IN THE SUPREME COURT OF MISSOURI

BETH ANN SCHWAN,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	Appeal No. SC85756
	)	
USAA CASUALTY INSURANCE COMPANY,	)	
	)	
RESPONDENT.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

THE HONORABLE ROBERT S. COHEN
CIRCUIT JUDGE, DIVISION ONE

SUBSTITUTE BRIEF OF RESPONDENT
USAA CASUALTY INSURANCE COMPANY

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Abbreviations:

"ASB"	Appellant's Substitute Brief
"L.F."	Legal File
"S.L.F."	Supplemental Legal File
"R.S.L.F."	Respondent's Supplemental Legal File
"R.S.S.L.F."	Respondent's Second Supplemental Legal File (Supreme Court)
"T."	Transcript

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STATEMENT OF FACTS

USAA Casualty Insurance Company provides a separate statement of facts to set forth those facts that are material to the questions presented by this appeal.

A. Introduction

Plaintiff Beth Ann Schwan appeals from a judgment entered on the jury's verdict for USAA on her action to recover under an insurance policy for property loss from a fire. Her action arises from a fire on January 20, 1998, which damaged a home and personal property that she owned with her husband, Kurt Schwan. Plaintiff filed suit against USAA, alleging USAA's refusal to pay the policy proceeds to her was vexatious and a breach of contract. (L.F. 6-8.) Kurt Schwan was not a party to the action and made no claim against USAA under the policy. (L.F. 6-8.)

USAA denied Plaintiff's claim, maintaining she was not entitled to recover under the policy because Kurt Schwan intentionally set the fire; therefore, coverage was excluded under a policy exclusion. (S.L.F. 1-3.) USAA submitted its defense to the jury under Instruction No. 6. (R.S.S.L.F. 7.) The instruction directed the jury to return a verdict for USAA if the jury believed the fire was intentionally set by Kurt Schwan with the intent to cause a loss. (*Id*.) The instruction followed the language of USAA's "intentional loss" instruction, which provides as follows:

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . .

h. **Intentional Loss**, meaning any loss arising out of any act committed:

(1) by or at the direction of an **insured**; and

(2) with the intent to cause a loss. (Emphasis in original.)

(L.F. 32.)

On the court's instructions, the jury returned a verdict for USAA on Plaintiff's claims for breach of contract and vexatious refusal to pay. (L.F. 69.) Thereafter, the trial court entered a final judgment for USAA. (L.F. 70.) Plaintiff's appeal followed.

B. USAA's Claim Investigation

Consistent with the standard of review, a statement of the facts in the light most favorable to the jury's verdict follows. For purposes of clarity and brevity, first names are used. No disrespect is intended.

1. Kurt Schwan - Motive

Approximately three months before the fire, in October 1997, Beth separated from Kurt, took their children, and went to live with her parents. (T. 114, 131, 156.) Beth left Kurt because he had problems with drinking and gambling. (T. 135, 188.) She and her husband were also experiencing serious financial problems in the period preceding the fire. (T. 28, 117, 132, 134-35.) They were behind on their mortgage payments, credit card payments, student loans, and utility bills. (T. 132-35, 190-91.) They owed back taxes. (T. 134, 191.) They also had plans to sell the home. (T. 119, 137, 159.) At the same time, Kurt was depressed and had stopped taking his depression medication. (T. 132.)

2. Kurt Schwan – The Prior Fire

Kurt was involved in a fire in 1982 in Columbia, Missouri. (T. 115.) The 1982 fire arose out of nearly identical circumstances as the fire at issue in this case.

Kurt admitted responsibility for setting fire to his apartment after his girlfriend had left him. (T. 115, 130-31.) At the time, he was depressed and frustrated because of his girlfriend's actions. (T. 131). Similarly, he was depressed when Beth left him before the fire at issue took place in 1998. (T. 132.)

3. Kurt Schwan - Opportunity

The fire on January 20, 1998, originated in the basement of the Schwan residence. (T. 106.) Kurt was the last one in the home on the morning in question, and he admitted to being in the basement that morning. (T. 125, 141.) Kurt's neighbor, Heather Winchell, heard Kurt leave the home around 7:30 a.m. (T. 225; Dep. of Heather Winchell at 3:12 to 5:4.) Approximately thirty minutes later, she saw smoke coming from the dwelling. (T. 225; Dep. of Heather Winchell at 4:12 to 5:4.) In addition, other neighbors, Carolyn and Ernie Hoskins, drove by the Schwan residence at 7:45 a.m., within fifteen minutes of Kurt's departure, and saw smoke coming from the home. (T. 203-4.)

4. USAA's Fire Investigation

On January 20, 1998, USAA retained investigator Michael Schlatmann to determine the fire's origin and cause. (T. 278.) Mr. Schlatmann conducted detailed fire scene investigations on January 21, 1998, and January 26, 1998. (T. 290-93.) He also conducted interviews of Kurt and Beth, as well as several of their neighbors. (T. 290,

293.) Based upon his investigation, Mr. Schlatmann concluded the fire was intentionally set. (T. 297.) Mr. Schlatmann also concluded that Kurt set the fire. (T. 308.)

Following the fire, Beth's father and Kurt's brother retained an investigator, Dr. Lloyd Brown, to investigate the fire. (T. 233-4.) He concluded the fire was intentionally set. (T. 242.) Dr. Brown ruled out the furnace and the water heater as potential causes. (T. 237, 239.) He also determined the fire's timing was not indicative of an electrical fire. (T. 240.)

Three years after the fire, Beth's counsel retained another investigator, Ronald Gronemeyer, to determine fire's the origin and cause. (T. 104.) Mr. Gronemeyer never went to the fire scene. (T. 104.) He never interviewed Kurt and Beth, or any other witnesses. (T. 105.) Mr. Gronemeyer was unable to determine the fire's cause, and was unable to rule out the possibility that the fire had been intentionally set. (T. 106-7.).

C. USAA's Claim Decision

Based on the facts and circumstances learned during the claim investigation, USAA concluded the fire was intentionally set by Kurt and, therefore, denied the insurance claim made by Beth. (S.L.F. 13-14.) USAA predicated its decision on the "intentional loss" exclusion in its policy. (T. 39-40, 255; L.F. 2, 32; S.L.F. 13-14.)

As did USAA, Beth concluded that Kurt had intentionally set the fire. (L.F. 78.) Within one week of the fire, she filed a verified Petition for Order of Protection against Kurt in the Circuit Court of St. Louis County. (T. 174-6.) In her Petition for Order of Protection, Beth stated:

> On January 20, 1998, our house burned to the ground. The fire is under investigation. The fire was deliberately set and he is under investigation. He has a mental illness and is not currently taking his medication. He has a drinking and gambling problem and a past history of arson. I don't know what he's going to do next.

(T. 211; L.F. 78.) After the fire, Beth repeatedly asked Kurt whether he had set the fire. (T. 207-8.)

In opening statements, Beth's counsel conceded it was reasonable for USAA to suspect Kurt of setting the fire. (T. 32-33.) Beth's counsel further conceded that if Kurt set the fire, then Beth should not be entitled to any coverage under the policy. (T. 32-33.)

