

IN THE SUPREME COURT OF MISSOURI

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Supreme Court No. SC88020

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**HOLLY TODD AND KODEY TODD,**  
**by and through Next Friend, HOLLY TODD,**  
Appellants,  
vs.  
**MISSOURI UNITED SCHOOL INSURANCE COUNCIL,**  
Respondent.

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Transferred from the Missouri Court of Appeals, Eastern District  
Court of Appeals No. ED87167

On Appeal from the Circuit Court of Clark County  
1<sup>st</sup> Judicial Circuit, State of Missouri  
Honorable Gary Dial  
Case No. 03CV-48483

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**RESPONDENT MISSOURI UNITED SCHOOL INSURANCE COUNCIL'S  
SUBSTITUTE BRIEF**

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TUETH, KEENEY, COOPER, MOHAN &  
JACKSTADT, P.C.

Submitted by:

Margaret A. Hesse, # 43059

Phyleccia Reed Cole, # 49120

34 N. Meramec, Suite 600

St. Louis, Missouri 63105

Telephone: (314) 880-3600

Facsimile: (314) 880-3601

Attorneys for Missouri United School  
Insurance Council

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## **JURISDICTIONAL STATEMENT**

This is an appeal of the Clark County Circuit Court's grant of summary judgment in favor of Respondent Missouri United School Insurance Council, and denial of summary judgment on behalf of Appellants. Jurisdiction was proper in the Missouri Court of Appeals, as this matter does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Mo. Const. Art. V, § 3. Appeals from Clark County Circuit Court are properly within the Eastern District of the Missouri Court of Appeals, pursuant to Missouri Revised Statutes § 477.050. Transfer to the Missouri Supreme Court is proper, pursuant to Missouri Supreme Court Rule 83.04.

## **STATEMENT OF FACTS**

On April 1, 1998, Petitioner Kodey Todd was an elementary school student in the Clark County R-I School District ("the District"). (L.F. 576). James Patterson was a substitute teacher in the District, and was assigned to Kodey Todd's classroom. (L.F. 576-577). On April 1, 1998, while on school premises, James Patterson physically assaulted Kodey Todd by grabbing Kodey's neck, lifting Kodey up by his neck, and grabbing Kodey by his arm. (L.F. 577). At the time of this incident, Mr. Patterson was employed by the District, and Kodey Todd was a student in the District. (L.F. 577). As a result of Patterson's actions, Kodey Todd experienced noticeable bruises on his neck and arm, and also claims to have

suffered emotional injuries. (L.F. 224). As a result of Mr. Patterson’s actions against Kodey Todd, Mr. Patterson plead guilty to the criminal offense of assault in the third degree, and endangering the welfare of a child, and was sentenced accordingly by the Clark County Circuit Court. (L.F. 577).

Kodey Todd’s medical records indicate that he was seen by his physician, to have “his throat looked at,” after being “choked.” (L.F. 194, 253). Kodey’s doctor did not prescribe any medications, nor did he provide any specific treatment to Kodey for his alleged injuries. (L.F. 195, 253). Following Kodey’s initial visit, he did not return to his doctor for any treatment related to his physical injuries. (L.F. 195, 253).

Kodey Todd was evaluated by licensed professional counselor, Susan Moon, more than a month after the assault by Mr. Patterson. (L.F. 195, 215-221). Kodey was only seen twice by Ms. Moon – including the initial assessment. (L.F. 195, 215-221). During his second (and final) visit with Ms. Moon, Kodey indicated that he was not that worried about Mr. Patterson. (L.F. 195, 220). Kodey’s counseling records indicate that the biggest concerns expressed by Kodey were the fact that his father was in jail, and his mom attending school events. (L.F. 195, 220).

At the time of the acts in question, the Clark County R-I School District was a member of the Missouri United School Insurance Council (“MUSIC”), a self-insured pool of Missouri school districts, and therefore was provided liability

coverage through MUSIC, pursuant to the 1998 MUSIC Plan Document. (L.F. 577). On September 14, 1999, Petitioners/Appellants filed a Petition for Damages in Clark County Circuit Court against Mr. Patterson, as well as the Clark County R-I School District, and District officials. (L.F. 577).

