Appeal No. SC95358

In The

SUPREME COURT OF MISSOURI

FRANKLIN ALLEN
Plaintiff/Garnishor/Respondent

vs.

WAYNE BRYERS
Defendant

ATAIN SPECIALTY INSURANCE COMPANY
Garnishee/Appellant

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 1216-CV31329

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

I. Atain's Initial Denial

Counsel for Plaintiff/Garnishor/Respondent Franklin Allen sent a letter to John Frank dated August 27, 2012 stating: "It is our contention that as owner of [the Sheridan Apartments] you are liable for Mr. Allen's injuries because of your negligence and the negligence of Mr. Breyer. [sic]" (Legal File, p. 181). On September 10, 2012, Garnishee/Appellant Atain Specialty Insurance Company received a copy of the August 27, 2012 notice of claim letter. (Legal File, p. 188). Two days later, on September 12, 2012, Atain mailed its "**Full Reservation of Rights and Non-Waiver**" letter to Defendant Wayne Bryers. (Legal File, p. 188). That letter concluded:

> Atain denies any and all coverage under the policy in connection with the claim described above and furthermore denies that it has any legal obligation to indemnify you in the event a lawsuit is filed and a judgment is entered against you.

(Legal File, p. 196).

II. The Policy and Atain's Pre-Judgment Actions

Atain issued a Commercial General Liability policy, Policy number CIP117483, hereinafter the Policy, to John Frank with a policy period of October 4, 2011 to October 4, 2012. (Legal File, p. 162-63 ¶ 2; p. 182-87, p. 333-89; Appellant's Appendix, p. A36-A37). The each occurrence limit in the Policy was $1,000,000. (Legal File, p. 345). The Policy provided the following coverage:

> SECTION I—COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .

(Legal File, p. 183, 346).

An "insured" under the Policy included "employees"—"but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (Legal File, p. 185 Section II ¶ 2.a.; p. 354). The insurance applied only to an "occurrence," which was defined as "an accident." (Legal File, p. 183 Section I ¶ 1.b.(1); p. 186 ¶ 13; p. 346, 359). "Bodily injury" was defined as "bodily injury, sickness or disease sustained by a person." (Legal File, p. 358). The Policy also stated:

> 2. Exclusions
>
> This insurance does not apply to:
>
> a. Expected Or Intended Injury
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

(Legal File, p. 184 Section I ¶ 2; p. 347).

The Policy also contained an Assault and Battery Exclusion:

> This insurance does not apply under COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY and COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY arising from:
>
> 1. Assault and Battery committed by any Insured, any employee of any Insured or any other person[.]

(Legal File, p. 187, 387).

Counsel for Franklin Allen sent a letter to John Frank dated August 27, 2012 stating: "It is our contention that as owner of [the Sheridan Apartments] you are liable for Mr. Allen's injuries because of your negligence and the negligence of Mr. Breyer. [sic]" (Legal File, p. 181).

Atain sent a letter to Wayne Bryers dated September 12, 2012 that included the heading: "**Full Reservation of Rights and Non-Waiver**". (Legal File, p. 188, 235-36). The letter acknowledged receiving the August 27, 2012 letter from counsel for Franklin Allen. The letter stated: "Atain believes that there may not be insurance coverage under the Atain policy for the claims of Mr. Allen." (Legal File, p. 189, ???). The letter further stated:

The reservations included in this letter are based upon the information received to date. Atain has the right and duty to defend you against claims but only if the claims are covered. A claim is not covered if it is excluded by the insurance policy. . . . Atain is reserving its rights to deny this claim for the following reasons:

Occurrence, Expected or Intended Injury Exclusion and/or Assault and Battery Exclusion. . . .

Liability Limits. . . .

No actions taken by Atain to date or in the future (unless explicitly stated) in investigating the claims or coverage, or Atain providing a defense under full reservation of rights to you, nor any other action shall be construed as admission of liability, or a waiver of any coverage defense or limitation, whether contained in the insurance policy or available by operation of law. Atain reserves all legal and policy defenses in connection with this matter.

Atain will continue to investigate (and will provide a defense on your behalf under a full and complete reservation of all our rights

and defenses if suit is filed). This reservation of rights extends to all facts, known and unknown, as they may pertain to this claim. Any action taken by us in the investigation, defense, or settlement of this claim shall not constitute or be construed as a waiver or an estoppel of any rights or defenses we have under the subject policy of insurance. We further reserve the right to deny coverage and withdraw from any further participation in this matter altogether, should the facts be developed that determine the above-captioned policy does not provide coverage for this loss.

(Legal File, p. 193-94).

The letter also stated: "In the event of a lawsuit against you, Atain intends to provide you with a defense under this full reservation of rights and non-waiver." (Legal File, p. 195). The letter concluded:

> Atain denies any and all coverage under the policy in connection with the claim described above and furthermore denies that it has any legal obligation to indemnify you in the event a lawsuit is filed and a judgment is entered against you.

(Legal File, p. 196).

Atain filed its Complaint for Declaratory Judgment in the United States District Court for the Western District of Missouri on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40 ¶ 8; Appellant's Appendix, p. A37, A64-A65).

Counsel for Franklin Allen sent a demand letter to Atain offering to settle for the policy limits on October 30, 2012. (Legal File, p. 163 ¶ 9, 207; Appellant's Appendix, p. A37). Atain sent a letter to counsel for Franklin Allen on November 19, 2012 which stated that Atain "is not in a position at this time to agree to pay the limits as you have demanded[.]" (Legal File, p. 163 ¶ 10, 208; Appellant's Appendix, p. A37).

Franklin Allen then filed his Petition for Damages against Wayne Bryers on December 4, 2012. (Legal File, p. 8, 9-16, 164 ¶ 11, 210-16; Appellant's Appendix, p. A1-A8, A38). The Petition for Damages asserted:

> This is a negligence cause of action that arises out of the unintentional and accidental discharge of a weapon that occurred

on the premises of . . . Sheridan Apartments . . . while Plaintiff Frank Allen was being escorted off and/or physically removed from the Sheridan Apartment premises by Defendant Wayne Bryers who managed the Sheridan Apartments for the benefit and as the agent of the owner of the Sheridan Apartments John Frank d/b/a/ The Sheridan Apartments.

(Legal File, p. 9 ¶ 1; Appellant's Appendix, p. A1).

Counsel for Atain sent a letter to counsel for Wayne Bryers dated December 14, 2012. (Legal File, p. 235, 498-500; Appellant's Appendix, p. A61). That letter began:

As you know, our law firm represents Atain . . . . You have previously received the letter from Atain to Wayne Bryers dated September 12, 2012 pertaining to Reservation of Rights and Non-Waiver (a copy attached). The contents of the 9/12/12 letter are incorporated by reference herein except to the extent any specific statement, if any, in the earlier letter is inconsistent.

As you know, Atain retained David Buchanan and the law firm of Brown & James, P.C., . . . to represent Mr. Bryers with Atain's reservation of rights to deny coverage as set forth by the facts and

policy provisions in the 9/12/12 letter. Atain is still providing this defense but reserving its rights to deny coverage as set forth by the specific issues in the previous letter as supplemented by this one.

Frank Allen has now filed suit against Mr. Bryers and a copy of that Petition is attached to this letter . . . . In addition, . . . Atain has filed a Complaint for Declaratory Judgment in Federal Court[.]

(Legal File, p. 498-99). The letter concludes: "Atain believes there may not be coverage for Mr. Bryers and is pursuing a Declaratory Judgment for the Court to make this determination." (Legal File, p. 500).

Counsel for Wayne Bryers sent a letter to David Buchanan, counsel retained by Atain, dated January 10, 2013 which stated: "Pursuant to our recent conversation, this letter is to confirm that Wayne Bryers rejects the reservation of rights defense provided by you and your firm." (Plaintiff's Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment Action).

Atain filed a Motion to Intervene on April 5, 2013. (Legal File, p. 6, 62-64). Atain's Suggestions in Support of Motion to Intervene indicate

that Atain was seeking to intervene as a matter of right pursuant to Supreme Court Rule 52.12(a). (Legal File, p. 67-68). The trial court denied the Motion to Intervene on April 17, 2013. (Legal File, p. 5). Atain did not file an appeal from that ruling. (Legal File, p. 5).

III. Facts Determined by Amended Judgment Entry

A bench trial was held on April 18, 2013 (Legal File, p. 5, 102; Trans., April 18, 2013, p. 3 ln. 2-4; Appellant's Appendix, p. A9), that eventually resulted in the entry of the Amended Judgment Entry on April 30, 2013. (Legal File, p. 5, 102-04; Appellant's Appendix, p. A9-A11). "Upon consideration of the evidence and pleadings the Court" made certain findings of fact. (Legal File, p. 102; Appellant's Appendix, p. A9). Those findings included, but were not limited to, the following:

"Prior to June 10, 2012, Wayne Bryers was hired by John Frank and/or John Frank DBA the Sheridan Apartments ('John Frank') to assist in managing the Sheridan Apartments[.]" (Legal File, p. 102 ¶ 1; Appellant's Appendix, p. A9). "In this position, Wayne Bryers' management duties included, but were not limited to, . . . insuring that only individuals who were authorized to be on the Sheridan Apartment premises remained on the premises[.]" (Legal File, p. 102 ¶ 2;

Appellant's Appendix, p. A9). "A significant portion of the course and scope of Wayne Bryers' work at the Sheridan Apartments involved monitoring pedestrian traffic in and out of the premises and ensuring that loitering was kept to a minimum both of which required escorting off and /or physically removing persons who Bryers determined were not properly on the premises." (Legal File, p. 102 ¶ 3; Appellant's Appendix, p. A9).

"Because of a series of criminal events that occurred at or near the Sheridan Apartments, John Frank directed Wayne Bryers to acquire and to carry a handgun to assist Bryers in carrying out his duties and responsibilities as a manager of the Sheridan Apartments." (Legal File, p. 102 ¶ 4; Appellant's Appendix, p. A9). "Wayne Bryers was authorized by his employer to escort off and/or physically remove from the Sheridan Apartments unauthorized visitors and/or unruly guests." (Legal File, p. 102 ¶ 5; Appellant's Appendix, p. A9).

"Wayne Bryers was under the influence of alcohol at the time the handgun that Wayne Bryers was directed to carry discharged and injured Franklin Allen." (Legal File, p. 103 ¶ 6; Appellant's Appendix, p. A10). "At the time of the discharge of the handgun on June 10th, 2012

Wayne Bryers was acting in the course of his employment with John Frank." (Legal File, p. 103 ¶ 7; Appellant's Appendix, p. A10). "At the time Wayne Bryers attempted to escort off and/or physically remove Franklin Allen from the Sheridan Apartments Bryers was carrying out his management duties and obligations for which Wayne Bryers received compensation from John Frank." (Legal File, p. 103 ¶ 8; Appellant's Appendix, p. A10). "The discharge of the handgun . . . occurred while Bryers was in the act of escorting off and/or physically removing Plaintiff Allen from the premises of the Sheridan Apartments." (Legal File, p. 103 ¶ 11; Appellant's Appendix, p. A10).

"At no time during Defendant Bryers' attempt to escort off and/or to physically remove Plaintiff Allen from the Sheridan Apartment premises on/or about the evening of June 10, 2012, did Defendant Bryers intend to discharge the handgun that discharged and injured Plaintiff Allen." (Legal File, p. A103 ¶ 12; Appellant's Appendix, p. A10). "The discharge of the handgun . . . was unintentional, accidental, negligent and/or reckless as a result of Bryers' intoxication, and his lack of training in the proper handling of a firearm." (Legal File, p. 103 ¶ 13; Appellant's Appendix, p. A10).

"Wayne Bryers admitted that his actions that resulted in the discharge of the handgun that injured Franklin Allen [were] negligent and that he was not intending or expecting to injure Franklin Allen." (Legal File, p. 103 ¶ 14; Appellant's Appendix, p. A10). "Wayne Bryers actions that resulted in the discharge of the handgun that injured Franklin Allen did not involve an assault, a battery or any intentional act." (Legal File, p. A103 ¶ 15; Appellant's Appendix, p. A10).

"To the extent, and if, Wayne Bryers used force in attempting to escort off and/or physically remove Plaintiff Allen from the Sheridan Apartment premises, Defendant Bryers used only that amount of force that was reasonably necessary for the purpose of defending himself while escorting off and/or physically removing Allen from the Sheridan Apartment premises." (Legal File, p. 103 ¶ 16; Appellant's Appendix, p. A10).

"Wayne Bryers cooperated fully with the Kansas City, Missouri Police Department and was not charged with any crime arising out of the accidental discharge of the handgun that injured Franklin Allen." (Legal File, p. 103 ¶ 9; Appellant's Appendix, p. A10).

"At no time on June 10th, 2012 did Plaintiff Franklin Allen intentionally assault, strike or batter Defendant Wayne Bryers." (Legal File, p. 103 ¶ 17; Appellant's Appendix, p. A10).

"Wayne Bryers admitted that as a direct result of his negligence and/or improper handling of his handgun, Franklin Allen was injured by a gunshot wound from Bryers handgun." (Legal File, p. 103 ¶ 10; Appellant's Appendix, p. A10). "That as a result of the accidental discharge of defendant's weapon Franklin Allen suffered a permanent and disabling spinal injury." (Legal File, p. 104 ¶ 18; Appellant's Appendix, p. A11).

The Amended Judgment Entry concluded:

> Upon consideration of the evidence and pleadings the Court finds the issues in favor of the plaintiff [Franklin Allen] and against the defendant [Wayne Bryers] and assesses plaintiff's damages in the sum of $16,000,000 (Sixteen Million and 00/100 dollars). Pursuant to Section 408.040(2) R.S.Mo., the judgment shall bear a per annum interest rate equal to the intended Federal Fund Rate plus five percent until full satisfaction is made. Costs taxed against the defendant.

(Legal File, p. 104; Appellant's Appendix, p. A11).

IV. Post-Judgment and Garnishment Proceedings

An Execution/Garnishment/Sequestration Application and Order was issued to Atain Specialty Insurance Company as Garnishee on June 12, 2013. (Legal File, p. 5, 105-110). Atain filed its Answers to Interrogatories on August 2, 2013. (Legal File, p. 4, 113-16).

Franklin Allen filed his Exceptions Objections and Denial of Garnishee's . . . Answers to Interrogatories on August 9, 2013. (Legal File, p. 4, 117-29). Atain filed its Answer to Plaintiff-Garnishor Franklin Allen's Exceptions Objections and Denial on August 29, 2013. (Legal File, p. 4, 130-49).

Atain filed a Motion to Dismiss, or in the Alternative, to Stay the Proceedings on September 23, 2013. (Legal File, p. 4, 150-51).

Franklin Allen filed his Motion for Summary Judgment as to His Petition in Garnishment and his Suggestions in Support on February 21, 2014. (Legal File, p. 3, 160-61, 162-80; Appellant's Appendix, p. A36-A54). Atain filed its Suggestions in Opposition to Plaintiff's Motion for Summary Judgment on March 31, 2014. (Legal File, p. 3, 230-86; Appellant's Appendix, p. A55-A111).