D. The Prior Litigation

Plaintiff originally filed suit against USAA and Kurt in the Circuit Court of St. Louis City in 1999. On January 24, 2000, the court sustained USAA's motion to transfer venue. (L.F. 8.) The court ordered Plaintiff's claims against USAA severed and transferred to the Circuit Court of Lincoln County. (L.F. 8.) On February 10, 2000, the court transferred its file relating to Plaintiff's action against USAA to Lincoln County. (L.F. 7.)

Plaintiff's claims against her husband remained pending in the Circuit Court of St. Louis City. On September 1, 2000, the court entered a default judgment for Plaintiff and against her husband, finding the fire was caused by his negligence and awarding her $121,771.14 in damages for personal property lost in the fire and $150,000 for the property's replacement cost. (L.F. 65-67.)

Plaintiff's action against USAA in the Circuit Court of St. Louis County followed. (L.F. 6.)

POINTS RELIED ON

I. The trial court did not err in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict, because USAA Casualty Insurance Company was entitled to judgment on the jury's verdict based on the jury's finding that Plaintiff's husband intentionally set the fire, in that:

A. USAA's policy contains an "intentional loss" exclusion that bars all insureds under the policy from recovery for a loss where any insured intentionally causes the loss;

B. Plaintiff waived her point for appellate review by not moving for a directed verdict at trial on the ground the exclusion is ambiguous, that she is an innocent co-insured, or that the exclusion is void as against public policy; and

C. In any event, the exclusion is enforceable as a bar to coverage because it is unambiguous and there is no applicable Missouri public policy that requires its invalidation.

Daniels v. Board of Curators of Lincoln University, 51 S.W.3d 1 (Mo. App. W.D. 2001)

Shelter Mut. Ins. Co. v. Brooks, 693 S.W.2d 810 (Mo. banc 1985)

Columbia Mut. Ins. Co. v. Martin, 912 S.W.2d 640 (Mo. App. S.D. 1995)

Childers v. State Farm Fire & Cas. Co., 799 S.W.2d 138 (Mo. App. E.D. 1990)

II. The trial court did not err in overruling Plaintiff's objection and in denying her motion for mistrial related to the comment in USAA's opening statement that Plaintiff's husband had a history of arson and in overruling her objection to USAA's admission of the statement in her petition for an order of protection that her husband had a history of arson, because the trial court acted within its discretion in so ruling, in that:

A. Plaintiff waived her objections by first raising her husband's history of arson in her opening statement and in her case-in-chief during her direct examination and the direct examination of her husband;

B. Contrary to Plaintiff's argument, USAA's counsel did not make any reference to her husband's 1982 guilty plea and suspended imposition of sentence at trial;

C. Plaintiff husband's involvement in a prior fire was relevant on the issue of motive and intent and as a defense to Plaintiff's vexatious-refusal-to-pay claim; and

D. In any event, the trial court was in the best position to assess prejudice, and by denying Plaintiff relief, concluded there was none.

Bowls v. Scarborough, 950 S.W.2d 691 (Mo. App. W.D. 1997)

Johnston v. Conger, 854 S.W.2d 480 (Mo. App. W.D. 1993)

Goodman v. State Farm Ins. Co., 710 S.W.2d 423 (Mo. App. E.D. 1986)

Hulsey v. Schulze, 713 S.W.2d 873 (Mo. App. E.D. 1986)

III. The trial court did not err in denying Plaintiff's motion for directed verdict based on the doctrine of collateral estoppel, because Plaintiff cannot establish each of the doctrine's essential elements, in that:

A. As the prior judgment upon which Plaintiff relies was a default judgment, there was no judgment on the merits that could be given preclusive effect on the nature of her husband's liability for the fire;

B. USAA was not a party to the default judgment in Plaintiff's favor and, as a conflict in interests exists between USAA and her husband, there is no privity between them;

C. USAA did not have a full and fair opportunity to litigate the issues in the prior action because it was not a party to the action at the time of the default judgment and its theory that Plaintiff's husband intentionally set the fire conflicted with his interests in defending against Plaintiff's claim in the prior litigation; and

D. USAA did not forfeit its right to litigate liability and coverage because an inherent conflict of interest existed between USAA and Plaintiff's husband over the fire's cause.

James v. Paul, 49 S.W.3d 678 (Mo. banc 2001)

Shahan v. Shahan, 988 S.W.2d 529 (Mo. banc 1999)

Hayes v. United Fire & Cas. Co., 3 S.W.3d 853 (Mo. App. E.D. 1999)

Cox v. Steck, 992 S.W.2d 221 (Mo. App. E.D. 1999)

ARGUMENT

I. The trial court did not err in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict, because USAA Casualty Insurance Company was entitled to judgment on the jury's verdict based on the jury's finding that Plaintiff's husband intentionally set the fire, in that:

A. USAA's policy contains an "intentional loss" exclusion that bars all insureds under the policy from recovery for a loss where any insured intentionally causes the loss;

B. Plaintiff waived her point for appellate review by not moving for a directed verdict at trial on the ground the exclusion is ambiguous, that she is an innocent co-insured, or that the exclusion is void as against public policy; and

C. In any event, the exclusion is enforceable as a bar to coverage because it is unambiguous and there is no applicable Missouri public policy that requires its invalidation.

Plaintiff argues the trial court erred in denying her Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial. She asserts the trial court's judgment for USAA is contrary to law because she is an innocent co-insured. In support, Plaintiff states USAA's "intentional loss" exclusion is ambiguous because it deprives her of insurance coverage for the loss because of her husband's wrongdoing. She also maintains that an exclusion depriving an innocent co-insured of coverage is against public policy and invites the Court to adopt an "innocent co-insured" rule. Plaintiff's

point should be denied. USAA's "intentional loss" exclusion unambiguously bars Plaintiff's right to recover under the policy because the jury found that her husband, who was an insured under the policy, had intentionally caused the loss. Moreover, Plaintiff waived her point for appellate review by not seeking relief on this basis in the trial court.

1. Plaintiff waived the right to appellate review on the ground that she is an innocent co-insured by not seeking relief on that basis in the trial court.

Plaintiff's first point is not preserved for appellate review. An issue not raised in a motion for directed verdict may not be used to seek a judgment notwithstanding the verdict on that issue or for obtaining appellate review. *Daniels v. Board of Curators of Lincoln Univ*., 51 S.W.3d 1, 6 (Mo. App. W.D. 2001). Here, Plaintiff did not seek relief in the trial court on the grounds that USAA's "intentional loss" exclusion is ambiguous, that she is an innocent co-insured, or that the exclusion is against public policy.

Plaintiff, in her motion for directed verdict, raised none of the grounds now presented in her first point on appeal. Her motion for directed verdict was limited to her argument that the nature of her husband's fault in causing the fire, *i.e*., negligent or intentional conduct, had been decided in the prior action in the Circuit Court of St. Louis City and that USAA was bound by that judgment, which found her husband negligent, under the doctrine of collateral estoppel. (L.F. 14-16; T. 223, 349.) Nor did she assert the grounds that she has presented for appellate review in her post-trial motion for judgment notwithstanding the verdict. (L.F. 71-73.)