Count I of Appellants' September 1999 Petition for Damages set forth a claim for Assault and Battery, directed against James Patterson. Count II of the September 1999 Petition set forth a claim for Negligent Hiring and Retention, directed against the Clark County R-I School District. Count III of the Petition for Damages set forth a claim of Negligent Supervision, directed against the Clark County R-I School District and the District officials. (L.F. 197-201, 577). On December 22, 1999, the Clark County R-I School District entered into a Settlement Agreement and Release with Ms. Holly Todd, whereby Ms. Todd, on behalf of herself and her son, received the sum of \$20,000.00, in settlement of all claims against the School District and the District officials, with the specific exception of James Patterson. (L.F. 577).

On April 16, 2001, Appellants entered into an agreement with James Patterson, whereby Mr. Patterson consented to the entering of a judgment against him in the amount of \$100,000.00, with the understanding that Appellants would not attempt to collect any portion of this amount from Mr. Patterson, but would seek payment from any insurance coverage that may exist. (L.F. 365-367, 577).

On July 23, 2001, a consent judgment was entered against Mr. Patterson, in favor of Appellants, in the amount of \$100,000.00. (L.F. 410, 577). As a result of that judgment, Appellants brought this action against MUSIC in Clark County Circuit Court, seeking payment of the \$100,000.00 judgment, interest, costs and attorney's fees. (L.F. 577-578).

It is undisputed that the 1998 MUSIC Plan document was in effect at the time of the April 1, 1998 assault by Mr. Patterson. (L.F. 578). Both parties attached copies of the 1998 MUSIC Plan Document to their respective motions for summary judgment. (L.F. 273-328, 424-479, 578).

On October 12, 2005, Judge Gary Dial granted summary judgment on behalf of MUSIC, and denied Appellants' motion for summary judgment. (L.F. 576-581). On October 31, 2005, Appellants filed their Notice of Appeal with the Clark County Circuit Court, requesting an appeal of the Circuit Court's decision. (L.F. 582). On July 18, 2006, the Missouri Court of Appeals, Eastern District, issued its Order reversing the Circuit Court's decision, and remanding the case back to the Clark County Circuit Court. On October 31, 2006, this Court accepted transfer of the instant case.

**POINTS RELIED ON**

- I. THE TRIAL COURT DID NOT ERR IN GRANTING MUSIC'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT, AS MUSIC'S 1998 PLAN DOCUMENT IS NOT AMBIGUOUS, AND CLEARLY EXCLUDES COVERAGE FOR AN INSURED WHO KNOWINGLY COMMITS AN UNLAWFUL ACT, OR WHO INTENTIONALLY CAUSED DAMAGE, HARM OR INJURY.

*Gulf Ins. Co. v. Noble Broadcast, et al.*, 1996 Mo. App. LEXIS 210 (Mo. App. 1996).

*James v. Paul*, 2000 Mo. App. LEXIS 928 (Mo. App. 2000).

*Lupo v. Shelter Mutual Ins. Co.*, 70 S.W.3d 16 (Mo. App. E.D. 2002).

*State Farm Fire & Casualty Co. v. Caley*, 936 S.W.2d 250 (Mo. App. 1997).

- II. IF RESPONDENT IS FOUND TO BE LIABLE FOR THE CONSENT JUDGMENT AGAINST MR. PATTERSON, THE \$100,000 JUDGMENT IS NOT REASONABLE BASED UPON THE NATURE AND EXTENT OF KODEY TODD'S INJURIES.

*Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171 (Mo. App. W.D. 2000).

*Gulf Ins. Co. v. Noble Broadcast, et al.*, 936 S.W.2d 810 (Mo. banc 1997).

III. IF RESPONDENT IS FOUND TO BE LIABLE FOR THE CONSENT JUDGMENT AGAINST MR. PATTERSON, RESPONDENT SHOULD RECEIVE A CREDIT FOR THE \$20,000 SETTLEMENT PAID TO APPELLANTS BY THE CLARK COUNTY R-I SCHOOL DISTRICT.

*Brickner v. Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108 (Mo. App. E.D. 1988).

*Taylor v. Yellow Cab Company*, 548 S.W.2d 528 (Mo. banc 1977).