Atain filed a Motion to Intervene and Motion to Set Aside Judgment Based on Fraud on April 25, 2014. (Legal File, p. 3, 536-77). Franklin Allen filed his Motion to Strike Atain Specialty Insurance Company's Motion to Set Aside Judgment Based on Fraud and Suggestions in Support on May 5, 2014. (Legal File, p. 3, 743-51).

A hearing was held on July 2, 2014 regarding the pending motions. (Legal File, p. 2; Trans., July 2, 2014, p. 3 ln. 2-4, 10-13). The trial court entered its Order Granting Summary Judgment in Favor of Plaintiff-Garnishor Allen on July 25, 2014. (Legal File, p. 2, 760-68; Appellant's Appendix, p. A12-A20). The trial court also entered its Order/Judgment on that same date granting the Motion to Strike Atain Specialty Insurance Company's Motion to Set Aside Judgment Based on Fraud and denying Atain's Motion to Intervene. (Legal File, p. 2, 769-70; Appellant's Appendix, p. A21-A22).

Atain filed its Notice of Appeal to the Missouri Court of Appeals, Western District, on September 2, 2014, appealing both of the July 25, 2014 rulings. (Legal File, p. 1, 790-91).

The Missouri Court of Appeals issued its Opinion on September 15, 2015 affirming in part, reversing in part, and dismissing in part. This Court subsequently granted transfer on March 1, 2016.

ARGUMENT

Additional Arguments in Support of Summary Judgment

Garnishee/Appellant Atain Specialty Insurance Company's Appellant's Substitute Brief raises nine points relied on that attack the trial court's grant of summary judgment in favor of Garnishor Franklin Allen as well as various other trial court rulings. (Appellant's Substitute Brief, p. 42-48). Such diverse, piecemeal, and random attacks on the trial court's rulings result in a confusing view of the underlying facts and summary judgment ruling.

For the sake of clarity, Franklin Allen begins with a discussion of the additional arguments that support the trial court's summary judgment in his favor. Each of Atain's various points relied on will then be addressed individually.

A. Standard of Review

> Our review of the circuit court's grant of summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid–America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment allows the court to enter judgment, without delay, where the moving party demonstrates a right to judgment as a matter of law based on facts as to which there is no genuine dispute.

Assurance Co. of America v. Secura Ins. Co., 384 S.W.3d 224, 230 (Mo.App.W.D. 2012).

B. The Policy Provides Coverage and Atain Had a Duty to Defend Wayne Bryers

Atain's "duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James v. Paul*, 49 S.W.3d 678, 689 (Mo.banc 2001). The only claim alleged in Franklin Allen's Petition for Damages was clearly within the coverage under the Policy, and Atain had a duty to defend. Further, under the facts established conclusively by the trial court in the Amended Judgment

Entry, it is clear that the Policy provides coverage for Franklin Allen's claim against Wayne Bryers.

The Policy provided the following coverage:

> SECTION I—COVERAGES
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .

(Legal File, p. 183, 346).

An "insured" under the Policy included "employees"—"but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (Legal File, p. 185

Section II ¶ 2.a.; p. 354). The insurance applied only to an "occurrence," which is defined as "an accident." (Legal File, p. 183 Section I ¶ 1.b.(1); p. 186 ¶ 13; p. 346, 359). "Bodily injury" is defined as "bodily injury, sickness or disease sustained by a person." (Legal File, p. 358).

The Petition for Damages asserted:

> This is a negligence cause of action that arises out of the unintentional and accidental discharge of a weapon that occurred on the premises of . . . Sheridan Apartments . . . while Plaintiff Frank Allen was being escorted off and/or physically removed from the Sheridan Apartment premises by Defendant Wayne Bryers who managed the Sheridan Apartments for the benefit and as the agent of the owner of the Sheridan Apartments John Frank d/b/a/ The Sheridan Apartments.

(Legal File, p. 9 ¶ 1; Appellant's Appendix, p. A1). This paragraph alone established that there was potentially or possible coverage under the Policy for the claims against Wayne Bryers. As a result, as discussed below, Atain had a duty to defend.

In addition, the trial court specifically found, in the Amended Judgment Entry, facts that establish coverage under the Policy.

- "At the time of the discharge of the handgun on June 10th, 2012 Wayne Bryers was acting in the course of his employment with John Frank." (Legal File, p. 103 ¶ 7; Appellant's Appendix, p. A10).
- "At the time Wayne Bryers attempted to escort off and/or physically remove Franklin Allen from the Sheridan Apartments Bryers was carrying out his management duties and obligations for which Wayne Bryers received compensation from John Frank." (Legal File, p. 103 ¶ 8; Appellant's Appendix, p. A10).
- "The discharge of the handgun . . . occurred while Bryers was in the act of escorting off and/or physically removing Plaintiff Allen from the premises of the Sheridan Apartments." (Legal File, p. 103 ¶ 11; Appellant's Appendix, p. A10).

These facts, in conjunction with the additional facts found in the Amended Judgment Entry, show that Wayne Bryers was an insured, i.e. an "employee[]" acting "within the scope of [his] employment by [John Frank d/b/a The Sheridan Apartments] or while performing duties related to the conduct of [John Frank's] business." (Legal File, p. 185 Section II ¶ 2.a.; p. 354).

Further, Franklin Allen sustained "bodily injury" that resulted from an "occurrence," i.e. an accident.

- "At no time during Defendant Bryers' attempt to escort off and/or to physically remove Plaintiff Allen from the Sheridan Apartment premises on/or about the evening of June 10, 2012, did Defendant Bryers intend to discharge the handgun that discharged and injured Plaintiff Allen." (Legal File, p. A103 ¶ 12; Appellant's Appendix, p. A10).
- "The discharge of the handgun . . . was unintentional, accidental, negligent and/or reckless as a result of Bryers' intoxication, and his lack of training in the proper handling of a firearm." (Legal File, p. 103 ¶ 13; Appellant's Appendix, p. A10).
- "Wayne Bryers admitted that his actions that resulted in the discharge of the handgun that injured Franklin Allen [were] negligent and that he was not intending or expecting to injure Franklin Allen." (Legal File, p. 103 ¶ 14; Appellant's Appendix, p. A10).
- "Wayne Bryers actions that resulted in the discharge of the handgun that injured Franklin Allen did not involve an assault, a battery or

any intentional act." (Legal File, p. A103 ¶ 15; Appellant's Appendix, p. A10).

- "To the extent, and if, Wayne Bryers used force in attempting to escort off and/or physically remove Plaintiff Allen from the Sheridan Apartment premises, Defendant Bryers used only that amount of force that was reasonably necessary for the purpose of defending himself while escorting off and/or physically removing Allen from the Sheridan Apartment premises." (Legal File, p. 103 ¶ 16; Appellant's Appendix, p. A10).
- "At no time on June 10th, 2012 did Plaintiff Franklin Allen intentionally assault, strike or batter Defendant Wayne Bryers." (Legal File, p. 103 ¶ 17; Appellant's Appendix, p. A10).

These facts also establish that the Expected Or Intended Injury and Assault and Battery exclusions do not apply. Franklin Allen's "Bodily injury" was not "expected or intended from the standpoint of" Wayne Bryers. (Legal File, p. 184 Section I ¶ 2; p. 347). Franklin Allen's "bodily injury" "result[ed] from the use of reasonable force to protect persons or property." (Legal File, p. 184 Section I ¶ 2; p. 347). Further, Franklin Allen's "bodily injury" did not arise from an assault and battery

committed by Wayne Bryers or any other person. (Legal File, p. 187, 387).

As a result, the Policy provided coverage for Franklin Allen's claims against Wayne Bryers and Atain had a duty to defend and indemnify Wayne Bryers in the underlying case.

C. Atain May Not Attack the Amended Judgment Entry

As an initial matter, the facts regarding Defendant Wayne Bryers' liability to Plaintiff Franklin Allen were conclusively determined by the April 30, 2013 Amended Judgment Entry. Atain is not entitled to relitigate Wayne Bryers' liability, the amount of damages, or any of the facts necessarily determined by the Amended Judgment Entry.

"Where the trial court has entered judgment after a hearing on liability and damages, . . . the insurer is not entitled to a second hearing on reasonableness in any garnishment or declaratory judgment action based on the policy." *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 265 (Mo.banc 2013). This is true if the insurer had the *opportunity* to control and manage the litigation, regardless of whether the insurer had the *duty* to do so. *Columbia Cas. Co.*, 411 S.W.3d at

264. Further, an insurer that "wrongly refused to defend . . . is not permitted to contest liability." *Columbia Cas. Co.*, 411 S.W.3d at 273.

This Court has explained: "Where one is bound to protect another from liability, he is bound *by the result of the litigation* to which such other is a party, provided he had opportunity to control and manage it." *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700, 709 (Mo.banc 2011) (emphasis in original; internal quotations omitted). The Missouri Court of Appeals, Western District, has explained:

> As noted in a leading treatise:
>
> > One who has undertaken to indemnify another against loss arising out of a certain claim and has notice and opportunity to defend an action brought upon such a claim is bound by the judgment entered in such action, and is not entitled, in an action against him for breach of his agreement to indemnify, to secure a retrial of the material facts which have been established by the judgment against the person indemnified.
>
> 17 LEE R. RUSS, COUCH ON INSURANCE sec. 239:73 (3d ed. 1995). In other words, an [*233] insurer who had notice of the

> litigation and the opportunity to control and manage it is bound by the result of the litigation, and the judgment rendered therein is conclusive in a later action on the indemnity contract as to those issues and questions necessarily determined in the underlying judgment.

Assurance Co. of America, 384 S.W.3d at 232-33.

Atain had the opportunity to defend, but chose to deny coverage and pursue its declaratory judgment action instead. "Insurers cannot force insureds to accept a reservation of rights defense." *Ballmer*, 923 S.W.2d at 369. Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment Action).

> When insureds exercise their right to reject the defense, insurers can act in one of three ways: (1) They may represent the insured without a reservation of rights defense; (2) They may withdraw from representing the insured altogether; or (3) They may file a declaratory judgment action to determine the scope of their policy's coverage.

Ballmer v. Ballmer, 923 S.W.2d 365, 369 (Mo.App.W.D. 1996). "'The insurer has the opportunity to control the litigation by accepting the defense without reservation.'" *Ballmer*, 923 S.W.2d at 369 (quoting *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307, 309 (Mo.App. 1993)). Atain elected not to represent Wayne Bryers without a reservation of rights and forfeited its opportunity to control his defense.

Atain had notice of the litigation between Franklin Allen and Wayne Bryers and the opportunity to control and manage Wayne Bryers' defense. As a result, Atain is bound by the result of that litigation. *Assurance Co. of America*, 384 S.W.3d at 232-33.

Atain's decision to refuse to defend Wayne Bryers was made at its own risk, because "[t]he facts decided in the underlying action most often will determine whether there is a duty to indemnify." *Assurance Co. of America*, 384 S.W.3d at 233. Atain's refusal to defend was unjustified because Franklin Allen's claim against Wayne Bryers was, when initially made, within the coverage of Atain's policy. *See Assurance Co. of America*, 384 S.W.3d at 233. As a result, Atain is now bound by the results of the underlying litigation against Wayne Bryers,

Schmitz, 337 S.W.3d at 709, and the facts found in that litigation establish that coverage exists under the Policy.

Atain is precluded from attacking the findings in the April 30, 2013 Amended Judgment Entry for an additional reason.

> As a general rule the garnishee cannot dispute the merits of plaintiff's claim against the defendant, [citation omitted], and cannot go outside the record to make a collateral attack on the judgment. The issues of the suit in which the judgment was obtained are not subject to being retried in a garnishment proceeding in aid of execution of that judgment.

Thompson v. B & G Wrecking & Supply Co., 346 S.W.2d 65, 68 (Mo. 1961).

Therefore, Atain is now bound by the findings in the April 30, 2013 Amended Judgment Entry. Those findings establish that coverage exists under the Policy and the trial court properly entered summary judgment against Atain.

D. Atain Wrongly Denied Coverage and Refused to Defend

Atain repeatedly and wrongly denied coverage and offered to defend Wayne Bryers only under a reservation of rights. Atain's first denial occurred on September 12, 2012 despite knowing that Franklin Allen was claiming that Wayne Bryers acted negligently and before a petition against its insured was filed. Atain then filed a declaratory judgment action denying coverage and any duty to defend. Atain then continued to wrongly deny coverage and offered to defend only under a reservation of rights after receiving a copy of Franklin Allen's Petition for Damages against Wayne Bryers asserting a claim for negligence only. All of these actions clearly show that Atain unjustifiably denied coverage and refused to defend Wayne Bryers, and, consequently, Atain breached its agreement and is now liable for the entire amount of the Amended Judgment Entry.

Counsel for Franklin Allen sent a letter to John Frank dated August 27, 2012 stating: "It is our contention that as owner of [the Sheridan Apartments] you are liable for Mr. Allen's injuries because of your *negligence* and the *negligence* of Mr. Breyer. [sic]" (Legal File, p. 181) (emphasis added). Atain sent a letter to Wayne Bryers dated September

12, 2012 that acknowledged receiving the August 27, 2012 letter from counsel for Franklin Allen just two days earlier. (Legal File, p. 188). As a result, Atain was placed on notice in September 2012 that Franklin Allen's claims against its insureds were based on negligence, not intentional torts.

Despite the knowledge that Franklin Allen's claims were based on negligence, and having received the letter from counsel for Franklin Allen only two days earlier, Atain's September 12, 2012 letter stated: "Atain believes that there *may not be insurance coverage* under the Atain policy for the claims of Mr. Allen." (Legal File, p. 189) (emphasis added). The letter also stated: "In the event of a lawsuit against you, Atain intends to provide you with a defense *under this full reservation of rights* and non-waiver." (Legal File, p. 195) (emphasis added). The letter concluded:

> *Atain denies any and all coverage* under the policy in connection with the claim described above and furthermore *denies that it has any legal obligation to indemnify you* in the event a lawsuit is filed and a judgment is entered against you.

(Legal File, p. 196) (emphasis added).

As a result, Atain denied that any coverage existed for Franklin Allen's claims and indicated that it would defend Wayne Bryers only under a complete reservation of rights nearly three months before Franklin Allen actually filed his Petition for Damages and only two days after receiving the letter from Franklin Allen's counsel. (*See* Legal File, p. 762 ¶ 11; Appellant's Appendix, p. A14) ("Atain's reservation of rights (ROR) letter was issued before Atain compared the language of the Atain Policy with the allegations alleged in the petition filed in Allen v. Bryers.").

Atain filed its Complaint for Declaratory Judgment on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40; Appellant's Appendix, p. A37, A64-A65).

> An insurers' decision to file a declaratory judgment action rather than to drop their reservation of rights defense is a risky one. [Citation omitted]. That decision is treated as a refusal to defend an insured, [citation omitted], and, if unjustified, the insurer is treated as if it waived any control of the defense of the

> underlying tort action. [Citation omitted]. An insurer may not reserve the right to disclaim coverage and simultaneously insist upon controlling the defense.