In addition, Plaintiff did not object to USAA's affirmative defense instruction on the ground that the instruction is contrary to law because she is an innocent co-insured. (T. 351.) The instruction directed the jury to return a verdict for USAA if the jury believed the fire was intentionally set by Plaintiff's husband with the intent to cause a loss. (R.S.S.L.F. 7.) As Plaintiff did not object to USAA's instruction on the legal grounds now presented for appellate review, she has waived her claim of error. Rule 70.03.

For these reasons, the Court should deny Plaintiff's first point for appellate review. As Plaintiff did not raise the grounds now asserted on appeal in the trial court, her first point for review has been waived.

2. The "Intentional Loss" Exclusion

In the alternative, and in the event the Court concludes Plaintiff's point is preserved for appellate review, the Court should affirm the trial court's judgment for USAA. The "intentional loss" exclusion unambiguously bars Plaintiff's right to recover under USAA's policy because the jury found that her husband had intentionally caused the fire.

USAA's "intentional acts" exclusion provides as follows:

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . .

> **h.** **Intentional Loss**, meaning any loss arising out of any act committed:
>
> (1) by or at the direction of an **insured**; and
>
> (2) with the intent to cause a loss. (Emphasis in original.)
>
> (L.F. 32.)

The term "insured" is a defined term under the policy. The term refers to "you," meaning the policy's named insureds. (L.F. 25.) Per the policy's declaration page, Plaintiff and her husband, Kurt Schwan, are the named insureds. (L.F. 18.)

The exclusion eliminates all coverage under the policy if "an insured" causes an intentional loss. Here, the jury, by finding for USAA, concluded that Kurt Schwan, an insured under the policy, intentionally caused the fire at issue. (L.F. 68-70; R.S.S.L.F. 7.) Therefore, the exclusion, by its terms, bars coverage for Plaintiff. Plaintiff's arguments do not support a contrary conclusion.

3. Plaintiff's ambiguity argument is contrary to her position in the trial court.

Plaintiff argues the "intentional loss" exclusion is ambiguous and open to more than one interpretation. Plaintiff asserts the exclusion bars coverage only for her husband and that she, as an innocent co-insured, should be entitled to recover. (ASB 19.) Plaintiff's ambiguity argument should be denied.

Her argument is contrary to her position in the trial court. There, Plaintiff admitted in her opening statement that the exclusion barred coverage for her so long as it

was found that her husband had intentionally caused the loss. Consider her opening statement:

> Now, I want to get something out on the table with you all from the very beginning. I think it was very reasonable for USAA to suspect Kurt Schwan in this case. I don't hold that against them for a moment. I think Beth would probably agree. I mean, it's a logical thing to do, did Kurt set this fire. Because if he did, he shouldn't be entitled to any kind of coverage under the policy. *Neither should Beth.* (T. 32-33.) (Emphasis added.)
>
> Later, in Plaintiff's opening statement, her counsel stated:
>
> So the impact that had on Beth was, if, in fact, Kurt had intentionally set the fire, Beth doesn't get anything, despite the fact that she didn't do anything to intentionally cause the fire. *They are right. That's what the policy says.* (T. 40.) (Emphasis added.)

Plaintiff's opening statement should bar Plaintiff's present argument that the exclusion is ambiguous. An unequivocal admission in a party's opening statement constitutes a judicial admission that is conclusive on the issue admitted. *Fust v. Francois*, 913 S.W.2d 38, 46 (Mo. App. E.D. 1995). Here, Plaintiff, without qualification, admitted that the exclusion barred coverage for her should the jury find that her husband intentionally caused the loss.

4. The "intentional loss" exclusion is not ambiguous.

Moreover, regardless of Plaintiff's opening statement admission and her failure to preserve this issue for appellate review, the "intentional loss" exclusion is not ambiguous

and should be enforced by its terms. The interpretation of an insurance policy is a question of law for the Court to decide. *McCormack Baron Mgm't Servs., Inc. v. American Guarantee & Liab. Ins. Co*., 989 S.W.2d 168, 171 (Mo. banc 1999). When interpreting an insurance policy, appellate courts give the language its plain meaning. *Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo. banc 1999). "The plain or ordinary meaning is the meaning that the average layperson would understand." *Id.* In the absence of an ambiguity, appellate courts must enforce the policy as written. *Trans World Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609, 622 (Mo. App. E.D. 2001). Absent an ambiguity, recourse to the rules of contract construction is unnecessary. *Shahan*, 988 S.W.2d at 535.

The same is no less true in the case of an adhesion contract. Absent an ambiguity in the policy language at issue, a court may not resort to the "reasonable expectations" doctrine to find coverage. *Kellar v. American Family Mut. Ins. Co*., 987 S.W.2d 452, 455 (Mo. App. W.D. 1999).

An ambiguity exists "when there is duplicity, indistinctness, or uncertainty in the meaning" of the policy language. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997). Restated, the language of a policy is ambiguous if it is reasonably and fairly open to different constructions. *Id*. In such event, the interpretation most favorable to the insured will be adopted. *American Family Mut. Ins. Co. v. Moore*, 912 S.W.2d 531, 533 (Mo. App. W.D. 1995).

However, the mere fact the parties disagree over the interpretation of a policy provision does not make the term ambiguous. *Sanders v. Wallace*, 884 S.W.2d 300, 302

(Mo. App. E.D. 1994). Moreover, "[c]ourts are not permitted to create ambiguities in order to distort the language of an unambiguous policy." *Shahan*, 988 S.W.2d at 535. Restated, the "ambiguity" rule does not permit a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists. *Moore*, 912 S.W.2d at 533.

Guided by these principles, USAA's "intentional acts" exclusion is unambiguous and bars Plaintiff's right to recovery. While this Court has not previously addressed this exclusion, decisions by the Missouri Court of Appeals support the view that an innocent co-insured may not recover where the policy has an unambiguous exclusion barring recovery by an innocent co-insured. *Childers v. State Farm Fire & Cas. Co*., 799 S.W.2d 138, 141 (Mo. App. E.D. 1990). In a later decision noting the innocent co-insured issue, the Court of Appeals again observed that unambiguous policy language in an insurance policy controls. *DePalma v. Bates County Mut. Ins. Co*., 923 S.W.2d 385, 388 (Mo. App. W.D. 1996).

Moreover, this Court has suggested that exclusionary provisions with wording substantially similar to the language in USAA's "intentional loss" exclusion would be upheld. Plaintiff's argument focuses on the fact that there are two named insureds under the policy, one guilty of wrongdoing, the other innocent. However, the multiplicity of insureds does not give rise to a policy ambiguity in the face of clear policy language. The Court's decision in *Shelter Mut. Ins. Co. v. Brooks*, 693 S.W.2d 810 (Mo. banc 1985), so demonstrates.

In *Brooks*, the Court addressed the effect of a "severability" clause on an exclusion found in an automobile liability policy. As the exclusion referred to "the insured," the Court discussed the significance of the words "the," "an," and "any" when used to modify the word "insured." *Id*. at 812. The Court concluded the use of the article "the" created an ambiguity when considered in conjunction with the policy's "severability" clause, explaining:

> If the article "the" is combined with the plural "insured" it would clearly encompass all insured under the policy. If on the other hand it is combined with the singular "insured" it speaks to a specific insured rather than all members of the class wherein the terms "an insured" or "any insured" are more properly utilized.

