable to appellants' first point is applicable to all other points relied on in this Brief. In the interest of judicial economy that standard of review is therefore hereby incorporated by this reference.

Analysis

There is no dispute that appellants never submitted any amended "paper" petition, nor did they mention or request leave to do so at any time. L.F. 281-314. Indeed, appellants requested the wrongful death court take judicial notice of its entire paper file, which included their petition and Flowers' answer thereto, which the court did. L.F. 283. So the only petition before the wrongful death court was the written petition, which the court specifically concluded was valid. L.F. 127.

This Court's review of this "amendment" issue is impeded because most of the exhibits the wrongful death court relied on in determining liability are not part of the record. See First Nat'l Bank of Carrollton v. McClure, 666 S.W.2d 434, (Mo. App. 1984) (explaining "[t]his court is required to review the evidence of record before the trial court in its review"). The majority of those exhibits were excerpts from OSHA's written report from its investigation of appellants' mother's death. L.F. 129-30. For the

trial court to conclude that the pleadings were amended to conform with evidence without actually seeing that evidence is an exercise in conjecture.

This is improper because the amendment by "implied consent" rule requires the evidence bear solely on a new issue, not an issue already in the case, so the evidence must be examined in context of the issues in the wrongful death case. See Lester v. Sayles, 850 S.W.2d 858, 869 (Mo banc 1993). This is especially important in a case where the wrongful death court performed an "[a]ssessment [that] requires consideration of numerous relevant facts and circumstances unique to each case." Leeper, *supra*, 2014 WL 2190966 at *16.

The trial court erred because it engaged in guesswork to conclude that the exhibits in the wrongful death action related solely to the purported amendment. Those exhibits are not part of the record, and, as far as can be discerned without examining them, they related to issues already part of the case. ILM has not met its burden to show amendment by implied consent. See Cremer v. Hollymatic Corp., 12 S.W.3d 363, 370 (Mo. App. 2000). Accordingly, this Court should reverse the trial court's judgment.

CONCLUSION

The trial court erroneously concluded ILM did not breach its duty to defend Flowers because he is covered as executive officer. The trial court failed to analyze the Martin decision, which holds there is coverage under the CGL for an executive officer in a negligence case even where the injured person is a co-employee. The trial court failed to apply the CGL's severability provision, which requires the CGL be applied separately to Flowers the executive officer. Instead it wrongfully conflated him with the corporate

employer, and it misapplied the employer liability and workers' compensation liability exclusions because Flowers was not the employer. The trial court erroneously concluded ILM was prejudiced when appellants presented the same information about Flowers' executive officer capacity at trial as ILM had all along.

This Court should reverse the trial court, enter judgment in appellants' favor on Counts I and II of their petition, deny ILM's motion for summary judgment in all particulars, and remand for calculation of the judgment and interest.

Respectfully submitted,

/s/Tom Pirmantgen
John Lake #23472
Tom Pirmantgen #52384
LAKE LAW FIRM, LLC
3401 West Truman Blvd.
Jefferson City, MO 65109
Phone: 573-761-4790
Facsimile: 573-761-4220
E-Mail: tom@lakelawfirm.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE UNDER RULE 84.06(c)

The undersigned hereby certifies to the best of his knowledge, information, and belief that this Appellants' Brief contains the information required by Rule 55.03; complies with the limitations contained in Rule 84.06(b); contains 22,523 words, as counted by Microsoft Word, which is the word processing program used to prepare this Brief; and this Brief is in 13 point Times New Roman font.

/s/Tom Pirmantgen
Tom Pirmantgen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellants' Brief was served on Respondent's Attorneys via e-filing system on October 9, 2014 to:

Michael Hackworth, Hackworth, Hackworth & Ferguson, L.L.C., 1401 North Main, Suite 200, Piedmont, Missouri 63957, and to Robert Luder and John Weist of Luder & Weist, L.L.C., 9401 Indian Creek Parkway, Suite 800, Overland Park, Kansas 66210.

/s/Tom Pirmantgen
John H. Lake #23472
Tom Pirmantgen #52384
LAKE LAW FIRM, LLC
3401 West Truman Blvd.
Jefferson City MO 65109
573-761-4790
573-761-4220-Facsmile
tom@lakelawfirm.com

Attorneys for Appellants