Ballmer, 923 S.W.2d at 369. Atain "chose to continue asserting a reservation of rights defense through its declaratory judgment action. The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Counsel for Franklin Allen sent a demand letter to Atain offering to settle for the policy limits on October 30, 2012. (Legal File, p. 163 ¶ 9, 207; Appellant's Appendix, p. A37). Atain sent a letter to counsel for Franklin Allen on November 19, 2012 which stated that Atain "is not in a position at this time to agree to pay the limits as you have demanded[.]" (Legal File, p. 163 ¶ 10, 208; Appellant's Appendix, p. A37). As a result, Atain was given notice of the nature of Franklin Allen's claim against Wayne Bryers and an opportunity to settle before Franklin Allen filed his Petition for Damages. However, Atain repeatedly denied that any coverage existed, refused to defend except under a reservation of rights, and filed a declaratory judgment action, which constitutes a refusal to defend.

The duty to defend arises if there is simply a *possibility* of coverage, even if that possibility is remote.

> "An insurance company has a duty to defend an insured when the insured is exposed to *potential* liability to pay based on the facts known at the outset of the case, no matter how unlikely it is that the insured will be found liable and whether or not the insured is ultimately found liable. [Citation omitted]. To extricate itself from a duty to defend the insured, the insurance company must prove that there is *no possibility* of coverage. [Citation omitted]. Coverage is principally determined by comparing the language of the insurance policy with the allegations in the pleadings. [Citation omitted]. "However, even though the pleadings do not show coverage, where known or reasonably ascertainable facts become available that show coverage[,] the duty to defend devolves upon the insurer." JOHN ALAN APPLEMAN, 7C INSURANCE LAW AND PRACTICE § 4684.01 (Walter F. Berdal, ed.1979)."

Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64, 79 (Mo.App.W.D. 2005) (quoting *King v. Cont'l W. Ins. Co.*, 123 S.W.3d 259,

265 (Mo.App.W.D. 2003) (emphasis added)). The duty to defend exists even if uncovered claims are also present. *Truck Ins. Exchange*, 162 S.W.3d at 79. "[A]s long as the petition demonstrates the potential or possible statement of a claim within insurance coverage, even if inartfully drafted, it triggers the insurer's duty to defend." *Truck Ins. Exchange*, 162 S.W.3d at 83.

Franklin Allen filed his Petition for Damages against Wayne Bryers on December 4, 2012. (Legal File, p. 8, 9-16, 210-16; Appellant's Appendix, p. A1-A8). The Petition for Damages asserted:

> This is a negligence cause of action that arises out of the unintentional and accidental discharge of a weapon that occurred on the premises of . . . Sheridan Apartments . . . while Plaintiff Frank Allen was being escorted off and/or physically removed from the Sheridan Apartment premises by Defendant Wayne Bryers who managed the Sheridan Apartments for the benefit and as the agent of the owner of the Sheridan Apartments John Frank d/b/a/ The Sheridan Apartments.

(Legal File, p. 9 ¶ 1; Appellant's Appendix, p. A1). The Petition also alleged that the discharge of the handgun that injured Franklin Allen

was "unintentional, accidental, negligent and/or reckless[.]" (Legal File, p. 11 ¶ 7, *see also*, p. 11 ¶ 8, 9, 10; Appellant's Appendix, p. A3). The Petition also stated: "Plaintiff Allen expressly alleges that his injuries were not caused by an assault, battery, an unlawful touching, an 'expected injury' or by any intentional act." (Legal File, p. 13 ¶ 16; Appellant's Appendix, p. A5).

It is clear that the Petition for Damages did more than allege a claim that was *potentially* or *possibly* within the coverage of the Policy. The only claim asserted in the Petition for Damages was within the coverage provided by the Policy. Further, the Petition did not allege any claims that were outside the coverage of the Policy. Despite the fact that the Petition for Damages asserted a claim within the coverage of the Policy, and despite Atain's duty to defend, Atain offered to defend only under a reservation of rights.

Counsel for Atain sent a letter to counsel for Wayne Bryers dated December 14, 2012. (Legal File, p. 236, 498-500; Appellant's Appendix, p. A61). That letter incorporated by reference the September 12, 2012 reservation of rights letter that denied coverage. (Legal File, p. 498). The December 14, 2012 letter confirmed that Atain was defending

Wayne Bryers under a reservation of rights. (Legal File, p. 498). The letter concluded: "Atain believes there may not be coverage for Mr. Bryers and is pursuing a Declaratory Judgment for the Court to make this determination." (Legal File, p. 500).

"Insurers cannot force insureds to accept a reservation of rights defense." *Ballmer*, 923 S.W.2d at 369. As a result, Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment Action). One option an insurer has when an insured rejects a defense under a reservation of rights is to defend the insured without a reservation of rights. *Ballmer*, 923 S.W.2d at 369. Atain did not elect to represent Wayne Bryers without a reservation of rights, despite the fact that the only claim asserted in the Petition for Damages was within the coverage of the Policy. Instead, Atain continued to deny coverage and to pursue its declaratory judgment action. "The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Atain's September 12, 2012 letter denied coverage and offered to defend Wayne Bryers only under a complete reservation of rights just two days after it received the initial letter from Franklin Allen's counsel

and nearly three months before Franklin Allen filed his Petition for Damages, and despite the clear indication that Franklin Allen was basing his claims on negligence. (Legal File, p. 181, 188, 194-96). Atain wrongly denied coverage without a full, fair, and prompt investigation and wrongly refused to defend except under a reservation of rights before the Petition for Damages was even filed.

Atain likewise filed its Complaint for Declaratory Judgment before Franklin Allen filed his Petition for Damages. The law treats the filing of that declaratory judgment action as a refusal to defend. *Ballmer*, 923 S.W.2d at 370. As a result, Atain repeatedly denied coverage and refused to defend *before Franklin Allen's Petition for Damages was even filed.*

Even after Franklin Allen filed his Petition for Damages clearly indicating that he was asserting negligence claims and affirmatively asserting that Wayne Bryers did not intentionally injure him, Atain refused to defend except under a reservation of rights and continued to pursue its declaratory judgment action. Atain's wrongful refusal to defend and its denial of coverage continued after Wayne Bryers rejected Atain's defense under a reservation of rights.

In addition, Atain actually offered to defend *under a denial of coverage*, not a reservation of rights. Atain's September 12, 2012 reservation of rights letter indicated that Atain "denies any and all coverage under the policy . . . and furthermore denies that it has any legal obligation to indemnify you[.]" (Legal File, p. 196). Atain filed its Complaint for Declaratory Judgment on October 22, 2012 denying coverage. (Legal File, p. 199-206). Atain's December 14, 2012 supplemental reservation of rights letter incorporated the September 12, 2012 reservation of rights letter (Legal File, p. 498), which denied coverage. As a result, all of Atain's offers to defend Wayne Bryers were made *after or in conjunction with* denials of coverage. Atain sought to defend Wayne Bryers, while at the same time completely denying any coverage under the Policy. Such action clearly constitutes an unjustifiable refusal to defend and provide coverage.

As discussed above, the facts actually determined by the trial court after the trial of Franklin Allen's claim against Wayne Bryers conclusively establish that coverage exists under the Policy. Despite such determination, Atain continues to deny coverage and improperly attempts to attack the Amended Judgment Entry.

As a result, it is clear that Atain repeatedly and unjustifiably refused to defend Wayne Bryers and to deny coverage in this matter, both before and after Franklin Allen's Petition for Damages was filed.

E. Atain Is Liable for the Entire Amount of the Amended Judgment Entry

The trial court also properly determined that Atain is liable for the entire amount of the April 30, 2013 Amended Judgment Entry. Atain wrongly refused to defend Wayne Bryers and is now responsible for the damages that resulted from that breach of contract, including the full amount of the resulting judgment.

This Court has explained: "The insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265. The reason for the refusal to defend is unimportant. Where an insurer's assertion of non-coverage is incorrect, the insurer's refusal to defend or provide coverage is unjustified. *Schmitz*, 337 S.W.3d at 710. It does not matter if the insurer's claim that its policy does not provide coverage is an honest mistake.

> "That the refusal of the insurer to defend on the ground that the claim is outside the policy is an honest mistake, nevertheless constitutes an unjustified refusal and renders the insurer liable to the insured for all resultant damages from that breach of contract."

Schmitz, 337 S.W.3d at 710 (quoting *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 481 (Mo.App.1992)).

As this Court has stated:

> Despite being bound to protect [Wayne Bryers], [Atain], on more than one occasion, refused to defend and to provide coverage. Once an insurer unjustifiably refuses to defend or provide coverage, the insured may, without the insurer's consent, enter an agreement with the plaintiff to limit its liability to its insurance policies.

Schmitz, 337 S.W.3d at 710.

> [Atain] was bound to the section 537.065 agreement because it unjustifiably refused to defend, and it was bound to the trial court's judgment awarding [Franklin Allen $16,000,000] because

it had an opportunity to control and manage the trial but failed to seize it.

Schmitz, 337 S.W.3d at 710 (footnote omitted).

Atain could have admitted coverage for the claim asserted in the Petition for Damages without admitting liability for any additional or different claims that might have been asserted in the future. The Policy provided coverage for the claim asserted in the Petition for Damages and "the duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James*, 49 S.W.3d at 689. As a result, Atain had a duty to defend and indemnify Wayne Bryers with respect to the claim asserted in the Petition for Damages. Instead, Atain denied coverage and offered to defend only under a reservation of rights months before the Petition for Damages was even filed.

Consequently, Atain had the opportunity to defend Wayne Bryers without a reservation of rights. Instead, Atain continued to deny coverage and to pursue its declaratory judgment action. Such decision constituted an unjustified refusal to defend and denial of coverage. As a result, Atain is responsible for all of the damages resulting from its

breach of contract, including the entire amount of the April 30, 2013 Amended Judgment Entry.

The trial court properly granted summary judgment in favor of Plaintiff-Garnishor Franklin Allen and against Garnishee Atain in the principal sum of $16,000,000 and this Court should affirm that judgment.

Appellant's Point I

Atain Is Not Entitled to Relitigate Issues Determined in the Amended Judgment Entry

First, Atain's argument regarding its Point I, which covers fourteen full pages, includes only seven citations to the Record on Appeal. All seven of those citations are found in the last four pages of that argument, despite numerous alleged factual assertions throughout the entire argument section. Such violations of Supreme Court Rule 84.04(e) hinders the ability to respond to and review the arguments raised in this point.

A. Atain Had an Opportunity to Defend Wayne Bryers

Contrary to Atain's repeated assertions, Atain clearly had an opportunity to defend Wayne Bryers, which it waived by refusing to defend except under a reservation of rights, by denying coverage, and by filing a declaratory judgment action.

Despite the knowledge that Franklin Allen's claims were based on negligence, and having received the letter from counsel for Franklin Allen only two days earlier, Atain's September 12, 2012 letter stated: "Atain believes that there *may not be insurance coverage* under the Atain policy for the claims of Mr. Allen." (Legal File, p. 189) (emphasis added). The letter also stated: "In the event of a lawsuit against you, Atain intends to provide you with a defense *under this full reservation of rights* and non-waiver." (Legal File, p. 195) (emphasis added). The letter concluded:

> *Atain denies any and all coverage* under the policy in connection with the claim described above and furthermore *denies that it has any legal obligation to indemnify you* in the event a lawsuit is filed and a judgment is entered against you.

(Legal File, p. 196) (emphasis added).

As a result, Atain denied that any coverage existed for Franklin Allen's claims and indicated that it would defend Wayne Bryers only under a complete reservation of rights nearly three months before Franklin Allen actually filed his Petition for Damages and only two days after receiving the letter from Franklin Allen's counsel. (*See* Legal File, p. 762 ¶ 11; Appellant's Appendix, p. A14).

In addition, Atain filed its Complaint for Declaratory Judgment on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40; Appellant's Appendix, p. A37, A64). "An insurers' decision to file a declaratory judgment action rather than to drop their reservation of rights defense is . . . treated as a refusal to defend an insured, and, if unjustified, the insurer is treated as if it waived any control of the defense of the underlying tort action." *Ballmer*, 923 S.W.2d at 369 (citations omitted). Atain "chose to continue asserting a reservation of rights defense through its declaratory judgment action. The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Atain had the opportunity to defend, but chose to deny coverage and pursue its declaratory judgment action instead. "Insurers cannot force insureds to accept a reservation of rights defense." *Ballmer*, 923 S.W.2d at 369. Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment Action).

> When insureds exercise their right to reject the defense, insurers can act in one of three ways: (1) They may represent the insured without a reservation of rights defense; (2) They may withdraw from representing the insured altogether; or (3) They may file a declaratory judgment action to determine the scope of their policy's coverage.

Ballmer, 923 S.W.2d at 369. "'The insurer has the opportunity to control the litigation by accepting the defense without reservation.'" *Ballmer*, 923 S.W.2d at 369 (quoting *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307, 309 (Mo.App. 1993)). Atain elected not to represent Wayne Bryers without a reservation of rights and forfeited its opportunity to control his defense.

Atain had notice of the litigation between Franklin Allen and Wayne Bryers and the opportunity to control and manage Wayne Bryers' defense. As a result, Atain is bound by the result of that litigation. *Assurance Co. of America*, 384 S.W.3d at 232-33.

Atain's decision to refuse to defend Wayne Bryers was made at its own risk, because "[t]he facts decided in the underlying action most often will determine whether there is a duty to indemnify." *Assurance Co. of America*, 384 S.W.3d at 233.

B. The Facts Determined Were Material

It is also clear that the facts determined in the April 30, 2013 Amended Judgment Entry were necessary and material to that judgment.

> [A]n [*233] insurer who had notice of the litigation and the opportunity to control and manage it is bound by the result of the litigation, and the judgment rendered therein is conclusive in a later action on the indemnity contract as to those issues and questions necessarily determined in the underlying judgment.

Assurance Co. of America, 384 S.W.3d at 232-33.

Atain mistakenly argues that conduct can be both negligent and intentional. (Appellant's Substitute Brief, p. 62) ("Just because conduct is negligent . . . does not negate the possibility that such conduct also rises to the level of intentional or the equivalent of an assault and battery.") Such argument misstates well established Missouri law.

"It is elementary that the words 'negligence' and 'intentional' are contradictory and that 'negligence' is not synonymous with 'intentional action'." *Martin v. Yeoham*, 419 S.W.2d 937, 944 (Mo.App. 1967). As a result, "[i]t is an axiom that theories based upon alleged 'negligent' and 'intentional' conduct are contradictory and mutually exclusive." *Gallatin v. W.E.B. Restaurants Corp.*, 764 S.W.2d 104, 105 (Mo.App.W.D. 1988).