*Teeter v. Missouri Highway and Transportation Commission*, 891 S.W.2d 817 (Mo. banc 1995).

## ARGUMENT

### **I. Standard of Review.**

Appellate review of a trial court's grant of summary judgment is essentially de novo. *Heffernan v. Reinhold*, 73 S.W.3d 659, 663 (Mo. App. 2002) (citing *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law, and no genuine issues of material fact exist. *Id.* Summary judgment is "designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated a right to judgment as a matter of law." *Simul Vision Cable Systems Partnership v. Continental Cablevision of St. Louis County, Inc.*, 983 S.W.2d 600, 603 (Mo. App. 1999). If the party bearing the burden of proof cannot establish an element necessary to carry its burden, then entry of summary judgment against it is proper. *State Farm Fire & Casualty Co. v. Caley*, 936 S.W.2d 250, 252 (Mo. App. 1997).

In a declaratory judgment action, as in this case, the party claiming coverage under a policy has the burden of proving that the claim was within the coverage of the policy. *Caley*, 936 S.W.2d at 251. Because Appellants cannot establish coverage under the 1998 MUSIC Plan Document for the intentional, criminal acts

of James Patterson, and because there are no issues of material fact, the Circuit Court's grant of summary judgment in favor of MUSIC must be affirmed.

**II. The Trial Court Did Not Err In Granting MUSIC's Motion for Summary Judgment and Denying Appellants' Motion for Summary Judgment, as MUSIC's 1998 Plan Document is Not Ambiguous, and Clearly Excludes Coverage for an Insured Who Knowingly Commits an Unlawful Act, or Who Intentionally Caused Damage, Harm or Injury.**

***A. The Exclusions Contained in the MUSIC Policy are not Ambiguous, and Clearly Exempt Mr. Patterson's Unlawful, Intentional Acts of Physical Abuse from Coverage.***

The 1998 MUSIC Plan Document is not ambiguous, and clearly exempts James Patterson's unlawful acts against Kodey Todd from coverage. Thus, MUSIC cannot be held liable for payment of the \$100,000.00 consent judgment entered against Mr. Patterson, as Mr. Patterson's intentional assault of Kodey Todd is not covered under the policy issued to the Clark County R-I School District. Appellants have the burden of proving that their claim was within the coverage of the policy issued by MUSIC. *State Farm Fire & Casualty Co. v. Caley*, 936 S.W.2d 250, 251 (Mo. App. 1997) (holding that the party claiming coverage under a policy has the burden of proving that the claim was within the coverage of the policy). The Declarations page for the District's liability coverage clearly states:

Insurance is subject to the provisions, stipulations, *exclusions* and other provisions in the Coverage Agreement attached to these Declarations and in the representations of the Member School District in the initial and subsequent applications for coverage, together with such other provisions, stipulations, exclusions and conditions as may be endorsed on said policy or added thereto.

(emphasis added). (L.F. 303). Specifically, in the Combined Liability Coverage Agreement for Primary General/Automobile Liability, School Board Legal Liability, the exclusions state:

#### EXCLUSIONS

19. This Coverage Agreement does not apply to and **we** are not liable for:

...

- n. liability of an Insured who knowingly committed any unlawful act; or who committed sexual assault, sexual or physical abuse or Sexual Molestation; or who intentionally caused damage, harm or injury; ...

(emphasis included in original). (L.F. 310-311).

Based upon the plain language of the MUSIC policy, specifically the exclusions, the unlawful acts of James Patterson against Kodey Todd are clearly excluded from coverage. There are no ambiguities in this policy related to coverage of Mr. Patterson's acts. When insurance policies are unambiguous, there is nothing to construe and they will be enforced as written absent a policy reason to the contrary. *Gulf Insurance Co. v. Noble Broadcast, et al.*, 1996 Mo. App. LEXIS 210, \*4 (Mo. App. 1996). Courts cannot twist the plain language of the policy in order to create an ambiguity. *Id.* at \*6. Even if it were possible to read an ambiguity into a policy, the Courts must make an attempt to harmonize any seeming contradictions. *Id.*