Brooks, 693 S.W.2d at 812.[1]

The Court's opinion suggested the means to avoid any ambiguities in this context. The Court made plain in *Brooks* that an exclusion prefacing the term "insured" with either "an" or "any" would be sufficient to survive an ambiguity challenge and bar coverage where the acts of one insured are meant to bar coverage for all insureds under the policy. *Id*. *See also* Note, *The Problem of the Innocent Co-Insured Spouse: Three Theories on Recovery*, 17 Val.U.L.Rev. 849, 872 (1983) (substitution of the term "the

[1] USAA's property coverage part, which is at issue in this case, does not contain a "severability" clause. However, the liability coverage part, which is not at issue, does, providing: "This insurance applies separately to each insured. . . ." (L.F. 39.)

insured" with "any" or "an" insured eliminates any question whether the misconduct of one insured defeats coverage for all insureds under the policy).

USAA, in drafting its policy, heeded the Court's precedent. The "intentional acts" exclusion passes the Court's ambiguity analysis in *Brooks*. Unlike the exclusion in *Brooks*, which the Court held ambiguous, USAA's exclusion prefaces the word "insured" with the article "an." (L.F. 32.)

The word "an" is an indefinite article "that is used as a function word before singular nouns when the referent is unspecified." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 43 (1989). In USAA's exclusion, the phrase "an insured" refers to an unspecified insured who causes an intentional loss. Therefore, if any insured intentionally causes a loss, all insureds are barred from recovering, regardless of whether the insured claiming coverage was the wrongdoer or not. *Brooks*, 693 S.W.2d at 812.[2]

5. Each district of the Missouri Court of Appeals has upheld similar exclusionary provisions as unambiguous bars to coverage.

Consistent with the Court's analysis in *Brooks*, each district of the Missouri Court of Appeals has upheld exclusionary provisions substantially similar to USAA's

[2] As part of a policy issued to a Missouri insured, the Director of the Missouri Division of Insurance has reviewed USAA's "intentional loss" exclusion for ambiguities. Under Section 375.920, R.S.Mo. 2000, the director is required to review policy forms to insure that each form complies with state insurance laws and contains "words, phraseology, conditions, and provisions which are specific, certain, and unambiguous."

"intentional loss" exclusion. In *Childers v. State Farm Fire & Cas. Co*., 799 S.W.2d 138, 141 (Mo. App. E.D. 1990), the Eastern District addressed the following policy language: "Concealment or Fraud: This entire policy shall be void if any insured has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance." The court observed:

> The policy provision unambiguously declares that [the insureds'] rights are jointly rather than severally held. By stating that the entire policy is void when *any* insured intentionally conceals a material fact or circumstance, the insurance contract clearly makes either [insureds'] recovery contingent upon the other's conduct.

Id. at 141 (emphasis in original). Although the court did not reach the innocent co-insured issue because both insureds made fraudulent claims, the court expressed its view that the provision would bar coverage for an innocent spouse. *Id*.

In *Columbia Mut. Ins. Co. v. Martin*, 912 S.W.2d 640 (Mo. App. S.D. 1995), the Southern District upheld an insurer's coverage declination because the insured husband made misrepresentations in the application and intentionally burned the insured home. In rejecting the insured wife's appeal, the court held the husband's conduct voided the policy from its inception, and, thus, there was no coverage for the wife, although she did not commit any fraud. *Id*. at 641-42. The court explained the insurer's policy provided that a material misrepresentation by "an insured" would void the policy. *Id*. In so holding, the court rejected the wife's contention that the phrase "an insured" referred only

to the insured causing the loss, finding no difference between the phrases "an insured" and "any insured." *Id*.

In *American Family Mut. Ins. Co. v. Moore*, 912 S.W.2d 531 (Mo. App. W.D. 1995), the Western District upheld a "business pursuits" exclusion, which negated coverage where "any insured" under the policy was engaged in a business activity that causes a loss. In affirming the trial court's summary judgment for the insurer, the court addressed whether the phrase "any insured" embraced all insureds under the policy. Answering the question affirmatively, the court held that, as the exclusion referred to "any insured," the policy "unambiguously expresse[d] an intention to deny coverage to all insureds when damage is the result of a business pursuit." *Id*. at 534-35.

Finally, consider the Eastern District's decision in *American Family Mut. Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625 (Mo. App. E.D. 1997), where the court addressed an exclusion that eliminated coverage for damage that was expected or intended from the standpoint of any insured. The court reversed the trial court's judgment that the wife was entitled to coverage, although her husband was not because the husband had sexually molested a minor. The court held the policy's use of the phrase "any insured" in the exclusion was unambiguous and barred coverage for the wife where her husband, who was also an insured under the policy, engaged in intentional misconduct. *Id*. at 628-29. The court explained that where coverage is contingent upon the conduct of any insured, and if one insured's conduct falls under the exclusion, all other insureds are barred from coverage. *Id*. at 628.

The result in this case should be different. As the jury found that "an insured" under USAA's policy intentionally caused the loss, the "intentional loss" exclusion bars coverage for all other insureds under the policy.

6. The Eighth Circuit's decision in *Haynes* has no precedential value.

Plaintiff's citation to the Eighth Circuit's decision in *Haynes v. Hanover Ins. Cos*., 783 F.2d 136 (8th Cir. 1986), in which the court suggested that Missouri's courts would adopt a rule permitting recovery by an innocent co-insured, is not controlling. The focus should be on the policy language at issue. Indeed, the Eighth Circuit acknowledged in *Haynes* that where a contract provision bars coverage for all insureds under the policy because of the wrongdoing doing of one insured, an "innocent co-insured" rule should not be applied. *Id*. at 138. Here, unlike the provision in *Haynes*, USAA's "intentional loss" exclusion bars coverage for all insureds under the policy so long as an insured under the policy has intentionally caused a loss. (L.F. 32.)

Moreover, subsequent federal decisions have not followed the dicta in *Haynes*. In *Amick v. State Farm Fire and Cas. Co*., 862 F.2d 704, 705-06 (8th Cir. 1988), the Eighth Circuit rejected the argument that an exclusion barring coverage for an innocent co-insured because of the wrongdoing of another insured was against Missouri public policy. The court explained that "[t]he key factor is whether the policy provision barring recovery by innocent co-insureds is clear and unambiguous." *Id*. at 706. The federal district court decision in *Employers Mut. Cas. Co. v. Tavernaro*, 4 F.Supp.2d 868, 870-71 (E.D. Mo. 1998), is in accord.

7. Plaintiff's foreign authorities should not be followed.

Plaintiff's cases from other states do not compel adoption of an "innocent co-insured" rule in Missouri. (ASB 19-20.) As demonstrated above, Missouri's courts have addressed policy language indistinguishable from the "intentional acts" exclusion in USAA's policy and have deemed that language unambiguous and enforceable. The fact other jurisdictions have adopted an "innocent co-insured" rule is of no import. Where a point at issue has been decided by Missouri's courts, the precedent thus established should not be upset merely because courts in other jurisdictions have declared a different rule. *Adair v. General Am. Life Ins. Co*., 124 S.W.2d 657, 660 (Mo. App. W.D. 1939); *Waye v. Bankers Multiple Line Ins. Co*., 796 S.W.2d 660, 662 (Mo. App. W.D. 1990).