Missouri courts have "observed that 'negligent and deliberate injuries could not coexist.'" *Martin*, 419 S.W.2d at 945. As a result:

> Testimony tending to sustain the charge of negligence and carelessness would negative and disprove willfulness or intentionality, and proof that the wrongdoing on the part of defendant was deliberate would exclude negligence, and contributory negligence would be no defense available to defendant for injury wantonly committed. . . . An act cannot be

> both careless and willful. Negligence is an unintentional act or omission. Willfulness is intentional—an act purposely done, not negligently or carelessly done or left undone; hence, . . . evidence to prove negligence would negative willfulness, and vice versa.

Martin, 419 S.W.2d at 945 (internal quotations omitted).

This Court has long held that an injury resulting from the discharge of a firearm can be *either* the result of negligence or of an assault and battery, but it cannot be both.

> Where one person is injured by the discharge of a firearm in the hands of another, he may have an action for assault and battery, if the shooting was intentional; or he may have an action for negligent injury, if the shooting was unintentional and the result of negligence. *But the cause of action in the one case is different from that in the other, and both cannot arise on the same state of facts*. It is said that a right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant, and the facts which establish the existence of that right and that delict constitute the cause of action. [Citation omitted]. In an action for

> personal injuries intentionally inflicted with a firearm, and in one for such an injury unintentionally but negligently inflicted, the plaintiff seeks a recovery for an invasion of the same primary right; but the defendant's delict in the one case is different from that in the other. As to that *different elements of proof are required in the two actions*, and *the consequences to defendant, as measured by the recoverable damages, are different*. Allegations of facts constituting a cause of action for personal injury willfully inflicted will not, therefore, be supported by proof of an injury negligently committed.

McLaughlin v. Marlatt, 296 Mo. 656, 246 S.W. 548, 552 (1922) (emphasis added).

> Where a plaintiff sues to recover for a personal injury suffered from the discharge of a firearm in the hands of another, the burden of proof is, of course, upon him to establish the cause of action alleged, whether it be for assault and battery, or based on negligence.

McLaughlin, 246 S.W. at 553.

In discussing *McLaughlin*, the Court of Appeals has stated:

> The decision is clear authority for the proposition that proof of an injury negligently inflicted will not support a petition alleging that the injury for which relief is sought [*946] was willfully or intentionally inflicted. Under the same reasoning and in the interest of consistency it also must be held that proof of a willful act resulting in bodily harm, to-wit, the intentional shooting and wounding of another person, will not justify or support jury submission of the case on a hypothesis that the injury for which recovery is sought was the result of an act of negligence. This holding accords with the basic rule, supported by Missouri cases of almost countless number, that an instruction should never submit an issue which is not supported by the evidence.

Martin, 419 S.W.2d at 945-46.

The Petition for Damages in this case asserted only a claim for negligence. (Legal File, p. 9-16; Appellant's Appendix, p. A1-A8). "A plaintiff cannot recover under a negligence theory if the only evidence is that of an intentional tort." *Jones v. Marshall*, 750 S.W.2d 727, 728 (Mo.App.E.D. 1988). As a result, Franklin Allen could not have recovered against Wayne Bryers in the Amended Judgment Entry if the

evidence at trial had established that Wayne Bryers acted intentionally. Therefore, the clear findings in the Amended Judgment Entry that Wayne Bryers acted negligently, not intentionally, when Franklin Allen was shot were material and necessary to the judgment. (Legal File, p. 103-04 ¶ 12, 13, 15, 18; Appellant's Appendix, p. A10-A11). Those findings, which are binding on Atain, exclude the possibility that Wayne Bryers acted intentionally or committed an assault and battery or other intentional tort.

Further, Atain ignores the fact that at the time of Franklin Allen's injuries, Wayne Bryers was acting as manager and agent for John Frank, the landowner. (*See* Legal File, p. 103 ¶ 7; Appellant's Appendix, p. A10). Whether or not Wayne Bryers was acting as the agent for the landowner in attempting to remove or eject Franklin Allen goes directly to the duty owed to Franklin Allen and Wayne Bryers' privilege to use force. Consequently, the question of whether Wayne Bryers was acting within the course and scope of his employment was material and necessary to a determination of his right to eject or remove Franklin Allen from the premises.

An owner or possessor of land is entitled to use "such force as was reasonable and necessary to remove" from the property, a person that "[remained] on defendant's premises without permission[.]" *See* M.A.I. 32.09 [1969 New]. Wayne Bryers, when acting within the course and scope of his employment by John Frank, would be acting as John Frank's agent with the authority to remove or eject trespassers using reasonable and necessary force.

As a result, the determination that Wayne Bryers was acting within the course and scope of his employment was necessary and material to determine Wayne Bryers' duty and privilege in using force. Likewise, the determination that the force Wayne Bryers used in attempting to remove Franklin Allen from the premises was reasonable and necessary was also material and necessary to Franklin Allen's recovery.

All of the facts determined in the Amended Judgment Entry were material and necessary to the judgment entered in favor of Franklin Allen and against Wayne Bryers. Those facts are now conclusive against Atain in this garnishment action. *Assurance Co. of America*, 384 S.W.3d at 232-33.

C. No Conflict Existed and Atain Had a Duty to Defend

The claim asserted by Franklin Allen against Wayne Bryers did not create any conflict between Wayne Bryers and Atain. Atain had a duty to defend Wayne Bryers. Atain's actions in denying coverage and refusing to defend except under a reservation of rights created the only conflict between Wayne Bryers and Atain. Atain cannot profit from its unjustified refusal to defend or provide coverage to its insured.

Any conflict that existed in this case arose because of Atain's actions in denying coverage and refusing to defend except under a reservation of rights. Atain denied that any coverage existed for Franklin Allen's claims and indicated that it would defend Wayne Bryers only under a complete reservation of rights nearly three months before Franklin Allen actually filed his Petition for Damages and only two days after receiving the letter from Franklin Allen's counsel. (Legal File, p. 188, 194, 196). Atain filed its Complaint for Declaratory Judgment on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40; Appellant's Appendix, p. A37, A64-65). Atain "chose to continue asserting a

reservation of rights defense through its declaratory judgment action. The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Even after the Petition for Damages was filed, Atain continued to deny coverage and refuse to defend except under a reservation of rights. Counsel for Atain sent a letter to counsel for Wayne Bryers dated December 14, 2012. (Legal File, p. 236, 498-500; Appellant's Appendix, p. A61). That letter incorporated by reference the September 12, 2012 reservation of rights letter that denied coverage. (Legal File, p. 498). The December 14, 2012 letter confirmed that Atain was defending Wayne Bryers under a reservation of rights. (Legal File, p. 498). The letter concluded: "Atain believes there may not be coverage for Mr. Bryers and is pursuing a Declaratory Judgment for the Court to make this determination." (Legal File, p. 500).

Counsel retained by Atain to defend Wayne Bryers under a reservation of rights filed an answer on behalf of Wayne Bryers. (Legal File, p. 50-55). That answer attempted to assert an affirmative defense based on Franklin Allen's alleged fault and negligence in causing his own damages. (Legal File, p. 54 ¶ 2). It is clear that Atain could, and

should, have provided Wayne Bryers a defense to the claim asserted in the Petition for Damages *without* a reservation of rights.

Atain could have admitted coverage for the claim asserted in the Petition for Damages without admitting liability for any additional or different claims that might have been asserted in the future. The Policy provided coverage for the claim asserted in the Petition for Damages and "the duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James v. Paul*, 49 S.W.3d 678, 689 (Mo.banc 2001). As a result, Atain had a duty to defend and indemnify Wayne Bryers *with respect to the claim asserted in the Petition for Damages*. Instead, Atain denied coverage and offered to defend only under a reservation of rights months before the Petition for Damages was even filed.

The cases relied upon by Atain in asserting the existence of a conflict are clearly distinguishable. (Appellant's Substitute Brief, p. 54-58). This Court's decision in *James v. Paul*, 49 S.W.3d 678 (Mo.banc 2001), is distinguishable for several reasons. First and foremost, this Court determined that State Farm was entitled to summary judgment because the guilty plea in the criminal case against the judgment debtor

resolved the question of whether the judgment debtor acted intentionally or willfully under the doctrine of collateral estoppel. *James*, 49 S.W.3d at 682.

Second, that same guilty plea was the basis for this Court to find that State Farm was not estopped based on the judgment in the tort action. This Court recognized "that, ordinarily, the duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James*, 49 S.W.3d at 689. This Court held, however, that "where the insured made a judicial admission as part of a prior judicial determination in a criminal case that the insured's conduct was intentional, the general rule . . . does not give rise to estoppel." *James*, 49 S.W.3d at 689. The explanation for that holding was:

> State Farm justifiably relied on the prior judicial admission and determination in concluding it had no coverage and, thus, no duty to defend Paul. For State Farm to have defended Paul on the ground that his conduct was intentional rather than negligent would have created an irreconcilable conflict with the insured. *Cox v. Steck*, 992 S.W.2d 221 (Mo.App.1999). Therefore, the doctrine of

> equitable estoppel does not apply to prevent State Farm from asserting the absence of coverage.

James, 49 S.W.3d at 689.

In contrast, no such collateral estoppel against Franklin Allen can exist in the present case. Wayne Bryers was not charged with any crime as a result of this incident. (Legal File, p. 103 ¶ 9; Appellant's Appendix, p. A10). Consequently, Franklin Allen is not estopped by any prior judicial determination and Atain did not have any judicial admission by Wayne Bryers upon which to rely in denying coverage. Therefore, the normal rule applies and "the duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James*, 49 S.W.3d at 689.

The ruling in *Cox v. Steck*, 992 S.W.2d 221 (Mo.App.E.D. 1999), is distinguishable because the pleadings in the underlying tort case created the conflict for State Farm. In that case, the plaintiff's first amended petition alleged assault and, in the alternative, negligence, and the defendant/insured's answer included a counterclaim that also alleged both assault and negligence. *Cox*, 992 S.W.2d at 222. State Farm's policy provided coverage for "an 'accident causing **bodily**

injury'" and excluded coverage for "'**bodily injury** … which is either expected or intended by an insured; or … to any person or property which is the result of willful and malicious acts of an **insured**.'" *Cox*, 992 S.W.2d at 222 n. 1.

As a result, the negligence and assault claims presented alternative covered and uncovered claims. At a trial under such competing theories, the insured would have had an interest in establishing that any liability he had was the result of negligence. *See Cox*, 992 S.W.2d at 224. State Farm would have had an interest in showing that any liability of its insured was the result of either intentional or willful and malicious acts. *See Cox*, 992 S.W.2d at 224. Those competing interests created the conflict that existed in *Cox*.

In contrast, Franklin Allen's Petition for Damages in this case alleged only covered negligence claims. (Legal File, p. 9-16; Appellant's Appendix, p. A1-A8). As a result, as discussed above, the Policy clearly provided coverage for the claim asserted in the Petition for Damages. There would have been no conflict between Atain and Wayne Bryers *if* Atain had chosen to defend the covered claim as required by the Policy. Both Atain and Wayne Bryers would have desired to show that Wayne

Bryers was not at fault or that Franklin Allen's comparative fault was the cause of his own damages.

"A liability insurer's duty to defend a suit against its insured is measured by the language of the policy and the allegations contained in the plaintiff's petition." *Cox*, 992 S.W.2d at 225. The language of the Policy in this case and the allegations contained in the Petition for Damages establish that Atain had a duty to defend. They also establish that no conflict would exist if Atain provided the defense, as it was duty bound to do.

The Court in *Cox* simply held that "under the specific facts before us, State Farm is not barred from litigating the issue of liability and policy coverage since an inherent conflict of interest prevented it from raising these issues in the underlying action." *Cox*, 992 S.W.2d at 226. Those "specific facts" do not exist in the present case, and Atain is barred from litigating the issues of liability and coverage.

Any conflict in this case arose because Atain denied coverage and refused to defend except under a reservation of rights long before the Petition for Damages was ever filed. Atain cannot create a conflict and

then rely on that conflict as a basis to escape the consequences of its own unjustifiable refusal to defend and provide coverage.

D. The Policy Exclusions Do Not Apply

Further, as discussed above, the trial court's findings in the Amended Judgment Entry establish that the exclusions in the Policy do not apply. The court found:

- "At no time during Defendant Bryers' attempt to escort off and/or to physically remove Plaintiff Allen from the Sheridan Apartment premises on/or about the evening of June 10, 2012, did Defendant Bryers intend to discharge the handgun that discharged and injured Plaintiff Allen." (Legal File, p. A103 ¶ 12; Appellant's Appendix, p. A10).
- "The discharge of the handgun . . . was unintentional, accidental, negligent and/or reckless as a result of Bryers' intoxication, and his lack of training in the proper handling of a firearm." (Legal File, p. 103 ¶ 13; Appellant's Appendix, p. A10).
- "Wayne Bryers admitted that his actions that resulted in the discharge of the handgun that injured Franklin Allen [were] negligent and that he was not intending or expecting to injure

Franklin Allen." (Legal File, p. 103 ¶ 14; Appellant's Appendix, p. A10).

- "Wayne Bryers actions that resulted in the discharge of the handgun that injured Franklin Allen did not involve an assault, a battery or any intentional act." (Legal File, p. A103 ¶ 15; Appellant's Appendix, p. A10).
- "To the extent, and if, Wayne Bryers used force in attempting to escort off and/or physically remove Plaintiff Allen from the Sheridan Apartment premises, Defendant Bryers used only that amount of force that was reasonably necessary for the purpose of defending himself while escorting off and/or physically removing Allen from the Sheridan Apartment premises." (Legal File, p. 103 ¶ 16; Appellant's Appendix, p. A10).
- "At no time on June 10th, 2012 did Plaintiff Franklin Allen intentionally assault, strike or batter Defendant Wayne Bryers." (Legal File, p. 103 ¶ 17; Appellant's Appendix, p. A10).

These facts establish that the Expected Or Intended Injury and Assault and Battery exclusions do not apply. Franklin Allen's "Bodily injury" was not "expected or intended from the standpoint of" Wayne

Bryers. (Legal File, p. 184 Section I ¶ 2; p. 347). Franklin Allen's "bodily injury" "result[ed] from the use of reasonable force to protect persons or property." (Legal File, p. 184 Section I ¶ 2; p. 347). Further, Franklin Allen's "bodily injury" did not arise from an assault and battery committed by Wayne Bryers or any other person. (Legal File, p. 187, 387).

As a result, the Policy provided coverage for Franklin Allen's claims against Wayne Bryers and Atain had a duty to defend and indemnify Wayne Bryers regarding such claims. The trial court properly granted summary judgment against Atain and this Court should affirm that judgment.

Appellant's Point II

Atain's Affirmative Defenses Fail as a Matter of Law

None of Atain's alleged affirmative defense preclude summary judgment and Atain is not entitled to relitigate the facts found in the Amended Judgment Entry in the guise of affirmative defenses. Despite couching its claim in terms of coverage or as affirmative defenses, Atain is actually attacking the finding that Wayne Bryers is liable to Franklin Allen as found in the Amended Judgment Entry. *See Assurance Co. of America*, 384 S.W.3d at 231-32. As discussed above, Atain is not entitled to attack the Amended Judgment Entry or relitigate the material facts found in that judgment.