In their Brief, Appellants briefly address the exclusions in the MUSIC policy, and in their cursory mention of such exclusions, Appellants focus on the portion of the relevant exclusion that does not apply to the incident in question. The second part of Exclusion paragraph 19 (n), which is highlighted by Appellants, is not relevant to the instant case, and is separated from the rest of paragraph 19 (n) by a semicolon. Appellants specifically cite the following, “ ... to any claim arising out of any sexual assault, sexual or physical abuse or sexual molestation, involving the same individual or individuals, which initially occurred after knowledge of any actual or alleged wrongful act by said individual(s) is received by the Member School District.” (L.F. 311). This clause of Exclusion 19 (n) does

not apply in the instant case, as the District did not have prior knowledge of any other wrongful acts on the part of Mr. Patterson at the time of the incident in question.<sup>1</sup>

It is the first clause of Exclusion 19 (n) that is applicable to the instant case. The first clause excludes an insured, such as James Patterson, from coverage for his/her own unlawful acts, physical abuse or intentional acts causing harm. (L.F. 311). There is no dispute that James Patterson knowingly committed an unlawful intentional act, by physically assaulting Kodey Todd. (Appellant's Brief, p. 4). It is also undisputed that his actions were found to constitute physical abuse by the Division of Family Services. (L.F. 194, 224, 230, 512). Thus, as there is nothing ambiguous about the Declarations or the Exemptions in MUSIC's policy, and Mr. Patterson's acts fall squarely within the clearly stated exclusions, based upon several different grounds, MUSIC cannot be held liable for the judgment entered against him, and the Circuit Court's decision should be affirmed.

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<sup>1</sup> This exclusion would apply, for example, in the case of a claim against a school district, *not an individual*, if the district had prior knowledge of an individual's assaults, abuse, etc.

***B. The Term “Unlawful Act” Contained in the MUSIC Policy Exclusions is not Ambiguous, and Must be Given its Natural and Ordinary Meaning.***

The MUSIC Policy, and specifically the term “unlawful act” included therein, is not ambiguous. To determine whether a contract is ambiguous, a reviewing court considers the whole document, and absent any definition within the contract, gives the contract terms their natural and ordinary meaning. *Lupo v. Shelter Mutual Insurance Co.*, 70 S.W.3d 16, 19 (Mo. App. E.D. 2002). A contract is ambiguous only if reasonable people may fairly and honestly differ in their construction of the terms, because the terms are susceptible of more than one meaning. *Id.*

As cited above, the MUSIC Policy clearly excludes from coverage, liability of an Insured who knowingly committed any unlawful act. (L.F. 310-311). As the term “unlawful act” is not specifically defined in the MUSIC Policy, it must be given its ordinary meaning. *Id. at 22*. The term “unlawful act” is not susceptible to more than one meaning. It is well settled law in Missouri that when interpreting the language used in an insurance policy, the court gives the term its ordinary meaning, unless it appears a technical meaning was intended. *Id.* To determine the ordinary meaning of a term, courts consult standard English language dictionaries. *Id.*

The ordinary meaning of the term “unlawful,” as defined in Merriam-Webster’s Dictionary, is “not lawful” or “illegal.” Illegal is defined as “not according to or authorized by law.” Any act, whether considered a misdemeanor or a felony under the Missouri criminal statutes, would commonly and ordinarily be considered to be unlawful. There is nothing contained in the MUSIC Policy to indicate that any other technical or unusual definition should be attributed to the term “unlawful act.” Therefore, the ordinary meaning of the term should be applied.

James Patterson’s actions in this case were clearly unlawful, as he pled guilty to the criminal charges of assault in the third degree, and endangering the welfare of a child in the second degree. (L.F. 257, 262-264). Mr. Patterson’s acts were illegal, and were not authorized by law – clearly within the ordinary meaning of the term “unlawful act,” and thereby specifically excluded by the MUSIC Policy.

Moreover, even if the term “unlawful act” were found to be ambiguous, which it is not, such ambiguity would not invalidate the remaining exclusions contained in the MUSIC Policy, which exclude Mr. Patterson’s actions from coverage. As discussed above, Mr. Patterson’s actions in assaulting Kodey Todd were, in addition to being unlawful, also admittedly intentional, and constituted acts of physical abuse. Therefore, *even if* the Court found the term “unlawful act”

to be ambiguous, which Respondent asserts it is not, such finding would not preclude a grant of summary judgment in favor of MUSIC, as Mr. Patterson's actions were properly excluded from coverage on two additional bases, neither of which are ambiguous.