Moreover, Plaintiff's authorities are distinguishable under Missouri law. The focus in Missouri is on whether the insurer's policy, by its terms, unambiguously bars recovery by an innocent insured for a loss intentionally caused by another insured under the policy. In contrast, Plaintiff's leading authority, *American Hardware Mut. Ins. Co. v. Mitchell*, 870 S.W.2d 783 (Ky. 1993), does not address policy language at all. Indeed, the dissenting opinion noted that the insurer's "intentional loss" exclusion was sufficient to put the wife on notice that the policy would afford her no coverage if her husband intentionally destroyed their home. *Mitchell*, 870 S.W.2d at 786 (Leibson, J., dissenting).

Plaintiff's citation to *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873 (Tex. 1999), does not advance her position. Rather than deciding the question based on policy considerations, the Supreme Court of Texas looked to the policy's language to determine whether the innocent insured could recover. *Id*. at 878. Noting the insurer's policy did

not contain an intentional loss exclusion and the insurer had waived its concealment and fraud condition, the court concluded the innocent co-insured could recover. *Id*. at 879-80. No similar waiver of a policy defense exists in this case.

Finally, Plaintiff's citation to the Illinois decision in *Fittje v. Calhoun County Mut. County Fire Ins. Co*., 552 N.E.2d 353 (Ill. App. Ct. 1990), is not helpful because the policy language is not addressed. As a later decision made plain, Illinois courts allow innocent co-insureds to recover only in the absence of an express policy provision to the contrary. *Westfield Nat. Ins. Co. v. Continental Community Bank & Trust Co*., 804 N.E.2d 601, 607 (Ill. App. Ct. 2003).

In contrast, courts that examine policy language have upheld exclusions similar to USAA's "intentional loss" exclusion that bar recovery to innocent co-insureds. Focusing on the insurer's policy language, the supreme courts of Iowa and Montana have upheld "intentional loss" exclusions with language identical to USAA's provision. *Vance v. Pekin Ins. Co*., 457 N.W.2d 589, 592-93 (Iowa 1990); *Woodhouse v. Farmers Union Mut. Ins. Co*., 785 P.2d 192, 194 (Mont. 1990). Other courts have enforced similar exclusions. *Spezialetti v. Pacific Employers Ins. Co*., 759 F.2d 1139, 1141-42 (3rd Cir. 1985) (applying Pennsylvania law); *Sales v. State Farm Fire and Cas. Co*., 849 F.2d 1383, 1385 (11th Cir. 1988) (applying Georgia law); *Hall v. State Farm Fire and Cas. Co*., 937 F.2d 210, 213-14 (5th Cir. 1991); *American Family Mut. Ins. Co. v. Bowser*, 779

P.2d 1376, 1382 (Colo. Ct. App. 1989); and *Bryan v. Employers Nat. Ins. Corp.*, 742 S.W.2d 557, 558 (Ark. 1988).[3]

8. Public policy does not render USAA's "intentional loss" exclusion unenforceable.

Plaintiff asserts USAA's "intentional loss" exclusion is against public policy. (ASB 18.) Her argument should be denied.

Missouri's courts recognize the freedom of contract in the insurance context. *Halpin v. American Family Mut. Ins. Co*., 823 S.W.2d 479, 483 (Mo. banc 1992). Parties to insurance policies may agree to such terms and provisions as they see fit to adopt, so long as the contract is lawful and reasonable. *American Family Mut. Ins. Co. v. Ward*, 789 S.W.2d 791, 795 (Mo. banc 1990).

As insurance policies are a matter of contract, public policy plays only a limited role in their interpretation. When the contract language is clear, exceptions based on public policy must find support in necessary implications from statutory provisions. *Halpin*, 823 S.W.2d at 483. Restated, the Court will not invalidate a policy provision unless it is contrary to the public policy of Missouri as expressed by the legislature. *First Nat. Ins. Co. of Amer. v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995). Here, there is no statutory enactment by the Missouri General Assembly that requires the Court to invalidate USAA's "intentional loss" exclusion under the facts of this case.

[3] Cases addressing the "innocent co-insured" issue are collected in Larry D. Scheafer, Annotation, *Rights of Innocent Insured to Recover under Fire Policy Covering Property Intentionally Burned by Another Insured*, 11 A.L.R.4th 1228.

USAA notes the general assembly has enacted a limited "innocent co-insured" rule that is applicable in the context of domestic violence, Section 375.1312, R.S.Mo. 2000. Section 375.1312.1(3) defines an "innocent coinsured" as "an insured who did not cooperate in or contribute to the creation of a property loss and the loss arose out of a pattern of domestic violence."

Where an insured qualifies an "innocent coinsured" under Section 375.1312.1(3), the statute forbids an insurance company from denying an innocent co-insured recovery if the co-insured files a police report and agrees to cooperate in any criminal prosecution of the other insured." Section 375.1312.5, R.S.Mo. 2000. Subsection 5 of Section 375.1312 provides as follows:

> If an innocent coinsured files a police report and completes a sworn affidavit for the insurer that indicates both the cause of the loss and a pledge to cooperate in any criminal prosecution of the person committing the act causing the loss, then no insurer shall deny payment to an innocent coinsured on a property loss claim due to any policy provision that excludes coverage for intentional acts. . . .

As to Plaintiff's claim against USAA, Section 375.1312.5 is unavailable to provide a legislative predicate for the invalidation of USAA's "intentional loss" exclusion on public policy grounds. Plaintiff does not qualify as an "innocent coinsured," as defined by the statute. The loss did not occur as the result of "a pattern of domestic violence." Nor has Plaintiff satisfied the preconditions for recovery as an "innocent coinsured" under subsection 5.

The legislature's intent that the application of subsection 5 is limited exclusively to "domestic violence" situations is confirmed by subsection 4 of Section 375.1312. Subsection 4 provides that nothing in Section 375.1312 "shall prohibit an insurer from taking an action described in subsection 2 of this section [including the exclusion and limitation of coverage for losses] if the action is otherwise permissible by law and is taken in the same manner and to the same extent with respect to all insureds and prospective insureds without regard to whether the insured or prospective insured is a victim of domestic violence." Therefore, by enacting Subsection 4, the legislature made plain that USAA's "intentional loss" exclusion is enforceable as a matter of Missouri public policy outside the limited statutory context of "domestic violence."

Moreover, if Section 375.1312 could be read to provide a legislative basis for the invalidation of USAA's exclusion on public policy grounds, which it cannot, the statute cannot be applied retroactively to nullify a policy provision applicable to a 1998 loss that took place over two years before subsection 5 of Section 375.1312 was enacted in 2000. L. 2000, H.B. Nos. 1677, 1675, & 1676. Article I, Section 13 of the Missouri Constitution prohibits the retrospective application of laws enacted by the legislature that take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past. *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 552 (Mo. banc 1987). *See also American Family Mut. Ins. Co. v. Ward*, 789 S.W.2d 791, 797 (Mo. banc 1990) (Covington, J., concurring) ("Whatever the public policy now

espoused by the State of Missouri, this Court should not by judicial fiat retroactively impose that policy on this antecedent insurance contract.")