A. The Policy Was Not Void or Rescinded

Atain is not entitled to rely on its affirmative defenses alleging that the Policy was either void or subject to rescission because it did not properly plead such defenses. A claimant seeking summary judgment is only required to negate properly pled affirmative defenses. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 383-84 (Mo.banc 1993).

Atain's two affirmative defenses relating to rescission (Legal File, p. 135, 136 ¶ 6, 13) failed to plead the factual basis for the alleged defenses as required by Supreme Court Rules 55.07 and 55.08. *ITT Commercial Finance Corp.*, 854 S.W.2d at 383.

> Missouri law requires the insurance company demonstrate that a representation is both false and material in order to avoid the policy when (1) the representation is warranted to be true, (2) the policy is conditioned upon its truth, (3) the policy provides that its falsity will avoid the policy, or (4) the application is incorporated into and attached to the policy. Otherwise, the insurance company must demonstrate that the representation in the application was false and fraudulently made in order to avoid the policy.

Continental Cas. Co. v. Maxwell, 799 S.W.2d 882, 888 (Mo.App.W.D. 1990). Atain did not allege facts supporting any of these requirements under Missouri law for avoiding a policy based on misrepresentations in an application. (Legal File, p. 135, 136 ¶ 6, 13).

In addition, Atain did not allege that it returned the premiums paid for the Policy. *Aetna Ins. Co. v. Doheca A & W Family Restaurant, No. 501, Inc.*, 503 F.Supp. 199, 201 (E.D.Mo. 1980) ("Having retained

premium payments for the period May 1, 1979, through July 7, 1979, Aetna is estopped from denying coverage for the fire loss of June 8, 1979.").

Atain's alleged affirmative defenses related to rescission of the Policy are insufficient as a matter of law. "Requiring a 'claimant' to negate such conclusory allegations as a prerequisite to summary judgment would require that party to first make the non-movant's case and then defeat it." *ITT Commercial Finance Corp.*, 854 S.W.2d at 384. That requirement "has been purposefully avoided by Missouri's historical adherence to 'fact pleading.'" *ITT Commercial Finance Corp.*, 854 S.W.2d at 384.

In addition, Atain has admitted that the Policy was "in effect on June 10, 2012." (Legal File, p. 333). Atain produced an affidavit stating: "The document attached as Exhibit 'A' . . . is a fair and accurate copy of Policy Number CIP117483 issued by Atain Specialty Insurance Company to John Frank DBA The Sheridan Apartments as named insured *in effect on June 10, 2012.*" (Legal File, p. 333) (emphasis added). Atain cannot now claim that the Policy was either void or rescinded.

B. The Amended Judgment Entry Was Not the Result of Fraud

Again, Atain failed to properly plead affirmative defenses that would allow it to avoid judgment in favor of Franklin Allen. In addition, Atain failed to develop any facts that support its allegations of fraud or collusion. As a result, the trial court properly granted summary judgment against Atain.

The majority of Atain's affirmative defenses related to fraud and collusion involve mere conclusory allegations. (Legal File, p. 135 ¶ 2, 3, p. 136 ¶ 14). Such alleged affirmative defenses are insufficient as a matter of law and Franklin Allen was not required to negate those defenses in order to obtain summary judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 384.

Atain's alleged affirmative defense number 1 is different because it combines *numerous unsupported conclusory allegations* without any factual allegations supporting the claim of fraud and collusion. (Legal File, p. 134-35 ¶ 1). First, R.S.Mo. § 537.065 specifically allows the agreement that was entered into between Franklin Allen and Wayne Bryers. Atain has not explained how the existence of an agreement specifically authorized by § 537.065 allowing Franklin Allen to collect

any judgment obtained from the Policy constitutes either fraud or collusion.

Further, Atain *did not* plead any facts showing: that the Amended Judgment Entry did not correlate to Franklin Allen's actual damages; that the claims and theory of liability pled were not supported by Missouri law; that Franklin Allen's damages were not caused by negligence; or that the Amended Judgment Entry was unreasonable with respect to either liability or damages. (Legal File, p. 134 ¶ 1). Again, Atain's alleged affirmative defense fails as a matter of law and Franklin Allen was not required to negate such defense in order to obtain summary judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 384.

Additionally, Atain's alleged affirmative defenses were simply an improper attempt to attack the Amended Judgment Entry. "'The insurer has the opportunity to control the litigation by accepting the defense without reservation.'" *Ballmer*, 923 S.W.2d at 369 (quoting *State ex rel. Rimco, Inc.*, 858 S.W.2d at 309). Atain elected not to represent Wayne Bryers without a reservation of rights and forfeited its opportunity to control his defense.

Atain had notice of the litigation between Franklin Allen and Wayne Bryers and the opportunity to control and manage Wayne Bryers' defense. As a result, Atain is bound by the result of that litigation. *Assurance Co. of America*, 384 S.W.3d at 232-33.

Finally, Atain fails to support its argument regarding fraud and collusion with any facts. Atain's argument regarding the alleged fraud and collusion in this Point completely fails to specify what false representations were allegedly made to the trial court, what evidence establishes that such representations were false, or what evidence establishes that such representations were made fraudulently. (Appellant's Substitute Brief, p. 68-69). The only citations to the Record on Appeal regarding this portion of the argument are to the Amended Judgment Entry. (Appellant's Substitute Brief, p. 68-69).

Atain could not support its argument in this Point with facts in the record because Atain did not develop any facts that support its arguments regarding fraud and collusion. The § 537.065 agreement is not in the record, so Atain has not provided this Court with any means to evaluate the terms of that agreement. Instead, the evidence indicates that the agreement was the result of an arms-length transaction.

Wayne Bryers and Franklin Allen were represented by separate counsel in the underlying action, and there is no evidence of collusion.

The affidavit of Ilene Starks that Atain references elsewhere in its brief expresses only her conclusions regarding the shooting, which were clearly not believed by law enforcement or Wayne Bryers would have been charged with a crime. Such affidavit does not show that Wayne Bryers or Franklin Allen acted fraudulently in entering into the § 537.065 agreement. In fact, Franklin Allen did not rely on any stipulation regarding liability or damages. Instead, Franklin Allen presented evidence at the hearing on April 18, 2013 to establish his right to recover against Wayne Bryers. (Transcript, April 18, 2013). Consequently, Franklin Allen "still had the burden to prove liability and damages in a bench trial. Although the trial court found [Wayne Bryers] liable and awarded [Franklin Allen $16,000,000] in damages, it could have found that [Wayne Bryers] was not liable or that no damages were suffered." *Schmitz*, 337 S.W.3d at 709.

Further, the fact that Wayne Bryers asserted his Fifth Amendment privilege does not establish any fraud or collusion. That assertion only allows a possible adverse inference. Any such inference was overcome

by the evidence presented on April 18, 2013 and the findings in the Amended Judgment Entry. The assertion of the Fifth Amendment privilege does not even suggest that Wayne Bryers acted intentionally. An unintentional shooting has the possibility of resulting in criminal charges and Wayne Bryers was entitled to assert his Fifth Amendment privilege to protect himself. More importantly, Wayne Bryers' assertion of that privilege protects only himself and does not aid Franklin Allen in his claim against either Wayne Bryers or Atain. Therefore, Wayne Bryers' assertion of privilege suggests the absence of fraud or collusion, contrary to Atain's arguments.

Atain failed to properly plead fraud and collusion as an affirmative defense, such defenses are an improper attempt to attack the Amended Judgment Entry, and Atain has failed to support its argument with any citation to any factual support. It is clear that Franklin Allen was not required to negate this attempted affirmative defense and Franklin Allen was entitled to summary judgment against Atain.

C. Atain's Breach Relieved Wayne Bryers of a Duty to Cooperate

As discussed above, Atain repeatedly, wrongly, and unjustifiably denied coverage and refused to defend Wayne Bryers except under a complete reservation of rights. Those actions constituted a breach of Atain's duties under the Policy and Atain was no entitled to control the settlement of the litigation between Franklin Allen and Wayne Bryers.

Atain denied that any coverage existed for Franklin Allen's claims and indicated that it would defend Wayne Bryers only under a complete reservation of rights nearly three months before Franklin Allen actually filed his Petition for Damages and only two days after receiving the letter from Franklin Allen's counsel. (Legal File, p. 188, 194, 196; *see also* Legal File, p. 762 ¶ 11; Appellant's Appendix, p. A14) ("Atain's reservation of rights (ROR) letter was issued before Atain compared the language of the Atain Policy with the allegations alleged in the petition filed in Allen v. Bryers.").

Atain filed its Complaint for Declaratory Judgment on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40; Appellant's Appendix, p. A37,

A64-A65). Atain "chose to continue asserting a reservation of rights defense through its declaratory judgment action. The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Even after the Petition for Damages was filed, Atain continued to deny coverage and refuse to defend except under a reservation of rights. Counsel for Atain sent a letter to counsel for Wayne Bryers dated December 14, 2012. (Legal File, p. 238, 498-500; Appellant's Appendix, p. A63). That letter incorporated by reference the September 12, 2012 reservation of rights letter that denied coverage. (Legal File, p. 498). The December 14, 2012 letter confirmed that Atain was defending Wayne Bryers under a reservation of rights. (Legal File, p. 498). The letter concluded: "Atain believes there may not be coverage for Mr. Bryers and is pursuing a Declaratory Judgment for the Court to make this determination." (Legal File, p. 500).

"Insurers cannot force insureds to accept a reservation of rights defense." *Ballmer*, 923 S.W.2d at 369. As a result, Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment

Action). Atain did not elect to represent Wayne Bryers without a reservation of rights. Instead, Atain continued to deny coverage and to pursue its declaratory judgment action. "The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

In addition, Atain actually offered to defend *under a denial of coverage*, not a reservation of rights. Atain's September 12, 2012 reservation of rights letter indicated that Atain "denies any and all coverage under the policy . . . and furthermore denies that it has any legal obligation to indemnify you[.]" (Legal File, p. 196). Atain filed its Complaint for Declaratory Judgment on October 22, 2012 denying coverage. (Legal File, p. 199-206). Atain's December 14, 2012 supplemental reservation of rights letter incorporated the September 12, 2012 reservation of rights letter (Legal File, p. 498), which denied coverage. As a result, all of Atain's offers to defend Wayne Bryers were made *after or in conjunction with* denials of coverage. Atain sought to defend Wayne Bryers, while at the same time completely denying any coverage under the Policy. Such action clearly constitutes an unjustifiable refusal to defend and provide coverage.

"Once an insurer unjustifiably refuses to defend or provide coverage, the insured may, without the insurer's consent, enter an agreement with the plaintiff to limit its liability to its insurance policies." *Schmitz*, 337 S.W.3d at 710. "The insurer cannot have its cake and eat it too by both refusing coverage and at the same time continuing to control the terms of settlement in defense of an action it had refused to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265 (internal quotations omitted).

Atain unjustifiably refused to defend or provide coverage nearly three months before the Petition for Damages was filed. Atain was not entitled to control the defense or settlement of the action and Wayne Bryers was free to enter into a R.S.Mo. § 537.065 agreement. Atain's alleged affirmative defenses fail as a matter of law and Franklin Allen was entitled to summary judgment.

D. Atain's Policy Defenses Do Not Apply

Atain's alleged policy defenses also fail as a matter of law because the facts determined in the Amended Judgment Entry establish coverage under the Policy and that exclusions relied upon by Atain do not apply.

The trial court specifically found, in the Amended Judgment Entry, facts that establish coverage under the Policy. (Legal File, p. 103 ¶ 7, 8, 11; Appellant's Appendix, p. A10). These facts, in conjunction with the additional facts found in the Amended Judgment Entry, show that Wayne Bryers was an insured, i.e. an "employees" acting "within the scope of their employment by [John Frank d/b/a The Sheridan Apartments] or while performing duties related to the conduct of [John Frank's] business." (Legal File, p. 185 Section II ¶ 2.a.; p. 354).

Further, Franklin Allen sustained "bodily injury" that resulted from an "occurrence," i.e. an accident. (Legal File, p. A103 ¶ 12-17). These facts also establish that the Expected Or Intended Injury and Assault and Battery exclusions do not apply. Franklin Allen's "Bodily injury" was not "expected or intended from the standpoint of" Wayne Bryers. (Legal File, p. 184 Section I ¶ 2; p. 347). Franklin Allen's "bodily injury"

"result[ed] from the use of reasonable force to protect persons or property." (Legal File, p. 184 Section I ¶ 2; p. 347). Further, Franklin Allen's "bodily injury" did not arise from an assault and battery committed by Wayne Bryers or any other person. (Legal File, p. 187, 387).

As a result, the Policy provided coverage for Franklin Allen's claims against Wayne Bryers and Atain's alleged policy defenses fail as a matter of law based on the undisputed facts established in the Amended Judgment Entry. The trial court properly granted summary judgment against Atain, which this Court should affirm.

Appellant's Point III

The Trial Court Properly Entered Judgment Against Atain for the Entire Amount of the Amended Judgment Entry

As previously discussed and contrary to Atain's repeated assertions, Atain clearly had an opportunity to defend Wayne Bryers, which it waived by refusing to defend except under a reservation of rights, by denying coverage, and by filing a declaratory judgment action.

Despite the knowledge that Franklin Allen's claims were based on negligence, and having received the letter from counsel for Franklin Allen only two days earlier, Atain's September 12, 2012 letter stated: "In the event of a lawsuit against you, Atain intends to provide you with a defense *under this full reservation of rights* and non-waiver." (Legal File, p. 195) (emphasis added). That letter concluded:

> *Atain denies any and all coverage* under the policy in connection with the claim described above and furthermore *denies that it has any legal obligation to indemnify you* in the event a lawsuit is filed and a judgment is entered against you.

(Legal File, p. 196) (emphasis added).

As a result, Atain denied that any coverage existed for Franklin Allen's claims and indicated that it would defend Wayne Bryers only under a complete reservation of rights nearly three months before Franklin Allen actually filed his Petition for Damages and only two days after receiving the letter from Franklin Allen's counsel. (*See* Legal File, p. 762 ¶ 11; Appellant's Appendix, p. A14).

In addition, Atain filed its Complaint for Declaratory Judgment on October 22, 2012 seeking a declaration, among other things, that the Policy did not provide coverage for Wayne Bryers regarding Franklin Allen's claim. (Legal File, p. 163 ¶ 8, 199-206, 239-40; Appellant's Appendix, p. A37, A64-65). Atain "chose to continue asserting a reservation of rights defense through its declaratory judgment action. The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

Atain had the opportunity to defend, but chose to deny coverage and pursue its declaratory judgment action instead. "Insurers cannot force insureds to accept a reservation of rights defense." *Ballmer*, 923 S.W.2d at 369. Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary

Judgment in Garnishment Action). One option an insurer has when an insured rejects a defense under a reservation of rights is to defend the insured *without* a reservation of rights. *Ballmer*, 923 S.W.2d at 369. "'The insurer has the opportunity to control the litigation by accepting the defense without reservation.'" *Ballmer*, 923 S.W.2d at 369 (quoting *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307, 309 (Mo.App. 1993)). Atain elected not to represent Wayne Bryers without a reservation of rights and forfeited its opportunity to control his defense.