***C. Respondent's Policy does not "Provide Coverage in One Place and Take it Away in Another," as Appellants Claim.***

Appellants argue in their Brief that Respondent attempts to provide coverage in one place in its policy, and take it away in another. This argument has no merit. The Declarations section of Respondent's policy states in plain language that the coverage is subject to the exclusions contained in the Coverage Agreement. (L.F. 303). Thus, there was never any coverage "given" for the types of criminal acts committed by Mr. Patterson, as the policy clearly states that all coverage is subject to the policy exclusions. Applying Appellants' argument to the instant case would lead to the conclusion that no insurance policy could contain exclusions, since exclusions, by definition, exclude items that would otherwise be covered by a policy. It is ridiculous to argue that the MUSIC policy, or any other policy cannot contain exclusions, which validly exclude certain acts from coverage, even though those specific acts could fall under a general provision.<sup>2</sup>

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<sup>2</sup> Insurance policies typically provide broad coverage. Then, specific exclusions to that broad coverage are set forth in the policy.

The cases cited by Appellants in support of this proposition are not analogous to the instant case. *Behr v. Blue Cross Hosp. Serv. Inc.*, 715 S.W.2d 251 (Mo. banc 1986), relates to the issue of whether a health insurance provider is liable for otherwise covered maternity expenses that were incurred after the termination of the policy, not the interpretation of an exclusion in a liability insurance policy. In *Behr*, the Court held that because liability had already attached, (i.e. the covered party became pregnant while the policy was in affect), the costs of delivery were payable under the old policy. *Id.* at 255. In addition, in *Behr*, the Court held that the advertising brochure was a part of the insurance contract, and that it contained statements that were not found elsewhere in the insuring agreement, but were essential to a complete contract. Therefore, because there were differences in the language of the two documents, the terms of coverage were ambiguous. *Id.*

The instant case, on the other hand, deals with the interpretation of a policy exclusion from coverage, and not the melding of two inconsistent separate documents. The Declarations and the Exclusions are clear and specific portions of the MUSIC policy, and are unambiguous as to what behavior is not covered under the policy. Therefore, the holding in *Behr* has no bearing on the case at hand.

Appellants rely primarily on the case of *Missouri Property and Casualty Insurance Guaranty Association v. Petrolite Corp.*, 918 S.W.2d 869 (Mo. App.

E.D. 1996). As stated by the Circuit Court, Appellants' reliance on *Petrolite* is misplaced. (L.F. 580). The *Petrolite* case does not interpret a policy which provides for coverage at one place in the policy and then excludes the same coverage under a section specifically entitled "Exclusions." Rather, in *Petrolite*, the Court found that the definitions of "occurrence" and "personal injury" were contradictory, and that to read them together one would reach the conclusion that the policy covers "unintentional intentional torts." *Petrolite*, 918 S.W.2d at 873. Thus, *Petrolite* is also not analogous to the situation at hand.

In addition, in the instant case, the policy definitions for "bodily injury" and/or "occurrence" are not ambiguous, and do not contradict each other, as Appellants claim. The definition of "Bodily Injury" on page 28 of the policy lists the types of injuries (i.e. physical, mental) that are to be considered "bodily" injury. (L.F. 305). Bodily injury is not "redefined" on page 30 as Appellants assert. The language quoted by Appellants is related to the definition of "Occurrence," and is not inconsistent with the definition of bodily injury. (L.F. 307). In fact, the language quoted by Appellants supports Respondent's position that the intentional acts of Mr. Patterson are not covered by the policy. The language quoted merely solidifies the policy's exclusion of intentional acts of an insured, by stating that where the injury is expected or intended, then the actions are excluded from coverage.