Finally, in the context of public policy, there are competing policies that favor rejection of an "innocent co-insured" rule and the enforcement of USAA's "intentional loss" exclusion according to its unambiguous terms. An exclusion that denies coverage to all insureds under a property policy where one insured intentionally destroys the insured property advances the public good by discouraging fraud and limiting the moral hazard. A contrary rule increases the risk of arson and insurance fraud. It is not difficult for collusive insureds to destroy their property, yet claim that one insured is entirely ignorant of the cause of the loss. Indeed, the more intimate the relationship between insureds, the greater the possibility of collusion in the presentation of a fraudulent insurance claim.

9. Conclusion

As the jury found that Plaintiff's husband intentionally caused the fire that destroyed the insured property, the policy's "intentional acts" exclusion bars Plaintiff's claim for insurance coverage for the loss as a matter of law. By its terms, the exclusion unambiguously provides that if any insured under the policy intentionally causes a loss, all insureds are barred from recovering. Moreover, as Plaintiff failed to raise the "innocent co-insured" issue in the trial court, her point should be denied because she waived her arguments for appellate review. Therefore, the trial court's judgment for USAA should be affirmed.

II. The trial court did not err in overruling Plaintiff's objection and in denying her motion for mistrial related to the comment in USAA's opening statement that Plaintiff's husband had a history of arson and in overruling her objection to USAA's admission of the statement in her petition for an order of protection that her husband had a history of arson, because the trial court acted within its discretion in so ruling, in that:

A. Plaintiff waived her objections by first raising her husband's history of arson in her opening statement and in her case-in-chief during her direct examination and the direct examination of her husband;

B. Contrary to Plaintiff's argument, USAA's counsel did not make any reference to her husband's 1982 guilty plea and suspended imposition of sentence at trial;

C. Plaintiff's husband's involvement in a prior fire was relevant on the issue of motive and intent and as a defense to Plaintiff's vexatious-refusal-to-pay claim; and

D. In any event, the trial court was in the best position to assess prejudice, and by denying Plaintiff relief, concluded there was none.

1. Introduction

Plaintiff argues the trial court erred in overruling her objection and in denying her motion for mistrial related to the comment in USAA's opening statement that Plaintiff's husband had a history of arson. Plaintiff also asserts the trial court erred in overruling her objection to the introduction of an identical statement that she made in her petition for an

order of protection. Plaintiff claims she was prejudiced by the trial court's rulings because the remarks in USAA's opening statement and the introduction of the order of protection permitted the jury to infer from them that her husband had a prior criminal history of arson. Plaintiff's point should be denied.

A mistrial based on comments made in opening statement is a drastic remedy. *Bowls v. Scarborough*, 950 S.W.2d 691, 698 (Mo. App. W.D. 1997). It should be granted only where the incident is so grievous that the comment's prejudicial effect can be removed no other way. *Id*. On appeal, a trial court's decision denying a motion for mistrial because of improper remarks during opening statement will not be disturbed unless the trial court clearly abused its discretion. *Id.* This is so because the trial court is in a better position than a reviewing court to assess the prejudicial effect, if any, of an allegedly improper comment, and is vested with considerable discretion in determining what corrective action is required. *Id*.

2. USAA's counsel did not refer to the guilty plea and suspended imposition of sentence that Plaintiff's husband received for the 1982 fire.

The trial court did not abuse its discretion in denying Plaintiff's request for a mistrial based on the comment of USAA's counsel during opening statement that her husband had a history of arson. Plaintiff's argument is predicated on the assumption that counsel's statement improperly referred to her husband's guilty plea to an arson charge in 1982 and the suspended imposition of sentence that he received for the crime. The challenged remark, in its context during opening statement, follows:

> She came – as Mr. Seibel told you, she came into this court and she filed what's called a petition for a protective order, an order of protection against Kurt Schwan. And you'll see that petition.
>
> In that petition, ladies and gentlemen, she says, Our house burned down on January 20th of 1998. The fire is under investigation. The fire was deliberately set. She wrote that in her own handwriting. And she says, Kurt is under investigation. She says, He has a mental illness. He's not currently taking his medications. He has a drinking and a gambling problem. He has a past history of arson. (T. 46-47.)

The record demonstrates the challenged remark referred to Plaintiff's own statement in her petition for an order of protection. The opening statement by USAA's counsel quotes verbatim the contents of Plaintiff's petition, which was written in her own handwriting. (L.F. 78; T. 211.)

Contrary to Plaintiff's argument, USAA's opening statement did not refer to any prior criminal charges against Plaintiff's husband. Absent in USAA's opening statement is any reference to his past criminal history. Nor are there any references by USAA to her husband's guilty plea and suspended imposition of sentence for arson in 1982 elsewhere in the record.

3. Plaintiff first introduced the contents of the order of protection in her counsel's opening statement.

Plaintiff ignores that she first introduced the contents of the order of protection at trial in her counsel's opening statement. A party who has introduced an issue at trial

cannot later complain when the opposing party introduces the same issue. *Johnston v. Conger*, 854 S.W.2d 480, 485 (Mo. App. W.D. 1993). In her opening statement, Plaintiff's counsel stated as follows:

> But Beth was in turmoil because of the suggestion that her husband destroyed the house. And she was concerned that when her kids were in school, whether Kurt could come – and if, in fact, he did set the fire, it was a pretty dramatic thing. So she applied for a restraining order here in this courthouse, and asked that Kurt stay away from the kids, because of the suspicion that was planted by USAA that Kurt had something to do with intentionally setting the fire. (T. 34.)

Similarly, no error resulted from the admission of Plaintiff's statement that her husband had a "history of arson," which she made in her petition for an order of protection. (T. 209-11.) A reviewing court considers a claim of error in the admission of evidence for abuse of discretion. *Miller v. Neill,* 867 S.W.2d 523, 528 (Mo. App. E.D. 1993). Here, no abuse of discretion occurred.

Plaintiff's argument ignores that her counsel questioned Plaintiff on direct examination about the order of protection in her case-in-chief. (T. 174-176.) A party who has introduced evidence cannot later complain when the opposing party offers similar evidence. *Johnston*, 854 S.W.2d at 485. Nor may a party complain of alleged error in which the party has joined or acquiesced. *Johnson v. Moore,* 931 S.W.2d 191, 195 (Mo. App. E.D. 1996). Plaintiff's counsel asked her what caused her to seek the

order. (T. 174-76.) Thus, Plaintiff cannot complain about USAA's cross-examination of Plaintiff's based on the contents of her petition for an order of protection.

This is especially true because Plaintiff, and not USAA, first introduced the fact of her husband's involvement in the 1982 fire into evidence. A party waives any claim of error by including the complained of evidence in the party's case-in-chief. *Smith v. Associated Natural Gas Co.*, 7 S.W.3d 530, 536-37 (Mo. App. S.D. 1999). Here, during her counsel's direct examination of her husband, Plaintiff voluntarily introduced evidence of her husband's involvement in the 1982 fire. (T. 115.) In response to her counsel's question, Plaintiff's husband testified as to how the 1982 fire occurred. (T. 115.)