Atain had notice of the litigation between Franklin Allen and Wayne Bryers and the opportunity to control and manage Wayne Bryers' defense. As a result, Atain is bound by the result of that litigation. *Assurance Co. of America*, 384 S.W.3d at 232-33.

It is also clear that Wayne Bryers was free to enter into a § 537.065 agreement with Franklin Allen as the result of Atain unjustifiable refusal to defend or provide coverage. "Once an insurer unjustifiably refuses to defend or provide coverage, the insured may, without the insurer's consent, enter an agreement with the plaintiff to limit its liability to its insurance policies." *Schmitz*, 337 S.W.3d at 710. "The insurer cannot have its cake and eat it too by both refusing coverage

and at the same time continuing to control the terms of settlement in defense of an action it had refused to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265 (internal quotations omitted).

Atain unjustifiably refused to defend or provide coverage nearly three months before the Petition for Damages was filed. Atain was not entitled to control the defense or settlement of the action and Wayne Bryers was free to enter into a § 537.065 agreement.

Consequently, Atain is liable for the entire amount of the Amended Judgment Entry. "The insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265.

Atain had the opportunity to defend Wayne Bryers without a reservation of rights. Instead, Atain continued to deny coverage and to pursue its declaratory judgment action. Such decision constituted an unjustified refusal to defend and denial of coverage. As a result, Atain is responsible for all of the damages resulting from its breach of contract, including the entire amount of the April 30, 2013 Amended Judgment Entry. The trial court properly granted summary judgment in favor of

Franklin Allen and against Atain in the principal sum of $16,000,000 and this Court should affirm that judgment.

Appellant's Point IV

The Trial Court Did Not Exceed Its Jurisdiction

The trial court did not exceed its jurisdiction or authority in granting summary judgment against Atain. As discussed above, Atain is liable for the entire amount of the Amended Judgment Entry as a result of its unjustified refusal defend Wayne Bryers. That obligation constitutes a chose in action that is subject to garnishment under Rule 90 and Chapter 525.

"There are two avenues for a judgment creditor to collect money from an insurance company: (1) a traditional garnishment under section 525.240 and Rule 90 or (2) a direct action against the insurer authorized by section 379.200." *Johnston v. Sweany*, 68 S.W.3d 398, 403 (Mo.banc 2002) (footnote omitted). This Court has stated:

> Garnishment is a legal process through which a holder of a judgment may apply sums which others owe the judgment debtors to the satisfaction of the judgment. [Citation omitted]. It is said that the garnishor stands in the shoes of the judgment debtor.

> [Citation omitted]. It follows that the garnishor may reach the indebtedness which the garnishee has a present obligation to pay to the judgment debtor at the time of service, and nothing beyond this.

Wenneker v. Physicians Multispecialty Group, Inc., 814 S.W.2d 294, 296 (Mo.banc 1991).

As a result, it is clear that Franklin Allen is entitled to proceed in this garnishment action pursuant to Rule 90 and Chapter 525 to obtain the proceeds of the Policy which provided coverage Wayne Bryers. In addition, it is also clear that the amount recoverable in this garnishment action is not limited to the policy limits since Atain is now liable for the entire amount of the Amended Judgment Entry due to its unjustifiable refusal to defend and provide coverage.

Garnishment actions are governed by Rule 90 and Chapter 525. Supreme Court Rule 90.01 provides, in relevant part:

> In this Rule 90:
>
> (a) A "garnishor" is a judgment creditor;
>
> (b) A "debtor" is a judgment debtor;

> (c) A "garnishee" is the person summoned as garnishee in the writ of garnishment or levy;
>
> (d) "Property subject to garnishment" is all goods, personal property, money, credits, bonds, bills, notes, checks, *choses in action*, or other effects of debtor and all debts owed to debtor. . . .

Mo. Crt. Rule 90.01 (emphasis added); *see also* R.S.Mo. § 525.040 (Providing that the notice of garnishment "shall have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, checks or other choses in action of the defendant in the garnishee's possession . . . or be owing by him or her[.]").

"Chose in action" is defined as:

> 1. A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. [Citations omitted]. 2. The right to bring an action to recover a debt, money, or thing. 3. Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.

Black's Law Dictionary, p. 258 (8th ed. 2004). This Court has explained:

> The elementary law writers define a chose in action to be a thing of which one has not the possession, or actual enjoyment, but only a right to it, or a right to demand it by action at law. (2 Black. Com. 396, 397.) Kent defines it to be a personal right not reduced to possession, but recoverable by suit at law. Thus it is said money due on a bond, note or other contract is a chose in action, for a property in the money vests whenever it becomes payable; but there is no possession till recovery by course of law, unless payment be voluntarily made. So damages for breach of covenant for detention of chattels, or for torts, come under the title of choses in action.

Sallee v. Arnold, 32 Mo. 532, 540 (1862). This Court has also stated:

> Now, "property," in one sense, may mean a chose in action. A "chose in action," in one sense, may be any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract.

Womach v. City of St. Joseph, 201 Mo. 467, 100 S.W. 443, 446 (1907).

Atain is liable for the entire amount of the Amended Judgment Entry because an "insurer that wrongly refuses to defend is liable for

the underlying judgment as damages flowing from its breach of its duty to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265. Atain's obligation to Wayne Bryers as a result of Atain's unjustifiable refusal to defend constitutes a chose in action, i.e. a "right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract." *Womach*, 201 Mo. 467, 100 S.W. at 446. Such debt is subject to garnishment under Rule 90.01.

It is true that a garnishment action cannot reach a contingent liability, because a contingent liability is not currently due. *See Raithel v. Hamilton-Schmidt Surgical Co.*, 48 S.W.2d 79, 81-82 (Mo.App. 1932). This rule is consistent with the provisions of Chapter 525, which provide: "Debts not yet due to the defendant may be attached, but no execution shall be awarded against the garnishee for debts until they shall become due." R.S.Mo. § 525.260. However, if the judgment debtor could currently sue the garnishee for the debt, such debt is not contingent. Instead, a present debt, for whatever cause of action, constitutes a "chose in action" that is subject to garnishment pursuant to Rule 90.01 and § 525.040.

The cases relied upon by Atain are distinguishable. The case of *Landmark Bank of Ladue v. General Grocer Co.*, 680 S.W.2d 949 (Mo.App.E.D. 1984), is distinguishable because it involved an attempt to use a garnishment action to reach a claim supposedly owed by the garnishee to the *garnishor*, not the judgment debtor. *Landmark Bank of Ladue*, 680 S.W.2d at 952 (Garnishor alleged "that if garnishee had disbursed any funds from this account, it had done so in breach of its fiduciary duty *to garnishor*.") (emphasis added).

The Court of Appeals affirmed the dismissal of the garnishment action, explaining:

> Garnishment in aid of execution is an incidental remedy whereby a plaintiff seeks to collect the judgment by reaching the defendant's property in the hands of a third party. . . . As an incidental remedy, garnishment was never intended to enable *a plaintiff* to enforce claims *held by him directly against the garnishee*.

Landmark Bank of Ladue, 680 S.W.2d at 953 (emphasis added). "Ordinarily, the test of a garnishee's liability is measured by its liability to the defendant." *Landmark Bank of Ladue*, 680 S.W.2d at 953. The

plaintiff in *Landmark Bank* was not attempting to collect on any liability owed to the defendant, but was instead seeking to collect on a debt allegedly owed to itself. That is not the purpose of a garnishment action.

In contrast, Franklin Allen, as garnishor, is seeking to garnish the amounts Atain, as garnishee, owes to Wayne Bryers, debtor, as a result of Atain's unjustifiable refusal to defend and indemnify Wayne Bryers. Franklin Allen is not attempting to collect a debt that Atain owed directly to Franklin Allen, as was the case in *Landmark Bank*.

Likewise, the case of *State ex rel. Government Emp. Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo.App. 1970), does not aid Atain. In that case, the plaintiff sought to attach the insurance company's obligation to defend and indemnify the defendant in order to secure in rem jurisdiction over the defendant. *State ex rel. Government Emp. Ins. Co.*, 454 S.W.2d at 945. The Court recognized "that to be the subject of a garnishment the debt must be certain and not contingent." *State ex rel. Government Emp. Ins. Co.*, 454 S.W.2d at 950. The Court then held:

> Considered in the light of these well-established principles, the conclusion is inescapable that neither of the contractual

> obligations of the relator in this proceeding is an attachable debt within the meaning of our statutes. The first of such obligations, to defend the defendant Slack in a suit properly brought against him, is clearly not an indebtedness absolutely due as a money demand. In and of itself, what monetary valuation could be placed on it? The second obligation of the relator, to indemnify Slack up to the limits of the liability policy issued to Slack, will mature only as, if and when the plaintiff, Mrs. Taussig, obtains a valid judgment against Slack. It would be difficult to imagine a so-called indebtedness more contingent and speculative than an action for personal injuries resulting from the alleged negligence of a defendant.

State ex rel. Government Emp. Ins. Co., 454 S.W.2d at 950.

In contrast, Franklin Allen has already obtained a judgment against Wayne Bryers. Atain's duty to defend and indemnify is no longer contingent. Instead, the facts found in the Amended Judgment Entry establish that Atain owed both a duty to defend and to indemnify, both of which Atain unjustifiably denied. As a result, Atain's obligation for

breach of its contractual obligations is no longer contingent, but has been established by the undisputed facts in this case.

Consequently, Atain is liable for the entire amount of the Amended Judgment Entry. "The insurer that wrongly refuses to defend is liable for the underlying judgment as damages flowing from its breach of its duty to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265. That debt constitutes a "chose in action" and is subject to garnishment under Rule 90.01 and § 525.040 and the trial court properly entered judgment against Atain for the full amount of the Amended Judgment Entry.

Appellant's Point V

Atain's Liability Is Not Limited to the Policy Limits

As has been discussed repeatedly, Atain unjustifiably refused to defend and indemnify Wayne Bryers. As a result of that breach of Atain's duties, Atain is now liable for the entire amount of the judgment entered against Wayne Bryers.

Atain sent a letter to Wayne Bryers dated September 12, 2012 which indicated that it would only defend Wayne Bryers "under a full and complete reservations of all our rights and defenses if suit is filed[.]" (Legal File, p. 188, 194). The letter concluded: "Atain denies *any and all*

coverage under the policy in connection with the claim described above and furthermore denies that it has any legal obligation to indemnify you in the event a lawsuit is filed and a judgment is entered against you." (Legal File, p. 196) (emphasis added).

Atain filed a declaratory judgment action on October 22, 2012 seeking a declaration that the Policy did not provide any coverage. (Legal File, p. 199-206). On November 19, 2012, Atain refused an offer to settle within the limits of the Policy. (Legal File, p. 208).

After Franklin Allen's Petition for Damages was filed on December 4, 2012 (Legal File, p. 8, 9; Appellant's Appendix, p. A1), Atain reaffirmed its earlier denial of coverage and offer to defend under a reservation of rights. (Legal File, p. 498). That letter concluded: "Atain believes there may not be coverage for Mr. Bryers and is pursuing a Declaratory Judgment for the Court to make this determination." (Legal File, p. 500).

Wayne Bryers exercised his right to reject the reservation of rights defense. (Exhibit P2, Hearing on Allen's Motion for Summary Judgment in Garnishment Action). Atain did not elect to represent Wayne Bryers without a reservation of rights. Instead, Atain continued to deny

coverage and to pursue its declaratory judgment action. "The law treats that decision as a refusal to defend." *Ballmer*, 923 S.W.2d at 370 (footnote omitted).

As a result, Atain initially denied coverage nearly three months before the Petition for Damages was filed, continued to deny coverage and offer to defend only under a reservation of rights, and pursued a declaratory judgment action seeking a judicial ruling that coverage did not exist.

As this Court has stated:

> Despite being bound to protect [Wayne Bryers], [Atain], on more than one occasion, refused to defend and to provide coverage. Once an insurer unjustifiably refuses to defend or provide coverage, the insured may, without the insurer's consent, enter an agreement with the plaintiff to limit its liability to its insurance policies.

Schmitz, 337 S.W.3d at 710.

> [Atain] was bound to the section 537.065 agreement because it unjustifiably refused to defend, and it was bound to the trial court's judgment awarding [Franklin Allen $16,000,000] because

it had an opportunity to control and manage the trial but failed to seize it.

Schmitz, 337 S.W.3d at 710 (footnote omitted).

Atain had the opportunity to defend Wayne Bryers without a reservation of rights. Instead, Atain continued to deny coverage and to pursue its declaratory judgment action. Such decision constituted an unjustified refusal to defend and denial of coverage. As a result, Atain is responsible for *all* of the damages resulting from its breach of contract, including the entire amount of the April 30, 2013 Amended Judgment Entry.

In addition, Atain misreads this Court's opinion in *Columbia Cas. Co. v. HIAR Holding, LLC*. The trial court in that case did find that Columbia Casualty acted in bad faith, *Columbia Cas. Co.*, 411 S.W.3d at 263, and the claimants argued "that there were sufficient allegations in this case that Columbia was acting in bad faith[.]" *Columbia Cas. Co.*, 411 S.W.3d at 273. However, this Court's rulings did not rely on any allegations or finding of bad faith.

- "*The insurer that wrongly refuses to defend* is liable for the underlying judgment as damages flowing from its breach of its duty to defend." *Columbia Cas. Co.*, 411 S.W.3d at 265 (emphasis added).
- "*Because Columbia wrongly denied coverage* and even a defense under a reservation of rights, and also refused to engage in settlement negotiations, Columbia should not avoid liability for the settlement judgment entered in this case." *Columbia Cas. Co.*, 411 S.W.3d at 274 (emphasis added).

Nothing in these statements indicate that bad faith is a prerequisite for finding an insurer liable for the entire amount of the liability judgment when the insurer unjustifiably refused to defend its insured. The trial court properly granted summary judgment in favor of Franklin Allen and against Atain in the principal sum of $16,000,000 and this Court should affirm that judgment.

Appellant's Point VI

No Genuine Issues as to Any Material Facts Exist

As an initial matter, the facts regarding Wayne Bryers' liability to Franklin Allen were determined by the April 30, 2013 Amended Judgment Entry. Atain is not entitled to relitigate Wayne Bryers' liability, the amount of damages, or any of the facts necessarily determined by the Amended Judgment Entry.

"Where the trial court has entered judgment after a hearing on liability and damages, . . . the insurer is not entitled to a second hearing on reasonableness in any garnishment or declaratory judgment action based on the policy." *Columbia Cas. Co.*, 411 S.W.3d at 265. This is true if the insurer had the *opportunity* to control and manage the litigation, regardless of whether the insurer had the *duty* to do so. *Columbia Cas. Co.*, 411 S.W.3d at 264. Further, an insurer that "wrongly refused to defend . . . is not permitted to contest liability." *Columbia Cas. Co.*, 411 S.W.3d at 273.