In *Farm Bureau Town & Country Insurance of Missouri v. Hilderbrand*, 926 S.W.2d 944 (Mo. App. W.D. 1996), also cited by Appellants, the Court held that the terms of two insurance applications were not consistent with an exclusion in the policy. In *Hilderbrand*, the insured's agent had handwritten notations on the application related to covering an individual who would not be covered pursuant to the policy exclusion related to partnerships. Two applications, along with the policy, all contained inconsistent language regarding the coverage of a particular individual, and therefore, the Court held that coverage as to this specific individual was ambiguous.

The instant case is again not analogous to *Hilderbrand*. In the instant case, there are no handwritten notations specifically stating that Mr. Patterson is to be covered under the District's policy. Rather, the MUSIC policy is clear that unlawful, and/or intentional acts are specifically exempted from coverage, as are acts of physical abuse. Nowhere in the MUSIC policy is there language that states otherwise, or that can be construed otherwise.

***D. The Definition of "Occurrence" is not Ambiguous in the MUSIC Policy.***

In their Brief, Appellants also focus on the definition of "occurrence" contained in the MUSIC policy. "Occurrence" is defined in the Definitions section of the policy, on page 30, as:

...an accident during the Coverage Period, an event that first occurs during the Coverage Period, or continuous, intermittent or repeated exposure to conditions that commence during the Coverage Period that causes Bodily Injury, Personal Injury or Property Damage neither expected nor intended by the Covered Party.

(L.F. 307). This definition is not ambiguous, and it clarifies what constitutes a single occurrence, as opposed to multiple occurrences, and also provides that where injury is expected or intended by the covered party, such acts are not considered a covered occurrence.

In addition, Appellants conclude that because “sexual assault” and “sexual and physical abuse” are mentioned in the discussion of whether such situations constitute a single (or multiple) occurrence, that it follows that intentional acts of physical abuse are covered by the policy. This is simply not the case. There are situations, for example, where a school district could be held liable for negligence, related to the sexual assault of a student. In such a situation, the sexual assault would constitute “an occurrence,” but the intentional sexual assault itself could still be excluded from coverage. Thus, while the school district might have coverage, the individual who actually committed the unlawful act, physical abuse, or intentional act, would not be covered.

Exclusion 19 (n), clearly and unambiguously excludes coverage for unlawful acts, intentional acts, and acts of physical abuse. There is no language in the policy that precludes such exclusion, and therefore, Respondent did not provide coverage to Mr. Patterson for his acts. Thus, as there are no ambiguities in the 1998 MUSIC Plan Document, and Mr. Patterson's acts against Kodey Todd were clearly excluded from coverage, summary judgment in favor of Respondent MUSIC is appropriate, and should be affirmed.

***E. It is the Public Policy in Missouri that an Insured is Prohibited from Insuring Against the Consequences of its Intentional Acts.***

In addition to the clear exclusion in the MUSIC Plan Document, it is a longstanding public policy in Missouri that an insured is prohibited from insuring against the consequences of its intentional acts. *James v. Paul*, 2000 Mo. App. LEXIS 928, \*23 (Mo. App. 2000). This holding is “based upon the public policy that permitting an insured to insure himself against his [intended or expected] acts would enable him to insure himself from bearing the consequences of his intentional acts.” *Id.* (citing *State Farm Fire & Casualty Co. v. Caley*, 936 S.W.2d 250, 253 (Mo. App. 1997)). Coverage is barred if it is shown that (1) the insured intended the acts causing the injury, and (2) injury was intended or expected from these acts. *Id.* at \*24. In cases involving exclusionary clauses, such as the instant case, intent can be inferred as a matter of law, when the nature and

circumstances of the insured's intentional acts are such that harm is substantially certain to result. *Id.* at \*27.

In the instant case, James Patterson's acts of forcefully grabbing a six year-old child by the neck and by the arm were substantially certain to result in the harm that did in fact come to Kodey Todd. As a result of Patterson's actions, Kodey Todd experienced noticeable bruises on his neck and arm, and also claims to have suffered emotional injuries. Thus, based upon established Missouri case law, intent is to be inferred to Mr. Patterson, as a matter of law. Therefore, as it is clear that Mr. Patterson's actions are considered intentional acts, and that intentional acts (in addition to unlawful acts and physical abuse) are specifically excluded under MUSIC's policy, MUSIC cannot be held liable for the judgment against Mr. Patterson, and summary judgment in favor of Respondent MUSIC should be affirmed.