4. The challenged evidence is relevant on Plaintiff's vexatious-refusal-to-pay claim.

Moreover, had Plaintiff not waived her objections, the trial court would not have abused its discretion in permitting USAA to introduce evidence of her husband's involvement in the 1982 fire. Plaintiff ignores that she also brought a vexatious-refusal-to-pay claim against USAA. (L.F. 8.)

Under Missouri law, an insurer defending a vexatious-refusal-to-pay claim may offer evidence of any facts and circumstances that it had before it and upon which it relied in denying liability under the policy in order to show that it had acted in good faith and upon reasonable grounds in refusing to pay the claim. *Scott v. Missouri Ins. Co.*, 233 S.W.2d 660, 665 (Mo. banc 1950); *Goodman v. State Farm Ins. Co.*, 710 S.W.2d 423, 424 (Mo. App. E.D. 1986); and *Jones v. Atlanta Life Ins. Co.*, 247 S.W.2d 314, 316-17 (Mo. App. E.D. 1952).

Moreover, evidence of the 1982 fire is admissible to establish USAA's coverage defense that Plaintiff's husband intentionally caused the fire at issue. Evidence of prior fires is admissible to show motive and intent in a civil arson case. *Galvan v. Cameron Mut. Ins.*, 733 S.W.2d 771, 774 (Mo. App. E.D. 1987).

5. Plaintiff's remaining arguments should be denied.

Plaintiff's citation to other references by USAA's counsel to the word "arson" at trial does not support a claim of trial court abuse of discretion. (ASB 23.) To the five cited references, four of which occurred during closing arguments, Plaintiff made no objection. (T. 53, 365, 392, 396, 397.) Therefore, she waived any complaints to these remarks. Error in closing argument is waived when a party fails to object to the allegedly improper comments at the time they are made. *Hulsey v. Schulze*, 713 S.W.2d 873, 876 (Mo. App. E.D. 1986).

Moreover, the challenged remarks do not refer in any way to her husband's past criminal record. When read in context, four of the five comments concern the fire at issue in this case (T. 53, 365, 396, 397) and one accurately recounts Plaintiff's statement in her petition for an order of protection (T. 392). Therefore, they cannot be read to be improper references to her husband's criminal record, including his suspended imposition of sentence for the 1982 fire.

Finally, Plaintiff's argument that the word "arson" "connotes" only the crime of arson, as specified under Section 569.040, R.S.Mo. 2000, and Section 569.050, R.S.Mo. 2000, should be denied. Contrary to Plaintiff's argument, the word "arson" has a common and ordinary meaning separate and distinct from its meaning under criminal

law. Webster's refers to "arson" as "the malicious or fraudulent burning of property (as a building)." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 105 (1989). Moreover, as demonstrated above, USAA's counsel never referred to the guilty plea by Plaintiff's husband or his suspended imposition of sentence at any time during the trial. Four of the five references concerned the fire at issue, and one concerned the statement Plaintiff made in her order of protection. (T. 53, 365, 392, 396, 397.)

6. Conclusion

The trial court did not abuse its discretion in overruling Plaintiff's objection and request for a mistrial based on USAA's opening statement. Nor did the trial court abuse its discretion in overruling Plaintiff's objection to the admission of her statement made in her petition for an order of protection. As Plaintiff first introduced the order of protection in her opening statement and first offered evidence of her husband's involvement in the 1982 fire in her case-in-chief, Plaintiff waived her claims of error. Moreover, regardless of her waiver, the trial court was in the best position to determine the prejudicial effect, if any, of its rulings. As neither act complained of informed the jury that Plaintiff's husband had a criminal history of arson, the trial court cannot be said to have abused its discretion under the circumstances. Therefore, Plaintiff's second point on appeal should be denied.

III. The trial court did not err in denying Plaintiff's motion for directed verdict based on the doctrine of collateral estoppel, because Plaintiff cannot establish each of the doctrine's essential elements, in that:

A. As the prior judgment upon which Plaintiff relies was a default judgment, there was no judgment on the merits that could be given preclusive effect on the nature of her husband's liability for the fire;

B. USAA was not a party to the default judgment in Plaintiff's favor and, as a conflict in interests exists between USAA and her husband, there is no privity between them;

C. USAA did not have a full and fair opportunity to litigate the issues in the prior action because it was not a party to the action at the time of the default judgment and its theory that Plaintiff's husband intentionally set the fire conflicted with his interests in defending against Plaintiff's claim in the prior litigation; and

D. USAA did not forfeit its right to litigate liability and coverage because an inherent conflict of interest existed between USAA and Plaintiff's husband over the fire's cause.

1. Introduction

In her final point, Plaintiff argues the trial court erred in denying her motion for directed verdict. She asserts that as her husband's intent in relation to the fire was litigated in prior litigation, the doctrine of collateral estoppel bars USAA from asserting that he acted intentionally. Plaintiff notes that in the prior litigation in the Circuit Court

of St. Louis City, which resulted in a default judgment in her favor and against her husband, the trial court found that her husband's negligence caused the fire. Plaintiff further argues that as USAA refused to defend her husband against her claim in the prior litigation, USAA is bound by the judgment that was entered in the prior case. Plaintiff's point should be denied.

Collateral estoppel bars a party from relitigating an issue that has been judicially determined in another case. *Shahan v. Shahan*, 988 S.W.2d 529, 532 (Mo. banc 1999). A court may give preclusive effect to a prior adjudication under the doctrine so long as four conditions are met:

1. The issue decided in the prior case is identical to the issue in the present matter;
2. The prior case resulted in a judgment on the merits;
3. The party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and
4. The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case.

James v. Paul, 49 S.W.3d 678, 682 (Mo. banc 2001).

Fairness is the overriding consideration in applying the doctrine. *Cox v. Steck*, 992 S.W.2d 221, 224 (Mo. App. E.D. 1999). Collateral estoppel will not be applied where to do so is inequitable. *James*, 49 S.W.3d at 683. Moreover, each case must be analyzed on its own facts.

Here, the doctrine has no application. Plaintiff cannot satisfy the second, third, and fourth elements of collateral estoppel.

2. The judgment in the prior action was not on the merits.

Plaintiff relies on a default judgment to meet the second element of collateral estoppel. (ASB 27.) Plaintiff's argument fails because the default judgment in her favor was not entered after a trial on the merits. (L.F. 82.)

A judgment on the merits is one rendered after argument and investigation and involves a determination as to which party is in the right as distinguished from a judgment entered on some preliminary or technical point, or by default, and without a trial. *Hayes v. United Fire & Cas. Co*., 3 S.W.3d 853, 856 (Mo. App. E.D. 1999). Where, as here, there was no trial on the merits, no preclusive effect may be given to the earlier decision. *Id*., *citing Hangley v. American Family Mut. Ins. Co*., 872 S.W.2d 544, 548 (Mo. App. W.D. 1994). Therefore, the trial court did not err in rejecting Plaintiff's assertion of collateral estoppel.