This Court has explained: "Where one is bound to protect another from liability, he is bound *by the result of the litigation* to which such other is a party, provided he had opportunity to control and manage it."

Schmitz, 337 S.W.3d at 709 (emphasis in original; internal quotations omitted). As a result, no material issues of fact exist and the trial court properly granted summary judgment against Atain.

A. The Policy Was Not Void or Rescinded

As discussed in Section A regarding Atain's Point II, Atain is not entitled to rely on its affirmative defenses alleging that the Policy was either void or subject to rescission because it did not properly plead such defenses. A claimant seeking summary judgment is only required to negate properly pled affirmative defenses. *ITT Commercial Finance Corp.*, 854 S.W.2d at 383-84.

Atain's two affirmative defenses relating to rescission failed to plead the factual basis for the alleged defenses as required by Rules 55.07 and 55.08. *ITT Commercial Finance Corp.*, 854 S.W.2d at 383.

> Missouri law requires the insurance company demonstrate that a representation is both false and material in order to avoid the policy when (1) the representation is warranted to be true, (2) the policy is conditioned upon its truth, (3) the policy provides that its falsity will avoid the policy, or (4) the application is incorporated into and attached to the policy. Otherwise, the insurance company

must demonstrate that the representation in the application was false and fraudulently made in order to avoid the policy.

Continental Cas. Co., 799 S.W.2d at 888. Atain did not allege facts supporting any of these requirements under Missouri law for avoiding a policy based on misrepresentations in an application. (Legal File, p. 135, 136 ¶ 6, 13).

In addition, Atain did not allege that it returned the premiums paid for the Policy. *Aetna Ins. Co.*, 503 F.Supp. at 201 ("Having retained premium payments for the period May 1, 1979, through July 7, 1979, Aetna is estopped from denying coverage for the fire loss of June 8, 1979.").

Atain's alleged affirmative defenses related to rescission of the Policy are insufficient as a matter of law and Franklin Allen was not required to negate those defenses in order to be entitled to summary judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 384.

In addition, Atain has admitted that the Policy was "in effect on June 10, 2012." (Legal File, p. 333). Atain cannot now claim that the Policy was either void or rescinded.

B. The Facts Establishing Liability and Coverage Were Determined in the Amended Judgment Entry

As discussed above, Atain is bound by the facts determined in the Amended Judgment Entry because it had the opportunity to control the defense but chose to deny coverage and refuse to defend instead. As a result, Atain's alleged defenses fail as a matter of law because the facts determined in the Amended Judgment Entry establish coverage under the Policy and that exclusions relied upon by Atain do not apply.

As previously stated, the trial court specifically found, in the Amended Judgment Entry, facts that establish coverage under the Policy. (Legal File, p. 103 ¶ 7, 8, 11; Appellant's Appendix, p. A10). These facts, in conjunction with the additional facts found in the Amended Judgment Entry, show that Wayne Bryers was an insured, i.e. an "employees" acting "within the scope of their employment by [John Frank d/b/a The Sheridan Apartments] or while performing duties related to the conduct of [John Frank's] business." (Legal File, p. 185 Section II ¶ 2.a.; p. 354).

Further, Franklin Allen sustained "bodily injury" that resulted from an "occurrence," i.e. an accident. (Legal File, p. A103 ¶ 12-17;

Appellant's Appendix, p. A10). These facts also establish that the Expected Or Intended Injury and Assault and Battery exclusions do not apply. Franklin Allen's "Bodily injury" was not "expected or intended from the standpoint of" Wayne Bryers. (Legal File, p. 184 Section I ¶ 2; p. 347). Franklin Allen's "bodily injury" "result[ed] from the use of reasonable force to protect persons or property." (Legal File, p. 184 Section I ¶ 2; p. 347). Further, Franklin Allen's "bodily injury" did not arise from an assault and battery committed by Wayne Bryers or any other person. (Legal File, p. 187, 387).

In addition, the facts Atain relies upon do not support its claim of fraud and collusion or provide any basis for finding that Atain is not bound by the facts determined in the Amended Judgment Entry. Atain primarily relies upon the Affidavit of Ilene Starks and Wayne Bryers' assertion of his Fifth Amendment privilege. (Appellant's Substitute Brief, p. 93-94) (citing pages 256-58, 297, 303, and 309 of the Legal File; the primary support for the allegedly uncontroverted facts on pages 256-58 are Exhibit D, the Affidavit of Ilene Starks, and Exhibit A, the deposition of Wayne Bryers).

Atain uses the possibility of an adverse inference from Wayne Bryers asserting his Fifth Amendment privilege in his deposition to support Atain's assertion that fact questions exist. Any such possible inference was overcome by the evidence presented to the trial court on April 18, 2013 upon which the trial court relied in entering the Amended Judgment Entry. (Transcript, April 18, 2013). The mere possibility of an adverse inference does not establish either the existence of fact questions or support Atain's assertion of fraud and collusion.

Atain also relies on the affidavit of one of the witnesses to the shooting in arguing that fact questions exist. Again, the existence of one witness does not overcome the facts established in the Amended Judgment Entry as a result of the trial on April 18, 2013. In addition, the police and prosecutors that investigated this shooting clearly did not believe Ilene Starks accusations that "Wayne Bryers tried to kill Franklin Allen" and that "Wayne Bryers wanted Franklin Allen to die." (Legal File, p. 391 ¶ 31-32). Otherwise, Wayne Bryers would have been charged with a crime, presumably attempted murder. Wayne Bryers was not charged with any crime as a result of this shooting (Legal File, p. 103 ¶ 9; Appellant's Appendix, p. A10), and Ilene Starks'

unsubstantiated allegations do not relieve Atain of the results of its unjustified refusal to defend and provide coverage.

Atain's "duty to defend is determined by comparing the policy provisions with the allegations of the petition." *James*, 49 S.W.3d at 689. Atain cannot escape that duty by obtaining an affidavit from a single, uncredible witness. Atain is bound by the findings in the Amended Judgment Entry as a result of its unjustifiable refusal to defend and provide coverage.

As a result, the Policy provided coverage for Franklin Allen's claims against Wayne Bryers and Atain's alleged defenses fail as a matter of law based on the undisputed facts established in the Amended Judgment Entry.

C. No Dispute Exists Regarding the Letters

Atain also claims that some of Franklin Allen's undisputed facts are supported by letters written by Franklin Allen's counsel that were not authenticated in the Motion for Summary Judgment. (Appellant's Substitute Brief, p. 89). However, those letters are authenticated by letters written by Atain or its counsel, or by stipulation at the hearing regarding the Motion for Summary Judgment.

Exhibit 1 to the Motion for Summary Judgment is a letter from G. Michael Fatall to John Frank dated August 27, 2012. (Legal File, p. 181). Atain's letter dated September 12, 2012 indicates that Atain received "a letter dated August 27, 2012 to you from attorney G. Michael Fatall, a copy is attached to this letter." (Legal File, p. 188). It is clear that Atain is referencing the August 27, 2012 letter. (Legal File, p. 181). Further, Atain objected to this letter on the basis that it was not authenticated, but did not deny that Atain received a copy of the letter. (Legal File, p. 231 ¶ 1).

Exhibit 5 to the Motion for Summary Judgment was authenticated by stipulation at the hearing on July 2, 2014. At that hearing, Atain stipulated to the foundation for Plaintiff's Exhibit P1, which included

the letter from G. Michael Fatall to Sally E. Rock, Senior Claims Manager for Atain. (Trans., July 2, 2014, p. 38 ln. 14 thru p. 29, l. 11; Plaintiff's Exhibit P1, p. 3; Legal File, p. 198). Further, Atain objected to this letter on the basis that it was not authenticated, but did not deny that Atain received a copy of the letter. (Legal File, p. 236-37 ¶ 5).

Exhibit 7 to the Motion for Summary Judgment is a letter from G. Michael Fatall to Sally Rock dated October 30, 2012 demanding the limits under the Policy. (Legal File, p. 207). Atain's letter to G. Michael Fatall dated November 19, 2012 specifically references "the demand set forth in [Mr. Fatall's] October 30, 2012 letter[.]" (Legal File, 208). Further, Atain objected to this letter on the basis that it was not authenticated, but did not deny that Atain received a copy of the letter. (Legal File, p. 240 ¶ 9).

Exhibit 11 to the Motion for Summary Judgment simply confirms Franklin Allen's intention to submit the agreement between Franklin Allen and Wayne Bryers to the trial court for in camera review. (Legal File, p. 220). The Order Granting Summary Judgment confirms: "On April 2, 2013 Allen's attorney submitted in camera to the undersigned a Section 537.065 agreement that had been entered into between Allen

and Breyers [sic] as a result of Atain's refusal to defend Bryers." (Legal File, p. 762 ¶ 16).

As a result, it is clear that no issues of material fact exist and the trial court properly granted summary judgment against Atain. This Court should affirm the Order Granting Summary Judgment.

Appellant's Point VII

Atain's Motion to Set Aside Judgment Was Properly Struck

A. The Motion to Set Aside Was Struck

Appellant's Point VII should be denied because the motion it addresses was struck by the trial court and Atain has not raised any issue in this appeal regarding that ruling. Point VII claims the trial court erred in denying Atain's Motion to Set Aside Judgment Based on Fraud, which was filed on April 25, 2014. (Appellant's Substitute Brief, p. 46, 95). However, the trial court did not address the merits of the Motion to Set Aside because it struck that motion. Atain has not raised any issue regarding the trial court's ruling striking the Motion to Set Aside. As a result, Atain is not entitled to any relief with respect to its Point VII.

Atain filed its Motion to Intervene and Motion to Set Aside Judgment Based on Fraud on April 25, 2014. (Legal File, p. 3, 536-77). Plaintiff Franklin Allen's Motion to Strike Atain Specialty Insurance Company's Motion to Set Aside Judgment Based on Fraud was filed on May 5, 2014. (Legal File, p. 3, 743-51). Atain did not file any response to the Motion to Strike. (Legal File, p. 2, 769; Appellant's Appendix, p. A21) ("[T]he Court finds that Plaintiff Allen's Motion to Strike Atain Specialty Insurance Company's Motion to Set Aside Judgment Based on Fraud is unopposed.").

The trial court's Order/Judgment entered on July 25, 2014 provided:

> **IT IS THEREFORE ORDERED** that Plaintiff's Motion to Strike is GRANTED. The Court hereby strikes that portion of Defendant Atain Specialty Insurance Company's Motion to Intervene and Motion to Set Aside Judgment Based on Fraud that pertains to the Motion to Set Aside Judgment Based on Fraud.

(Legal File, p. 769; Appellant's Appendix, p. A21).

Atain filed its Motion to Reconsider and/or Motion to File Suggestions in Opposition to Plaintiff's Motion to Strike Out of Time on August 15, 2014 (Legal File, p. 2, 771-81), which was denied by the trial

court's Order/Judgment entered on August 22, 2014. (Legal File, p. 2, 788-89).

As a result, the trial court did not address the Motion to Strike on the merits and Atain has not asserted any error in any point relied on regarding the trial court's ruling striking the Motion to Set Aside. The merits of Atain's Motion to Set Aside are irrelevant unless the trial court's order striking the Motion to Set Aside is reversed, which Atain has not requested. Therefore, Atain is not entitled to any relief with respect to its Point VII and such point relied on should be denied.

B. Atain Was Not Authorized to File a Motion to Set Aside

In addition, the trial court properly struck Atain's Motion to Set Aside because Atain was not authorized to file a motion to set aside the Amended Judgment Entry. Atain's motion was filed pursuant to Rule 74.06(b). (Legal File, p. 536, 538). That rule provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

Mo. Crt. Rule 74.06(b). "The provisions of Rule 74.06(b) are limited to parties." *State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928, 930 (Mo.banc 1997).

Atain, as a non-party to the underlying action, did not have standing to file the Motion to Set Aside. As stated by the Missouri Court of Appeals, Western District in a similar situation:

> Rule 74.06(b) provides that upon motion and upon such terms as are just, the court may relieve a party or its legal representative from a final judgment or order. . . . [Atain] was not entitled to file a motion to vacate the judgment under Rule 74.06(b) because [Atain] was not a party to the action in which the [] judgment was entered. Thus, [Atain] lacked standing . . . under Rule 74.06(b) to file a motion to set aside or vacate the judgment entered in the [] action.

In re 1985 Buick 1G4E257YXFE411823, 788 S.W.2d 548, 549 (Mo.App.W.D. 1990).

As discussed below regarding Appellant's Point VIII, the trial court lost jurisdiction over the Amended Judgment Entry thirty days after it was entered. Mo. Crt. Rules 75.01; 81.05(a)(1). As a result, the trial

court could not grant Atain's Motion to Intervene filed nearly a year after entry of the Amended Judgment Entry. Consequently, Atain was not a party to the underlying tort action and was not entitled to seek to have the Amended Judgment Entry set aside pursuant to Rule 74.06(b).

"Although [Atain] filed a motion to set the judgment aside pursuant to Rule 74.06(b), no relief could be provided under that rule. The provisions of Rule 74.06(b) are limited to parties. The trial court was without jurisdiction to take any further action." *State ex rel. Wolfner*, 955 S.W.2d at 930. The trial court properly struck Atain's Motion to Set Aside and Atain has not raised any issue regarding that ruling. Consequently, Atain cannot claim any error regarding the merits of the Motion to Set Aside and Point VII should be denied.

C. The Amended Judgment Entry Was Not the Result of Fraud

In addition, the facts Atain relies upon do not support its claim of fraud and collusion or provide any basis for finding that Atain is not bound by the facts determined in the Amended Judgment Entry. Atain primarily relies upon the Affidavit of Ilene Starks and Wayne Bryers' assertion of his Fifth Amendment privilege to support is arguments. (Appellant's Substitute Brief, p. 98-115). However, those items do not

show fraud or otherwise entitled Atain to escape the results of its unjustifiable refusal to defend or provide coverage to Wayne Bryers.

Atain uses the possibility of an adverse inference from Wayne Bryers asserting his Fifth Amendment privilege in his deposition to support Atain's assertion that fact questions exist. Any such possible inference was overcome by the evidence presented to the trial court on April 18, 2013 upon which the trial court relied in entering the Amended Judgment Entry. (Transcript, April 18, 2013). The mere possibility of an adverse inference does not establish either the existence of fact questions or support Atain's assertion of fraud and collusion.

Further, Wayne Bryers' assertion of privilege does not even suggest that he acted intentionally. An unintentional shooting has the possibility of resulting in criminal charges and Wayne Bryers was clearly entitled to assert privilege to protect himself. His assertion of privilege also negates the claim of collusion because it protects only Wayne Bryers. The assertion of privilege does not aid Franklin Allen in his claims against either Wayne Bryers or Atain, thus suggesting the absence of collusion.