**III. If Respondent is Found to be Liable for the Consent Judgment Against Mr. Patterson, the \$100,000 Judgment is Not Reasonable Based Upon the Nature and Extent of Kodey Todd's Injuries.**

Even if the Court determines that Respondent is liable for the judgment entered against James Patterson, which it should not be, the \$100,000.00 judgment against James Patterson should be reduced, as it was not reasonable. Although Mr. Patterson entered into what amounts to a settlement pursuant to Mo. Rev. Statutes

§537.065, MUSIC can contest and litigate the issue of whether the \$100,000.00 consent judgment entered into by Mr. Patterson was reasonable. *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 176 (Mo. App. W.D. 2000); *see also, Gulf Insurance Co. v. Noble Broadcast, et al.*, 936 S.W.2d 810, 815-816 (Mo. banc 1997). The test of whether a settlement amount is reasonable is what a reasonable person in the position of the defendant would have settled for on the merits of the plaintiff's claim. *Id.* The determination involves a consideration of the facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial. *Id.*

In the instant case, James Patterson allegedly physically assaulted Kodey Todd, while at school, by grabbing Kodey's neck and arm, leaving bruises. (L.F. 224). Although this behavior does constitute physical abuse on the part of Mr. Patterson, the injuries sustained by Kodey as a result, do not warrant a judgment or settlement of \$100,000.00. Kodey Todd's medical records indicate that he was seen by his physician, to have "his throat looked at," after being "choked." (L.F. 194, 253). Kodey's doctor did not prescribe any medications, nor did he provide any specific treatment to Kodey for his alleged injuries. (L.F. 195, 253). Following Kodey's initial visit, he did not return to his doctor for any treatment related to his physical injuries. (L.F. 195, 253).

Kodey's alleged emotional injuries were also minimal, and do not warrant a settlement or judgment of \$100,000.00. Kodey Todd was evaluated by licensed professional counselor, Susan Moon, more than a month after the assault by Mr. Patterson. (L.F. 195, 215-221). Kodey was only seen twice by Ms. Moon – including the initial assessment. (L.F. 195, 215-221). During his second (and final) visit with Ms. Moon, Kodey indicated that he was not that worried about Mr. Patterson. (L.F. 195, 220). Kodey's counseling records indicate that the biggest concerns expressed by Kodey were the fact that his father was in jail, and his mom attending school events. (L.F. 195, 220). Thus, there is no evidence of Kodey Todd suffering any substantial physical or emotional injuries as a result of Mr. Patterson's actions. Therefore, a judgment of \$100,000.00 is not reasonable to compensate Appellants for the minimal injuries suffered by Kodey Todd.

Based upon the foregoing, if the Court decides that Respondent is liable for the judgment entered against James Patterson, which it is not, Respondent requests that this matter be remanded for a determination by the trial court on the issue of the reasonableness of the settlement amount. (See L.F. 524).

**IV. If Respondent is Found to be Liable for the Consent Judgment Against Mr. Patterson, Respondent Should Receive a Credit for the \$20,000 Settlement Paid to Appellants by the Clark County R-I School District.**

If Respondent is found to be liable for satisfaction of the \$100,000.00 consent judgment entered against Mr. Patterson, which it should not be, then Respondent should receive a credit for the \$20,000.00 settlement paid to Appellants by the Clark County R-I School District. A defendant is entitled to a credit on a judgment equal to the sum a plaintiff has received from other joint tortfeasors, as partial compensation for his damages. *Brickner v. Normandy Osteopathic Hospital, Inc.*, 746 S.W.2d 108, 117 (Mo. App. E.D. 1988); *See also, Teeter v. Missouri Highway and Transportation Commission*, 891 S.W.2d 817, 820-21 (Mo. banc 1995); *Taylor v. Yellow Cab Company*, 548 S.W.2d 528, 534 (Mo. banc 1977).