3. USAA was not a party to the prior action.

Plaintiff cannot satisfy the third element of collateral estoppel. USAA was not a party to prior action at the time the default judgment was taken.

The Circuit Court of St. Louis City entered the default judgment on September 1, 2000. (L.F. 84.) Previously, on January 24, 2000, the Circuit Court of St. Louis City sustained USAA's motion to transfer based on improper venue. (R.S.L.F. 8.) The court's order resulted in the severance of Plaintiff's claims against USAA and their transfer to the Circuit Court of Lincoln County. (*Id*.)

Moreover, USAA and Plaintiff's husband were never in privity with each other. A privy, within the doctrine of collateral estoppel, means one so related by identity of interest with the party to the judgment that the party represented the same legal right held by the other party. *Land Clearance for Redevelopment Auth. of the City of St. Louis v. United States Steel*, 911 S.W.2d 685, 688 (Mo. App. E.D. 1995).

Here, there was no privity between Plaintiff's husband and USAA. There was no alignment of interests between the two. Indeed, as USAA maintained that he had intentionally destroyed his home by fire, USAA and Plaintiff's husband were adversaries. In the case of a contested first-party insurance claim, the insured and the insurer are adversaries who deal with each other with wariness. *State ex rel. Safeco Nat. Ins. Co. v. Rauch*, 849 S.W.2d 632, 634-35 (Mo. App. E.D. 1993); *Duncan v. Andrew County Mut. Ins. Co*., 665 S.W.2d 13, 19 (Mo. App. W.D. 1983). Therefore, the trial court correctly rejected the application of collateral estoppel.

In this case, it cannot be said that Plaintiff's husband was representing USAA's interests at the time the default judgment was entered. To have done so would have required Plaintiff's husband to act against his penal interests by conceding that he had acted intentionally in burning the home. To the contrary, by permitting a default judgment to be taken against him by Plaintiff on the basis of "negligence," Plaintiff's husband was acting exclusively for Plaintiff's benefit, aiding her in an attempt to escape the application of the "intentional loss" exclusion, and to the extent they both remain married, for his own behalf too, in order to share in the recovery of the insurance proceeds.

4. USAA did not have a full and fair opportunity to litigate in the prior case.

The "full and fair opportunity to litigate" element is a shorthand description of the analysis required to determine whether non-mutual collateral estoppel may be applied. *James*, 49 S.W.3d at 684. This element cannot be met where a plaintiff asserts collateral estoppel against a defendant who was not a party to the prior action and who had no control over that litigation. *Neurological Medicine, Inc. v. General Am. Life Ins. Co*., 921 S.W.2d 64, 68 (Mo. App. E.D. 1996). Indeed, "[i]t is a matter of fundamental due process that one is not bound by a judgment to which he was not a party or adequately represented by a party." *James*, 49 S.W.3d at 693 (Wolff, J., concurring in part and dissenting in part).

Here, USAA did not have a full and fair opportunity to litigate whether Plaintiff's husband intentionally burned their home. The Eastern District's decision in *Cox v. Steck*, 992 S.W.2d 221 (Mo. App. E.D. 1999), a factually similar case, so demonstrates.

In *Cox*, Cox and Steck engaged in a bar fight in which Cox was injured. Cox sued Steck for his personal injuries, alleging negligence. *Id*. at 222. State Farm, which insured Steck, initially defended Steck under a reservation of rights. *Id*. at 222-23. After State Farm withdrew its defense, Cox entered into an agreement under Section 537.065, R.S.Mo. 2000. *Id*. at 223. Thereafter, a judgment was entered for Cox in which the trial court found that Steck had negligently injured him. *Id*. Cox then brought a garnishment action against State Farm, which defended by claiming there was no coverage under

Steck's policy because Cox's injuries resulted from Steck's willful and malicious conduct. *Id*.

On State Farm's defense, Cox moved for summary judgment, claiming State Farm was collaterally estopped from denying coverage because it was bound by the underlying judgment for negligence. *Id*. The trial court agreed, concluding State Farm had an opportunity to litigate in the underlying action. *Id*.

The Eastern District reversed. The court explained that State Farm did not have a full and fair opportunity to litigate the issues in the underlying action, including the issues of Steck's liability and insurance coverage, because State Farm's coverage position that Steck's conduct was intentional conflicted with Steck's theory that Cox's injury was accidental. *Id*. at 224-26. The result here should be no different.

This case presents a similar conflict in interests between Plaintiff's husband and USAA. As in *Cox*, USAA's theory that Plaintiff's husband intentionally set the fire is in direct conflict with defending him against Plaintiff's action. Therefore, as USAA did not have a full and fair opportunity to litigate the nature of her husband's liability and the question of insurance coverage in the underlying action, the trial court properly rejected the application of collateral estoppel. The Eastern District's *Cox* decision permits no other conclusion. *See also James*, 49 S.W.3d at 689.

5. USAA did not forfeit the right to litigate the issue of liability in the prior action by refusing to defend Plaintiff's husband against her action.

Plaintiff, in her final argument for application of collateral estoppel, asserts that USAA is bound by the default judgment because USAA refused to defend her husband against her "negligence" claim. The *Cox* decision dispels her argument. Where there is an inherent conflict of interest between an insurer and its insured that prevented the insurer from litigating the issues of liability and insurance coverage in the prior litigation, the insurer is free to later litigate the same issues. 992 S.W.2d at 226. As this Court noted in *James*, an insurer's justifiable refusal to defend does not estop an insurer from later asserting a lack of coverage. 49 S.W.3d at 689.

Plaintiff's authorities do not support a contrary conclusion. Plaintiff's citation to *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475 (Mo. App. W.D. 1992), is inapposite. As noted by the Eastern District in *Cox*, the rule relied upon by Plaintiff does not apply in situations where the insurer has an inherent conflict of interest with its insured. 992 S.W.2d at 225. Indeed, even Plaintiff's leading authority, *Lodigensky v. American States Preferred Ins. Co*., 898 S.W.2d 661, 664 n. 3 (Mo. App. W.D. 1995), acknowledges that the rule upon which Plaintiff relies may not apply where the insurer has an inherent conflict of interest with its insured.

6. Conclusion

The trial court's judgment for USAA should be affirmed. Collateral estoppel has no application because Plaintiff cannot establish the doctrine's essential elements. Therefore, Plaintiff's third and final point on appeal should be denied.

CONCLUSION

Respondent USAA Casualty Insurance Company respectfully requests the Court to affirm the trial court's judgment in its favor.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Respondent's Substitute Brief and a disk containing same were deposited on this 10th of May, 2004, in the United States Mail, postage prepaid, addressed to Mr. Robert C. Seibel, Attorney for Appellant, 7711 Bonhomme, Ste. 400, St. Louis, Missouri 63105.

_____

T. Michael Ward #32816

Subscribed and sworn to before me, a Notary Public, this 10th day of May, 2004.

_____

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Respondent's Substitute Brief complies contains 11,885 words, and that the computer disk filed with Respondent's Substitute Brief under Rule 84.06 has been scanned for viruses and is virus-free.

_____

T. Michael Ward #32816

APPENDIX

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