Atain also relies on the affidavit of one of the witnesses to the shooting in arguing that fact questions exist. Again, the existence of one witness does not overcome the facts established in the Amended Judgment Entry as a result of the trial on April 18, 2013. In addition, the police and prosecutors that investigated this shooting clearly did not believe Ilene Starks accusations that "Wayne Bryers tried to kill Franklin Allen" and that "Wayne Bryers wanted Franklin Allen to die." (Legal File, p. 391 ¶ 31-32). Otherwise, Wayne Bryers would have been charged with a crime, presumably attempted murder. Wayne Bryers was not charged with any crime as a result of this shooting (Legal File, p. 103 ¶ 9; Appellant's Appendix, p. A10), and Ilene Starks' unsubstantiated allegations do not relieve Atain of the results of its unjustified refusal to defend and provide coverage.

Atain's "duty to defend is determined by comparing the policy provisions with the allegations of the petition." James, 49 S.W.3d at 689. Atain cannot escape that duty by obtaining an affidavit from a single, uncredible witness. Atain is bound by the findings in the Amended Judgment Entry as a result of its unjustifiable refusal to defend and provide coverage.

The trial court properly struck Atain's Motion to Set Aside. That ruling has not been questioned in this appeal and Atain's Point Relied On VII should be denied.

Appellant's Point VIII

Atain Was Not Entitled to Intervene as a Matter of Right

A. Standard of Review

The applicable standard of review is found in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court denying [insurer's] motion to intervene will be reversed if it erroneously declares or applies the law. The burden is on [insurer], the intervenor, as pleader, to show all the elements required for intervention as of right pursuant to Rule 52.12.

Ballmer v. Ballmer, 923 S.W.2d 365, 368 (Mo.App.W.D. 1996).

B. The Trial Court Did Not Have Jurisdiction to Grant Atain's Motion to Intervene

Atain filed its initial Motion to Intervene on April 5, 2013. (Legal File, p. 6, 62-64). Atain's Suggestions in Support of Motion to Intervene indicate that Atain was seeking to intervene as a matter of right pursuant to Supreme Court Rule 52.12(a). (Legal File, p. 67-68). The

trial court denied the Motion to Intervene on April 17, 2013. (Legal File, p. 5). Atain did not file an appeal from that ruling, despite the fact that "the denial of a motion to intervene as a matter of right under Rule 52.12(a) is a final and appealable judgment." *State ex rel. Ideker, Inc. v. Grate*, 437 S.W.3d 279, 283 (Mo.App.W.D. 2014) (internal quotations omitted).

Atain subsequently filed a Motion to Intervene and Motion to Set Aside Judgment Based on Fraud on April 25, 2014. (Legal File, p. 3, 536-77). A hearing was held on July 2, 2014 regarding the pending motions. (Legal File, p. 2; Trans., July 2, 2014, p. 3 ln. 2-4, 10-13). The trial court entered its Order/Judgment on July 25, 2014 denying Atain's Motion to Intervene. (Legal File, p. 2, 769-70; Appellant's Appendix, p. A21-A22). Atain then filed its appeal regarding both the summary judgment granted on July 25, 2014 and the July 25, 2014 Order/Judgment denying the Motion to Intervene. (Legal File, p. 790).

The Motion to Intervene filed on April 25, 2014 was untimely and the trial court did not have jurisdiction to grant that motion. As a result, the Order/Judgment denying the Motion to Intervene is void and this Court does not have jurisdiction over the appeal from that ruling.

The Amended Judgment Entry was entered on April 30, 2013. (Legal File, p. 5, 102; Appellant's Appendix, p. A9). Neither party filed any authorized after-trial motions or a notice of appeal regarding that judgment. (Legal File, p. 5). Atain filed its Motion to Intervene and Motion to Set Aside Judgment Based on Fraud on April 25, 2014 (Legal File, p. 3, 536-77), nearly a year after entry of the Amended Judgment Entry.

The trial court lost jurisdiction over the Amended Judgment Entry thirty days after it was entered.

> Rule 75.01 limits the circuit court's control over a judgment to 30 days after a judgment is entered. That rule provides: "The trial court retains control over judgments during the thirty-day period after entry of judgment and may, after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time." Further, Rule 81.05(a)(1) provides that "[a] judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed."

Williston v. Missouri Department of Health and Senior Services, 461 S.W.3d 867, 869 (Mo.App.W.D. 2015). The Amended Judgment Entry was entered on April 30, 2013 and the parties did not file any authorized after-trial motions. As a result, the Amended Judgment Entry became final on May 30, 2013 and any notice of appeal from that judgment was due June 10, 2013. Mo. Crt. Rule 81.05(a)(1), 81.04(a).

The trial court did not have jurisdiction to grant Atain's Motion to Intervene filed nearly a year after entry of the Amended Judgment Entry.

> "After the expiration of the 30 days provided by Rule 75.01, the trial court is divested of jurisdiction, unless a *party* timely files an authorized after-trial motion." [*Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 468–69 (Mo.banc 2011)] (emphasis in the original). "Following divestiture [of the circuit court's jurisdiction], any attempt by the trial court to continue to exhibit authority over the case ... is void." *Id*. at 469. "Since the judgment was final and the [circuit court] no longer had jurisdiction, the [circuit court] no longer had the power to grant the ... motion to intervene." *State ex rel. Abdullah v. Roldan*, 207

S.W.3d 642, 647 n. 6 (Mo.App.2006); *see also Pius v. Boyd*, 857 S.W.2d 238, 242 (Mo.App.1993) ("[O]nce judgment is final, the trial court loses jurisdiction and an application for intervention is precluded because no pending action exists into which the applicant could intervene").

Williston, 461 S.W.3d at 870 (footnote omitted).

The trial court had no jurisdiction to rule upon Atain's Motion to Intervene and Motion to Set Aside Judgment Based on Fraud and "any ruling on the motion to intervene is void. [Atain] cannot appeal from the circuit court's void order." *Williston*, 461 S.W.3d at 870. Atain's appeal from the Order/Judgment entered on July 25, 2014 denying the Motion to Intervene should be dismissed.

C. Atain Was Not Entitled to Intervene as a Matter of Right

Regardless of the jurisdiction of the trial court to grant the Motion to Intervene, Atain was not entitled to intervene. Atain does not have a direct interest sufficient for intervention as a matter of right, because it refused to defend Wayne Bryers and has continued to deny coverage.

"In Missouri, intervention as a matter of right is governed by Rule 52.12(a)[.]" *Ballmer*, 923 S.W.2d at 368.

> [A] would-be intervenor must meet three requirements in order to intervene as a matter of right: (1) an interest in the subject matter; (2) a disposition of the action that may impede the ability of the applicant to protect that interest; and (3) the applicant's interests are not adequately represented by the existing parties.

Ballmer, 923 S.W.2d at 368. "A motion to intervene may be denied if any one of the requirements is not met." *Ballmer*, 923 S.W.2d at 368.

The interest necessary to support intervention of right must be direct so that the intervenor's interest is determined by the action into which it seeks to intervene without any other contingencies. "'[T]he interest must be so immediate and direct that the would-be intervenor will either gain or lose by the direct operation of the judgment that may be rendered therein.'" *In re Clarkson Kehrs Mill Transp. Development Dist.*, 308 S.W.3d 748, 753 (Mo.App.E.D. 2010) (quoting *Borgard v. Integrated Nat. Life Ins. Co.*, 954 S.W.2d 532, 535 (Mo.App.E.D. 1997)). "It does not include a consequential, remote or conjectural possibility of being affected as a result of the action." *In re Clarkson Kehrs Mill Transp. Development Dist.*, 308 S.W.3d at 753.

"The liability of an insurer as a potential indemnitor of the judgment debtor does not constitute the type of interest required to intervene as of right because the insurer does not either gain or lose from the direct operation of that judgment." *Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 937 (Mo.App.W.D. 1997); *see also Eakins v. Burton*, 423 S.W.2d 787, 789 (Mo. 1968).

> In the third party liability claim context, the insurance carrier has no right to intervene in litigation between its policyholder and the third party; the carrier can participate in the litigation only pursuant to its contractual obligation to defend the policyholder. [Citation omitted]. This is true because the insurance carrier has no direct interest in a lawsuit for damages filed against its policyholder by a third party. [Citation omitted]. In such cases, if the insurer [*898] has a right to participate in the litigation, it is a contractual right, not a right based on Rule 52.12(a). [Citation omitted]. Thus, if the carrier wrongfully denies coverage, it has breached its contractual obligation, and, in turn, the policyholder is relieved of his obligations under the contract. [Citation omitted]. Therefore, the carrier can no longer participate in the litigation

> absent the policyholder's consent. [Citation omitted]. Rule 52.12, setting out the requirements for intervention of right, is not available to restore an insurance carrier to control of the defense of a third party liability claim when the carrier forfeited control by denying coverage. [Citation omitted]. Nor can the insurer's breach and the insured's settlement in reliance thereon, create an interest where one does not otherwise exist.

Charles v. Consumers Ins., 371 S.W.3d 892, 897-98 (Mo.App.W.D. 2012).

Atain, as the liability insurer for Wayne Bryers, does not have a direct interest in the lawsuit between Franklin Allen and Wayne Bryers. Atain denied coverage, offered to defend Wayne Bryers only under a reservation of rights, and filed a declaratory judgment action. As a result, Atain breached its contractual obligation to defend Wayne Bryers and forfeited control of the litigation. Atain does not have any right under Rule 52.12 to intervene and its Motion to Intervene was properly denied.

Appellant's Point IX

Atain Was Not Denied Due Process

Finally, Atain's claim that its due process rights have been violated is baseless. First, Atain has not properly preserved this issue. Second, Atain had the opportunity to defend Wayne Bryers and control his defense, but chose to deny coverage instead. As a result, Atain is bound by the results of the underlying litigation. Such result does not constitute a deprivation of any due process rights.

A. Atain Failed to Preserve Any Constitutional Claim

This Court has explained:

> To raise a constitutional challenge properly, the party must:
>
> > (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) *state the facts showing the violation*; and (4) *preserve the constitutional question throughout* for appellate review.

> *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). The purpose of this rule is "to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue." *Winston v. Reorganized Sch. Dist. R–2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982).

Mayes v. Saint Luke's Hosp. of Kansas City, 430 S.W.3d 260, 266 (Mo.banc 2014) (emphasis added).

In the present case, Atain failed to properly raise its constitutional challenges at the first available opportunity and failed to preserve the challenges throughout the proceedings. Atain did not properly raise its challenges in its Answer and did not renew its challenges in response to the Motion for Summary Judgment. The occasion for Atain's desired ruling regarding the constitutional issues first appeared when the trial court was ruling on Franklin Allen's Motion for Summary Judgment. *See Mayes*, 430 S.W.3d at 267-68. "When the trial court was considering the motion, it did not have an opportunity to fairly identify and rule on the claims [that Atain was denied due process] because [Atain] failed to present these claims to the court." *Mayes*, 430 S.W.3d at 268.

Atain attempted to raise numerous constitutional challenges in its Answer to Plaintiff-Garnishor Franklin Allen's Exceptions Objections and Denial. (Legal File, p. 137-39 ¶ 19, 26-38). On appeal, Atain raises only a due process challenge, initially citing "U.S. Const. Amend. XIV, section 1; Mo. Const. art. I, sec. 10" (Appellant's Substitute Brief, p. 118), but eventually citing "the Fifth, Sixth, Eighth and Fourteenth Amendment of the United States Constitution and . . . the Missouri Constitution Article 1, §§ 10, 18A, 19, 21 and 22A." (Appellant's Substitute Brief, p. 123).

Most of Atain's constitutional challenges in its Answer relate to punitive damages, which are not involved in this appeal and cannot preserve Atain's current due process challenge. (Legal File, p. 137-39 ¶ 26-31, 34-38). Atain's remaining constitutional challenges in its Answer either fail to "designate specifically the constitutional provision claimed to have been violated" or fail to "state the facts showing the violation[.]" *Mayes*, 430 S.W.3d at 266 (internal quotations omitted).

Paragraph 19 of Atain's Answer fails to specifically designate the constitutional provision relied upon. (Legal File, p. 137 ¶ 19). Paragraphs 32 and 33 of Atain's Answer simply state: "The standard by

which [Atain's] conduct is to be determined as alleged by plaintiff is vague and wholly arbitrary and as such denies due process in violation" of either Missouri Constitution Article 1, § 10 or the Fifth and Fourteenth Amendments of the United States Constitution. (Legal File, p. 138-39 ¶ 32-33). Those paragraphs wholly fail to "state the facts showing the violation[.]" *Mayes*, 430 S.W.3d at 266 (internal quotations omitted). Consequently, Atain did not "raise the constitutional question at the first available opportunity[.]" *Mayes*, 430 S.W.3d at 266 (internal quotations omitted).

In addition, Atain did not "preserve the constitutional question throughout[.]" *Mayes*, 430 S.W.3d at 266 (internal quotations omitted). Atain did not raise any due process challenge in its Suggestions in Opposition to Plaintiff's Motion for Summary Judgment. (Legal File, p. 230-86; Appellant's Appendix, p. A55-A111). "When the trial court was considering the motion, it did not have an opportunity to fairly identify and rule on the claims [that Atain was denied due process] because [Atain] failed to present these claims to the court." *Mayes*, 430 S.W.3d at 268.

The constitutional objections in Atain's Answer to Plaintiff-Garnishor Franklin Allen's Exceptions Objections and Denial do not preserve Atain's claims for review when Atain failed to assert them in their response to the Motion for Summary Judgment. *Mayes*, 430 S.W.3d at 268. Therefore, Atain's constitutional challenges are not preserved for review. *Mayes*, 430 S.W.3d at 269.

B. Atain Was Not Denied Due Process

Finally, as discussed regarding Appellant's Point VIII, Atain does not have a recognizable interest in the litigation between Franklin Allen and Wayne Bryers that would entitle it to intervene as a matter of right. Once Atain decided to deny coverage and Wayne Bryers refused its offer to defend under a reservation of rights, which he was entitled to do, the only protection to which Atain was entitled was the right to file a declaratory judgment action and to request that the tort action be stayed. *Ballmer*, 923 S.W.2d at 369-70. "That . . . is the extent of protection the insurer receives in these situations." *Ballmer*, 923 S.W.2d at 370.

"Because [Atain] has no recognizable interest on which to base its constitutional claims, those claims must fail." *Ballmer*, 923 S.W.2d at

370. Atain's "constitutional challenges are without merit." *Ballmer*, 923 S.W.2d at 370.

CONCLUSION

Atain is liable for the entire amount of the Amended Judgment Entry as a result of its unjustifiable refusal to defend and to provide coverage. The facts determined in the Amended Judgment Entry establish that coverage exists under the Policy and the trial court properly granted summary judgment against Atain for the entire amount of the Amended Judgment Entry. This Court should affirm the trial court's rulings in their entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Respondent's Substitute Brief was served this 15th day of April, 2016, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

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/s/ Kirk R. Presley
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RULE 84.06(c) CERTIFICATE

I certify that this Respondent's Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 23,878 words.

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