On or about December 22, 1999, a settlement was reached in the case of *Todd v. Clark County R-I School District, et al*, Cause No. CV199-134cc, between Appellants and the Clark County R-I School District, in which the School District agreed to pay Appellants the sum of \$20,000.00. (L.F. 404-407, 483). Based upon Missouri law, as Appellants have already received \$20,000.00 from accused joint tortfeasor Clark County R-I School District, James Patterson is entitled to receive a credit for that amount to the \$100,000.00 judgment entered against him in the same action. Therefore, even if Respondent is held liable for the judgment against Mr. Patterson, which it should not be, Respondent should receive a credit of

\$20,000.00, against any *reasonable* judgment entered by the trial court in this matter on remand.

### **CONCLUSION**

The actions of James Patterson in intentionally physically assaulting Appellant Kodey Todd on April 1, 1998 were not covered under the insurance policy issued to the Clark County R-I School District by MUSIC, based upon the policy's clear and unambiguous exclusions from coverage for such acts. As Patterson's conduct was specifically not covered, MUSIC never had a duty to defend or indemnify Patterson against Appellants' original claims against him, and therefore cannot, as a matter of law, be held liable for the \$100,000 consent judgment subsequently entered against Patterson for said acts against Kodey Todd.

Furthermore, if the Court finds that Respondent MUSIC is liable, which it is not, the \$100,000 judgment entered against James Patterson should be reduced, as it is unreasonable, based upon Kodey Todd's injuries. Lastly, if the Court finds that MUSIC is liable, which it should not be, MUSIC is entitled to a \$20,000 credit for the settlement previously paid to Appellants by the Clark County R-I School District.

WHEREFORE, Respondent respectfully requests that this Court affirm the decision of the Clark County Circuit Court, granting summary judgment in favor of MUSIC, and denying summary judgment to Appellants.

Respectfully submitted,

TUETH, KEENEY, COOPER, MOHAN &  
JACKSTADT, P.C.

By: \_\_\_\_\_

Margaret A. Hesse, # 43059

Phyleccia Reed Cole, # 49120

34 N. Meramec, Suite 600

St. Louis, Missouri 63105

Telephone: (314) 880-3600

Facsimile: (314) 880-3601

Attorneys for Missouri United School  
Insurance Council

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

The undersigned certifies that:

- (1) This brief contains the information required by Rule 55.03;
- (2) This brief complies with the limitations contained in Rule 84.06(b);
- (3) There are 5,836 words in this brief;
- (4) The electronic mail file containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

\_\_\_\_\_

**CERTIFICATE OF SERVICE**

The undersigned certifies that one true and correct printed copy of the foregoing, and one floppy disk containing the foregoing, were served by first-class U.S. mail, postage pre-paid, this 8th day of December, 2006 to:

Seth Shumaker, Esq.  
Attorney for Appellants  
716 S. Baltimore  
Kirksville, MO 63501

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IN THE SUPREME COURT OF MISSOURI

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Supreme Court No. SC88020

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**HOLLY TODD AND KODEY TODD,**  
**by and through Next Friend, HOLLY TODD,**  
Appellants,  
vs.  
**MISSOURI UNITED SCHOOL INSURANCE COUNCIL,**  
Respondent.

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Transferred from the Missouri Court of Appeals, Eastern District  
Court of Appeals No. ED87167

On Appeal from the Circuit Court of Clark County  
1<sup>st</sup> Judicial Circuit, State of Missouri  
Honorable Gary Dial  
Case No. 03CV-48483

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**RESPONDENT MISSOURI UNITED SCHOOL INSURANCE COUNCIL'S  
APPENDIX TO SUBSTITUTE BRIEF**

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TUETH, KEENEY, COOPER, MOHAN &  
JACKSTADT, P.C.

Submitted by:

Margaret A. Hesse, # 43059

Phyleccia Reed Cole, # 49120

34 N. Meramec, Suite 600

St. Louis, Missouri 63105

Telephone: (314) 880-3600

Facsimile: (314) 880-3601

Attorneys for Missouri United School  
Insurance Council

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**CERTIFICATE OF SERVICE**

The undersigned certifies that one true and correct printed copy of the foregoing Respondent's Appendix to Substitute Brief, was served by first-class U.S. mail, postage pre-paid, this 8th day of December, 2006 to:

Seth Shumaker, Esq.

Attorney for Appellants

716 S. Baltimore

Kirksville, MO 63501

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